DORSEY B. HOUCK, CONSTABLE, V. ELIZABETH HEINZMAN.

FILED JUNE 30, 1893. No. 4966.

1. **Fraudulent Conveyances:** MORTGAGES: EVIDENCE: QUESTION OF LAW. Where the facts relied upon to render a mortgage fraudulent as to creditors appear upon the face thereof or are undisputed, the question of fraud is one of law for the court. In all other cases it is a question of fact for the consideration of the jury.

2. ———: ———: ———: PERISHABLE PROPERTY. A mortgage will not be declared fraudulent as to creditors on the sole ground that among a large number of separate chattels included therein is a small amount of perishable property which it is impossible to preserve until the maturity of the mortgage debt, although such fact may be considered as evidence of fraud. The question of good faith in such case is one of fact and not of law.

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

W. H. Thompson and *Charles Offutt*, for plaintiff in error.

Donovan & Evans and *Gannon & Donovan, contra.*

POST, J.

This was an action of replevin in the district court of Douglas county in which the defendant in error, plaintiff below, claimed possession of the property in dispute, to-wit, two horses, two wagons, and two sets of harness, through a mortgage from her son William Heinzman, while the defendant below claimed as constable by virtue of an order of attachment in an action in which the Omaha Packing Company was plaintiff, and the said William Heinzman was defendant. The first error assigned is the receiving in evidence of the mortgage through which the plaintiff below claimed, without sufficient evidence of its

execution by the alleged mortgagor. The plaintiff first introduced in evidence a note payable to her order for $1,250, bearing date of April 18, 1890, due two years after date and bearing interest at 7 per cent purporting to have been signed by William Heinzman. After having testified that the note aforesaid was given for money advanced by her to her son, she was asked:

Q. State if you asked him for any other security.

A. I asked him for a mortgage.

Q. Did you get it?

A. Not just then, I got it afterwards.

Q. You got a mortgage?

A. Yes, sir.

Peter O'Malley county clerk, the proper foundation having been laid, testified:

Q. You may examine that book and see if you can find a mortgage there from William Heinzman to Elizabeth Heinzman?

A. Yes, sir.

Q. Are they numbered in the order in which they are filed?

A. Yes, sir.

Q. What number is that?

A. Number 8, of July, 1890.

The mortgage introduced in evidence bears date of July 1, 1890, and purports to have been executed by William Heinzman to Elizabeth Heinzman to secure a note of the former payable to the latter for $1,250, dated April 18, 1890, due two years after date and bearing interest at 7 per cent. It appears to have been acknowledged before a notary public on the day of its execution and filed in the office of the county clerk on the same day. The property described in the mortgage aforesaid evidently includes the horses, wagons, and harness in controversy. The evidence clearly points to William Heinzman as the mortgagor and we think proves *prima facie* that it was executed by him.

2. But the chief reliance of the plaintiff in error is upon the proposition that the mortgage is by its terms and the character of the property thereby conveyed fraudulent and void as to creditors of the said William Heinzman. The following is the description of property contained in the mortgage: "One bay horse about twelve years old, weight about 1,000 pounds; one sorrel mare about six years old, weight about 1,000 pounds; one meat delivery spring wagon, with red running gear and blue box; one butcher's delivery wagon, with red bed and yellow or straw colored gear; one side-bar buck-board buggy, Drummond make; one set single harness, heavy; one set single harness, light; also, all of the stock and fixtures in the butcher shop situated at number 714 north Sixteenth street, Omaha, consisting of meats, poultry, and ice box, meat blocks, saws, cleavers, meat racks, counters, scales, butcher's knives, meat rocker and block; also all of the book accounts of said butcher shop." It should be observed that the mortgage contains no provision for the sale of any part of the property therein described by the mortgagor, hence the rule announced in *Tallon v. Ellison*, 3 Neb., 75, has no application. It is suggested, however, that a mortgage of perishable property like meats, poultry, and butchers' stock, which it is obviously impossible to preserve until maturity of the debt secured, implies a power of sale and is therefore presumptively fraudulent. The sound rule is believed to be that such fact does not render the mortgage void *per se*, although it may be considered by the jury as evidence of fraud, the question of fraud or good faith being one of fact and not of law. (See Herman, Chat. Mtges., sec. 106; Jones, Chat. Mtges., sec. 368; *Shurtleff v. Willard*, 19 Pick. [Mass.], 202; *Hedman v. Anderson*, 6 Neb., 392; *Davis v. Scott*, 22 Id., 154; *Barkow v. Sanger*, 47 Wis., 500; sec. 20, ch. 32, Comp. Stats.) There is no evidence in the record upon which to base a finding of the amount of perishable property in stock at the time of the execution of the

mortgage on the 1st day of July, or the amount thereof, if any, disposed of by the mortgagor subsequent to the date last named and before the property was seized by the plaintiff in error two days later to satisfy the order of attachment. Nor is it pretended that such sales, if any, were made with the knowledge or consent of the plaintiff. It is clear, therefore, that the authorities cited are in point, and that the mortgage will not be presumed fraudulent by reason of the character of the property conveyed thereby.

3. The mortgage was however presumptively fraudulent as to creditors for the reason that there was no change of possession of the property mortgaged. But that question was submitted to the jury by instructions which fairly state the law and which are here copied at length:

"In this action the plaintiff has taken by writ of replevin the property described in the petition, claiming to be entitled to its possession as mortgagee under a mortgage executed by Wm. Heinzman, previously the owner of the property. The property in question was in the possession of defendant as a constable by virtue of a writ of attachment executed against the property of William Heinzman.

"The issues made by the pleadings raise the question for your determination as to the validity of the plaintiff's mortgage. You are instructed

"1. That Wm. Heinzman had a right to secure plaintiff any valid and subsisting indebtedness owing by him to plaintiff, and for that purpose to execute to her a mortgage on his property if made in good faith without any intention to defraud a creditor. Defendant excepts.

"2. The evidence in this case shows that after the giving of the mortgage to plaintiff no change in the possession of the property took place, and the law is that the mortgage is to be conclusively presumed to be fraudulent, and shall be considered as void unless the plaintiff shows on her part that the mortgage was made in good faith and without any intent to defraud creditors, and the burden of

showing such good faith and absence of fraud is on the plaintiff. Defendant excepts.

"3. Every mortgage made with the intent to hinder, delay, or prevent creditors from the collection of their debts is fraudulent and void as to such creditors, and if the plaintiff either participated in such intent or knew of such intent on the part of Wm. Heinzman at the time of taking the mortgage, or if she had notice of such facts as would put a person of ordinary prudence and care on such inquiry as would have led to knowledge of such fraudulent intent on the part of the mortgagor, the mortgage would be void as to her. Defendant excepts.

"In determining the question of whether plaintiff has shown an absence of such notice or knowledge on her part you are to consider the relations of the parties, the surrounding circumstances, the manner of the transaction, and any other fact shown by the evidence.

"4. Transactions between relatives, whereby property is transferred from one to another, when it is shown that the person parting with the property is in embarrassed circumstances, are to be closely scrutinized and the good faith of such transaction must be clearly established.

"5. If under these instructions you find that the plaintiff has by a preponderance of the testimony shown her good faith as defined herein in the taking of the mortgage your verdict will be for the plaintiff. If plaintiff has failed satisfactorily to show such good faith on her part your verdict will be for the defendant. Defendant excepts."

4. Finally, it is urged that the verdict is not sustained by sufficient evidence of good faith on the part of the plaintiff below to overcome the presumption of fraud arising from the continued possession of the mortgaged property by her son. That the note of $1,250 was executed by the latter for money advanced by the plaintiff is clear from her testimony and is not seriously controverted. It is true as stated in the brief of plaintiff in error that she

rested her case after showing merely the advancement of the consideration named in the note and mortgage. But from her cross-examination it appears that it was understood when the money was advanced that she should be secured by mortgage and that she had asked for it at different times prior to its execution. She was also asked:

Q. You wanted to get security?

A. Yes, sir.

Q. That is, you wanted to get your claim before your son's other creditors got theirs?

A. I did not know about his other creditors; I wanted to be secured for the amount of money I gave him. If it had only been $200 or $300 I would not be so particular.

Q. When you went to the lawyers' office you knew the Omaha Packing Company was suing him.

A. No, sir; I did not.

The foregoing is substantially all the evidence upon the question and is, we think, quite sufficient to sustain the finding of good faith. It is apparent that the district court did not err in denying the motion for a new trial and that the judgment should be

AFFIRMED.

THE other judges concur.

PHENIX INSURANCE COMPANY OF BROOKLYN V. WILLIAM O. DUNGAN.

FILED JUNE 30, 1893. No. 4538.

Fire Insurance: CONDITIONS OF POLICY: PREMIUM NOTE PAYMENT: FORFEITURE: WAIVER. A policy of insurance provided that upon the failure of the insured to pay the premium note therein described in full at maturity, such policy should cease to be in force and continue null and void while said note re-

mained unpaid. Said note not having been paid at maturity the insurance company accepted as a credit thereon an amount of money largely in excess of the premium earned, and left the note with its local agent for collection. Subsequently, and before the premium so paid had been earned and before the note had been paid in full, the property insured was destroyed by fire. *Held*, That the policy was voidable only at the election of the insurance company, and that by receiving and retaining the part payment after default and retaining the note for collection, it waived the right to insist upon a forfeiture thereof.

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

Godfrey & Godfrey, for plaintiff in error.

St. Clair & McPheely, contra.

POST, J.

This was an action in the district court of Kearney county upon a policy of insurance, resulting in a verdict and judgment for the defendant in error, plaintiff below. The policy bears date of July 25, 1887, and expires July 25, 1892. The consideration therefor is the note of the defendant in error for $190, bearing date of July 25, 1887, and maturing July 1, 1888. The loss occurred on the 29th day of September, 1889. Proof of loss appears to have been made in due form and within the time specified in the policy. In the court below the plaintiff in error filed an answer in which, after admitting the issuing of the policy sued on and the loss as charged, it alleges: "That said defendant, at the same time said defendant made, executed, and delivered his one certain promissory note in writing in amount $190, due on the first day of July, 1888, a copy of said note is hereto attached marked 'Ex. B' and made a part hereof; that on the 29th day of September, 1889, said note so given by plaintiff, although long past due, remained wholly unpaid and still so remains unpaid, except an indorsement October 8, 1887, of $27.00, also a credit

by loss $75 occurring prior to maturity of said note, although indorsed on said note 12-3-88.

"Defendant avers that since maturity of said note no extension has been granted thereon, nor has said note been held for the purpose of collection, neither has there been any effort made to so collect, but the same has been held since maturity for naught and defendant has at all times since said maturity, and now is willing to return said note and now tenders the same to plaintiff. Defendant for further answer denies each and every allegation in plaintiff's petition not herein specially admitted."

The following is a copy of the note referred to:

"$190.

"On the first day of July, 1888, for value received, I promise to pay to The Phenix Insurance Company, of Brooklyn, N. Y. (at their office in Chicago, Ill.), or order, one hundred ninety dollars in payment of premium on policy No. 0255242 of said company, with ten per cent interest from maturity until paid. If this note is not paid at maturity said policy shall then cease and determine and be null and void and so remain until the same shall be fully paid and received by said company. In case of loss under said policy this note shall immediately become due and payable and shall be deducted from the amount of said loss. If this note be paid at maturity all interest shall be waived. It is understood and agreed that this note is not negotiable.

"Dated at Minden, Neb., this 25th day of July, 1887.

"W. O. DUNGAN."

Upon the back of the note above described appear the following indorsements:

"Received on the within described premium note the sum of $27.00. R. P.

"Date—Sept. 30, 1887.

"$27.00. R. P.; Oct. 8, '87.

"Pd. by loss, $75.00, 12-3-88.

"C. H. WILLIAMS."

It appears from the undisputed proofs that the credit of $75 was made on the 3d day of December, 1888, and represents the amount due the defendant in error at that time by the terms of a tornado policy previously issued to him by the plaintiff in error. It is not contended that the note in question was surrendered to the defendant in error upon default of payment at maturity thereof, or that any notice was given of the forfeiture of the policy or any overt act indicating an election by the insurance company to cancel the same. On the other hand it appears that said note remained in the hands of the collection agents of the company at Minden until after the loss. The defendant in error testified in his own behalf as follows: "I stepped into the office of Godfrey & Godfrey to see about this matter. I had that day sold a piece of land and I knew I could pay this note when I got the money on the land. I had never seen this agent. I met George Godfrey as I went in and he introduced me to the agent. The agent said to me: I would like it if you would secure that note if you can't pay it right away. I told him that I could pay it sometime in October; that I could have the money sometime from the 1st to the 15th, and that if I fail to get the money then I would secure the note; he said that would be all right and he would leave the note with Godfrey & Godfrey and I could come to their office and pay it or secure it."

The agent referred to above was Mr. Williams, the adjuster of the defendant company, whose authority to waive the conditions of the policy by extending the time of payment as claimed is not denied.

The defendant in error further testified that after the maturity of the note, and before the loss occurred, payment thereof was demanded several times by the local agents of the company.

Mr. Godfrey, the local agent, testifies that he was present at the conversation between the defendant in error and the

adjuster Williams, and that the latter remarked that he would leave the note with witness and see if defendant would pay it, but that no agreement was made for an extension of payment; he also denies that he demanded payment after the maturity of the note.

Williams, the adjuster, testifies that he was present at the time in question and indorsed the credit of $75 upon the note, but that he informed defendant in error that such payment would not be considered as a waiver of any condition of a policy which would "stand suspended until the balance of the note was paid."

In the policy above described is found the following conditions: "In case the assured fails to pay the premium note or order at the time specified, then this policy shall cease to be in force and remain null and void during the time said note or order remains unpaid after its maturity." That the plaintiff in error might have declared the policy forfeited for non-payment of the note will not be denied. Nor is it necessary to determine whether the plaintiff in error, in order to avail itself of the provision for a forfeiture of the policy, was required to indicate its intention by an overt act, such as notice to the insured or return of the note. The policy was by its conditions voidable at the election of the insurer. But the evidence establishes to our satisfaction an extension of the time of payment, and which must be construed as a waiver of the strict conditions of the policy.

The evidence is at most conflicting, and we are not at liberty to say that the jury were not warranted in finding for the defendant in error upon the disputed questions. Although contradicted by the more numerous witnesses of the plaintiff in error he is strongly corroborated by the admitted facts of the case. The credit of $75, December 3, 1888, together with previous payments, greatly exceeded the premium earned at that time, and it is not probable that the defendant in error would have advanced such a

sum knowing his policy was not in force, and that, to use the language of the adjuster, it would continue to "stand suspended."

While the plaintiff in error by its answer offers to surrender the note, there has been no offer to return the amount paid thereon in excess of the premium earned at the time of the default. It was entitled to demand payment in full of the note at maturity, but having after default received and appropriated the money paid thereon, a sum in excess of the premium earned at the date of the loss, it will not now be permitted to interpose the strict conditions of the policy as a defense. Such is the rule repeatedly recognized by this court. (See *Phenix Ins. Co. v. Lansing*, 15 Neb., 494; *Schoneman v. Western Horse & Cattle Ins. Co.*, 16 Id., 404; *Western Horse & Cattle Ins. Co. v. Scheidle*, 18 Id., 495.) The judgment of the district court is right and should be

AFFIRMED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. T. J. CARTER ET AL., V. TRUSTEES OF THE VILLAGE OF ELWOOD.

FILED JUNE 30, 1893. No. 6197.

1. **Liquors: LICENSE: APPEAL FROM VILLAGE BOARD: STAY OF PROCEEDINGS.** An appeal by a remonstrant from an order of a village board under the provisions of section 4, chap. 50, Comp. Stats., in order to have the effect of a stay and prevent the issuing of license to the applicant, must be taken immediately and perfected as soon as a transcript can with reasonable diligence be procured and filed in the district court. *Lydick v. Korner*, 13 Neb., 10.

2. ——: ——: ——: ——: **MANDAMUS.** License was allowed on the 9th day of May. The remonstrant immediately

gave notice of an appeal, knowing that the district court for the county would convene pursuant to adjournment on the 18th day of the same month, and that the next session thereof would be in September following. A transcript was demanded for the first time on the 19th, after the final adjournment of the district court, and filed on the 20th. It appears that a transcript could with reasonable diligence have been procured and filed within twenty-four hours from the time the license was allowed. *Held*, That the appeal was not taken in time to have the effect of a stay, and a peremptory *mandamus* should not be allowed to compel the village board to revoke and cancel a license issued on the 18th after the final adjournment of the district court.

ORIGINAL application for *mandamus*.

T. J. Carter and *A. M. White*, for relators.

W. S. Morlan, contra.

POST, J.

This is a *mandamus* proceeding instituted in this court to compel the board of trustees of the village of Elwood, Gosper county, to revoke and cancel a liquor license issued to one Gill, pending an appeal from the order allowing the same to the district court of said county. The cause is by written stipulation submitted to us upon the petition and answer, in addition to certain admissions not appearing from the pleadings, which will be noticed hereafter.

The facts disclosed by the pleadings are substantially as follows: On the 12th day of April, 1893, John Y. Gill filed with the clerk of the village board his petition for a license to sell liquors for the ensuing year in conformity with the provisions of the statutes and ordinances of said village. Notice having been given of such application, and that it would be heard on the 1st day of May following, the relator and others presented a written remonstrance and objection to the granting of a license to the petition. Subsequently the petition was amended by the signing of additional names thereto, and the remonstrance

renewed. It is not necessary to critically examine the remonstrance in this connection. It is enough to say that it is sufficient in form and substance to entitle the signers thereof to a hearing before the village board and to prosecute an appeal to the district court.

From the allegations of the answer, which are admitted to be true, it appears that the hearing before the village board was, at the request of the remonstrants, adjourned first to the 5th and afterward to the 9th day of May. On the last named day there was a hearing of the application and remonstrance, which resulted in a finding for the petitioner and an order for the issuing to him of a license as prayed. Notice was immediately given by the remonstrants of their intention to appeal to the district court for said county, whereupon the board refused to issue the license until such appeal could be heard and determined. It appears also that at the time of the hearing before the board it was known to the remonstrants and their attorneys that the district court for said county would, pursuant to adjournment, convene on the 18th day of May following, and that the next term thereafter would be held in September, 1893; that at the adjourned session held on the 18th there was ample time and opportunity for the hearing of said appeal, and that a transcript of the proceedings could, with reasonable diligence, have been procured and filed with the clerk of the district court within twenty-four hours from the time the license was allowed, but that the remonstrants did not demand a transcript until the 19th day of May, and that the same was not filed in the district court until the day following, and after the adjournment thereof to the next regular term in September.

That on the evening of the 18th, and after the final adjournment of the district court, the village board being convened in lawful session, the petitioner Gill appeared before the respondents at such meeting and showed to their satisfaction that no transcript had been demanded or filed,

or other steps taken to perfect an appeal from the order above mentioned, and demanded that a license be issued to him in accordance with such order; and acting in the belief that the failure to perfect their appeal in time for hearing at the adjourned term of the district court was intended by the remonstrants to prevent action thereon until the September term, they decided to issue the license, notwithstanding the notice of appeal, which they accordingly did, as alleged in the petition.

It appears from the written admission accompanying the pleadings that on the 19th, when the relator demanded a transcript, the village clerk did not demand his fees therefor in advance; that he was also county clerk and clerk of the district court, and was in the habit of performing official services for the relator when requested on the credit of the latter and to render bills therefor at his pleasure. If it were a material question in the case, we should feel constrained to hold that the clerk had waived his right to demand his fee for the transcript in advance, and that the relator has not been prejudiced by his failure to tender the fee therefor. But since the writ must be denied on other grounds, we have no occasion to further discuss that question.

The writer was at first disposed to regard *State, ex rel. Weber, v. Bays*, 31 Neb., 514, as decisive of this case, but, upon a careful examination thereof, concurs with the other members of the court in holding that the question now at issue was not involved therein. The essence of the decision in that case is found in the concluding sentence of the opinion on page 516, viz.: "The remonstrants therefore must be heard, and if an appeal is duly taken to the district court such appeal must be disposed of before the license can issue." Was the appeal in this case "duly taken" within the meaning of the statute as above interpreted? We think not. It may be that upon the filing of the transcript on the 20th the district court ac-

quired jurisdiction to entertain the appeal, but such appeal was not taken within the time contemplated by the statute so as to operate as a stay and thus prevent the issuing of the license. It was held in *Lydick v. Korner*, 13 Neb., 10, that the appeal must be taken immediately, that is, as soon as the transcript can be procured and filed in the district court. In *State v. Bonsfield*, 24 Neb., 520, it was said by REESE, Ch. J.: "It was evidently the purpose of the legislature that no delay should result from the appeal except such as was caused by the time intervening before the next session of district court, and that the appeal should be decided without unnecessary delay."

We do not doubt the honesty and perfect good faith of the appellants in this case, but to hold that their appeal ten days after the order complained of was taken immediately would not only be a forced construction of the statute but would be using the process of the court to defeat the action of the tribunal to which the law has entrusted a discretion over the subject, and which, so far as this record discloses, acted in good faith and strictly within its jurisdiction. It follows that the action should be dismissed and the

WRIT DENIED.

THE other judges concur.

FRANK M. STRATTON V. OMAHA & REPUBLICAN VALLEY RAILROAD COMPANY.

FILED JUNE 30, 1893. No. 3972.

Ejectment: TITLE. Where one in possession of land under an executory contract for the purchase of the same conveys to a railroad company a strip of said land for its right of way, and afterwards by *mesne* assignments of the interest of the respective

holders of said executory contract, the right to a deed thereunder vests in one who takes such an assignment and a deed thereunder with full knowledge of the conveyance of said right of way and of the operation of a railroad line thereon for almost ten years, with full acquiescence of all parties concerned, it was properly adjudged by the district court that ejectment would not lie in favor of the holder of such deed against said railroad company for the possession of said right of way strip.

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

J. R. Gilkeson and *H. Gilkeson*, for plaintiff in error.

J. M. Thurston and *W. R. Kelly, contra.*

RYAN, C.

This was an action of ejectment brought in the district court of Saunders county, Nebraska, for the possession of a strip 200 feet in width along the west side of the north half of the southeast quarter of section 3, township 14, range 7 east, of the 6th P. M. This strip has been occupied for right of way, depot grounds, and other railroad uses by the defendant since October, 1876. The eighty-acre tract of which said strip was a part was patented by the general government to the Union Pacific Railroad Company March 6, 1875, though the patentee under an act of congress was entitled to such patent long before its date and anterior to any transaction hereinafter narrated. As the above strip was part of the northwest quarter of said southeast quarter the history of said forty-acre tract need alone receive our attention.

On the 30th day of July, 1873, the Union Pacific Railroad Company contracted in writing with George H. Stocking to convey to him, in consideration of prompt payment of the purchase price, the forty-acre tract last described, reserving, however, "a strip of land 400 feet wide, to be used by the party of the first part (the Union Pacific Rail-

road Company) for right of way or other railroad purposes in case the line of the road has heretofore, or shall be, laid over the premises." On the 24th day of October, 1876, the said George A. Stocking, his wife Emma C. joining him, conveyed the right of way in dispute to the defendant in this action by a right of way deed, which was filed for record October 25, 1876. Defendant soon afterward built its line of railroad upon said right of way, and has ever since continued to use and occupy the same for railroad purposes. On January 19, 1878, Stocking assigned all his interest in said executory contract to one Perky, by whom a like assignment thereof was made to one Knapp. Afterward, on June 20, 1878, Knapp assigned in like manner an undivided half interest in said contract to plaintiff, which on March 29, 1879, was followed by an assignment, between the same parties, of the other undivided half. Each holder of said executory contract retained possession of the tract therein described, except that defendant retained and used the strip referred to for right of way purposes until September 26, 1883, and even then and thenceforward defendant's possession has continued as before. On the date last mentioned, the Union Pacific Railroad Company executed to plaintiff a conveyance of the north half of the southeast quarter of the section above described, pursuant to the terms of two contracts therein described, one of which is that above referred to; the said conveyance reciting that it is "in pursuance and fulfillment of which said contracts this conveyance is made and executed." This conveyance contained the following language following the description of the subject-matter thereof: "Reserving, however, to the said Union Pacific Railway Company all that portion of the land hereby conveyed (if any such there be) which lies within lines drawn parallel with and one hundred feet on each side distant from the center line of its road as now constructed, and any greater width when necessary permanently to include all its cuts,

embankments, and ditches, and other works necessary to secure and protect its main line."

Plaintiff claims that he ought to recover from the defendant the right of way strip conveyed by Stocking and wife, notwithstanding such conveyance and the above quoted language, for the alleged reason that the deed of Stocking was but a quitclaim deed of a strip of which the Union Pacific Railway Company at the time held the legal title; that by such quitclaim deed the grantee was only vested with such interest in the property as was at the time held by the grantor, which was less than the legal title, which never passed until vested in plaintiff; and that plaintiff by virtue of said legal title should have had a judgment of ouster against defendant in this ejectment suit. This claim has sufficient plausibility to deserve consideration.

At the time Stocking made a conveyance of the right of way to the defendant, the Union Pacific Railway Company was holding the legal title to the forty-acre tract as trustee for the use of Stocking, and compellable to convey to him upon his making payments as agreed. Each assignee under Stocking took only the interest which his immediate assignor had in said tract; meantime the defendant was holding continuous possession under and by virtue of its deed from Stocking. There can be no question that the original entry of the defendant upon the right of way was lawful, and so continued, at least while Stocking held the contract in question. We are at a loss to conjecture just when it is assumed that such possession became wrongful. It seems, however, to be contended by the plaintiff, that at the date of the deed of the Union Pacific Railway Company to plaintiff, such possession, as against plaintiff, became illegal. In this view we cannot concur. It might be that the covenants in the deed of the Union Pacific Railway Company were already broken when made, but that does not affect the merits as between the parties to this controversy. If, upon due legal proceedings, it shall be established that there has

been a breach of the Union Pacific Railroad Company's warranties to plaintiff, such breach might be satisfied in damages in a proper action between those parties as covenantor and covenantee. The plaintiff in this action, however, who has taken the legal title with full knowledge of the possession held by the defendant for almost ten years under a deed from Stocking, through whom plaintiff claims by mere assignment of his interest, is not in a position to maintain ejectment against the defendant. There are between the parties equities which cannot properly be ignored, as must be done if plaintiff is adjudged entitled to maintain this action. The following language of COBB, J., in *Omaha & N. N. R. Co. v. Redick*, 16 Neb., 313, applies to the facts under consideration; "Whatever the rights the plaintiff may have against the present plaintiff in error, growing out of this right of way question, and whether he is estopped *in pais* to assert any or all of them, it seems clear to me that he is not entitled to a judgment that would enable him to sever a line of commerce which by his assent, if not through his actual agency in part, was constructed over this same property, and has enjoyed free passage over it for at least seven years." The judgment of the district court is

AFFIRMED.

THE other commissioners concur.

CUYLER SHULTS V. STATE OF NEBRASKA.

FILED JUNE 30, 1893. No. 5527.

1. **Homicide:** INSANITY AS DEFENSE: NON-EXPERT WITNESSES. Only such intimate acquaintances of a person accused of crime as have seen him almost daily for several months preceding the date upon which the alleged crime occurred, are competent as

non-expert witnesses to testify as to the sanity or insanity of the accused.

2. ———: ———: ———. Such testimony, however, must be strictly limited to such sanity or insanity, and confined to those occasions upon which the witness testifies to having observed the conduct and appearances of the individual whose sanity is the subject of inquiry.

3. ———: ———: ———. The rule permitting a non-expert witness to testify as to the sanity or insanity of a party whose legal accountability is the sole matter in issue does not allow such witness to testify that at a certain date such party knew the difference between the right and wrong of an act at that time committed by him.

ERROR to the district court for Hall county. Tried below before HARRISON, J.

W. A. Prince and *W. H. Thompson*, for plaintiff in error.

George H. Hastings, Attorney General, and *Charles G. Ryan*, for the state.

RYAN, C.

Cuyler Shults was convicted in the district court of Hall county, Nebraska, of the murder of J. P. Farr, charged to have been committed in said county on the 28th day of August, 1891. There was no question that said Farr came to his death at the time and place charged from the effect of a gunshot wound inflicted upon him by said Shults. The defense was insanity, of which there was much evidence. It was shown that the accused was wounded in the right side of the head by a fragment of a shell on the 6th of April, 1862, at the battle of Shiloh; that since his discharge from the federal army the accused has become gradually morose, at times almost savage towards the members of his family; that he has become year by year quarrelsome at times and distrustful of his family and friends; that he frequently was cruel towards his cattle and horses; that

when crossed by either man or beast he became much irritated, and on such occasions threatened to take the life of the animal or man by whom his displeasure was excited; that he sought solitude and talked much to himself; that a medical examination showed that his left side was partially paralyzed; that his sleep was fitful; that owing to a continuous pain in the region of the above mentioned wound the accused habitually slept with his hands locked across his head; that he seized frequently the bed clothes in his teeth and bit and tried to tear them, at the same time gritting his teeth, and on one or two occasions it was testified that he foamed at the mouth. There was evidence that the night before the commission of the homicide the accused was agitated beyond reason by an act of Farr, which accused considered as an outrage toward himself and his family; that in speaking of it he shed tears on that day, and on the same day as, and just previous to, the killing of Farr, saying at each time mentioned that he had to kill Farr. Other evidence in the same direction was given and there was also evidence of epilepsy of accused's mother. The wife of the accused testified that accused said that by the use of intoxicating liquors the pain which continuously existed in his head was deadened; and she further testified as of her own observation that such use enabled him to sleep when otherwise he could not. There was medical expert testimony that periodic insanity of a sub-acute character was indicated by the symptoms of the prisoner.

The state insisted that the above conduct of the accused was owing to a violent temper, often aggravated by intoxication, but that no insanity existed.

As the sole contention in this case was as to the sanity and ability of the accused to discriminate between right and wrong on the 28th day of August, 1891, we shall limit our observations to that and incidental inquiries, giving the testimony of the witnesses on rebuttal at considerable length. (To a proper understanding of this evidence

it is proper to explain that the accused for some years previous to the homicide resided between eight and nine miles in a southerly direction from Grand Island.)

James McKnight testified that he had known the accused about four years; lived within about a mile and a half of the place of residence of accused; was middling well acquainted with him; saw him pretty often but could not say just how often; sometimes once or twice a week, sometimes would not see him for a month, perhaps; saw him quite frequently during the summer previous to that in which the evidence was given, and saw him and talked with him on the 27th of August, 1891. That during the time witness saw the accused he talked with him about as frequently as one neighbor would with another, but never had any business transactions with him. Had seen him drink in Grand Island, and once saw him under the influence of liquor when he was coming home from Grand Island, which was August 27, 1891. Following this testimony the witness was asked:

Q. I will now repeat the question. You may state, Mr. McKnight, from your knowledge of Cuyler Shults, gained by your acquaintance with him as you have stated, whether in your opinion he was sane or insane on the 28th of August, 1891.

A. I would say he was as sane as any man as far as I could see.

On further examination this witness testified that he had never noticed any peculiar acts of insanity about the accused.

John Schwim testified that he resided at Doniphan, Nebraska, where he had lived for about six years; had met the accused in Mr. Wolbach's store, where witness was book-keeper, about seven years before the date of the trial; since that would sometimes see him every week, and sometimes once a month; during the preceding spring, on account of accused's sickness, he had not seen him during a

period of two or three months. Witness further testified that his occupation was that of cashier of the bank of Doniphan; that for the last three or four years the accused had owed the bank some money, and the bank had generally some collection notes against the accused, who was accustomed to visit the bank perhaps once a month; sometimes there would be a lapse of two or three months. Witness testified that he had seen the acccused about a week or two before the 28th of August, 1891; accused was then at the bank talking with witness; his condition was about as usual ever since witness had known him. Witness testified that he had passed the house of accused a couple of times, talked with him about fishing—a general conversation; this was in July or August, 1891. The habits of the accused were irregular; witness had never seen the accused take a drink, and in relation to being under the influence of intoxicating liquors, seemed always to be the same, that is, witness could not distinguish it if he was under the influence of liquor. Upon this preliminary examination, the following question was propounded to the witness:

Q. Now, from what he appeared to you on the 28th day of August, and from what you have known of him during all the time during the last seven years, in your judgment or opinion, was the man sane or insane on the 28th day of August, 1891?

Objection duly made, overruled, and exception taken.

The court remarked: "I think he may answer now; it is pretty close, though." Whereupon witness answered:

A. I cannot form an idea if he had been sane or insane. Mr. Shults was eccentric. I cannot draw the line between insanity and eccentricity; I am no expert.

Q. What does his eccentricity consist of, Mr. Schwim?

A. Well, first, he had a mania for lying.

Q. What else, if anything?

A. And telling stories in general.

Q. What else?

A. Oh, he had—I don't think he ever liked to work very much; he wanted to go fishing and hunting; it was one of his passions.

Q. That was one of his eccentricities, was it?

A. Well, it was more of a passion, I should think, and lying I should class as an eccentricity. A man may have a passion for lying the same as he may have for stealing or kleptomania. I don't know as there is any man that has the habit of lying when it don't do any good.

Q. From your knowledge of this man during these seven years, and the many times you have met him and talked with him, with all of his eccentricities, taking them all together, what, in your opinion, was the man's ability to judge between right and wrong in this particular crime committed on the 28th of August, 1891?

Due objection was made, overruled, and exception taken. Witness answered:

A. I think when—of course I don't know what state his mind was in at that time—the day he committed the crime, but from the appearance he gave me the last few times I think he could distinguish between right and wrong.

Mr. Henry Denman testified on rebuttal that he lived eleven miles southwest of Grand Island at the time of testifying, where he had lived over twenty-two years; had known Cuyler Shults between twelve and fifteen years, and during the time of his acquaintance with Shults had seen him two or three times a week, sometimes might be a month, probably not more than once or twice a month, and again witness might not see him for two months. During the time of his acquaintance with the accused witness had held the office of sheriff and jailer of the county for two years; had seen the accused in the jail perhaps three or four times during those two years, which were 1882 and 1883. Since the last date above given witness had lived on his farm in the neighborhood of two and

a half miles from the residence of the accused, during which time he had seen him every two or three days; often saw him on the road and sometimes in the village of Doniphan, sometimes in the city of Grand Island. Sometimes he would see him once a week and sometimes it might be two or three weeks; when witness saw the accused in Doniphan he would be doing considerable talking, and drank considerable liquor; had met the accused a great many times in Grand Island, and the accused seemed, and was, under the influence of liquor; when in this condition he was more boisterous than when sober; was talkative and violent; when under the influence of liquor Mr. Shults' eyes seemed to be glary—had a devilish appearance; devilish disposition seemed to have possession of him. When sober the witness could observe no incoherence in the speech of the accused, but when drunk the accused's tongue would be thick and numb, and he could scarcely talk. Witness testified that he did not see the accused very often during the summer of 1891; probably met him a half dozen times in the fore part of the season—June and July—on the road from accused's place to Doniphan. Witness testified that he was at the home of the accused between the 25th day of July and the 15th of August, 1891, between 9 and 10 o'clock in the evening. After witness had been there ten or fifteen minutes accused came from the river where he had been attending to his fish hooks; witness conversed with him; accused did not act any differently from any time when witness had met him when he was sober.

Premised with this testimony, the following questions and answers appear in the record:

Q. Now, Mr. Denman, from your knowledge of him as you have stated, was he in your opinion sane or insane in August, 1891?

Upon the suggestion of the court that the question be confined to the acquaintance of the witness with the accused, the question was put in the following form:

Q. Mr. Denman, from this knowledge and acquaintance with the defendant, was he during the time you have known him, sane or insane, in your opinion?

Due objections were made, overruled, and exceptions taken.

A. My opinion is he was sane.

Q. From your knowledge and acquaintance with him during the time you speak of did he, in your opinion, know the difference between right and wrong?

A. Yes, sir.

Q. From your knowledge of him during the time you have known him, could he in your opinion, distinguish the difference between right and wrong in the particular act charged in this information, namely, the killing of J. P. Farr on the 28th of August, 1891?

Due objections were made to this proposed evidence, which were overruled, to which the defendant excepted.

Witness answered:

A. Yes, sir.

John W. Denman testified to an acquaintance with the accused and opportunities of observing his conduct, much to the same effect as detailed in the evidence of the last witness. He said that he saw the accused on the 27th day of August, 1891, going to Grand Island about 11 o'clock in the forenoon, when he had some talk with the accused, who told him about his trouble with Mr. Farr; that he saw the accused the same day about sunset; that at the last named time the accused was under the influence of liquor; saw him the next day after the homicide, when the accused said to him good bye; that accused never expected to see witness again; that witness remarked to him that he (Shults) would get into the "jug" over to Grand Island. No further conversation was had at that time; that during the witness's acquaintance with the accused he lived within about three miles of him.

After this preliminary testimony the witness was asked the following question:

Q. Now from your knowledge and acquaintance of this man for the number of years that you have known him, state, Mr. Denman, what was your opinion of this man in regard to his ability to judge between right and wrong of this particular act committed on the 28th of August, 1891?

After the overruling of objection and taking of exception witness answered:

A. Well, I should judge he was able to judge between right and wrong.

John Gallagher testified that at the time of giving his testimony witness lived seven and a half miles south of Grand Island, where he had lived for about a year; previous to that time he had lived one mile north of Doniphan and a mile east for four years; prior to that time he had lived six miles east of Doniphan, or rather five miles east of Doniphan and one mile south. He detailed about the same means of observation, and the same intimacy of acquaintance as has been stated by the two witnesses whose evidence immediately precedes that of this witness. Witness further stated he had always considered the conversation of the accused just as rational as his own; never saw him take a drink of liquor in his life; every time witness met the accused coming from toward Grand Island accused seemed to be intoxicated; at such times he talked just as any other man would when the worse for liquor; sometimes he would be drunk almost and lying in the bottom of the wagon, letting his horses proceed homeward without any restraint at all; had seen the accused under the influence of liquor in Grand Island; noticed no difference in him when intoxicated in appearance from the appearance of other men when intoxicated; sometimes under such circumstances he was profane and abusive; sometimes, whether intoxicated or not, he was angry and excited; one time in 1889, while surveying, noticed such conduct of the accused when he was sober, the defendant then accused witness of bringing Mr. Shaw, "the damn big Scotchman,"

as he called him, out to cheat him out of his land; warned witness not to come near him or witness might look out for the hatchet which was in the hands of the accused; at that time the accused ground his teeth and looked like an angry man; the expression in his eyes was one which witness had noticed many times when accused was excited; he had a flashing eye. When talking the accused would put the corner of his handkerchief or necktie into his mouth; on such occasions he would talk rational, however; never heard him give any reason for this conduct. Witness saw accused in August, 1891, when accused was brought before the commissioners of insanity; met him on the way to Grand Island; at that time had conversation with him and accused talked as he always did; said he had been over before the said commissioners, but said that the commissioners could not keep the accused long because he just told them that if he was insane they would have to take care of him, and if he was not insane they would have to turn him out and let him go; accused told witness at that time that it was a damn good scheme for to git rid of him. The defendant accused Mr. Yonker of having instituted the proceedings before the commissioners of insanity. (Yonker is his son-in-law.) At that time accused told witness that Yonker could not stay on his place. Subsequently to that time, and before the homicide, witness had met the accused and talked with him for probably an hour or an hour and a half; could see no difference in his talk or conduct from what it ordinarily was. This last conversation witness fixed as on the 26th of August, 1891; it was just a general conversation in regard to the weather, the old trouble of cutting a fence; accused said if they would rebuild it and deprive his family from going to school and provision to live on he would cut the fence down; said they could not ride over him any longer, or if they did he would shoot them; did not say who he referred to. Witness was then asked the following question:

Q. Mr. Gallagher, from your acquaintance with him, as you have detailed, you may state whether or not in your opinion he was sane or insane during the time you have known him?

To this there was proper objection, which was overruled and exception taken.

The witness answered: "I always thought he was a sane man."

Zenas H. Denman testified to facts showing about the same means of observation and acquaintance with the accused as has been stated in the testimony of the three last named witnesses. The witness further stated that the last time he saw the accused was about five or six weeks prior to the homicide, that is the last time he had a talk with him. He was then asked this question:

Q. Mr. Denman, from your acquaintance with him, as you have detailed, did he, in your opinion, know the difference between right and wrong as to the killing of J. P. Farr on August 28th, 1891?

He answered:

A. From the last talk I had with him, I think it was about six weeks prior to the shooting, I should say he would know right from wrong.

Dr. Sutherland testified as to the indications of certain phenomena respecting the accused which had been detailed by the other witnesses.

John Allan testified that he was clerk of the district court of Hall county, and *ex-officio* clerk of the board of commissioners of insanity; that defendant Shults was before the board on the charge of insanity on July 22 or 23, 1891; that he attended the inquisition held as to the alleged insanity of defendant Shults; that witness talked with accused about his condition and that accused said if he was insane then he always had been; claimed that his family was plotting against him; that he had had trouble with Yonker; also with his own son John; that accused's

wife was very deceitful, when any person was around the the house she was pleasant and nice to him, but as soon as they were gone she abused and aggravated him; that he wanted to subpœna twenty-five witnesses from Grand Island and the neighborhood where he lived to prove that he was not insane; this was about 8 o'clock in the evening; that the commission did not want to put the county to a great deal of expense, and commenced and concluded to hold the examination that evening; it was held in the county superintendent's office; Mr. Shults handled his own case and made the witnesses own up to nearly everything he had told the commissioners; that the commissioners turned Mr. Shults over to the sheriff until next morning at 10 o'clock; the accused talked a great deal, repeated the assertions he had made as to his family, and commenced to tell war stories among other things; did not see the accused after that time before the 28th of August; had known Cuyler Shults for ten years, during which time witness had seen him on an average probably of about once in two months in Grand Island; sometimes the accused came in to have witness make out his pension papers, affidavits, etc.; sometimes witness saw him on the street; accused talked a good deal, was generally under the influence of liquor, sometimes a good deal under the influence of liquor; was full of talk, made rather rough remarks and jokes; did not particularly notice his eyes; had noticed him when he was angry, when he would be a little more talkative than usual; talked rather loud and in rather a disconnected manner; witness did not have a great deal of talk with him when he was intoxicated; would get through with him as soon as possible; merely required him to answer questions to get his papers in proper shape and signed; talked with him on the streets probably three or four times a year. Witness was then asked:

Q. Now, from your acquaintance with him as you have detailed, was he in your opinion sane or insane during the time you knew him?

After the overruling of an objection and exception taken thereto, witness answered:

A. Sane, but not very well balanced.

He was then asked:

Q. Mr. Allan, from your acquaintance with him as you have testified, did he in your opinion know the difference between right and wrong on the 28th of August, 1891, when he killed J. P. Farr?

Upon proper objection being overruled and exception taken, the witness answered:

A. I think he did, he seemed to know the penalty of the crime he had committed.

Mr. Glanville, another member of the board of commissioners of insanity, testified substantially as above in respect to the proceedings had on July 22 or 23, 1891. He was not asked his opinion as to the sanity or insanity of the accused, or his ability to discriminate between right and wrong.

George Grantham testified that he lived three and a half miles south of Doniphan; had known the accused for twenty years; first knew him in Butler county, Nebraska, where he lived in the same house with witness; might have been for four or five months; during that time he appeared all right; in speaking, his manner was very quick, spoke quicker than some people do; did not drink much then as he has lately, because he was poor at that time; would get mad very quick; after he left Butler county witness next saw him at Doniphan, Nebraska, about twelve years before the date of the trial, when he was living on a farm on the Platte river; witness and the accused had had a little trouble in Butler county, and the accused wanted to make it up with the witness every time they met, and especially when the accused had had liquor; at such times the accused terribly wanted to get into conversation with witness and make it up, and said that if witness would come down home with him accused's wife would make witness some

candy—he was somewhat intoxicated at the time. While at Doniphan witness had seen accused around the corner of a building drinking out of a bottle once or twice. After accused came to Hall county, Nebraska, witness saw him once in two or three weeks, or once a month just as it happened; had seen accused after accused had said his wife would make witness some candy; sometimes he was sober and sometimes he was not. Witness had never seen accused excited or angry since he had been in Hall county; witness had seen accused sometime before the killing of J. P. Farr, but could not say how long previous to that date; could not say in what year. Witness was then asked this question:

Q. Now, Mr. Grantham, from your acquaintance from the time you first met him in Butler county, was he in your opinion sane or insane during the time you have known him up to the 28th of August, 1891?

Objection was duly made to this question, which was overruled, and exception taken. Witness then answered:

A. Well, sir, I should say he was a sane man, sir.

Witness was then asked this question:

Q. From what you know of him from the time you first knew him in Butler county up to the 28th day of August, 1891, did he, in your opinion, know the difference between right and wrong as to the killing of J. P. Farr on August 28th, 1891?

After the overruling of due objection to this question, to which exception was taken, the following answer was made by the witness:

A. I should judge he did know right from wrong.

It will scarcely escape observation that all the preliminary inquiries made were introductory to two questions: First, whether the accused was sane or insane, in some instances on the day of the homicide, in others during the acquaintance of the witness with the accused; second, whether on the day of the homicide the accused could judge between right and wrong in respect thereto. This

evidence was in no instance given by an expert, hence the following quoted language is applicable thereto: In *Schlencker v. State*, 9 Neb., 250, occurs the following language: "The defense of insanity being interposed, and several witnesses having testified of strange conduct on the part of the prisoner shortly before and on the day of the homicide, a number of witnesses, not experts, however, were examined by the state as to his conduct and appearance in their presence on sundry occasions both before and shortly after the shooting occurred. The opinions of these witnesses as to the prisoner's mental condition, based upon what they had personally observed, and then detailed to the jury, were admitted in evidence under the objection that they were incompetent evidence. That none but medical experts shall be permitted to give to the jury their opinions, based upon the testimony of other witnesses on the question of insanity, is, we believe, universally held. In this case, however, the witnesses were the neighbors and acquaintances of the prisoner, knew him well, and their opinions were formed from seeing and observing him for several months almost daily. Opinions formed under these circumstances, although not those of medical men, are, nevertheless, entitled to respectful consideration by courts and juries, and we have seen no satisfactory reason for holding them to be incompetent evidence."

In *Polin v. State*, 14 Neb., on page 546, is found the following language: "Non-expert testimony on the question of the prisoner's alleged insanity was admissible. The witnesses had known the prisoner for years; were more or less intimately acquainted with his habits and practices, and formed their opinions from facts within their own knowledge. Their testimony was clearly within the rule announced in the case of *Schlencker v. State*, 9 Neb., 241."

In *Burgo v. State*, 26 Neb., on page 643, this court said: "It is probable that there is no better proof of the sanity or insanity of a person than the testimony of those who

are intimately acquainted with him and have observed his conduct for months or years."

The inquiry as to sanity or insanity is as to a fact, "and the expressed opinion of one who has had adequate opportunities to observe his conduct and appearance is but the statement of a fact; not indeed a fact established by direct and positive proof, because in most if not all cases it is impossible to determine with absolute certainty the precise mental condition of another, yet being founded on actual observation, and being consistent with common experience and the ordinary manifestations of the condition of the mind, it is knowledge, so far as the human intellect can acquire knowledge upon such subjects." (*Connecticut Mutual Life Ins. Co. v. Lathrop*, 111 U. S. Rep., 620.)

To testify as above indicated, it should be affirmatively shown that the non-expert witness has had sufficient acquaintance and means of observation to testify as to sanity or insanity as to any other physical fact. In support of the ruling of the court in excluding the opinion of Campbell, a witness of the class now under consideration, counsel for the defendant in error in their brief use the following apposite language: "The doctrine is well settled, in accordance with the current of authority, that the witness who is not a medical expert, may, in certain cases where the question of insanity is raised, and the state of mind of a person is the subject of investigation, state his opinion, but to warrant this being done, and such opinion being received in evidence, it must first be shown that the acquaintance of the witness with the party, whose sanity is questioned, is of an intimate character and his associations with him of sufficient duration to justify him in forming a correct judgment as to the intellectual status of the person whose sanity is under investigation." This rule properly excluded the testimony of Campbell, and with the same effect should have been interposed against the evidence of some of the witnesses on rebuttal, notably that of George

Grantham. The evidence should, to qualify a non-expert witness to testify as to a condition of sanity or insanity, show an acquaintance with that condition, which, in the instance last cited at least, was not sufficiently done. Not only so, but evidence of such condition must be confined to periods when there was sufficient opportunities for observation. It will readily be seen that some of these witnesses showed a disconnected acquaintance with the prisoner extending through several years, yet they testify as to the condition of the accused apparently in no way limited by or having relation to the periods covered by such observation. This could hardly be considered evidence pertinent to the existence of a fact, established though it was by observation. It may have been an inference by the witness deduced from the presumed continuance of the condition which the witness had observed, but that is not within the rule, or the reason of the rule, which permits the use of this class of evidence.

There is, however, a more radical objection to the testimony given by these witnesses in rebuttal than has been yet made, though it lies in the general course of former observations. After having shown opportunities for observation of the accused from twice a week to once in two or three months—in one instance at least, being no nearer than six weeks to the date of the homicide, witnesses were asked whether in their opinion the accused knew the difference between right and wrong on August 28, 1891, as to the killing of J. P. Farr. The evidence of these witnesses as to the sane or insane condition of the prisoner was tolerable, only because they testified as to the existence of sanity or insanity as a fact. What deduction was to be drawn from that fact was solely a question for the consideration of, and determination by, the jury. The contest was not as to the fact of the homicide, but was as to the legal responsibility of the accused for its commission. The court properly instructed the jury that if the accused at

the time, by reason of insanity, had not the capacity to distinguish between right and wrong, he could not be held accountable. This capacity was the sole question for the jury to determine. To allow the witnesses to testify that in their opinion the accused, when he committed the homicide, was sane, and, further, that he knew the difference bebetween right and wrong as to his killing of J. P. Farr, at the time of the commission of that homicide, was to allow of as incompetent evidence as to have permitted the same witnessess to testify whether or not in their opinion the accused was guilty as charged. If the testimony really given was accepted by the jury and acted upon as true, only a verdict of guilty could logically result. The reason for the rule allowing non-expert witnesses to testify as to sanity or insanity as a physical fact has been fully set out, that it may be obvious that in this there is no violation of the general rule which forbids witnesses not experts from testifying as to a mere opinion. In some courts even this class of evidence has been rejected because assumed to be but one kind of an opinion. By the great majority of courts, however, it is allowed because it is not open to that objection. This rule, however, furnishes no excuse for permitting non-expert witnesses giving what without doubt is a mere opinion, and that too upon the one vital question in the case—the legal accountability of the prisoner for a homicide admittedly committed by him.

The judgment of the district court is

REVERSED.

IRVINE, C., concurs.

RAGAN, C., as counsel, having advised parties interested in respect thereto, took no part in the consideration or decision of the above case.

ANDREW M. WISTEDT, APPELLANT, V. ANDREW BECKMAN ET AL., APPELLEES.

FILED JUNE 30, 1893. No. 5131.

1. **Appeal:** TIME OF FILING TRANSCRIPT: JURISDICTION. To give the supreme court jurisdiction to review a case on appeal the transcript of the proceedings must be filed in this court within six months after the rendition of the decree sought to be appealed from.
2. **Review:** PETITION IN ERROR. A judgment cannot be reviewed on error by the supreme court unless a petition in error is filed in this court therefor.

APPEAL from the district court of Burt county. Heard below before IRVINE, J.

H. H. Bowes, for appellant.

Sears & Thomas, contra.

RAGAN, C.

This is an appeal from the district court of Burt county. The appellant sued the appellees for an accounting, claiming due him from them $800. The appellees answered, admitting $6 due appellant. The court found due the appellant $78.13. This decree was rendered March 31, 1891. The transcript and the evidence for appeal were filed with the clerk of this court December 16, 1891, or more than six months after the rendition of the decree.

No petition in error has ever been filed in this court. We are precluded then from examining the evidence in the bill of exceptions, and trying this case either on appeal or error. The pleadings support the judgment. The findings and decree of the district court are

AFFIRMED.

RYAN, C., concurs.

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

FIRST NATIONAL BANK OF WYMORE v. ABRAHAM L. MILLER.

FILED JUNE 30, 1893. No. 4871.

1. **Negotiable Instruments:** CHECKS: PRESENTMENT: REASONABLE TIME: RELEASE OF INDORSER. On Saturday, the 31st day of May, 1890, about the close of banking hours, one M. indorsed in blank and deposited to his credit in a bank in Wymore, Nebraska, certain checks drawn to his order by one B. on a bank in Cortland, Nebraska. Wymore and Cortland are twenty-seven miles distant from one another, but connected by telegraph, telephone, and railroad lines, and a mail left Wymore at 6 P. M. daily, arriving at Cortland at 9 P. M. the same day. The Wymore bank made no inquiry of the Cortland bank as to whether the checks were good, nor did it at any time advise the Cortland bank that it held the checks, but on the day of their receipt, mailed said checks to a bank in St. Joseph, Missouri, which bank sent them by mail to a bank in Omaha, Nebraska, and this latter bank sent them by mail to the bank in Cortland, at which they arrived on June 5, and were then protested for non-payment. *Held*, That the Wymore bank did not present the checks for payment to the Cortland bank in a reasonable time, and that the indorser, Miller, was thereby discharged.

2. ———: ———: ———: DILIGENCE. An ordinary check is not designed for circulation, but for immediate presentment, and to charge an indorser must be presented with all due dispatch and diligence consistent with the transaction of other commercial business.

3. ———: ———: ———: ———. Greater diligence is required in presenting ordinary checks for payment than in presenting bills of exchange. Whether an ordinary check has been presented for payment by the indorsee thereof in such a reasonable time as to hold the indorser must be determined from the facts and circumstances of each particular case.

4. **Banks and Banking:** CUSTOM AND USAGE: CHECKS. No custom or usage among bankers as to the manner of presenting ordinary checks for payment will relieve them from the legal duty of presenting such checks for payment within a reasonable time.

5. **Checks:** INDORSERS: PRESENTMENT: DAMAGES: EVIDENCE. In a suit by an indorsee against the indorser of an ordinary check, where the defense is that the check was not presented for payment within a reasonable time, inquiry as to whether the indorser was damaged by reason of the failure to present the check for payment is immaterial.

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

A. D. McCandless and *Marquett, Deweese & Hall*, for plaintiff in error.

Griggs, Rinaker & Bibb and *T. F. Burke, contra.*

RAGAN, C.

On Saturday, the 31st day of May, 1890, about 4 o'clock in the afternoon, Abraham L. Miller indorsed in blank and deposited to his credit in the First National Bank of Wymore two checks, drawn by A. W. Beahm to Miller's order, on the State Bank of Cortland, Nebraska. These checks aggregated $3,429.25.

The town of Cortland is twenty-seven miles distant from Wymore, the two being connected by telephone, telegraph, and railroad lines, and two daily mails. The mails for Cortland closed at Wymore, at that time, at 6 and 8 o'clock respectively in the afternoon of each day. The first mail would reach Cortland at 9 o'clock P. M. of the same day, and the second at 10 o'clock the next day.

The plaintiff in error made no inquiry of the Cortland bank as to whether the Beahm checks were good, nor did it notify the Cortland bank that it held such checks. On the same day that the checks were received by it, the

plaintiff in error sent them by mail to a bank in St. Joseph, Missouri, for collection. That bank forwarded them by mail to the Omaha National Bank, at Omaha, Nebraska, for collection, and the latter sent them by mail to the State Bank of Cortland, on which they were drawn. This bank received them on Thursday, the 5th day of June. Beahm being insolvent, they were protested for non-payment. At the close of business on Saturday, the 31st of May, Beahm had to his credit in the State Bank of Cortland, $3,533.76. On the morning of Monday, the 2d day of June, at the commencement of business, Beahm had to his credit in the State Bank of Cortland, the sum of $3,533.76, and during the day he deposited $3,200 more to his credit in the same bank. Against this sum the cashier of the Cortland bank had agreed to accept checks of Beahm's amounting to $3,800. On the morning of Tuesday, June 3, Beahm had to his credit in the Cortland bank, $2,132.65. On the morning of Wednesday, June 4, he had to his credit a balance in the Cortland bank of $1,621.35, and during the day deposited $500 more. During this day, June 4, he drew against his deposits in the Cortland bank, so that on Thursday morning, June 5, he had left to his credit in the Cortland bank the sum of $310.15. After Miller had deposited in plaintiff in error the two Beahm checks, he drew against them checks amounting to $2,472.29, which plaintiff in error paid, leaving to his credit a balance of $956.96. The bank having refused to pay him this, he brought this suit to recover it.

The plaintiff in error filed an answer and counter-claim, in and by which it alleges the deposit by Miller in its bank of the Beahm checks; that it forwarded said checks in a reasonable time to the State Bank of Cortland, on which they were drawn, but that the checks were worthless and payment was refused for the reason that Beahm had no funds in the Cortland bank with which to pay the same, and that the checks were duly protested; and that on the

day the checks were deposited it had paid checks of Miller's amounting to $2,482.28, and that subsequently it had collected from the said Beahm $800, and put the same to the credit of Miller, leaving Miller owing the plaintiff in error $1,687.84, for which sum, with interest and protest fees, it prayed judgment against Miller.

The case was tried to the court, a jury being waived. The court found for the defendant in error, Miller, and rendered judgment against the plaintiff in error for the sum of $956.96, the difference between the Beahm checks and the total of the checks which Miller had drawn on the bank after their deposits, and which the bank had paid.

The bank brings the case here for review, the error alleged being that the findings and judgment of the court below were contrary to the law and evidence.

After a careful and patient examination of this record, we have no doubt that the Beahm checks were received by the plaintiff in error as cash, and that they were not received by the plaintiff in error for collection for Miller. This proposition is abundantly supported by the facts and the evidence throughout the entire case. These checks were payable to Miller's order, and by him indorsed and delivered to the plaintiff in error, which gave Miller credit for the amount of them and allowed him to check against them. After these checks were deposited in plaintiff in error by Miller, the relation subsisting between the bank and Miller was, first, that of depositor and depositee, and second, that of indorser and indorsee.

The plaintiff in error contends, conceding the checks were not presented for payment within a reasonable time, that Miller was not prejudiced by the delay. We do not assent to this as a conclusion of fact. The evidence is: Had plaintiff in error, on the date it received the checks, advised the Cortland bank of the fact, that bank would have paid the checks in full. At the opening of business on Monday, June 2, Beahm had on deposit in the Cort-

land bank $3,533.76, and during the day he deposited $3,200 more. Against this there was a check of $3,800 that the bank had agreed to accept, which would leave on deposit at the Cortland bank at the close of business on Monday, June 2, to Beahm's credit, $2,933.76. Had the checks reached Cortland on Tuesday, June 3, there were $1,186.35 of Beahm's money on deposit there that date. Had they reached the Cortland bank on Wednesday, June 4, there were in the Cortland bank, to Beahm's credit, $2,125.35. We do not see from this evidence how plaintiff in error can claim that the delay in presenting these checks worked no injury to Miller. But in a suit like this, between the indorsee and indorser of an ordinary check, is it a material inquiry whether the delay of the indorsee in presenting the check damaged the indorser?

Tiedeman, Commercial Paper, sec. 442, after stating that the drawer of a check would not be discharged by the failure to present it for payment within a reasonable time, unless the drawer was prejudiced thereby, continues: "The rule is different with regard to indorsers. They are discharged whether they have suffered any damage or not from the failure to make due presentment and give the notice of dishonor within a reasonable time."

In *Northwestern Coal Co. v. Bowman & Co.*, 69 Ia., 150, that court say, after deciding that the plaintiff had held the check in question an unreasonable time before presenting it, and that it could not recover against indorsers: "The fact that the drawer had no funds in the hands of the drawee when the check was drawn makes no difference."

In *Gough v. Staats*, 13 Wend., 549, the supreme court of New York say: "If there has not been due diligence in presenting the check for payment, the indorser is discharged, although he has not been prejudiced by the delay."

We think these cases state the rule correctly, and that the question as to whether the indorser was damaged by the delay in presenting the Beahm checks for payment was

wholly immaterial. The question then is, whether plaintiff in error was guilty of such negligence or laches in the presentment of these checks for payment to the bank on which they were drawn as to release the indorser Miller? The authorities all say that in order to hold an indorser of a check it must be presented by the indorsee in a reasonable time, and as to what is a reasonable time, depends upon the facts and circumstances of each particular case.

Now, it appears from the evidence in this record that the plaintiff in error was guilty of negligence at the time it received the Beahm checks in not inquiring of the Cortland bank as to whether they would be paid on presentation. It further appears that Cortland is only twenty-seven miles distant from Wymore, plaintiff in error's place of business; that the checks could have been mailed by the plaintiff in error to the Cortland bank the same day they were received, and they would have reached the Cortland bank, at the furthest, on Monday at 10 o'clock in the forenoon. The plaintiff in error could have mailed the checks on Monday and they would have reached the Cortland bank on Tuesday at 10 o'clock A. M. Instead of this the plaintiff in error chose to mail these checks to St. Joseph, Missouri, and they go around by way of Omaha and then back to Cortland. It is also in evidence in this record, from the mouths of experienced bankers, that due diligence in the presentment of these Beahm checks to the Cortland bank required that the plaintiff in error should send them by the first mail to the Cortland bank, and the evidence does not establish the contention of the plaintiff in error that these checks were presented for collection to the Cortland bank under any custom of bankers. And if it did, we do not think that bankers, by any custom, can evade their legal duties. We think, therefore, that the plaintiff in error did not use such diligence in the presentment of these Beahm checks for payment as to hold the indorser, Miller, thereon.

In *Smith v. Janes*, 20 Wend., 192, the supreme court of New York say: "The holder of a check can recover against the indorser only when he has used due diligence in presenting or giving notice of demand and nonpayment. * * * Where the parties all reside in the same place the check should be presented on the day it is received, or on the following day; and when payable at a different place from that in which it is negotiated it should be forwarded by the mail on the same or the next succeeding day for presentment." (See also *Holmes v. Roe*, 62 Mich., 199.)

In *Mohawk Bank v. Broderick*, 10 Wend., 304, the supreme court of New York say: "A check on a bank for the payment of money, to charge an indorser, must be presented with all dispatch and diligence consistent with the transaction of other commercial concerns, and it was accordingly held, where a check was received in Schenectady on the 14th of January, drawn on a bank in Albany, a distance of sixteen miles from the former place, and between which places there is a daily mail, and not presented until the 6th of February, that laches was imputable to the holder, and that the indorser was discharged. * * Although it is said that checks are like inland bills of exchange and are to be governed by the same principles, greater diligence is required in presenting them than in presenting bills of exchange." This case was affirmed by the court for the correction of errors in 13 Wend. [N. Y.], 133. See to the same effect *Northwestern Coal Co. v. Bowman*, 69 Ia., 150.

We do not mean to lay down any rule by which the indorsee of a check must present the same for payment in any given time in order to hold the indorser. What we do decide, however, is, in this case, that the Beahm checks were not presented by the plaintiff in error within a reasonable time. In this case, Tuesday, June 3, would have been a reasonable time within which to present these checks.

It must be borne in mind that ordinary checks are not designed for circulation, but for immediate presentment. (Tiedeman, Commercial Paper, sec. 443, and cases there cited.)

The judgment of the district court is therefore in all things

AFFIRMED.

THE other commissioners concur.

STATE OF NEBRASKA, EX REL. JOSEPH GARNEAU, JR., COMMISSIONER GENERAL, V. EUGENE MOORE, AUDITOR OF PUBLIC ACCOUNTS.

FILED JULY 14, 1893. No. 6332.

1. **Legislative Appropriations:** CLAIMS AGAINST STATE: APPROVAL: DUTIES OF STATE OFFICERS. Under the provisions of section 9, article 9, of the constitution, all claims upon the state treasury are to be examined and adjusted by the auditor and approved by the secretary of state before any warrant for the same shall be drawn. This applies to all appropriations, specific as well as general.

2. ———: ———: COMMISSIONER GENERAL: VOUCHERS. The original vouchers approved by the commissioner general are to be presented to the auditor so that he may see that the claim is one for which an appropriation has been made.

ORIGINAL application for *mandamus*.

A. J. Sawyer, for relator.

George H. Hastings, Attorney General, contra.

MAXWELL, CH. J.

This is an application for a *mandamus* to compel the auditor to draw his warrant on the state treasury of Ne-

braska for the sum of $5,000 from the funds appropriated in said act and now in the state treasury, and deliver the same to the relator. The defendant has filed an answer in which he admits many of the allegations of the petition, but denies that the relator has devoted his entire time and attention to the duties of his office; and denies that the expenditures mentioned in the petition were all necessary, just, and proper; and denies that the estimate for said $5,000 was accompanied by proper vouchers. The petition is accompanied by a copy of the act of the legislature approved April 8, 1893, and by a large number of vouchers and estimates submitted by the relator to the auditor, covering moneys heretofore drawn. Among the estimates and vouchers filed we find charges for hotel bills and other like charges, and most of the estimates are not accompanied by vouchers of the parties rendering the services or furnishing the materials.

Section 9, article 9, of the constitution provides that the legislature shall provide by law that all claims upon the treasury shall be examined and adjusted by the auditor and approved by the secretary of state before any warrant for the amount allowed shall be drawn; *Provided*, That the party aggrieved by the decision of the auditor and secretary of state may appeal to the district court. The construction of this provision of the constitution was before this court in *State v. Babcock*, 22 Neb., 38. In that case the legislature had passed an act to provide for paying the expenses incurred in the prosecution of Olive for murder. The court held that the constitution requires that all claims upon the state treasury must be examined and adjusted by the auditor, and his action approved by the secretary of state, before any warrant can be drawn therefor, and this provision applies to all claims, whether claimed by virtue of a specific appropriation or not.

In *State, ex rel. Dales, v. Moore*, 36 Neb., 579, this court held that the original vouchers must be presented to the

auditor for him to act upon. This seems important in order that the auditor may determine that the claim is one for which the legislature has provided an appropriation. If it is not, it is his duty to refuse to draw a warrant. The auditor draws every warrant at his peril, and if he draws a warrant without authority of law, he and his sureties are liable for the same. This would seem to be important in this case. A number of claims are presented to the auditor that are clearly for expenses. The relator is paid a salary of $2,000 per year; he is also entitled to his traveling expenses. In estimating traveling expenses, however, they would be simply compensation for going from his home to Chicago, and from Chicago to his home. If in the meantime he desires to return home, and from thence to Chicago, he must do so at his own expense. The return is for his own convenience, and must be at his own expense. The original vouchers must in all cases be sent to the auditor. The commissioner should approve the same before sending them. The auditor will then have the evidence of the debt before him and will know whether it is such a claim as the legislature has provided an appropriation for. If it is, it is his duty to draw a warrant; if it is not, then he should refuse. He is not to draw a warrant upon mere estimates, and as the application in this case is to draw upon a mere estimate, the writ of *mandamus* must be refused.

It may be said that this will occasion inconvenience by causing delay in the payment of claims; but not necessarily so. Lincoln is but sixteen hours from Chicago, and claims sent one day can be returned not later than the third day, so that there will be no great delay. In any event, the constitutional provision applies to all claims, including the claims in question, and the construction heretofore placed upon the provision must be adhered to. The writ is

DENIED.

NORVAL, J., concurs.

POST, J., dissenting.

I dissent from the conclusion of the majority of the court in this case for reasons which will hereafter appear.

In order that the questions involved may be clearly understood it is necessary to set out parts of the pleadings.

The first and part of the second paragraph of the petition is merely a history of the legislation upon the subject of the exhibition of the resources of the state at the World's Columbian Exposition, the creation of the office of commissioner general, and the appointment and qualifications of the relator as such commissioner. The other allegations of the petition are as follows:

"That up to July 3, 1893, there had been paid out and expended for the promotion of Nebraska's exhibit at the World's Fair upwards of $55,000, all of which moneys have been drawn from the treasury of Nebraska upon warrants issued by the auditor of said state upon estimates furnished him by the Nebraska Columbian Commission and by this relator, $20,000 of which has been drawn as aforesaid upon estimates furnished by this relator as commissioner general under said act passed by the last legislature, and that there is now in the treasury of the state of Nebraska, not otherwise appropriated, for the purpose of promoting and conducting said Nebraska exhibit at the World's Fair, $29,546.73.

"3. That on the 17th day of June, 1893, the respondent Eugene Moore, who is the auditor of public accounts for the state of Nebraska, drew his warrant on the state treasury against the fund appropriated in said act for the sum of $5,000 for the relator upon the relator furnishing to him, the said respondent, an estimate for $5,000 for future expenses, and in connection therewith the items of expenditure paid by relator, the date of the expenditure, to whom paid, and for what purpose each item had been paid, accompanied by detailed estimates of the expenditures, with vouchers.

"4. That relator afterwards cashed said $5,000 warrant and laid out and expended the proceeds thereof in the proper presentation of the products, resources, and possibilities of the state of Nebraska, and in paying for such labor and necessary expenses in connection therewith as were necessary, just, and proper, and in addition thereto $1,096.42; and on the 3d day of July, 1893, relator furnished respondent an estimate for $5,000 more which would be necessary to meet current bills and expenses due and likely to become due in connection with said Nebraska exhibit, the items composing said estimate being as follows:

Balance on swine exhibit	$750
Salaries	2,000
Incidentals	500
Furnishing account	1,750
Total	$5,000

and requested the respondent to draw his warrant on the state treasury against the funds appropriated in said act for said purposes in favor of the relator. The relator, at the time of furnishing said estimate to said respondent, furnished an estimate showing the items of expenditures paid by relator, the date of payment, to whom, and for what purposes each item had been paid, together with a detailed statement of the expenditures, with the proper vouchers. Said estimate is hereto attached and marked Exhibit A and made a part of this petition. Said vouchers, showing the items of expenditures, together with the dates of payment, to whom and for what purposes each item was paid, together with a detailed statement of the expenditures, are hereto attached and made a part of this petition and are numbered from one to seventy-seven, inclusive; also a recapitulation of the expenditures, which is hereto attached and made a part of this petition, and marked Exhibit B.

"5. That under the provisions of said act the relator is entitled to receive a salary of $2,000 per annum, payable

quarterly, from the moneys appropriated in said act, and in addition his traveling expenses each day devoted to his official services as duty may require, and he is authorized and empowered to appoint assistants and employ such clerical and other force as he may find necessary for the successful presentation of his work, the same to be paid from the funds appropriated by said act, and this relator says that he has devoted his exclusive time and services to the promotion of said work and that he has appointed such assistants and employed such clerical and other force as he has found necessary and proper for the successful presentation of said work and no more, and has procured the same at as little cost as possible, and that all of the items of expense, labor, and material for which said itemized accounts have been rendered are just and reasonable.

"6. That said respondent, though often requested, has refused and still refuses to draw his warrant on the state treasury against the funds appropriated in said act for the promotion of the cause therein mentioned in favor of relator.

"7. That in order to carry on and promote the Nebraska exhibit at the World's Fair large expenses are daily incurred; and without the moneys can be speedily furnished to meet said expenses by a warrant drawn upon said appropriation, the objects for which said appropriation was made must necessarily fail, and the exhibit closed; that the relator is without any adequate remedy at law, and without any funds drawn from said appropriation."

Exhibit B is an itemized statement of sums paid to parties therein named, seventy-four in number.

The material parts of the answer are as follows:

"He admits all the allegations to be true contained in paragraph 1 of said petition.

"2. This defendant admits all the allegations contained in paragraph 2 of said petition to be true except 'that said commissioner general has, ever since the date of his appoint-

ment, devoted his entire time and attention to the duties of his office to the best of his ability and understanding."

"3. The defendant admits all the allegations contained in the 3d paragraph of the plaintiff's petition to be true.

"4. The defendant, further answering, admits all the allegations contained in the 4th paragraph of the defendant's petition to be true, except such as are hereafter denied. The defendant denies that the expenditures mentioned in the 4th paragraph were all necessary, just, and proper. The defendant further denies that the estimate for $5,000 was accompanied with proper vouchers.

"5. Further answering the petition of the plaintiff, the defendant admits all the allegations contained in the 5th paragraph, except such as are herein denied. The defendant denies that the relator has devoted his exclusive time and services to the promotion of the duties of commissioner general, and further denies that said commissioner general employed such assistants and clerical help and other force as was necessary and proper for the successful presentation of said work and no more, and has procured the same at as little cost as possible, and that all the items of expense, labor, and material for which said itemized accounts have been rendered are just and reasonable.

"6. The defendant admits the allegation of the 6th paragraph of the plaintiff's petition to be true.

"7. The defendant admits the allegation contained in the 7th paragraph of the plaintiff's petition to be true, except that the defendant does not admit that the plaintiff is without funds drawn from said appropriation except as recited in the vouchers filed herewith."

It will be seen from a careful scrutiny of the answer that the allegations of the petition are all admitted except the following:

First—That the relator has since his appointment devoted his entire time and attention to the duties of the office according to the best of his ability.

Second—That the purposes for which the $5,000, drawn June 17, were expended are all necessary, just, and proper.

Third—That the estimate of July 3 was accompanied with proper vouchers.

Fourth—That the assistants employed by the relator were necessary, or that the labor or material enumerated in the itemized account just and reasonable.

The first denial certainly tenders no issue of fact. It is at most a mere conclusion and not sufficient to put the relator upon his proof. If he has been derelict in his duties and has failed to devote his time and abilities to the work in hand within the knowledge of the respondent, the latter would be justified in refusing payment of the full amount of salary provided therefor. But in such case he could not rest upon a mere denial. The rule has never been questioned, to my knowledge, that where an officer is charged with misconduct, such as a culpable neglect of duty, the presumption is in his favor and the burden upon the party asserting such misconduct. (See Phillips, Evidence, 151; *Hartwell v. Root*, 19 Johns. [N. Y.], 345*; 19 Am. & Eng. Ency. of Law, 44, and notes.) In order to justify the respondent in refusing to pay the relator's salary on that ground he is required to tender a definite issue by setting out the particular act or acts of delinquency relied upon.

The denial "that the expenditures mentioned in paragraph 4 were all necessary, just, and proper" is palpably bad. The relator, in the schedule attached to his petition, has set forth in detail the amounts disbursed and to whom paid, while the vouchers referred to show the purposes for which the money was expended. A denial, therefore, that all of such items were just and proper is a mere conclusion, and presents no issue. In *McLaughlin v. Wheeler*, 47 N. W. Rep. [S. Dak.], 816, the distinction between a denial and a negative pregnant is thus stated: "If plaintiffs had pleaded the facts out of which the indebtedness re-

sulted as a conclusion, a denial of such conclusion would have been insufficient to make an issue, but having alleged the indebtedness as a fact we think the defendants might so treat and so deny in their answer." (See also Maxwell, Code Pl., 789, where the last named case is cited with approval.)

The denial that the estimate of July 3 "was accompanied by the proper vouchers" is a mere conclusion and tenders no issue. Tested by all rules of pleading it should be construed as going to the form and legal sufficiency of the vouchers and not traversing the facts stated in the petition.

By denying that the assistants employed or the material procured are necessary or reasonable, I understand the auditor to assert the right to review the actions of the relator, and in effect to control his discretion in the disbursement of the money appropriated, in order to give effect to the declared intention of the legislature. To that proposition I cannot assent. It is clear that the legislature intended to make the commissioner the sole agent for the disbursing of the money, and to hold him to a strict account for the execution of the trust thus imposed. For instance, it is provided in section 2 of the act in question that the commissioner "shall have sole and exclusive charge of the management, collecting, presenting, and dismantling of the products and industries of the state at the exposition. * * * He shall be the sole receiving and disbursing officer, through whose hands all moneys drawn and expended must pass. He shall give bonds, approved by the governor, in a sum not less than thirty-five thousand dollars ($35,000)."

By section 3 it is provided that the money appropriated by the act can be drawn only upon estimates made by the commissioner general.

By section 4 it is provided that the commissioner shall receive a salary of $2,000 per year, payable quarterly, and

in addition his traveling expenses for each day devoted to his official services, as duty may require. He is authorized and empowered to appoint assistants and employ such clerical and other force as he may find necessary for the successful presentation of his work.

By section 5 it is made his duty at the close of his service to render a "complete financial statement of receipts and expenditures."

But I understand the majority of the court to hold that the act in question, in so far as it provides for the payment to the commissioner of the money appropriated upon estimates, is unconstitutional and void. It is not pretended that such limitation upon the power of the legislature is expressed in the constitution. Nor can it, in my opinion, be said to exist by fair or reasonable implication from any of the provisions therein. The only sections which have any bearing upon the subject are section 22 of article 3, and section 9 of article 9, which are as follows:

"Sec. 22. No allowance shall be made for the incidental expenses of any state officer, except the same be made by general appropriation and upon an account specifying each item. No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued by the auditor thereon, and no money shall be diverted from any appropriation made for any purpose, or taken from any fund whatever, either by joint or separate resolution. The auditor shall, within sixty days after the adjournment of each session of the legislature, prepare and publish a full statement of all moneys expended at such session, specifying the amount of each item, and to whom and for what paid."

"Sec. 9. The legislature shall provide by law that all claims upon the treasury shall be examined and adjusted by the auditor and approved by the secretary of state before any warrant for the amount allowed shall be drawn; *Provided*, That a party aggrieved by the decision of the

auditor and secretary of state may appeal to [the] district court."

The above provisions were intended to restrict the application of money raised by taxation to the purposes for which it is appropriated, and not as a limitation upon the discretion of the legislature in selecting the agencies through which it is to be expended. Such is, in my view, the only reasonable or natural construction, the one upon which the legislature and the executive officers of the state have acted since the adoption of the constitution. In the payment of the current expenses of the state, and the greater part of the money appropriated for other purposes, the auditor acts upon the original vouchers, which are said to be the primary evidence, and the law in such cases contemplates that they shall be furnished, or other satisfactory proof of payment made, before warrants are drawn therefor. But appropriations of the kind involved in this case are an exception to the rule. Here the auditor has discharged his whole duty in the examination of the claim when he has ascertained that it is for money the payment of which has been expressly ordered by the legislature out of funds appropriated therefor, and for a purpose authorized by the constitution. Fraud is of course an exception, and may be interposed as a defense whenever discovered. But to hold that the auditor may in this case refuse to pay the money which the law-making power has seen fit to appropriate in the interest of the state, on the ground that he may honestly differ with the commissioner as to the necessity or propriety of the supplies purchased, the amount or character of the assistance employed or the compensation allowed therefor, is to sanction a flagrant usurpation of power by him and the exercise of a discretion which is in express terms entrusted to another. I must not, however, be understood as calling in question the motives of the auditor, who, it is plain, has acted in good faith, although from a mistaken sense of duty.

The views herein expressed with respect to the legality of the provision for payment of the appropriation to the commissioner are in harmony with prior decisions of this court.

In *State v. Wallichs*, 14 Neb., 439, it was held that there was no authority for the employment of clerks of the committees of the legislature, and a voucher for services so rendered would not authorize the drawing of a warrant therefor by the auditor.

In *State v. Babcock*, 22 Neb., 38, the act was construed as authorizing payment only of the amount due the relator, notwithstanding the language of one section, without reference to the other provisions of the act, seems to indicate an intention to appropriate a specific amount. It is true Judge REESE, on page 47, says, "when they [claims] are presented and that if he [the auditor] finds the claim illegal or unjust or that it has been paid he should refuse to issue his warrant," etc. By the term unjust I understand the writer to mean fraudulent or unlawful, and not to intimate, as claimed in this case, that the auditor is possessed of the power to review the actions of other public officers in order to determine whether they have properly exercised the discretion with which they are invested by law. It will be observed, too, that the question of pleading is not discussed in that case, hence it is not authority for the proposition that the auditor is justified in denying payment of claims apparently valid without alleging sufficient reasons for his refusal.

The only question involved in *State, ex rel. Dales, v. Moore*, 36 Neb., 579, was the right of the regents of the university to draw money appropriated by the legislature of 1891 for a library building without presenting the vouchers therefor. The right was denied by the court on the ground that the act expressly provided that the money should be drawn upon the presentation of vouchers. In no prior case has the question under discussion been presented or considered. We are at liberty, therefore, to give to the provisions of

the constitution involved that meaning which seems obviously sound according to recognized canons of construction, among which are that words are to be used in their natural sense, and that an act will not be declared invalid by the courts unless so plainly and irreconcilably in conflict with the constitution as that no reasonable doubt thereof can be said to exist. (*Pleuler v. State*, 11 Neb., 547; *McClay v. Lincoln*, 32 Id., 412.)

The power to advance money upon estimates to disbursing officers of the state may be a dangerous power, because of its liability to abuse, but that is a question of legislative policy and involves the exercise of a discretion which the judicial power of the state should not assume to control. My first impression was that the writ should be denied on the ground that the relator's remedy was by appeal to the district court, but upon a closer inspection of the record, it does not appear that any such action has been taken by the respondent as contemplated in *State v. Babcock, supra.* A final order, such as would give the claimant the right to appeal, is an estoppel by judicial act; in other words, a judgment, which should be pleaded when relied upon in a collateral proceeding. It is made the duty of the respondent to audit claims when presented; that is, to determine, upon examination, whether they are legal demands against the state, and whether he is authorized to pay them. If so, it is his duty, after approval by the secretary of state, to draw warrants against the appropriations out of which they are payable. If he neglects or refuses to discharge that duty after demand, it will be enforced by *mandamus* upon the relation of the party in interest. Nor is it a sufficient answer in such case to say that the items included in the aggregate of claims are not all chargeable to the state. His duty is to draw his warrant for such as the state is liable for and reject all others. In support of this well-settled rule it is sufficient to cite the leading cases of *People v. Board of Supervisors of Delaware County*, 45 N. Y., 196, and *State v. Warner*, 55 Wis., 271.

If it is true that the itemized statement presented by the relator includes charges for his board and personal expenses at the exposition (although I find nothing in the record to support such a contention), it was the duty of the respondent to reject them, because unauthorized by law; but that fact will not excuse a refusal to act upon the other items.

It must be borne in mind that the respondent does not attempt to justify his refusal upon the ground that the demand of the relator or the prayer of the petition is too broad, but rests his defense upon the one proposition, viz., that certain of the items paid out of the proceeds of warrants previously drawn are not proper charges against the state. It is clear to me, therefore, that the judgment should have been for the relator.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1893.

PRESENT:

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

STATE OF NEBRASKA, EX REL. CITY OF OMAHA, V. PETER W. BIRKHAUSER ET AL.

FILED SEPTEMBER 19, 1893. No. 6291.

1. **Metropolitan Cities**: POWER TO MAKE PUBLIC IMPROVEMENTS: PAVING STREETS: THE MAYOR AND COUNCIL of a city of the metropolitan class have jurisdiction to create paving districts without a petition of the property owners being presented to the city council, except where the entire improvement is to be done at the cost of the lot owners, in which case they have no power to act unless petitioned to do so by the owners of the majority of the feet frontage of the lots in such proposed district.

2. ——: PAVING ORDINANCES: JURISDICTION OF COUNCIL: PETITION OF PROPERTY OWNERS. To confer jurisdiction upon the mayor and council of such a city to pass an ordinance

ordering the paving of streets in a paving district, a petition praying for such improvement, signed by the owners representing a majority of the front feet of the lots abutting upon the portion of the street to be improved, must be first submitted to the city council.

3. ———: PAVING STREETS: DESIGNATION OF MATERIAL: RIGHTS OF PROPERTY OWNERS. The kind of material to be used in the paving, repaving, or macadamizing of streets shall be such as the majority of the property owners in the paving district shall determine; and in case such owners fail to designate the material they desire to use in such improvement within thirty days, the mayor and council have authority to make the selection.

4. ———: ———: ———: BIDS: BOARD OF PUBLIC WORKS. Bids for paving may be advertised for and received either before or after the selection of material is made, and if made before such selection it is not necessary that the board of public works should readvertise for and receive bids after such designation, although they may do so.

5. ———: PUBLIC IMPROVEMENTS: DUTIES OF BOARD OF PUBLIC WORKS. By section 104 of the act incorporating metropolitan cities, it is made the duty of the board of public works to make contracts on behalf of the city for the performance of such works, and the erection of such improvements as shall be ordered by the mayor and city council, but subject to their approval.

ORIGINAL application for *mandamus*.

W. J. Connell and *Frank T. Ransom*, for relator.

George W. Covell and *R. S. Hall, contra.*

NORVAL, J.

This was an application for a peremptory writ of *mandamus* to compel and require the respondents, as the board of public works of the city of Omaha, to enter into a contract on behalf of said city, with the lowest responsible bidder, for the paving of improvement district No. 512, and submit the same to the mayor and city council for their approval, and on their approval thereof to cause said work of paving to be done in accordance with the terms of said

contract. The cause was submitted at the last term of this court on a general demurrer to the petition, which was overruled by the court, and a peremptory *mandamus* issued, as prayed. To the writer has been assigned the duty of preparing an opinion expressing the views of the court upon the questions involved in the case.

The facts alleged in the application, and by the demurrer admitted to be true, may be summarized as follows:

The city of Omaha is a city of the metropolitan class, having a population of more than 80,000 inhabitants. The respondents, Peter W. Birkhauser, St. A. D. Balcombe, and John B. Furay are the members of the board of public works of said city. On the 14th day of March, 1893, an ordinance was passed by the city council of said city, which was duly approved by the mayor on March 17, 1893, creating numerous paving districts, among others, street improvement district No. 512, which comprises Twenty-sixth street from Farnam street to Half Howard street, and ordering the curbing and paving of the streets, avenues, and alleys in said districts, authorizing and directing the board of public works to advertise for bids for said work and giving the property owners in said district thirty days' notice within which to select the materials to be used for paving, and making other provisions relating to said improvements. In pursuance of said ordinance, the board of public works, on the 22d day of March, 1893, published a notice in the Omaha *Bee*, the official paper of said city, that sealed bids would be received until April 7, 1893, of the following kinds of paving materials, viz.: Sioux Falls or other granite, Colorado sandstone, sheet asphaltum, and vitrified brick, for paving said street improvement districts.

After the publication of said advertisement for bids, for the length of time and in the manner required by the ordinance, bids were received and acted upon, the bids for asphaltum were rejected, and a second and third advertise-

ment for asphalt bids was duly made and published in the official paper, and bids for asphaltum were thereafter received and accepted by the board of public works.

Subsequently, on April 14, 1893, the respondents published, for the time required by the ordinances, a notice in said official paper of said city, to the owners of the real estate in said improvement district, to designate and select the materials they desired used for paving. After the publication of said notice, petitions of lot owners abutting upon that part of Twenty-sixth street from Farnam street to Half Howard street, representing a majority of the foot frontage on said part of said street, and a majority of the area within said district, were duly presented to the mayor and city council, asking for the paving of said district, and selecting vitrified brick, class A, price $1.89 per square yard, with five years' guaranty, as the material the petitioners desired used in such paving.

In pursuance of said proceedings, and in accordance with said petition, the city council, on the 22d day of June, 1893, duly passed ordinance No. 3590, which was approved by the mayor the next day, providing for the paving of Twenty-sixth street from Farnam street to Half Howard street, in said improvement district No. 512; that by the terms of said ordinance the board of public works was ordered and directed to cause said work to be done, and to enter into a contract for the same with the lowest responsible bidder, the lowest bid being $1.89 per square yard for vitrified brick, class A, five years' guaranty, and expressly required that vitrified brick, class A, be used for said paving.

After the passage and approval of said ordinance a certified copy thereof was furnished the respondents, and it thereupon became their duty to make and execute a contract on behalf of the city with J. E. Riley, who was, and who had been declared by the board of public works, the lowest responsible bidder for said material so desig-

nated by said property owners, yet the respondents absolutely and unqualifiedly refused to execute a contract for said paving, or to submit any contract to the mayor and council for their approval, and refused to cause said paving to be done. Whereupon this action was commenced.

The respondents claim that the ordinance passed by the mayor and council of the city of Omaha creating improvement district No. 512 is invalid, for the reason the same was adopted without a petition being presented by the property owners asking for the creation of said district and the paving thereof; in other words, that the council of a city of the metropolitan class has no jurisdiction, either to form a street improvement district, or to order the paving of the streets and alleys therein, until there has been first presented to the mayor and council a petition therefor signed by the owners of lots representing a majority of the feet frontage of the property abutting upon the streets or alleys included within the proposed improvement district. The case of *Von Steen v. City of Beatrice*, 36 Neb., 421, is relied upon as an authority to sustain the foregoing proposition.

At the hearing of the case at bar, upon a hasty reading of section 69 of the act governing cities of the metropolitan class, the court reached the conclusion, and so announced, that the mayor and council of a metropolitan city have no power or authority to create a paving district, except upon a petition signed by a majority of the property owners of the proposed district; but after a more careful reading and consideration of said section, we are now convinced that its provisions are not susceptible of such construction.

The section already mentioned, and it is the only one bearing upon the question which we have been able to find, and counsel have not called our attention to any other, declares that "the mayor and council shall have power to open, extend, widen, narrow, grade, curb, and gutter, park,

beautify, or otherwise improve and keep in good repair, or cause the same to be done in any manner they may deem proper, any street, avenue, or alley within the limits of the city, and may grade partially, or to the established grade, or park, or otherwise improve any width or part of any such street, avenue, or alley, and may also construct and repair, or cause and compel the construction and repair of sidewalks of such city, of such material and in such manner as they may deem proper and necessary; and to defray the cost and expense of improvements, or any of them, the mayor and council of such city shall have power and authority to levy and collect special taxes and assessments upon the lots and pieces of ground adjacent to or abutting upon the street, avenue, alley, or sidewalk thus in whole or in part opened, widened, curbed and guttered, graded, parked, extended, constructed, or otherwise improved or repaired, or which may be especially benefited by any of said improvements; * * * *Provided*, That where any street is to be graded under the provisions provided by this section, but not to the established grade, it shall be done only after the owners representing a majority of the front feet of the property abutting on the part of such street to be so partially graded shall have petitioned the city council for such work to be done; *Provided further*, That whenever the owners of the lots abutting upon any street or alley, or part thereof, within said city representing three-fifths ($\frac{3}{5}$) of the feet front abutting upon such street or alley desired to be graded, shall petition the council to grade such street or alley, or part thereof, without charge to the city, the mayor and council may order the grading done and assess the cost thereof against the property abutting upon such street or alley, or such part thereof, so graded. The total cost of such grading shall be levied and collected in a single payment upon the completion of such work; or upon petition of not less than three-fifths ($\frac{3}{5}$) of the feet front along the street or alley so graded the cost may be made payable in ten (10) equal install-

ments extending over a period of nine years, in the same manner, at the same rate, and subject to the same conditions as are payments for paving, curbing, guttering, and like improvements hereinafter specified. In case of such installment payments the mayor and council shall by ordinance create districts embracing the property represented by such petition, and abutting or which said grading was done, to be known as grading districts and numbered consecutively; * * * *Provided further*, That curbing and guttering shall not be ordered or required to be laid on any street, avenue, or alley not ordered to be paved, except on the petition of a majority of the owners of the property abutting along the line of that portion of the street, avenue, or alley to be curbed and guttered. The mayor and council shall have power to improve any street or alley, or part thereof in the city, and for that purpose to create suitable street improvement districts, which shall be consecutively numbered; such work to be done under contract, and under the superintendence of the board of public works of the city; said improvements shall consist of paving, repaving, or macadamizing, as well as curbing, if such are necessary, on any street or alley ordered by the mayor and council. * * * Whenever the owners of the lots or lands abutting upon the streets or alleys within the street improvement district representing a majority of the feet frontage therein shall petition the council to improve such streets or alleys, it shall be the duty of the mayor and council to improve the same, and in all cases of paving, repaving, or macadamizing there shall be used such material as such majority of the owners shall determine upon; *Provided*, The council shall be notified in writing by said owners of such determination within thirty days next after the passage and approval of the ordinance ordering such improving. In case such owners fail to designate the material they desire to use in such improving, in manner and within the time above provided, the mayor and

council shall determine upon the material to be used; * * *Provided further*, That whenever the property owners representing three-fifths ($\frac{3}{5}$) of the feet frontage of lots or lands upon any street or alley or part thereof shall petition the city council to create an improvement district, including street and alley intersections, if any, and to have the same improved without cost to the city, then, and in that case, the city council shall have power to create such district and cause a contract to be made for such improvement, and to assess and levy a special tax upon all lots or lands within such improvement district so created to pay for the said improvement within the same, including the intersection of streets and alleys, if any," etc.

A perusal of the numerous provisions of the foregoing section is sufficient to carry conviction to the mind that the law-makers never intended to limit the jurisdiction of the city council to form paving districts to cases where the property owners have petitioned for the same. It will be observed that the statute under consideration contains no provision which in express terms requires that the lot owners must petition for the creation of a paving district before the same can be established, except where the entire improvement is to be done without expense to the municipality. The legislature has provided by language that cannot be misunderstood that certain street improvements can be made alone upon a petition of the property owners. Thus, where a street is to be graded otherwise than at the established grade, the owners representing a majority of the front feet of the lots abutting upon the portion of the street to be so graded must petition for such improvement; and when three-fifths of such lot owners petition for the grading of a street or alley without expense to the city, the work may be ordered done and the costs thereof assessed against the abutting property. Likewise, it is provided that a street, avenue, or alley which has not been ordered paved, the city council cannot require to be curbed and guttered,

unless petitioned so to do by a majority of the owners of property abutting upon the part of the street, avenue, or alley to be thus improved. The section also confers definite and distinct authority upon the city council to create an improvement district, including street and alley intersections, and have the same improved without cost to the city, and assess the expenses of such improvements, including the intersections of streets and alleys, against the real estate within such district, whenever the property owners representing three-fifths of the feet frontage of lots in such proposed district shall, by petition, request the council to do so. Inasmuch as the section specifies the cases in which the city council must act upon petition of the property owners, the fair and reasonable inference is that in all other matters relating to the improvement of streets, which are within the authority conferred by statute, the mayor and council may act without a petition therefor being presented to them. The conclusion is irresistible that a petition for the erection of a paving district is not required, except where the entire improvement is to be done at the costs of the lot owners of such district.

This construction of the statute does not conflict with the decision in *Von Steen v. City of Beatrice*, *supra*. That was an action to enjoin the making of a contract for the grading and paving of two districts in the city of Beatrice. The petition for paving of one of the districts was signed by less than a majority of the lot owners, and the same is likewise true of the petition for improving the streets of the other district, not counting the names of those who signed conditionally. The court held that a petition to confer jurisdiction upon the council of a city of the second class, having over 5,000 and less than 25,000 inhabitants, to order the paving of streets in a paving district, must be signed unconditionally by the owners of the majority of the feet frontage therein. Whether a city council possesses authority to create a paving district, except upon a petition,

the court did not consider or pass upon in that case, although there appears in the body of the opinion filed therein a single sentence which seems to be in conflict with the views above expressed. The language referred to is "that ordinance creating district No. 9, and all acts in pursuance thereof, are void." What led to the use of the expression doubtless, was the title of the ordinance then under consideration in the Beatrice case, which ordinance, although it provided for and ordered the paving of certain streets therein named, was known and designated as "an ordinance creating paving district No. 9, and defining the boundaries thereof, and providing for the grading and paving of said district."

It is urged by counsel for relator that the mayor and council have jurisdiction to order the paving of the streets, alleys, and avenues of a city, even though no petition of property owners for paving is submitted to the council prior to the passage of the ordinance ordering the improvement. The proposition was decided adversely to the contention of counsel in the Beatrice case, to which reference has already been made. True, that decision was not under the same statute we have been considering, but an examination of the provisions of the two statutes will show that they are substantially alike. We are entirely satisfied with the decision in *Von Steen v. City of Beatrice*, and it will be adhered to. Petitions of property owners of paving district No. 512, signed by the requisite number of petitioners, were presented to the council prior to the passage of ordinance No. 3598, ordering the paving of the streets within such district. Said petitions were in every particular sufficient to confer jurisdiction on the city council to act, and the paving was by said ordinance directed to be done in accordance with said petitions.

The remaining question to be considered is this: Was it necessary to advertise and receive bids for paving after the designation by the lot owners of materials to be used?

The statute authorizes a majority of the property owners to select the kind of material to be used in paving streets, and in case they fail to notify the council in writing of such selection within thirty days, the mayor and council are empowered to designate the material. By section 113 of the act governing cities of the metropolitan class it is provided that "all grading, paving, macadamizing, curbing, or guttering of any streets, avenues, or alleys, in the city shall be done by contract with the lowest responsible bidder, or by days' work, as petitioned by property owners representing a majority of the property in front feet in any paving district, under the direction and supervision of the board of public works." Neither the foregoing nor any other statutory provision specifies whether the bids for paving shall be made before or after the materials to be used have been selected. The statute seems to be silent upon the subject. We are constrained to hold that bids for paving may properly be advertised for and received, either before or after the selection of material, and in case satisfactory bids have been received prior to the designation of materials, it is not absolutely necessary that the board of public works should again readvertise for and receive bids after such designation. It is incorrect to say that no reasonable bid could be made until it is known what material is to be used. The advertisement or notice to contractors may, and in this case did, call for bids on the various kinds of materials liable to be used, and in that event contractors could bid as intelligently as if bids were asked for on vitrified brick alone, or on any other material. Where bids are asked for and received on the different materials before the property owners are called upon to name the material they desired used, they can more intelligently make the selection, as they would know the cost of the various kinds of material, and should they deem all bids unreasonable, they could petition for the improvement to be done by days' work. The method adopted in this case is more likely to prevent com-

bination between contractors than if bids were asked upon any one kind of material after the selection thereof has been made by the property owners. Doubtless, lower bids are more likely to be secured than could be obtained by waiting until after the designation of the material, since contractors for the same kind of material would not only bid against each other, but in order to induce the selection of their material they would compete with contractors of all other kinds of material.

Under section 104 of the act incorporating metropolitan cities, it is made the duty of the board of public works to make contracts on behalf of the city for the performance of all such works and the erection of such improvements as shall be ordered by the mayor and city council, subject to their approval. Under the facts admitted by the demurrer, it was clearly the duty of the respondents to enter into a contract on behalf of the city with the lowest responsible bidder for the paving of improvement district No. 512 with the kind of material selected by the property owners of said district. The demurrer to the application is overruled and a peremptory writ of *mandamus* is allowed.

WRIT ALLOWED.

THE other judges concur.

LUCIEN DERANLIEU V. FRANK E. JANDT.

FILED SEPTEMBER 19, 1893. No. 4937.

1. **Review:** NON-JOINDER OF PARTIES: EVIDENCE examined, and *held* to sustain the verdict.
2. **Trial:** OFFICER IN CHARGE OF JURY: REVIEW. It is not reversible error to permit a jury to remain in charge of a deputy sheriff while deliberating upon their verdict without his being specially sworn by the court in that behalf.

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

Albert W. Crites and *W. H. Fanning*, for plaintiff in error.

E. W. Dailey and *Alfred Bartow, contra.*

NORVAL, J.

Frank E. Jandt brought suit against Lucien Deranlieu in the county court on account for goods sold and delivered, and plaintiff also sued out a writ of attachment and caused the same to be levied upon forty-one head of cattle, twenty-nine calves, and one horse. Defendant moved for a dissolution of the attachment, which was overruled. An answer was filed setting up, among other defenses, the non-joinder of necessary parties defendant. Plaintiff replied by a general denial. There was a trial to a jury, which resulted in a verdict in favor of the plaintiff for $332.40 and costs. Thereupon the defendant filed a motion for a new trial, which was denied by the court, and judgment was entered upon the verdict. A bill of exceptions was settled and allowed, and defendant prosecuted error to the district court from both decisions, where the order of the county court sustaining the attachment was reversed and the judgment upon the merits was affirmed. From the decision of the district court affirming the judgment of the county court in the main case, Deranlieu brings the case to this court for review by petition in error.

The main question is, whether there was a non-joinder of parties defendant, the plaintiff in error contending there was, by reason of the failure to make Samuel Young a defendant.

It appears that defendant in error was engaged in the mercantile business in the town of Crawford, this state, and that Deranlieu and one Samuel Young were railroad

contractors doing business under the firm name of Deranlieu & Young. There is a conflict in the testimony as to whom the credit was extended by Jandt for the goods charged for in the petition. The plaintiff in error insists, and there is in the record testimony tending to support it, that the goods were purchased by said firm on credit, and not by Deranlieu individually. It is disclosed that a portion of the goods was delivered on written orders, and a part upon the verbal orders, of the plaintiff in error. The original written orders were produced at the trial, and all but one of which were signed in the firm name of Deranlieu & Young. One order was signed by plaintiff in error individually. All bills for the goods were made out in the firm name. If these facts stood alone, taken in connection with the testimony of plaintiff in error and Mr. Young, there would be no escaping the conclusion that the action was improperly brought against Deranlieu as sole debtor. But the bill of exceptions contains other testimony bearing upon the subject, which, if true, is ample to sustain the verdict of the jury. The evidence of the defendant in error, and also John C. Hoagland, who managed the business for Mr. Jandt, is to the effect that the goods were sold and delivered upon the sole credit of plaintiff in error, and were charged to him individually upon the books; that prior to the furnishing of the goods Jandt was well acquainted with plaintiff in error, who was regarded responsible, and when the latter came to the defendant in error to make arrangements for credit he was informed that Jandt would not let the goods go on the firm's credit, but that they would be charged to Deranlieu personally, to which plaintiff in error gave his consent. It further appears in testimony that the bills were made out against Deranlieu & Young at the request of plaintiff in error, so that he could keep his private account separate from the goods that were furnished for the use of the firm. The jury passed upon the conflicting testimony and found

that the credit was extended to plaintiff in error and not to the firm of which he was a member, and the finding is not so palpably against the evidence as to warrant a reviewing court to disturb it.

It is finally urged that the county court erred in permitting the jury to remain in charge of the deputy sheriff during the time they were deliberating upon their verdict, without being specially sworn in that behalf. This objection was not made until after verdict, therefore it came too late. Moreover, it does not appear that plaintiff in error was in the least prejudiced by the failure to swear the officer. Besides, there is no statutory provision, that we are aware of, which requires that a sheriff or his deputy shall be specially sworn by the court before taking charge of a jury while deliberating in a civil case.

There is no reversible error in the record and the judgment of the court below is

AFFIRMED.

THE other judges concur.

ALICE SMITHSON, APPELLANT, V. WILLIAM SMITHSON, APPELLEE.

FILED SEPTEMBER 19, 1893. No. 5062.

1. **Courts of Equity:** JURISDICTION. Where courts of equity have assumed jurisdiction of a particular class of cases their jurisdiction in such cases will continue notwithstanding, in the development of legal means, redress becomes attainable in courts of law.

2. ———: REMEDIES NOT WITHIN PROVISIONS OF CODE. It is not the object of the Code to abolish existing remedies in cases where no provision is made therein for the prosecution of actions. Cases involving substantial rights, which are clearly outside the provision of the Code, may be prosecuted in accordance with the

practice previously recognized in courts of common law and equity.

3. ———: ———: DECREE OF DIVORCE: ACTION TO VACATE FOR FRAUD: PLEADING. In the petition it is alleged that the defendant therein, plaintiff's husband, in the year 1878, procured a decree of divorce in this state by means of fraud and perjured testimony. At said time and until recently the plaintiff resided in the state of Pennsylvania; that the only service upon her was by publication in a local newspaper and that she was not aware of the whereabouts of her husband or of said action or decree until the time of the filing of her petition eleven years later. *Held*, To state a cause of action, since the remedy by petition for a new trial under the Code is inadequate, and that the court which allowed the decree may, in the exercise of its general equity powers, vacate it upon proper showing of fraud and imposition.

4. ———: DECREE OBTAINED BY FRAUD: VALIDITY: COLLATERAL ATTACK. A judgment or decree procured by fraud is not void in the sense that it can be assailed in a strictly collateral proceeding, but is voidable merely at the election of the party defrauded thereby.

4. ———: ———: ACTION TO VACATE DIVORCE: JURISDICTION OF COURT IN DIFFERENT COUNTY. One S. procured a divorce from his wife by decree of the district court of Fillmore county in 1878 upon constructive service. In 1889 the latter commenced an action in the district court of Douglas county to set aside and annul the said decree, on the ground that it was procured by means of perjury, and for a divorce on the ground of desertion and failure to support. *Held*, That the cause of action is primarily to vacate the decree of the district court of Fillmore county, and that the district court of Douglas county does not have jurisdiction thereof.

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

John L. Carr and *Ambrose & Duffie*, for appellant.

Charles Offutt and *Ong & Jensen*, *contra*.

POST, J.

The parties to this action were married in the state of Pennsylvania in the year 1866, where they resided until

the year 1872. In the year last named the defendant removed to this state and took up a permanent residence in Fillmore county, where he has since that time continuously resided. In the month of September, 1878, he commenced an action for divorce against the plaintiff, in the district court of said county, alleging willful abandonment as grounds therefor, notice of said action being given by publication in a newspaper of the county. Said action resulted in a decree of divorce in accordance with the prayer of the petition. In the month of November, 1889, the plaintiff instituted this action in the district court of Douglas county. In her petition she asks the court (1) to vacate and annul the decree of the district court of Fillmore county, on the ground that it was procured by means of fraud and perjury, (2) for a decree of divorce and alimony on the grounds of cruelty and abandonment. Summons was served upon the defendant in Fillmore county, who first entered a special appearance in which he challenged the jurisdiction of the court over his person or the subject of the action. His challenge having been overruled by the court, Doane, judge, presiding, he filed an answer in which he renews his objection to the jurisdiction of the court. The answer contains also a general denial and other defenses which do not call for notice in this opinion. A final hearing was had before Davis, judge, upon the plaintiff's evidence, the defendant's offer of proof having been refused on account of his failure to comply with an order of the court for the payment of suit money. The hearing resulted in a finding that the decree of 1878 was not procured through fraud or upon perjured testimony, and a decree dismissing the plaintiff's petition, from which she has appealed to this court.

It is necessary to consider but one of the several questions argued, viz., the jurisdiction of the district court of Douglas county to vacate the decree of the district court of Fillmore county. It should be observed that no objection

is made to the record of the decree sought to be impeached. The district court of Fillmore county certainly had jurisdiction of the subject of the action and had acquired jurisdiction of the defendant therein in the manner prescribed by law. The decree of divorce is therefore not void in the sense that it can be assailed in a strictly collateral proceeding. A judgment or decree stands upon the same footing as any other advantage procured by fraud. It is voidable only at the election of the injured party, and not absolutely void. (Black, Judgments, 170.) It is but fair to add that there does not appear to be any difference of opinion between plaintiff's counsel and the court upon that proposition. The action to vacate and annul the decree is a recognition of its present conclusiveness. The question under consideration involves two inquiries, viz.: (1.) Is the right to vacate judgments and decrees therein included within the general equity powers of the district court, or is the remedy provided by the Code of Civil Procedure exclusive? (2.) Assuming that the petition presents a case for equitable relief, must the plaintiff's remedy be sought in the district court of Fillmore county, where the decree was rendered, or can she maintain an independent action for that purpose in the district court of Douglas county, or other court possessing general equity jurisdiction?

Referring to the inquiry first suggested, we do not hesitate to hold that the petition presents a cause for equitable interference. It is therein alleged that the defendant deserted his family in the year 1872; that the allegations in the divorce proceeding, charging the plaintiff herein with desertion, were false and made for the purpose of corruptly deceiving the court, and supported at the trial by false and perjured testimony; that she was not personally served with notice of said action and did not at the time know it was pending, and that she first learned of the whereabouts of the defendant and of said divorce proceeding about the time this action was commenced in 1889, nearly eleven years subsequent to the date of the decree.

By section 602 of the Code it is provided that the district court shall have power to vacate or modify its own judgments and decrees after the term at which they are rendered for fraud practiced by the successful party. But by section 609 it is provided that proceedings to vacate or modify a judgment or decree on the ground of fraud must be commenced within two years after the rendition thereof, unless the party entitled thereto be an infant, a married woman, a person of unsound mind, etc. This section appears in its present form in the Revised Statutes of 1866, hence the exception in favor of married woman can have no force at this time, in view of subsequent statutes removing the disabilities imposed upon them by the common law. It is provided by section 82 that a party against whom a judgment has been rendered without other service than in a newspaper may have the same opened at any time within five years thereafter, etc. That provision, it was held in *O'Connell v. O'Connell*, 10 Neb., 390, is not applicable to divorce proceedings, but the force of that case as an authority, it is argued, has been weakened by subsequent decisions. However, that is a collateral question and foreign to the present inquiry. It will be seen from what has been said that the plaintiff is without relief if the remedy provided by the Code is held to be exclusive. It is a fundamental rule of equity that where courts of chancery have once assumed jurisdiction over a particular class of cases it will not be ousted therefrom simply because, in the development of legal means, redress becomes attainable at law. (Story, Eq., sec. 64*i*, and note; Bispham, Eq., p. 57.) And that principle is distinctly recognized in section 901 of the Code, viz: "Rights of civil action given or secured by existing laws shall be prosecuted in the manner provided by this Code, except as provided in the following section. If a case ever arise in which an action for the enforcement or protection of a right or the redress or prevention of a wrong cannot be had under this Code, the practice hereto-

fore in use may be adopted so far as may be necessary to prevent a failure of justice."

The provisions of the Code being inadequate, it follows that the remedy afforded by courts of equity is still available to the plaintiff. The subject under discussion might have been dismissed by a reference to the case of *Wisdom v. Wisdom*, 24 Neb., 551, but for the reason that it is not apparent from the statement thereof whether or not the legal remedies provided by the Code were available to the plaintiff at the time the action was commenced.

2. Is the action cognizable by the district court of Douglas county? It is apparent that the cause of action is primarily to vacate the prior decree, and that the petition for divorce is but an incident thereto, upon the evident theory that the court, having once acquired jurisdiction, will retain it for the purpose of such equitable relief as the plaintiff is entitled to. (Adams, Equity, 7th Am. ed., 418.) This case differs essentially upon principle from one in which the beneficiary of a fraudulent judgment or decree has undertaken to assert a right thereunder. In such case, whether it be by means of an execution or an action, fraud which inheres directly in the judgment or decree may be interposed as a defense. Here, however, the decree is assailed by the defendant therein in the first instance in a collateral proceeding.

According to the practice which formerly prevailed in the courts of chancery, a decree, when once enrolled, could be set aside or impeached at the instance of the parties thereto only upon a bill of review or a bill to impeach on the ground of fraud. Before the enrollment thereof the remedy was by supplemental bill in the nature of a bill of review. (Adams, Eq., 416*; 2 Madd., Chancery, 537*.) But according to the modified form of the chancery practice as it prevails in the equity courts of this country, the term bills of review is used in a more comprehensive sense and includes supplemental bills of the same nature and

bills to impeach on the ground of fraud. (Story, Eq. Pl., secs. 403, 428; Black ,Judgments, sec. 301.) Considerable contrariety of opinion is apparent from the earlier cases, as well as text-books, upon the question whether bills of review and bills to impeach upon the ground of fraud are or are not original bills. A citation of the cases or even the views of text-writers in this connection would not be profitable.

The conflict of opinion upon the subject is sufficiently illustrated by reference to two leading American authors. In Willard's Equity, page 103, such bills are treated as strictly original bills, while in Story's Equity Pl., secs. 18, 20, 21, they are classed with those bills which "are for the purpose of cross-litigation, or of controverting or suspending or reversing some decree or order of the court or carrying it into execution," and therefore not original bills. Other writers treat them as bills in the nature of original bills. (Harrison, Prac. in Chancery, 166.) The writer has, during an examination of all of the authorities attainable, found no reported case in which the power of a different court, although possessing the same general jurisdiction with respect to the subject-matter, has been invoked to impeach a decree on the ground of fraud in accordance with the practice in the courts of chancery. In short, the terms original bill and bill in the nature of an original bill are used by the judges and text-writers in a restricted sense and refer to the character of the pleading rather than that of the action or proceeding to which they apply. The view just expressed finds support in Willard's Eq., p. 163, where it is said: "There is no case in which equity has ever undertaken to question the judgment of another court for mere irregularity. The power in such case is always exercised by the court in which the judgment was given and the relief is frequently granted upon terms." The term irregularity as here used evidently includes fraud as well as such other acts or omissions as render the judgment void

or reversible at the election of the unsuccessful party. (*Fischer v. Langbein*, 103 N. Y., 84; Black, Judgments, 170.)

Our conclusion is that the district court of Douglas county did not have jurisdiction of the cause of action. The decree, therefore, should be reversed and the action

DISMISSED.

THE other judges concur.

JOHN S. CAULFIELD V. GUY L. BITTENGER ET AL.

FILED SEPTEMBER 19, 1893. NO. 4929.

Attachment: DEBT NOT DUE. An action can be maintained on a claim before it is due only in the exceptional cases enumerated in section 237 of the Code.

ERROR from the district court of Dawes county. Tried below before CRITES, J.

E. S. Ricker and *James A. Powers*, for plaintiff in error.

Alfred Bartow, contra.

POST, J.

This is a proceeding in error and brings up for review the judgment of the district court of Dawes county reversing an order of the county judge of said county, overruling the motion of the defendants in error to discharge an attachment issued at the instance of the plaintiff in error. The material facts are as follows: On the 9th day of March, 1891 the plaintiff in error, Caulfield, filed with the county judge an account of which the following is a copy:

"JOHN S. CAULFIELD
v.
GUY L. BITTENGER,
RALPH R. BITTENGER.

"Bought of John S. Caulfield.

1890.

Nov. 18.	To merchandise, per bill rend.....		$4 30
Nov. 26.	" "		14 13
Dec. 10.	" "		67 48
Dec. 10.	" "		5 08
Dec. 13.	" "		2 00
Dec. 17.	" "		1 25
Dec. 30.	" "		1 02
Jan. 2.	" "		20 73
Jan. 6.	" "		11 93
Jan. 8.	" "		10 55
Jan. 10.	" "		1 00
Feb. 6.	" "		13 72
Feb. 9.	" "		32
Feb. 11.	" "		6 60
Feb. 14.	" "		1 80
Feb. 16.	" "		1 74
	Total.....		$162 93
Feb. 28.	By mds. returned.....		1 74
			$161 19

"OMAHA, COUNTY OF DOUGLAS,
STATE OF NEBRASKA.

"March 6, 1891, on this day appeared before me John S. Morrison, a notary public in and for said county, Frank J. Coates, who, being first duly sworn, deposes and says that he is book-keeper for John S. Caulfield, and that the foregoing account against G. L. and R. R. Bittenger is correct and just, and wholly unpaid to the best of his knowledge and belief."

On the same day Caulfield, by his attorney, filed an affi-

davit for attachment, which, so far as it is material to the question presented by the record in this case, is as follows:

"E. S. Ricker, attorney for the said plaintiff John S. Caulfield, makes oath that the claim in this action is for the payment of money only upon account for goods, wares, and merchandise sold and delivered by plaintiff to defendants at their request within one year prior to the commencement of this action, and which account affiant believes is not wholly due; and the said E. S. Ricker also makes oath that the said claim is just and that the plaintiff John S. Caulfield ought, as he believes, to recover thereon one hundred sixty one and $\frac{19}{100}$ dollars; he also makes oath that the defendants Guy L. Bittenger and Ralph R. Bittenger are about to remove their property, or a part thereof, out of the county with the intent to defraud their creditors, and are about to convert their property, or a part thereof, into money for the purpose of placing it beyond the reach of their creditors, and have assigned, removed, or disposed of, or are about to dispose of, their property, or a part thereof, with intent to defraud their creditors, and have sold, conveyed, or otherwise disposed of their property with a fraudulent intent to cheat or defraud their creditors or to hinder or delay them in the collection of their debts, and are about to make such sale, conveyance, or disposition of their property with such fraudulent intent, and are about to remove their property, or a material part thereof, with the intent or to the effect of cheating or defrauding their creditors or of hindering and delaying them in the collection of their debts, and to accomplish such fraudulent purposes the said Guy L. Bittenger and Ralph R. Bittenger secretly planned and arranged to sell all of their stock of merchandise in said county without retaining enough other property subject to execution to pay said debts, and so planned and arranged without the knowledge of their creditors and willfully and purposely deceived and misled said creditors, by denying to them that they were intending to sell their said stock, and

by making false representations as to the extent and amount of their indebtedness, and by making other false and fraudulent misrepresentations regarding their business intentions and acts relative thereto, all of which were calculated to deceive and mislead said creditors. Affiant further states that the Honorable M. P. Kinkaid, judge of the district court of Dawes county, is absent from said county, wherefore affiant, on behalf of said plaintiff, prays the Hon. S. A. Ballard, judge of said county court, that he grant the order for the issuance of an order of attachment against said defendants, and further saith not."

Upon the filing of the foregoing affidavit an order of attachment was issued, and the sheriff, by virtue thereof, took possession of the property in controversy, to-wit, a stock of books, stationery, cigars, and fruit in the city of Chadron. Subsequently the defendant moved to discharge the attachment, alleging as grounds thereof: First, the facts stated in the affidavit are not sufficient to authorize the allowing of the order of attachment; second, the statement of facts in said affidavit are untrue. The motion aforesaid having been overruled and judgment entered by the county judge in favor of the plaintiff, the cause was removed to the district court by petition in error, where the order overruling the motion to discharge was reversed.

It is apparent from an inspection of the record that the proceeding before the county judge was an action for a debt not then due. It is alleged in the affidavit that the account is not wholly due and it is impossible to determine, either from the affidavit or the bill of particulars, what part of the account, if any, had matured at the time the action was commenced. The attachment must be sustained, therefore, if at all, under the provisions of section 237 of the Code. It is clear, however, that attachment is allowable for debts not due, only in the exceptional cases for which provision is made in that section. (See *Seidentopf v. Annabil*, 6 Neb., 524; *Philpott v. Newman*, 11 Id., 299.) Both defendants

deny *seriatim* all the allegations of fraud contained in the affidavits upon which the attachment was allowed.

It appears from the affidavit of R. R. Bittenger that there had been negotiations between himself, as managing partner, and C. E. Wilson, of Omaha, for a sale of the business to the latter, but that the transaction was in good faith and without any intention to delay or defraud the creditors of the firm, and that said firm was perfectly solvent, having a stock of goods worth more than $3,000, and $200 in good accounts, while the liability thereof did not exceed $1,200. He is corroborated by Wilson and also by Mr. Burnett, who had been employed as a clerk in the store for five months preceding the service of attachment. This evidence is not controverted by the plaintiff, although a number of affidavits were introduced tending to prove that Ralph R. Bittenger at Omaha and Chadron about the 5th day of March, 1891, had made false statements with respect to the indebtedness of the firm. This evidence might have been material had the attachment been allowed under section 198, but is insufficient to sustain an attachment under section 237. The judgment of the district court is right and is

AFFIRMED.

THE other judges concur.

MARTIN L. EATON V. FAIRBURY WATER-WORKS COMPANY.

FILED SEPTEMBER 20, 1893. No. 4771.

1. **Municipal Corporations**: FRANCHISES: WATER COMPANIES: CONTRACTS: FAILURE TO SUPPLY WATER: LIABILITIES FOR DAMAGES BY FIRE. A provision in the ordinance of a city granting a franchise to supply water to the city requiring that "the

grantee shall constantly, day and night (except in the case of an unavoidable accident), keep all fire hydrants supplied with water for instant service, and shall keep them in good order and efficiency," did not confer upon the owner of property destroyed by fire a right of action against said grantee on account of its failure to furnish water as stipulated, although thereby the loss by such fire would have been obviated.

2. ——: ——: ——: ——: ——: ——. Under such circumstances such grantee is not liable by reason of assuming the functions which might properly belong to the city, for the reason that under the facts stated, the city, if performing the same functions, would not be liable.

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

Hambel & Heasty, for plaintiff in error:

Under the contract, or ordinance, the defendant receives three thousand dollars per annum, which amount is levied as a special tax and paid by the taxpayers of the city of Fairbury, of which plaintiff is one, as alleged in his petition. The defendant in consideration thereof, among other things, expressly agreed "constantly, day and night, to keep all fire hydrants supplied with water for instant service, and to keep them in good order and efficiency." The water company is not exempt from liability in case it fails to comply with the requirements of that contract. (*Paducah Lumber Co. v. Paducah Water Supply Co.*, 12 S. W. Rep. [Ky.], 554; *Atkinson v. Newcastle and Gateshead Water-works Co.*, L. R. 6 Exch. [Eng.], 404; Shearman & Red., Negligence, sec. 54*a*, 120–124; *Couch v. Steel*, 3 El. & Bl. [Eng.], 402; *Rowning v. Goodchild*, 2 W. Bla. [Eng.], 906; *Mersey Docks v. Gibbs*, 11 H. L. Cas. [Eng.], 686; *Western Saving Fund Society of Philadelphia v. City of Philadelphia*, 31 Pa. St., 185; *Lacour v. New York*, 3 Duer [N. Y.], 406; *Bailey v. New York*, 7 Hill [N. Y.], 146.) On a contract made between two parties for the benefit of another, the latter may sue in his own name for a

breach thereof. (*Hale v. Ripp*, 32 Neb., 259; *Shamp v. Meyer*, 20 Id. 223.)

Henry D. Estabrook, contra, to sustain the proposition that there is no privity of contract, cited: *Davis v. Clinton Water-works Co.*, 54 Ia., 59; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn., 29; *Foster v. Lookout Water Co.*, 3 Lea [Tenn.], 45; *Becker v. Keokuk Water-works*, 79 Ia., 419; *Van Horn v. City of Des Moines*, 19 N. W. Rep. [Ia.], 293.

W. P. Freeman, also for defendant in error.

RYAN, C.

On the 5th day of May, 1890, Martin L. Eaton filed in the district court of Jefferson county his petition praying judgment against the Fairbury Water-works Company, for the value of certain of his goods destroyed by fire on December 2, 1889. The right to the recovery sought, was predicated upon the statements that the defendant was, at the time of said fire, owner of, and operating in the city of Fairbury, in said county, a system of water-works built and constructed pursuant to the terms and conditions of a certain contract and franchise entered into and granted by said city to A. L. Strang, and his successors, under the provisions of a certain ordinance of said city, whereby said Strang and his assignees were bound, during the continuance of said franchise, to keep all fire hydrants supplied with water for instant service, and to keep them in good order and efficiency; that payment for the aforesaid service was provided to be made by the levy of a tax upon all taxable property in said city; that plaintiff was one of the said taxpayers, and that the loss aforesaid was caused by the negligent failure of the water-works company aforesaid to provide water for the hydrants near the place of said fire in sufficient quantity to extinguish the same, notwithstand-

ing it was required by said ordinance to make such provision. There was a detailed description of the property destroyed and a statement of its value, and a prayer accordingly.

On April 7, 1890, there was filed a general demurrer to said petition, which, on the 11th day of the same month, was overruled, and two days thereafter a judgment was rendered against the water-works company for the full amount claimed in the petition aforesaid. On the 5th day of the month following, the water-works company filed in said court its petition praying that the aforesaid judgment be set aside and that said water-works company be admitted to defend against the claim set up in said petition. The grounds upon which this relief was sought were that the attorneys for the water-works company had been misled as to the time when the demurrer aforesaid could be taken up and presented for determination, and therefore had failed to appear on or before the 11th day of April aforesaid to present the defense of said company. It was claimed that this misunderstanding, in the main, was attributable to a telegram received from the attorneys for Martin L. Eaton by the attorneys for the water-works company, a contention sustained by the district court, and which, as a question of fact decided upon conflicting evidence, will be treated as correct and therefore will receive no further notice. To the petition to open the judgment there was filed a general demurrer, after which was filed an answer putting in issue the several matters alleged in said petition, to which answer there was a reply. Upon a trial of these issues the district court made the following finding and order, to-wit:

"This cause coming on to be heard upon the petition of the plaintiff and the evidence, on consideration whereof the court finds that without fault or negligence on the part of the plaintiff herein it was prevented from appearing and making its defense in cause No. 47, docket F, of this court,

wherein the plaintiff herein was defendant, by the acts of said Eaton and his attorneys as in plaintiff's petition alleged, and that said judgment should be vacated and set aside, but at the costs of the plaintiff herein; the court is not attempting to settle the merits of the case of said Eaton against the water-works company, and makes no finding as to the merits of said defense of said water-works company in said action. It is therefore considered that the judgment heretofore rendered in cause No. 47, docket F, wherein Martin L. Eaton is plaintiff and the said water-works company is defendant, be, and hereby is, set aside and vacated and a new trial granted in said cause at the costs of the plaintiff herein of the former trial. It is ordered that said cause be placed upon the trial docket for trial in its order. To which acts and doings of this court all and singular the said Eaton duly excepts."

From this order awarding a new trial and vacating a former judgment in his favor the plaintiff in error brings the cause in which said order was made for review to this court. As some of the matters considered by the district judge were such that they must have transpired under his observation—such as, for instance, whether the order overruling the demurrer was entered upon being regularly reached upon call of the trial docket—we shall not attempt to review his findings that, without fault upon the part of the water-works company, or its attorneys, it was prevented from making a defense. The sole question remaining for our consideration then is, whether or not the petition of Eaton against the water-works company stated a cause of action.

Plaintiff in error predicates his right to maintain an action against the water-works company upon the following provision of the ordinance under which the water-works company, as assignee of the rights of A. L. Strang, operated its water-works: "The grantee (A. L. Strang or his assignee) shall constantly, day and night (except in the case of an una-

voidable accident), keep all the hydrants supplied with water for instant service, and shall keep them in good order and efficiency." It is insisted in argument that this provision, while made with the city, was for the benefit of the tax-payers, and that therefore it was a contract for the benefit of plaintiff upon which he might bring suit for its violation to the detriment of plaintiff. The decision of this court relied upon to sustain this position is that of *Shamp v. Meyer*, 20 Neb., 223. As that case illustrates well the class of cases to which is applicable the principle that where a promise is made by one for the benefit of another, suit may be brought for the enforcement of such promise by the beneficiary, it should receive more than a mere passing notice. In that case Meyer was a member of the firm of Noring & Meyer, which had assumed the performance of the promise of its predecessor, one of which was to pay all the indebtedness of its predecessor, a firm of which Shamp was a member. This was not done, but Shamp was compelled to pay said indebtedness provided against, and thereupon sued Meyer for the amounts which he had thus been compelled to pay. This undertaking of the firm, of which Meyer was a member, was founded upon a valuable consideration, and it was held that though the consideration did not move directly from Shamp to the firm of which Meyer was a member, yet it did move from the parties with whom Meyer's firm contracted and was enforcible at the suit of Shamp, on the same principle as where in a deed, the payment of a mortgage is assumed absolutely, suit may be brought by the mortgagee against the party who thus assumed payment. In the case at bar, however, Eaton was not in any way recognized as either a party or a beneficiary, so that the authority cited in no way aids his contention. If his action could at all be maintained, it must be upon grounds different from those considered in *Shamp v. Meyer, supra*, for, as we have observed, there is no express provision in the ordinance in his favor. The case most

nearly in point cited by plaintiff favorable to his right of recovery is that of *Paducah Lumber Co. v. Paducah Water Supply Co.*, 12 S. W. Rep. [Ky.], 554, in which there were general provisions as to the manner in which payment should be made the supply company; *i. e.*, by a general tax. As a demurrer was sustained to the petition, its averments of fact controlled the decision of the court, as clearly appears from the language of that opinion. After reciting the above manner of raising water rental by general tax, and the agreement of the water supply company in consideration thereof to supply fire protection, which, it was alleged, it had failed to do to plaintiff's loss, the opinion proceeds in this language:

"It is further stated that under a contract directly between them there had been erected, previous to the fire on the same lot where the burned property was situated, two hydrants, one within thirty and the other seventy feet of the place where the fire originated, and connected by pipes with the water-main, to be used by appellant to extinguish fires, and for steam purpose, for which it had been paying rent to appellee, and that in consideration thereof appellee had agreed to furnish and have ready at all times water sufficient to throw streams through hose kept by appellant in proper condition, to be connected with the two hydrants, the height provided for in said contract between appellee and the city of Paducah; that the fire originated in a wood building situated on the lot of appellant, and connected with its other property, though occupied at the time by another, but said fire occurred without any fault or negligence of appellant or its servants, and it could and would have been extinguished before doing damage to the property of appellant if there had been the stipulated quantity of water in the stand pipe and conducting pipes, or the pumping machinery had been in readiness to operate, and the engineer and servants of appellee had been present to set it in motion; for immediately after

the fire commenced and before it had done any damage or extended to the premises then occupied by appellant, hose-pipes in good order were attached to the two private hydrants and carried to within five or six feet of the fire for the purpose of applying water to it."

Following this language there was a condensed statement of the several matters constituting the alleged negligence of the supply company in making proper provisions to extinguish the fire, by reason of all which failures recited in the petition the fire was not put out, but was suffered to inflict great loss upon appellant by the destruction of its property. Commenting upon the averments of the petition, the court proceeded thus: "Clearly appellant had a right to sue for a breach of the distinct contract set out in the petition, by which, in consideration of rent paid for the use of the two hydrants on its own lot, water was agreed to be furnished directly to it by appellee."

It will thus be seen that this private contract largely influenced the court in its determination that the demurrer had been improperly sustained to the petition. As to the right to maintain an action as upon the promise of the supply company to the city of Paducah for the benefit of the lumber company, the opinion of the court runs as follows, after an epitomized statement of the undertakings of the water supply company, to-wit, "That appellee also agreed to have in the stand-pipe * * * at all times a supply of water sufficient to afford a head or pressure requisite for all domestic, manufacturing, and fire protection purposes for all the inhabitants and property of the city, and to increase the number and length of hydrants and pipes when necessary to meet demands of the city and citizens; that said contract was made with appellee by the city of Paducah for the use and benefit of all its property owners and inhabitants, and appellant's property was from 1885 until destroyed by fire, in common with that of others, taxed at its full value to raise money with which to pay said hydrant rents."

In this case it thus appears not only that there was a liability upon a private contract between the two companies to furnish an ample supply of water to extinguish fires, but that in addition the petition alleged that the city, for the benefit of all its property owners and inhabitants, contracted for like immunity from fire. This last liability was alleged as arising upon an express contract for the benefit of property owners and inhabitants, who in such case undoubtedly had a right to sue upon such contract. This case having been considered upon a demurrer to the petition, its averments were conceded to be true, and it was not unreasonable (there having been therein alleged: first, an express contract between plaintiff and defendant, and second, an express contract between the defendant and the city of Paducah on behalf of the plaintiff) that the supply company should be held to make good its agreement for the protection of the plaintiff from fire in accordance with the terms of both contracts. This case, however, furnishes no support to the contention in the case at bar that the provision in the ordinance that Strang or his assignee "shall constantly, day and night, keep all fire hydrants supplied with water for instant service and shall keep the same in good order and efficiency," was a contract for the benefit of plaintiff in this case. It is true that *Atkinson v. Newcastle & Gateshead Water-works Co.*, 6 L. R. Exch. [Eng.], 404*, somewhat countenances the contention of plaintiff. That case was decided mainly upon the authority of *Couch v. Steel*, 3 El. & Bl. [Eng.], 402. Upon appeal, however, the case of *Atkinson v. Newcastle & Gateshead Water-works Co.*, *supra*, was reversed and the correctness of the law as laid down in *Couch v. Steel* was seriously questioned. (See *Atkinson v. Newcastle & Gateshead Water Co.*, *supra*, 46 L. J., Q. B., [Eng.], n. s., 775. Another case relied upon by plaintiff is that of *Rowning v. Goodchild*, 2 W. Bla. Rep. [Eng.], 906, which was a suit brought against a deputy postmaster for unlawfully failing to de-

liver to plaintiff his letters. This was an action *ex delicto*, not *ex contractu*, and it would seem clear that the conceded right of one injured to sue him who caused the injury should not serve as a precedent to sustain the suit of a plaintiff who sues, not because the defendant committed the injury complained of, but because he did not prevent it. To fix liability in the latter case a contract to avert the injury must be shown—in the other case no element of contract is necessary; the law implies a contract to make reparation for his tortious act. The same considerations apply to another case cited by plaintiff (*Mersey Docks v. Gibbs*, 11 H. L. Cases [Eng.], 686), where the action was for the failure of the dock company to keep its docks in proper condition, whereby the ship and cargo of Gibbs were damaged. It is quite a matter of doubt why the case of *Western Saving Fund Society v. City of Philadelphia*, 31 Pa. St., 185, was cited, for the question in that case was simply whether there could be increased the number of trustees from twelve, as provided in the ordinance, to eighteen as proposed, a loan having been made upon the faith of the ordinance as it stood.

The case of *Lacour v. City of New York*, 3 Duer [N. Y.], 406, involved merely the right of plaintiff to recover for damages caused him in the necessary suspension of his business resulting from the manner in which an excavation was made in the streets. The entire opinion in the case of *Bailey v. City of New York*, 7 Hill [N. Y.], 146, is embraced in the following language: "As the verdict in the present case was rendered before the act of 1844 was passed, the charge for interest should have been disallowed. Notwithstanding the peculiar phraseology of the section relied on by the plaintiff's counsel, we think it ought not to be so construed as to give it a retroactive effect." As to the inapplicability of this language to the case at bar, no comment is necessary. The above are all the cases cited to sustain the contention of plaintiff. By the defendant are

cited a number of adjudicated cases, of which we will notice the following in detail:

Davis v. Clinton Water-works Co., 54 Ia., 59, was an action to recover the value of certain buildings destroyed by fire, upon the ground that defendant was bound by contract with the city of Clinton to supply water to be used in extinguishing fires, and failed to perform its obligation in this respect, whereby resulted the destruction of plaintiff's property. Delivering the opinion of the court, Beck, J., said: "The only question presented in the case is this one: Is the defendant liable to plaintiff upon the contract embodied in the ordinance? The petition does not allege or show any privity of contract between plaintiff and defendant. The plaintiff is a stranger, and the mere fact that she may find benefits therefrom by the protection of her property in common with all other persons whose property is similarly situated, does not make her a party to the contract, or create a privity between her and defendant. It is a rule of law, familiar to the profession, that a privity of contract must exist between the parties to an action upon a contract. One whom the law regards as a stranger to the contract cannot maintain an action thereon. The rule is founded upon the plainest reasons. The contracting parties control all interests and are entitled to all rights secured by the contract. If mere strangers may enforce the contract by actions, on the ground of benefits flowing therefrom to them, there would be no certain limit to the number and character of actions which would be brought thereon. Exceptions to this rule exist which must not be regarded as abrogating the rule itself. Thus, if one under a contract received goods or property to which another, not a party to the contract, is entitled, he may maintain an action therefor; so the sole beneficiary of a contract may maintain an action to recover property or money to which he is entitled thereunder. In these cases the law implies a promise on the part of the one holding the money or prop-

erty to account therefor to the beneficiary. Other exceptions to the rule, resting upon similar principles, may exist. (See *Second National Bank of St. Louis v. Grand Lodge*, 98 U. S., 123.) The case before us is not an exception to the rule we have stated. The city, in exercise of its lawful authority to protect the property of the people, may cause water to be supplied for extinguishing fires and for other objects demanded by the wants of the people. In the exercise of this authority, it contracts with defendant to supply the water demanded for these purposes. The plaintiff received benefits from the water thus supplied in common with all the people of the city. These benefits she receives just as she does other benefits from the municipal government, as the benefits enjoyed on account of improved streets, peace and order enforced by police regulations, and the like. It cannot be claimed that the agents or officers of the city employed by the municipal government to supply water, improve the streets, or maintain good order, are liable to a citizen for loss or damages sustained by reason of the failure to perform their duties and obligations in this respect. They are employed by the city and responsible alone to the city. The people must trust to the municipal government to enforce the discharge of duties and obligations by the officers and agents of that government. They cannot hold such officers and agents liable upon the contracts between them and the city."

The case of *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn., 24, was upon a like claim for damages with that above considered, and Park, Ch. J., delivering the opinion of the court, said: "It will be observed that the plaintiffs complain that the defendants did not supply with water the hydrants which had been established by the city and the Bridgeport Water Company under their contract, to enable the city through its fire department to perform a public duty which it owed to the plaintiffs and others, to extinguish their fires. Had the plaintiffs' fire been extin-

guished it would have been done by the fire department; for there is no allegation in the count that the plaintiffs had hose which might have been attached to the hydrants, and the fire extinguished by their own efforts. Hence, whatever benefit the plaintiffs could have derived from the water would have come from the city through its fire department. The most that can be said is that the defendants were under obligation to the city to supply the hydrants with water. The city owed a public duty to the plaintiffs to extinguish their fire. The hydrants were not supplied with water, and so the city was unable to perform its duty. We think it is clear that there was no contract relation between the defendants and the plaintiffs, and consequently no duty which can be the basis of a legal claim."

In *Foster v. Lookout Water Co.*, 3 Lea [Tenn.], 45, the conclusion above announced was arrived at by the court, which, in its opinion, quoted with approval a considerable part of the language of Park, Ch. J., of which we have made use.

In *Becker v. Keokuk Water-works Co.*, 79 Ia., 419, and in *Van Horn v. City of Des Moines*, 19 N. W. Rep. [Ia.], 293, the same doctrine was again recognized and enforced; but as full quotations have already been made from the supreme court of Iowa, it would be like mere repetition to quote at length opinions on the same subject from the same source. The decided weight of authority, as well as the better reason, is in favor of the rule above announced. In the case under consideration the contract embodied in the ordinance (of which the provisions were accepted by A. L. Strang) made no mention of, or reference to, plaintiff or any class of citizens or taxpayers of which he was one. The payment of taxes by him for the water-works company entitled him to no more privileges in reference to the subject-matter for which the taxes were collected than if it had been for any other purpose for which taxes might be

levied. Let us suppose that this tax had been paid for disbursement to a contractor who built sidewalks, or laid down pavements for the city. Could it reasonably be claimed that this fact gave the taxpayer any special ground of recovery against the contractor for injuries received by reason of a failure to complete the works of improvement as agreed? Manifestly in the case supposed there is no privity between the contractor and the taxpayer, no matter how solemnly the contractor had agreed to perform the work in a specified time or manner. In such a case there might be a right of recovery against the city. In the one under consideration there could not, even if it assumed directly to furnish water to the consumer. "The reason is that the hazard of pecuniary loss might prevent the corporation from assuming duties which, although not strictly corporate nor essential to the corporate existence, largely subserve the public interest. The supplying water for the extinguishment of fires is precisely one of those acts which bring no profit to the corporation, but are eminently humanitarian. To hold a city responsible for the loss of a building, or of whole streets of houses, as sometimes happens, because it might be thought, or because in reality some of its indispensable agents had been negligent of their duty, might well frighten our municipal corporations from assuming the startling risk." (*Foster v. Lookout Water Co.*, 3 Lea [Tenn.], 49, *supra.*) The liability of the water-works company in this case could not, therefore, devolve upon it by reason of its assumption of certain functions which might properly be assumed by the municipal corporation, for the municipality itself would not be liable under the circumstances, and its right of exemption extends to its substitute.

The plaintiff has not established any privity of contract between himself and the defendant, and we conclude that no action would lie in favor of plaintiff upon the facts

stated in his petition. The judgment of the district court is therefore

AFFIRMED.

RAGAN, C., concurs.

IRVINE, C., having been of counsel in the above cause, took no part in its consideration or decision.

L. D. WELLINGTON ET AL. V. HATTIE M. MOORE.

FILED SEPTEMBER 20, 1893. No. 4718.

Conversion: DAMAGES: EVIDENCE. Where the action is for the value of property alleged to be wrongfully detained by the defendant, and for damages for such wrongful detention, it is reversible error for the plaintiff, over proper objections, to testify as a conclusion the amount of damages she has sustained independently of the value of such property. RAGAN, C., dissents.

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

O. H. Scott and *S. A. Searle*, for plaintiffs in error.

Manford Savage, contra.

RYAN, C.

On the 6th day of December, 1888, Hattie M. Moore filed her petition in the district court of Thayer county, Nebraska, in which she claimed, as owner, the immediate possession of certain goods and chattels, which she alleged were wrongfully detained by, and in the possession of, the defendants W. J. Green and L. D. Wellington. In due time an answer in general denial was filed by the defendants. The action was finally tried as one for the conver-

sion of the goods and chattels, and a verdict was rendered in favor of the plaintiff for the sum of $383.75. The defendant Wellington, as constable, justified his possession of the property by the production of executions and judgments in favor of judgment creditors of the husband of Mrs. Hattie M. Moore. As is quite common where the relationship shown exists, the contention was, upon the trial, that the alleged ownership of Hattie M. Moore was fraudulently asserted solely to prevent the application of the property in dispute to the payment of her husband's just debts. In the arguments there has been quite an extended discussion of the sufficiency of the testimony to sustain the verdict. It will suffice to say on this head, that if that was the only question in the case, we are not satisfied that the verdict was so far without support as that the judgment upon the verdict should be reversed. Neither do we find that that result should follow upon the several questions of law urged, except as to the one which we shall presently notice.

The action as tried was for the value of the property alleged to have been converted and for damages incidental to such conversion. In her own behalf the plaintiff was sworn and upon her examination was asked the following question:

Q. You may state what your damages were that you sustained by reason of the taking of these goods, outside the value thereof?

To this question objections were duly made and overruled, to which there was a proper exception; whereupon the plaintiff answered:

A. I think the damages were $500, if not more.

It is obvious that this testimony was not as to a fact; it was as to a conclusion, which rested solely with the jury to find from a consideration of all the facts. It was the testimony of a witness as to damages which she believed that she had suffered, without in any way stating the several

items thereof or the grounds upon which she predicated her opinion of the damages testified to by her. The testimony given was clearly incompetent, and no instruction of the court or evidence afterwards given could do away with its effect. This court has already held in a similar case that a question and answer less objectionable than that at bar was incompetent. (See *Burlington & M. R. R. Co. v. Beebe*, 14 Neb., 463.) It follows that the judgment of the district court is

REVERSED.

IRVINE, C., concurs.

RAGAN, C., dissents

D. N. WHEELER v. SWAN OLSON.

FILED SEPTEMBER 20, 1893. No. 5265.

1. **Motion for New Trial:** AFFIDAVITS: BILL OF EXCEPTIONS: REVIEW. Upon the consideration of a motion for a new trial where there were used several affidavits, and the clerk of the court wherein the trial was had having identified said affidavits, and counsel for the respective parties having stipulated that the foregoing (affidavits) contained all the evidence offered on either side on the motion for a new trial, and counsel upon whom was served the proposed bill of exceptions having returned the same without suggestion or amendment, and the said clerk having settled the proposed bill of exceptions as by law provided in such cases, a motion to strike out said affidavits because not shown to have been used on the determination of said motion, or identified in the bill of exceptions, must be overruled.

2. **New Trial:** EXCUSE FOR ABSENCE OF PARTY AND WITNESSES: HEARING AND RULING ON AFFIDAVITS: REVIEW. The ruling of the trial court upon a motion for a new trial, predicated upon the inability of the defeated party to attend the trial with his witnesses because of the impassable condition of the public highways, will not be disturbed when a counter showing

has been made which raises serious doubts as to the existence of the facts upon which the defeated party relies to excuse his non-attendance at the trial.

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

T. M. Franse, for plaintiff in error.

J. C. Crawford, contra.

RYAN, C.

On the 25th day of July, 1890, Swan Olson filed his petition in the office of the clerk of the district court of Cuming county, Nebraska, in which he alleged that under an agreement between the plaintiff and defendant that plaintiff had cared for 400 steers for the defendant at the agreed price of $1.50 per head, and that by reason of said services the defendant was indebted to plaintiff in the sum of $600, with interest from May 1, 1890. On September 13, 1890, as shown by the record, the defendant answered, admitting the making of the contract sued upon, and that thereunder the defendant had delivered to the plaintiff 400 head of steers to be cared for by the terms of said agreement, and admitted that on the 5th day of May, 1890, the plaintiff took 374 of the said cattle to the place of delivery agreed upon in said agreement. For a cause of action in favor of defendant against the plaintiff, the defendant alleged that the plaintiff agreed to keep, feed, and care for the cattle during the time agreed upon, and that the plaintiff would be responsible for all cattle lost through his negligence; that on the 27th day of March, 1890, while said cattle were under the care of plaintiff, he, in plain violation of his agreement, carelessly and negligently allowed a large number of said cattle to be driven by a storm into the Logan river near plaintiff's premises, by reason of which negligence twenty-six of said steers were drowned,

and eighteen so injured, by being left in the water a long time, that they are of little value; that the value of the twenty-six steers drowned was $910, and the said eighteen steers were injured to the amount of $90; wherefore defendant asked for judgment that $640 of the sum claimed by plaintiff be set off against the claim of plaintiff, and that defendant have judgment for the sum of $360 and costs. On the 4th day of December, 1890, the plaintiff filed a reply denying each and every allegation of new matter set forth in the answer. On the 15th day of December, 1890, the defendant moved for a continuance on the ground of the absence of material testimony, and sickness and other causes set out in his affidavit, which motion was sustained and the cause continued.

The questions discussed in argument involve simply the propriety of overruling an application made for a continuance at the February term of the district court of Cuming county, by the defendant, and the overruling of defendant's motion for a new trial.

In respect to the application for a continuance, plaintiff in error concedes, in effect, that technically it was insufficient, a concession which we think is fully justified by an examination of the record.

Accompanying the motion for a new trial were several affidavits, probably those which we find in the record. With the submission of this cause for final determination the defendant submitted his motion for an order to strike from the files and suppress the affidavits attached to, and in support of, the motion for a new trial, for the reason that it does not appear that either of said affidavits were read in support of said motion or offered in evidence at the hearing on said motion, nor were said affidavits preserved in the bill of exceptions as required by law. Immediately following the motion for a new trial the record discloses several affidavits apparently attached to said motion; after which follows the journal entry as to the ruling upon the

motion for a new trial filed by the defendant, the exceptions of the defendant thereto, and the giving of forty days from the rising of the court to prepare his bill of exceptions. This is followed by a copy of the judgment in favor of the defendant for the amount of the verdict, $655.54, and costs, $60.88. There is then set out a copy of the supersedeas bond *in extenso*, with a copy of the approval of the clerk thereon. Subsequent to all these is the certificate of the clerk of said district court that the "foregoing is a true transcript of the petition, answer, reply, journal entry, and the original affidavits used in said case, and supersedeas bond, as the same are of record and on file in his office." This is accompanied by a stipulation of the parties that the foregoing is all of the evidence offered on either side on the motion for a new trial in this cause, and that this court may settle and sign the bill of exceptions. Not only so, but indorsed upon the purported bill of exceptions is a receipt signed by the attorney for plaintiff in the action in the district court, in which he states that the proposed bill of exceptions is returned without any suggestions or corrections. The history of this bill of exceptions is concluded with a certificate of the clerk that by virtue of authority in him vested he allows and signs the bill of exceptions and orders the same to be made a matter of record, etc., as though settled by the district judge.

From this showing it is satisfactorily apparent, first, that the so-called bill of exceptions contained all the testimony used on the hearing of the motion for a new trial; and, second, that the affidavits were used in evidence on said hearing. It therefore sufficiently appears that there is presented the motion for a new trial upon the same evidence as was considered by the district judge in his ruling upon said motion. It is possible that a very technical construction might find wanting some technical requirement of a bill of exceptions. No such omission has been pointed out, however, in the elaborate brief of the defendant in er-

ror, and if such omission exists it has escaped a careful examination of the record submitted in connection with the motion for a new trial. It is but fair under such circumstances to accept as binding the stipulation of the parties that the motion for a new trial is accompanied by all the evidence used upon the hearing and determination of said motion, and not by a hypercritical analysis to seek to deprive the parties of any rights that are fairly before us for consideration.

The motion for a new trial was mainly based upon alleged impossibilities of defendant's attendance upon the trial of the cause in the district court. Without incumbering the record with the details of dates, it is sufficient to state generally that the case was not reached for trial until after the date fixed for the trial in the calendar prepared by the clerk; that, as often happens, it came on for trial unexpectedly, because of the continuance of a case preceding it, as to which it was expected that a week or more would be consumed in its trial. It is asserted in the affidavits that by reason of a deep snow, which it is claimed obstructed the highway, the defendant was unable to attend in person or to procure the attendance of necessary witnesses, and that by reason of the sickness of one of the defendant's attorneys the defendant had not been able properly to present his defense. The fact, however, remains conceded, that T. M. Franse had been employed at a sufficiently early date to have been prepared as an attorney to present the case of his client, had the defendant, upon his first knowledge of his employment, gone to him and laid before him the facts which it would be necessary for him to know in order to intelligently prepare and present his defense. The affidavits show that for a long time, indeed from the December term of court, the defendant had been aware of the sickness of one of his attorneys, and that for some time previous to the trial of this case he had known that one of his attorneys whom he first employed to pre-

sent his defense had associated in the defense T. M. Franse, an attorney resident at the town where the trial was to take place. It is but fair to Mr. Franse to state, in this connection, that he did everything that lay in the power of any attorney, under the circumstances which he found surrounding him, to notify his associates and the defendant in time to be prepared for the trial. It is unfortunate that circumstances often require that witnesses should be kept in attendance sometimes for days on account of the uncertainty as to the time which will be occupied in the trial of a case standing for trial prior to that of the case in which the witnesses are in attendance; and yet, if the court is not to be interrupted in the continuity of its session, no other course can be safely adopted. We cannot but sympathize with Mr. Franse's annoying situation when he found that unexpectedly a case, upon which he had counted as consuming several days, had been continued by reason of the sickness of one of the litigants, for this is a common experience with every practitioner. It would, however, be too much extending the aid of the court of review to hold that such a condition of affairs entitled a too trusting party to a continuance of his case because, from necessity, another case had been continued by the trial court.

As to the inability of the defendant to travel and procure the attendance of necessary witnesses by reason of the obstructed condition of the roads, it is proper to observe that by the counter-affidavits of plaintiff and several other parties, it is shown that the roads were not impassable, and that the plaintiff, after it was known that the case preceding, upon the long existence of the trial of which they had relied, had been continued, had personally notified his witnesses and had them present in time for the trial when this case was called. Not only so, but the plaintiff and perhaps some of his witnesses are shown to have traveled as far as forty-eight miles on the day preceding that upon which this trial was had. Of necessity the presiding judge

in the district court must have had knowledge of circumstances which it is impossible to bring to the attention of this court. At any rate he is vested with a certain discretion as to granting a motion for a new trial based upon such grounds as are here presented, and in consideration of the affidavits and the facts therein stated, limited as we are by the presumption which necessarily attaches in favor of the judgment of the district court as to questions of fact, we cannot say that the court improperly overruled the motion for a new trial. It follows, therefore, that the judgment of the district court must be, and is

AFFIRMED.

THE other commissioners concur.

MRS. JOHN L. HODGMAN V. SAMUEL G. THOMAS.

FILED SEPTEMBER 20, 1893. No. 4795.

1. **Review:** EVIDENCE: A VERDICT will not be set aside as unsupported by the evidence if there is competent evidence to support it.
2. **An Instruction** requested by a party need not be given if the essential principle therein stated is otherwise fairly enunciated to the jury by the court.

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

S. L. Geisthardt, for plaintiff in error.

B. F. Johnson, Paul F. Clark, and *T. C. Munger, contra.*

RYAN, C.

This action was tried in the district court of Lancaster county, Nebraska, and a verdict returned and judgment

rendered in favor of the defendant in error and against the plaintiff in error for the sum of $50, as a commission earned in the exchange of certain real estate owned by the plaintiff in error. On behalf of the plaintiff in the trial of said action there was sufficient evidence, if uncontradicted, to sustain a recovery. On some points this evidence is quite successfully contradicted by what ordinarily might be considered a fair preponderance. The ultimate questions of fact, however, deducible from a consideration of all the testimony, was submitted to the jury, by whom a verdict was rendered in favor of the defendant in error. This verdict is not without such support as precludes us from reviewing the testimony to determine whether by it the verdict was sustained. The only question of law which arises is upon the instruction No. 3 asked by the plaintiff in error and refused. This instruction is in the following language: "The jury is instructed that where an agent brings persons together for the purpose of arranging a sale or trade of property, and negotiations are abandoned by the parties in good faith, and the agent makes no further effort to bring about a trade or sale between them, he is not entitled to commission even though by reason of something subsequently occurring negotiations are afterwards begun anew between the principals and result in a sale or trade affecting the same property."

The court upon its own motion gave instruction No. 3: "The burden of proof is upon the plaintiff to establish all material allegations of his petition, which in this case are: that he procured for the defendant a purchaser for his real estate situate in Carbondale, Illinois, who was able and willing, and who purchased the same."

Instruction No. 4, given by the court, is as follows: "If you believe from the evidence that plaintiff rendered services as alleged in his petition, and the defendant was enabled thereby to dispose of her property, the plaintiff would, if you so find, be entitled to recover for his services so ren-

dered; and if you find for the plaintiff you will assess the amount of his recovery at such a sum as you believe from the evidence he is fairly entitled to receive, not exceeding, however, the sum of $100 as claimed in his petition."

Upon the defendant's request the following instructions were also given:

"1. The jury is instructed that to entitle a real estate agent to recover commission for the sale or exchange of property, he must procure a buyer ready, able, and willing to take the property upon the terms fixed by the seller.

"2. The jury is instructed that when a person makes a sale or exchange of property listed with a real estate agent, the agent must show that he was the procuring cause of the sale in order to recover the commission; in other words, it must be shown that he rendered actual services resulting in a sale or trade as a consequence thereof.

"5. If you find from the evidence that the defendant made the sale of his Carbondale property without the assistance of the plaintiff, and that plaintiff did not, in fact, furnish a purchaser for the defendant's property, the verdict will be in favor of the defendant."

These instructions given, we think, fairly submitted to the jury as essential the question whether or not the services of the plaintiff were the inducing cause of the trade effected between the parties to the real estate transaction. The court having once fairly stated the law upon this head, could not properly be required to reiterate that statement of the law, at the request of the defendant, even though such statement was correct. It is true the defendant requested another instruction, which was, that plaintiff was not entitled to recover upon the evidence introduced. It was perhaps unnecessary to have mentioned this, as the language employed in the beginning of this opinion sufficiently meets this contention or statement of the result of the evidence. There was no exception taken to the giving of any instruction, and hence the consideration already

given the instructions sufficiently covers all the points that can properly be reviewed in this court. It follows that the judgment of the district court is

AFFIRMED.

THE other commissioners concur.

STATE OF NEBRASKA, EX REL. JAMES B. FILBERT, V. EMMA SCHROEDER ET AL.

FILED SEPTEMBER 20, 1893. No. 6268.

Parent and Child: CUSTODY OF INFANTS. When the infant daughters of the relator (their father) are in the custody of the step-mother of the deceased mother of such infants, which step-mother and her husband have demonstrated that they are able, willing, and intend to, and have so far provided for the said infants in all respects as they should for their own grandchildren, and it clearly appears that it is for the best interest of said infants that they remain where they now are, such infants will not be delivered to the custody of their father, who has no place, means, or assistance suitably to providing for them.

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

A. N. Sullivan, for plaintiff in error.

Byron Clark and *B. S. Ramsey, contra.*

RYAN, C.

The relator began this action in the district court of Cass county, Nebraska, for the possession of his two children, Florence A. Filbert, aged seven years, and Angela G. Filbert, aged four years, of whom it was alleged their step-grandmother had unlawful possession. The petition fur-

ther stated that the relator was able and willing to maintain and care for said children; notwithstanding which facts, the step-grandmother of said children, Emma Schroeder, and her husband, Fred Schroeder, refused to allow the relator to take charge of said children, or even to visit them.

The answer admitted the relationship between the parties averred in the petition, as well as the description of the children, and the alleged refusal to allow the relator to visit them. There was a denial of every other allegation of the petition. The answer alleged that said Emma Schroeder was the step-mother of the mother of said infant children; that said Emma Schroeder was married to the father of the mother of said minors a great number of years before the death of Dorothea C. Filbert, the mother of said minors, and that said Emma Schroeder had raised said Dorothea, and had always since her early childhood sustained towards her the relation of a mother until said Dorothea married the relator. The answer, in effect, further alleged that at the time of the marriage of said Dorothea to the relator, the said relator was possessed of nothing but an inordinate ambition to secure control of, and appropriate to his own use, the patrimony of said Dorothea, of a considerable alleged value; that he had obtained possession and squandered a large part of the inheritance of said Dorothea; had deprived her of the control of the above named infants and secreted them, thereafter informing the said Dorothea that unless she gave the relator possession and control of her individual property she should never see said children again, by which means the relator obtained possession and control of other property of the said Dorothea. Upon information the answer further charged that the relator afterwards abandoned his wife and children for a long time immediately preceding the death of said Dorothea, which event, the answer admits, occurred on July 17, 1891, as stated in the petition. The answer further stated that Emma Schroeder and Fred Schroeder, her husband,

had no children; that their family consisted of said minor children and themselves, and that the relator was not permitted to see said children for the reason that the elder stood in great fear of her father. Further, the answer alleged that Emma Schroeder had been appointed guardian of said children by appropriate proceedings in the county court of Cass county, Nebraska, and had duly qualified as such.

By an amendment to the answer it was alleged that at the time of the decease of Dorothea C. Filbert she entrusted the care, custody, and control of her children, the above mentioned infants, to Mrs. Emma Dewey, a married sister of Dorothea, who, by reason of ill health and the necessity of caring for her own family, was unable to give to said minor children the care and attention which she believed they should receive, and, therefore, entrusted them to the respondents, Emma Schroeder and Fred Schroeder. This amendment further charged that the relator, by reason of being a single man without a home or means of support, and on account of his general habits, was not a fit person to have the care and nurture of his daughters; that the interest of the children demanded that the respondents have the care and custody of them. In closing this amendment, the respondents alleged that they were ready to adopt said children with full property rights of inheritance.

Upon the trial the following findings were made, omitting the formal introductory parts:

"First—That the relator, James B. Filbert, is a man of exemplary character and a fit person to have the custody of his infant children.

"Second—That at the time of the pretended appointment of the respondent, Emma Schroeder, as guardian of said infants, the said infants had neither domicile nor property of any kind in Cass county, and that said appointment is no defense to the relator's action for the possession and custody of said infants, his children.

"Third—The court further finds that the relator has failed to show to the satisfaction of the court that he has at present a suitable home for said infant children.

"Fourth—That the respondents have a suitable home for said children, and that it is for the best interests of said children that they be left with said respondents for the present, until the relator can at any time satisfy the court that he has a suitable home.

"Fifth—The court further finds that the relator has a right to visit his children at all suitable times, and orders and directs that respondents permit him so to do; that unless this order is complied with, relator may make a further showing of the fact to the court, when a further order may be entered in this cause.

"It is therefore considered by the court that the relator's petition be refused."

A motion for a new trial having been overruled, the alleged errors are presented for review in this court. In some slight respects there might be room for disagreement with the conclusions of the district court. As to such propositions as are essential to a determination of this proceeding, there is, however, no room for argument—the evidence fully sustains them. It is found that James B. Filbert has failed to show that he has at present a suitable home for his infant children, and that, on the other hand, the respondents have such a home, and that it is for their best interests that they be left with the respondents until their father can satisfy the court that he has suitably provided for them. It is unnecessary to review the proofs, as they fully sustain these conclusions, and we shall, therefore, confine our attention to the legal results which should follow upon these findings.

In the case of *Sturtevant v. State, ex rel. Havens*, 15 Neb., 462, REESE, J., delivering the opinion of this court, said: "Were the question of the *right* of the father the only question to be considered, we should perhaps coincide

with the conclusions of law as stated by the district court. It is true this legal right was at one time, in the early history of our jurisprudence, fully recognized both by the courts of England and of this country; and it is in part made the law of this state by section 6, chapter 34, of the Compiled Statutes, which provides that 'the father of the minor, if living, and in case of his decease, the mother while she remains unmarried, being themselves respectively competent to transact their own business, and not otherwise unsuitable, shall be entitled to the custody of the person of the minor, and to care for his education.' Were this section alone to determine the rights of the parties, and were the rule here laid down an inflexible one, it would not only decide this case in favor of the defendant in error, but in a proper case it would deprive the mother of the control or education of her children upon the decease of the father and her remarriage, without any reference to the best interests of the children, and in that case it might be conceded that she was in every other respect worthy and qualified, that she had ample means and was greatly attached to her children, and her remarriage might place them in a better condition, morally, socially and financially, and yet this section of the statute, if strictly followed by the courts, would override every consideration of the welfare of her children, take them from her, and place them in the hands of strangers. Such could not have been the intention of the legislature which passed this section of the law. It is true that this section is declarative of the law in its general sense, but we cannot agree with the defendant's counsel and decide the cause upon the rule there laid down, unaided by recent judicial decisions or the circumstances of the case. But rather taking our statute as a general guide, we will look to the particular necessities of the case and give our special attention to the best interests of the child about whom this unfortunate controversy has arisen."

After the citation of several authorities in support of

the general proposition laid down, Judge REESE, on page 464, employed the following language: "From a careful examination of the authorities at our command, we think the prevailing rule in this country may be briefly stated to be, that in controversies similar to this, especially where the infant is of the tender age of the one contended for, the court will consider only the best interest of the child, and make such order for its custody as will be for its welfare, without any reference to the wishes of the parties."

Further on he continued thus: "It is no doubt true that the defendant in error is greatly attached to this child, and that the facts as found by the court show that he is in every respect a suitable person to have its care and custody, but when we consider his age and want of experience, we are driven to the conclusion that *personally* he could not care for the wants of a child so young and helpless. True, he has means and has employed a suitable nurse, yet, so far as we are informed, this nurse is a stranger to the child, and of course does not feel that personal interest in its welfare as would be felt by a near relative."

In *Giles v. Giles*, 30 Neb., 624, the rule laid down in *Sturtevant v. State, ex rel. Havens*, was considered and approved, and without doubt is now the settled law of this state. After the quotations above made, it is unnecessary to amplify upon the facts as found by the court. The conclusion which must result from these findings, under the decisions above cited, is unavoidable. The judgment of the district court is therefore, in all things,

AFFIRMED.

THE other commissioners concur.

HANNAH A. NELSON, APPELLANT, V. C. A. ATKINSON ET AL., APPELLEES.

FILED SEPTEMBER 20, 1893. No. 5102.

Deeds as Mortgages. Where a conveyance of property is shown by the contemporaneous written contract of the parties thereto, to have been intended solely as security for the payment of money, or as indemnity against liability, such conveyance as between said parties must be treated as, and in fact is, a mere mortgage.

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

Richard Cunningham, for appellant:

Where the evidence shows that an absolute deed is given and intended as security, it should be considered a mortgage, and the right of redemption cannot be limited in time or to a particular person. (*Wright v. Mahaffe*, 40 N. W. Rep. [Ia.], 112; *Scudder v. Trenton Delaware Falls Co.*, 23 Am. Dec. [N. J.], 772; *Wilson v. Giddings*, 28 O. St., 554; *Scott v. Mewhirter*, 49 Ia., 487; *Trucks v. Lindsey*, 18 Id., 504; *McHugh v. Smiley*, 17 Neb., 622; *Lipp v. South Omaha Land Syndicate*, 24 Id., 692.)

Atkinson & Doty, contra.

RYAN, C.

Most of the necessary facts for a determination of this controversy will sufficiently appear by the article of agreement made November 12, 1888, which is as follows:

"Article of agreement, made this 12th day of November, 1888, by and between C. A. Atkinson and J. L. Doty, parties of the first part, and H. A. Nelson, party of the second part, witnesseth: Whereas said party of the second part has employed said first parties as her attorneys to

bring, conduct, and prosecute on her behalf an action against Jasper L. Nelson and W. B. Howard; and whereas it is necessary in said action for said party of the second part to give a bond, and said first parties have agreed to go on said bond or secure some one to go on said bond; and whereas, in order to secure and indemnify said first parties against loss or damage by reason of the giving of said bond, and to secure to said first parties the payment of their fees in and about the bringing, conducting, and prosecuting of said action, the said H. A. Nelson has this day conveyed by warranty deed to said first parties the following described real estate, situated in Lancaster county, Nebraska, to-wit: Lot number one (1) and two (2), in block ten (10), in Yolande Place addition to the city of Lincoln:

"Now, therefore, the said H. A. Nelson hereby agrees to pay to said first parties their fees in said action, and also to pay all costs and damages that may be adjudged against her in said action, and to hold said first parties harmless from any and all damages by reason of the giving of said bond; and the said first parties hereby agree to and with the said second party that in case said second party shall, within one year from the date hereof, pay to the said first parties their fees in and about said action, and shall fully and completely release and have said first parties discharged from all liability on said bond within one year from the date hereof, then and in that case the said first parties hereby agree to convey to said second party the premises above described. In case said second party shall fail to pay said first parties and release and discharge them from all liability by reason of said bond within one year as aforesaid, then the said premises shall be and become the absolute property of said first parties, and they shall be released from all obligations to convey said premises to said H. A. Nelson."

This agreement was duly signed by the parties therein named as parties of the first and second part respectively.

The appellant, as plaintiff, filed in the district court of Lancaster county her amended petition, in which she prayed that an accounting might be had and a settlement between herself and the defendants, and that if anything should be found due from herself to the defendants, the amount thereof should be fixed by the court, and that she be allowed to pay the same, and that the above contract be adjudged to be a mortgage; and that on the payment of the amount which might be adjudged to be due to the defendants from said plaintiff, the said instrument be adjudged to be paid and satisfied and discharged of record, or that said property be reconveyed to said plaintiff, or that said decree of conveyance be decreed by the court, and for general equitable relief.

The contention of the appellees, that the instrument above set out was not a mortgage or mere security, was sustained by the district court, and plaintiff's petition was dismissed, in so far as a foreclosure was prayed. In the brief of appellees they state that the only question involved in this case to be determined by this court is this: "Was this contract, as appeared in the record, a conditional sale or a mortgage? If the conveyance merely secured a debt, it is a mortgage; if it extinguishes the debt, it is a sale, notwithstanding the reservation of the right to redeem." The agreement just quoted falls clearly within the first class referred to in the above definition. The indebtedness was not ascertained at the time the agreement was made. Indeed, for the most part, it was not yet in existence, and was never fixed until by stipulation between the parties, after the commencement of this action. The provisions of the contract were such that H. A. Nelson obligated herself to pay the fees of the first parties, pay all costs and damages adjudged against her, and to hold harmless the first parties from any and all damages by reason of the giving of the bond, and by the said agreement the appellees were bound, upon payment of their fees and upon being fully released

and discharged from all liability on the bond within a year from the date of the agreement, to reconvey to said second party the premises described. In case Mrs. Nelson failed to pay said appellees and release and discharge them from all liability by reason of said bond within the time fixed, the premises were to become the absolute property of the appellees, and thereby they were released from all obligations to reconvey the premises to Mrs. Nelson. No argument or amplification could make it more clear than a simple consideration of the above stipulation, that there was no element of a conditional sale in this contract. While not in the exact language or form of the ordinary mortgage, the provisions, in effect, are just such as we generally find to be in such an instrument. It follows that the judgment of the district court holding otherwise was wrong, and it is therefore

REVERSED.

THE other commissioners concur.

STATE OF NEBRASKA, EX REL. JAMES SINGLETON, V. FRANK J. SADILEK, COUNTY TREASURER.

FILED SEPTEMBER 20, 1893. No. 4664.

Mandamus: PROCEDURE IN SUPREME COURT. Where an application for a *mandamus* is submitted for final determination upon the petition and a general demurrer thereto, no briefs being filed, and the petition appearing upon original examination to sufficiently state a cause of action, a peremptory writ may be awarded as prayed.

ORIGINAL application for *mandamus*.

Abbott & Abbott, for relator.

W. G. Hastings, contra.

RYAN, C.

On the 28th day of February, 1891, a petition for *mandamus* was filed in this proceeding against Frank J. Sadilek, treasurer of Saline county. The relator alleges in this petition that he is a resident and freeholder of Crete precinct, in said county and state, and in connection with his averments as to the voting of precinct bonds in Crete precinct to aid in the construction of the Missouri Pacific railroad he alleged that the bonds had been duly earned by the said railway company, and that said company had paid said taxes duly assessed on its line of road in said precinct, and having alleged such facts further as entitled the taxpayers of said precinct to have set apart and appropriated the taxes paid by said railroad company in said precinct for the payment of the amounts due on said bonds, the relator prayed that the defendant, whom he alleged refused so to do, should be compelled to segregate the said taxes for the use aforesaid.

On the 3d day of March, 1891, a general demurrer was filed to the aforesaid petition. As we have been favored with a brief on neither of these pleadings, we are, perhaps, somewhat in the dark as to what question was intended to be presented by the demurrer. As the matter is of public interest, however, the petition and demurrer have been carefully considered, and the conclusion reached is that the petition states a cause of action. As the case was submitted for final determination upon the petition and demurrer, a peremptory writ will issue as prayed.

WRIT ALLOWED.

THE other commissioners concur.

TOWNSHIP OF MIDLAND, APPELLEE, V. COUNTY BOARD OF GAGE COUNTY ET AL., APPELLANTS.

FILED SEPTEMBER 20, 1893. No. 3452.

1. **Railroad Companies:** CONSTRUCTION OF ROAD: TOWNSHIP BONDS: VARIANCE BETWEEN PETITION FOR ELECTION AND PROPOSITION VOTED UPON. Fifty freeholders of Midland township, in Gage county, petitioned the board of supervisors to call an election in said township and submit to the electors thereof a proposition to vote bonds to aid a certain railroad company to construct its railroad into and through said county of Gage. The supervisors called an election and submitted to the electors of said township the proposition to vote bonds to aid said railroad company in the construction of its road into and through said township. *Held*, As no part of the railroad was built in the township, the railroad company was not entitled to the bonds voted.

2. ———: ———: ———: ———: TRANSFER OF RIGHTS OF DONEE: INJUNCTION. The electors of Midland township, in Gage county, by a vote, authorized the supervisors of said county to issue and deliver the bonds of said township to a railroad company designated, upon the construction by it of a certain railroad. The railroad company named as donee failed to build the road, sold out its property and franchises, and its vendee built the improvement and claimed the bonds. *Held*, That the electors of the township are entitled to stand upon the very letter of their promise; that the supervisors of the county were special agents of the electors of the township with limited powers, and would be enjoined at the suit of the township from delivering the bonds to the vendee of the company named as donee in the election proceedings.

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

Hazlett & Bates and *Brown & Craig*, for appellants:

The mistake made by the board of supervisors in substituting the word "township" in the call and notice of election for the words "county of Gage" contained in the

petition of the freeholders, was an immaterial clerical error, which could have had no effect upon the result of the election, and could not, consequently, effect its validity. Ch. 45, sec. 14, Comp. Stats., gave the township the right to aid any railroad in constructing its line into the city of Beatrice, Gage county, even though it should not enter the township. (*State v. Babcock*, 23 Neb., 179; *Quincy, M. & P. R. Co. v. Morris*, 84 Ill., 410; *St. Joseph & D. C. R. Co. v. Buchanan County Court*, 39 Mo., 485; *Walker v. Cincinnati*, 21 O. St., 14; *Council Bluffs & St. J. R. Co. v. Otoe County*, 16 Wall. [U. S.], 667; *Bell v. Mobile & O. R. Co.*, 4 Id., 598.) If any taxpayer was deceived he must not only show it, but must act promptly in protesting, and not wait until the work is completed and thus secure all the benefits while escaping his obligation to pay. (*Brown v. Merrick County*, 18 Neb., 355, and cases cited.) The sale and transfer by the Nebraska company of its railroad, constructed and to be constructed, and the appurtenant franchise, to the Kansas company, had no effect upon the contract for the issue of the bonds. (Morawetz, Corporations [2d ed.], secs. 1004, 1010; *Livingston County v. Portsmouth Bank*, 128 U. S., 102; *New Buffalo v. Iron Co.*, 105 Id., 73; *Harter v. Kernochan*, 103 Id., 562; *Bates County v. Winters*, 112 Id., 325; *Menasha v. Hazard*, 102 Id., 81; *Scotland County v. Thomas*, 94 Id., 682; *Town of East Lincoln v. Davenport*, Id., 801; *Wilson v. Salamanca*, 99 Id., 499; *Henry County v. Nicolay*, 95 Id., 619; *Empire v. Darlington*, 101 Id., 87; *Nugent v. Supervisors, Putnam County, Ill.*, 19 Wall. [U. S.], 241.)

Griggs, Rinaker & Bibb, contra.

RAGAN, C.

This is an action in equity brought by the township of Midland, in the county of Gage, to restrain the board of supervisors and county clerk of said Gage county from

issuing and delivering certain bonds of said township to the Chicago, Kansas & Nebraska Railroad Company, or to any corporation or person. The district court, on the hearing of the case, made the injunction perpetual. The board of supervisors and county clerk, and the Chicago, Kansas & Nebraska Railway Company, who had been made a party defendant on its own motion, and filed an answer in the case, appealed from the decree of the district court.

The Chicago, Kansas & Nebraska Railroad Company will be hereinafter designated the "railroad company," and the Chicago, Kansas & Nebraska Railway Company will be hereinafter designated as the "railway company."

We have reached the conclusion that the decree of the district court should be affirmed for the following reasons:

1. The petition presented to the board of supervisors by the fifty freeholders of Midland township prayed the board to call an election in said township and submit to the electors thereof the question whether there should be issued to the railroad company $4,000 of bonds of the township to aid the railroad company in constructing its railroad into and through said county of Gage. The proposition, as actually submitted by the supervisors to the electors of the township, and voted upon by them, was whether the township would authorize the board of supervisors to issue the bonds of said township to aid the railroad company in constructing its railroad into and through said township. Here was a variance between what was asked for by the petition and what was submitted and voted upon by the electors of the township. The appellants say that this variance was a mistake or accident on the part of the supervisors, and that the township electors understood at all times that the road was not to be built through the township. We do not know how this may be. There is no such evidence in the record and we have no right to indulge in such a presumption. We only know that the electors voted to issue bonds to aid in the construction of

the railroad into and through their township; and the deduction logically follows that if the road was not built there, the electors of the township did not agree or consent or promise the donation of the bonds.

The statute regulating the voting of bonds by townships, counties, cities, etc., to aid in the construction of works of internal improvement, should be strictly construed in favor of the electors. A donee claiming bonds by virtue of an election and vote of the people, must show a literal compliance with the law and the terms and conditions of the proposition submitted to and voted on by the electors. The courts will indulge in no presumptions or constructions in order to enable the claimant of such donation to sustain the same. He must make out for himself, through the law and record, an unambiguous right to the donation he claims. The freeholders who signed the petition praying the board of supervisors to call an election and submit to the township electors the proposition to aid in constructing the railroad through the county may have been willing that a tax should be levied on the property of the township for that purpose, and it is a fair inference that they at least understood the railroad would not touch their township. But this township, for aught we know, may have had five hundred or five thousand electors, two-thirds of whom, if voting, must agree to the donation to make it valid. So far as we are advised by the record, two-thirds of them did agree to aid in the construction of the improvement, but with the condition that it should be built through their township. It may be that these electors read the notices of the election published in the newspapers and posted up in the township. The presumption is that they did so. The statement in these notices that the road was to be built through their township may have controlled their votes, gained their consent or the consent of a sufficient number of them to decide the election in favor of the donation. The fact that the building of the road in their township

would add to the taxable property therein, may have influenced the vote. It is idle to indulge in any conjectures. The question is: Did the electors of this township vote to donate bonds to aid in the construction of this railroad anywhere in Gage county outside of that township? The answer must be "no."

2. The petition presented to the board of supervisors by the freeholders of the township, prayed the calling therein of an election and the submission to the electors of a proposition to aid the railroad company. The proposition submitted to the electors was to aid the railroad company. The electors voted to aid the railroad company and authorized the board of supervisors, on the completion of the improvement by the railroad company, to issue the bonds of the township and deliver them to the railroad company. Yet this railroad company did not complete the improvement. It sold out its property and franchises, and its vendee built the improvement and now claims the bonds. This will not do. If one vendee can claim this aid successfully, any vendee of the railroad company can.

The record discloses that the Union Pacific Railroad Company and the Burlington Railroad Company both have lines of road traversing the country in the vicinity of this township. Suppose the railroad company had sold out to the Burlington or Union Pacific, and the purchasing road had built the improvement. The electors might have been, and perhaps were, influenced and induced to vote this aid with a view to obtaining a competing line of railroad through that country. The electors of the township are entitled to stand on the very letter of their promise. If they promised a donation to A if he would build a certain improvement, it does not follow that B is entitled to the donation, though he builds the improvement; in other words, the township electors designated the donee and only the one designated can take the donation. The electors did not authorize the supervisors to deliver the bonds voted

to the railroad company or its vendee, and had they, it would have been ineffectual and the bonds invalid. (*Jones v. Hurlburt*, 13 Neb., 125; *Spurck v. Lincoln & N. W. R. Co.*, 14 Id., 293; *State v. Roggen*, 22 Id., 118.) The most that can be said for the appellees is that the electors of this township authorized their agents, the board of supervisors, and the county clerk of Gage county, to issue the bonds of said Midland township and deliver them to the railroad company when it had built a certain improvement. The railroad company never complied with the condition coupled with the authority given by the township electors to its agents. The vendee of the railroad has complied with the condition to build the improvement and it now claims these agents should deliver the bonds to it. Authority from a principal to an agent to do a specific act is limited to that act. (*State v. Commissioners of Nemaha County*, 10 Kan., 577.)

In the case last cited the facts were: In 1866 there were two railway companies existing, the one known as the St. Joseph & Denver City Railroad Company, and the other as the Northern Kansas Railroad Company. Each was organized to construct a railroad from Elwood to Marysville, in the state of Kansas, and authorized to receive subscriptions to their capital stock from the county of Nemaha in said state. The county commissioners of Nemaha county, Kansas, submitted to the voters of said county the question of subscribing to the capital stock of the Northern Kansas Railroad Company in the amount of $125,000, and issuing the bonds of the county in payment therefor. The election was duly held and the commissioners of the county were authorized to subscribe for the stock and issue bonds of the county. In October, 1866, the two railroad companies above named, under and by virtue of the laws of Kansas, were consolidated into a single corporation under and by the name of the St. Joseph & Denver City Railroad Company. This company com-

pleted the road according to the proposition submitted to the electors of Nemaha county, and thereupon the commissioners of that county made a subscription to the capital stock of the St. Joseph & Denver City Railroad Company; this company then tendered the supervisors $125,000 of the capital stock of the company and demanded the bonds voted. The commissioners refused to issue the bonds and an application was made to the supreme court for a writ of *mandamus* to compel the commissioners to issue the bonds to the relator, the St. Joseph & Denver City Railroad Company. The opinion of the court was delivered by Justice Brewer. Among other things he said:

"The county commissioners are the agents of the county, but agents with limited and defined powers. They cannot by virtue, merely, of their office, bind the county to a subscription to the capital stock of a railroad corporation any more than could the sheriff, county clerk, or any other county official. A power so vast * * * is wisely entrusted to no official or agent. The people must give their agents the authority to subscribe or they are not bound. We must look, therefore, beyond the mere fact of the subscription, to see what authority the commissioners had to make the subscription. The vote * * * is the alleged authority. Was it authority? The subscription is not within the express terms of the authority. That vote empowered the commissioners to subscribe to the stock of the Northern Kansas Railroad Company. The subscription was to the St. Joseph & Denver City Railroad Company. Upon authority to make the county a stockholder in one corporation, they attempted to make it a stockholder in another. *Prima facie* then, their act was *ultra vires*. * *

"But it is said that the Northern Kansas Railroad Company was, in pursuance of the law, * * * merged in the St. Joseph & Denver City Railroad Company, and that the latter succeeded to all the powers, rights, and franchises * * * of the former. This is all true; but it

does not avail the plaintiff anything. The mere vote of the people, giving the commissioners authority to subscribe, created no contract between the county and the company; gave the latter, as against the former, no rights and imposed no duties. The company had nothing which it could transfer; nothing which its successor could take. The Northern Kansas Railroad Company could not, by virtue of the vote, compel the commissioners to subscribe; neither could the county compel the company to build its road in compliance with the conditions of the vote. Neither had, as against the other, any rights, whether of action or otherwise. * * * Again, it is urged that the law authorizing the consolidation of railroads was in force at the time of the vote, and that, therefore, the vote was based upon that law and authorized the commissioners to subscribe to the stock of the Northern Kansas Railroad Company, or to that of any other company into which it might be consolidated. We do not so understand the law of agency. * * Nor is the authority enlarged because the party with whom the agent is empowered to contract is by law at liberty to change his conditions and relations. A principal empowers an agent to invest his money in a certain named partnership with specific amount of capital. Now, any partnership may, with the consent of its members, change its name, admit new members, and increase its capital. When all this has been done, will any one contend that the agent may, by virtue of the original authority, invest his principal's money in such new partnership? Yet the cases are parallel. Each is a case of principal and agent. In each the authority is specific and definite. Each party with whom the contract is to be made has by law, in force at the time the authority is given, the power to change its relations and conditions. It does make such change. * * * In each the authority of the agent fails. Indeed, it may safely be affirmed, as a general rule, that where an agent has authority to make a specific contract with a

third party, any change in the conditions and relations of that party which would materially modify the contract destroys the power of the agent." And the court denied the writ.

The decree of the district court was right and is in all things

AFFIRMED.

THE other commissioners concur.

JAMES GADSDEN, APPELLANT, V. CHARLES J. PHELPS, APPELLEE.

FILED SEPTEMBER 20, 1893. No. 5028.

Appeal: TRIAL DE NOVO: FINDINGS: EVIDENCE: THE SUPREME COURT, though trying a case *de novo* on appeal, will not disturb the finding of the district court unless the finding and decree cannot be reconciled with any reasonable construction of the testimony.

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

E. T. Hodsdon, for appellant.

Reese & Gilkeson and *C. O. Sabin, contra.*

RAGAN, C.

James Gadsden sued Charles J. Phelps in the district court of Colfax county, and in his petition alleges, in substance, that on and prior to March, 1891, Phelps was his trusted agent and attorney; that on said date Phelps came to his office and advised him that there was a piece of land about to be sold at the court house at public auction by the sheriff, and that Gadsden and Phelps then entered into an

agreement, the substance of which was that Gadsden would furnish Phelps $500 in money, and that with this money Phelps was to attend the sale, purchase the real estate offered thereat in his own name, have the sale confirmed and procure a sheriff's deed therefor, and then, on request, he would convey said land to said Gadsden; that in pursuance of the agreement he furnished Phelps the $500; that Phelps purchased the land in his own name and had the sale confirmed, and procured a sheriff's deed therefor, but had refused on demand to quitclaim to him, Gadsden. There was a prayer that the defendent might be decreed to convey the premises to the plaintiff, Gadsden. The answer, in effect, was, so far as we care to notice it, a general traverse of all the allegations of the petition. The court, after hearing all the evidence in the case, rendered a decree dismissing the cause of plaintiff, and he brings the case here on appeal.

There is no question of law involved in this case, and it would subserve no useful purpose to quote the testimony introduced on the trial. We cannot even say that had we been trying the case we would have reached a different conclusion than that reached by the learned judge who presided in the district court. The testimony was conflicting, but the finding and decree of the district court was abundantly sustained by the evidence.

The supreme court, though trying *de novo* an equity case, on appeal, will not disturb the finding and decree of a district court unless there is no evidence to support such finding, or unless the finding and decree cannot be reconciled with any reasonable construction of the testimony. The judgment of the district court is

AFFIRMED.

THE other commissioners concur.

FREDERICK SONNENSCHEIN ET AL. V. CHARLES BARTELS ET AL.

FILED SEPTEMBER 20, 1893. No. 4676.

1. **Fraudulent Conveyances:** EVIDENCE. Direct proof of fraud can seldom be obtained, nor is such evidence absolutely essential to establish the fraudulent purpose of the parties to a pretended transfer of property; but such fraudulent purpose may be shown by the conduct of the parties, the details of the transaction, and all the surrounding circumstances.
2. ———: ———. The evidence in the present case examined, and *held* to be sufficient to sustain a finding that an alleged transfer of a stock of goods was made for the purpose of hindering, delaying, and defrauding creditors.
3. **Sufficiency of Evidence to Sustain Verdict:** REVIEW. When a jury has decided a question of fact properly submitted, and the trial judge has overruled a motion for a new trial, then, if the record discloses competent evidence on which the finding may have been based, such finding cannot be disturbed by the supreme court.
4. **Fraudulent Conveyances:** CONVERSION: ACTION AGAINST SHERIFF: JUSTIFICATION: EVIDENCE. Where a suit in attachment was brought against a vendor of a stock of goods on the ground that the sale was fraudulently made to defeat creditors, a sheriff seized the goods, judgment was rendered sustaining the attachment, and ordering the goods sold. *Held*, That the record of said attachment proceedings, the same being in force, was competent evidence on behalf of the sheriff in a suit brought against him for the unlawful conversion of said stock of goods, in which suit he pleaded justification under said attachment proceedings, and that the sale to plaintiffs with their knowledge was fraudulently made to defeat the creditors of their vendors.

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

J. C. Crawford and *Cowin & McHugh*, for plaintiffs in error.

T. M. Franse and *M. McLaughlin*, *contra*.

RAGAN, C.

About June 30, 1888, the defendant Charles Bartels was the owner of a stock of merchandise situate at West Point, in Cuming county, Nebraska, and on this date sold it to Brazda Bros., of the same place, at the invoice price of $11,300. Of this sum, Brazda Bros. paid Bartels, at the time of the sale, $3,000 cash, and gave their promissory notes for $8,300, secured by the personal signatures of their friends living in said Cuming county. On Saturday, March 2, 1889, Brazda Bros. made an alleged sale and delivery of this stock of goods to the plaintiffs in error, for the alleged consideration of $3,200 in cash, and some lands in Boone and Keya Paha counties, and some lots in in the city of Omaha. The balance of the purchase price of the goods sold to Brazda Bros. remained, at this time, unpaid to Bartels. On Monday, March 4, there were filed in the recorder's office of Cuming county mortgages made by the sureties on Brazda Bros.' notes, conveying and incumbering most, if not all, of the property of said sureties. A suit was brought by Bartels against the Brazda Bros. and the sureties who had signed their notes, on the alleged ground that the sale of the stock of goods from Brazda Bros. to the plaintiffs in error, and the mortgages made by said sureties of their property, were all fraudulent and made for the purpose of hindering, delaying, and defrauding Bartels in the collection of his debt against Brazda Bros. An attachment was issued in said action, by virtue of which the sheriff of Cuming county seized the said stock of goods. Motions to discharge the attachment were overruled, judgments rendered against the Brazda Bros. and sustaining the attachment and ordering the goods sold, and the proceeds applied on the judgment; all of which was done. Plaintiffs in error then brought this suit against Bartels, Sharpe, the sheriff of Cuming county, Mr. Franse and Mr. McLaughlin, Bartels' attorneys, alleging that they

had unlawfully and wrongfully converted to their own use the said stock of goods, they then and there being the property of the plaintiffs in error.

The answer of the defendants, so far as material here, consisted: (1) Of a general denial; (2) that the sale of the goods by Brazda Bros. to the plaintiffs in error was fraudulent and made with the intent and for the purpose, on the part of both vendors and vendees, to hinder, delay, and defraud the creditors of the said Brazda Bros.; (3) that the defendants took the stock of goods under the writ of attachment in a suit brought in the district court of Cuming county by Bartels against Brazda Bros. and the said sureties on their notes.

There was a trial to a jury with a verdict and judgment for the defendants in error.

The principal point litigated on the trial in the district court was, whether the sale of the stock of goods made by Brazda Bros. to plaintiffs in error was fraudulent. The jury, by its verdict, said it was, and the first error alleged here is, that there was no evidence before the jury to support this finding. Let us see. The jury had before it evidence that Bartels and plaintiffs in error lived in the same town; were neighbors on good terms; intimately acquainted and saw each other often; that plaintiffs in error were engaged "in the real estate, loan, and mercantile brokerage business;" that plaintiffs in error negotiated or took part in negotiating the sale of the stock of goods in June, 1888, from Bartels to Brazda Bros.; that the plaintiffs in error knew at the time that Brazda Bros. gave their notes for the larger part of the purchase price, which notes were secured by the personal signatures of some men in Cuming county; that the plaintiffs in error knew on March 2, 1889, when they claimed to have purchased these goods of Brazda Bros., that Bartels' notes were unpaid; that the plaintiffs in error knew at said time that Brazda Bros. were otherwise largely indebted and in financial straits; that this sale

was made without an invoice; that it was made on a Saturday night after the close of business; that it was made secretly, the employes in the store, when they left at 8 or 9 o'clock in the evening, suspecting no change; that Bartels was in the store during the day and just before it closed in the evening, but he was not advised of the sale; that it was not made in the usual course of mercantile business; that the plaintiffs in error were not then engaged, nor did they intend to engage, in mercantile pursuits; that the consideration paid by the plaintiffs in error for said stock of goods, except $3,200 in cash, consisted of some lands in Boone and Keya Paha counties, of a poor quality, and incumbered by mortgages to about their value, and some lots in the city of Omaha, also incumbered to about the extent of their value; that the consideration paid for said goods was disproportionate to their value; that the plaintiffs in error, on Monday morning, March 4, advertised to sell, and did sell, many of the goods at and below cost; that between the closing of business hours on Saturday night, March 2, and Monday morning, March 4, a large amount of silk goods was removed from the stock; that as early as 8 or 9 o'clock on Monday morning, March 4, following the alleged sale conveyances from the sureties on Bartels' notes of their, property were placed on file in the register's office in said Cuming county; that these sureties lived, at the time, from twelve to twenty miles from West Point, where the mortgages were executed, and that there was no railway communication between West Point and the homes of said sureties. This is a synopsis of some of the evidence tending to show that the sale from Brazda Bros. to plaintiffs in error was fraudulent.

On the other hand there was evidence that negotiations for the sale of this stock had been pending for some two weeks between Brazda Bros. and plaintiffs in error and other parties, among them one "Father Resing;" that the cash paid Brazda Bros. by plaintiffs in error was applied

on a debt due from Brazda Bros. to a bank in West Point; that the sale was made in the afternoon of Saturday; that the value of the lots and lands traded for the stock, added to the cash paid, equaled or exceeded the value of the goods; that the plaintiffs in error, at the time of their purchase, had no knowledge of Brazda Bros.' indebtedness excepting the debts to Bartels and the bank; that the most of Bartels' unpaid notes were not due at the time of the sale; that the plaintiffs in error had traded lands and money for mercantile stocks before; that Bartels congratulated the plaintiffs in error, on Monday morning, over their purchase, rented them his store room for sixty days, and induced them to hire his son as a clerk. This is a synopsis of some of the evidence tending to show the good faith of the sale from Brazda Bros. to the plaintiffs in error.

Of course almost everything testified to by one side was denied by the other. There is in the case a continual conflict. The case was vehemently and persistently tried on both sides by eminent counsel, and from the record before us it appears, as is usual in such cases, one party claimed that everything done was "as pure as the snow on Diana's lap," while the other indicted the transaction "a fraud that smelled to heaven." Whatever may be the truth, one thing is certain: that the only tribunal designated by the laws of this country to hear, deliberate upon, and decide such a dispute as the one in this record is the one that did decide it, a jury. Not only did twelve jurymen hear this evidence, but a learned, upright, and impartial judge presided at this inquiry. He also heard the witnesses, observed their demeanor on the stand, and to him, first, the plaintiffs in error alleged, in their motion for a new trial, the error we are now considering. Had he been of the opinion that this verdict was unsupported by the evidence, or contrary to the weight thereof, he was invested by law with the discretion and authority to set it aside. He was evidently not of that opinion, for he refused to disturb

the finding of the jury. Here, then, are the judgments of thirteen men as to the weight of this evidence, men who heard and saw the witnesses. It was the special privilege as well as the duty of at least twelve of these men to weigh this evidence and to scrutinize it. This court cannot weigh evidence in a case like this. For it to do so, would be doing violence to the spirit if not the letter of our laws. The laws and constitutions of nearly all civilizations of the nineteenth century forbid the trial and determination of questions of fact by judges. When a jury has decided a disputed question of fact, and the trial judge has said by his ruling it was rightly decided, then, if the record discloses any competent evidence on which the finding may have been based, it cannot be disturbed by the supreme court, as it has no authority to scrutinize or weigh evidence in such cases. We agree with the trial court that the verdict of the jury was supported by the evidence.

On the trial the defendants put in evidence the proceedings in the attachment suit of Bartels against Brazda Bros. and their sureties, and the deeds and mortgages made by the sureties on Monday, March 4, 1889. This is the second error alleged.

One of the defenses of the defendants was that the goods sued for in this action were, in fact, the property of Brazda Bros., and were taken by the defendants in the attachment suit of Bartels against Brazda Bros. In short, this defense was a justification. The attachment proceedings were a part of the defendants' case and competent evidence. The judgment of the court sustaining the attachments proved the fraud pleaded by the defendants so far as Brazda Bros. were concerned; and the defendants were also entitled to this evidence, because it negatived the probable inference that might have arisen in the minds of the jury, if the evidence had been excluded, that the sheriff and the other defendants were malicious trespassers.

As to the mortgages and deeds made by the sureties of

Brazda Bros., the theory of the defendants was that the making of these deeds and mortgages on Sunday or Monday following the alleged sale on Saturday night was a part of one transaction or conspiracy participated in by the plaintiffs in error and Brazda Bros. to defraud Bartels. That these conveyances were made by these sureties to defraud Bartels, no one we think, who reads this evidence, can doubt. These sureties lived from twelve to twenty miles from the place where the sale of goods occurred. The record does not show that they were in town on the day of the alleged sale, and they had no railway communication with the town. There was evidence which tended to show that this alleged sale was made late on Saturday night. On Monday morning, as early as 8 o'clock, some of these sureties filed for record conveyances of their property. They must have been advised of the sale during Sunday. There was evidence—and whether true or false was for the jury to decide—which tended to show that the sale from Brazda Bros. to the plaintiffs in error was not made in good faith either on the part of Brazda Bros. or the plaintiffs in error. Under these circumstances we cannot say that the trial court erred in admitting in evidence these conveyances. They were so intimately connected and interwoven with the acts of the parties to the sale of the goods, and followed so closely upon that transaction, as to be *prima facie* a part of it. Fraud may be proved by circumstances (*Strauss v. Kranert*, 56 Ill., 254), and in some cases can only be so proved.

The next error assigned is the giving by the court, on its own motion, of instruction No. 6. It is as follows: "It is not necessary that the testimony should show actual knowledge by the parties of the fraudulent purposes of Brazda Bros. in making the sale of their stock; but if the testimony shows the existence of such facts and circumstances as would have led a man of ordinary sagacity and prudence to the knowledge of the purposes with which

Brazda Bros. disposed of their stock, then you will be justified in finding that the parties had such knowledge of the fraudulent purposes of Brazda Bros."

Plaintiffs in error say that the instruction was erroneous for the reason "that there is no testimony tending to show that Brazda Bros. disposed of their stock of goods with intent to defraud their creditors, much less that plaintiffs in error knew of such fraudulent intention, if it existed." We think that there was evidence which tended to show that the sale from Brazda Bros. to the plaintiffs in error was made with the intention on the part of both vendors and vendees to hinder and delay the creditors of Brazda Bros. There was no error in the giving of this instruction.

It it also alleged that the court erred in giving instructions 1 to 8, both inclusive, asked by the defendants in error. And this error is based on the contention of the plaintiffs in error that the instructions were not applicable to the evidence in the case. We have stated above the synopsis of the testimony bearing upon the good faith of the sale made by Brazda Bros. to plaintiffs in error. The instructions complained of as not applicable to this evidence are as follows:

"1. If you find from the evidence that the plaintiffs in this case acquired their alleged title to the goods in controversy by purchase from Brazda Bros.; and if you further find that the Brazda Bros., in making such sale to the plaintiffs, intended thereby to hinder, delay, and defraud their creditors, and that the plaintiffs in purchasing the same participated in, or knew, or had notice of, such fraudulent intent on the part of said Brazda Bros., before or at the time they made such purchase, then you will be authorized to find that the plaintiffs acquired no title to said goods as against the creditors of Brazda Bros.

"2. An actual agreement or conspiracy between the Brazda Bros. and the plaintiffs, that the latter would aid

the former to defraud their creditors, does not have to be shown. It is sufficient to avoid the sale if the facts and circumstances within the knowledge of the plaintiffs are such as fairly induce the belief that they either knew of the fraudulent purpose of the Brazda Bros., or, having good reason to suspect it, they purposely refused to make inquiry and remained willfully ignorant.

"3. The court instructs the jury that fraud in the sale or conveyance of property is a fact that may be proved by showing the existence of other facts and circumstances surrounding or connected with the transaction tending to show a fraudulent intent on the part of the parties to such sale or conveyance, or tending to show a purpose not consistent with an honest intent, and if the jury believe, from the evidence in this case, as shown by the proof of facts and circumstances, that Brazda Bros. intended by the sale of the property in controversy in this action to hinder, delay, and defraud their creditors, and that the plaintiffs, in purchasing the same, participated in, or knew, or had notice of, such fraudulent intent on the part of Brazda Bros. before or at the time they made such purchase, then in such case the defendants are entitled to recover in this action.

"4. The court instructs the jury that if they believe Brazda Bros. sold and conveyed the property in controversy to the plaintiffs, and they further believe from the evidence that Brazda Bros. intended by such sale to hinder, delay, and defraud their creditors, and that before or at the time the plaintiffs made such purchase they had knowledge or notice of such fraudulent purpose of Brazda Bros., or before or at the time of such purchase the plaintiffs had knowledge of such facts and circumstances as would have aroused the suspicion of and put a reasonably prudent man upon inquiry, which inquiry, if pursued, would have led to knowledge or notice of such fraudulent intent on the part of Brazda Bros., then, in such case, plaintiffs cannot recover in this action, and they will find for the defendants.

"5. The court instructs the jury that if they believe from the evidence that Brazda Bros. sold and conveyed to plaintiffs the property in controversy, and that in said sale it was the intent of Brazda Bros. to hinder, delay, and defraud their creditors, and that plaintiffs participated in such fraudulent purpose, or had knowledge or notice of the same before or at the time of the purchase, then and in that case plaintiffs take no title to property so purchased as against the creditors of Brazda Bros., though the jury may believe from the evidence that they paid full value therefor, and in such case the jury will find for the defendants.

"6. A full consideration paid in cash will not protect a purchaser who had notice, actual or constructive, that the vendor was selling to hinder, delay, or defraud his creditors. It is not enough that a vendee is a purchaser for value; he must be an innocent purchaser.

"7. The court instructs the jury that if they believe from the evidence that Brazda Bros. were insolvent, or were largely indebted, and that they were being pressed by creditors for payment of their respective claims, and that while so indebted they made sale of all their property to plaintiffs, and that such sale had the effect to defeat the creditors of Brazda Bros. in the collection of their debts, and that such indebtedness of Brazda Bros. was known to plaintiffs before purchasing the property, then these facts, if shown in the evidence, are circumstances to be considered by the jury as showing a fraudulent intent in the sale of such property.

"8. The court instructs the jury that fraud in the sale and conveyance of property is often difficult to detect and hard to prove, and for this reason the law permits fraudulent purpose and intent to be shown by proof of the existence of other facts and circumstances, surrounding or connected with the fraudulent act, that tend to show a dishonest purpose; and in this case, if the jury believe from the evidence that the plaintiffs were not merchants or deal-

ers in the character of goods in controversy, and that they purchased all the property in controversy from the Brazda Bros. at and for a price less than its real value; that prior to said purchase no invoice of said property had been taken whereby the quantity and value of the same could be ascertained; that at the time of such purchase Brazda Bros. were insolvent and largely indebted; that the remainder of the property of the Brazda Bros. and the separate property of Anton Brazda and Dominik Brazda, who composed said firm, were so incumbered as not to be available for the payment of their creditors; that such sale would have the effect to hinder, delay, or defeat the creditors of said Brazda Bros. in the collection of their debts; that plaintiffs knew of such indebtedness of Brazda Bros., or could have known it by ordinary inquiry; that said sale was secretly and hurriedly made and consummated in the nighttime; that immediately after the plaintiffs came into possession of said stock of goods they proceeded to advertise and sell said goods at cost and less than costs, and did sell a large amount of said goods at original costs and at less than original cost price, and continued to do so until stopped by the service of a writ of attachment upon them at suit of the defendants in this action; that the plaintiffs did not intend to sell said goods and run a mercantile business after the manner and custom of merchants, but expected to make money out of the goods by closing out the entire stock at cost and less than costs, at private sale or by auction; then these and similar facts and circumstances, if shown in evidence to the jury, are to be considered by them in determining whether the sale of the property in controversy by Brazda Bros. was fraudulent or not."

These instructions were applicable to the evidence before the jury. That they stated the law correctly, see the following authorities: *Gollober v. Martin*, 33 Kan., 252; *Strauss v. Kanert*, 56 Ill., 254; *Purkitt v. Polack*, 17 Cal., 327; *Holcombe v. Ehrmantraut*, 49 N. W. Rep. [Minn.],

191; *Beels v. Flynn*, 28 Neb., 575; *Tootle v. Dunn*, 6 Id., 93; *Knower v. Cadden Clothing Co.*, 57 Conn., 202; *Bollman v. Lucas*, 22 Neb., 796; *Blum v. Simpson*, 71 Tex., 628; *Cox v. Cox*, 39 Kan., 121.

The plaintiffs in error, in their motion for a new trial, assigned, as one of the reasons therefor, misconduct of the jury and the defendants. It is here claimed that the evidence used on the hearing of the motion for a new trial "showed that some of the jurors were tampered with during the trial, being treated with whiskey and cigars by some of the defendants." We cannot agree to the conclusion deduced by the eminent counsel from the facts stated in the affidavits. We are of the opinion that these affidavits failed to show that any juryman was tampered with by any one, and they fail to show that any juryman was treated with whiskey or other drink or cigars by any of the defendants or their counsel. Nor do these affidavits show any such misconduct on the part of the defendants or any of them, or of their counsel, as would have justified the setting aside of this verdict. "Upon a motion to set aside the verdict of a jury in which questions of fact are involved, the court hearing the motion becomes the judge of such questions of fact, and his decision thereon must be final, unless clearly and manifestly wrong." (*Sang v. Beers*, 20 Neb., 365.) The judgment of the district court was right, and is in all things

AFFIRMED.

THE other commissioners concur.

E. B. WILBUR, APPELLEE, v. LOUIS JEEP, APPELLANT.

FILED SEPTEMBER 20, 1893. No. 4837.

1. **Negotiable Instruments:** INDORSEE: PURCHASE AFTER MATURITY: SET-OFF. Any set-off to a promissory note which would have been good between original parties may be pleaded against an indorsee who acquires it after maturity, as he takes it subject to any set-off which the maker had against any prior holder.
2. ———: ACTION BY INDORSEE AFTER MATURITY: SET-OFF. In a suit on a note by the indorsee thereof after due, against the maker, the latter may set off a past due note owned by him, made by others, and on which the plaintiff's assignor is liable to the defendant as indorser, such makers and indorser being insolvent.
3. ———: ———: ———. In a suit on a note by the indorsee thereof after due, against the maker, the latter may set off a judgment owned by him against the plaintiff's assignor and others, such judgment debtors being insolvent.

APPEAL from the district court of Dakota county. Heard below before NORRIS, J.

R. B. Daley, for appellant.

Jay & Beck, contra.

RAGAN, C.

The appellant, on November 1, 1886, executed to one F. Smith a negotiable note, due November 1, 1888, and secured by a real estate mortgage. This note was purchased from Smith by appellant for a valuable consideration in June, 1890, after its maturity, and this is a suit in equity for an accounting of the amount due on said note and to foreclose the mortgage given to secure the same. Appellant, on the 17th day of October, 1889, and before appellee became the owner of the note sued on, purchased of

said F. Smith six notes of $110 each, owned by him and executed by Arnsdorf & Leader, copartners, and one Fred Parent. These notes were duly indorsed by Smith to appellant. At their maturity, appellant sued the makers and Smith, the indorser of said notes, in the county court of Dakota county and obtained judgments against them. No execution was ever issued on said judgments. No stay of execution or appeal was taken, and the greater part, if not all, of said judgments remained, at the date of the trial of this case, unpaid. To the petition filed in this suit by the appellee the appellant pleaded the judgments of the county court as a set-off, alleging the insolvency of each of the judgment debtors at all times since the recovery of the judgments in the county court. The district court, by its decree, denied the set-off pleaded by appellant Jeep, and that is the ruling complained of here on this appeal.

There is no serious contention as to the appellee's ownership of the note. It is not claimed by the appellee that he purchased it before maturity. On the contrary, he expressly admits that he purchased it after it was due. This being true, appellee held the note subject to any set-off or other defense of Jeep's allowed by law. (Sec. 31, Code of Civil Procedure.) Set-off was not allowed at common law, but under our Code any set-off to the note which Jeep could have pleaded against Smith, had he sued the note, may be pleaded against Wilbur, the indorsee thereof, after maturity. (*Davis v. Neligh*, 7 Neb., 78.)

Section 104, Code of Civil Procedure, provides: "A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of a court." Wilbur's action is founded on contract, and the set-off pleaded by Jeep not only arose upon contract, but had been ascertained by the judgment of a court.

Section 106, Code of Civil Procedure, provides: "When cross-demands have existed between persons under such cir-

cumstances that if one had brought an action against the other a counter-claim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, but the two demands must be deemed compensated so far as they equal each other."

In *Simpson v. Jennings*, 15 Neb., 671, it is said: "A claim on the part of a defendant, which he will be entitled to set off against the claim of a plaintiff against him, must be one upon which he could, at the date of the commencement of the suit, have maintained an action on his part against the plaintiff." Jeep, at the time this suit was commenced, could have sued Smith on the judgments of the county court. (2 Black, Judgments, sec. 958, and cases there cited.) Jeep then, at the commencement of this action, held a claim against Smith on which he could have maintained an action against him. It follows that the set-off pleaded by Jeep came within both the letter and spirit of the Code and within the construction placed thereon by this court. But the record before us discloses the fact that all of the defendants to the judgments pleaded by Jeep were insolvent, and had been since and before the rendition of the judgments. This fact invested the court, sitting as it was in equity, with power to set off the judgments of the appellant Jeep against the claim of the appellee Wilbur, even if the appellant's case had not been provided for by statute. (*Spear v. Dey*, 5 Wis., 193; *Pond v. Smith*, 4 Conn., 297; *Thrall v. Omaha Hotel Co.*, 5 Neb., 295.)

One of the points made by the appellee here is, that Jeep's judgments, being against the copartnership of Arnsdorf & Leader, and against Parent as well as Smith, could not be made a set-off to a claim against Jeep only; that is, that the demands were not mutual and between the same parties. Doubtless this is the rule in some states, but it is not supported by the weight of modern authority. In *Seligmann v. Heller Bros. Clothing Co.*, 69 Wis., 410, it was expressly ruled: "A judgment against an insolvent firm

is a good, equitable set-off to a debt due to one of the partners from the judgment creditor."

Another contention of the appellee is, that Jeep's right of set-off was lost by a merger of the notes in the judgments. In *Baker v. Kinsey*, 41 O. St., 403, Baker, on April 1, 1873, gave his note to Blystone. On the same day, Rummell, as principal, and Blystone, as surety, gave their note to Baker, who reduced it in due time to judgment. Kinsey, as Blystone's indorsee, after due, sued Baker on the note given by him to Blystone. Baker pleaded in defense his judgment against Rummell and Blystone, their insolvency at the date of and since the transfer of the note to Kinsey, and that his judgment was unpaid. The case went up on exception to the instructions of the trial court to the jury, and the supreme court ruled: 1. That the jury should have been instructed, if they found the judgment debtors of Baker insolvent, as pleaded, to set off Baker's judgment against Kinsey's claim; 2. That the merger of Baker's notes into judgment did not preclude him from resorting to the original demand for the purpose of enabling him to assert the set-off. The facts in that case are substantially the same as in the case at bar, and the decision announced in the Ohio case is decisive of this appeal.

This action is to be tried and determined in all respects as if it had been brought by Smith himself. It appears from the record that at the time of the trial Jeep was in danger of and would probably lose the entire debt owing him by Smith and others; yet by the decree of the court Jeep is compelled to pay a debt due from him to Smith, who is insolvent. The injustice of this is manifest. We cannot render a decree in this court, as we are not able to ascertain from the record just what amount is due to Jeep on his judgments. The decree appealed from is reversed and the cause remanded to the district court with instructions to it to ascertain the amount due and unpaid on the judgments held by Jeep against Smith and others, and to set

off that amount against the claim held by Wilber against Jeep.

JUDGMENT ACCORDINGLY.

THE other commissioners concur.

E. A. MORLING v. H. M. BRONSON ET AL.

FILED SEPTEMBER 20, 1893. No. 4593.

Negotiable Instruments: INSTALLMENTS DUE ON DIFFERENT DATES: OPTION OF HOLDER TO DECLARE DEBT TO BE DUE ON DEFAULT: NOTICE TO MAKER. A promissory note payable in installments, the consideration of which was the procuring of a loan for the maker by the payees, contained a provision that if default should be made in the payment of any installment when due, the whole note should become due at the option of the holder. *Held*, First, that the failure to pay any installment rendered the whole note due at the election of the holder; Second, that in the absence of a showing of fraud, want of consideration, or illegality in the contract, a court of equity would enforce the contract as made by the parties; Third, that the holder was under no legal obligation to notify the maker that by reason of the default he had elected to declare the whole note due; Fourth, that the court would not, on motion of a stranger, in default of an appearance by the maker and a plea of usury by him, add the amount of the commission note to the interest on the loan for five years in order to taint the transaction with usury.

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

Charles Riley and *Soper, Allen & Morling*, for plaintiff in error.

J. A. Price, contra.

RAGAN, C.

William S. Brown employed Ormsby Bros. & Co. to procure a loan of $700 for him, to be secured by a first mortgage on his real estate in Boone county, Nebraska, the loan to draw interest at the rate of seven per cent per annum, payable semi-annually, which they did. To pay them for their services, or commission for securing this loan, Brown executed and delivered to them his note for $76.15, payable in installments, the first installment due June 1, 1886, and one other installment each six months thereafter; each of said installments to draw interest at the rate of ten per cent per annum after maturity. The note contained a provision that if any installment should not be paid when due, it should cause the whole amount of the note to become due at the option of the holder thereof. The amount of this note was arrived at by computing two per cent on this loan for the five years it had to run. To secure the payment of the note Brown and his wife executed a mortgage to Ormsby Bros. & Co. on the same real estate which secured the loan they procured for him. This commission note, and mortgage securing the same, were afterwards sold to the plaintiff in error in this case, who brought this suit in the district court of Boone county to foreclose the mortgage. At the time the suit was brought Brown had paid two of the installments, seven of the installments were past due and unpaid, and two of the installments had not then matured. Due service was made upon Brown and his wife, but they made no appearance and were defaulted. The other defendants in error were made parties because they held third liens upon this property.

The plaintiff in error, in his petition, after setting up the giving of the note and mortgage to secure the same, and the assignment to him, set out the fact that Brown had made default in the payment of seven of the installments,

and that he, the plaintiff in error, for that reason, elected to declare the whole debt due. He prayed for an accounting of the amount due him, and for a decree of foreclosure. The court made a finding of the facts as above stated and rendered a decree for the installments that were due at that date, but refused to allow the whole note to be declared due, and expressly found and adjudged that one installment of $7 would not mature until December, 1890, and another installment would not mature until the first day of June, 1891. To these findings and decree the plaintiff in error excepted. A motion for a new trial was filed, and after the overruling of the same by the trial court, the plaintiff below brings the case here.

With counsel for plaintiff in error we say: It is difficult to understand on what principle the express and positive contract was disregarded by the court below. If Ormsby Bros. & Co. had sold Brown a wagon for $76.15 and had taken a note for the price, such as that in suit, and Brown had made default, what reason could there possibly be for relieving Brown from the effect of his contract? If they had rendered Brown services as a farm hand or physician, or an attorney, of the value of $76.15, and had taken his note therefor, payable in installments, why should they not be permitted to enforce the contract according to its terms? Here Ormsby Bros. & Co., procured a capitalist to make the loan to Brown, and he agreed that the value of their services was equal to two per cent of the amount of the loan for each year it had to run, and to pay for these services he gave Ormsby Bros. & Co. this note. On what principle, then, can this court say that one of the conditions of the written contract is a nullity, or is not enforcible, and hold that although Brown has made voluntary default, yet the consequences, solemnly agreed to in writing by him, shall not be permitted to follow. This provision, in the absence of a showing of fraud, want of consideration, or illegality in the transaction, is a valid provision. There is

in this record no pleading or evidence of any fraud, want of consideration, or illegality in the transaction whatever. In fact, Brown does not appear in the case. The objection made in the court below to enforcing the contract as made came from a stranger. There being no fraud, or illegality, or want or failure of consideration for the contract, the courts cannot relieve Brown from the consequences of his default. Courts can only enforce a contract as made. They do not sit to make contracts for parties or relieve them of the consequences of a breach of their agreements. It is not for us to inquire into the purposes of the parties in introducing a condition into the note, or to express the opinion that in this respect the contract was a harsh or unfair one. All we can say is, that the parties voluntarily entered into the contract, and they are bound by it, and must submit to the consequences provided for in case of its breach. (*Owens v. Butler County*, 40 Ia., 192; *Patton v. Bond*, 50 Id., 508.)

In *Whitcher v. Webb*, 44 Cal., 127, it is said: "If a promissory note, payable at a future day, provides for the payment of interest quarterly, and that if default be made in the payment of the interest quarterly that the whole note shall immediately become due at the option of the holder, a failure to pay the interest makes the principal due, and a court of equity will not relieve against the enforcement of a contract as made." The principle of that case is like the one at bar. The promise of Brown to pay this note in installments was absolute, and a failure on his part left it wholly optional with the holder to declare the entire debt due, and Brown was not entitled to notice in advance that, if he failed to pay any installment, the holder would insist upon his right to the whole debt.

Courts of equity will sometimes interfere to relieve a party who has been betrayed by the unconscionable or illegal or fraudulent conduct of another, but this case is not such an one. The contract is fair in its terms. There

is nothing contrary to equity or good conscience in it. It surely cannot be said to be against conscience that one should be held to the performance of his contract fairly made. The fact that the note in suit was given for commissions for procuring a loan afforded no reason whatever, so far as the evidence in this record shows, for the refusal of the court to enforce it. The amount of the note, added to the five years' interest on the loan procured, would not taint the transaction with usury; and if it did, in the absence of any appearance by the maker of the note and a plea of usury by him, this court would not, on motion of a stranger, adopt such construction to relieve the maker from the consequences of his contract. It follows from the foregoing that the court erred in not rendering the decree for the full amount of the note sued on. The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

THE other commissioners concur.

SARAH A. LATTA V. CONRAD VISEL ET AL.

FILED SEPTEMBER 20, 1893. No. 5112.

Insufficiency of Evidence to Support Verdict in Action on Bond: REVIEW. There is no question of law involved in this case, and as the verdict of the jury is wholly unsupported by the evidence, the judgment rendered thereon is reversed.

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

Adams & Scott, for plaintiff in error.

Harwood, Ames & Kelly and *W. L. Cundiff, contra.*

RAGAN, C.

Sarah A. Latta sued Conrad Visel, as principal, Joseph C. McBride, J. O. Carter, and Karl Schmitt, as sureties, on a bond alleged to have been executed by them. The substance of the petition filed in the district court is that on the 8th day of September, 1888, the plaintiff was engaged in the building of the "Latta Block," in Lincoln, Nebraska, and on said date she entered into a written contract with Visel in and by which he agreed to furnish all labor necessary for the cutting of stone for the front of said building and delivering the same at said building; and that to secure the faithful performance of said contract, Visel, as principal, and the other defendants, as sureties, entered into a bond conditioned that Visel should faithfully perform the contract, one clause of which was that he would protect the said Latta and her property from mechanics' liens for labor performed in the cutting and delivering of said stone; that Visel had violated said contract and plaintiff had been compelled to pay and had paid for labor and materials furnished for the front of said building the sum of $535.47. The second cause of action in the petition was that Visel had neglected and failed to complete the work by October 1, 1888, as provided in the contract, and that by reason thereof the plaintiff had lost six months' rent of said building.

The defendants, sureties on the bond, filed an answer consisting of a general denial.

Visel filed an answer admitting the execution of the contract and denied all the other averments in the petition. He also alleged that his failure to complete the building by October 1, 1888, was not his fault, but was owing to the failure of the plaintiff to furnish him stone to be cut; and that the stone furnished him was of a different quality from that provided in the contract, and required more time and labor for its cutting than that provided by the con-

tract. Another defense set up by him was that the causes of action in plaintiff's petition had already been adjudicated in another suit between him and the plaintiff. He filed also a counter-claim for extra work which he had been compelled to perform in the cutting of said stone, in the amount of $713.66. Another counter-claim was that by reason of the failure of the plaintiff to furnish him stone as she should have done under the contract, he was unable to work himself, or to keep his men at work, and lost seventy-five days of time; that he had in his employ from ten to sixteen skilled workmen, especially employed for this work, and that he was damaged by the loss of time in the sum of $500. Another cause of action in his counter-claim was that he had been damaged $1,500 by reason of the plaintiff furnishing him a different kind of stone for cutting than that provided in the contract.

To this answer the plaintiff filed a reply, in which she denied all the allegations of new matter in the answer, and pleaded that the counter-claim of Visel for extra work had been adjudicated in a former suit between the parties.

The jury found a verdict in favor of the sureties on the bond, and also a verdict in favor of Visel and against the plaintiff for $464.50. They made special findings, which will be noticed hereafter.

A motion for a new trial was overruled and a judgment rendered for Visel against the plaintiff on the general verdict, and plaintiff brings the case here on error, alleging, in substance, that the verdict of the jury and the judgment of the court are contrary to the law and the evidence of the case.

We will first dispose of the case so far as the sureties are concerned. The question of the execution of the bond was squarely in issue, and the overwhelming testimony is, that while the bond was actually executed and delivered, it was to secure Visel's faithful performance of another contract entered into between him and the plaintiff and not

the one in suit, and by some means was detached from the other contract and attached to this one. The finding of the jury, therefore, in favor of the sureties on this bond was right; but for some reason no judgment was rendered in favor of the sureties on this finding.

We will now dispose of the plea set up by Visel in his answer, that the causes of action set out in plaintiff's petition had already been adjudicated in a former suit between the parties. It appears from the record that in December, 1888, and early in the year 1889, Visel filed mechanics' liens against the property of plaintiff. One of these liens is in the record, and was for extra labor in cutting "rubble stone instead of dimension stone" as provided in the contract, and was filed for $713.66. The record does not disclose the other lien. However, there is enough in the record to show that it was filed for money claimed by Visel to be due him from Latta for labor performed in and about the front of this building under the contract of September 8. Latta filed a bill in equity in the district court of Lancaster county against Visel, setting out the making of this contract of September 8; setting out that she had fully paid Visel the full consideration of said contract, and that she had overpaid him, and that notwithstanding this he had filed against her property the liens above mentioned, claiming there were due him from her large sums of money under this contract. She alleged in this bill that there was nothing due him; that she had, in fact, overpaid him; that the liens were clouds upon her title and asked to have them canceled. Visel answered this bill in equity, resistingt he cancelation of the liens and alleging substantially the same thing that he has alleged in his answer here, except that there was no counter-claim in that answer for loss of time. The court, after a hearing in that case, found "against the defendant on the causes of action set forth in his answer and cross-bill, and that said answer and cross-bill should be dismissed; found that the mechanics' liens

were clouds on the title of the plaintiff, and rendered a decree dismissing the cross-bill of Visel and canceling the liens." It will be observed that the object of that suit, so far as the plaintiff was concerned, was to cancel the liens as clouds on her title. The question as to whether or not she had been damaged by Visel's failure to protect the building from liens, and the question as to whether she had been damaged by reason of his failure to complete the building in time, were not in issue. The evidence does not support the plea of former adjudication set up by Visel in his answer against the causes of action of the plaintiff in this case.

We now turn our attention to the plea of former adjudication set up by plaintiff in her reply to the answer and cross-petition of Visel. In the suit filed by Latta to cancel mechanics' liens, Visel defended his liens on the ground that he had not been paid for the work done, and that there was due him from Latta $713.66 for extra work—that is, in cutting of rubble stone instead of dimension stone as provided by the contract; that on the 21st day of November, 1888, he made an oral contract with the plaintiff by which he agreed to perform certain work on the same block, and in consideration of such agreement plaintiff promised and agreed to pay him what his services were worth; that he performed the work and his services were worth $2,513.66. These are the same defenses that are interposed here now, and the evidence in the record conclusively supports the plea in plaintiff's reply of a former adjudication for the claim of Visel for the extra labor performed by him on this building. This left, then, in this record unadjudicated the following issues:

1. Whether the plaintiff was compelled to and did pay out money, over and above the contract price of $1,800, to protect her property from mechanics' liens.

2. Whether by reason of the delay of Visel in not completing the building by October 1, 1888, she was damaged by loss of rents.

On the part of the defendant Visel there is left but one question, so far as affirmative relief on his part is concerned, viz.: Whether, by reason of the plaintiff neglecting to furnish him stone to be cut according to the contract, he was damaged by loss of time. The jury found a general verdict in favor of Visel and against the plaintiff for $464.50. This, as will be seen hereafter, was predicated solely on the time lost by Visel by reason of the alleged delay of Latta in furnishing him stone for cutting. This verdict is unsupported by the evidence. The only evidence in the record on the subject is the statement by Visel that he lost from fifty-two to sixty days of time, and that this time was worth $5 per day.

The court required the jury to answer certain questions, as follows:

"1. How much was overpaid, above the contract price, by the plaintiff Latta to the defendant Visel, or to protect the said Latta from liens under the contract of September 8?

"A. $404.68; interest, $70.82; total, $475.50.

"2. What was the value of the labor performed by the defendant Visel outside of the labor not included in the contract, if any such labor was performed, upon the stone in question, under the contract of September 8?

"A. Amount, including interest, $940.

"3. What was the amount of damage, if any, sustained by the plaintiff Latta, by the failure of the defendant Visel, if any such failure be found, to complete his contract within the time required?

"A. Not anything.

"4. What was the amount of damage, if any, sustained by the defendant Visel by reason of the failure of the plaintiff, if any such failure be found, to furnish him with stone for cutting purposes as required by said contract?

"A. Amount, including interest at seven per cent, $464.50."

As to the first special finding, it was abundantly supported by the evidence.

As to the second special finding, the subject-matter out of which it grew had already been adjudicated between the parties, and Visel could claim nothing from that in this suit.

As to the third special finding, there was evidence from which the jury might have found as they did, and as there was some evidence to support it, this court will not disturb it, although, had the question been tried to us, we might have reached a different conclusion.

As to the fourth special finding of the jury, it will be observed that it is based on the contention of Visel that he lost time by reason of Latta's delay in furnishing him stone, and, as stated above, the evidence does not support this finding. The most that can be said for it is that he lost sixty days at five dollars per day, or three hundred dollars, which, with interest, would be much less than this.

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

REVERSED AND REMANDED.

THE other commissioners concur.

EMMA HANISKY V. M. A. KENNEDY.

FILED SEPTEMBER 20, 1893. No. 4423.

Bastardy: DEATH OF CHILD: ABATEMENT OF ACTION. The prosecution of the father of a bastard child, under chapter 37, Compiled Statutes, does not abate by the death of the child pending the prosecution.

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

John D. Carson and *Hastings & McGintie*, for plaintiff in error, cited: *Cottrell v. State*, 9 Neb., 127; *Jones v. State*, 14 Id., 210; *Hinton v. Dickinson*, 19 O. St., 583; *Meredith v. Wall*, 14 Allen [Mass.], 155; *Smith v. Lint*, 37 Me., 546; *Maxwell v. Campbell*, 8 O. St., 265; *Hauskins v. People*, 82 Ill., 193; *Evans v. State*, 58 Ind., 587; *Jardee v. State*, 36 Wis., 170; *State v. Zeitler*, 35 Minn., 238; *Scatterwhite v. State*, 32 Ala., 578.

Richard Cunningham, contra, cited: *State v. Beatty*, 16 N. W. Rep. [Ia.], 149.

RAGAN, C.

On the 15th day of May, 1889, Emma Hanisky filed a complaint before the county judge of Fillmore county, alleging she was a single woman and pregnant of a bastard child, and that M. C. Kennedy was the father of such child. Such proceedings were had that Kennedy was held to answer said complaint at the next term of the district court of said county. This court convened in November of that year, and it being made to appear to the court that the child was born on the 22d day of September and had died on the 26th day of October following, the district court, on motion of the defendant Kennedy, dismissed the action. The plaintiff took an exception to this, and brings the case here on error.

The sole question presented by this record is, whether or not the pending action abated by reason of the death of the child. The answer to this question must depend upon the construction of section 6, chapter 37, entitled "Illegitimate Children," Compiled Statutes, which provides: "That in case the jury find the defendant guilty, or such accused person, before the trial, shall confess in court that the accusation is true, he shall be judged the reputed father of said child, and shall stand charged with the maintenance thereof, in such a sum or sums as the court may order and

direct, with payments of costs of prosecution, and the court shall require the reputed father to give security to perform the aforesaid order. * * *" It will be seen from this statute that the object of this proceeding is that the complainant may have the verdict of a jury and a judgment of the court as to whether the person accused is the father of the bastard child. If the jury shall so find, then it becomes the duty of the court to render a judgment (*a*) that the defendant is the reputed father of the child; (*b*) that he pay or secure $—— to maintain the child; (*c*) that he pay the costs of the prosecution. This much the statute literally commands. The complainant was, if successful, entitled to recover the costs expended by her, and the reasonable costs of maintaining the child during its life. But we think this statute should be liberally construed, and in such a case as this the term "maintenance" is broad enough to include the necessary expense incident to the birth of the child, such as the employment of nurse, midwife, and physician, and a decent burial of the infant.

The court erred in dismissing the action. The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

THE other commissioners concur.

SCHUYLER NATIONAL BANK v. NEIL R. BOLLONG.

FILED SEPTEMBER 20, 1893. No. 3691.

Usury: NATIONAL BANKS: ACTION TO RECOVER PENALTY: JURISDICTION OF STATE COURTS. The courts of this state have jurisdiction in actions brought to recover the penalty provided by the acts of congress for the charging and taking by national banks, for the loan of money, a greater rate of interest than allowed by the laws of the state of their domicile.

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

E. T. Hodsdon, for plaintiff in error.

J. A. Grimison and *Phelps & Sabin, contra.*

RAGAN, C.

Neil R. Bollong sued the Schuyler National Bank of Schuyler, Nebraska, in the district court of Colfax county, to recover the penalty provided by the acts of congress for the charging and taking by national banks, for the loan of money, of a greater rate of interest than allowed by the laws of the state of their domicile. There was a finding and judgment for Bollong, and the bank brings the case here and alleges the sole error that the district court had no jurisdiction over the subject-matter of the action. This precise point has been decided at least twice by this court, against the contention of the plaintiff in error. (*First National Bank of Tecumseh v. Overman*, 22 Neb., 116; *Schuyler National Bank v. Bollong*, 28 Id., 684.) Without, therefore, examining the authorities cited by counsel in their brief, and on the authority of the above cases, the judgment of the district court is

AFFIRMED.

THE other commissioners concur.

JOHN WITHNELL ET AL. V. CITY OF OMAHA ET AL.

FILED SEPTEMBER 20, 1893. No. 5023.

1. **Review:** PROCEEDINGS IN ERROR: NEW TRIAL. The supreme court will not review alleged errors of law occurring in a trial to the district court unless a motion for a new trial is made there and a ruling had on such motion.

2. **Appeal**: TIME FOR FILING TRANSCRIPT: JURISDICTION. The supreme court is without jurisdiction to try a case on appeal where the transcript therefor is not filed here within six months after the rendition of the judgment sought to be appealed from.

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

Kennedy & Gilbert, for plaintiffs in error.

Winfield S. Strawn, W. J. Connell, Lake & Hamilton, Montgomery, Charlton & Hall, and *F. T. Ransom, contra.*

RAGAN, C.

John Withnell and others brought this suit against the city of Omaha and others in the district court of Douglas county. The cause was tried to the court without a jury, and judgment entered on December 29, 1890. The plaintiffs filed in this court their transcript of the pleadings and evidence and a petition in error on October 12, 1891. No motion for a new trial was filed in the court below. As the transcript of the pleadings and evidence was not filed here within six months after the rendition of the decree of the district court, the supreme court has no jurisdiction to try the case as an appeal. (Code of Civil Procedure, sec. 675.)

There having been no motion for a new trial made in the district court, this court cannot review the case on error. (*Carlow v. Aultman*, 28 Neb., 672; *Jones v. Hayes*, 36 Id., 526, and cases there cited.)

The pleadings support the judgment. The petition in error is therefore dismissed, and the judgment of the district court in all things

AFFIRMED.

THE other commissioners concur.

HARRIET PERRY ET AL. V. STATE OF NEBRASKA.

FILED SEPTEMBER 20, 1893. No. 4976.

1. **Review:** BILL OF EXCEPTIONS: STIPULATION OF FACTS. In order for this court to examine the evidence embraced in a stipulation of facts between parties to a case tried in the district court, such stipulation must be embodied in the bill of exceptions.
2. **Municipal Corporations:** INMATES OF DISORDERLY HOUSES: POWER TO PUNISH: THE MAYOR AND COUNCIL of a city of the second class have authority to prohibit by ordinance persons from being inmates of houses of prostitution, and to punish them for the violation of such ordinance.

ERROR to the district court for Platte county. Tried below before POST, J.

Plaintiffs in error, *pro se.*

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

RAGAN, C.

The plaintiffs in error were convicted in police court of the city of Columbus on a complaint charging them with being inmates of a house of prostitution in said city. They appealed to the district court. The chief of police filed in that court a complaint against them in words and figures as follows:

"THE STATE OF NEBRASKA,
PLATTE COUNTY,
CITY OF COLUMBUS. } ss.

"Charles M. Taylor, a witness of lawful age, being first duly sworn, deposes and says that in the city of Columbus, in the county of Platte, and state of Nebraska, on the first day of July, 1890, one Hattie Perry and Maria Longscrew, whose true name is to affiant unknown, were inmates of a

certain house of prostitution, and were harbored therein, and contributing to the support thereof, contrary to the ordinances in such cases provided. C. M. TAYLOR,
"Chief of Police."

To this complaint the plaintiffs in error filed a demurrer, alleging that the facts stated in the complaint were not sufficient to constitute an offense. This demurrer was overruled, and the plaintiffs in error, refusing to plead further, were tried, convicted, and sentenced by the court. They filed a motion for a new trial, which being overruled, they bring the case here on error.

The sole point made by them here is, that the ordinance under which the prosecution was had was invalid. We do not know whether it was or not, as there is in the record no bill of exceptions. There is in the record a stipulation signed by the counsel for the state and the plaintiffs in error, to the effect that this complaint was based on an ordinance which was set out at length in the stipulation. But this stipulation is presented without a bill of exceptions, and we cannot examine it, for that reason. It was said by Chief Justice COBB, in *Herbison v. Taylor*, 29 Neb., 217: "There are brought up in this case the petition in error and the transcript of the judgment, and motion for a new trial in the district court. Neither the pleadings nor a bill of exceptions are before us. To this record is attached the stipulation of facts entered into by the attorneys of record in the district court. The stipulation is supposed to have taken the place of evidence upon the trial below, and upon it the judgment is founded. That evidence cannot be accepted by this court without a bill of exceptions, settled in due form as provided by statute. There being none, the court is without the criterion for passing upon the questions raised by the plaintiff in error in his brief."

It remains then for us to determine whether the complaint, on its face, stated a cause of action against the plaintiffs in error. By subdivision 46 of section 52, chapter 14,

Compiled Statutes, it is provided that cities of the second class shall have power "to restrain, prohibit, and suppress * * houses of prostitution and other disorderly houses and practices, * * * and all kinds of public indecencies." This statute is broad enough to authorize the city council of the city of Columbus to pass an ordinance prohibiting persons from being inmates of a house of ill-fame, and punishing them therefor. The demurrer admitted that the plaintiffs in error were inmates of a house of prostitution, and were harbored therein, contrary to the ordinances of the city. This court will take judicial notice of the fact that Columbus is a city of the second class, and since the judgment of the court is supported by the pleadings in the case, we will presume that the court had before it evidence that the plaintiffs in error were inmates of a house of prostitution in the city of Columbus; that there was in force in said city a valid ordinance against persons being inmates of such houses. It is true that before the plaintiffs in error could have been lawfully convicted there must have been introduced in evidence facts proving that they were inmates of a house of ill-fame, and there must have also been introduced a valid ordinance of the city of Columbus forbidding persons from being inmates of such houses. As a matter of fact none of these things may have been done, but every reasonable presumption will be indulged by this court in favor of the correctness of the judgment of the court below. The judgment of the district court is in all things

AFFIRMED.

THE other commissioners concur.

COMMERCIAL NATIONAL BANK OF ST. PAUL, MINNESOTA, V. JOHN W. BRILL ET AL.

FILED SEPTEMBER 20, 1893. No. 4984.

1. **Negotiable Instruments:** AUTHORITY OF SECRETARY OF CORPORATION TO TRANSFER: VALIDITY OF INDORSEMENTS: EVIDENCE. Where a bank has an arrangement with a corporation whereby the bank agrees to discount notes held by the corporation, and in pursuance of such agreement such notes have customarily been brought to the bank and been negotiated by the secretary of the corporation, such facts are sufficient evidence of the authority of the secretary to transfer a particular note and of the genuineness of the indorsement upon such note, the proceeds of the note having been placed by the bank to the corporation's credit, and paid out on the corporation's checks.
2. ———: ———: ———: THE DECLARATIONS OF OFFICERS of such corporation, made after the transfer to the bank, are inadmissible in a suit by the bank against the makers of the note, for the purpose of showing want of authority in the secretary to make the transfer.
3. **Verdict Supported by Incompetent Evidence:** REVIEW. Where incompetent evidence is admitted against objections, but the admission of such evidence is not specifically assigned as error, this court will nevertheless disregard such incompetent evidence in considering the question whether the verdict is sustained by the evidence.

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

M. McLaughlin, for plaintiff in error.

C. C. McNish, contra.

IRVINE, C.

The plaintiff in error brought this action in the district court of Cuming county to recover from the defendants in error upon a promissory note for $315, made to the order

of the J. H. Mahler Company, and by that company indorsed to plaintiff. The defendants admitted the execution of the note but alleged that it had been procured from them by the Mahler Company by fraud and without consideration, and that one Miller, the secretary of the Mahler Company, had, without authority from that company, delivered the note to the plaintiff, and that the plaintiff knew that Miller had no authority to transfer the note. The plaintiff in reply denied the affirmative allegations of the answer, and pleaded that it was a *bona fide* purchaser for value before maturity.

The case was argued largely upon the question as to whether or not the bank took the note with notice of the fraud alleged. It will be observed, however, that the precise issue tendered and joined was as to the transfer of the note to the bank and the authority of the officer making the same.

Upon the part of the bank, its cashier testified that he bought the note for the bank in the ordinary course of business without notice of any of the relations existing between the Mahler Company and the makers; that the bank had arrangements with the Mahler Company by which it agreed to discount notes held by the Mahler Company, not to exceed at any time $25,000; that this note was taken under that agreement; its proceeds placed to the credit of the Mahler Company and checked out by that company. He further testified that Miller, the secretary of the Mahler Company, presented most of the notes for discount. This note bears an indorsement as follows: "J. H. Mahler Company, per J. H. Mahler, Prest."

While the secretary of a corporation has not, merely by virtue of his office, authority to negotiate notes held by the corporation, it is well settled that if such an officer has been permitted by the directors to negotiate notes, or if the company acquiesce in and receive the benefit of such acts, a purchaser of a particular note, familiar with such facts,

may assume the officer's authority, and the corporation will not be permitted to set up a want of authority against such purchaser. (*Lester v. Webb*, 83 Mass., 34; *Partridge v. Badger*, 25 Barb. [N. Y.], 146; *Foster v. Ohio-Colorado Reduction & Mining Co.*, 17 Fed. Rep., 130.) The testimony of the cashier brings the case within this rule. There is no direct evidence of the genuineness of the indorsement itself, but the indorsement being regular in form, and the note having been brought to the bank by that officer of the company who customarily attended to such business, the indorsement must be taken as genuine. As against this testimony there is nothing except the testimony of one of the defendants and another witness as to admissions or statements made to them by the president and secretary of the Mahler Company long after the bank took the note. This testimony was clearly inadmissible against the bank. The admission of this evidence, although there were proper objections and exceptions, is not specifically assigned as error in the petition in error; but it is assigned as error that the verdict is not sustained by the evidence, and the court, in passing upon that assignment, will not consider incompetent evidence admitted over proper objections and exceptions. The bank having made a *prima facie* case which was not disputed except by such incompetent evidence, there was no evidence sufficient to sustain the verdict in favor of the defendants.

REVERSED AND REMANDED.

THE other commissioners concur.

FREDERICK SCHMID V. REGINA SCHMID.

FILED SEPTEMBER 20, 1893. No. 4531.

1. **Review: ERROR PROCEEDINGS: MOTION FOR NEW TRIAL.** To obtain a review upon error of matters occurring upon a trial in the district court, a motion for a new trial must have been made in that court, but, in the absence of such a motion, this court will examine the question as to whether the petition states a cause of action.
2. **Petition for Reconveyance of Land.** A petition alleging an agreement within the statute of frauds, but not alleging that such agreement was in writing, is sufficient after judgment.

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

T. B. Wilson and *Lamb, Ricketts & Wilson*, for plaintiff in error.

George I. Wright and *M. B. Reese, contra.*

IRVINE, C.

This case was originally brought into this court by appeal, but the transcript not having been filed within the period prescribed by law, upon motion the appeal was dismissed, and the appellant given leave to file a petition in error. No motion for a new trial was made in the trial court, and that fact precludes us from an examination of any of the questions raised, except those which arise upon the assignment of error that the petition does not state facts sufficient to constitute a cause of action. The petition alleges that the plaintiff Regina Schmid, on August 23, 1887, was the owner of certain land described in the petition, and that the defendant Frederick Schmid, the son of Regina, on said day, by the use of certain representations unnecessary to here set forth, but which are alleged to have been

false and fraudulent, induced Regina to convey to him said lands, "upon the express understanding and agreement that said Frederick Schmid should thereafter, at any time, upon request by the said Regina Schmid, her heirs, legal representatives, or assigns, reconvey said premises to said Regina Schmid, her heirs or assigns, or to such person or persons as she should designate, and should hold, use, and enjoy said premises * * * in trust for the said Regina Schmid, her heirs and assigns; the said conveyance of said plaintiff Regina Schmid to the said Frederick Schmid being for no consideration whatever except the trust aforesaid." It is alleged further that defendant now denies the trust. After stating certain other facts, possibly sufficient in themselves to justify the relief asked, the plaintiff prays for a reconveyance and for other relief. A decree was rendered substantially in accordance with the prayer of the petition.

At this stage of the case the question of the sufficiency of the petition being now for the first time raised, the petition should receive a very liberal construction and every intendment should be in its favor. The requirement of a writing signed by the person to be charged, in order to evidence an express trust in land, or create or transfer any interest therein, being a purely statutory requirement, it was not necessary at common law to plead the existence of such a writing. (Stephen, Pleading, 330.)

The petition in the portion quoted contains sufficient averments to establish a trust, unless the Code has changed the common law rule so as to require in pleading a contract within the statute of frauds, the averments that the contract was in writing and was signed by the party to be charged. Safe pleading under the Code undoubtedly demands these averments, but their absence affects only the certainty of the pleading, and where the petition substantially pleads the agreement, and is silent on this point, the objection should be made by motion. The omission of such

averments does not invalidate a judgment rendered upon the petition. (Maxwell, Code Pleading, 15.) We think, therefore, that in this respect, if in no other, the petition states a cause of action, and that being the only question open for consideration, the judgment is

AFFIRMED.

THE other commissioners concur.

STATE OF NEBRASKA, EX REL. AUSTRIAN, WISE & COMPANY, V. J. F. DUNCAN, COUNTY JUDGE.

FILED SEPTEMBER 20, 1893. No. 3830.

1. **Attachment:** GARNISHMENT: AFFIDAVIT. In order to found proceedings in garnishment in aid of an attachment, it is necessary that the affidavit required by law be filed in the court issuing the process before notice is served upon the garnishee.
2. ———: ———: JURISDICTION: SPECIAL APPEARANCE. In order that proceedings in garnishment may be pleaded against third parties, it must affirmatively appear from the record that the steps were taken necessary to confer jurisdiction, and a voluntary appearance and answer by the garnishee does not supply the place of such jurisdictional proceedings.
3. ———: ———: PRIORITIES. Under section 946 of the Code, where several attachments are levied upon the same property, or the same persons are made garnishees in several cases, the justice issuing the order first served may, upon motion of any of the plaintiffs, determine the amounts and priorities of the several attachments; and he has authority to do this as well when the validity of some of the attachments or garnishments is disputed as when their validity is unquestioned.
4. ———: A DETERMINATION OF PRIORITIES so had constitutes an adjudication which cannot be collaterally attacked.
5. **County Courts:** POWER TO VACATE JUDGMENTS. The county court, acting within its special jurisdiction, has power to vacate

judgments and final orders during the term at which they were rendered.

6. ———: ———. In cases within the jurisdiction of a justice of the peace a county judge possesses only the powers of a justice, and can only vacate judgments and final orders in cases where justices are expressly authorized so to do.

7. ———: ———. A county court acting within its special jurisdiction may vacate its judgments or final orders for irregularity in obtaining the same upon proceedings had in pursuance of sections 602 to 610, inclusive, of the Code.

8. ———: ———: VALIDITY OF ORDER: COLLATERAL ATTACK. An order vacating such judgment or final order is not void for want of a finding that the applicant had a valid defense or cause of action. The want of such finding renders the proceedings, at most, only irregular or erroneous, and they are not on that account open to collateral attack.

ORIGINAL application for *mandamus*.

Wigton & Whitham, for relators.

D. A. Holmes, John R. Hays, and *Mahoney, Minahan & Smyth, contra.*

IRVINE C.

This is an original application for *mandamus* to require the respondent, county judge of Madison county, to pay to the relators the amount of a judgment recovered by relators out of certain moneys paid into court in pursuance of garnishment proceedings and alleged to be properly applicable to the satisfaction of relators' judgment. There was an order of reference and a report made by the referee in favor of the relators, and the case now comes up upon the relators' motion for judgment upon the report and the respondent's exceptions to the report.

Upon December 1, 1888, suits were begun in the county court of Madison county by Kaminer, Prinz & Co., J. T. Robinson Notion Company, Frankenthal, Freudenthal & Co., W. V. Morse & Co., and Turner & Jay against Corn-

bleth & Pelzer, and attachment proceedings were instituted in each case. Upon the part of the respondent there was offered in evidence before the referee affidavits entitled in each case, as follows:

"D. A. Holmes, one of the attorneys for the plaintiff above named, being first duly sworn, deposes and says that he has good reason to believe, and does believe, that the Norfolk National Bank has property of the defendant, to-wit, a stock of merchandise, in its custody in this county.

"D. A. HOLMES.

"Subscribed in my presence and sworn to before me this 1st day of December, 1888. GEORGE M. BEELS,

"*Justice of the Peace.*"

These affidavits were all objected to as incompetent. The copies appearing in the bill of exceptions show no certificate of filing, but from some arguments in the brief it may be inferred that they were delivered to the officer with the order of attachment upon December 1. They were not filed in court until May 11, 1889. The officer returned the orders of attachment showing that upon December 1 he served the Norfolk National Bank as garnishee in each of said cases. Upon December 3 the relators commenced the action resulting in the proceedings upon which this case is based; they also instituted attachment proceedings, filed an affidavit for garnishment against the Norfolk National Bank, R. E. Levy, and John R. Hays. Upon December 4 notice of garnishment was served. These proceedings are admitted to be regular in every respect. Upon January 14, 1889, John R. Hays filed a written answer, verified by his oath, a single paper bearing the titles of all of the cases, and proceeding as follows:

"Comes now John R. Hays, and for answer in garnishment in the above entitled causes of action, and in each of them, shows the court as follows: That on December 1, 1888, the defendants Cornbleth & Pelzer made and executed a chattel mortgage to the Norfolk National Bank, of Norfolk,

Nebraska, for $500, on all of defendants' stock of merchandise, etc., in Norfolk, Nebraska, and on the same day defendants executed another chattel mortgage for $500 on the same goods to R. E. Levy, subject to the first above described mortgage, both of which mortgages were on the same day placed in the hands of said John R. Hays for collection; that immediately affiant, on the same day, took possession of the mortgaged property under both of said mortgages and proceeded to sell the same at both public and private sale as thereto authorized; that all the mortgaged goods have been sold and the same have realized the sum of $2,527.98; that the expenses of said sale so far paid out amount to the sum of $297.73; that affiant does not now know of any further expenses, but there may possibly be a small bill or two yet unpaid; that affiant has paid to the Norfolk National Bank the amount due said bank on the above mentioned mortgage, as principal, $500, and interest, $2.08; total, $502.08; that affiant has not yet paid over to R. E. Levy the amount due on said mortgage, but still holds the same; that there still remains in the hands of affiant the sum of $1,728.17, as follows:

Amount realized		$2,527 98
Expenses paid	$297 73	
Paid Norfolk National Bank	502 08	
		799 81
Now in affiant's hands		$1,728 17

"That there is now due and should be paid to R. E. Levy, on the mortgage hereinbefore mentioned, the sum of $500, with interest thereon at ten per cent from December 1, 1888, and the balance left after that is held subject to the order of the court; that the Norfolk National Bank, nor the officers thereof, nor R. E. Levy, know anything about the amounts realized, nor the expenses attending the same, and none of them have any money or property of any kind in their control or possession, and had not at the time

of garnishment, as affiant is informed and verily believes; that affiant therefore respectfully askes that garnishee Norfolk National Bank and garnishee R. E. Levy be discharged as such garnishees; that affiant be directed by the court to pay to R. E. Levy the amount due on the mortgage mentioned, and that the court direct this affiant as to the amounts and persons to whom to pay the balance left, and that, when so paid, affiant be also discharged under the garnishment proceedings."

In the course of time judgments were rendered against Cornbleth & Pelzer in each of the cases, and upon May 17 an order was made in each case directing Hays to pay into court the sum of $1,205.84, in accordance with his answer. Upon the same day in the Kaminer, Prinz & Co. case the following order was made:

"May 17, 1889, 1 P. M., this being the 12th day of the May, 1889, term of this court, the attorneys for the plaintiff appeared and asked to have an order made requiring the garnishee in this action to pay into court the amount acknowledged by him to be in his hands belonging to defendant as per answer of garnishee on file.

"F. P. Wigton, attorney for Austrian, Wise & Co., Hansen Empire Fur Factory, and James Forrester & Co., appeared and in open court objected to making order and distribution in the order of service for the reason that the affidavits for garnishment were not sufficient, and are void, and asked to have the same distributed in the order of service in the cases of Austrian, Wise & Co., Hansen Empire Fur Factory, and James Forrester & Co.

"Attorney for plaintiff D. A. Holmes filed affidavit, marked Exhibit 'B,' attached to affidavit of garnishment marked Exhibit 'A.' (This affidavit shows that the affidavit in garnishment was handed to the officer before notice in garnishment was served.)

"After hearing the argument of counsel the objection is overruled, to which attorneys except, and it is ordered that

the answer of J. R. Hays, filed in garnishment in this case, be taken as true, and that the same be allowed, and that he pay me the sum found to be due the defendants after the payment of the mortgage to R. E. Levy, as stated in the answer in garnishment in this action filed January 14, 1889. I find that attachment in this case was levied December 1, 1888, at 11:15 P. M., and is prior to all other attachments in this case. It is therefore considered by me that Joseph Kaminer & Co. has prior lien upon the property attached in this case, and that the judgments be paid in the order of the priority of liens as follows:

"First—Joseph Kaminer & Co., served December 1, 11:15 P. M.

"Second—J. T. Robinson Notion Co. and Frankenthal, Freudenthal & Co., served December 1 at 11:20 P. M.

"Third—W. V. Morse & Co. and Turner & Jay, served December 1, 1888, at 11:30 P. M.

"Fourth—W. V. Morse & Co., served December 3, 1888, at 11:15 P. M.

"Fifth—James Forrester & Co., Hansen Empire Fur Factory, and Austrian, Wise & Co., served December 4, 1888, at 7 A. M.

"Witness my hand this 18th day of May, 1889.

"J. F. DUNCAN,
"*County Judge.*"

Upon May 18 the following order appears:

"It appearing to the court that the above findings and orders, commencing with F. P. Wigton, attorney for Austrian, Wise & Co., etc., as found on page 168 and closing at middle of page 181 this docket, were made and entered through a mistake and misunderstanding between the court and the parties to be affected thereby, by their attorneys, as to what the application made by said attorneys was, the said findings and orders are hereby set aside, vacated and held for naught. It is therefore ordered that John R. Hays, heretofore garnished in this action, pay to me the sum

of $1,205.84, the amount admitted by him to be due said defendant as per his answer heretofore filed in this case.

"J. F. DUNCAN,

"*County Judge.*"

The respondents offered in evidence a transcript of the county court records as follows:

"November 28, 1891, John R. Hays appeared as attorney for Joseph Kaminer & Co. in the above entitled case and filed motion, supported by affidavit, to have the order and entry made in this case by this court on the 18th day of May, 1889, vacated and stricken out, so far as the same attempts and purports to reverse and set aside the order made by this court in this case on the 17th day of May, 1889. This vacation and correction is asked at this time on the ground of irregularity in obtaining the judgment or order now complained of.

"It appears to the court from proof on file, that F. P. Wigton and Wigton & Whitham have been duly notified of this application and that they have accepted service of such notice. By agreement of the parties this case is continued to December 5, 1891, at 1 o'clock P. M.

"Now on this 5th day of December, 1891, at 1 o'clock P. M., D. A. Holmes appeared for plaintiff Joseph Kaminer & Co., and in favor of said motion; F. P. Wigton appeared adversely and objected to the jurisdiction or right of the court to entertain said motion, to hear any evidence in support thereof, or make the change prayed. Said F. P. Wigton filed no answer or demurrer to plaintiff's demand, but made only the objection that the court could not, for want of jurisdiction, modify or in anywise change the order complained of. This objection was overruled, but the said Wigton made no exception to this ruling.

"The sworn testimony of J. F. Duncan and D. A. Holmes was then offered to the court, and the cause was submitted to me upon the pleadings and the evidence. In consideration whereof I find that the order made by J. F.

Duncan, judge of this court, on the 18th day of May, 1889, in this cause, as such order appears recorded at the middle of page 181 of this docket, was irregularly obtained and should be set aside; that said order was made for the purpose of changing and reversing the order and judgment of this court in this cause on the 17th day of May, 1889. The court finds that both parties in interest were present in court on the 17th day of May, 1889, and argued the case, and upon such argument and presentation of the case the order and judgment of that date were entered.

"The court finds that the order made herein on the 18th day of May, 1889, was procured at the instigation and request of the parties who appeared in this cause adversely to the plaintiff, and that said order of May 18, 1889, was thus procured without the knowledge or consent of the plaintiff and in his absence. The court further finds that the statements contained in plaintiff's motion are true, and that the motion should be allowed and the prayer thereof granted.

"It is therefore considered and adjudged that the docket in this case be, and the same hereby is, corrected by striking out and setting aside the entry made by this court in this case on the 18th day of May, 1889, so far as the last named entry purports to modify or vacate the judgment of this court entered in this case on the 17th day of May, 1889. It is further ordered that said judgment entered as aforesaid on the 17th day of May, 1889, shall stand in full force as the legal judgment of this court in this case, and for the distribution of the money mentioned to the several creditors named in said judgment. M. J. MOYER,

"County Judge."

This offer was objected to as incompetent, immaterial, and because the court had no jurisdiction to make the order contained in the record. The objection was sustained by the referee.

It will be observed that the relators' case was not begun

until two days after the notices of garnishment had been served in the other cases, and the question involved is as to the validity of the proceedings in those cases. The facts as above stated are practically undisputed, and upon these facts the referee found that the Norfolk National Bank did not appear or answer as garnishee in any of the actions, but that John R. Hays did voluntarily appear in the five first commenced, no notice of garnishment having been served upon him. The contention centers upon this finding and upon the referee's conclusion that the county court obtained no jurisdiction by virtue of the garnishment proceedings in the cases first begun, the affidavits being held insufficient, and the garnishee having appeared voluntarily.

A question was raised as to the sufficiency of the affidavits in the cases begun December 1. The referee held that they were insufficient. It is said, first, that the affidavits are insufficient in form to authorize any garnishment proceedings because they do not show that the Norfolk National Bank is within the county where the actions were brought. Whether the omission of this averment renders the garnishment proceedings void, or whether it is a mere irregularity which may be waived by the garnishee's appearing and answering, it is not necessary to here decide.

It is also urged that the garnishee in the actions of December 1 was the Norfolk National Bank, while the answer was made by Hays in his own behalf, and he was a mere volunteer. This question is also eliminated from the case by the conclusion reached upon the next question, which, we think, goes to the foundation of the whole proceedings.

A recurrence to the statement of facts will show that there is nothing in the records of the cases of December 1 showing that any affidavits for garnishment were filed in the county court until May 11, 1889, long after relators' rights accrued, and after service upon the garnishee. On behalf of respondent it is argued that our statute only requires that such an affidavit should be *made* and not that

it be *filed* in the court. The question is a new one in this state, but the language of the Wisconsin statute is the same as our own, and the supreme court of Wisconsin, in the case of *Wells v. American Express Co.*, 55 Wis., 23, has, we think, determined the question in consonance with law, and upon general legal principles which cannot be questioned. It is there said: "The entries in the docket of a justice of the peace showing appearance of the defendant would be sufficient to warrant the judgment in ordinary common law causes. But the proceeding of garnishment is special and statutory and in derogation of the common law. It is a proceeding by which the debtor is compelled to pay another than his creditor, and the right of the creditor is transferred to another against his will, and this can only be done by force of the statute strictly pursued. It is in the nature of a proceeding *in rem* by which the plaintiff is sought to be invested with the right to appropriate to the satisfaction of his claim against the defendant a debt due from the garnishee to him. This being the nature of the proceeding, the principle is elementary that jurisdiction of the court therein must affirmatively appear. * * * In most, and perhaps all, of the cases of garnishment sought to be introduced in evidence in defense of this action there is an entry by the justice that an affidavit was made and filed. What the affidavit contained does not appear. The affidavit, being a prerequisite of jurisdiction, must not only appear upon the records, but be strictly sufficient; and not appearing, no jurisdiction whatever is shown in the justice." And, as said in *Steen v. Norton*, 45 Wis., 412, "In order to entitle a plaintiff to have recourse to the process of garnishment, in order to confer on the justice jurisdiction to entertain it, he must first make the affidavit required by the statute. * * * All proceedings founded on a materially defective affidavit are *coram non judice*, and no appearance, no submission of the garnishee, can operate to waive the defect of jurisdiction."

It will be observed that the court thought it necessary not only that a sufficient affidavit should affirmatively appear, but that it must appear from the records of the court. In order for the affidavits to appear from the record they must be filed, and the question then recurs, when is it necessary that the filing should take place? We answer that it should be before the notice is served. Respondent contends that this is inconvenient, as in some cases causing delay which might be hazardous, and he supports that contention by the language of the statute requiring only the making of an affidavit. The argument *ab inconvenienti* is clearly unsound. It might as well be applied to writs of attachment, executions, or other process which issue only from courts in pursuance of proceedings already had therein; and such force as the argument might have is more than met by the consideration that it would be on many accounts dangerous and unjust to permit an administrative officer to act in such extraordinary cases upon the authority of documents placed in his possession and not deposited in a public office. So far as the question turns upon the language of the statute, it may be observed that sections 200 and 926 of the Code, relating to undertakings for attachments, merely require the undertaking to be *executed* in the office of the clerk or the justice without any specific direction that they should be filed. Section 219 provides for the discharge of an attachment upon the *execution* of a bond to perform the judgment. Section 255, relating to injunction bonds, provides that no injunction shall operate until the party obtaining the same shall *give* an undertaking. It would hardly be claimed that in any of these cases the undertaking or bond would be effectual until filed and made a part of the record of the case. For the reasons stated in the Wisconsin cases the garnishment proceedings were without jurisdiction until May 11, 1889, when the affidavits were filed. Had they been contested down to that time they must have failed, and it will not do to allow the

filing of the affidavits upon that date to have a retroactive effect, and render valid proceedings had long before, and which both the courts and interested parties might rightfully assume from the state of the record down to that time to be wholly invalid.

The next question which arises is as to the effect of the proceedings of May 17, 1889. The record shows that the attorney for the relators on that day asked for an order of distribution in favor of the relators and certain others, excluding the plaintiffs in the case of December 1; that there was a hearing upon this motion and a finding of the order of priority among the different plaintiffs. Section 232 of the Code provides that where several attachments are executed upon the same property or the same persons are made garnishees, the court, on motion of any of the plaintiffs, may order a reference to ascertain and report the amounts and priorities of the several attachments. This power clearly confers upon the court authority to consider such report as in other cases and adjudicate priorities. Section 946, relating to justices of the peace, provides that in such cases the justice issuing the first order served, on the motion of any of the plaintiffs may determine the amounts and priorities. It is claimed by the relators that the proceedings had on May 17 were not within the power conferred by these sections, for the reason that the validity of the proceedings was involved. In other words, respondent urges that the statute should be construed so as to restrict it to cases where the validity of the different orders is unquestioned. Such a construction practically defeats the statute, because in such cases there is usually no occasion for any adversary proceedings. We think the object of these sections was to provide a speedy and convenient method of determining such conflicting claims. The record shows that these proceedings were had upon the motion of the relators and they were bound thereby. If these proceedings remain in force they constitute an adjudication

of the whole of the controversy against the relators which could only be attacked by appellate proceedings, and not collaterally.

The order of May 18 purports to vacate the proceedings of the 17th. Was it effectual for that purpose? The provisions regarding courts of records apply to county courts, while acting within their special jurisdiction, and such courts have the same powers as the district court to vacate judgments or orders during the term at which they were rendered. (*Noakes v. Switzer*, 12 Neb., 156; *Volland v. Wilcox*, 17 Id., 46.) An inspection of the calendar shows that May 18 was within the term as fixed by statute, and the order was therefore within the power of the court in those of the cases involving upwards of $200; and its effect was to vacate the proceedings of May 17 in those cases. There was one suit begun by W. V. Morse & Co., in which less than $200 was claimed, and another by Turner & Jay, of the same character. As to these cases the county judge had only the jurisdiction of a justice of the peace, and, except in those cases especially provided by statute, a justice of the peace has no power to set aside a judgment or final order after its rendition. (*Cox v. Tyler*, 6 Neb., 297; *Templin v. Snyder*, 6 Id., 491; *State, ex rel. Carter, v. King*, 23 Id., 540.) The order of May 18 was a nullity in the two cases referred to, and as to those the order of May 17 remained in force.

Finally, what was the effect of the proceedings of December, 1891? This was meant to be a proceeding under section 602 of the Code. It was brought within the time allowed by law; there was an appearance on behalf of relators, and the order of May 18 was set aside and distribution ordered in accordance with the order of May 17. By section 610 of the Code the provisions of 602 are made applicable to county courts. It will be observed that in the record of 1891 there was no express finding that the applicant had a "valid defense or cause of action." This

phrase, as applied to these proceedings, must be taken as meaning good grounds for having an order entered different from that which it was sought to set aside. It is probable that by direct proceedings the order of 1891 might have been reversed for want of such a finding. The failure to make such finding did not, however, oust the court of jurisdiction or open the proceedings to collateral attack. We think, therefore, that the referee erred in not receiving in evidence the record of November and December, 1891. The result of these proceedings is to reinstate the orders of May 17, and the referee should have found that the whole matter herein in controversy had been adjudicated in those proceedings adversely to the relator. We think the adjudication was erroneous, but the remedy for that was by appeal or by proceedings in error. It follows that the writ must be denied.

WRIT DENIED.

THE other commissioners concur.

LEONARD K. SCROGGIN v. JOHN W. MCCLELLAND.

FILED SEPTEMBER 20, 1893. No. 4270.

1. **Bank Checks:** THE STATUTE OF LIMITATIONS begins to run in favor of the drawer of a check at the latest after the lapse of a reasonable time for the presentment of the check.
2. **Foreign Laws:** FAILURE TO PLEAD: PRESUMPTIONS. The courts of this state will not take judicial notice of the laws of other states, and in the absence of proof such laws will be presumed to be the same as our own.

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

John M. Ragan and *S. A. Searle*, for plaintiff in error.

H. W. Short, contra.

IRVINE, C.

The defendant in error sued the plaintiff in error in the district court of Nuckolls county upon a check drawn by plaintiff in error to the order of defendant in error for $746.22 upon Scroggin & Son, bankers, Mount Pulaski, Ill., and dated November 10, 1882. He alleged presentment and dishonor of the check November 14, 1888. The suit was begun February 20, 1889. The plaintiff in error in answer pleaded, first, the statute of limitations; second, that the check was presented and paid at or about the day of its date; third, matter claimed to operate in estoppel, which it will not be necessary here to notice. The reply amounts to a general denial. The case was tried to the court, a jury being waived, and there was a general finding and judgment for the defendant in error.

One of the errors assigned, and the only one which we shall notice, is that the court erred in not finding that the action was barred by the statute of limitations. This assignment raises the question as to when the statute begins to run upon a bank check in an action against the drawer of the check. A check is in some respects analogous to a bill of exchange or a note payable on demand. On notes payable on demand the statute of limitations has been held to run from the date of the note. (*Little v. Blunt*, 9 Pick. [Mass.], 488; *Wenman v. Mohawk Ins. Co.*, 13 Wend. [N. Y.], 267.) Where a drawer of a check had no funds to meet it, it was held that the statute began to run from the date of the check. (*Brush v. Barrett*, 82 N. Y., 400.)

It is true that the last case was decided upon the theory that inasmuch as the drawer had no funds in the bank to meet the check, presentment immediately would have been unavailing, and a cause of action, therefore, arose in favor

of the payee as soon as the check was given. We can see, too, that there is a distinction between a note payable on demand and a check, as an action lies at once against the maker of a demand note without actual prior demand. (*Norton v. Ellam*, 2 M. & W. [Eng.], 461; *Burnham v. Allen*, 1 Gray [Mass.], 496; *New Hope Delaware Bridge Co. v. Perry*, 11 Ill., 467.) Nevertheless a check is not designed for circulation, but for immediate presentment. (*First National Bank of Wymore v. Miller*, 37 Neb., 500.)

The time within which presentment must be made is quite limited. Ordinarily, when the payee of a check and the bank upon which it is drawn are in the same town, a check must be presented before the close of banking hours the day after it is received. (See cases cited in note to *Holmes v. Briggs*, 17 Am. State Rep. [Pa.], 804.) Otherwise it should be forwarded for presentment the day after it is received by the payee and presented the day after it is received by the agent for collection. Special circumstances may excuse a greater delay, but no excuse is pleaded or proved for the delay in this case. We think that the statute should be deemed to have begun to run at the latest upon the expiration of a reasonable time for presenting the check, and that a delay for over six years would complete the bar of the statute beyond all question.

It is claimed by defendant in error that delay in presenting the check does not release the drawer unless he has been injured. This is the rule where suit is brought within the period of limitations, but the statute in all cases bars relief. The statute runs in favor of the drawer as well as others. It is also claimed that the drawer has, during the whole period, resided in Illinois, and that the statutory period is there ten years. This may be true, but it is neither pleaded nor proved. The court cannot take judicial notice of the law of another state, but in the absence of proof it will be presumed to be like that of our own. (*Lord v. State*, 17 Neb., 526; *Bailey v. State*, 36 Id.,

808.) Presuming the law of Illinois to be the same as our own, the action had been barred by the laws of that state at the time it was commenced here, and was, therefore, barred here. (Code of Civil Procedure, sec. 18; *Hower v. Aultman*, 27 Neb., 251.) Aside from the failure of proof upon this point the pleadings entirely failed to present the issue. Upon the face of the petition the action was barred, and a demurrer would have lain.

REVERSED AND REMANDED.

RYAN, C., concurs.

RAGAN, C., having been of counsel in the case, took no part in its consideration or decision.

DANIEL C. KAVANAUGH V. I. OBERFELDER & COMPANY.

FILED SEPTEMBER 20, 1893. No. 4969.

1. **Trover and Conversion:** PLEADING. A petition in an action in the nature of trover averred ownership generally of certain chattels in the plaintiff. The defendant denied plaintiff's ownership and alleged ownership in one B. F. S., and a seizure by defendant under proceedings against B. F. S. *Held*, That the title to the chattels was properly put in issue by these pleadings, and that plaintiff's case was sustained by proof of ownership in Mrs. S., and a chattel mortgage made by Mrs. S. to the plaintiff.

2. **Voluntary Assignments:** PREFERRED CREDITORS. The assignment law, Compiled Statutes, chapter 6, does not deprive insolvent debtors of their common law right to prefer creditors. The law merely prohibits preferences (with certain exceptions named in the act) when made in the assignment itself and preferences made within thirty days before an assignment actually executed, with notice upon the part of the creditor preferred that the debtor was then insolvent or contemplating insolvency.

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

Bowman & Smith and *Pound & Burr*, for plaintiff in error.

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

IRVINE, C.

This cause has twice before been in this court. It is reported in 21 Neb., 483, and 29 Neb., 427. The former opinions contain a full statement of the facts. A third trial resulted in a verdict in favor of Oberfelder & Co., the plaintiffs below, for $2,072, and the defendant, this time, prosecutes error.

It is claimed that the court erred in giving certain instructions submitting to the jury the question as to whether B. F. Stump or Mrs. Stump was the owner of the goods in controversy. No exceptions were taken to the giving of these instructions, and they are, therefore, not presented to this court for review. If, however, the plaintiff in error is correct in his theory that the ownership of the goods was not put in issue by the pleadings, the point is probably preserved by the assignment of error that the verdict was not sustained by sufficient evidence, and that it is contrary to law, the estoppel pleaded having been held bad in 29 Neb., 427, and not having been submitted to the jury upon the third trial. It is true that the plaintiffs below did not allege that the goods belonged to Mrs. Stump and that they derived their title through her. They do, however, allege ownership in themselves, and issue was joined by the answer's alleging ownership in Stump and a seizure upon process directed against him. We do not think it necessary for the plaintiff in an action of trover to trace in his petition the devolution of title to himself; and, while the evidence shows that Oberfelder & Co. claimed ownership

under a mortgage and not absolute ownership in the goods, we think evidence of such title was admissible under a general allegation of ownership; especially since the case has been twice considered by this court, and each time the true state of the title was treated as having been properly put in issue.

Plaintiff in error next argues that, conceding Mrs. Stump to be the owner of the goods, the mortgage to Oberfelder & Co. was fraudulent as against creditors. The argument is that, at the time the mortgage was given, Mrs. Stump was contemplating making a general assignment for creditors; that through Mr. Oberfelder's influence she was induced to make the mortgage, in effect preferring his claim; that an assignment was in fact drawn. This was not executed by her, or at least not delivered. It is claimed that the policy of our assignment law is to prevent preferences, except those permitted by the act, and that the execution of this mortgage operated to create an unlawful preference and to prevent an assignment, and must be treated as void under section 42 of the assignment law.

The assignment law was not intended to deprive a debtor of his right to prefer creditors. In *Hershiser v. Higman*, 31 Neb., 531, it is said: "This court in numerous cases has held that it is competent for a debtor to secure one or more creditors to the exclusion of others where the transaction is not tainted with any fraudulent intent. The fact that Boylan was insolvent does not affect his right to secure part of his creditors." And in *Brown v. Williams*, 34 Neb., 376, the court, through Mr. Justice POST, says: "It has been frequently held by this court that it was not the purpose of the assignment law to take away the dominion which, at common law, one is permitted to enjoy over his own property. A debtor in failing circumstances may still secure one or more of his creditors by mortgage or conveyance absolute, provided the transaction is not tainted with fraud, although the effect of such conveyance or mortgage

is to defeat the collection of other claims." And the case of *Banks v. Omaha Barb Wire Co.*, 30 Neb., 128 (the case relied upon by plaintiff in error), is cited in support of that proposition. All these cases arose after the passage of the present assignment law. An assignment is a voluntary act. A debtor cannot be compelled to make it, and it is only when he does make such an assignment that section 42 of the act applies, and renders void transfers of his property made within thirty days before the making of such assignment with notice to the grantee of his insolvency.

As was said in *Hershiser v. Higman, supra*, referring to sections 42 and 43 of the assignment law: "The above provisions do not in any manner affect mortgages given to preferred creditors more than thirty days before the making of an assignment, but such mortgages are valid unless followed by an assignment within thirty days after the same are given." The common law right to prefer a creditor, therefore, remains, and the assignment law only defeats such preference when an assignment is thereafter actually made and delivered within the period provided by the act and under the circumstances therein designated.

The sufficiency of evidence as to the ownership of the goods is generally questioned. Upon this point the testimony was conflicting, as from the former opinions it seems to have been upon the other trials. We have examined it and are satisfied that it is sufficient to support the verdict.

JUDGMENT AFFIRMED.

THE other commissioners concur.

JOHN L. WHEELER V. GEORGE A. VAN SICKLE.

FILED SEPTEMBER 20, 1893. No. 4939.

1. **Review**: RULING ON EVIDENCE: OBJECTIONS. An objection interposed to a question not answered by a witness does not present for review in this court the propriety of a similar question asked at a later stage of the examination and answered without objection.
2. **Witnesses**: IMPEACHMENT. Upon a second trial of a case it cannot be shown for the purpose of impeachment that upon a former trial a witness failed to testify as to certain facts covered by his examination upon the second trial, unless it be also shown that he was interrogated as to such facts or that his attention was otherwise directed thereto.

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

Lamb, Ricketts & Wilson, for plaintiff in error.

Wooley & Gibson, contra.

IRVINE, C.

The defendant in error recovered judgment in the district court of Lancaster county against the plaintiff in error for commissions claimed to have been earned in procuring a purchaser for real estate of the plaintiff in error.

The plaintiff in error contends that the court erred in refusing to give the third instruction asked by him. This instruction was as follows:

"You are instructed that before plaintiff can recover he must prove by a preponderance of evidence that he was the procuring cause of making a sale, or of producing a purchaser who is willing, ready, and able to buy on the terms proposed by the seller. Unless the principal, Birney, authorized his agent, Hitchcock, to accept defendant's offer,

any acceptance by him would not make a sale, and would not entitle plaintiff to his commissions."

The substance of this instruction was given in the second instruction given at the request of defendant in error, and in the first, second, and third instructions given at the request of the plaintiff in error, as well as by the second and third given by the court of its own motion. No error can be predicated upon the refusal of this instruction.

It is next claimed that the court erred in permitting the witness Hitchcock to testify as to the contents of a letter received by him from one Birney, the purchaser whom the defendant claims to have produced. It is claimed that no sufficient foundation was laid for the introduction of secondary evidence. This witness testified that he had received certain letters from Birney subsequently to one introduced in evidence; that he had made search for the lost letter and had not been able to find it. He was then asked to state what the letter contained. An objection was made and overruled, whereupon, without any answer having been given to that question, counsel for plaintiff in error interrogated the witness at some length as to the fact of the receipt of the letter in regard to which inquiry was made. After that examination the witness was again asked the contents of the letter. No further objection was interposed and the questions were answered. The objection to the first question asked is not sufficient to bring the competency of the evidence before this court for review. The examination on the part of the plaintiff in error was in the nature of a cross-examination as to the foundation laid for this evidence, and the objection made before this cross-examination cannot be extended so as to apply to a similar question asked and answered without objection, after the preliminary testimony had taken a different form.

It is urged that the court erred in excluding evidence to the effect that on a former trial of the case in the county court the witness Hitchcock had mentioned no such letter

as that last referred to as having been received and lost. In explanation of this point, it may be well to state that the principal controversy in the case was whether or not the purchaser whom the defendant in error claims to have produced, was willing to take the land upon the terms proposed by Wheeler. A letter from the purchaser to Hitchcock, his agent in Lincoln, was introduced in evidence, but that letter contained reservations and conditions of such a nature as to prevent its being an absolute acceptance of Wheeler's terms. The court instructed the jury to that effect. The defendant in error sought to show that very shortly after this letter was received another had come, absolutely accepting the terms. This was the letter alleged to have been lost.

Hitchcock was asked, on cross-examination, whether in the county court he had testified that he had received a letter and lost it. He said he did not know. He was then asked, "Did you not there testify that this was the letter on which you acted and the only one you had from him after you sent him Wheeler's proposition?" He was also asked whether he testified anything about it and whether he stated its contents. To all of these questions he answered in effect that he could not remember.

Mr. Wheeler in rebuttal was asked: "Did he (Hitchcock) in that examination and trial claim that there was another letter on which he acted, except the one in evidence in this case?" This was objected to, as incompetent and immaterial, and because no evidence had been produced that Hitchcock had been interrogated relative to any such matter. Plaintiff in error then offered to show that Hitchcock, during his examination in the county court, made no allusion to any letter except the one in evidence, and made no claim to having acted under the authority of any other letter. We think the trial judge was right in excluding this evidence. The foundation which would have justified impeaching evidence was in the question quoted, wherein

Hitchcock was asked whether he did not testify that the letter in evidence was the one on which he acted and the only one. There was no offer to produce any such evidence, but simply an offer to show that Hitchcock had not, in fact, testified in regard to any other letter, and there was no offer to show that he did testify that the letter in evidence was the one upon which he acted, or that he testified that there was no other letter, or that his attention was called in any way to the subject of the second letter. Certainly no inference can be drawn against the credibility of a witness's testimony because upon a former trial of the case he remained silent upon a subject upon which he had never been interrogated, and to which his attention was not directed. It is not the duty of witnesses to volunteer testimony, and their failure to do so cannot be shown for the purpose of impeaching them.

It is alleged that the verdict was not sustained by the evidence. It would be useless to review the evidence in detail. We have examined it carefully, and while upon one or two points we are not satisfied that the jury reached the correct conclusion, we think there was sufficient evidence before them to sustain their verdict, and that under the rule established in this state it cannot be disturbed.

JUDGMENT AFFIRMED.

THE other commissioners concur.

IN RE SUPREME COURT COMMISSIONERS.

FILED SEPTEMBER 26, 1893. No. 6672.

1. **Constitutional Law**: STATUTES: SUPREME COURT COMMISSIONERS. Under the act approved March 9, 1893, authorizing the supreme court to appoint three supreme court commissioners to assist in disposing of the business of the supreme court, three commissioners were appointed who duly took the oath required by law, and prepared certain opinions in cases pending in the supreme court. The syllabus of each case was examined by the court and approved by it, and the opinion then filed under the general rule of court that when so filed it should stand as the judgment of the court. *Held*, Not in conflict with the constitution of the state.
2. **Supreme Court Commissioners**: DUTIES. The commissioners themselves file no opinions. It is their duty to examine records, hear arguments, consider the authorities bearing upon the questions involved, and write opinions conforming to their views. In all these respects they are to act independently of the court, but their opinions have no force or effect until the syllabus of each case is approved by the court and filed by it.
3. ———: MOTIONS FOR REHEARING. Motions for rehearing may be filed as in cases where the opinions have been prepared by the court, and such motions will be considered by the court. If there is probable error a rehearing will be granted.

OPINION.

MAXWELL, CH. J.

In a number of cases decided by the supreme court commissioners the validity of their acts is questioned, and it is alleged that a judgment entered by them is illegal and void. Instead of considering this question in connection with the motions for rehearing filed in several cases we will consider it by itself. The act creating the commission is as follows:

"Section 1. The supreme court of the state, immediately upon the taking effect of this act, shall appoint three per-

sons, 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 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 1 of article 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 9th, A. D. 1893."

In pursuance of this act the court appointed three commissioners, who at once took the oath required by law and entered upon the duties of their office. At that time the court made a general order that the opinions of the commissioners, when filed, in every case should stand as the judgment of the court. It may be well to state that the commissioners themselves file no opinions. They are all submitted to the court and the syllabus of each case is examined. If approved, it is filed by the court. If not approved, it is then returned to the commissioners to have

the same made to conform to the suggestions of the court, or the court itself makes the necessary changes. The court, however, desires to have the commission act independently in the first instance in rendering decisions, and to examine the records and investigate the authorities and endeavor to reach a correct conclusion in each case. Motions for a rehearing are filed in the same manner as in cases prepared by the court. These motions are carefully considered by the court, and if sufficient cause is shown for a rehearing it will be granted. The court, however, files the opinions, and when filed they stand as the judgment of the court until vacated or modified. The attacks made on the commissioners, therefore, are unauthorized, and the objections are overruled.

THE other judges concur.

ERNST F. HARTWIG v. JAMES L. GORDON.

FILED SEPTEMBER 26, 1893. No. 5160.

1. **Trial:** INSTRUCTIONS. A party has a right to have his case submitted to the jury upon the issues in his favor as presented by his pleadings and proof.
2. **———:** ORAL INSTRUCTIONS: REVIEW. The statute requires all instructions to a jury and modifications thereof to be in writing, and where oral instructions or oral modifications thereof are given, to which exceptions for that cause are taken, it is ground of error.

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

Rickards & Prout, for plaintiff in error:

The instructions should be applicable to the evidence introduced on the trial. It is error to disregard this rule.

(*City of Lincoln v. Holmes*, 20 Neb., 47; *Stough v. Stefani*, 19 Id., 468; *Ballard v. State*, Id., 619; *Meredith v. Kennard*, 1 Id., 319; *Neihardt v. Kilmer*, 12 Id., 38; *Republican V. R. Co. v. Fink*, 18 Id., 92.) Instructions should be in writing. (Ch. 19, secs. 52, 56, Comp. Stats.; *Republican V. R. Co. v. Arnold*, 13 Neb., 488.)

Griggs, Rinaker & Bibb, contra.

MAXWELL, CH. J.

This is an action commenced by the plaintiff to recover from the defendant the sum of $98.60, balance due on a bill of merchandise sold to the defendant in error. Trial was had and judgment for plaintiff. Defendant appealed to the district court. The defendant answered the petition of the plaintiff, admitted the claim of the plaintiff, and for further answer set up a counter-claim against the plaintiff in the sum of $250, moneys which he claimed to be due him on account of failure of a warranty of title to certain saloon fixtures which he alleged in his answer he purchased from the plaintiff for the sum of $550. The plaintiff replied denying each and every allegation of new matter contained in the answer. A trial was had to a jury.

In addition to the testimony in behalf of the defendant, and sustaining his cause of action, the evidence tends to show the following facts: In 1884 one George Poffenbarger was indebted to H. R. W. Hartwig & Co., a wholesale liquor firm of St. Joseph, Missouri, in a large sum of money, $600 of which was secured by chattel mortgage upon saloon fixtures and buildings located in the town of Blue Springs. In 1889 Poffenbarger sold the saloon fixtures, with the consent of Hartwig & Co., to the firm of Sivey & Bloom, who paid $300 in cash and executed to Hartwig & Co. a promissory note for $300 due July 8, 1889, as collateral to the note and mortgage which they already held against Poffenbarger. On or about the 5th

day of July, 1889, Sivey & Bloom became indebted to the plaintiff herein in quite a large amount for merchandise, and becoming embarrassed it was agreed between Sivey & Bloom and the plaintiff that George Poffenbarger should be placed in the saloon to receive the moneys and apply the proceeds after the payment of current expenses to the liquidation of Hartwig's claim against Sivey & Bloom. Poffenbarger remained in this position until some time in May, 1890, when the defendant Gordon went to Blue Springs and negotiated for the purchase of the fixtures for the purpose of going into the saloon business in Blue Springs. After some preliminary arrangement a sale was consummated between the parties by which the defendant Gordon was to pay $550 for the saloon fixtures, $300 of which was to be paid in taking up a note which Sivey & Bloom had given to Hartwig & Co., the remaining $250 to be paid upon the bills of the concern which had been contracted during the time that Sivey, or Sivey & Bloom, were running the business. About the 21st day of October, 1889, Eli Sivey, who succeeded to the rights of Sivey & Bloom in said property, executed a mortgage to secure a note of $1,000 to one Walter Foster, and afterwards, on the 11th of November, 1889, Sivey executed another mortgage upon the same property to Walter Foster to secure the sum of $1,000. Both these notes and mortgages were afterwards assigned by Foster to one William Little, who, in June, 1890, and after the sale to Gordon, attempted to foreclose the mortgages, and for that purpose commenced a replevin action in the district court of Gage county against Eli Sivey and the defendant Gordon, to recover possession of said property, which action was tried in the district court of Gage county and judgment rendered in favor of the plaintiff therein on the 18th day of December, 1890; that action is now pending on error in this court.

The theory on which this case was tried on the part of defendant in the court below was that Hartwig claimed to

be the absolute owner of the property, and, as such owner, sold the same to Gordon and warranted the title. The evidence fails to establish this theory. The evidence shows clearly that the only interest Hartwig had in this property was to the extent of his mortgage of $300, three hundred of the $600 due him from Poffenbarger having been paid at the time Sivey & Bloom purchased from Poffenbarger. Of the $250 which Gordon paid, and for which he claims reimbursement from the plaintiff, not one dollar was received by Hartwig except on a merchandise bill which Sivey owed, and interest on the Sivey & Bloom note which had accumulated prior to the purchase by Gordon. Every cent of this $250 was paid out for the benefit of Sivey on bills which he had contracted while running the saloon, except possibly $25 which went to pay a check which he had drawn. It is further shown by the evidence that Hartwig was in no manner responsible for any of these debts to the payment of which the $250 was applied. How then can it be claimed that the plaintiff is responsible for this money to Gordon and should pay the amount back to him? But it is contended on behalf of this defendant that Poffenbarger was the agent of the plaintiff, and that he received the $250. The interest of the plaintiff in the property extended no further than his lien by virtue of the mortgage of $300. This amount was assumed by Gordon, who, as he himself testifies, went to St. Joseph and had an interview with the plaintiff, and it was then agreed that Gordon should pay the $300 to plaintiff, and that he should have six months' further time in which to pay it. It seems he never complied with that part of his contract. This being true, Hartwig could have had no interest whatever in the $250 which was paid by Gordon and applied to the payment of the debts of Sivey, and that Poffenbarger, in receiving the money, if he did receive it, which is not entirely clear, could not have acted as the agent of Hartwig for that purpose. The extent and scope of Poffenbarger's

agency is shown by the affidavit and letter of Hartwig introduced in evidence by the defendant:

"STATE OF MISSOURI, } ss.
COUNTY OF BUCHANAN, }

"Personally appeared Ernst F. Hartwig, who being duly sworn by me, upon his oath says that on July 5, 1889, he appointed George W. Poffenbarger his agent to hold and keep in his possession the saloon fixtures and pool and billiard tables located in the Sivey & Bloom saloon at Blue Springs, Nebraska, until he could find a purchaser therefor; that about the fore part of May, 1890, said George W. Poffenbarger sold said fixtures and pool and billiard tables to J. L. Gordon, which sale he confirmed.

"ERNST F. HARTWIG.

"Sworn and subscribed to before me this first day of December, 1890. MAX ANDRIANO,

"[SEAL.] *Notary Public.*"

"ST. JOSEPH, MO., Dec. 1, 1890.

"*Mr. G. W. Poffenbarger, Blue Springs, Neb.*—DEAR SIR: Yours to hand and all contents duly noted. Enclosed I hand you my affidavit which I think will be satisfactory in covering disputed points in the Sivey & Bloom and J. L. Gordon business. As to sale made to J. L. Gordon about May 1, 1890, of billiard and pool tables and barroom fixtures, will state that you were empowered by us to make the transfer as our agent of above named fixtures then in your possession. J. L. Gordon accepting note of Sivey & Bloom, amount of same, $300, bearing interest at ten per cent; date of note April 8, 1889, payable 90 days after date. On this note J. L. Gordon paid interest to May 1, 1890, $32.50, and agreed that he would pay principal and interest amounting to $315 November 1, 1890, without fail. Of course Gordon's failure on complying with the agreement leaves him out, and the goods revert back to us. I hope you will succeed in getting everything in good shape so that there will not be any more disputes hereafter. Yours respectfully, E. F. HARTWIG."

These two papers should be read and construed together. They show that Poffenbarger was to hold possession of the saloon fixtures, pool and billiard tables until a purchaser could be found. Therefore, it will be observed that Hartwig assumed no control over the saloon, or over any property, except such as was covered by his chattel mortgage. The letter also shows just what plaintiff understood at the time in relation to the sale to Gordon, *i. e.*, that all he, plaintiff, had to do with the transaction was to receive the $300 and interest which was due him, and which, as he says in the letter, Gordon agreed to pay "November 1 without fail." Nowhere in this letter or affidavit is any reference made to the $250 which Gordon claims he paid to Hartwig or his agent.

The court instructed the jury as follows:

"The court instructs the jury that where a vendor in possession of personal property either by himself or agent sells the same to a purchaser who buys in good faith, believing he is obtaining a clear title to the property, there is an implied warranty of title by the vendor; and if in such case there is an outstanding claim of title, evidenced by a duly filed chattel mortgage on the property sold, and the mortgagee takes possession of said property under a writ of replevin, thereby depriving the purchaser of the possession of said property, and upon the trial of the replevin suit the judgment for the possession of the property is for the said mortgagee, then and in that case the purchaser of said property would be entitled to recover, against the vendor of the same, damages by reason of the failure of the vendor's title."

This instruction as an absolute proposition of law is no doubt correct, but it is not applicable to the testimony in the case as it in effect assumes that the plaintiff had sold the property to the defendant.

The plaintiff asked the following instructions, which were refused:

"1. The jury are instructed that if you believe from the evidence that the title transferred to Gordon as stated in defendant's answer failed by reason of chattel mortgage given on said property by one Sivey after the date of the sale described in defendant's answer, then you are instructed that such failure is no fault of the plaintiff, nor does such failure come within the breach described in defendant's answer; and if you so find the facts to be, you should find for the plaintiff.

"2. The jury are instructed that if you believe from the evidence that H. R. W. Hartwig & Co., prior to the time that the defendant Gordon purchased the goods in question, had a claim against one Sivey, and that the only part that Hartwig & Co. took or had in the sale in question was for the better securing an indebtedness due them, and that at said time the real title to such property was in said Sivey, then you are instructed that the failure of said title at any subsequent time is not chargeable to this plaintiff, and you should find for the plaintiff."

These instructions should have been given. This was the plaintiff's theory of the case as presented by his pleadings and proof, and he had a right to have the case as presented by him submitted to the jury. The court therefore erred in refusing the instructions. There is some complaint that certain oral instructions were given to the jury, to which exceptions were taken on that ground. Our statutes provide that all instructions and modifications thereof shall be in writing, and it is ground of error if they are given orally. An exception, however, must be taken on that ground. This seems to have been done in this case. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

M. M. BARNEY v. JOSEPH PINKHAM.

FILED SEPTEMBER 26, 1893. No. 4844.

1. **Trial**: INSTRUCTIONS: REQUESTS: OBJECTIONS: WAIVER. It is the duty of the court on its own motion to state the issues as presented by the pleadings to the jury. If, however, it fails to do so, a request to that effect must be made, and upon the failure, an exception taken. If no exceptions are taken and the objection not assigned in the motion for a new trial, it will be deemed waived.
2. **Instructions** *held* to state the law correctly.
3. **The evidence**, being conflicting, was fairly submitted to the jury.

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

Greene & Hostetler, for plaintiff in error.

St. Clair & McPheely, contra.

MAXWELL, CH. J.

The cause of action in this case is stated as follows:

"The plaintiff complains of the defendant for that at the time of the transactions, wrongs, and injuries hereinafter named, to-wit, prior to and until April 27, 1888, plaintiff was the owner of a certain roan mare of the actual value of $200; that on or about the 21st day of April, 1888, the said mare became and was sick with disease then unknown to plaintiff; that on said date last aforesaid, and for a long time prior thereto, the defendant claimed to be, and advertised and held himself out to the public and to plaintiff to be, a veterinary surgeon and asked to be employed as such in the treatment of sick and diseased horses; that the plaintiff, on or about the 22d day of April, 1888, employed the defendant as a veterinary to treat and doctor the said mare

for her said sickness for pay; that defendant, under said employment and in the capacity of veterinary aforesaid, visited said mare a number of times, examined her, diagnosed her case, prescribed medicines as remedies for her, gave her medicine and drugs, and treated and caused her to be treated under his sole direction, control, and management from said last named date until on or about April 27, 1888, when said mare died.

"Plaintiff alleges that the defendant, at the time of said employment and the treatment of said mare, was incompetent to treat sick and diseased horses; that he was grossly ignorant and unskilled in the profession of veterinary, and did not possess nor bring to the treatment of said mare ordinary skill or due care, but so ignorantly, carelessly, and unskillfully treated and administered medicine to her, and in such large quantities, as to cause and did cause the death of said mare; that he gave and administered to said mare drugs wholly improper to be given for her treatment and cure, and by such treatment aforesaid, done ignorantly, unskillfully, and negligently, caused her death as aforesaid, to the damage of the plaintiff in the sum of $200; that by reason of the premises the defendant is justly indebted to the plaintiff in the sum of $200, which is past due and wholly unpaid, and for which sum, with costs of suit, plaintiff demands judgment against the defendant."

The answer is a general denial. On the trial of the cause the jury returned a verdict for $135 in favor of Pinkham, and a motion for a new trial having been overruled, judgment was entered on the verdict.

The first error complained of is the failure of the court to state the substance of the issues to the jury. In this case the court referred them to the petition. It no doubt is the duty of the court to state the substance of the issues to the jury, and this should be done without request; but if the judge fail to do so, he should be requested to charge as desired, and if he refuses to so charge, an exception

should be taken. In the case at bar no exceptions were taken, nor is the objection made in the motion for a new trial. The objection, therefore, cannot be considered.

The instructions need not be reviewed at length. They state the law correctly and seem to be based on the testimony.

It is objected that there is not sufficient testimony to sustain the verdict. An examination of it shows that it is conflicting upon the principal questions and was proper for a jury to consider. There is no error apparent in the record and the judgment is

AFFIRMED.

THE other judges concur.

HORTON, GILMORE, MCWILLIAMS & COMPANY V. MARTIN C. BLOEDORN ET AL.

FILED SEPTEMBER 26, 1893. No. 4914.

1. **Partnership:** FIRM PROPERTY: SALE BY INDIVIDUAL: MORTGAGE BY ONE PARTNER TO SECURE FIRM DEBT: CONVERSION. Where there is no sufficient reason for making a sale of the whole of the partnership property, one partner, without consultation with, or consent of, his copartner, cannot sell the firm property. If, however, the firm is insolvent, one partner in the firm name may in a proper case give security on a stock of goods to secure a *bona fide* debt of the firm.
2. **Instructions as to duress** *held* to state the law correctly.

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

Harwood, Ames & Kelly and *McAllister & Cornelius*, for plaintiffs in error.

Sullivan & Reeder, contra.

MAXWELL, CH. J.

On the 14th day of May, 1888, Daniel J. Maher and Martin Maher were engaged as a copartnership, under the firm name of D. J. Maher & Co., in the business of retail dealers in general hardware at Platte Center, Nebraska, and were indebted to the plaintiffs, Horton, Gilmore, McWilliams & Co., in the sum of $1,201.11. At about 2 o'clock P. M. on that day one Van Brunt, as the agent of the plaintiffs, applied to the defendants at their place of business in Platte Center for the payment or security of plaintiffs' claim. Martin Maher, one of the members of the firm, was absent from the town and did not return until the following day; but Daniel J. Maher, who was the member of the firm having principal charge of the general business, was present. After negotiations consuming the entire afternoon, Daniel J. Maher, at about 7 or 8 o'clock in the evening, executed a bill of sale of all the merchandise, stock in trade belonging to D. J. Maher & Co., to the plaintiffs in satisfaction of, or in security of, the plaintiffs' claim, and delivered the same, together with the property intended to be conveyed to Van Brunt, as the agent of the plaintiffs. This property comprised the entire assets of the firm and was not in value in excess of the amount of the indebtedness to the plaintiffs. Van Brunt received of Daniel J. Maher the key to the store in which the property was situated, and immediately went into actual possession of the same, claiming title thereto in the plaintiffs under the bill of sale. The bill of sale was signed by Daniel J. Maher in the name of D. J. Maher & Co.

Afterwards, on the same day, probably about 9 o'clock P. M., Daniel J. Maher executed to the intervenors herein, the Empkie Hardware Company, a promissory note for $800 in consideration of indebtedness from said copartnership to said hardware company, and also executed and delivered in like manner to said Empkie Hardware Company

a mortgage upon the goods and chattels theretofore conveyed to the plaintiffs in error and conditioned for securing the payment of the note. Subsequently, and on the 16th day of May, 1888, the defendant Martin C. Bloedorn, as the sheriff of Platte county, levied, upon all the goods and chattels above mentioned, executions issued upon judgments rendered against the said D. J. Maher & Co. in favor of others of their creditors, and was assisted in such levy by the defendant Israel Gluck. Thereupon the plaintiffs began this action against the defendants Bloedorn and Gluck, to recover damages for the wrongful conversion of the property, the petition being in the usual form in such cases.

The Empkie Hardware Company was permitted to intervene in this action, and it and the defendants Bloedorn and Gluck filed separate answers to the petition, which, however, are substantially alike, and each of which contained two defenses which may be briefly stated as follows: First, that the conveyance and bill of sale of the plaintiffs were void because they were executed by D. J. Maher without the actual knowledge, consent, or concurrence of his partner, who was then temporarily absent from Platte Center, and that they had for that reason on the second day thereafter been expressly repudiated and attempted to be rescinded by the said Martin Maher; and second, that the bill of sale and transfer were void because they had been obtained from Daniel J. Maher by means of duress, it being alleged that Van Brunt, in order to obtain the same, said to said Daniel J. Maher that the latter had been guilty of a criminal offense in incurring of the indebtedness in consideration for which the same was given, and in having given the plaintiffs a check for the sum of $700 upon a bank in which Maher or Maher & Co. had no moneys, and in making false property statements to plaintiffs upon which plaintiffs had been induced to sell and deliver goods to the firm upon credit, by means of which Maher had become lia-

ble to arrest and imprisonment in the penitentiary, and that unless he immediately executed and delivered to the plaintiffs the bill of sale, and delivered to Van Brunt, for the plaintiffs, possession of the property, he, Maher, would be arrested and prosecuted for the alleged criminal offenses, and convicted thereof, and sent to the penitentiary. The court, at the conclusion of the trial, instructed the jury that Maher, under the circumstances, as managing partner, had authority to convey the property in controversy to the plaintiffs, for and in the name of D. J. Maher & Co., either to satisfy or secure the indebtedness of said firm to the plaintiffs, providing that the transfer was in good faith and without any intent to hinder, delay, or defraud the other creditors of said firm or his copartner, Martin Maher, of which there was no allegation or proof. So that this feature of the case may be regarded as having been disposed of by the court, and not to have been considered by the jury, and may be properly laid out of consideration in this court. The bill of sale and transfer to the plaintiffs, in other words, are, for the purpose of this argument, to be treated as valid unless the same are subject to be avoided by reason of the alleged duress.

On the trial of the cause the court instructed the jury as follows:

"1. That said D. J. Maher, as managing partner, had authority to convey the property in controversy to plaintiffs for and in the name of D. J. Maher & Co. either to satisfy or secure the indebtedness of said firm to plaintiffs, providing said transaction was in good faith and without any intent to hinder, delay, or defraud the other creditors of the firm or his copartner, Martin Maher, and cannot be set aside or annulled on the sole ground that the said Martin Maher was not present and did not personally join in, or consent to, such conveyance.

"2. If plaintiffs have any cause of action in this case it is against both defendants Bloedorn and Gluck for the

full amount of their, plaintiffs', interest in the property in controversy.

"3. The instrument, by virtue of which plaintiffs claim, purports to be a bill of sale and is in due form of law, and if executed and accepted in good faith as explained in the last paragraph hereof will entitle them to recover.

"4. You are charged, however, that if the written conveyance referred to was procured from said D. J. Maher by means of duress it would not be in good faith as the term is here used, but on the contrary would be voidable; that is, the said D. J. Maher and Martin Maher might in such case disaffirm the contract in question by any act which would clearly indicate an intention on their part to disaffirm and repudiate the aforesaid contract; and a notice to Mr. Van Brunt on the 16th day of May following the conveyance to plaintiffs that they elected to disaffirm said contract would be sufficient evidence of a disaffirmance, provided that you find that said contract was procured by duress as here explained.

"5. The burden of the proof is upon the defendants upon the question of duress; that is, the presumption of law is that the conveyance of the property to plaintiffs was the voluntary act of said D. J. Maher, hence in order to find that said conveyance was procured by duress the defendants must satisfy you by proof and a preponderance of evidence that at or a short time previous to the execution thereof plaintiffs' agent or attorney had threatened said D. J. Maher with arrest and prosecution for an alleged crime, and that the threats so made, if any were in fact made, must have been of such a character as to naturally overcome the mind and will of a person of ordinary firmness and deprive him for the time being of the power of mind and will to resist the demand by the person making such threats.

"6. You are also charged that the threatened injury, in order to amount to duress, must be immediate. By a mere threat to prosecute the witness Maher at some indefinite

time in the future, particularly if he, Maher, at the time knew the person making such threat had no present means of carrying it into execution by actually taking him into custody, and he still had within his own knowledge the power and opportunity to make a defense to such threatened prosecution, the contract in question cannot be avoided, set aside, or disaffirmed on the ground that it was procured by duress.

"7. There is still another question of fact in this case. You have noticed that evidence has been offered tending to prove that the instrument of conveyance executed by D. J. Maher, for and in the name of D. J. Maher & Co., was intended merely as a security for the amount due and owing plaintiffs—in short, that, according to the intention of the parties, it was in effect a mortgage only, and you are required to find whether it was intended as an absolute sale of the property conveyed to plaintiffs or merely a security.

"8. If you find from the evidence that the agreement between D. J. Maher and Van Brunt on the 14th day of May, 1888, was that plaintiffs should take possession of the goods conveyed and satisfy their claim of $1,201 and turn over or account to D. J. Maher & Co. or their creditors any balance remaining, the transaction would in law be merely a mortgage and not a sale."

In our view, one partner, where there is no sufficient reason for making the sale, cannot sell the whole firm property without consultation with or consent of his copartner. If, however, the firm is insolvent, one partner may, in a proper case, sell or execute a mortgage upon the stock to secure a *bona fide* debt of the firm. In *Sullivan v. Smith*, 15 Neb., 476, this rule was applied to a conveyance of real estate where one of the partners had absconded. This question seems to have been fairly submitted to the jury.

There was some testimony tending to show duress, and it thus became a question of fact for the jury. The instructions on that question submit the question fully and

fairly and the verdict is not against the weight of evidence. There is no error apparent in the record and the judgment is

AFFIRMED.

NORVAL, J., concurs.

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

THOMAS VINCENT V. STATE OF NEBRASKA.

FILED SEPTEMBER 26, 1893. No. 3150.

1. **Homicide:** RULINGS ON ADMISSION OF TESTIMONY: BILL OF EXCEPTIONS: REVIEW. Certain assignments of error in this case not considered, for the reason the alleged rulings were not preserved by a bill of exceptions.
2. **Supreme Court:** JURISDICTION: NEW TRIAL. The supreme court has no original jurisdiction or authority to vacate a judgment and grant a new trial in a cause tried and determined in a district court. The jurisdiction of this court to grant a new trial in such case is appellate only.
3. **Homicide:** EVIDENCE OF GOOD CHARACTER: INSTRUCTIONS: REVIEW. It is reversible error to instruct the jury in a criminal case that "evidence of good character is entitled to great weight when the evidence against the accused is weak or doubtful, but is entitled to very little weight when the proof is strong," as it invades the province of the jury. It is for them, and not the court, to determine what weight shall be given to evidence of good character.

ERROR to the district court for Custer county. Tried below before HAMER, J.

C. W. McNamar, for plaintiff in error.

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

NORVAL, J.

Plaintiff in error was tried in the court below upon an information charging him with the murder of one Enoch Young. There was a verdict of guilty of murder in the second degree, and the accused was thereupon sentenced to confinement in the penitentiary for the period of twenty-four years. To reverse said judgment he brings the case to this court.

The first, second, third, and fourth assignments in the motion for a new trial and in the petition in error are based upon certain alleged rulings of the trial court on the admission of testimony. These alleged errors cannot be reviewed by this court, for the reason there is no bill of exceptions in the case, and there is nothing to show whether any objections were made in the trial court to the introduction of the testimony complained of. For the same reason the fifth, sixth, seventh and ninth assignments of error cannot be considered. Since there is no bill of exceptions we cannot know whether the official stenographer read to the jury part of the evidence of the state's witnesses, or whether witnesses were called and examined by the county attorney, when introducing his evidence in chief, whose names were not indorsed on the information, or whether the jury were allowed to separate after they had retired to consider their verdict, or whether the verdict is contrary to the evidence.

It appears from numerous affidavits filed in this court that the reason the evidence taken on the trial and the rulings of the trial court were not preserved by a bill of exceptions is on account of the inability of Mr. Neevs, the official stenographer, to take down all the testimony and proceedings of the court, or to read and transcribe his notes. For this reason we are asked to grant a new trial, and the case of *Curran v. Wilcox*, 10 Neb., 449, is cited as authority in support of the contention of plaintiff in error.

It was there decided that in a proper case a new trial will be granted a party who, without fault on his part, is deprived of a bill of exceptions, by reason of the court reporter failing to make a transcript of the oral proceedings of the trial within the time limited by law. We do not question the soundness of the doctrine there laid down, but it is not an authority here. In that case a petition was presented to the district court praying a new trial on the ground above stated, which application was denied. On error to this court, the decision of the district court was reversed and set aside. In the case we are considering, no application for a new trial was made to the trial court on the ground of the inability of plaintiff in error to obtain a transcript of the testimony. Had such an application been made to that court, and the same had been by it refused, then we could have reviewed the decision. The supreme court has no original jurisdiction or authority to vacate a judgment and grant a new trial in a cause tried and determined in a district court. Its jurisdiction in such matter is appellate only. (*Paulson v. State*, 25 Neb., 347.)

Complaint is made of the instruction of the court relating to evidence of good character of the accused. The instruction to which objection is made reads as follows:

"13. Evidence of good character is entitled to great weight where the evidence against the accused is weak or doubtful, but is entitled to very little weight when the proof is strong."

This instruction invaded the province of the jury and was highly prejudicial to the defendant. A person accused of a crime may on the trial introduce evidence of his good character, no matter how heinous the offense charged, or how strong the evidence may be against him, and when such evidence is before the jury, it is their duty to give it such weight as they believe it entitled to. It is for them, and not the court, to say what importance should be given to evidence of good character. Instructions substantially

the same as the one above quoted, which were given in other cases, have been condemned by this court. (See *Long v. State*, 23 Neb., 33; *Johnson v. State*, 34 Id., 257, 51 N. W. Rep., 835.) Controlled by these views, we are obliged to reverse the judgment of the court below.

REVERSED AND REMANDED.

THE other judges concur.

M. R. SMITH ET AL. V. N. H. JOHNSON ET AL.

FILED SEPTEMBER 26, 1893. No. 5138.

1. **Ruling on Motion for New Trial: FINAL ORDER.** An order denying a motion for a new trial is not final in such a sense as to constitute a final judgment, nor is a mere judgment for costs.
2. **Review Before Entry of Final Judgment: ERROR PROCEEDINGS: DISMISSAL.** The rulings of the district court cannot be reviewed in this court before final judgment has been entered upon the merits of the case in the court below.

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

Dryden & Main, for plaintiffs in error.

Greene & Hostetler, contra.

NORVAL, J.

This was an action by M. R. Smith and Alfretta Smith against the defendants in error to recover for the conversion of certain personal property. There was a trial to a jury, which resulted in a verdict for the defendants. Plaint-

iffs filed a motion for a new trial, which was overruled by the court. The journal entry in the case reads as follows:

"Now, on this 30th day of March, 1891, this cause coming on for hearing upon the petition for a new trial, filed herein by the plaintiff, the court in consideration thereof, and being fully advised in the premises, does overrule the same, to which ruling of said court the plaintiffs except, and the exception is allowed by the court, whereupon the court enters up judgment against the plaintiffs for costs of this action, taxed at $36.23."

This is not a final judgment upon the merits of the case, but is merely a judgment for costs. An order denying a motion for a new trial is not a final judgment, although, if erroneous, the error may be made available on a review of the case in the appellate court, after final judgment has been given in the action. The rule is that an order of a court is not final in such a sense as to constitute a final judgment, unless it disposes of the entire case. There is nothing to prevent the court below from changing its ruling. It may yet set aside the verdict of the jury and grant the plaintiffs a new trial. (*Sprick v. Washington County*, 3 Neb., 253; *Nichols v. Hail*, 5 Id., 194; *Riddle v. Yates*, 10 Id., 510; *Gapen v. Bretternitz*, 31 Id., 302; *Stone v. Neeley*, 34 Id., 81.) Inasmuch as no final judgment has as yet been entered, the petition in error is

DISMISSED.

THE other judges concur.

I. SMITH & SON COMPANY, APPELLANT, V. LOIS C. PARSONS ET AL., APPELLEES.

FILED SEPTEMBER 26, 1893. No. 4695.

1. **Mechanics' Liens: WAIVER BY ACCEPTANCE OF NOTE.** The acceptance by a mechanic or material-man of the note of the debtor, or of a third person, for the amount of the debt maturing within the time fixed by statute for the enforcement of a mechanic's lien, is not alone sufficient to raise any presumption of the extinguishment of the original debt, or of the abandonment or relinquishment of the statutory right to a lien, but an agreement must be shown that it should have that effect.

2. ———: ———. Where a person entitled to a mechanic's lien expressly agrees to and does accept a note of a third person in full discharge of the amount due, he thereby abandons his lien.

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

W. S. Morlan, for appellant.

C. C. Williams and *A. F. Parsons, contra.*

NORVAL, J.

The plaintiff prosecutes this action to foreclose a mechanic's lien upon real estate held by the defendant, Lois C. Parsons, under and by virtue of a contract of purchase made with the Lincoln Land Company. The premises constitute the homestead of the said Lois C. and her husband, Albert F. Parsons. The Lincoln Land Company, the Parsons, and also all persons claiming mechanics' liens upon the property, were made defendants. Plaintiff furnished materials for the erection of a dwelling upon the real estate in controversy, and afterwards perfected its lien by filing a duly verified account of the materials so furnished in the office of the county clerk of Perkins county. The Parsons

answered, setting up as a defense that the plaintiff waived the statutory lien by the acceptance of the note of the defendant, Albert F. Parsons, in full payment of the debt secured by said lien. The court found that plaintiff accepted and received said note in full discharge and payment of said lien and debt. Upon the facts so found, it was adjudged that the property was not subject to a mechanic's lien in favor of the plaintiff.

That Mr. Parsons executed and delivered his note to the plaintiff, calling for $612.65, and that said sum covered the amount for which a lien was asked, and also a small account for coal, is undisputed. It was stipulated on the trial that plaintiff is entitled to a foreclosure for the amount claimed in the petition, unless the right to a lien was discharged by the taking of the note above alluded to.

It will not be presumed, from the mere acceptance by a mechanic or material-man of the note of the debtor, or of a third person, for the amount of the debt maturing within the period allowed by statute for the bringing of a suit to enforce a mechanic's lien, that the same was taken in payment of the debt; but in the absence of any proof upon the subject the presumption is that it was not so taken, and that it was not intended to operate as an abandonment or relinquishment of the statutory right to a lien. (*Milwain v. Sanford*, 3 Minn., 92; *Poter v. Talcott*, 1 Conn., 359; *Goble v. Gale*, 7 Blackf. [Ind.], 218.)

It was decided in *Hoagland v. Lusk*, 33 Neb., 376, that a mechanic's lien for materials furnished for the erection of a building under a contract with the owner is not waived by the acceptance of the promissory note of the debtor secured by a chattel mortgage, unless such was the intention of the parties. It is plain that the taking of distinct security is not inconsistent with an intention that the lien given by the statute shall also be enforceable, as both kinds of security may exist at the same time. As between the parties, the question of waiver is largely one of intent.

There can be no doubt, upon principle as well as authority, that the acceptance by the creditor of the promissory note of a third person, in pursuance of an agreement or understanding that the same should be received as a payment and discharge of the original demand, waives the lien. (Phillips, Mechanics' Liens, sec. 275; *Crooks v. Finney*, 39 O. St., 57; *McCoy v. Quick*, 30 Wis., 530.) The burden of proof is upon the debtor to show, by clear and convincing proof, that the creditor so agreed. (*Merrick v. Boury*, 4 O. St., 60; *Leach v. Church*, 15 Id., 169.)

Applying the foregoing principles to the facts before us, how stands the case at bar? The testimony in the record bearing upon the question of waiver is conflicting. It would be unprofitable to discuss at length the evidence, or to set out the same in detail in this opinion. A brief reference to the testimony of the principal witnesses will be sufficient. Mr. Parsons testified, in substance, that a few days before the taking of the note he had a conversation with one B. H. Smith, the secretary and treasurer of plaintiff, in regard to the payment of the lien; that during this talk it was agreed between them that witness should give his note in full satisfaction of the debt secured by said lien; that at said time Mr. Smith informed witness that plaintiff had filed a mechanic's lien but did not desire to foreclose it, stating, further, "We don't want to put you to the trouble, and if you will give us a note in payment of that claim it will save us that trouble and we will not have to do it, and will be relieved from that necessity." Mr. Parsons further testified that a few days after said conversation he gave his note to plaintiff in pursuance of said agreement. There is some other testimony in the record, although it is meager, which tends to corroborate the witness Parsons. B. H. Smith testified, expressly denying having any such conversation with Mr. Parsons, and further that it was never agreed or understood between the parties that Parsons should give his note in satisfaction of

the debt, but that the same was taken for the sole purpose of showing that the account for materials which went into the construction of the house was correct. It was the province of the district court to decide upon the conflicting testimony. This court invariably refuses to molest the findings of the trial court on questions of fact, unless they are manifestly against the clear preponderance of the testimony. This rule has been stated so frequently that it has become trite. We consider the finding of the trial court was justified by the evidence, and the judgment is

AFFIRMED.

THE other judges concur.

G. W. HOLLEMBAEK ET AL. V. GEORGE H. DRAKE ET AL.

FILED SEPTEMBER 26, 1893. No. 6293.

1. **Liquors**: APPLICATION FOR LICENSE: REMONSTRANCE: VILLAGE BOARD: JURISDICTION: ORDER FOR HEARING. Due notice having been published for the full time fixed by the statute, precedent to the hearing of an application for a license to sell liquors, the village board, before which such application is pending, has jurisdiction of the subject-matter, and in case a remonstrance has been filed within the statutory time, should fix an hour of some subsequent day for hearing the application and remonstrance.

2. ———: ———: ———: ———: TIME OF HEARING BY CONSENT. After a village board has jurisdiction of the subject-matter of an application to sell liquors, and the time has fully expired for filing a remonstrance, and one has been filed, the petitioners and remonstrators may consent to a hearing at as early time as they choose, and in such case cannot be heard to allege that such hearing was premature.

3. ———: ———: HEARING BEFORE VILLAGE BOARD: JUDICIAL

ACTS: REVIEW. In considering whether or not a license to sell liquor should be granted, a village board acts in a judicial capacity, and its refusal to hear competent testimony relevant to objections made in remonstrance against the granting of such license, presents a sufficient reason for the reversal of an order granting a license.

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

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

Murphy & Le Hane, contra.

RYAN, C.

On the 12th day of May, 1893, one of the plaintiffs in error, George C. Ferguson, filed with the clerk of the board of trustees of the village of Odell the petition of thirty-four persons, asking that a license be granted to said Ferguson to sell spirituous, vinous, and malt liquors in said village for the municipal year ending April 30, 1894. A notice of the filing of said petition was published in a newspaper printed and published in said village, the first insertion being May 12, followed by another on the 19th of the same month, concluding with still another publication in the same newspaper the 26th of May, all in the year 1893. Section 2, chapter 50, Compiled Statutes of Nebraska, provides that "no action shall be taken upon said application until at least two weeks' notice of the filing of the same has been given by publication in a newspaper published in said county," etc.

It seems that in this particular case another notice was also posted on May 24, calling attention to the application aforesaid and fixing the 27th of May as the date when a hearing would be had. Contention is made that this should be taken into consideration in some way, but why, is not clearly defined. The notice given in the newspaper had been given for two weeks with the expiration of May

26. If no remonstrance was filed a license might have been granted on the 27th. There was, however, such a remonstrance filed on the 26th, and it came up for consideration on the 27th of May at 9 o'clock in the forenoon, the time fixed in the published notice. At this time the remonstrators were present by their counsel, and the further hearing was adjourned until 6 o'clock P. M., when it was again postponed until 7 o'clock P. M. There was at this time a hearing and argument, upon which the remonstrance was overruled and a license was granted.

It is now urged that no hearing could properly be had on the 27th, and this is insisted upon as having been settled in *State v. Reynolds*, 18 Neb., 431. Between that case and the one under consideration there is a most marked difference. In the hearing before the council upon the application covered in *State v. Reynolds, supra*, the license was granted at the first meeting after the full notice had been given, without allowing an opportunity to remonstrators to adduce evidence. In this case evidence was heard, and upon this evidence and the argument of counsel the question of granting a license was considered and determined. There seems to have been acquiescence in this procedure by the remonstrators, and no objection raised as to the time of hearing until after the final decision adverse to the remonstrators. Had time for offering evidence in support of the averments of the remonstrance been asked, it would have been the duty of the board to have granted it, and to have fixed a reasonable time for the purpose. Indeed, it is doubtful whether less than an affirmative waiver of further time would relieve the village trustees of the duty of fixing such reasonable time in advance of the proposed hearing. After the two weeks' notice had been given, however, the village board had jurisdiction to pass upon the application, in view of such remonstrance as may then have been filed. Until the expiration of the time specified for giving notice it could not be known who might wish to

resist the application. The time having fully expired, however, all possible adverse parties were before the board, whose duty it was to fix a time for trial. This time should have been reasonably sufficient to permit the production of evidence. What is a reasonable time of course depends upon circumstances, a hearing upon the same day with the first consideration of the remonstrance, ordinarily, not being deemed proper. Where, however, as in this case, the contesting parties appear after the board has acquired jurisdiction, and without objection voluntarily proceed to trial and the final determination of the question at issue before the village board, it is too late to complain of a premature hearing.

The remonstrance was based largely upon the averments that the applicant was not in good faith applying on his own account, but to enable one Truxaw to operate a saloon in Odell; that by reason of the said Truxaw having violated the law the year before when he had a license by selling liquor to minors and habitual drunkards, and to others on Sundays and on general election days, and by keeping a gambling house, that said Truxaw was disqualified to obtain a license in his own proper name for selling liquors for the municipal year ending April 30, 1894, and that he had procured Ferguson to make the application with the object of himself operating a saloon in the name of Ferguson, and that, to that end, he had been largely instrumental in procuring signatures to the petition of Ferguson. Evidence directly competent to prove a material part of these allegations was tendered and rejected, upon what theory we are unable to conjecture. The same course was taken as to other averments of the remonstrance, though not with the same recklessness as upon the branch just referred to. In this trial there was, however, a sort of consistency toward both parties, for the board refused to hear any evidence that the proposed vendor of liquors was a man of good moral character. The board seems, from its conduct,

to have been elected as a license board, and each trustee appears to have assumed that the matter of granting a license had been settled in advance by his own election. It is a matter of serious regret that proceedings of this nature should assume such shape. At best, the liquor question is one that seems almost incapable of a satisfactory solution. Absolute prohibition has been attempted by some states; one commonwealth, to effectively control the traffic, has itself monopolized it entirely. In this state, regulation is sought by requiring that the business be conducted only by a person of respectable character and standing, backed by the petition of a majority of the resident freeholders of the precinct or village in which it is proposed to license the saloon, and held in check by a bond to observe faithfully the several provisions of the statute upon that subject. To the board of villages is entrusted the duty of determining the existence of these necessary safeguards precedent to granting a license, and that duty should be performed with absolute impartiality to all parties concerned. The range of inquiry is very extensive, and all evidence competent to prove or disprove the applicant's right to a license should be received, made a matter of record, and judicially considered by the village board. Whatever result may be reached, the evidence should appear so that a full and fair review may be had in the district court if either party feels aggrieved by the decision of the board. This cannot be done if competent testimony is arbitrarily excluded, and in such case the action of the village board should be reversed. In the case under consideration the course indicated as proper has not been pursued, and in view of this fact it is ordered that the judgment of the district court, and the decision of the village board of Odell, be and hereby are reversed, and that this cause be remanded to the district court of Gage county, with directions to remand the same to said village board, with instructions to that body to hear the remonstrance anew, receiving the evidence offered by

either party, after due notice of the time of hearing to both parties.

REVERSED AND REMANDED.

THE other commissioners concur.

CYRUS E. KITTELL V. PETER JENSSEN.

FILED OCTOBER 3, 1893. No. 4535.

Ejectment: BOUNDARIES: LOCATION OF GOVERNMENT CORNER: EVIDENCE: INSTRUCTIONS. Where a government corner between two adjoining land-owners has been obliterated, the exact location of the corner may be determined by the jury from the evidence in an action of ejectment, and it is unnecessary first to establish the corner by an action in equity.

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

C. H. E. Heath, for plaintiff in error.

Nightingale Bros., *contra*.

MAXWELL, CH. J.

This is an action of ejectment. The dispute is in regard to a triangular piece of land containing two acres. The plaintiff owns the northeast quarter of section 33, township 14, range 13 west, and defendant owns the northwest quarter of section 34, in the same town and range, and therefore adjoining plaintiff's land on the east. The government corner lying between the two tracts on the north line is not in dispute, but only the one on their south line. Plaintiff contends that his southeast corner, which should be identical with defendant's southwest corner, is lost; and

he accordingly procured the county surveyor to locate it. The county surveyor ran a straight line north and south from the section corner on the north, which is conceded to be a government corner, to the section corner directly south, which is also conceded to be a government corner, and divided the distance equally, and placed a stake. The defendant contends that a stake with witness holes lying four rods south of the stake set by the county surveyor is the actual corner; that this monument existed and was plain to be seen when he first occupied the land, about five years before the commencement of this suit; that the original government corner disappeared, but he replaced it with another; that he has kept the witness holes renewed and has always been able to identify the location of this government corner from its relation to artificial land marks, such as plowing. Defendant's testimony is corroborated by four of his neighbors, who are all old settlers. Plaintiff and his brothers deny that this is the original government corner, and claim that it is lost. The county surveyor says that the stake is not a government stake. He admits that the government survey is very irregular and inaccurate in that locality, and that the stake with witness holes, which defendant claims is the true government corner, does not deviate from a correct survey as much as some other government corners in the county.

Objection is made to the third instruction, which is as follows: "If the missing government corner is lost and the testimony does not establish its location by a preponderance of evidence, you cannot find for the plaintiff until the lost corner has been legally established under the order of the court by a legal proceeding begun for that purpose." The instruction is clearly wrong. The fact that the corner is obliterated does not affect the plaintiff's right to recover all the land owned by him. He may prove the proper location of the corner by any competent evidence. The question for determination is the exact location of the cor-

ner as established by the government surveys. This is a question of fact for the jury to find from the evidence, and this may be proved in an action of ejectment. It is unnecessary to review the other errors assigned. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. MARSHALL L. SCOTT, V. JOHN CUNNINGHAM ET AL., COUNTY COMMISSIONERS OF SAUNDERS COUNTY.

FILED OCTOBER 3, 1893. NO. 6296.

Counties: BRIDGE CONTRACTS: MANDAMUS. Where the cost of a county bridge exceeds $100, contracts for the erection of the same must be let to the lowest competent bidder after due advertisement stating the general character of the work.

ORIGINAL application for *mandamus*.

Good & Good, for relator.

MAXWELL, CH. J.

This is an application for a *mandamus* to compel the county board of Saunders county to cancel a certain contract for the building of bridges with one Lillibridge and again advertise for bids for the construction of bridges in said county. It is alleged in the relation that "the plaintiff, for his cause of action against the respondents, shows to the court that he is a citizen and taxpayer of Saunders county, Nebraska, and has so been for more than two years

last past; that the respondents, and each of them, are the duly elected, qualified, and acting commissioners of Saunders county, Nebraska, and have so been for more than one year last past, except the respondent Malloy, who has been such qualified and acting commissioner of said county since the 5th day of January, 1893; that in the month of January, and on or about the 25th, 1893, the respondents Cunningham, Lehr, and Malloy, who then constituted the board of county commissioners of said Saunders county, caused a notice for bids for the construction of pile bridges in Saunders county for the year 1893 to be published in the *New Era*, a newspaper published in and of general circulation in said county, which notice was as follows, to-wit:

"'NOTICE TO CONTRACTORS.

"'Sealed proposals will be received at the office of the county clerk of Saunders county, Nebraska, until noon on the 7th day of March, 1893, for the furnishing of all material and labor necessary for the completion of all pile bridges, twenty feet long and over, that are to be built during the year 1893 in the county. Said bridges to be constructed of white or burr oak, except the railings which shall be of pine, and the joists must be of long leaf pine. All materials must be of the best quality. All piling must be of white or burr oak and of necessary length for the respective bridges, and not measure less than ten inches in diameter in center of length when twenty-six feet or less in length, and when more than twenty-six feet in length must measure fourteen inches in diameter in center of length, and must be three piles to the bent. Said bids must be on fourteen-foot roadway, and must state the price per lineal foot. Each bid must be accompanied by plans and specifications or the same will not be considered.

"'The board of county commissioners reserve the right to reject any and all bids. No bid will be considered that is not accompanied by a certified check in the sum of $200

as evidence of good faith on the part of the bidder. The party receiving the contract to execute a good bond in the sum of $2,000 for the faithful performance of the same. All proposals should be addressed to W. O. Rand, county clerk, and marked "Proposals of bridge builders."

"'By order of the county commissioners of Saunders county, Nebraska, Wahoo, Nebraska, January 25, 1893.'

"That in pursuance to said notice your relator, on the 7th day of March, 1893, filed with W. O. Rand, county clerk of said county, and in his office, a bid to perform such work and build such bridges, accompanied by plans and specifications and a certified check for $200; * * * that one C. E. Lillibridge, on the 7th day of March, 1893, also filed with said clerk of said county a bid to build such bridges, accompanied by plans and specifications and certified check for $200, and a duly certified copy of such bid; * * * that there were no other bidders for the building of said bridges filed except the one filed by your relator and the said C. E. Lillibridge; that the bid to do and perform such work made by your relator was for the sum and at the rate of $3.93 per lineal foot and that the bid of the said C. E. Lillibridge was to do and perform such work at the rate of $4.00 per lineal foot; that the bid of your relator was the lowest and best bid, and that your relator was the lowest competent bidder for such work to be performed; that, notwithstanding the fact that your relator was the lowest competent bidder for such work, the respondents did, on the 14th day of March 1893, award the contract for the building of said bridges to the said C. E. Lillibridge, well knowing that he was not the lowest competent bidder therefor, and have entered into a contract with the said C. E. Lillibridge for the building of said bridges as required by the said notice printed as aforesaid; that a duly certified copy of all the proceedings of the respondents as county commissioners of said county is hereto attached; * * * that such certified copy contains all the

records of the proceedings of the said county commissioners that in any manner relate to the letting of said contract to said Lillibridge as aforesaid; that a duly certified copy of the contract entered into by and between the said county commissioners and the said C. E. Lillibridge as aforesaid is hereto attached; * * * that said contract so entered into as aforesaid was not legally entered into and is of no legal or binding force upon the said Saunders county for the reason that the same was not let to the lowest responsible bidder, nor to the lowest competent bidder, as required by law, and for the further reason that no sufficient notice for bids was ever published as required by law, in that said notice so published does not specify the number of bridges to be built, the length thereof, or their location, and does not call for separate bids upon each bridge to be built; that your relator was willing, ready, and competent to enter into a contract with the said commissioners for the building of said bridges, and was and has been ready and willing to tender to the said commissioners a good and sufficient bond with good and sufficient securities in the amount required by law, and to do and perform all things necessary to the entering to said contract with the said commissioners as required by law; that your relator has made a written demand upon the said respondents to cancel the said contract with the said Lillibridge, and set the same aside, and to advertise for new bids for the construction of such bridges as required by law, * * * but that the said respondents have failed, neglected, and refused to so cancel said contract with the said Lillibridge, and failed, neglected, and refused to again advertise for bids for the construction of such bridges."

A copy of the several propositions and contracts is set out in the record and need not be referred to here as the principal question is the sufficiency of the advertisement for bids.

Section 83, chapter 78, Compiled Statutes, is as follows:

"All contracts for the erection and reparation of bridges and the approaches thereto, for the building of culverts and improvements on roads, the cost or expense of which shall exceed $100, shall be let by the county commissioners to the lowest competent bidder, but no contract shall be entered into for a greater sum than the amount of money on hand in the county road fund derived from the levy of previous years and two-thirds of the levy for the current year, together with the amount of money in the district road fund of the district where such work is to be performed; and every bidder, before entering on any work pursuant to contract, shall give bond to the county with at least two good and sufficient sureties in any sum double the amount of the contract, which bond shall be approved by the county commissioners, conditioned for the faithful execution of the contract."

Sec. 84 provides, "Before any contract as aforesaid shall be let, the county commissioners shall advertise for bids therefor, and shall require bidders to accompany their bids with plans and specifications of their work, and they may accept the most suitable plan and award the contract accordingly, or may reject any or all bids."

Sec. 85 provides, "Such advertisement shall state the general character of the work and shall be published four consecutive weeks in some newspaper printed and of general circulation in the county; and if there be no newspaper printed in the county, then such advertisement shall be published in some newspaper of general circulation therein. Where the cost of the work exceeds $500, such advertisements shall also be published four consecutive weeks in some newspaper printed in and of general circulation throughout the state."

It will thus be seen that the advertisement wholly fails to comply with the statute. Where the cost of a bridge exceeds $100, the contract for that bridge is to be let to the lowest competent bidder. This requires the adoption

of some plan so that bidders may bid against each other, in order that there may be competition. In the case at bar no doubt the county board acted honestly in letting the contract in the way they did, but it fails to comply with the statute and admits of favoritism. The statutory mode, therefore, must be pursued. The writ must therefore be granted as prayed.

WRIT ALLOWED.

THE other judges concur.

THOMAS L. MESSICK V. RACHEL WIGENT ET AL.

FILED OCTOBER 3, 1893. No. 4764.

Summons: TIME OF SERVICE: FORCIBLE DETAINER: JURISDICTION OF COUNTY COURT. A summons in an action of forcible detainer, issued and served three days prior to the day appointed for trial, including the day of service, is sufficient to confer jurisdiction over the person of the defendant.

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

E. J. Clements, for plaintiff in error.

A. Norman, *V. H. Stone*, and *E. M. Coffin*, *contra*.

NORVAL, J.

This is an action of forcible detainer brought by defendants in error in the county court. A summons was issued on December 24, 1890, returnable on the 27th day of the same month at 10 o'clock A. M., which was served on the day of its date. On the return day the defendant

made a special appearance, objecting to the jurisdiction of the court over his person, for the reason that the summons had not been issued and served three days before the day of trial. The objection was overruled, and the defendant refusing to appear further, judgment of ouster was rendered against him. The district court affirmed the judgment.

It is claimed that the summons was not issued and served a sufficient length of time prior to the day of trial. A similar question was presented to this court and considered in *White v. German Ins. Co.*, 15 Neb., 660, and it was there held that in an action before a justice of the peace, where the summons is served three days before the time set for trial, including the day of service, it is sufficient to confer jurisdiction. That decision was based upon section 911 of the Code, which declares that "the summons must be returnable not more that twelve days from its date, and must, unless accompanied with an order to arrest, be served at least three days before the time of appearance," etc.

The foregoing provisions control the service of summons in justice courts in ordinary actions. The law governing the issuing and service of summons in forcible detainer cases is found in section 1024 of the Code, which reads as follows: "The summons shall be issued and directed, shall state the cause of the complaint, the time and place of trial, and shall be served and returned as in other cases. Such service shall be three days before the day of trial appointed by the justice." It will be observed that the provisions of the section relating to the length of time the summons shall be served before the trial are substantially the same as those found in section 911 above quoted. It follows that to adopt the construction contended for by plaintiff in error would, in effect, overrule the decision in *White v. German Ins. Co.*, *supra*. That case has been adhered to too long to now change the rule there announced. We therefore hold that a summons in an action of forcible entry and detainer, issued and served three days before the day ap-

pointed for trial, including the day of service, is sufficient to confer jurisdiction. The judgment is

AFFIRMED.

THE other judges concur.

WILLIAM MCKEAN V. LOUIS B. SMOYER.

FILED OCTOBER 3, 1893. No. 4768.

Landlord and Tenant: RIGHT OF LESSEE OUT OF POSSESSION TO CROPS RAISED BY TENANT PENDING FORCIBLE ENTRY SUIT AGAINST THE LATTER: REPLEVIN. Action of S. against M. to recover possession of a quantity of corn which plaintiff had planted, cultivated, and grown during the season of 1889 upon land owned by T. The land on which the corn was grown was in plaintiff's possession when the crop was planted and grown, and had been in his possession for several years prior thereto under a lease from the owner. Defendant claimed the crop by virtue of a lease from T. for the same year, although he neither planted nor cultivated the land. After the corn was planted M. brought a forcible detainer suit against S. before a justice of the peace to obtain the premises and recovered a judgment of restitution, which was taken by M. on error to the district court and there affirmed. The crop was put in before, but raised and matured during the pendency of the forcible detainer action. After the corn was ready to gather, M. took possession thereof and refused to surrender the same to S. Verdict and judgment for S. upheld.

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

The facts are stated in the opinion.

F. E. Brown and *E. F. Warren*, for plaintiff in error:

The judgment of the justice of the peace in the forcible entry and detainer proceeding was conclusive between the parties thereto, and until reversed was final. (*Mitchell v.*

Hawley, 4 Den. [N. Y.], 414; *Bray v. Saaman*, 13 Neb., 518.) McKean had parted with the possession of the goods at the time the action of replevin was brought, and for that reason an action in replevin cannot be maintained. (*Hall v. White*, 106 Mass., 599.) An action of replevin cannot be maintained by a trespasser who sows grain on another's land, and the true owner enters and cuts it. (*Elliott v. Powell*, 36 Am. Dec. [Pa.], 200; *Hooser v. Hays*, 50 Id. [Ky.], 540.) A disseisee cannot maintain replevin for grain sown by him on land of which he has been disseised. (*De Mott v. Hagerman*, 18 Am. Dec. [N. Y.], 443; *Bruen v. Ogden*, 20 Id. [N. J.], 606; *Rich v. Baker*, 3 Den. [N. Y.], 79; Cobbey, Replevin, sec. 381.) Title to land cannot be tried in replevin. (*Page v. Fowler*, 28 Cal., 605.)

Thomas B. Stevenson, contra:

The judgment in the forcible entry and detainer suit, commenced, as it was, after the corn, the subject-matter of the suit, was planted, did not determine the ownership of the crop raised during the time the suit was pending. This was not in issue in that suit, and the defendant in error, having been in the possession of the lands in question from year to year, for a number of years, and having in good faith, with the knowledge of McKean and Talbot, plowed the land, planted and cultivated the corn, is the owner thereof, and entitled to the possession. (*Youmans v. Caldwell*, 4 O. St., 71; *Kinney v. Degman*, 12 Neb., 237.) The principle that a disseisee cannot maintain replevin does not arise in this case, as title to real estate cannot be tried in a justice court, nor in a forcible entry case. (Constitution, art. 5, sec. 18; *Aubrey v. Almy*, 4 O. St., 524.)

NORVAL, J.

The defendant in error brought an action of replevin in the court below against plaintiff in error and one Dexter W.

Green, to recover some corn in the field. On the trial of the case judgment was rendered in favor of Green, but for Smoyer and against McKean. The latter brings the case here on error.

It appears from the record that one Talbot was the owner of the land upon which the corn was grown, and that, for six or eight years prior to the year 1889, Smoyer farmed the land under a lease from the owner from year to year, some years paying grain rent, while others, cash. In the spring of 1889, Smoyer planted the same land to corn, consisting of about thirty acres, and cultivated the same. The crop thus raised is the corn in controversy. Defendant in error claimed the corn by virtue of a lease entered into in the fall or winter of 1888, with Mr. Talbot, the owner of the land, and plaintiff in error claims that Talbot in November, 1888, leased the land to him for the season of 1889, therefore the crop belonged to him. Both parties claim to have leased from the same person, and the matter in controversy is, which one is entitled to the crop.

Plaintiff in error testified upon the trial that on the day of the general election in November, 1888, he leased the land of Talbot for the season of 1889, at a rental of $2 per acre, $5 of which was to be paid at the time, and the remainder on March 1, 1889; that he paid $2.50 down, and tendered to Talbot the balance on March 1, which he declined to receive.

Mr. Talbot's testimony is to the effect that he agreed to lease the land to McKean for $2 per acre, who promised to pay on that day $5 of the amount, and the remainder before March 1, the day the term was to commence; that a receipt for $5 was drawn and signed, but McKean only had $2.50, which he gave Talbot, took the receipt and went away, promising to return and pay the other $2.50 during the day, which he failed to do. Witness further testified that a lease was to have been drawn upon the payment of the $5; that no tender of the remainder of the rent was

made within the time agreed upon, and when tendered, Talbot refused to receive the same, and offered to McKean the $2.50 which had been paid, which offer was refused.

It is uncontradicted that Talbot leased the land to Smoyer for the year 1889, who farmed the ground during that season, and planted, cultivated, and raised the corn taken under the replevin writ. McKean did nothing towards putting in and cultivating the crop, except breaking some of the corn-stalks. After the corn was planted by Smoyer, plaintiff in error brought a forcible detainer suit before a justice of the peace against Smoyer, where he recovered a judgment of restitution. On error to the district court, the judgment in the forcible detainer action was affirmed. There is some conflict in the testimony as to whether a writ of restitution was ever issued and served upon Smoyer. It does, however, appear that McKean, after the crop had matured, entered the premises and gathered some 200 bushels of the corn, which he sold to Green, and refused to allow Smoyer to take the portion remaining ungathered.

We are satisfied, under the undisputed facts, and those established by the clear preponderance of the evidence, that Smoyer was the owner of the corn in question and was entitled to the possession thereof. The land on which the corn was grown was in his possession when the crop was planted and grown, and had been in his possession for several years prior thereto under a claim of right, as the tenant of Mr. Talbot, the owner of the land. McKean was never upon the land, except one day when he attempted to break stalks, until after the crop had been matured, when he entered the premises and gathered a portion of the corn. We do not think the judgment in the forcible detainer suit is a bar to this action. It was conclusive upon the parties as to the right of possession of the land, but the ownership of the crop, which had been planted before that action was instituted, raised and matured during the pendency thereof, was not in issue therein. When Smoyer took the judg-

ment in that suit to the district court for review, he gave a bond, conditioned for the payment of rents in case the judgment should be affirmed. McKean's remedy is upon the bond, or an action for damages against Talbot for breach of lease. He cannot have the crop and recover rent too.

The authorities cited by plaintiff in error, to the effect that a trespasser planting and cultivating a crop on another's land cannot maintain replevin against the owner who has entered into actual possession and harvested the crop, are not applicable to this case. Defendant in error was not a trespasser. He took possession of the land in the utmost good faith with the consent of the owner. Each party claimed to be the tenant of Talbot, and as between them we think the one who did not sow is not entitled to reap.

It is urged that replevin will not lie, as McKean had sold the corn to Green prior to the bringing of the action. The evidence of the sale of the corn to Green is not very satisfactory. There had been delivered only that which had been gathered, about 200 bushels, and nothing had been paid. The corn obtained under the writ was in McKean's possession, and he refused to allow Smoyer to take the same, although requested so to do. An action of replevin is properly brought against the one who unlawfully detains the possession of the property. The judgment is

AFFIRMED.

THE other judges concur.

JAMES D. GAGE ET AL. v. BLOOMINGTON TOWN COMPANY.

FILED OCTOBER 3, 1893. No. 4823.

1. **Review**: FAILURE TO FILE MOTION FOR NEW TRIAL: PARTIES. In an action of ejectment against twenty-three different defendants, Z. and eight others united in an answer signed by W. their attorney, while G. with twelve others by their attorney F. filed an answer alleging a defense different from that stated in the answer of Z. After a finding and judgment for the plaintiff against all of the defendants, a motion for a new trial was filed alleging errors of law occurring at the trial and signed "E. A. F., attorney for defendants." *Held*, In the absence of evidence that F. appeared in the district court for the defendants who joined in the answer of Z., the latter have no standing in this court, and are not entitled to have the judgment reviewed.
2. ———: ERROR PROCEEDINGS: IMPEACHMENT OF JOURNAL ENTRY OF JUDGMENT BY MINUTES OF JUDGE. On proceedings by petition in error to review a judgment of the district court, the minutes of the judge on the trial docket will not be received to impeach the judgment as entered at large upon the journal and approved by the judge.

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

E. A. Fletcher, for plaintiffs in error.

Sheppard & Black, contra.

POST, J.

This was an action by the defendant in error in the district court of Franklin county to recover the west half of the southwest quarter of section 31, township 2, range 14 west, in said county. There were named in the petition twenty-three different defendants, of whom Julia M. Zediker and eight others joined in an answer by their attorney, H. Whitmore, and James D. Gage with twelve others joined

in an answer by E. A. Fletcher, their attorney. These pleadings will for convenience be referred to as the "Gage answer" and the "Zediker answer."

It is alleged, among other things, by the plaintiff below that it is a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska. The Zediker answer consists of a denial in the following language: "The defendants deny that said plaintiff is or ever has been a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska."

The Gage answer consists (1) of a general denial, (2) an allegation that certain conveyances through which the plaintiff claims title were made without consideration, (3) an allegation that The Franklin Town Company, the plaintiff's immediate grantor at the time of the execution of the deed to it, and at the time it attempted to convey to plaintiff was not a corporation, and incapable of receiving, holding, or conveying the title to property of any kind or character.

The reply to each answer is a general denial.

From the transcript filed in this court it appears that a trial was had on the 12th day of December, 1890, which resulted in a finding and judgment for the plaintiff below against all of the defendants therein. On the 19th day of the same month a motion for a new trial was filed, alleging, as grounds therefor, that the finding is against the law and the evidence; also errors occurring at the trial. Said motion is signed "E. A. Fletcher, attorney for defendants."

1. The first proposition argued is that the defendants named in the Zediker answer have no standing in this court, for the reason that they did not join in the motion for a new trial. In that proposition we fully concur. So far as we are informed, Mr. Fletcher appeared in the district court only for the defendants named in the answer signed by him. Since the record fails to disclose the filing of a motion for a new trial by the defendants named, we must as-

sume that they were satisfied with the judgment below, and cannot now complain.

2. It is apparent that the motion of the other defendants was not filed within the time required by law, and was for that reason properly overruled. The provision which requires the motion to be filed within three days from the date of the verdict or finding is mandatory and cannot be enlarged by the court. (*Fox v. Meacham*, 6 Neb., 530; *Roggencamp v. Dobbs*, 15 Id., 620; *Davis v. State*, 31 Id., 242; *McDonald v. McAllister*, 32 Id., 514.) We find in the record, however, a certified copy of the judge's notes as they appear from the trial docket, as follows:

"Dec. 10. Trial.

"Dec. 12. Jury waived and trial to the court. Court finds on issues joined for the plaintiff, and finds that defendant has paid taxes on same in the sum of $15, and that defendant has a lien on premises in question for such sum of $15. Motion for new trial overruled. Defendant excepts. Judgment for plaintiff for possession of land in question, and judgment for defendant Gage for sum of $15. Each party to pay their own costs. Defendant allowed forty days to present his bill of exceptions to adverse party."

Provision is made for a trial docket, which is to be made up by the clerk at least twelve days prior to the first day of each term of court, and in which shall be entered such causes as stand for trial thereat. (Code, secs. 281*a*, 323.) Although it is customary for the judge to enter in the trial docket or calendar notes or minutes of the orders made, such entries are not made pursuant to the requirement of any statute and are not, strictly speaking, parts of the record of the court. They are rather memoranda for the use of the judge and clerk in making up the record. It is provided by section 27, chapter 19, Comp. Stats., entitled "Courts," that the clerk shall keep a record of the proceedings under the directions of the judge, which shall, when the business of the court does not prevent, be made up before

the opening of the next day, and that the first business of each day shall be the reading of the record of the preceding day, and when found correct to be signed in open court. The record therein contemplated, when once made up, is the legal and authentic evidence of the proceedings of the court, and cannot in any appellate proceeding be contradicted or impeached by the entries in trial docket. (*Moore v. Brown*, 10 O., 198; *Keller v. Killion*, 9 Ia., 329; *Hoffman v. Leibfarth*, 51 Id., 711; *Miller v. Wolf*, 63 Id., 233.) The principle of the above cases is distinctly recognized by this court. (*Sullivan Savings Institution v. Clark*, 12 Neb., 578.) As the judgment must be affirmed on the grounds stated, it is unnecessary to consider the other questions presented by the record.

AFFIRMED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. WILL ENSEY, V. W. E. CHURCHILL ET AL., COUNTY COMMISSIONERS, ET AL.

FILED OCTOBER 3, 1893. No. 5775.

1. **County Boards:** EXAMINATION OF CLAIMS: JUDICIAL ACTS: JUDGMENTS. The county board, in the examination of claims against the county, acts judicially, and its judgments or orders in such cases are conclusive unless reversed or set aside on appeal.
2. **Judicial Acts:** OFFICERS: MANDAMUS will not lie to compel officers exercising judicial functions to make a particular decision, or to set aside or vacate a decision already made.

ORIGINAL application for *mandamus*.

Marquett, Deweese & Hall, for relator.

N. Z. Snell, contra.

POST, J.

This is an original application for a writ of *mandamus* to compel the respondents, the county clerk and commissioners of Lancaster county, to issue and deliver to the relator a warrant upon the treasury of said county for the sum of $106, being the aggregate of amounts allowed in his favor by said county board for services as bailiff of the district court for the months of February, March, and April, 1892. An answer has been filed in which the service of the relator as bailiff, and the allowance in his favor by the county board of the sum of $106, is admitted as charged. The refusal to deliver or issue a warrant therefor is justified, however, on the ground that a certificate of the county treasurer had been presented to the respondent from which it appears that there were delinquent personal taxes chargeable to the relator and appearing upon the tax lists for said county for the years 1878, 1879, 1880, 1886, 1887, and 1888, amounting in the aggregate to $78.66, which sum was by the county board deducted from the amount found in his favor. It is further alleged that warrants amounting in the aggregate to $27.34, being the balance due him after deducting the amount of his aforesaid delinquent personal taxes, have been tendered to the relator. The right to deduct delinquent taxes for the years 1887 and 1888, amounting to $3.86, seems to be conceded by the relator, but he denies the right to offset taxes assessed for previous years against his claim, on the ground that the right of recovery therefor is barred by the statute of limitations.

By sections 48 and 49, chapter 18, Compiled Statutes, entitled "Counties and County Officers," it is provided as follows:

"Sec. 48. The county board of any county, whenever the account or claim of any person against the county is

presented to them for allowance, may, in their discretion, procure from the county treasurer a certificate of the amount of delinquent personal taxes assessed against the person in whose favor the account or claim is presented, and may deduct from any amount found due upon such account or claim the amount of such tax and issue a warrant for the balance remaining.

"Sec. 49. For any such delinquent personal taxes, so set off and deducted from any such account or claim, the board shall issue an order to the county treasurer directing him to draw from the same fund out of which said account or claim should have been paid the amount of said delinquent taxes so set off or deducted and apply the same upon the said delinquent personalty taxes in satisfaction thereof, and the said treasurer shall, upon application, receipt therefor to the person whose taxes are so satisfied."

It has been definitely settled by repeated decisions of this court that the county board, in the examination and allowance or rejection of claims against the county, acts judicially, and its judgments or orders in such cases are conclusive unless reversed in the manner provided by law. (See *Brown v. Otoe County*, 6 Neb., 111; *State v. Buffalo County*, Id., 454.) It may be assumed that the statute of limitations had run against the taxes in question, and that the county board should not have deducted the amount thereof from the relator's claim against the county, but that is at most an error for which an adequate remedy exists by appeal.

A rule without exception is that the writ of *mandamus* will not be allowed to compel officers vested with discretionary powers to make a particular decision or to set aside one already made, notwithstanding such decision is erroneous in the sense that it may be reversed upon appeal, writ of error, or other appellate proceeding. (See *State v. Board of Commissioners of Hamilton County*, 26 O. St., 364; *People v. Chapin*, 104 N. Y., 96; *People v. Auditors of Wayne County*, 10 Mich., 307; 14 Am. and Eng. Encyc. of Law,

183, and note.) It follows that the writ of *mandamus* should be denied and the action dismissed.

WRIT DENIED.

THE other judges concur.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY V. CHARLES BROWN ET AL., APPELLANTS, IMPLEADED WITH ROBERT BLACK, APPELLEE.

FILED OCTOBER 3, 1893. No. 5468.

1. **Appeal:** REJECTED EVIDENCE: PRACTICE IN SUPREME COURT. It is not the practice, where cases are brought into this court by appeal, to receive evidence offered by the appellant and rejected by the district court. If evidence material to the issues in an equitable proceeding is rejected by the district court the remedy therefor is by petition in error.
2. ———: ———: ———. If it is within the discretion of this court to receive original evidence in appeal cases, the exercise of such a discretion can be justified only in extreme and exceptional cases, where the injured party is without fault, and would be otherwise without a remedy.
3. **Fraudulent Mortgages:** FORECLOSURE: BONA FIDE HOLDER: BURDEN OF PROOF. One who attempts, in an action against the equitable owner of land, to assert a mortgage executed in fraud of the defendant's rights by the holder of the legal title, is required to show affirmatively that he took such mortgage for value, without notice of the equities of the defendant, relying upon the apparent ownership of the mortgagor.
4. **Evidence** examined, and *held* to sustain the decree of the district court.

APPEAL from the district court of York county. Heard below before BATES, J.

George B. France and *J. D. Pope*, for appellants.

Harlan & Harlan, for appellee.

POST, J.

The plaintiff herein, on the 10th day of January, 1891, commenced in the district court of York county an action for the foreclosure of a mortgage executed by the defendant Brown and wife upon the southeast quarter of section twenty-five, township nine, range one in said county; Thomas Riley, who holds a subsequent mortgage, and Robert Black, who claims adversely to Brown, being joined as defendants. A final decree was subsequently entered for the plaintiff, to which no objection is made; also a finding and decree for Black against the other defendants, from which the latter have appealed to this court.

It appears from the cross-petition of Black that in the year 1882 he held the land in controversy by contract with the Chicago, Burlington & Quincy Railroad Company, and that Brown and wife, the latter being his niece, resided with him thereon; that he was then old and infirm, being seventy-five years of age, and that Brown, by representing to him that it was necessary to procure a loan upon the land to pay off the amount due thereon to the railroad company, induced him to assign said contract to him, Brown, who was younger and more active and better able to attend to it, and who agreed, after procuring the necessary loan thereon, to convey the premises to him by deed, subject to the contemplated mortgage; that on the 1st day of April, 1882, said parties entered into a subsequent agreement to the effect that Brown should retain in his own name the east half of the premises above described, and, as a consideration therefor, pay to Black the sum of $125 per annum during the lifetime of the latter; that in pursuance of said agreement Brown and wife conveyed to Black by warranty deed the west half of the quarter section aforesaid, and on the 20th day of January, 1883, in pursuance of the same

agreement, Brown executed and delivered to him a contract in writing as follows:

"This indenture, made this 20th day of January, 1883, between Chas. Brown, of the county of York, state of Nebraska, party of the first part, and Robert Black, of the county and state aforesaid, party of the second part, witnesseth: That the said party of the first part, for value received, do by these presents grant unto the said party of the second part a lien on the following described real estate, to-wit: The east one-half of the southeast quarter (E. ½ S. E. ¼) of section number twenty-five (25), township number nine (9) north, of range number one (1) west, of the sixth principal meridian, in the county of York and state of Nebraska, containing eighty (80) acres, be the same more or less, for the sum of $125 per year during the natural lifetime of the second party. Said money to be paid on or before the 1st day of January of each year.

"It is hereby further stipulated and agreed that if the said first party shall fail to pay the said party of the second part at the time before stipulated, then the said second party, by giving thirty days' notice, may take full possession of the above described land and use it for his own benefit during the full term of his natural life. And the said party of the second part hereby waiving any notice of such election, or any demand for the possession of said premises.

"The covenants herein shall extend to and be binding upon the heirs, executors, and administrators of the first party, and at the death of the second party this lien shall become null and void.

"Witness the hand and seal of the first party aforesaid.

"CHAS. BROWN. [SEAL.]"

That default has been made by Brown, whereby there is now due upon the agreement, set out above, the sum of $1,250; that, relying upon the honesty and good faith of Brown, he neglected to file the aforesaid deed and contract

for record until the 31st day of May 1888, and that on the 20th day of November, 1886, said Brown, without his knowledge or consent, fraudulently mortgaged the entire quarter section to the plaintiff for the sum of $1,600; that of the proceeds of said mortgage, the sum of $900 was applied to the payment of the mortgage herein first described, and the balance, $700, was converted by Brown to his own use; that said Brown, on the 5th day of April, 1889, without his knowledge or consent, in like manner fraudulently mortgaged said quarter section to the defendant Riley for $786. It is further alleged that by mistake the number of the range was omitted from the deed, whereby Brown conveyed to him the west half of said quarter section, by reason of which the register of deeds refused to file it for record until the 29th day of September, 1890, on which day it was filed and recorded without having been corrected. The petition concludes with a prayer for an accounting and a decree of foreclosure against the east half of said quarter section, and that his, Black's, title to the west half thereof may be quieted, and for general equitable relief.

Brown and wife and Riley join in an answer to the foregoing cross-petition, in which they allege that in the year 1879, Black, for the purpose of inducing Brown and wife to remove from Missouri to York county, agreed with them that if they would board and care for him during his lifetime he would as a consideration therefor deed said property to said Brown; that in pursuance of said agreement the latter removed to York county and took up their residence upon said premises, and that soon thereafter Black made a will in which he devised said property to Brown; that said Black has continuously, since the month of November, 1879, made his home with the Browns, who have, during all of said period, furnished him with boarding, clothes, medicines, and medical attendance; that from the month of March, 1885, until the month of May, 1887, Black's

wife, who was an invalid and required especial care, resided with them, and that the care and money bestowed and expended in behalf of Black and wife is of the value of $3,500. They further allege that the proceeds of the $900 mortgage was all used in the payment of debts owing by Black, except the sum of $80, which was expended for improvements upon the land in question. The concluding paragraph of the answer is as follows:

"That in November, 1886, the mortgage and note sued on in this case were given and the money was obtained for the purpose of improving said land and caring for the said Black; that the said defendant Black is an aged man and requires a great deal of care, and in order to do so this defendant Brown is put to a large expense continually; that the said mortgage in suit was made in accordance with the desire of the said Black, and the said Brown is still caring for the said Black and expects to care for him during his natural lifetime, in accordance with the agreement made between the said Brown and the said Black, and the said Brown has fully paid the said Black for each and every of the land described in the petition, by means of taking care of the said Black and his said wife; but notwithstanding this fact, the said Brown expects to care for the said Black during his natural lifetime and to do and perform the agreement that he has made with the said Black, and, except as hereinbefore expressly admitted or denied, this answering defendant denies each and every allegation in the said answer and the said cross-petition of the said Black contained. Wherefore this answering defendant prays that whatever lien, if any, the said Black may have on said premises may be declared to be no lien, and the title to the said premises may be declared to be in the said Brown, subject to the mortgages of the plaintiff and the defendant Riley, and that this defendant may have judgment accordingly, and in event that this defendant cannot have decree as herein prayed that he may have judgment against the

said Black for the said sum of $3,500, and that the same may be declared to be a lien upon said real estate, subject to the lien of the mortgages above spoken, and for such other and further relief as may be just and equitable."

Riley also filed a separate answer and cross-bill, in which he sets up his mortgage and prays for a decree of foreclosure. A reply was filed by Black in which he admits having made his home with Brown as alleged, and that during a part of said time his wife, now deceased, likewise resided with him upon said premises. But he alleges that Brown has been fully paid for all money expended, as well as board and lodging furnished himself and wife, by his labor on the land during the time in question and by the proceeds of a team, wagon, and harness, and other farming implements and grain turned over to and converted by Brown. He further alleges that Brown has had the use of the west half of the quarter section above described from 1882 until 1891, inclusive of both years, which is worth $160 per year. He also prays for an accounting and judgment, etc.

It is apparent from the above statement that there are two branches of the controversy, viz., (1) questions in dispute between Brown and Black, and (2) questions with respect to the rights of Black as against Riley.

The decree, so far as it relates to the first branch of the case, is as follows:

"The court further finds that on the 20th day of January, 1883, the defendant Charles Brown for value executed and delivered to Robert Black an agreement in writing duly acknowledged, and thereby promised to pay to said Robert Black the sum of $125 per year during the natural life of said Black, and to secure the payment of the said annuity the said Brown granted unto the said Black a lien on the E. ½ S. E. ¼ section 25, township 9 north, range 1 west. Said lien was duly recorded in the office of the county clerk of York county, Nebraska, on May 31, 1888. The

said Brown has not paid said annuity, or any part thereof, whereby said lien has become absolute, and there is due said Robert Black from the said Charles Brown the sum of $400, and said Black is entitled to have his said lien enforced, and the same is the second lien on said E. ½ of said quarter section, subject only to the lien of the plaintiff Phœnix Insurance Company. It is therefore ordered and adjudged by the court that unless the said Charles Brown shall, within twenty days from the entry of this decree, pay, or cause to be paid, to said Robert Black the said sum of $400, that his equity of redemption be foreclosed, and an order of sale shall issue for the sale of said land, and that the proceeds thereof be brought into court to be applied in satisfaction of said claim. It is further ordered and adjudged that the conveyance of the W. ½ S. E. ¼ section 25, town 9, range 1, dated April 1, 1882, whereby the said Charles Brown and wife conveyed by warranty deed to said Robert Black said W. ½ of said quarter section, was absolute, and the title to said land is hereby quieted in said Robert Black as against the said Charles Brown and the said Thomas Riley, and said defendants are hereby enjoined from setting up any claim to said land; to all of which the defendants Brown and Riley duly except, and forty days given to reduce exceptions to writing."

The grounds of Brown's claim at this time to the entire quarter section is not clear from the record, although his version of the reasons for the assignment to him in the first instance of the contracts for the land is reasonable and must be accepted because not seriously controverted. It is, in short, that Black, in order to defeat the claim of his wife, who was then living in the state of Iowa, requested him to procure and hold the legal title to the land. But his explanation of the subsequent conveyance of the west half and the mortgaging of the east half thereof to Black, viz., to prevent it from descending to his heirs in case Black should survive him, is less reasonable. And, in

view of the conflict between the parties, who are the only surviving witnesses to the transaction, the finding of the district court is clearly right. Complaint is made of the excluding of evidence of the value of the support and care furnished for Black and wife. Under the issues presented by the pleadings Brown should have been permitted to prove the value of the care and support supplied by him for the wife of Black. But the offer, so far as it included the support of Black himself, was properly rejected, for the reason that the only contract, express or implied, for the rendering by Brown of the service charged, is the alleged agreement of Black to devise the land by will to him. This agreement, it appears from the answer of Brown, continues in full force and effect, and the will executed in his favor unrevoked. He is, so far as appears from the record, in a position, on the death of Black, to insist upon the conditions of that agreement. It requires no argument to prove that he cannot recover in this action from Black for the same consideration for which he claims the land through the will in his favor.

It is suggested that we should, on this appeal, receive the evidence rejected by the district court and allow an accounting here of all the matters in issue. This was designed as a court of appellate jurisdiction, with the few exceptions enumerated in section 2, article 6, of the constitution. But assuming that we have the power to receive original evidence in cases brought before us by appeal, there is reason to doubt both the wisdom and the propriety of such a practice. If, as argued by counsel, the receiving of original evidence in such case is within the discretion of the court, the exercise of that discretion can be justified only in extreme and exceptional cases in order to prevent a certain failure of justice. In this case the appellant Brown has little reason to complain. The rejection by the district court of his cause of action for caring for the wife of Black, leaves him at liberty to prosecute an action there-

for, while he is in a position to assert his claim to the land on the death of the appellee. Whether the several claims of the latter, including rents and the proceeds of the mortgage above described, are all concluded by the decree is not so apparent. But as he is satisfied with the result we can see no grounds for interference.

The only remaining question is that of the rights of Riley by virtue of the mortgage executed in his favor by Brown. We have seen that Black was at the time said mortgage was executed the equitable owner of the west half of the quarter section in controversy. It follows that the mortgage is void as against the latter unless Riley received it in good faith without knowledge of Black's equities. And he is required to show affirmatively that he took it relying upon Brown's apparent title thereto. (*Bowman v. Griffith*, 35 Neb., 361.) Upon that proposition there is an entire failure of proof. Riley himself was not sworn. The only evidence on that branch of the case is the testimony of Brown, who swears that the mortgage was given for a past due indebtedness, incurred by him as surety for a third party. The evidence falls far short of proving Riley to be a mortgagee in good faith, hence the decree of the district court is

AFFIRMED.

THE other judges concur.

WILLIAM NASH, APPELLANT, V. NELSON A. BAKER ET AL., APPELLEES.

FILED OCTOBER 4, 1893. No. 5147.

Railroads: MUNICIPAL CORPORATIONS: PROPOSITION TO VOTE BONDS IN AID OF CONSTRUCTION: FRAUDULENT REPRESENTATIONS OF DONEE: RESTRAINING ISSUANCE OF BONDS. A proposition to vote bonds in aid of the construction of a rail-

road, when accepted, is in the nature of a contract, and if the electors, through false or fraudulent representations of the officers of the donee, have been induced to vote such aid, a court of equity in a proper case will relieve as against such bonds.

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

The facts are stated in the opinion.

Greene & Hostetler, *R. A. Moore*, and *J. B. Strode*, for appellant:

The false and fraudulent representations made by the officers and agents of the defendant company as to the character of the road for which the bonds were sought to be voted were made for the purpose of deceiving the electors, thereby inducing them to vote in favor of the bond proposition. Equity will lend its aid to relieve the people under such circumstances. The finding and judgment of the lower court were therefore wrong and should be reversed and the injunction made perpetual. (*Wakefield Case*, 2 O'Mal. & H. [Eng.], 102; *Taunton's Case*, 21 Law Times Rep., n. s. [Eng.], 169; *Boston Case*, 2 O'Mal. & H. [Eng.], 161; *Brassard v. Langevin*, 1 Sup. Ct. Can., 145; 6 Am. & Eng. Ency. Law, p. 371, sec. 7; Cooley, Torts, 501; *Haldeman v. Chambers*, 19 Tex., 50; *Henderson v. San Antonio R. Co.*, 67 Am. Dec. [Tex.], 675; *Wullenwaber v. Dunigan*, 30 Neb., 877; *Sinnett v. Moles*, 38 Ia., 25; *Wickham v. Grant*, 28 Kan., 517; *Curry v. Board of Supervisors of Decatur County*, 15 N.W. Rep. [Ia.], 602; *Melendy v. Keen*, 89 Ill., 395; *Sanford v. Handy*, 23 Wend. [N. Y.], 260; *Burhop v. City of Milwaukee*, 18 Wis., 453; *McClellan v. Scott*, 24 Id., 81; *Davis v. Dumont*, 37 Ia., 47; *Crump v. United States Mining Co.*, 56 Am. Dec. [Va.], 116.)

Sinclair & Brown and *Calkins & Pratt*, *contra*, cited: 2 Pomeroy, Eq. Jur., sec. 894; *Runge v. Brown*, 23 Neb.,

822; Wharton, Evidence, secs. 328, 340; *Brown v. Piper*, 91 U. S., 37; Taylor, Evidence, sec. 4, note 2; Best, Evidence, secs. 253, 254; *Gibson v. Stevens*, 8 How. [U. S.], 384; Cooley, Torts, p. 476; *Mooney v. Miller*, 102 Mass., 217; *Starr v. Bennett*, 5 Hill [N. Y.], 303; *Williams v. Spurr*, 24 Mich., 335; *Mitchell v. McDougall*, 62 Ill., 498.

RYAN, C.

This action was begun in the district court of Buffalo county, Nebraska, by William A. Nash, for himself and on behalf of the taxpayers of the city of Kearney, against the mayor and members of the city council of said city, and the Kearney & Black Hills Railway Company, to enjoin the collection of $75,000 in bonds voted by the city of Kearney in aid of the construction of said railroad. The petition, or rather the amended petition, upon which the case was tried, was very lengthy, alleging, as it did, many irregularities in the manner of submitting the proposition for voting bonds to the Kearney & Black Hills Railway Company, and setting forth other irregularities as to the manner in which the votes were cast and the result ascertained and announced. The chief paragraph however, and the one to which we have devoted special attention, reads as follows:

"7. That the Kearney & Black Hills Railway Company, by its officers and agents, procured the votes at said pretended election to be cast in favor of said bonds by false and fraudulent representations made to the electors of said city concerning the said Kearney & Black Hills Railway Company, in this; that said railway company, by its officers and agents, represented and pretended to the electors, for the purpose of procuring their votes for said proposition, that the said railway was an independent line of road, and a competing line with all other roads, and had no connection with any other line of railroad in its management, operation, or organization, and would be so run and operated.

Plaintiff alleges the truth to be that the said Kearney & Black Hills railway was not an independent line of road, and was not a competing line of railroad and was not so intended to be, which all of said officers and agents then and there well knew, but that said Kearney & Black Hills Railway Company had at said time a freight traffic contract with the Union Pacific Railway Company by which all freight shipped over said Kearney & Black Hills railroad was and is but a feeder to the Union Pacific railroad, and was so known to be by said officers and agents at the time they made such fraudulent and false representations aforesaid, and was and is under the control and domination of the Union Pacific Railway Company."

The prayer of the amended petition was, that a temporary order of injunction might be granted restraining the said authorities designated from authorizing the issuance of said bonds and donating the same, or any part thereof, to the Kearney & Black Hills Railway Company, or to any person in its behalf or for its use and benefit, and restraining the Kearney & Black Hills Railway Company from taking or receiving the said bonds or any part thereof from the officers of said city, or from attempting to or negotiating and disposing of said bonds and procuring the same to be registered, or from in any way interfering or meddling until the further order of the court, and that upon the final hearing said injunction might be made perpetual, and for such other and further relief as was just and equitable.

Issue was duly joined upon the averments of the amended petition, and a trial thereof was had, and decree rendered in favor of the defendants on the 15th day of July, 1891. In this decree is the following finding, to-wit:

"The court further finds that while the officers and agents of the Kearney & Black Hills Railway Company represented to the voters of the city of Kearney that said line of road would be an independent line of road, and that great benefits were likely to accrue to the city of

Kearney on account thereof, yet the road was only to be built a distance of 67 miles and to terminate at the city of Kearney, near the center of the continent and distant 700 miles from a practicable waterway; that its only method of reaching the coast was over the line of the Union Pacific, or Burlington & Missouri River railway, both of which railway lines run through the city of Kearney; that these facts were common knowledge to all persons in the city of Kearney of ordinary intelligence, and the representations should have deceived no one, and were allowable under the rule of law which excludes actual deception but permits puffing and exaggeration of language in the encouragement of trade."

As we regard this finding of the court as not at all satisfactory as to the averments set out in paragraph 7, we shall examine *de novo* the issues specially presented by that paragraph, taken in connection with the averments of the amended petition.

John H. Hamilton, vice-president of the Kearney & Black Hills Railway Company, testified that a night or two before the date of the election, February 13, 1890, E. C. Davidson, president of the above railroad company, made a speech at Durley's hall at Kearney, in which he urged that the bonds be voted as proposed, and said that the Union Pacific Railway Company did not own a dollar of the stock of the Kearney & Black Hills Railway Company; that the Union Pacific was to receive and be paid $205,000 in bonds by the Kearney & Black Hills Railway Company for the right of way and grade up the Wood river valley; that to his knowledge no director or stockholder of the Kearney & Black Hills company was in any way either directly or indirectly connected with the Union Pacific railroad. Mr. Hamilton testified further, that before the election he had stated to the people that the Kearney & Black Hills railroad was not controlled by the Union Pacific Railway Company; that the Kearney & Black Hills

railroad would be built by a company which was not under the control of the Union Pacific; that it would be controlled by people in Nebraska; and that it would be operated by a traffic agreement with the Union Pacific. He further testified that the board of trade of Kearney appointed a committee to ascertain what the Kearney & Black Hills Railroad Company proposed as to building a line of road; that he told said committee that the last named company would be independent of the Union Pacific Company, but would be operated under a traffic agreement with the Union Pacific; and that witness had interested some of his friends, and got them to organize a company to buy that line, and operate it under a traffic agreement with the Union Pacific.

W. C. Holden testified that at the public meeting held at Durley's Hall, just before the bonds were voted, Mr. Davidson, the president of the Kearney & Black Hills Railroad Company, had said that the latter company had a traffic agreement by which all unconsigned freight would be turned over to the Union Pacific at Kearney, and that Mr. Cameron, and possibly Mr. Holcomb, of the Union Pacific, held stock in the Kearney & Black Hills Railroad Company,—witness thought to the amount of $100,000; never heard that it held one-half of said stock. It was insisted by the opposition to the bonds, that the Union Pacific Company was interested in the Kearney & Black Hills Company, and was to hold a controlling interest in the road. This was denied by the other party, who claimed it was not a Union Pacific road.

E. C. Davidson, the president of the Kearney & Black Hills Railway Company, testified that he made a speech to the people of Kearney two nights before the election, at Durley's Hall. About one hundred people were present. That he stated to these people that he and his associates in the Kearney & Black Hills Railroad Company had an option that permitted them to buy the right of way and

grade to Milldale, and that if the bonds were carried it should be bought and the road completed. At that public meeting Mr. Greene had asked this witness as to the proposed railroad being independent or distinct from the Union Pacific, and that witness had answered that neither the Union Pacific road nor any stockholder in the Union Pacific road, had any stock in the Kearney & Black Hills road. The original contract was that the road-bed should be paid for by first mortgage bonds, but after the Kearney & Black Hills Railroad Company got into position to deal, the last named company appointed Mr. Hamilton to negotiate, and he made what was considered a better contract, by the terms of which payment was made in stock instead of bonds. The Union Pacific owned the whole road at the time of the election and had given the other railroad company an option to purchase, but owned no stock in the Kearney & Black Hills road. Mr. Davidson further testified that at the public meeting referred to, one of the prominent questions discussed was whether the Kearney & Black Hills railroad was to be an independent road, or whether it was to be under the domination of the Union Pacific Railroad Company, the opponents of the bonds claiming that it would be dominated by the Union Pacific.

Thomas H. Cornett testified that in the canvass for the bonds it was urged in opposition to voting them that the road proposed to be aided was simply a Union Pacific "stub," and a scheme of the Union Pacific to secure the bonds to be voted. The friends of the proposition scouted that idea all through the campaign, denied it, and claimed that if the road was built and operated the Union Pacific would not have anything to do with it so far as its ownership or control was concerned. Witness attended only one meeting, but at that it was stated that the headquarters of the proposed road would be at Kearney. In a general way the opponents of the bonds claimed it was a ruse of the Union Pacific, and that the Union Pacific was

to dominate the thing, and that it was a part of the Union Pacific system. The friends of the bonds claimed that was not so.

B. H. Goulding testified that the opponents of the bonds undertook to fight them down with the idea, or with those statements, that it was a Union Pacific "stub." Witness had one or two talks with different parties and the company,—one with Mr. Davidson, and once or twice talked with Mr. Hamilton,—and never understood that it was a "stub" road, but understood it was an independent company that had a good traffic arrangement. That was one of the things witness inquired about.

Gen. A. H. O'Connor, whom the evidence shows to have been very active and efficient in urging that the bonds should be voted, testified that in his speeches he did not claim it would be a competing line, for he knew if it came into Kearney with no way to get out it could not be competing; that he said in urging people to vote the bonds he did not believe it was a Union Pacific railroad, and he did not believe it was; that he was frank in that.

The above quoted evidence was given by witnesses sworn on behalf of the defendants on the trial in the district court. For the plaintiff in that court the testimony of F. J. Switz, Henry S. Harding, Lyman Brigham, J. C. Beswick, James O'Kane, A. H. Bolton, H. H. Seeley, P. D. Henderson, B. G. Henderson, J. E. Shipman, M. V. Esler, C. F. Yost, J. W. Worsley, F. Y. Robertson, and Lewis Robertson was even more pointed as to the representations being that the proposed line of road would, when built, be entirely independent of the Union Pacific Railway Company, than was the evidence of the defendants' witnesses. These last named witnesses further testified to the generally favorable effect of the assertions of the Kearney & Black Hills Railroad Company's independence of the Union Pacific Railway Company in respect to the bond proposition, and at least three of these witnesses directly

testified that this asserted independence induced them respectively to abandon opposition to, and vote for, the bonds. It, therefore, must be accepted as without question, first, that a great deal of opposition to voting the bonds existed, founded upon a suspicion that the Kearney & Black Hills railroad when built would be under the control of the Union Pacific Railway Company, and, second, that the direct assurances of the officers and duly accredited agents of the Kearney & Black Hills Railroad Company, by denials of the dependence of the said company upon the Union Pacific Railway Company, in a large measure overcame existing opposition to voting the bonds as proposed.

It now becomes material to consider what relations were sustained or in contemplation between the Union Pacific Railway Company and the Kearney & Black Hills Railway Company at the time the bonds were voted. The ordinance under which the proposition to vote the bonds was submitted required that active work should commence in the construction of the proposed railroad within thirty days from the election adopting the proposition, and from the time its adoption should be duly declared. Within that space of time a written contract was entered into on March 14, 1890, between the Omaha & Republican Valley Railroad Company, the Kearney & Black Hills Railway Company, and the Union Pacific Railway Company. This agreement recited that the Republican Valley Railroad Company had acquired the right of way for a great part of a proposed line of railroad from Kearney to Milldale, and had expended large sums of money in unfinished construction of a railroad thereon, and that an agreement had been entered into between the two first above named companies for the sale by the first to the second named of the said right of way, and for the completion of said line of railroad by the second, and for the working of the said railway in connection with the railway of the Union Pacific Railway Company upon the terms in said agreement contained.

Following these recitals the agreement stipulated that the sale was by the first railroad named to the second named, of the unfinished line aforesaid between Kearney and a point about seven miles northwest of Callaway, being a distance of about seventy-two and eleven-hundredths miles. The sum to be paid to the Omaha & Republican Valley Railroad Company was to be ascertained by estimates thereafter to be made by the chief engineer of the said Omaha & Republican Valley Railroad Company, and to be paid in the shares of the Kearney & Black Hills Railroad Company at their nominal value. The Kearney & Black Hills Railroad Company agreed with the Union Pacific Railway Company to transfer to the trustees mentioned in said written contract, and to issue to them one certificate for so many hundred dollar shares of the Kearney & Black Hills Railroad Company's stock as, together with the said shares transferred to the Omaha & Republican Valley Railroad Company, should equal in nominal value $12,000 for every mile, and a proportionate sum for every part of a mile, of the length of the partly graded location agreed to be sold, which was to be measured under the direction of said chief engineer, whose certificate as to said length should be final. The above transfers of stock were provided to be made contemporaneously; by which it may be unnecessary to remark, there would be vested in these two transferees stock to the nominal amount of $12,000 per mile of the road contemplated.

The agreement further provided that the Republican Valley Railroad Company should, for the period of fifty years, be entitled to name two members of the board of directors and the secretary of the Kearney & Black Hills Railroad Company. During that period no mortgage could be made for over $20,000 per mile, and the capital stock could not exceed $24,000 per mile, to be completed before the creation of such stock; and in case of an increase of stock, one-half of such increase should be thereupon

transferred to the trustees above referred to and thereinafter named, and a certificate accordingly issued.

The agreement provided for the construction of the line of road contemplated upon certain conditions, which it is needless to quote, except to note that it was required to be of uniform gauge with that of the Union Pacific railway, and that for all purposes of traffic during the existence of the agreement, the Kearney & Black Hills railroad line was required to be worked as one line with the Union Pacific Railway Company's lines and the lines worked and controlled by the last named company.

The Kearney & Black Hills Railroad Company further agreed that it would never make any discrimination as regards rates or otherwise against the railway system of the Union Pacific Company; and it was agreed between them that the rates for all traffic carried between any places by the railways of the two last named companies should always be as low as the rates for carrying traffic between the same or competitive places by any other railway or railways in competition with the railway systems of said companies, and that all traffic secured by the Kearney & Black Hills Company to be carried to or by way of any place or places on the railway system of the Union Pacific Railway Company should, so far as the Kearney & Black Hills Company could lawfully determine the same, be carried by the railway system of the Union Pacific Railway Company, and for that purpose be delivered upon its railway system at some point of juncture of the two systems.

It was further provided that the Kearney & Black Hills Railway Company should always use its influence in favor of such traffic being so carried, and during the continuance of the agreement always work in close harmony and connection with the railway system of the Union Pacific Company, and would not at any time make any contract with any other railway company or line for connection or interchange of traffic, except at places on the northwesterly part

of its railway system, where its railway system does not connect with the railway system of the Union Pacific Company; nor make or allow any lease or mortgage of its railway system or any part thereof; nor create or suffer any lien or incumbrance thereon; nor make any issue of stock without the previous assent of the Union Pacific Company expressed by resolution of its board of directors, except to the extent previously provided.

The Union Pacific Railway Company on its part bound itself to divert to the Kearney & Black Hills Company such traffic as it lawfully might during the existence of the agreement. It was further provided that the Kearney & Black Hills Company, under such reasonable rules and regulations as the superintendent of the Union Pacific railway should prescribe, might use for its passenger trains the passenger station of the Union Pacific Railway Company at Kearney, and have performed for it such usual service as that use rendered necessary, at a price not exceeding $75 per month so long as the Kearney & Black Hills Company's line should not in length exceed 100 miles.

It was also agreed that the gross receipts arising from the traffic of both roads under the above provisions should be apportioned between them according to the arrangement that took effect on the 1st of January, 1889, for division of joint earnings between the Union Pacific Company and the Omaha & Republican Valley Railroad Company. No evidence was introduced as to the terms of this arrangement, nor was this subject of division in any place in the record referred to, so that we are without any data whereby to determine the ratio of division of the proceeds of the joint traffic between the two railroad companies under this agreement. It is probable that the traffic agreement frequently spoken of at the meeting of the people of Kearney antecedent to the vote upon the bonds, is embraced in the latter part of the above described agreement, and the arrangement between the Union Pacific

Railway Company and the Omaha & Republican Valley Railroad Company, which took effect January 1, 1889, referred to in said agreement.

To a satisfactory understanding of the alleged traffic agreement between the Union Pacific Railway Company and the Kearney & Black Hills Railroad Company, the arrangement which took effect January 1, 1889, is indispensable. As we are without the means of ascertaining the terms of the arrangement referred to, we must consider the relation of the parties as shown by extrinsic evidence. We shall first review the evidence as to the construction of the projected railroad line, prefaced, as it must be, with a short history of its origin and development. Next shall be given the evidence as to the practical relations existing between the Union Pacific Railway Company and the Kearney & Black Hills Company, as indicated by the construction given the contract between the parties.

J. H. Hamilton, who at the time the bonds were voted was vice president of the Kearney & Black Hills Railroad Company, testified that at the time of giving his evidence the constructed railroad of the Kearney & Black Hills Company was sixty-five and seventy-three one-hundredths miles in length; that when the company was organized the stock subscriptions were for $500,000, but that the stock was not issued until the money was paid in and the road built. Altogether there was paid in $320,000, being eighty per cent on $400,000. The railroad company let the contract for building their road to the Wood River Improvement Company, and the Wood River Improvement Company built the railroad for so much stock and so much bonds. The bonds have been declared in the dividend, and at the time of the trial were held by the individual stockholders of the Wood River Improvement Company. No stock was subscribed by the Wood River Improvement Company. This company got stock for building the railroad. The stock is not issued yet; it will be issued when

there is a settlement between the Wood River Improvement Company and the railroad company. The Wood River Improvement Company distributed the stock it received for building the railroad to the stockholders in the Wood River Improvement Company. The railroad stock was all issued to the Wood River Improvement Company. The Kearney & Black Hills Railroad Company transferred all its stock to the Wood River Improvement Company (except enough to enable them to hold office in the company) upon the improvement company assuming the obligations of the subscribers for stock in the Kearney & Black Hills Railroad Company. The Wood River Improvement Company, for and in consideration of the transfer to them of this $500,000 of stock, undertook and did build this road and equipped it. The Wood River Improvement Company got 5020.1691 shares of stock—all the stock that was ever issued by the railroad company except 1429.6691 shares, which were issued to the Union Pacific Railroad Company. Beside the above stock the Wood River Improvement Company received for building the road $13,500 per mile of the bonds of the railroad company. The aggregate cost of building and equipping the road was $800,000. As before stated, eighty per cent of $400,000, or $320,000, was raised by assessments upon the holders of the stock of the Wood River Improvement Company. The residue of the $800,000 they borrowed upon the security of the bonds of the Kearney & Black Hills Railroad Company. They owed the most of it at the time the witness Hamilton testified.

The Union Pacific Railroad Company held by itself and its officers, of the Wood River Improvement Company's total stock of $400,000, stock to the amount of $210,000. At the time of the trial there was held by parties resident in Kearney, Mr. Tillson, Mr. Downing, and others, $145,000 par value of stock in the Wood River Improvement Company. The bonds issued by the Kearney &

Black Hills Railroad Company were to the amount of $13,500 per mile. Mr. Hamilton testified that before the bonds were voted on, he and his associates had drafted an agreement by which they had an option to build a line either from Pleasanton on the South Loup line, or from Kearney, and were to pay the Union Pacific Company $205,000 in first mortgage bonds of the Kearney & Black Hills Railroad Company for the grade. About two weeks after the election, Mr. Hamilton testified that he went to Boston to sign up the agreement; that all the previous sketches and drafts that had been made were already there. The agreement was made up finally from the sketches and drafts that had been made in part. The Omaha & Republican Valley Railroad Company owned the grade and right of way which the Kearney & Black Hills Railroad Company was compelled to purchase for the construction of its line. The Union Pacific Company owns the stock of the Omaha & Republican Valley Railroad Company; the Union Pacific Company made the trade; the Union Pacific Company made the deal; it controlled the Omaha & Republican Valley Company, and whatever the Union Pacific Company agreed to the Omaha & Republican Valley Company had to.

Mr. Hamilton further testified that Mr. Davidson was not acquainted with the details of the agreement made with the Union Pacific Railway Company; that he guessed he himself was the only one who was, as he transacted all the business. Mr. Davidson knew that the Kearney & Black Hills Railroad Company was to run in connection with the Union Pacific so far as freight traffic was concerned. Mr. Hamilton testified that after the election was held and the result announced, before thirty days had expired, the railroad company commenced the work of construction and completed the road October 7, 1890, to Callaway.

As to the present condition of the traffic affairs of the Kearney & Black Hills Railroad Company, its general

freight and passenger agent testified that the B. & M. R. R., through the C., B. & Q. R. R. Co., has a direct line from Kearney to Chicago; that when the Kearney & Black Hills railroad had a consignment from Callaway to Chicago over the C., B. & Q. railroad the same rate is not charged the shipper as when the consignment is by way of the Union Pacific railway, because the Kearney & Black Hills Railroad Company has no through rate from Kearney to Chicago with the C., B. & Q. R. R. Co; that there exists a through rate with the Union Pacific Railroad Company. There is a difference in favor of the Union Pacific road. The B. & M. road does not run across the tracks of the Union Pacific railroad to the tracks of the Kearney & Black Hills road and that would make it more expensive. It is more expensive to ship from a point on the Kearney & Black Hills railroad to Chicago over the B. & M. than over the Union Pacific railroad because of added local charges, and on account of transfer charges across the Union Pacific railway's track at Kearney; would have to get consent of the Union Pacific Railway Company to do this. The Kearney & Black Hills Railroad Company is in competition with the B. & M. on the Grand Island Branch. The Kearney & Black Hills road does not own the line across to the Grand Island line; it is a wagon competition. Between the Grand Island branch of the B. & M. R. R. and the Kearney & Black Hills railroad line there is a strip of from twenty to thirty miles.

It is unnecessary to review the evidence which has already been stated at considerable length in stating our conclusions as to the relations which the Kearney & Black Hills Railway Company sustain to the Union Pacific Railway Company. The last named company owns, by reason of the sale of the road bed, 1,429 shares, and through the Wood River Improvement Company, controls the remainder of the capital stock of the Kearney & Black Hills

Railroad Company, and is entitled to one-half of whatever increase of stock shall hereafter be made. To secure this and other interests of the Union Pacific Railway Company, it practically has the right to name the secretary and two directors of the Kearney & Black Hills Railroad Company. By means of the Wood River Improvement Company, the Union Pacific Railway was able to secure the control and placing of the bonds, secured by first mortgage, of the Kearney & Black Hills Railroad Company to the amount of $13,500 per mile, all the bonds issued. By reason of the necessity of crossing the Union Pacific line at Kearney to reach any other railroad connection, the Kearney & Black Hills Railroad Company is powerless to establish or maintain traffic relations with any line of railroad other than the Union Pacific, even if it was willing to violate the restrictive terms of its agreement to the contrary. It is idle to insist that under such conditions the Kearney & Black Hills railroad is, or ever can be, independent of the Union Pacific Railway Company in any sense whatever.

It is established satisfactorily that one main inducement to the voting of the bonds was the representation that the proposed railroad should, when built, be independent of the Union Pacific Railway Company. With equal conclusiveness the evidence shows that this representation has failed; that though in a certain sense something of independence existed at the time of making these representations, yet that immediately, or very soon after the bonds were voted, such independence, by the voluntary act of the donee of the bonds, wholly ceased to exist. In the face of this condition of affairs the donee of the bonds insists that the injunction prohibiting the delivery of the bonds shall be dissolved, and that this court shall sanction such delivery.

In *Wullenwaber v. Dunigan*, 30 Neb., 877, it was held, where certain petitioners were induced to sign a petition calling an election in K. township, Seward county, upon

the representations of an agent of the railway company that the depot would be located on section 16 of said township, when in fact the depot was afterwards located on section 17, that the company was bound by the representations of its agents, and that persons who had been deceived thereby and induced to sign the petition might set up such facts to enjoin the issuing of bonds. In the opinion rendered by MAXWELL, J., occurs the following apposite language: "A proposition to vote bonds is in the nature of a contract which, when accepted, is binding upon the respective parties. Hence, if the electors, through false or fraudulent representations, have been induced to vote bonds to aid in the construction of such railway, a court of equity in a proper case will grant relief. (*Curry v. Board of Supervisors*, 15 N. W. Rep. [Ia.], 602; *Sinnett v. Moles*, 38 Ia., 25; *Henderson v. San Antonio R. Co.*, 67 Am. Dec., 675; *Crump v. U. S. Mining Co.*, 56 Id., 116; *Wickham v. Grant*, 28 Kan., 517.)"

In the case under consideration the representation was of the existence of a fact of controlling weight with the electors called upon to vote bonds in aid of the enterprise projected. The voter could only know of the nature and object of the project to be assisted by the representations of its promoters. These representations necessarily referred to future conditions, the power to establish which was lodged in the promoters of the scheme. The promise was that the road, when built, should exist and operate in entire independence of the domination of another road already in existence. It might be that this independence was undesirable, useless, and worthless. That proposition however, should have been argued to the voters. It cannot now be urged against them. In an opinion of this court, in *Township of Midland v. County Board of Gage County*, 37 Neb., 582, filed during the present term, it has been held that the electors of a township are entitled to stand upon the very letter of their promise, a wholesome rule which should be

extended to the facts under consideration. In the case at bar it may be that the insistence upon independence of the Union Pacific railway was without reason, and even merely whimsical, yet it was a condition which the voters had a right to insist upon as qualifying their proposed donations. The propriety of employing the power of taxation to making donations to enterprises in no way connected with the administration of government may well be doubted in any case. Such restrictive conditions as the voters see fit to insist upon must not be ignored by the proposed donee, especially after accepting the donation burdened with them.

The judgment of the district court is reversed, and a decree will be entered in this court conformably to the prayer of appellant's petition.

DECREE ACCORDINGLY.

THE other commissioners concur.

JOHN D. KILPATRICK ET AL. V. ANDREW J. RICHARDSON, JR.

FILED OCTOBER 4, 1893. No. 4683.

1. **Trial:** REVIEW: EVIDENCE: THE INSTRUCTIONS of the court should direct the attention of the jury only to facts in support of which evidence has been introduced upon the trial. When an instruction is not founded upon the evidence, and is calculated to mislead the jury in considering the facts of the case, the judgment must be reversed.

2. **Negligence:** EXPLOSIVES: PERSONAL INJURIES: EVIDENCE: INSTRUCTIONS. To sustain a verdict for damages on account of an injury suffered by reason of alleged negligence of the defendants, there must be evidence that such injury resulted from the negligence charged. Such causation cannot be left to the mere conjecture of the jury.

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

Harwood, Ames & Kelly and *Alfred Hazlett*, for plaintiffs in error.

C. H. Bane, H. C. Brome and *D. B. Jenckes, contra.*

RYAN, C.

On the 26th day of November, 1889, a petition was filed in the district court of Dawes county, Nebraska, on behalf of Andrew J. Richardson, Jr., an infant under the age of fourteen years, by his next friend, Andrew J. Richardson, Sr., against John D. Kilpatrick and others associated with him as partners under the firm name and style of Kilpatrick Bros. & Collins. This petition alleged that the defendants began the construction of a tunnel in the said county of Dawes, previous to the injury complained of, and continued said construction until that time; and that while engaged in said work of construction, the said defendants negligently and knowingly caused and permitted a large number of exploders, which were of a dangerous character, to be left and scattered over the ground at and near the north end of said tunnel, and upon and adjacent to the right of way of the railway for the use of which said tunnel was being made at that point, where children and persons not acquainted with the dangerous character of said exploders, and not accustomed to the use thereof, were accustomed to pass and repass; and that the defendants, by their agents, servants, and employes, carelessly, negligently, and knowingly suffered and permitted said exploders to remain scattered over the surface of the ground at said point, exposed and unguarded, up to and including the 6th day of October, 1889, well knowing that children of tender years and childish instincts, without any knowledge or warning in reference to the great danger and peril to which they were ex-

posed, might take and handle said exploders. The petition further alleged that on the 6th day of October, 1889, while walking near the north entrance to said tunnel, the plaintiff discovered several of said exploders so carelessly, negligently, and knowingly left exposed and unguarded by the servants and agents of said defendants in the manner hereinbefore recited, and picked up one of them, not knowing what it was, and not knowing what it contained, and picked said exploder with a horseshoe nail, and without any warning or knowledge of the dangerous character of said exploder, and, without any fault on plaintiff's part whatever, said exploder so picked up by the plaintiff suddenly exploded in plaintiff's hands, and shattered and mangled, and completely tore off plaintiff's left hand so that it became necessary to amputate it to save his life; and shattered and tore off the thumb of plaintiff's other hand, and otherwise wounded plaintiff in the hand and face and permanently disabled him for life; and that as one direct result of said injury, plaintiff was for a long time, and still is, sick and disabled. There were allegations of suffering great pain and agony resulting from said injuries; of the expenditure of large sums of money made necessary thereby, and of the maiming, deforming, and incapacitating of plaintiff for the performance of any labor. The amount of damages was laid at $25,000, for which judgment was prayed.

The answer admitted the partnership as charged, and that during the year 1889 the defendants were engaged in the construction of a tunnel on the line of railroad running into and through Dawes county, Nebraska, and that in the construction of said tunnel the said defendants used and exploded dynamite in the removal of rock from said tunnel by the use of exploders; but alleged that if the plaintiff was injured, it was by reason of his own carelessness and negligence and through no fault of the defendants, and long after the defendants had finished their work on said

tunnel, and long after the same had been received and accepted by the said railroad company. Following these averments was a denial of each and every allegation of the petition except such as had been admitted to be true.

At the October, 1890, term of the district court of Dawes county a trial of the issues joined was had, which resulted in a verdict for the plaintiff in the sum of $5,000, upon which judgment was duly rendered. In due time proper proceedings were taken for the presentation in this court of errors alleged to have occurred on said trial.

The testimony discloses, as undisputed facts, that on Sunday, the 6th day of October, 1889, the lad who was injured, accompanied by his parents, his aunt, and one sister and perhaps another member of the family, went to the tunnel which had been constructed as alleged in the petition. The plaintiff, and the others who accompanied him, resided in Dawes county about twelve miles from the tunnel which they visited. Their object seems to have been simply to look at the tunnel as a matter of curiosity, and, perhaps, pleasantly employ the hours of that holiday. The boy who was injured was of the age of about eight years. Accompanied by his sister, aged about twelve years, he explored the surroundings of the tunnel, and finding several exploders, he and his sister brought them to the place where their mother and aunt were sitting. These exploders were about one and one-eighth inches in length, and from the testimony it would seem that they are from one-eighth to one-fourth of an inch in diameter and of a cylindrical shape. One end is closed and the other left open in the same manner as the shell of a cartridge for use in a rifle or pistol. Inside this exploder is placed for use some material which easily explodes, causing a report and jar which explodes the dynamite cartridge with which it is placed in contact. The boy having found a horseshoe nail, proceeded, with childish curiosity, to remove the contents of one of the exploders which he had found. This, as the boy in his

childish way said, caused the exploder to "blow off," and thereby the injury was inflicted of which complaint is made in the petition.

The first and most important question with which we are confronted is, where did the lad find the exploder which caused the injury of which he complains? His own testimony was that he picked up a dynamite cartridge just a little ways from the tunnel; that he saw about fifteen other cartridges where he picked up this one; that they were lying around on the ground; that he picked this particular one with a horseshoe nail he found at the tunnel, and that the cartridge blowed off and hurt him. On his cross-examination this lad testified that he found the cap which exploded around the tunnel on the west side of the tunnel.

Maggie Richardson (Andrew's sister, of the age of twelve years at the time of the accident) testified that she saw some of the exploders before the accident. She said, "We picked them up all around in the little building where they had been, where they had staid nights." She further testified that she could not tell how many buildings there were, but there were lots of them around there; that they picked up no exploders anywhere else than in those buildings that she remembered of. These buildings were just pine trees cut down and covered over with brush and stuff. Some had doors, some had not. All were open. No one was in them. They found the exploders lying on the floor or on a little stand or table among some gunnysacks that laid around. This was on the hillside quite a way from the banks over the tunnel.

E. C. Simmons testified that when attracted by the explosion he went at once to the scene of the accident and found lying around there some other articles and a tin box in which are usually kept exploders, and saw some exploders; that the little girl said "he got them [the exploders] over there," waving her hand off towards the "Dago shacks," as they were called. Mr. Simmons testi-

fied that one of these shacks was between him and the tunnel, and the rest were further west and further to the south from the tunnel. The little girl motioned to the south and west in a still further direction from where the boy was found. Between where the boy was injured and the road, along the top of the ridge through which the tunnel was made, the ground was bluffy except over the tunnel itself, where it was tolerably smooth. There were some rough buildings on the same side of the hill and a little west of where the boy was injured, commonly called "dug-outs." Some of these were made of poles leaned together at the top, and brush thrown over them, and some were made square with brush over the top and covered with sod. These, during the work, were occupied by Italians employed by defendants. The highest place the tunnel went through ran between the Kilpatrick buildings and the Dago huts, although the Dago huts were pretty well up towards the top on the north side. None of them could be seen from the Kilpatrick buildings.

John Waldo, one of plaintiff's witnesses, in the district court, testified that the shanties or dug-outs were about fifty yards from the north end of the tunnel. Some of them were right above the tunnel.

Ben Hayden, another witness for plaintiff, testified that there were buildings that might be termed "shanties," or "dug-outs," some of them over the tunnel; that there was over a half dozen of these shanties which witness guessed the Dagoes had put there.

It would seem by this evidence clearly established, that the exploder which caused the injury to the boy was obtained by him in one of the shanties occupying the northern slope of the ridge through which the tunnel was built; and that the nearest of these shanties to the tunnel was distant therefrom fifty yards, up a steep and bluffy hill; the others within a radius of one hundred and fifty yards from the tunnel, measured over like ground.

John Waldo furthur testified that the powder house, in which were kept the exploders, was located still further south than the shanties—within about 150 yards of the south end of the tunnel. Other witnesses for the defendants in the district court testified as to the different distances, but no controversy existed as to this powder house being located south of the summit of the ridge and nearer the south end of the tunnel than the north end. This building was constructed of rough boards, and was in dimensions twelve by fourteen feet, and was provided with a lock and key to secure the door. There is no conflict in the evidence as to the completion of the tunnel August 28, 1889, and there is uncontradicted evidence that under orders of plaintiffs in error, there was removed from their buildings about the tunnel everything except some scrapers and other like personal property, which were left at the blacksmith shop. The witness who superintended this removal testified that he removed everything, but the above property is shown afterwards to have been removed by another person, and there is evidence that subsequent to the removal there were found some exploders in the powder house. The witness who found these exploders, however, testified that when he found them the lock of the powder house had been pulled out, and that the door was propped shut with a board. The custodian of this powder house testified that the staple was pulled out so that the door could be opened, and that two days before the removal of the contents, finding that the door had been opened, he nailed a board across it and fastened it shut. There was no evidence whatever that the explosives found in the powder house after September 10 were left there intentionally, neither was there to the contrary. It appears, after the removal of the contents of the powder house, as testified to by the custodian, that the board which had been nailed across the door was again removed, by whom or for what purpose no one could tell. There was abundant undisputed evidence that

between the completion of the work and the occurrence of the accident there were no exploders in the tunnel. The shanties in which the exploders were found by the children on the date of the accident were situate a distance of from 50 to 150 yards from the tunnel, a bluffy hillside intervening. The evidence showed that these shanties were built by the Italians who lodged in them. They were apart from the buildings erected by Messrs. Kilpatrick & Collins, and so far the testimony shows, these gentlemen were neither responsible for their erection, use, or existence.

There was a great deal of evidence directed to showing the manner in which the exploders were used during the progress of the work previous to August 28, the date of its completion. There was testimony on behalf of the defendants that the exploders were never attached to the fuse outside of a little house erected for that purpose, unless in very exceptional cases of hurry, while the contrary was testified to by the witnesses of the other party litigant. On the part of the plaintiff in the district court, there was evidence that at times exploders were, during the progress of the work, kept in unnecessary numbers of from one to one hundred, and there was also evidence that on different occasions these exploders were permitted to lie near the work on the ground. There was, however, no proof that the alleged careless manner in which the exploders were brought to, used, and permitted to lie promiscuously about in the tunnel, caused the injury complained of. It seems to be assumed, however, that this negligent use of these dangerous agencies, if established by proof, would justify the inference that such use was the direct cause of the accident; and the plaintiffs in error contend that the court, by the instruction to which reference will now be made, presented to the jury a state of facts materially different from any such as the evidence showed to exist.

After saying to the jury, in effect, that if they found that defendants were engaged in making a tunnel which re-

quired the use of exploders dangerous to children not accustomed to them, the court continued the instruction complained of in this language: "and that defendants, while so using such exploders by their servants, agents, or employes, caused or permitted said exploders to be scattered and left on the surface of the ground in or near said tunnel, or on the floor of unlocked or open buildings in the vicinity of said tunnel, or left or permitted said exploders to be left where persons other than the servants, agents, or employes of defendants might take the same, and scatter them over the surface of the ground or leave the same within said open and unguarded buildings; and if you further find from the evidence that children and all persons who might desire to do so were in the habit or accustomed to come at will with the knowledge and acquiescence of said defendants, their agents and employes, into said tunnel and upon and over the ground in the vicinity thereof and around and about said unguarded buildings, then you will determine whether or not such use and handling of said explosives was a negligent and careless use of the same; and if you do find such use and handling of said explosives to have been a negligent and careless use thereof, and if you further find from the evidence that exploders brought to said tunnel by defendants were scattered over the surface of the ground near said tunnel, or left in such buildings in either of the modes hereinbefore suggested, and that said plaintiff was a child not of mature years, and not acquainted with the dangerous character of said exploders, or accustomed to the use thereof, and that plaintiff, on said 6th day of October, 1889, came upon the ground in the vicinity of said tunnel and into and around such buildings, and while there picked up one of said exploders and picked the same with a horseshoe nail, whereby the same was exploded, and that plaintiff was injured by such explosion, and this without negligence on his part, then your verdict in this case must be for plaintiff, and you will al-

low him such damages as the evidence shows he has sustained; and the fact that defendants had completed their work at said tunnel, and said work had been turned over to, and accepted by the railroad company for whom it was performed, would not prevent a recovery in this case."

The evidence has been carefully collated, and the facts have been stated as favorably as possible to the contentions of the defendant in error, that it might be determined, upon a careful comparison, whether a state of facts reasonably deducible from the evidence was correctly set forth in this instruction. Our conclusion is that the court erred in assuming that there was evidence showing that the exploder, to which this injury was due, was one left by plaintiffs in error in the tunnel, or that said exploder was found upon the floor of any building owned by the plaintiffs in error, or under their control, or that the plaintiffs in error were in any way responsible for said exploder being where it was found. It is possible that this explosive was taken from the powder house wherein it had been stored; or it may have been picked up by some one who carried it to the shanty where it was found. In either event the testimony should have shown that fact, and that plaintiffs in error were in some way responsible for its being placed where it was found, or had control of and were responsible for the condition of the shanty in which the boy unfortunately discovered it.

In *Meyer v. Midland P. R. Co.*, 2 Neb., on page 336, LAKE, J., thus quoted the modification made to an instruction: "This is the law: Unless the conductor or engineer in charge of the train, by the exercise of care and watchfulness, might have seen the child or children running directly towards the track so as to cross it, and from their size and conduct knew the child or children to be under the years of discretion, it was then the duty of those in charge of the train to check its speed, if possible, and put the same under such control, if practicable, as to be

able to avoid a collision with the children if they continued their course onto and across the railroad track."

On page 338 of the volume referred to, the opinion is continued in these words: "There was no testimony tending even to show that the child was seen 'running towards the track;' or that she was in a position where she could have been seen by the engineer one moment sooner than she was, as sworn to by him. It is altogether probable, and it seems to be generally conceded, that she and her little brother were concealed in the small ditch which crossed the track at the place of the accident, and stepped out of it upon the track when the train was so near that, by the efforts which were put forth, it was not stopped until the engine had passed over them. The tendency of this instruction was to mislead the jury and give them to understand that they were at liberty to resort to mere conjecture to enable them to account for what the testimony failed to show; and that they might infer the existence of a state of facts in respect to the relative position of the parties which the testimony would not warrant. There was no evidence upon which to predicate this instruction. The charge of the court to the jury should always be founded on, and be applicable to, the testimony; and when it is not, and is calculated to mislead the jury in considering the facts of the case, the judgment ought to be reversed. (*Meredith v. Kennard*, 1 Neb., 312, and cases there cited.)"

On page 339 of the same case, the following language was used: "It is the right of a party to a suit, by proper instructions, to have the minds of the jury directed to the essential features of the case, and their attention challenged to the testimony which should influence them in making up their verdict. They should also be advised of the legal effect of the establishment of, or failure to establish, the material facts of the case. When, however, this is not done, but, on the contrary, their minds are diverted from the real issues to be tried, and permitted to wander outside of the

testimony into the region of mere conjecture for the purpose of finding an excuse for returning a verdict in accordance with their own sympathies and desires, the chief value of a judicial trial is lost, and it is impossible to measure the injurious consequences that are likely to follow. More especially is this so in a case like the one at bar, where the jury had before them, as plaintiff against a railroad company, a mere child, who by so terrible an accident had been so unfortunate as to be made a cripple for life while perhaps endeavoring to rescue her little brother, who was so shockingly crushed to death."

The principles recognized and laid down in that case are the settled law in this state. No amplification of ours could render more clear the necessity for a strict adherence to the facts proven in discussing in instructions, the law as applicable to the facts which are in controversy before the jury. These principles, applied to the facts in this case and the instruction complained of, are decisive of this proceeding, and the judgment of the district court is

REVERSED.

THE other commissioners concur.

CORTELYOU, EGE & VANZANDT V. JUSTIN MCCARTHY, SR.

FILED OCTOBER 4, 1893. No. 4626.

1. **Trial**: CHANGE OF VENUE: MISCONDUCT OF JURY: REVIEW. Where only questions of fact are involved, as respects either the ruling of the trial court upon motions supported and resisted by affidavits, or upon the sufficiency of the evidence to sustain the verdict, such rulings will not be disturbed unless clearly wrong.

2. **An Instruction** requested, which directed a verdict for either party upon an issue of fact which ignored the material question of fact in issue, was properly refused.

3. **Instructions.** The trial court cannot properly be requested to instruct the jury what comparative importance shall by the jury be attached to instructions given, even though a portion of such instructions was given at the request of one of the parties to the action.

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

H. M. Uttley and *E. W. Adams*, for plaintiffs in error.

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

RYAN, C.

This action was begun before a justice of the peace of Holt county, Nebraska, on July 18, 1888, by the plaintiffs in error, against the defendant in error, for the possession of certain cattle, horses, hogs, and farm implements mortgaged by the defendant to the plaintiffs. The value of the property having been found by the appraisers to be $425, the proceedings were certified to the district court of said county. Upon proper issues the jury in that court found for the defendant and assessed the value of the replevied property at the sum of $1,025.50, and the damages for the wrongful detention of the same at $113.75, upon which judgment was duly rendered.

The errors alleged will be considered, as nearly as may be, in the same order as they are discussed in plaintiffs' brief. Plaintiffs have argued at considerable length that the court should have granted a change of venue because of the showing made of prejudice existing in Holt county against the plaintiffs. Section 61 of the Code of Civil Procedure provides that "In all cases in which it shall be made to appear to the court that a fair and impartial trial cannot be had in the county where the suit is pending,

* * * the court may, on the application of either party, change the place of trial to some adjoining county, wherein such impartial trial can be had." In support of the application for a change of place of trial there were filed several affidavits which were met by equally numerous contradictory affidavits, thus presenting simply a question of the weight of evidence, the proofs of the non-existence of prejudice being so strong that the decision of the trial court must be held final.

It is insisted that there was such misconduct on the part of the jury during the trial of this cause that the verdict should have been set aside. Briefly stated, this misconduct consisted, first, in the alleged fact that one of the jurors, during a recess of the court, drank a glass of whiskey. Mr. Uttley, one of plaintiffs' attorneys, stated in his affidavit that he saw one of the jurors go into a certain saloon just after court had adjourned for dinner; that he immediately went into the saloon and passed through it and heard the order given (affiant failed to state what that order was), and that on affiant's return through the saloon he observed an empty glass on the counter. Possibly this juror may have ordered and drank whiskey. We cannot, however, presume it, in the absence of proof, so that no matter what it might have been worth if established by proof, this contention must fail for want of evidence. Second, it is urged that there was misconduct of some of the jurymen, for it is asserted that said jurors freely expressed a determination to find against the bank long before all the testimony was submitted on the trial. The evidence upon this was conflicting, and the judgment of the trial court in weighing it should not therefore be disturbed. Third, it is contended that the jury, in its deliberations, as to the value of the property in dispute, agreed that each juror should mark down his estimate of such value; that the total of these amounts should be divided by twelve, which should be the verdict, on that point, the jury would render; and that such

value was accordingly so found and returned. There was submitted evidence in support of this state of facts, but there was a greater amount of evidence that there was no agreement in advance that the average result should be the finding of the jury. It seems from the greater number of the affidavits of the jurors that upon balloting there was found to be so great a difference in judgment of the value of the replevied property, which could not be eliminated by discussion, that it was proposed to average opinions and see what that result would be, and that after doing so some jurors favored more and some less than the average ascertained, but that finally that average was accepted by all as the reasonable and fair value of the property. In this condition of affairs, this court cannot say that the alleged misconduct existed. The ruling of the trial court must, therefore, be sustained so far as it involves this point.

The contention upon the trial was that for the chattel mortgage, upon which plaintiffs predicated their right to the possession of the property in dispute, there had been substituted as security a real estate mortgage made by defendant and his wife to plaintiffs. The difference in the evidence was as to whether the real estate mortgage was cumulative merely or whether it was an entire substitution for the chattel mortgage security. On the part of the defendant there was a great deal of evidence that the real estate mortgage was given and accepted for and in place of the chattel mortgage, and that Mr. Cortelyou, one of the plaintiffs, for and on behalf of plaintiffs, agreed to release and cancel the chattel mortgage. On the other hand, there was not so much direct testimony, but more which rendered intrinsically probable the testimony of Mr. Cortelyou that the real estate mortgage was given and taken only as additional security, there being no agreement whatever that the chattel mortgage should be released or abandoned. In such condition of the evidence the judgment of the trial judge is entitled to great consideration, for he saw and

heard the testimony of the different witnesses, observed their deportment, and had an opportunity for judging of the weight to be given the statements of each, which, in the nature of things, are denied this court. Had the trial judge seen fit to have set aside the verdict as contrary to the weight of the evidence his ruling would probably not have been disturbed by this court for the reasons above given. His judgment adversely to the plaintiffs, upon the comparative weight of the testimony as being sufficient to sustain the finding of the jury, is entitled to at least equal weight and cannot be disturbed.

Plaintiffs' next contention is that it was prejudicial error to allow the defendant to prove the value of the land upon which the real estate mortgage was made. It seems to us that this evidence was proper, as showing the probable sufficiency of the real estate security for the amount due, in view of the defendant's contention that contemporaneously with taking this security the mortgagees released other securities which they held for most of the indebtedness.

The court instructed the jury fully upon the issues involved, and as to these instructions no error is assigned nor was any exception taken. It is, however, insisted by the plaintiffs that the court should have given their second instruction asked, which is in the following language:

"2. What was the consideration of the note, why or for what it was given, or what rate of interest was to be paid for the same, can in no way affect this suit or the right of the plaintiffs to recover so long as the defendant has admitted that at least a part of said note remained unpaid."

This instruction ignored the contested facts in the case. No question was made upon the trial that a large part of the amount secured by the chattel mortgage was also secured by the real estate mortgage, but a substitution of the latter for the former was claimed to have taken place. This instruction would have required the jury to have ignored this contention, and if they found that a portion of the debt

was unpaid it would have been their duty, had the instruction been given, to have found for the plaintiffs, irrespective of whether there had been a substitution or not. It was, therefore, proper for the court to refuse, as it did, the second instruction, as based upon too insufficient statement of the facts to justify the conclusion which the jury were informed they should reach.

It is also insisted that there was error in refusing the fourth instruction asked by the plaintiffs. This instruction is as follows:

"4. In order to cancel this mortgage it is necessary that the defendant produce proof greater in amount and more prudent in character than the instrument based on the testimony that is offered to support the same."

The instruction complained of is set out in the language just quoted, and it is very difficult to imagine, if we take this language literally, what plaintiffs' counsel had in mind when he drew this instruction. It is probable, however, that in transcribing into the record an injustice has been done, and that the instruction quoted is not in the language in which it was asked. If the intention was to instruct the jury that they must find greater and more convincing proof in its character than the instrument itself imports and the testimony that was offered to support the same, it is a misleading instruction. The court had already informed the jury what their duty was in weighing the testimony adduced by the respective parties to this controversy. It was, in addition to that, no part of the duty of the court to take up the evidence piece-meal and instruct the jury that it must be weighed and considered in that manner. The court, therefore, properly refused to give this instruction.

Complaint is made that the court refused to give the ninth instruction asked on plaintiffs' behalf. It is as follows:

"9. The jury are instructed that the instructions which are asked by the counsel and given by the court are to be

considered by them the same as instructions which are given by the court on its own motion."

Probably no harm would have resulted from the giving of this instruction; that its refusal prejudices a substantial right of the plaintiffs we cannot conceive. Each of the instructions asked by the plaintiffs which the court gave were given in the same manner, and so far as we can judge from the record, with the same force as though they were the instructions written by the court. It would probably be sufficient grounds to set aside a verdict if the record showed that the court in any way intimated to the jury, upon giving instructions of a party against whom a verdict was afterwards rendered, that they were to be considered of less force or in any other manner than instructions emanating from the court. We cannot assume, however, that instructions which are given at the request of either party in the ordinary course of a trial are considered by the jury as having less weight than those given by the court, and that therefore there exists a necessity of counteracting that false conception of the jury.

The several alleged errors have been fully considered in connection not only with the briefs of the respective parties but with the record and bill of exceptions submitted, and we find no other substantial errors alleged,—certainly none exist in the record,—and the judgment of the district court is

AFFIRMED.

THE other commissioners concur.

W. H. FILLEY v. PATRICK SCOLLARD.

FILED OCTOBER 4, 1893. No. 4760.

Conflicting Evidence: REVIEW. The record presenting but a question of fact to be reviewed upon conflicting evidence, the judgment of the district court is affirmed.

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

Davis, Gantt & Keatley, for plaintiff in error.

Barnes & Eames, contra.

RYAN, C.

This action was brought in the district court of Dixon county by Patrick Scollard to recover the amount of a promissory note made to him January 31, 1888, by G. W. Cassell and W. H. Filley, due by its terms February 1, 1889, for $1,050. The defendant Cassell answered, admitting the execution of the note, but insisting that the time of payment thereof had been, upon sufficient consideration, extended one year from and after its maturity; and that the note was usurious. Upon this answer the court by its finding sustained the claim of usury. As to this finding no question is presented in this court. It will not therefore be further considered.

The defendant Filley in his separate answer alleged that he was but a surety on said note, as was well known to plaintiff, and that upon a sufficient consideration, after the maturity of said note, paid by the principal maker thereof to the payee, the payee had agreed to an extension of the time of payment for a year from the date of the maturity of said note as fixed by its terms, without the consent or knowledge of said surety, whereby said surety was discharged from

all liability thereon. Issue was duly joined upon the averments of the answers aforesaid, and upon a trial of said issues to the court a finding was made that no extension of time upon the note had been assented to, and judgment accordingly rendered against both defendants. This conclusion was reached upon conflicting evidence sufficient to sustain the finding of the trial court either way, and, as there is no other question than this presented by the record, the judgment is

AFFIRMED.

THE other commissioners concur.

COMMERCIAL NATIONAL BANK OF OMAHA ET AL., APPELLEES, V. JOHN H. GIBSON ET AL., APPELLANTS.

FILED OCTOBER 4, 1893. No. 4632.

1. **Pleading:** AMENDMENTS: DISCRETION OF TRIAL COURT. After the issues have been fully made up it rests within the sound judicial discretion of the trial judge either to permit amendments of the pleadings in furtherance of justice, and on such terms as may be proper, or absolutely to refuse the right of amendment.

2. **Corporations:** UNPAID SUBSCRIPTION: LIABILITY OF STOCKHOLDERS. Under section 4, article 11, of the constitution of Nebraska, the original subscribers for stock of a corporation or joint stock association are liable to the creditors of such corporation or association for the amount unpaid on said subscription, and such liability shall follow the stock without releasing such subscriber.

3. ——: ——: ——: PROCEDURE. The constitutional requirements, that the exact amount justly due shall be first ascertained, and that the corporate property shall have been exhausted before enforcing individual liability for unpaid subscription for stock, are sufficiently met by the rendition of a

judgment and the return of an execution *nulla bona* against the corporation whose stockholders are sought to be held liable to its creditors.

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

The facts are stated in the opinion.

Lake, Hamilton & Maxwell, for appellant Layton:

From the facts as disclosed by the evidence there is no privity between Layton and the Omaha Varnish Company by reason of his purchase from Bodine of his shares of stock, and he would not be liable to it in an action for unpaid subscriptions, and for the same reason he is not liable at the suit of creditors of the insolvent corporation against its stockholders to enforce payment of their claims. (Cook, Stock and Stockholders, secs. 258–266; *Marlborough Mfg. Co. v. Smith,* 2 Conn., 579; *Northrop v. Newtown & Bridgeport Turnpike Co.,* 3 Id., 544; *Oxford Turnpike Co. v. Bunnell,* 6 Id., 552; *Dane v. Young,* 61 Me., 167; *Adderly v. Storm,* 6 Hill [N. Y.], 624; *Rosevelt v. Brown,* 11 N. Y., 152.) The claim of Edward Ainscow against the Omaha Varnish Company cannot be enforced in this action, not having been reduced to judgment and the exact amount justly due first ascertained. (*Weil v. Lankins,* 3 Neb., 384; *Crowell v. Horacek,* 12 Id., 622; *Keene v. Sallenbach,* 15 Id., 202; *Kennard v. Hollenback,* 17 Id., 365; *Sayre v. Thompson,* 18 Id., 33.) To authorize the filing of a creditor's bill or the recovery by a creditor of the corporation of the amount of his claim against the subscribers and stockholders, it is not only necessary that the claim should be first reduced to judgment, but that an execution thereon should be returned not satisfied, or it should, at least, be alleged and proved that the corporation had no real or personal estate liable to levy and sale on execution whereby the judgment could be satisfied. (*Sayre v. Thompson,* 18 Neb., 33.)

A. S. Churchill, for appellant French:

The company had no authority to interfere with the transferability of the shares. (*Upton v. Tribelcock*, 91 U. S., 45; Angell & Ames, Corporations, secs. 558, 566; *Webster v. Upton*, 91 U. S., 70; Thompson, Liabilities of Stockholders, secs. 1, 4, 210; *Billings v. Robinson*, 94 N. Y., 415; *Bank of Attica v. Manufacturers & Traders Bank*, 20 Id., 501; *Discoll v. West*, 59 Id., 96; *People v. Ellmore*, 35 Cal., 653; *Chouteau Spring Co. v. Harris*, 20 Mo., 383.)

Gregory, Day & Day, for appellee Ainscow:

Ainscow commenced no suit by creditor's bill, but was made a party defendant in the subject-matter by suit, properly brought by persons having obtained judgment and a right to bring a creditor's bill, and the right to consider and award judgment for the amount due rests upon that general principle of equity, that where a court once acquired jurisdiction of the subject-matter it acquired it for all purposes whatsoever, and has the power in matters thus acquired of making just such order and entering such judgment as a court of law would have done if it had first acquired jurisdiction. (*Swift v. Dewey*, 20 Neb., 107; *Buchanan v. Griggs*, Id., 165; *Whiting v. Root*, 52 Ia., 292; *McMurray v. Van Gilder*, 56 Id., 605.) The appellant French is liable in that he did not transfer the stock till long after the corporation ceased to do business and was winding up its affairs and in a state of dissolution, with every evidence of insolvency, and with the full knowledge of which he was charged as an officer of the corporation, and was without power to make a legal transfer. (Morawetz, Private Corporations, secs. 166, 168, 310.)

Montgomery, Charlton & Hall, for appellees:

The original subscribers are liable for their unpaid sub-

scription. Payment may be enforced, not only as against the holder of the stock but also the original subscribers, after the corporate property shall have been exhausted. (Constitution, art. 11, sec. 4; 2 Waterman, Corporations, sec. 275; *Brown v. Hitchcock*, 36 O. St., 667; *Pittsburgh & C. R. Co. v. Clark*, 29 Pa. St., 146; *Messersmith v. Sharon Savings Bank*, 96 Pa. St., 440; *Hager v. Cleveland*, 36 Md., 476.) If the stockholders knew of the insolvency at the time of the transfer it would be very strong evidence of fraud, and it would be hard to resist the conclusion that such transfer was made in bad faith. A transfer made with the purpose of escaping liability, to a person who is incapable of responding in respect of such liability, is void as to creditors and other shareholders. (*Miller v. Great Republic Ins. Co.*, 50 Mo., 57; *Providence Savings Institution v. Jackson Place Skating Rink*, 52 Id., 558; *McClaren v. Franciscus*, 43 Id., 467; *Nathan v. Whitlock*, 9 Paige Ch. [N. Y.], 152; *Marcy v. Clark*, 17 Mass., 334; *Brown v. Hitchcock*, 36 O. St., 667; Thompson, Liability of Stockholders, sec. 215; *Bowden v. Johnson*, 107 U. S., 251; *Sawyer v. Hoag*, 84 U. S., 610.) The evidence discloses that the Omaha Varnish Company had no property remaining out of which the claims of creditors could be made, and the district court so adjudged. Execution had issued prior to the commencement of this suit and returned unsatisfied. This showing is conclusive as to the corporate property having been exhausted. (*Baines v. Babcock*, 27 Pac. Rep. [Cal.], 674; *Hatch v. Dana*, 101 U. S., 205.)

RYAN, C.

On the 31st day of October, 1888, the Commercial National Bank of Omaha and L. C. Gillespie, as plaintiffs, filed in the district court of Douglas county, Nebraska, their petition, in which were made defendants Edward Ainscow and the Omaha Varnish Company, of Omaha, with various other parties whom it alleged were, or had

been, stockholders of the said varnish company. It was alleged in this petition that the articles of incorporation of the Omaha Varnish Company, defendant, were duly adopted, subscribed, and acknowledged on the 20th day of April, 1887; and that it was provided in said articles that said corporation should commence on the 18th day of April, 1887, and terminate one hundred years from that date; that said company commenced doing business soon thereafter, and in the course of its business became indebted to the Commercial National Bank on account of money loaned, and to the plaintiff L. C. Gillespie on account of goods by him sold to said company; that on August 4, 1888, the said plaintiff, the Commercial National Bank, recovered a judgment against said Omaha Varnish Company for the sum of $2,179.72, and that L. C. Gillespie recovered judgment in the sum of $1,882.02 on the same date, which judgments, by their terms, drew interest at ten per cent per annum from May 14, 1888, and that no part of either of said judgments had been paid. The petition further alleged that on the 7th day of August, 1888, executions were duly issued upon said judgments and delivered to the sheriff of said Douglas county, and by him, on the 19th day of October, 1888, were returned unsatisfied for want of goods, chattels, lands, or tenements of the said defendant, the Omaha Varnish Company, whereon to levy, the said sheriff, after diligent search, having been unable to find any property of the said varnish company, and that the Omaha Varnish Company, of Omaha, Nebraska, is insolvent, and has no property out of which the said plaintiffs can make their judgment aforesaid. The petition further alleged that it was provided by the articles of incorporation of the Omaha Varnish Company that the capital stock thereof should be $25,000, divided into shares of $100 each, which should be subscribed and paid for in installments, the first installment to be fifteen per cent, and the subsequent ones as might be required by

order of the board of directors. The petition then in detail recited the subscription for, or acquisition of, stock by transfer of each of the sixteen defendants described as stockholders of, and therefore associated with, the said Omaha Varnish Company as defendants. The prayer of the petition was that each of the defendants then or theretofore holding stock in the Omaha Varnish Company should be held liable for the unpaid eighty-five per cent due upon each of the respective shares of stock by them held, and that such defendants as stockholders be required to pay Edward Ainscow (a co-defendant, who, by reason of having a claim against said company and refusing to join in said petition, was made a defendant) the amount which was due him from said varnish company, and that judgment be rendered accordingly. Several of the defendants made default, and judgment was thereupon rendered against them as prayed.

On the 13th day of December, 1888, Egbert E. French, one of the defendants, answered denying any knowledge as to whether there had been judgments rendered against the Omaha Varnish Company in favor of the plaintiffs, or that execution had issued on such alleged judgments. The answer of French admitted that he was at one time a stockholder of the Omaha Varnish Company, but alleged that on October 17, 1887, he had sold and transferred unto William J. Paul all the stock and interest he ever had in said association, since which time he had had no connection or interest therein; that at the time of transferring said stock said corporation was solvent and abundantly able to pay all its debts and liabilities. On the 9th day of January, 1889, C. D. Layton, one of the defendants, answered admitting that there had been a formal transfer to him of stock in the Omaha Varnish Company by one George W. Bodine, but alleged that no registry of said transfer was ever made by said company, and denying that such registry had by him ever been authorized to be made, and that upon

a date, which he unfortunately left blank, he had transferred his certificates of stock to one John H. Rikerd. This defendant also denied that certificates of stock alleged to have been issued to him were so issued. Further answering, this defendant alleged that no part of said pretended indebtedness or liability of said varnish company to said plaintiffs, to said co-defendant Ainscow, or to either of them, had been incurred by said company while this defendant formally held the aforesaid certificates of stock therein as hereinbefore admitted, and this defendant further alleged that at the time of transferring said certificates of stock as aforesaid to said Rikerd, the said Omaha Varnish Company was solvent and abundantly able to pay all its debts and liabilities. The answer closed with a denial of every allegation in the petition not before specifically admitted or modified.

The plaintiffs replied to the answer of defendant Layton by a denial of the several averments thereof. Thereupon the reply alleged that the Omaha Varnish Company never had any notice of the alleged transfer of stock certificates in said corporation by the said defendant Layton to the said John H. Rikerd, and that no such transfer was ever registered by said corporation, and that neither plaintiffs nor any other creditor of said Omaha Varnish Company had any notice of such alleged transfer. The reply admitted that the indebtedness of the Omaha Varnish Company to plaintiffs and to defendant Ainscow had been incurred before the transfer of the stock of Bodine to the defendant Layton, and alleged that said varnish company was then and continued liable for all of it while the defendant Layton was a stockholder in said company. The reply further denied that the Omaha Varnish Company had been solvent or abundantly able to pay all its indebtedness or liabilities during any of the times since defendant Layton had become a stockholder in said corporation, except as such payment might be made by calling upon the

individual stockholders in said varnish company for payment of their unpaid subscriptions.

In reply to the answer of defendant French the plaintiffs denied the transfer alleged in said answer, and averred that if said defendant French entered into any arrangement with the defendant William J. Paul for the transfer of said stock of said company, that no notice that such arrangement had been made for said transfer had been given, and that there had been no transfer of said stock, and that neither plaintiffs nor any other creditor of said Omaha Varnish Company had any notice of any arrangement for or attempted transfer of stock by the said French to said Paul, and that there had been no transfer of said French's certificates of stock upon the books of said corporation, and that no request for such transfer had ever been made by either said French or Paul. This reply closed with the same denial as to the solvency of the varnish company as is found in the reply to the answer of Layton.

These replies were filed in March of 1889.

Edward Ainscow, who by the petition had been alleged to be a holder of a claim against the Omaha Varnish Company, answered, admitting the existence of the indebtedness as charged from the Omaha Varnish Company to him, and alleging that said indebtedness was still due. This defendant further answered as follows: "And this defendant, without relinquishing or waiving any of his rights against the makers of said notes in question, makes such tender and such tender only of the notes in question as will enable the same to be equitably enforced against the defendant the Omaha Varnish Company and its stockholders who have been made defendants." The defendant Ainscow thereupon prayed that his claim might be considered in so far only as it should affect the liability of the defendant the Omaha Varnish Company, and the defendants as stockholders of the same, and that said Ainscow have and

obtain such order and decree for the payment of the same as to the court should seem meet and proper.

The trial of this case was commenced on December 13, 1889, the issues at that time being as above described. On the date last named there was filed in said cause the following motion:

"Comes now Egbert E. French, one of the defendants herein, and moves the court for leave to file his amended answer instanter and cross-bill, which he herewith tenders, and for reasons therefor states, that said amended answer and cross-bill tenders a just and meritorious defense to said action. This defendant for further reason refers to the affidavit filed herewith in support of said motion."

Most diligent search has failed to disclose in the record the existence of any affidavit accompanying the motion just set out. The defense, or rather the new defense, just proposed to be set up by this answer, consisted, so far as we can discover, in simply setting up such facts in detail as would indicate that the Omaha Varnish Company, at the time French transferred his stock, was solvent. The detailed statement referred to was of the property then owned and of its value. The court refused to give leave to defendant French to file his proposed answer, and on the 14th day of December, the said answer appearing to have been filed, it was by the court ordered to be stricken from the files.

A similar condition of affairs to that described in relation to French existed in relation to the amended answer and cross-bill of C. D. Layton, except that there was no filing of the same or order of the court ordering it stricken from the files. The new defense, however, proposed to be set up was of much of the same nature as was tendered in the amended answer of French.

From the record we cannot determine when the offer to file the amended answer and cross-bill of Layton was made. The only record upon that subject is a stipulation

signed by the several parties to this litigation. It simply recites that "appellant Layton, before the cause came on for hearing in the district court, orally moved for leave to file an amended answer and cross-bill, and presented to the court the identical amended answer and cross-bill herewith attached, and asked leave to file the same, and upon consideration thereof by the court the said court overruled said motion, and said Layton was by the court not permitted to file said pleading, to which said Layton excepted." This stipulation was filed in this court, it being therein agreed that the tender of the answer should be considered as if the same had been regularly shown by the record of the district court. From the nature of this stipulation we are left entirely to infer the date on which the amended petition was presented for filing in the district court; but, as the stipulation recites that it was before the trial, it will be assumed that it was upon the same date as was tendered the amended answer and cross-bill of the defendant French. The action of the court in refusing to allow the proposed amendments will, therefore, be considered as though taken only on one of these tenders made upon the same date that the cause was taken up for trial.

Section 144 of the Code of Civil Procedure provides that: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." This language clearly vests in the district judge a discretion as to allowing the filing of amendments. Of course this is a judicial discretion, the abuse of which is subject to review. It is none the less necessary, however, to the efficient administration of justice. If it was in the power of a party at any time to tender an amend-

ment to his pleading which the court is bound to permit, there would be no need of dilatory motions or applications for a continuance. Until the trial day, there could not be known how much of truth or falsity there was in the averments of an answer, and such an answer drawn by an adroit attorney could always be made to present a new defense which plaintiff would be unprepared to meet on the eve of trial. The provision allowing amendments is intended to aid in the administration of justice and not to defeat it. We do not mean to be understood to intimate that there was anything in the nature of sharp practice in the presenting of these particular pleadings for filing just as the case was reached for trial. We are discussing simply the general proposition which must govern judicial proceedings. To prevent such abuse of power of filing amendments and procrastination of judicial proceedings it is necessary that to the impartiality and unbiased judgment of the district judge there should be left the exercise of discretion. In the case at bar the proposed amendment presented no defense other than such as had already been tendered by a sufficient answer; there was no showing by the proposed affidavit of any reason for tendering the amendments of French at the late date at which it was tendered, and as to Mr. Layton, no pretense was made of a reason for his delay. Under all these circumstances we think the district judge properly refused to grant leave to file the proposed amended answers and cross-petitions.

It is quite unnecessary to review at length the testimony upon which the decree was rendered. It is sufficient to observe that the findings made in the said decree are fully sustained by the evidence at all points. After recording the default of the defendant, the Omaha Varnish Company, and such of its stockholders as had failed to plead, the decree was for judgment by default against the said parties, after which it proceeded in the following language, which, as it clearly states the extent of the liability of the several parties, and the reason upon which the same is

founded, we shall adopt as the correct version of the facts involved in this case:

"It is therefore by the court considered, adjudged, and decreed as follows: That the plaintiff, the Commercial National Bank of Omaha, Nebraska, recover of and from the said last named defendants the sum of $2,636.27, together with interest thereon at the rate of ten per cent per annum from May 12, 1890; that the plaintiff L. C. Gillispie recover of and from the said last named defendants the sum of $2,280, with interest thereon at the rate of ten per cent per annum from May 12, 1890; and that the defendant Edward Ainscow recover of and from the said defendants the sum of $1,779.43, together with interest thereon at the rate of ten per cent per annum from May 12, 1890; that the said plaintiffs and the said defendant Ainscow recover of and from the said defendants the costs of this suit taxed at $——; that the amounts thus adjudged against the said defendants and in favor of the said plaintiffs and the said defendant Ainscow be, and the same are hereby, decreed payable as adjudged hereinafter.

"That the following named defendants were original subscribers to the capital stock of the Omaha Varnish Company for the following stated number of shares, each of the par value of $100, amounting in the aggregate to the following named sums, and such stock was issued to such defendants in certificates numbered as follows:

Name of defendant.	No. of certificate.	No. of shares.	Amount.
John H. Gibson	1, 2, 3, 4	8, 8, 8, 9	$3,300
Eugene Aylesworth	5, 6, 7, 8	8, 8, 8, 8	3,200
Charles P. Benjamin	9, 10, 11, 12	8, 8, 8, 8	3,200
Fred W. Race	13, 14	10, 10	2,000
George W. Bodine	15, 16, 17	9, 8, 8	2,500
John F. Kellogg	18, 19, 20	9, 8, 8	2,500
Alfred Millard	21, 22	10, 5	1,500
Richard C. Patterson	23, 24	5, 5	1,000
Ernest C. Keniston	25, 26	5, 5	1,000
Egbert E. French	27, 28, 29, 30	9, 8, 8, 8	3,300
William H. Elbourne	31	10	1,000
C. H. Wilson	32	5	500

"That the defendant Egbert E. French sold all his stock in October, 1887, to W. J. Paul, whom the evidence shows to be solvent, which said shares of stock are the only shares at any time held by said French in said corporation; but that said defendant French, as one of the original subscribers, is liable for the unpaid portion of such subscription, notwithstanding such transfer.

"That only fifteen per cent of the subscription or par value of the capital stock has been paid up, and each of the said defendants is liable to pay towards satisfaction of the amounts due the plaintiffs and the defendant Edward Ainscow, as above determined, eighty-five per cent of the aggregate amount subscribed by each of said defendants, as above determined, or so much thereof as may be necessary to satisfy and pay the plaintiffs and the defendant Edward Ainscow the aforesaid determined sums due them together with the costs of this action.

"That subsequent to the issuance of said certificates of stock the defendant Alfred Millard purchased of the defendant Eugene Aylesworth the eight shares of his capital stock represented by certificate No. 7; and the defendant Ernest C. Keniston purchased of the defendant Eugene Aylesworth the eight shares of his capital stock represented by certificate No. 8; and the defendant Fannie A. Benjamin purchased of the defendant Charles P. Benjamin the thirty-two shares of his capital stock represented by certificates Nos. 9, 10, and 12; and the defendant Ernest C. Keniston purchased of the defendant Fred W. Race five shares of his capital stock included in certificate No. 13; and the defendant Chesley D. Layton purchased of the defendant George W. Bodine the latter's twenty-five shares of his said capital stock represented by certificates Nos. 15, 16, and 17; and the defendant Robert B. Guild purchased of the defendant John F. Kellogg the nine shares of his capital stock represented by certificate No. 18; and the defendant Ernest C. Keniston purchased of the defendant John F.

Kellogg the sixteen shares of his capital stock represented by certificates Nos. 19 and 20.

"That the said last named defendants who purchased from the other defendants the said shares as stated are, as transferees, jointly and severally liable to the plaintiffs and the defendant Ainscow, together with their transferers, for eighty-five per cent of the aggregate par value of the shares purchased by each, or so much thereof as may be necessary under the terms of this decree to satisfy and pay the said plaintiffs and the defendant Edward Ainscow the amounts adjudged above due them, with costs.

"That the defendants, within twenty days from the entry of this decree, pay, or cause to be paid, to the said plaintiffs and the said Edward Ainscow the several amounts adjudged due them as above stated, together with the costs of this action, and in default thereof that execution be issued against the defendants John H. Gibson, Charles P. Benjamin, Fannie A. Benjamin, Ernest C. Keniston, Chesley D. Layton, Robert B. Guild, Alfred Millard, Richard C. Patterson, Egbert E. French, and C. H. Wilson, being the defendants who have been served with summons in said action and over whom this court has jurisdiction, and against their property, directed to the sheriff of Douglas county, Nebraska, and commanding him to collect from the said defendants, or their property, the following sums, or so much thereof *pro rata* as in the aggregate will be sufficient to pay the said amounts due the said plaintiffs and the said defendant Ainscow, together with interest and costs, namely: From John H. Gibson, the sum of $2,905; from Charles P. Benjamin and Fannie A. Benjamin, jointly or severally, the sum of $2,720; from Ernest C. Keniston, the sum of $3,325; from Chesley D. Layton, the sum of $2,125; from Robert B. Guild, the sum of $765; from Alfred Millard, the sum of $1,955; from Richard C. Patterson, the sum of $850; from Egbert E. French, the sum of $2,905; and from C. H. Wilson, the sum of $425.

"In the event that the said sheriff is unable to collect from any of said last named defendants the said amount or amounts for which said defendant or defendants are adjudged liable, the said sheriff is to be directed by said execution and is hereby adjudged to collect from the other of the defendants and against whom the sheriff may be able to enforce such execution, the said amounts due to the plaintiffs and the said Ainscow with interest and costs; provided, however, that the said sheriff shall not collect from any defendant more than the amount which is adjudged against him, as above stated. That whenever any defendant shall have paid the full amount for which he is above decreed liable, such payment shall operate as a full satisfaction of this judgment as against any such defendant."

In argument it is insisted by the appellants that the decree rendered against them was unauthorized, notwithstanding the provisions of section 4, article 11, of the constitution of the state of Nebraska, which is as follows: "In case of claims against corporations and joint stock associations the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers therefor shall be individually liable to the extent of their unpaid subscriptions, and the liability for the unpaid subscriptions shall follow the stock." This language is broad enough to describe all classes made defendants in this action—the original subscribers as well as the subsequent holders of the stock. As to the first, the stockholder is individually liable to the extent of his unpaid subscription; that is to say, by parting with his stock he does not divest his liability to pay whatever remains unpaid upon his subscription. The constitution creates the same liability as against the original holder of stock as would obtain against one who signs any other agreement to pay to a corporation a sum of money. Nothing but his payment will discharge his liability so far as the creditors are concerned. In this case the promise to pay

eighty-five per cent of the stock subscribed for exists as a binding claim against a subscriber for stock until full payment is made. As between himself and the corporation it may be that in some manner such liability ma be discharged, but as to the creditors the liability still exists, notwithstanding a transfer of the stock in consideration of the issuing of which such liability was incurred. As to the other class upon whom is fastened a liability by reason of becoming holders of stock, the language of the constitution is equally plain. "The liability for the unpaid subscription shall follow the stock," can have no other meaning than that whoever becomes an owner of stock shall be cumulatively liable with the original holder for whatever amount is unpaid thereon. In the case at bar each of the defendants holding stock of the Omaha Varnish Company was either an original subscriber for such stock, or became such holder by assignment. His liability seems to be fairly fixed by that part of the constitution just quoted. The decree of the district court in that respect was therefore right.

It is insisted in argument, however, that the exact amount had not been first ascertained, neither had the corporate property been exhausted when this action was commenced. We know of no more effective way of ascertaining the amount due than by a judicial determination of that fact. As to the corporate property having been exhausted there exists no better form of evidence than the return of the sheriff *nulla bona* on an execution issued against a defendant whose property is required to be exhausted precedent to the commencement of other proceedings. These observations apply with special force to the claims of the Commercial National Bank and L. C. Gillespie respectively. As to the claim of Ainscow against the Omaha Varnish Company, we think that the judgment by default in this same action sufficiently established the amount due, and that, as the evidence showed that executions had been returned *nulla bona* as to the above two claims sought to be

enforced, it was not essential as to the claim of Ainscow that an execution should have issued and been returned *nulla bona* as a condition precedent to such relief as he might be entitled to. The judgment of the district court is

AFFIRMED.

THE other commissioners concur.

JOHN C. MORRISSEY, APPELLANT, V. GEORGE BROOMAL ET AL., APPELLEES.

FILED OCTOBER 4, 1893. No. 5125.

1. **Equitable Actions:** FORECLOSURE OF LIEN OF WAREHOUSE RECEIPTS. An action to foreclose a lien of certain warehouse receipts on grain in storage, pledged to secure the payment of a promissory note, is a suit in equity.

2. ———: COUNTER-CLAIM BY DEFENDANT: RIGHT TO JURY TRIAL. A defendant in an equity suit is not entitled, as a matter of right, to a jury for the trial of a counter-claim for damages, which he has voluntarily pleaded in the case.

3. **Contracts:** RESERVATION OF RIGHT TO TERMINATE. Ordinarily where the right to terminate a contract on notice is reserved in the instrument itself, without fraud or mistake, and with the actual knowledge and consent of all the parties thereto, such reservation is valid, and the exercise thereof will be enforced by the courts, if not contrary to equity and good conscience.

4. ———: USURY: QUESTIONS OF FACT. Where by the terms of a written contract a commission merchant in Chicago advances money to a grain dealer in Nebraska, for which the latter agreed to pay interest at the rate of seven per cent per annum, and also agreed to pay the commission merchant a stated sum as commissions for the sale of all grain purchased with the money borrowed, whether the borrower sold his grain through the commission merchant or elsewhere, *held*, (1) that the contract was not on its face usurious; (2) that whether it was intended as a

cover for usury, or an honest contract for commission business in connection with the use of the money, was a question of fact.

5. **Gambling Contracts:** COMMISSION MERCHANTS: GRAIN DEALERS: INTENTION OF PARTIES: QUESTIONS OF FACT: EVIDENCE. Wanzer & Co., commission merchants in Chicago, made a written contract with one Morrissey, a grain dealer in Nebraska, by which they agreed to lend the latter money to be used by him in the purchase of grain in Nebraska. This contract contained the further provision that the "said Morrissey further agrees to sell through said Wanzer & Co., for future delivery in Chicago market, corn equal to the amount of ear corn purchased with funds furnished by Wanzer & Co., which sales may be changed from month to month, as may be directed by said Morrissey. For the purchase and sale of this grain said Morrissey agrees to pay said Wanzer & Co. one-sixteenth of one cent per bushel per month on all corn on hand at the close of each and every month, which shall cover the charges of change from month to month; and if purchases and sales of this character are made in any month in excess of the amount of corn on hand, the charges of such purchase and sale, or sale and purchase, shall also be one-sixteenth of one cent per bushel." *Held*, (1) the contract on its face was not one from which it appeared that the parties intended to speculate in grain upon the market without actual delivery by settling the differences, and was therefore not a gambling contract; (2) whether the parties honestly intended to deal in actual grain, or use the contract as a cover for betting on the rise and fall of its price in the market, was a question of fact to be determined from what the parties did in pursuance of the contract and other competent evidence.

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

The opinion contains a statement of the case.

G. M. Lambertson, for appellant:

The court erred in overruling the motion to transfer the case to the law docket and impanel a jury for the trial of the same, and erred in refusing to impanel a jury in the equity court to try the issues of fact. (Code, secs. 100, 101, 280, 281; *Dale v. Hunneman*, 12 Neb., 225; *Lamaster v. Scofield*, 5 Id., 149; *Betts v. Sims*, 25 Id., 184; *Dohle v.*

Omaha Foundry, 15 Id., 437; *Davis v. Morris*, 36 N. Y., 572; *Ladd v. James*, 10 O. St., 438; *Keller v. Wenzell*, 23 Id., 579; *Greason v. Keteltas*, 17 N. Y., 499.) The contract is non-forfeitable under the thirty-day clause. The party claiming forfeiture must show complete readiness to perform. (*Post v. Garrow*, 18 Neb., 687; *Nebraska City v. Nebraska City Hydraulic Gas Light & Coke Co.*, 9 Id., 343; 2 Kent's Com., p. 555; *People v. Gosper*, 3 Neb., 285; *Barton v. Fitzgerald*, 15 East [Eng.], 541; *Merrill v. Gore*, 29 Me., 346; *Newlean v. Olson*, 22 Neb., 719; Jones, Chattel Mortgages, sec. 430; *Anderson v. Holmes*, 14 S. Car., 162.) When commissions are exacted for money advanced, aggregating, with the interest charged, a greater rate than the rate allowed by law, there being no other service rendered than the loan of the money, the contract stipulating for such commission and all notes given in payment of sums advanced under such contract are usurious and illegal. (*Brown v. Vredenburgh*, 43 N. Y., 295; *Merchants Exchange Nat. Bank v. Commercial Warehouse Co.*, 49 Id., 640; *Olmstead v. New England Mortgage Security Co.*, 11 Neb., 493; *New England Mortgage Security Co. v. Hendrickson*, 13 Id., 157; *Rosa v. Doggett*, 8 Id., 48; *Richards v. Kountze*, 4 Id., 205; *Stark v. Sperry*, 40 Am. Rep. [Tenn.], 47; *Chester v. Apperson*, 4 Heisk. [Tenn.], 639; *Fanning v. Dunham*, 9 Am. Dec. [N. Y.], 283; *Harman v. Lehman*, 5 So. Rep. [Ala.], 203; *Cleveland v. Loder*, 7 Paige Ch. [N. Y.], 557; Tyler, Usury, p. 327; *Palmer v. Baker*, 1 Maule & S. [Eng.], 56; *Grubb v. Brooke*, 47 Pa. St., 485; *Large v. Passmore*, 5 S. & R. [Pa.], 51; *French v. Baron*, 2 Atk. [Eng.], 120; *Brakely v. Tuttle*, 3 W. Va., 87.) The contract entered into between Wanzer & Co. and J. C. Morrissey, and the notes executed for the payment of moneys advanced under said contract are gambling contracts, and are illegal and void. (*Rudolph v. Winters*, 7 Neb., 126; *Pickering v. Cease*, 79 Ill., 328; *Embrey v. Jennison*, 131 U. S., 336; *Mohr v.*

Meisen, 49 N. W. Rep. [Minn.], 862; *Irwin v. Williar*, 110 U. S., 499; *Sprague v. Warren*, 26 Neb., 326; *Watte v. Wickersham*, 27 Id., 457; *Fareira v. Gabell*, 89 Pa. St., 89; *Lyon v. Culbertson*, 83 Ill., 33; *Roundtree v. Smith*, 108 U. S., 269; *Bigelow v. Benedict*, 70 N. Y., 202; *Hentz v. Jewell*, 20 Fed. Rep., 592; *Union Nat. Bank v. Carr*, 15 Id., 438; *Irwin v. Williar*, 4 Sup. Ct. Rep., 160; *Waugh v. Beck*, 6 Atl. Rep. [Pa.], 923; *Beadles v. McElrath*, 3 S. W. Rep. [Ky.], 152; *Cobb v. Prell*, 15 Fed. Rep., 774; *Barnard v. Backhaus*, 9 N. W. Rep. [Wis.], 595; *Fisher v. Bridges*, 3 El. & Bl. [Eng.], 641; *Griffith v. Sears*, 112 Pa. St., 523; *Flagg v. Baldwin*, 38 N. J. Eq., 218; *Loury v. Dillman*, 59 Wis., 197; *Melchert v. American Union Telegraph Co.*, 3 McCrary [U. S.], 521; Bishop, Contracts, sec. 535; *Oldershaw v. Knowles*, 101 Ill., 117; *Samuels v. Oliver*, 130 Id., 84; *Sampson v. Shaw*, 101 Mass., 145; *Raymond v. Leavitt*, 46 Mich., 447; 2 Parsons, Contracts, p. 747; *Nellis v. Clark*, 20 Wend. [N. Y.], 24; *Perkins v. Savage*, 15 Id., 412; *People v. Fisher*, 14 Id., 9; *Dixon v. Olmstead*, 9 Vt., 310; *Ball v. Gilbert*, 12 Met. [Mass.], 397; *Wheeler v. Russell*, 17 Mass., 258; *Hooker v. De Palos*, 28 O. St., 251; Greenhood, Public Policy, p. 642; *Wright v. Crabbs*, 78 Ind., 487; *Shaffnerr v. Pinchback*, 133 Ill., 410; *Cappell v. Hall*, 7 Wall. [U. S.], 558.)

Lamb, Ricketts & Wilson, contra:

It is discretionary with the trial court to call to its aid a jury on issues of fact in an equity cause. (*Wilson v. Riddle*, 8 Sup. Ct. Rep., 255; *Fishburne v. Furguson's Heirs*, 4 S. E. Rep. [Va.], 575; *De Witt v. Barly*, 17 N. Y., 350.) A defendant, in an equity case, who voluntarily pleads a counter-claim involving legal issues is not thereby entitled to a jury trial as a matter of right. (*Installment Building & Loan Co. v. Wentworth*, 25 Pac. Rep. [Wash.], 298; *Ryman v. Lynch*, 41 N. W. Rep. [Ia.], 320; *Gormley v. Clark*, 134 U. S., 338; *Martin v. Martin*, 24 Pac. Rep. [Kan.], 418;

Wilson v. Johnson, 43 N. W. Rep. [Wis.], 148; *Espenhain v. Steinkirchner*, Id., 158; *Dohle v. Omaha Foundry & Machine Co.*, 15 Neb., 437.) Right to jury trial on issue raised by counter-claim in equity suits is not guarantied by constitution. (*Chapman v. Robertson*, 6 Paige Ch. [N. Y.], 627; *Jennings v. Webster*, 8 Id., 503*; *MacKellar v. Rogers*, 17 N. E. Rep. [N. Y.], 350.) Where a court of equity once obtains jurisdiction it will retain it for the purpose of doing complete justice between the parties, although rights at law are involved. (1 Pom., Equity Jurisprudence, 181; *Ryman v. Lynch*, 41 N. W. Rep. [Ia.], 320; *Van Rensselaer v. Van Rensselaer*, 113 N. Y., 207; *Martin v. Martin*, 24 Pac. Rep. [Kan.], 418; *Haynes v. Whitsett*, 22 Id. [Ore.], 1072.) If any part of the case is exclusively of equitable cognizance a jury trial will be refused. (*Towns v. Smith*, 16 N. E. Rep. [Ind.], 812; *Quarl v. Abbott*, 1 Id., 482.) Demand for a jury trial not confined to law issues is properly denied. (*Lace v. Fixen*, 38 N. W. Rep. [Minn.], 762; *Greenleaf v. Egan*, 15 Id., 254.) When the right to terminate a contract on notice is reserved in the contract it will be enforced by the courts. (*Fitzgerald v. Allen*, 128 Mass., 232; *Ireland v. Dick*, 18 Atl. Rep. [Pa.], 735; *Crescent Mfg. Co. v. Nelson Mfg. Co.*, 13 S. W. Rep. [Mo.], 503; *Fitzpatrick v. Woodruff*, 96 N. Y., 561; *Balen v. Mercier*, 42 N. W. Rep. [Mich.], 667; *Henderson Bridge Co. v. O'Connor*, 11 S. W. Rep. [Ky.], 18; *Patrick v. Richmond & D. R. Co.*, 93 N. Car., 422; *Thayer v. Allison*, 109 Ill., 180.) A contract between a commission merchant and a grain buyer for a loan of money from the former with which to buy and store grain, which provides that the latter shall sell the grain for future delivery through the former, for which a commission is paid, will not make the contract usurious, although commissions and interest reserved exceed the highest lawful rate, unless it clearly appears that the contract was a cover for a usurious transaction. (*Matthews v. Coe*, 70 N. Y., 242; *Cockle v.*

Flack, 93 U. S., 344; *Virginia & T. R. Co. v. Campbell*, 22 Va., 438; *Hollis v. Swift*, 74 Ga., 595; *Callaway v. Butler*, 7 S. E. Rep. [Ga.], 224; *White v. Guilmartin*, 10 Id. 444; *Woolsey v. Jones*, 4 So. Rep. [Ala.], 190; *De Forest v. Strong*, 8 Conn., 513; *Beckwith v. Windsor Mfg. Co.*, 14 Id., 594.) When the promise to pay a sum above legal interest depends upon a contingency, the contract is not usurious. (*Spain v. Hamilton*, 1 Wall. [U. S.], 604; *Truby v. Mosgrove*, 11 Atl. Rep. [Pa.], 806; *Philadelphia & R. R. Co. v. Stichter*, 11 W. N. Cas. [Pa.], 325.) An agreement to sell grain for future delivery is not a gambling contract. (*Pixley v. Boynton*, 79 Ill., 351; *Sanborn v. Benedict*, 78 Id., 309; *White v. Barber*, 123 U. S., 392; *Sawyer v. Taggart*, 14 Bush [Ky.], 727; *Gregory v. Wendell*, 39 Mich., 337; *Whitesides v. Hunt*, 97 Ind., 191; *Irwin v. Williar*, 110 U. S., 499; *Bibb v. Allen*, 149 Id., 481.) This is true, though the seller has not the grain on hand but relies upon purchasing it in the open market to supply his sale. (*Bibb v. Allen*, 149 U. S., 481; *Gregory v. Wendell*, 39 Mich., 337; *Clarke v. Foss*, 7 Biss. [U. S.], 540; *Porter v. Viets*, 1 Id., 177.) A construction consistent with the validity of a contract is preferred. (*Wing v. Glick*, 56 Ia., 473; *Bigelow v. Benedict*, 70 N. Y., 202; *Story v. Solomon*, 71 Id., 420; *Clay v. Allen*, 63 Miss., 426; Wharton, Contracts, sec. 337.) The burden of proof is upon him who contends that a contract was intended as a cover for wagering transactions. (*Crawford v. Spencer*, 4 S. W. Rep. [Mo.], 713; *Dykers v. Townsend*, 24 N. Y., 57; *Mohr v. Miesen*, 49 N. W. Rep. [Minn.], 862; *Benson v. Morgan*, 26 Ill. App. Ct. 22.) The intention must be mutual and contemporaneous with the agreement to make a contract a cover for wagering transactions. (*Lehman v. Feld*, 37 Fed. Rep., 856; *Irwin v. Williar*, 110 U. S., 499; *Gregory v. Wendell*, 39 Mich., 337; *Beveridge v. Hewitt*, 8 Bradw. [Ill.], 467; *Clarke v. Foss*, 7 Biss. [U. S.], 540; *Bartlett v. Smith*, 13 Fed. Rep., 263; *Gregory v. Wendell*, 40

Mich., 432; *Murry v. Ocheltree*, 59 Ia., 435; *First Nat. Bank of Lyons v. Oskaloosa Packing Co.*, 23 N. W. Rep. [Ia.], 255; *Kent v. Miltenberger*, 13 Mo. App., 503; *Melchert v. American Union Telegraph Co.*, 11 Fed. Rep., 193; *Gilbert v. Gaugar*, 8 Biss. [U. S.], 214; *Fareira v. Gabell*, 89 Pa. St., 89; *State v. Carroll*, 6 Mo. App., 263; *Roundtree v. Smith*, 108 U. S., 269.) The deposit of margins to protect a sale or purchase against the fluctuations of the market is no evidence of a gambling transaction. (*Gruman v. Smith*, 81 N. Y., 25; *McGinnis v. Smythe*, 4 N. E. Rep. [N. Y.], 759; *Gregory v. Wendell*, 39 Mich., 337.) The sale on the board of trade of grain in store, although extended from month to month, and, in fact, never delivered, is not to be construed a gambling transaction. (*Douglas v. Smith*, 38 N. W. Rep. [Ia.], 163.) In a contract which is not as a whole illegal and is severable, that which is legal will be sustained, while that which is illegal will be rejected. (Wharton, Contracts, sec. 338; *Anderson v. Powell*, 44 Ia., 20.)

RAGAN, C.

March 1, 1889, appellant was a grain dealer in Nebraska and appellees were commission merchants in Chicago, Illinois. These parties entered into a written contract bearing said date, in words and figures as follows:

"This agreement, made this first day of March, 1889, by and between Wanzer & Co., of Chicago, Illinois, of the first part, and J. C. Morrissey, of Lincoln, Nebraska, of the second part, witnesseth as follows: Wanzer & Co. agree to loan to said Morrissey a sum not exceeding thirty thousand dollars, to be used in the purchase of corn and other grain, seeds, etc., in the state of Nebraska; the rate of interest on the same to be seven per cent per annum, to be charged monthly as said Morrissey's indebtedness may appear. Said Morrissey agrees to give his promissory notes at thirty, sixty, and ninety days, to be renewed from

time to time as may be necessary, for the entire sum so loaned, together with crib or warehouse receipts representing all the grain purchased with such funds, or other grain or produce of fully equal value. Said Morrissey further agrees to sell through said Wanzer & Co., for future delivery in the Chicago market, corn equal to the amount of ear corn purchased with funds furnished by Wanzer & Co., which sales may be changed from month to month as may be directed by said Morrissey. For the purchase and sale of this grain said Morrissey agrees to pay Wanzer & Co. one-sixteenth of one cent per bushel per month on all corn on hand at the close of each and every month, which shall cover the charge of changing from month to month; and, if purchases and sales of this character are made in any month in excess of the amount of corn on hand, the charge of such purchase and sale, or sale and purchase, shall also be one-sixteenth of one cent per bushel. Said Morrissey agrees to ship to Wanzer & Co. all grain, seeds, and other produce purchased by him, Wanzer & Co. to sell same in the Chicago market in such manner as in their judgment shall best serve the interests of said Morrissey, and the commission charge for such service shall be one-half cent per bushel for corn, and for all other grain or produce one-half the rates provided for by the rules of the Chicago board of trade for the shipment of non-members of said board of trade; provided, however, that said Morrissey shall have the privilege of selling such grain on track or of shipping it to other markets, having first obtained the written consent of said Wanzer & Co.; said Morrissey to pay to Wanzer & Co. the sum of $2 per car on every car of grain, or seed, or produce shipped by him or his agents during the life of this contract, and not handled by said Wanzer & Co., which $2 per car shall be in lieu of the one-half cent per bushel above provided for. Said Morrissey shall make a full statement at the close of each calendar month of the amount of grain on hand and the amount of grain

sold or shipped by him during that month other than to Wanzer & Co., and on receipt of said statement, Wanzer & Co. shall make the charges provided for in this agreement. Said Morrissey shall also furnish to said Wanzer & Co., on their request, a full and unreserved statement of his financial condition as they may demand from time to time.

"Beside such sums of moneys as are above provided for, Wanzer & Co. agree to pay drafts attached to negotiable bills of lading to nearly the value of the property so represented.

"Said Wanzer & Co. agree to report daily all sales of property for account of said Morrissey, and to furnish him with such information as he may request concerning such sales, and to make all returns as promptly as possible. Said Morrissey further agrees to pay interest on all sums Wanzer & Co. may deposit as margins on transactions made in his behalf, and said Wanzer & Co. shall notify said Morrissey of the deposit of said margins.

"This contract shall be terminated on the first day of March, 1890, Wanzer & Co. reserving the right to terminate the same by giving thirty days' written notice; and on the termination of this contract, either by such notice or at the expiration of the time herein agreed, said Wanzer & Co. shall be entitled to collect from said Morrissey a sum equal to one-half the charges said Wanzer & Co. would receive on the grain said Morrissey shall then have on hand, according to the afore-named rates in this contract.

"J. C. MORRISSEY.
"WANZER & CO."

Under this contract appellees advanced appellant $19,750, for which appellant gave his notes secured by warehouse or crib receipts on grain stored in his elevators in Nebraska. In January, 1890, appellees held a note of appellant for $2,000, dated March 15, 1889, due sixty days after date, on which there were due and unpaid $1,230 and some in-

terest; to secure the payment of which appellees held certain warehouse or crib receipts issued to them by the appellant on grain in his elevators. At this date, January, 1890, appellees sent this note and the crib receipts to a bank in Lincoln, Nebraska, for collection. It appears that while the bank held the note and warehouse receipts, appellant brought this action in the district court of Lancaster county to enjoin the appellees and the bank from transferring or disposing of the warehouse receipts and from taking possession of the grain covered by them, and to cancel said securities. Appellees filed a cross-petition in this action setting out the contract above, the giving to them by appellant of the note and crib receipts to secure the payment of the same, and that the note was unpaid, and prayed for an accounting of the amount due on it, and a foreclosure of their lien on the grain, and a sale of the same to satisfy the amount found due. Appellant then dismissed his injunction suit and filed an answer to appellees' cross-petition, which, after admitting the execution of the contract and note and crib receipts, set out the following defenses:

a. A general denial of the averments of the cross-petition.

b. That the crib receipts sought to be foreclosed had been satisfied by grain shipped and money remitted by the appellant to appellees according to the terms of said contract, and that the grain so shipped was grain purchased with the money borrowed by the appellant of the appellees, and the money remitted was proceeds derived from the sale of the grain purchased with the money borrowed of the appellees, and that appellant had no grain in his possession covered by said warehouse receipts.

c. That the appellant was financially responsible, and therefore appellees had a complete and adequate remedy at law, and that the court was without equitable jurisdiction.

d. That the contract between the parties and the notes executed in pursuance thereof were usurious.

e. That "the contract is illegal and void, having been made in violation of the law and against public policy, in so far as the plaintiff agrees to make good any margins advanced by the defendants on grain bought or sold for future delivery on the board of trade, * * * the same being a gambling contract."

f. A counter-claim that appellant was induced to sign the "contract with the belief and the understanding and agreement that the same should continue in force for one year from its date, and with the understanding and agreement then had, and with the understanding and agreement subsequently had, with the defendants that said contract should continue in force one year from its date; * * * and the plaintiff avers that notwithstanding said clause authorizing said forfeiture of said contract at the option of the defendants on thirty days' notice was in said contract at the date of its execution, yet it was then agreed and understood by and between the plaintiff and defendants that said clause should have no force and effect; * * * that the plaintiff continued to do business with the defendants until about the 18th of November, 1889, when the said defendants, arbitrarily, unjustly, and without any good cause or reason, notified the said plaintiff that said contract would be forfeited on or about the 20th day of December, 1889; * * * and by reason of the notice of said defendants that said contract was terminated, and their refusal to carry it into effect and advance said moneys for one year, as understood and agreed between the plaintiff and defendants, and by reason of the defendants' recall of all the moneys advanced and loaned, said plaintiff was damaged in his business and credit and put to great expense in the sum of $10,000."

The prayer of this answer was that the cross-petition of the appellees might be dismissed, and the appellant might have such other relief as in equity and good conscience the court might find him entitled.

To this answer appellees filed their reply denying all the allegations of new matter in the answer.

There was a trial to the court, who found all the issues in favor of the appellees, but found that appellant had sold and shipped the identical grain covered by the crib receipts, and the court rendered a personal judgment against the appellant for the amount due on the note.

When the issues were complete appellant moved the court to transfer the case to the law docket and impanel a jury for the trial of the case. This motion the court overruled. When the trial was about to begin appellant again moved the court for a jury trial on the issues of the facts involved in the case. This motion the court overruled. The overruling of these motions is the first complaint made by the appellant here. Whether this ruling of the court was correct depends upon the nature of the issues made by the pleadings and the character of the relief demanded.

The cross-petition alleged the making and delivery by the appellant to appellees of a note and certain warehouse receipts on grain in his elevators to secure the payment of the note; that the note was past due and unpaid. Appellees' prayer was for a foreclosure of the liens on the grain, and a decree for its sale to pay the amount due on the note.

The answer admitted the execution of the notes and securities, but alleged that the liens or crib receipts had been discharged; that the note was usurious; that the contract, out of which the subject-matter of the claim in the cross-petition grew, was void, being a gambling contract; that said contract as written was not as agreed and understood by the parties, and there was a prayer for a reformation of it.

The cross-petition demanded equitable relief only. It invoked the equity powers of the court, and the issues made by the cross-petition, the answer of the appellant thereto, and the reply of the appellees were entirely equitable; but appellant also alleged by way of counter-claim in his an-

swer that he had been damaged $10,000 by the wrongful termination of the contract by the appellees.

Did this counter-claim of the appellant for damages oust the court of its equitable jurisdiction? Is a defendant to a purely equitable suit entitled as a matter of right and law to a jury for the trial of an issue of law which he has voluntarily brought into the case? We think not. The appellant had a right, if he was so minded, to file his counter-claim for damages in this equity suit. It was an independent cause of action existing in his favor and against appellees, but appellant's cause of action on his counter-claim was not lost to him or barred had he left it out of this suit.

The action as made by the appellees in their cross-petition was one purely of equitable cognizance; but part of the relief demanded by the appellant could only be granted by a court of equity. The familiar principle is that when a court of equity acquires jurisdiction over a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of all the matters put at issue in the case. (1 Pomeroy, Eq. Juris., sec. 181, and cases there cited.)

In *Wilson v. Johnson*, 74 Wis., 337, it is said: "An action to enforce a lien upon a pledge is an equitable one, triable by the court."

In *The Installment Building & Loan Co. v. Wentworth*, 25 Pac. Rep., 298, the supreme court of Washington say: "As the foreclosure of a mechanic's lien is a proceeding cognizable in a court of equity, the mere fact that the defendant in such suit interposes a counter-claim for damages, as he is allowed to do by the laws of Washington, is not sufficient to divest such court of its jurisdiction and to entitle defendant to demand a trial by jury."

This court said in *Dohle v. Omaha Foundry & Machine Co.*, 15 Neb., 436, that "An action to foreclose a mechanic's lien is essentially a suit in equity, and a party is not, as a

matter of right, entitled to a jury trial therein." (See also, *Gormley v. Clark*, 134 U. S., 338; *Ryman v. Lynch*, 76 Ia., 587.)

After the evidence was in, it appeared that the grain called for by the warehouse receipts sought to be foreclosed had been already disposed of by the appellant, and his counsel now contends that the court should have then impaneled a jury. But this position is untenable. The court was sitting in equity. It had before it on the pleadings an equitable action, and it did not lose its jurisdiction because the evidence disclosed that the only adequate relief it could afford was a personal judgment. (*Van Rensselaer v. Van Rensselaer*, 113 N. Y., 207.) The court was right in refusing the appellant a jury trial.

The contract between the appellant and appellees contained this clause: "This contract shall be terminated on the first day of March, 1890, Wanzer & Co. reserving the right to terminate the same by giving thirty days' written notice; and on the termination of this contract, either by such notice or at the expiration of the time herein agreed, said Wanzer & Co. shall be entitled to collect from said Morrissey a sum equal to one-half the charges said Wanzer & Co. would receive on the grain said Morrissey shall then have on hand, according to the afore-named rates in this contract." On November 18, 1889, appellees notified appellant in writing of their election to terminate said contract on December 20, 1889, and on said last date appellees terminated the contract.

The appellant's next point is that the contract between him and the appellees was to continue in force until March 1, 1890, notwithstanding the agreement therein that the appellees might terminate it sooner. Appellant bases this contention on an agreement which he alleges existed between himself and appellees to that effect, outside of the instrument itself. The court found this issue against the appellant, and rightfully so. We cannot stop here to quote

the correspondence between the parties leading up to the execution of this agreement, but it settles beyond all doubt that the contract as signed and as it exists is in all respects as all parties thereto understood it at the time of its execution. The evidence shows that the appellees refused absolutely to contract with appellant on any terms unless the right to terminate the contract on thirty days' notice was reserved to them in the instrument. There was much correspondence between the parties on this very clause, prior to the execution of the contract; and it is a waste of words in the face of this record to say that appellant did not know that the right to terminate the agreement was reserved, or that there was any agreement or understanding, even on appellant's part, that the contract should, at all events, run to March, 1890. Appellant contends, however, that notwithstanding the clause in the agreement reserved to appellees the right to terminate it on giving thirty days' notice, the contract could not, as a matter of law, be thus terminated. We do not so understand the law. When the right to terminate a contract on notice is reserved without any fraud or mistake, but with the actual knowledge and consent of all parties to the agreement, it is as valid in law as any other clause of the instrument; and the courts, when called upon, will enforce it, unless to do so would be manifestly contrary to equity and good conscience.

In *Ireland v. Dick*, 18 Atl. Rep., 735, the supreme court of Pennsylvania say: "The appellants, in May, 1876, accepted a license from appellees for the manufacture of drilling jars and jar fillings under a certain patent. The agreement was in writing,—that is, it was a printed form, filled in as to names, dated, etc., in writing, and with the addition in writing, on the margin, of the following stipulation: 'It is agreed by the parties of the first part that the parties of the second part (licensees) can cancel this license by giving thirty days' notice in writing.' * * * This portion of the instrument * * * is presumed to have

been separately and particularly considered by the parties, and to express their exact agreement upon the subject. * * * Both parties acted under the license agreement until December 19, 1878, when the licensees under the written clause above quoted sent a notice to the licensors in the following terms: 'We wish to cancel our license concerning the manufacture of drilling jars, bearing date of May 16, 1876, as per contract.' * * * It is entirely clear that this letter was an absolute and complete rescission of the agreement."

The district court found that the appellant was not entitled to recover any damages from the appellees by reason of their having terminated the contract, and that finding is the next in order of appellant's complaints. This claim for damages is based solely on the assumption that the appellees violated their contract with the appellant. But did they? The contract was terminated in accordance with its provisions. There is no evidence tending to show that it was terminated by the appellees for a sinister purpose; nor that, in exercising their right to terminate it, they acted maliciously or arbitrarily. Indeed, the evidence would support a finding that the appellant's own violation of the contract afforded sufficient grounds for its termination by the appellees had the contract, by its terms, required the existence of such grounds as a prerequisite to the right of the appellees to terminate it. The evidence shows that the appellees, however, in no respect violated either the letter or spirit of the contract; nor has the appellant sustained any damages by reason of its termination, for which appellees can be made liable. The losses, if any suffered by the appellant in consequence of the termination of the agreement, were such only as he must have known, when he signed the contract, might ensue if it should be terminated according to its provisions.

The appellant also claims that the court's finding, that the contract between the parties thereto was not usurious,

is erroneous. By the terms of the contract appellant was to pay seven per cent interest on all money loaned him by the appellees, the money borrowed to be used in the purchase of grain. Appellant was to pay appellees a commission of one-half of one cent per bushel for selling grain shipped to them, and $2 per car on diverted shipments; that is, for all grain he shipped to others than appellees, and which grain had been purchased with money furnished by them. Appellant was also to sell through the appellees, for future delivery in Chicago market, corn to equal the amount of ear corn purchased by the appellant with the money borrowed; and for making these sales appellant was to pay appellees one-sixteenth of one cent per bushel on all corn appellant had on hand at the close of each month. Appellant now contends that as the amount paid appellees on diverted shipments, $412, the amount paid for commission on sales for future delivery, $189.24, added to the amount paid as interest, $788.48, exceeded ten per cent interest on the money during the time it was loaned, that therefore the agreement was usurious. The contract is not on its face necessarily a usurious one. Appellees were engaged in the buying and selling of grain on commission, and had a right to lend their money at lawful rates of interest to such parties, and on such terms, as would probably increase their commission business, and out of which increase they might derive additional profit. The circumstance that their profits growing out of the transaction covered by the contract exeeded the legal rate of interest on the amount of money actually embarked in the enterprise does not afford conclusive proof that the agreement was in fact a usurious one. At the most this circumstance was evidence tending to show that the intention of the parties was to make the contract a cover for usurious transactions. The question is: Were these charges for diverted shipments and for making sales for future delivery honestly so intended by the parties as compensation for such services, or

were these charges invented as a cover for usury? This was a question of fact for a trial court to determine. He has found that the transactions were not usurious ones, and the evidence supports that finding. (*Cockle v. Flack*, 93 U. S., 344; *Beckwith v. Windsor Mfg. Co.*, 14 Conn., 594.)

Finally, it is said by the appellant that the contract between him and the appellees was a gambling contract, and void. If this is so, it must appear either from the instrument itself or from the transactions of the parties under it. The expressions in the contract which it is alleged show it a gambling contract on its face are as follows:

1. "Said Morrissey further agrees to sell through said Wanzer & Co., for future delivery in the Chicago market, corn equal to the amount of ear corn purchased with funds furnished by Wanzer & Co., which sales may be changed from month to month as may be directed by said Morrissey. For the purchase and sale of this grain said Morrissey agrees to pay Wanzer & Co. one-sixteenth of one cent per bushel per month on all corn on hand at the close of each and every month, which shall cover the charge of changing from month to month; and, if purchases and sales of this character are made in any month in excess of the amount of corn on hand, the charge of such purchase and sale, or sale and purchase, shall also be one-sixteenth of one cent per bushel.

2. "Said Morrissey further agrees to pay interest on all sums Wanzer & Co. may deposit as margins on transactions made in his behalf, and said Wanzer & Co. shall notify said Morrissey of the deposit of said margins."

The substance of the first quotation is that the appellant would sell through appellees in the Chicago market, for future delivery, as much corn as appellant purchased with the money borrowed of the appellees; in other words, it was an agreement to sell grain for future delivery. The sale of grain for delivery in the future is a valid contract. (*Gregory v. Wendell*, 39 Mich., 337.) "If a party has prop-

erty under his control, he has a right to sell it to be delivered at a future time." (*Sanborn v. Benedict*, 78 Ill., 309.) "A purchase of grain at a certain price per bushel, made in good faith, to be delivered in the future, is not an illegal or gambling contract." (*Pixley v. Boynton*, 79 Ill., 351; *Irwin v. Williar*, 110 U. S., 499.) "The validity of 'option' contracts depends upon the mutual intention of the parties. If it is not the intention in making the contract that any property shall be delivered or paid for, but that fictitious sales shall be settled on differences, the contract is illegal; but if it is the good faith intention of the seller to deliver, or the buyer to pay, and the option consists merely in the time of the delivery, within a given time, the contract is valid and the putting up of margins to cover losses which may accrue from fluctuations of the price is legitimate and proper." (*Union National Bank of Chicago v. Carr*, 15 Fed. Rep., 438, cited in *Whitesides v. Hunt*, 97 Ind., 191.) "A *bona fide* contract for the actual sale of grain, deliverable within a specified future month, * * * is not a gambling contract." (*White v. Barber*, 123 U. S., 392.) "Contracts for future delivery of personal property which the vendor does not own or possess, but expects to obtain by purchase or otherwise, are valid, if at the time of making the contract an actual transfer of the property is contemplated by at least one of the parties to the transaction." (*Bibb v. Allen*, 149 U. S., 481.) It seems settled from the foregoing authorities that this agreement to sell grain for future delivery is not, on its face, a gambling contract.

The substance of the second quotation is that the appellant agreed to pay interest on all sums of money appellees might advance for him as margins on transactions in his behalf. What transactions? Gambling transactions? We do not think such is a fair construction of the language of this instrument. Where a contract is capable of two constructions, the one making it valid and the other void,

the law will adopt the construction that upholds the contract. (Wharton, Contracts, sec. 337.) To say that this clause shows that the intention of the parties to the contract was to engage in gambling transactions in grain under it would be a forced construction of the language. "A contract for the sale of grain for future delivery being legal, it logically follows that the agreement of the appellant to pay interest on moneys advanced for him by the appellees to protect these sales against the fluctuations of the market did not taint the contract with the vice of gambling." (*Gruman v. Smith*, 81 N. Y., 25; *Gregory v. Wendell*, 39 Mich., 337.) In *Rudolf v. Winters*, 7 Neb., 125, this court said: "A contract to operate in grain options, to be adjusted according to differences in the market value thereof, is a contract for a gambling transaction, which the law will not tolerate." We adhere to that decision. (To the same effect, see *Embrey v. Jemison*, 131 U. S., 336; *Sprague v. Warren*, 26 Neb., 326; *Watte v. Wickersham*, 27 Id., 457.) But the contract we are considering does not come within the rule laid down by those cases. The true question here is from the terms of this contract, what was the intention of the parties thereto? Was their intention to buy and sell grain upon the market, and settle the differences without any delivery? If so, the contract was a gambling one, and void. But to render a contract invalid it must appear, either from the instrument itself or from the evidence outside, that at the time of its execution the mutual intent of the parties was that no deliveries of grain should be made under it, but the difference in the price paid. We are of the opinion that this contract, on its face, cannot be held a gambling one. But appellant insists that if this agreement cannot be construed from its text to be a gambling contract, such facts nevertheless appear of evidence. We cannot quote all the testimony to this point. The appellees testified that they had no intention by entering into this contract to speculate or gamble in the price of grain.

The appellant testified as follows:

Q. (By the court.) What do you mean by "selling for future delivery"?

A. I will explain that to your honor. We in the grain business build cribs and elevators for the purpose of getting storage out of our grain. We buy the grain from the farmer in November and December and January, during the winter months, when there are good storage charges. The winter storage is generally about four cents from December until May. * * * Now, when a man takes and fills a crib up in November he has money to pay for it—he has money to pay for it in the bank, and he don't ship it out but puts it in the crib, and fills the cribs up; and as he fills the crib he wires a commission house in Chicago: "Sell 5,000 bushels March delivery against my actual corn in crib."

Q. Then he actually intends to deliver that corn?

A. Yes, sir.

Q. Is that a gambling contract?

A. That is not a gambling contract when you sell corn in crib for future delivery, when you have the actual corn.

Q. Was there anything of that kind in this contract between you and Wanzer & Co.?

A. I don't think there was any gambling any different from selling against the corn which was being held in cribs.

Q. Anything in the contract?

A. Not on my part, any other intention than that I went into this contract for to get the storage charges. I had money enough to run this business. The object was to put the corn in store, and get the winter storage on it; * * * that was the inducement for going into that contract.

The record also shows that the appellant, from time to time, sold for future delivery as much grain as he had on hand, and when the time arrived to make delivery, instead of shipping the grain he had in the cribs, he would buy grain on the market to fill or offset the sales made, and re-

sell the grain on hand for a future delivery. These transactions, or rather the record of them, would make it falsely appear that the appellant sold very much more corn than he ever paid for during the time of the transactions; and it is this feature of the dealings of the parties that appellant's counsel claims establishes by the acts of the parties to the contract under it a gambling character. But we think this is not a fair deduction from the evidence. It shows that all these sales and purchases of appellant on the market were based on grain he had on hand, and that this selling and buying on the market was not dealing in options, not betting on the rise and fall of the market, but purchases made to fill sales he had previously made, and thus obviated the necessity of delivery of the grain he had in his cribs in Nebraska.

The case of *Douglas v. Smith*, 74 Ia., 468, is one in which the facts were substantially the same as in the case at bar, and that court said: "Where country grain buyers had a large quantity of corn in cribs, and they made sales from time to time through Chicago commission merchants for future delivery of No. 2 corn, but fearing that their corn would not grade No. 2, and hoping that it would improve with age, they bought in and resold, intending to deliver the corn to cover their sales, held, that the transactions were not illegal so as to defeat their brokers in the collections of margins advanced for them."

The facts in this case bring the transactions of the parties within the operation of the decisions of the case last above cited. The preponderance of the testimony establishes the fact that the sales made by the appellant were not wagers but that the grain was to be actually delivered at the time agreed upon. The decree of the district court is right and the same is in all things

AFFIRMED.

THE other commissioners concur.

JOHN TAYLOR V. STATE OF NEBRASKA.

FILED OCTOBER 4, 1893. NO. 4461.

1. **Homicide**: CONFESSIONS: EVIDENCE. A confession receivable in evidence, only after proof that it was made voluntarily, is restricted to an acknowledgment of the defendant's guilt, and the word does not apply to a statement made by the defendant of facts which tend to establish his guilt.
2. ——: FACTS DISCOVERED BY CONFESSIONS: ADMISSIBILITY. Any circumstance tending to establish the prisoner's guilt may be proved, although it was brought to light by an admission of the prisoner, inadmissible of itself as having been obtained by improper influence.

ERROR to the district court for Lancaster county. Tried below before CHAPMAN, J.

E. P. Holmes and *Charles E. Magoon*, for plaintiff in error:

It was error to overrule the motion to strike out the sheriff's testimony. The confession was inadmissible. (3 Russell, Crimes [9th Am. ed.], 367; *Kelly v. State*, 72 Ala., 244; *Redd v. State*, 69 Id., 255; *Young v. State*, 68 Id., 569; *Commonwealth v. Knapp*, 9 Pick. [Mass.], 496; *Queen v. Doherty*, 13 Cox C. C. [Eng.], 23; *Reg. v. Bate*, 11 Id. [Eng.], 686; *Reg. v. Warringham*, 2 Den. C. C. [Eng.], 447; *Sherrington's Case*, 2 Lew. C. C. [Eng.], 123; *Commonwealth v. Tuckerman*, 10 Gray [Mass.], 173; *Commonwealth v. Curtis*, 97 Mass., 578; *Commonwealth v. Taylor*, 5 Cush. [Mass.], 610; *Kennon v. State*, 11 Tex. App., 356; *Hopt v. Utah*, 110 U. S., 574.) There seems to have been an attempt to distinguish a difference between the alleged confession and what was said by the prisoner about the disposition of the gun. No difference, however, does exist, for the conversation is one and the same. The sheriff ought not to have been allowed to testify to the efforts made by the prisoner, under his direction, to find the gun,

because the gun was not found. Not only were the alleged disclosures made under the influence of both hope and fear, but the alleged confession was found to have been false, in that the gun was not found. The confession of a prisoner of the locality of stolen property, though induced by threats, is admissible when verified by finding the property where he locates it; and all he says in conveying the information which is directly connected with or explanatory of the discovery is also admissible, but his confession that he stole it is not admissible. (*Yates v. State*, 47 Ark., 172; *Davis v. State*, 8 Tex. App., 510; *Strait v. State*, 43 Id., 486; *White v. State*, 3 Heisk. [Tenn.], 338; *State v. Garvey*, 28 La. An., 925; *Laros v. Commonwealth*, 84 Pa. St., 200.)

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

In the seventh paragraph of the motion for a new trial it is alleged that the court erred in allowing admissions made by defendant, but what admissions, by what witness narrated, what the subject-matter was, and whether material, relevant, or pertinent to the issue, the trial court was wholly uninformed, and the attention of the trial judge was not challenged to any particular error or series of errors by the motion for a new trial. The statute, as well as the established rules of practice, requires a specific designation of the particular errors relied upon to be made in a motion for a new trial, and unless this requirement is observed, no foundation is laid for a review of questions raised and decided on the trial below. (*Midland P. R. Co. v. McCartney*, 1 Neb., 398; *Mills v. Miller*, 2 Id., 299; *Hull v. Miller*, 6 Id., 128; *Cropsey v. Wiggenhorn*, 3 Id., 108; *Lynam v. McMillan*, 8 Id., 135; *Republican V. R. Co. v. Hayes*, 13 Id., 491; *Uhl v. Robison*, 8 Id., 272; *Tomer v. Densmore*, Id., 384; *Lowrie v. France*, 7 Id., 191; *Phœnix Ins. Co. v. Readinger*, 28 Id., 587; *Rogers v. Rogers*, 46 Ind., 1; *Tucker v. Call*, 45 Id., 31; *Musselman v. Musselman*, 44 Id., 106; *Burdge v. Lewis*, 43 Id., 349.)

RAGAN, C.

John Taylor was convicted in the district court of Lancaster county of murder in the second degree, and sentenced to imprisonment in the penitentiary for life. The crime for which he was tried and convicted was the shooting on the night of April 22, 1889, of one Robert Woods. The murdered man was at the time at home in his bed. The fatal shot was probably from a double barreled shot gun, loaded with leaden slugs and fired through a window in Woods' house. The evidence on which Taylor was convicted was circumstantial. During the trial the state sought to prove by the sheriff a confession made to him by Taylor that he committed the murder. The court excluded the jury from the court room during the preliminary examination of the sheriff to ascertain whether the alleged confession was made under such circumstances as to be competent evidence against Taylor. On the return of the jury to the court room, and in their presence, the trial judge ruled out the offer of the state as to Taylor's confession and in so doing said: "The person that was in the cell with him was concerned to bring that about, and I have concluded, after looking the authorities up, that I will exclude the admission. I think it infringes on the rule in this one respect: The inducement that was offered by the party in view of the peril of mob that was hanging over him seems to have been the inducement, or at least, so far as the evidence shows, was the inducement for him to make his admission. The truth of the matter, if admitted, would be altogether left to the jury, and I am inclined to think, from the view of the authorities laid down by our supreme court, that I will exclude it. Here was a man put into the cell for the purpose of obtaining from him, by persuasion,—there is no evidence here that there was any authority given him to promise him anything, but at the same time he did volunteer the information there to him that

he was in danger, and that if he would make a statement, he would protect him, and that the sheriff would. It must be absolutely voluntary. That seems to be the rule laid down by the authorities. If the testimony had rested upon the officers,—if the testimony rested upon them alone,—I would unquestionably have admitted it. You are bound to recognize this fact,—that the person placed there by the officer was acting by his authority to that extent. If the representations made to him were confined simply to the question where this gun had disappeared to, then I would have admitted it. But he has gone beyond that. He said that the admission, or confession, or whatever it was that he got, was upon the promise that he would grant him immunity from impending mob violence." This language of the court is here assigned as prejudicial error by Taylor. The plaintiff in error cannot be heard now to allege this, as he made no objection and noted no exception to the language of the court at the time.

The theory of the state at the trial was that Taylor shot Woods with a double barreled shot gun procured from one Curtis for the purpose; that Woods' wife, Amanda, and Curtis were unduly intimate; that they had procured Taylor to commit the murder. The evidence shows that Curtis had a double barreled shot gun; that it was delivered to Taylor on April 19, on an order from Curtis; that Taylor borrowed gunpowder and gun caps and loaded the gun with leaden slugs, which he had been seen previously preparing from pistol cartridges; on the night, and at the time of the homicide, Woods' wife and two elder daughters were away from home; during the evening Taylor came into the house, bringing a bottle of whiskey, and requested Woods to drink. Soon after Taylor left, Woods retired leaving a lamp burning in his bedroom, and soon afterward the shot was fired that killed Woods in his bed. The lead slugs found in the body and bed of the murdered man were very similar to the ones Taylor had been seen loading the shot gun with. The gun was not found.

After the evidence of the above facts had gone to the jury, and after the court had excluded the state's offered evidence of the confession made by Taylor to the sheriff, the state recalled the sheriff and examined him as follows:

Q. I believe you said you saw the defendant on the night of the murder of Robert Woods?

A. I did.

Q. Where did you first see him?

A. I saw him at his—where he was living.

Q. Did you have any conversation with him about the gun that night?

A. I did.

Q. What was it?

A. I asked him if he had the gun.

Q. What did he say?

A. He gave me the answer, he said he didn't have.

Q. He said he didn't have?

A. Yes, sir.

Q. Did you make any effort to find the gun?

A. I did.

Q. Supposed to have been used on this occasion?

A. I did; I did make an effort.

Q. What effort did you make and where did you get the information that induced you to make that effort?

A. I took Taylor with me to look for the gun.

Q. Where did you go?

A. I went down on the bottom near where this murder had been committed.

Q. Where did you search?

A. I searched the pond of water.

Q. Who made the search?

A. The defendant made most of the search.

Q. How did you come to go there?

A. The defendant told me he thought he could.

Q. How did the defendant come to go with you, voluntarily or otherwise?

A. Voluntarily.

Q. Now, state what he said about it on this occasion.

A. He told me he thought he could find the gun if I would take him to where he would search for it.

Q. Where did he say he last saw the gun on this occasion?

A. He told me he delivered the gun to Mr. Curtis at Curtis' gate.

Q. When?

A. The evening of the murder—the night of the murder.

Q. Before or after?

A. After.

Q. Was there anything said at that time as to where he last saw the gun, and if so, state what it was?

A. He told me he delivered the gun to Curtis at Curtis' gate the night of the 22d.

Q. Where did he last see it—what if anything was done with it, if he seen it?

A. I asked him what Curtis did with the gun and he said he started east—that is east from his gate.

Q. In what direction was it you made the search?

A. East of there in a pond of water.

Q. How many searches did you make for the gun at that place?

A. I made two searches.

Q. With this defendant?

A. Two searches with him.

Q. How far apart were these two efforts made?

A. I think it was two different days; that is my recollection.

Q. If anything was said at this second search by this defendant to you with reference to this matter that you have not stated, state it now; anything additional in reference to this gun or matter in the second effort to find it.

A. It was simply a repetition of the first conversation.

We did not succeed in finding the gun in the first search, and he said perhaps that he didn't hide it in the pond and that we might find it about the premises—that is, Curtis' premises, and we searched through the lot to an old shed and barn that he had and in his house and through his house and in the house adjoining the lot. He had two houses, one on the next lot, and we searched that.

Q. The defendant was with you helping you make this search?

A. Yes, sir.

Q. Did you ever hear the defendant make any statement in reference to this matter in the presence of Curtis with reference to this gun—what was done with it?

A. He did make a statement.

Q. Tell me what he said.

A. He told him, Curtis, in my presence, that he delivered the gun to him at his gate after he had done the job; that he started out and said to him, "You started east with the gun from your gate."

Q. When was this?

A. To the best of my recollection, it was the evening of the murder; that was the evening of the 22d.

This evidence, condensed, amounts to this: That the sheriff testified that the prisoner told him that he thought he could find the gun if the sheriff would take him to where he, the prisoner, would search for it; that he, the prisoner, had delivered the gun to Curtis at his gate the evening the murder was committed and after its commission; and that the prisoner said to Curtis, in the presence of the sheriff, that he, the prisoner, had delivered the gun to him, Curtis, at his gate after he had done the job (that he started out to do), and the prisoner further said to Curtis at this time, "You started east with the gun from your gate."

The cross-examination of this witness, so far as the same is material, was as follows:

Q. The defendant was under arrest at the time you have been narrating?

A. Yes, sir.

Q. He was in your custody?

A. He was.

Q. You were making all possible efforts and using all possible means to find out where the gun was?

A. I think I was.

Q. You had been telling the defendant had you not—had you not been holding out some hope to the defendant if he would find this gun?

A. I think I had.

Q. Is it not a fact that you had been telling the defendant that if he would tell you all about this, and if he would help you find this gun, his life would be saved?

A. Shall I repeat just what I told him, judge?

By the court: Yes.

A. I told him I thought if he had committed this murder and made a clean breast of it, and if there were others implicated, and if he would tell all about it and all he knew about it, that I did not think he would be hung; that I did not think he would get more than just a sentence to the penitentiary for life.

Q. You told him you would stand by him?

A. Yes, sir; I said I would be his friend and do all I could for him.

Q. Didn't you say you would see he would not be hung?

A. I said I would see his friends and that I did not think he would be hung.

Q. You gave him to understand that he would not be hung?

A. I told him in those words.

Q. After that he volunteered to go with you and help find the gun, didn't he?

A. Yes, sir.

The substance of this cross-examination is that while the sheriff had the prisoner under arrest, he said to him that if he would confess the murder, tell all he knew about it, he did not think the prisoner would be hung, and would not be punished more than by being sent to the penitentiary for life; that he would be his friend and do all he could for him.

At the close of this cross-examination the prisoner's counsel moved the court to exclude from the jury the testimony of the sheriff as detailed above, and the refusal to do so is one of the errors assigned here now.

Was this evidence admissible? It is claimed by the plaintiff in error that this testimony, in effect, was putting in evidence to the jury Taylor's confession that he had committed the murder; but it will be observed that the statements made by Taylor to the sheriff were not confessions that he had committed the murder.

"A confession in criminal law is the voluntary declaration made by the person who has committed the crime, to another, of the agency or participation he had in the same. The word 'confession' is not the mere equivalent of the word 'statement,' or 'declaration.'" (*People v. Strong*, 30 Cal., 151.)

"A confession receivable in evidence, only after proof that it was made voluntarily, is restricted to an acknowledgment of the defendant's guilt; and the word does not apply to a statement, made by the defendant, of facts which tend to establish his guilt." (*People v. Parton*, 49 Cal., 632.)

"Any circumstance tending to establish the prisoner's guilt may be proved, although it was brought to light by an admission of the prisoner, inadmissible of itself as having been obtained by improper influence." (*Walrath v. State*, 8 Neb., 80.)

The admissions and statements made by Taylor to the sheriff, as testified to by him, come squarely within the

doctrine laid down in the cases above cited. They were not confessions of Taylor's guilt, but circumstances which tended to prove his guilt, but were not, for that reason inadmissible. It is true that in the statement made by Taylor to Curtis the prisoner voluntarily admitted the killing of Woods with the gun; but this confession, if it should be called that, was not made to the sheriff. It was not made to any one in authority, nor any one who had any control over the prisoner, so far as this record discloses, and seems to have been made voluntarily. The exceptions must be overruled. The judgment of the district court is

AFFIRMED.

THE other commissioners concur.

FRANK L. STETSON, APPELLANT, V. JAMES EDWARD RIGGS ET UX., APPELLEES.

FILED OCTOBER 4, 1893. No. 4921.

Mortgages: FORECLOSURE: FALSE REPRESENTATIONS: DEFENSE: PLEADING. To maintain an action for damages for false representation, the plaintiff must allege and prove (1) what representation was made; (2) that it was false; (3) that plaintiff believed the representation to be true, (4) relied on and acted upon it, (5) and was thereby injured.

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

Marquett, Deweese & Hall and *A. G. Greenlee*, for appellant.

Webster, Rose & Fisherdick, contra.

RAGAN, C.

One Stetson conveyed two lots in Lincoln, Nebraska, to one Riggs, in exchange for a stock of drugs. One of the lots conveyed was incumbered by a mortgage of $700, previously executed by Stetson to other parties, which mortgage Riggs assumed. On the maturity of the mortgage Stetson advanced the money, took an assignment of it, and brought this suit to foreclose it. Riggs filed an answer, the substance of which is as follows: "And for further answer this defendant says that said described real estate was conveyed to the defendant by the plaintiff in a transaction of barter and exchange, as part of the consideration for the purchase of a stock of drugs and merchandise, and to induce the defendant James Edward Riggs to receive the deed for and accept said real estate for exchange of said merchandise received by the plaintiff, the plaintiff represented to the defendant that one of the pieces of real estate so deeded and pledged in the mortgage was the corner lot immediately back of the residence of J. J. Kelly, and said real estate, if it had been located as described, and as the same was in fact pointed out to this defendant by the plaintiff would have been described as lot one (1), block six (6), in Houtz' addition to the city of Lincoln; and seeing said ground as pointed out and described to this defendant, defendant was willing to accept the same in trade and barter on said stock of merchandise, and agreed so to do; but the plaintiff conveyed other and different real estate to this defendant, which was of much less value, being worth $500 less than the real estate pointed out, or the said lot had it been located as described and represented," and prayed that $500 of damages might be set off against the amount due Stetson on the mortgage. Stetson replied to this answer by a general denial. The court, by its decree, allowed Riggs the set-off of $500 as claimed, and Stetson appeals.

The appellant makes the points that the answer of

Riggs does not state facts sufficient to constitute a defense, and that the finding and decree are unsupported by the evidence. We agree with the appellant in the above contentions. The defense of Riggs was, in effect, an action against Stetson for damages for false representation made by the latter. This answer, then, to be good, must allege with reasonable certainty (*a*) that Stetson made some representation to Riggs, meaning he should act on it; (*b*) that the representation made was false; (*c*) that Riggs believed such representation to be true, relied and acted upon it, and was thereby damaged. (*Byard v. Holmes*, 34 N. J. Law, 296, and cases there cited.)

The answer of Riggs contains no allegation that he believed or relied upon, or acted upon, the alleged false representation of Stetson, nor can these conclusions be deduced from a reasonably liberal construction of the answer. It did not state a cause of action against Stetson (here a defense to his action), and the objection of the appellant to the introduction of any evidence under it should have been sustained. An examination of all the evidence discloses no statement by any one that Riggs believed or relied on, or acted upon, the false representation of Stetson, nor is there in the record any evidence from which such conclusions can be inferred. The decree is, then, unsupported by the evidence.

In *Taylor v. Guest*, 58 N. Y., 262, the rule is thus announced: "It is incumbent upon a party seeking to recover in an action for deceit, founded upon false representations, to show that he was influenced by them to his damage."

In *White v. Smith*, 39 Kan., 752, the rule is thus announced: "To sustain a judgment for damages for fraud and deceit in the sale of a newspaper, upon the ground that its subscription list was not as large as represented, it must be alleged and also shown, that the purchaser relied on the representation of the number of paying subscribers as an inducement to the purchase."

In *Humphrey v. Merriam*, 32 Minn., 197, it is said: "It is also necessary for the plaintiff in such an action (damages for false representations) to prove that he believed and relied on the false representations in order to entitle him to recover."

In *Clark v. Tennant*, 5 Neb., 549, this court said: "In order to avoid a sale on the ground of fraudulent representations, they must be of a matter material to the contract, and by which the purchaser was misled or deceived, and but for which the contract would not have been made."

And again in *Runge v. Brown*, 23 Neb., 817, the rule is thus announced: "In order to maintain an action for deceit, it is not only necessary to establish the telling of an untruth, knowing it to be such, but it is equally necessary that it be shown that the plaintiff had a right to rely, and did rely, upon the representations made, and that he altered his condition in consequence thereof, and suffered damages thereby."

These authorities are decisive of the case at bar. The decree appealed from must be reversed and the cause remanded, and it is so ordered.

REVERSED AND REMANDED.*

THE other commissioners concur.

KILPATRICK-KOCH DRY GOODS COMPANY V. WILLIAM S. MCPHEELY.

FILED OCTOBER 4, 1893. No. 5113.

1. **Fraudulent Conveyances: PREFERRED CREDITORS: QUESTIONS OF FACT.** A debtor in failing circumstances has a right

* Upon application for rehearing, the order to remand was modified so as to direct the district court to permit defendant to file an answer setting up a breach of contract.

to secure or pay in full a portion of his creditors, to the exclusion of the others; and whether in so doing he was actuated with a fraudulent purpose, is a question of fact and not of law.

2. **Attachment:** DEBTS FRAUDULENTLY CONTRACTED: EVIDENCE. Where a plaintiff in attachment claims the debt for which he sues was fraudulently contracted, and, to sustain such claim, offers in evidence a statement made by the debtor to his banker, and by the latter communicated to plaintiff, to render such communication admissible it must be identical with the statement made, or the substance of it, and not the banker's conclusion deduced therefrom.

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

The facts are stated in the opinion.

Albert W. Crites, for plaintiff in error:

The evidence shows that defendant had parted with the legal title to the attached property, as well as with the possession of the same. He therefore had no such interest therein as would support a motion to dissolve. (*Chandler v. Nash*, 5 Mich., 409; *Price v. Reed*, 20 Id., 72; *Mitchell v. Skinner*, 17 Kan., 563; *Zook v. Blough*, 42 Mich., 487; *Mendes v. Freiters*, 16 Nev., 388.) Plaintiff was entitled to rely on the representations made by defendant to the First National Bank of Chadron, and communicated to it as to his indebtedness, and such statements, if relied upon and untrue, form the ground of attachment that the debt was fraudulently contracted. A representation a business man makes to a bank relating to his business or pecuniary responsibility is among those expected to be communicated to others for them to act upon. (*Stevens v. Ludlum*, 48 N. W. Rep. [Minn.], 771.) Statements made to a commercial agency are of the same character, although plaintiff had no personal knowledge of what such statements consisted. (*Gries v. Blackman*, 30 Mo. App., 2.) The mortgages must be deemed fraudulent in law as to other creditors, as they cover property in value greatly in

excess of the indebtedness represented by the mortgages. (*Bonns v. Carter*, 22 Neb., 517; *Russell v. Lau*, 30 Id., 805; *Brown v. Work*, Id., 800; *Morse v. Steinrod*, 29 Id., 108; *Thompson v. Richardson*, 33 Id., 714; *Smith v. Boyer*, 29 Id., 76.)

Alfred Bartow, R. St. Clair, and *J. L. McPheely, contra:*

Where the purchaser intends to pay, and has reasonable expectations of being able to do so, the contract is not fraudulent, although the purchaser knows himself to be insolvent, and does not disclose it to the vendor, who is ignorant of the fact. (*Talcott v. Henderson*, 31 O. St., 162; *Kelsey v. Harrison*, 29 Kan., 143; *Van Dyck v. McQuade*, 86 N. Y., 44; *Nicholas v. Pinner*, 18 Id., 295; *Nicholas v. Michael*, 23 Id., 264; *Hennequin v. Naylor*, 24 Id., 139; *Morris v. Talcott*, 96 Id., 100; *Peru Plow & Wheel Co. v. Benedict*, 24 Neb., 345.)

RAGAN, C.

The plaintiff in error attached a stock of goods belonging to the defendant in error. The district court of Dawes county discharged the attachment and the plaintiff in error brings the case here and asks the reversal of this order of the district court. The grounds of attachment alleged in the affidavit are: First, that said defendant has assigned and disposed of his property with intent to defraud his creditors; second, that the defendant fraudulently contracted the debt.

As to the first ground of attachment, the evidence in the record not only does not show, or tend to show, that the defendant in error had disposed of his property, or any of it, with intent to defraud his creditors, or any of them, but the evidence affirmatively shows that the disposition made by the defendant in error of his property was for the purpose of securing his creditors. It appears from the evidence that the defendant in error owned a stock of mer-

chandise in Chadron and on the 20th day of February, 1891, the stock was worth $5,425.41, the book accounts $500, or a total of $5,925.41, exclusive of some store fixtures, the value of which is not shown. On that day the defendant in error executed a chattel mortgage on this stock of merchandise, book accounts, and fixtures, as follows: First mortgage, $2,500; second mortgage, $875; third mortgage, $1,629.39, and delivered possession of the mortgaged property to the mortgagees. The second mortgage was, by its terms, made subject to the first; and the third subject to the first and second. These mortgages, as the evidence shows, were all made and accepted in good faith without intent on the part of any one to defraud, and were made to secure honest debts owing by the defendant in error to the mortgagees.

The contention of the plaintiff in error seems to be that as the value of the property mortgaged was $5,925.41, and the debt secured by the first mortgage was only $2,500, the security was so greatly in excess of the amount of the first mortgage debt as to render the mortgage fraudulent in law, whatever that may mean. But these mortgages were all made and filed on the same day and within a few minutes of each other; in other words, they were one transaction. We are not prepared to say that a mortgage would be fraudulent solely because the value of the property mortgaged was two, or even three, times greater than the debt. Whether it would be, would be a question of fact for a jury or trial court, and not a question of law. A debtor has a right to prefer his creditors; to pay part in full to the exclusion of others; and he has a right to secure the debts of a part of his creditors to the exclusion of the others; and this is true whether he be insolvent or in failing circumstances, or not. All that the law requires of him is that he should act honestly; that his disposition of his property should not be made for the fraudulent purpose of hindering, delaying or defrauding his creditors, and

whether an act of a debtor in the disposition of his property was fraudulent, is always a question of fact, and not a question of law. Section 20, chapter 32, Compiled Statutes, provides: "The question of fraudulent intent * * * shall be deemed a question of fact and not of law." The rule of construction invoked here by the plaintiff in error should not be applied. The court evidently considered the giving of the three mortgages as one transaction, and this was correct.

We now turn our attention to the second ground of attachment, viz., that the defendant in error fraudulently contracted the debt. It appears from the evidence that one Mead, a traveling salesman of the plaintiff in error, sold the goods to the defendant in error for which this attachment suit was brought. Mead made inquiries of the cashier of a bank in Chadron as to the financial standing of the defendant in error, and was informed, so he says, that the defendant in error was "all right." He communicated by letter this information to the plaintiff in error. The evidence also shows that the plaintiff in error, "in selling said goods and in granting to said defendant such credits, fully believed in and relied upon the statement in said letter (Mead's) contained, to the effect that 'Mr. Miller, the cashier of the First National Bank told me (Mead) he (defendant in error) was all right,' and said statement was the consideration and basis upon which said goods were sold and delivered and said credit extended to said defendant." It seems that the bank cashier acquired his knowledge of the defendant in error's financial condition from a statement made by the defendant in error to the president of the First National Bank on September 24, 1890. The president of the bank swears that at this time defendant in error made a statement to him of his indebtedness, and that some of the debts secured by the mortgages given were not included in the statement of the debts mentioned by the defendant in error, though it now appears that such debts were then in existence. Defend-

ant in error does not deny making the statement to the bank president, but swears the statement of the indebtedness made by him had reference only to the financial condition of the copartnership of McPheely & Co,—the dedefendant in error had previously been doing business in the same place with another gentleman under the copartnership name of McPheely & Co.,—and that the bank at that time held a note of that firm.

Counsel for plaintiff in error says: "Plaintiff was entitled to rely on the representation made by the defendant to the First National Bank of Chadron, and communicated to it as to his indebtedness, and such statement, if relied upon and untrue, forms a ground of attachment, viz., that he fraudulently contracted the debt." Counsel cites *Stevens v. Ludlum*, 48 N. W. Rep. (Minn.), 771, as authority for his contention. In that case it is said: "One making representations relating to his business to a commercial agency may be estopped as to its patrons to whom it communicates such representations." This case is not in point here. The bank at Chadron was not a commercial agency, nor does it appear from the record that the plaintiff in error was a patron of the bank. There is no evidence that the representations made by the defendant in error to the president of the bank were intended or expected by the defendant in error to be communicated to the plaintiff in error, or any one else. Besides, the preponderance of the evidence is that the statements made by the defendant in error to the bank president had reference solely to the debts of the old firm of McPheely & Co. Again, it does not appear that the precise statement made by the defendant in error to the bank president, nor the substance of it, was ever communicated to the plaintiff in error. The most that can be said is that the cashier of the bank, knowing what statement had been made, deduced from it the conclusion that the defendant in error was "all right," and communicated this information to the plaint-

iff in error. This is not enough in such cases as this. If the plaintiff in error claims to have relied on a statement made by the defendant in error to the president of the bank, and by him communicated to it, it must show that the identical statement made was communicated to it. It must have had before it the facts; not a conclusion drawn from them by its informant. All that has been said above applies also to a statement alleged to have been made by the defendant in error to J. V. Farwell & Co. It remains to be said of the latter statement, however, that there was no competent evidence before the court concerning it. The alleged copy of the statement attached to the affidavit was not competent evidence. Besides, this copy showed on its face that the statement had reference to the indebtedness of McPheely & Co. It should not have been considered by the court, and probably was not.

There is in the record some evidence which tends to show that the defendant in error fraudulently contracted the debt sued, but the evidence is very weak and contradicted at every point. The trial judge decided rightly that the evidence failed to support the charge that the debt was fraudulently contracted.

The plaintiff in error makes the point that the mortgagees held the legal title to the property and the possession of the same, and, therefore, the defendant in error is not in a position to move to discharge the attachment. It would seem that the legal title to chattels mortgaged remains in the mortgagor until divested by a foreclosure of the mortgage and sale of the property. However, it is not necessary to determine that question now, and we do not decide it. Counsel's point was before this court in *Grimes v. Farrington*, 19 Neb., 45, and there decided adversely to his contention, the court saying: "A mortgagor of personal property, upon which an attachment issued against him has been levied, has the right, under the provisions of section 235 of the Civil Code, to resist the attach-

ment by a motion to discharge the same, upon the ground that the allegations of fraud, upon which the order of attachment was procured, are untrue." There is no error in the judgment of the district court, and the same is in all things

AFFIRMED.

THE other commissioners concur.

OTTO BAUMANN, GUARDIAN, V. THOMAS M. FRANSE, APPELLANT, IMPLEADED WITH JOSEPH PIMPER ET AL., APPELLEES.

FILED OCTOBER 4, 1893. No. 4955.

1. **Homesteads:** EXECUTION SALES: TITLE UNDER SHERIFF'S DEED. A sale of a debtor's homestead, at the time actually occupied by himself and family as such, by a sheriff on an ordinary execution, will not divest the debtor of his title to the homestead; nor will the sheriff's deed, made in pursuance of such sale and a confirmation thereof, convey any title to the purchaser of such homestead at such sale.

2. ———: ———: ———: BONA FIDE PURCHASERS. The purchaser of title to real estate, derived through a sheriff's sale thereof on ordinary execution, with actual knowledge that the same was at the time of sale the homestead of the execution debtor, and actually occupied by himself and family as such, is not an innocent purchaser.

APPEAL from the district court of Cuming county. Heard below before NORRIS, J.

T. M. Franse, pro se.

Fannie O'Linn, contra.

RAGAN, C.

About twenty years ago the appellee Joseph Pimper acquired, under the homestead laws of the United States, title to an eighty-acre tract of land in Cuming county. Some time after that he acquired title to another forty-acre tract adjoining the eighty-acre tract, and, with his wife, the appellee Eva Pimper, and their family, continuously resided on said tract of land, using and occupying the same as their homestead until March, 1889. On the 30th of October, 1888, the appellees Joseph and Eva Pimper executed a mortgage upon this 120 acres of land to the appellant Franse. He assigned the mortgage and the debt secured by it to the appellee Otto Baumann, guardian. On the 31st day of October, 1888, one McLaughlin, in a justice court in Cuming county, recovered a judgment for $150 for attorney's fees against the said Joseph Pimper. A transcript of this judgment was duly filed in the office of the clerk of the district court of said county on November 2, 1888, at what hour the record does not show. On the 2d day of November, 1888, Joseph Pimper and his wife, Eva, executed a deed of said 120 acres of land to the appellee Frank Schmeiser, for the purpose and with the intention of having him convey the title of all of said lands to the wife, Eva Pimper. This deed was filed for record in the office of the register of deeds on the 7th day of November, 1888. On the 27th day of February, 1889, in pursuance of their agreement, Schmeiser and wife conveyed eighty acres of said land back to Eva Pimper, and on the same date, without consideration, Schmeiser and wife conveyed to one Uldrich forty acres of said land, and in May following, Uldrich, for no valuable consideration, by quitclaim deed, conveyed said forty acres to the appellant Franse. On the 27th day of November, 1888, the sheriff of Cuming county levied an execution, issued on the judgment held by McLaughlin against Pimper, upon the said homestead of the

Pimpers, and afterwards sold said real estate to one Kimball E. Valentine, which sale was confirmed on the 28th of January, 1889, by the district court, and the sheriff thereupon executed to said Valentine a deed of conveyance for said real estate, bearing date the 2d day of February, 1889. On the 26th day of April, 1889, Valentine and his wife conveyed said real estate to the appellant Franse. During the month of March, 1889, Joseph Pimper and his wife and family moved off the said homestead.

Baumann, guardian, brought this suit in the district court of Cuming county to foreclose the mortgage on this homestead, made by Pimper and his wife to Franse. Joseph Pimper and Eva Pimper, his wife, Frank Schmeiser, and the appellant Franse were made defendants. Schmeiser did not appear in the action. Franse filed no answer to the petition to foreclose, nor made any defense thereto. The Pimpers made no defense to the foreclosure suit, but the wife, Eva Pimper, filed a cross-petition in said action against her co-defendant, Franse, in which she alleged, in substance, that she and Joseph Pimper were husband and wife; that they had owned and resided upon the 120 acres of land with their family, as a homestead, for about twenty years; set out the conveyance of the land as above stated, to Schmeiser, for the purposes above stated; that Schmeiser accepted the trust and expressly agreed to convey all of said premises to her at once; that in pursuance of the agreement he did convey to her eighty acres of it, but neglected to convey a forty-acre tract to her, and in disregard of his trust conveyed it to one Uldrich, without consideration, and that Uldrich had subsequently, and without consideration, conveyed it to her co-defendant, Franse. She further set out in her cross-petition the levy upon said homestead by the sheriff; the sale of the same; the purchase by Valentine; the confirmation of the sale and the deeding of the homestead to Valentine by the sheriff; that Valentine had subsequently conveyed to Franse. She alleged that the

conveyance from Valentine to Franse was without consideration, and that Franse purchased with due notice of her rights. She prayed that the sheriff's deed to Valentine, the deed from Valentine to Franse, the deed from Schmeiser to Uldrich and from Uldrich to Franse, might all be canceled and the title to all of said real estate quieted and confirmed in her. The appellant Franse answered this cross-petition and, in substance, pleaded that he was an innocent purchaser for a valuable consideration, without notice, of all of said lands from Valentine. He pleaded that he was an innocent purchaser of the forty-acre tract from Uldrich; that the conveyance made by Pimper and his wife to Schmeiser was done for the purpose of defrauding the creditors of Joseph Pimper, and that the Pimpers had abandoned the land as a homestead. On these pleadings and issues, without objection from any one, so far as the record discloses, the case was tried to the court, who rendered a decree of foreclosure of the mortgage and ordered the property sold to satisfy the mortgage debt. He further found and decreed that the allegations in the cross-petition of Eva Pimper were true, and quieted and confirmed the title to all of said real estate in her, and rendered a personal judgment against the appellant Franse, for some rents of the property that he had collected and appropriated.

Franse brings the case here on appeal, and contends that as plaintiff's action was for the foreclosure of a mortgage, and no defense was made to that proceeding by any one, the action should not be retained for the purpose of settling the title between the defendants, and that the proper remedy for Mrs. Pimper for trying her title to the land against appellant is an action of ejectment. These objections of the appellant come too late. So far as the record before us discloses the proceedings in the court below, the appellant answered the cross-petition of Mrs. Pimper, setting out his own title to the land, and asking to have his

title thereto quieted and confirmed. In other words, without objection of any kind, he submitted his rights and case to the court, sitting in equity, and he cannot now be heard to complain that a question of title was tried in the foreclosure suit; nor can he now question the decree against him because he was entitled as a matter of law, had he demanded it, to have the question of his title passed upon by a jury. This question was before this court in *Gregory v. Lancaster County Bank*, 16 Neb., 411, and the court said: "There is no doubt that the proper remedy of a party out of possession of real estate, and holding the legal title to the same, is ejectment. He, as well as the party in possession, is entitled to two trials and to a jury to determine the facts; but the right to trial by jury or to a second trial is a personal privilege that may be waived. If the plaintiffs in error had filed an answer alleging that the defendant in error was not in possession of the premises, and that the plaintiffs in error were in possession, and denying the right of the defendant in error to proceed in equity, it is probable the defendant in error would have been required to amend its petition and proceed at law. But instead of this we find that the plaintiffs in error have set up in their answer all the steps in their proceeding by which they acquired title, and the court was in effect asked to enter a decree that their title was paramount and superior to that of the defendant in error. That the court had jurisdiction in such a case there can be no doubt." This question was again before the court in *Snowden v. Tyler*, 21 Neb., 199, and the same doctrine was announced. Again in *Mollie v. Peters*, 28 Neb., 670, the question arose, and this court said: "When both parties to a suit by their pleadings claim title to the same tract of land, and each asks to have his title quieted, it is too late, after decree, for the losing party to urge for the first time that the proper remedy was by an action of ejectment."

The undisputed evidence in this record shows that the

land in controversy was levied upon and sold by the sheriff to Valentine to satisfy the judgment of McLaughlin against Joseph Pimper; that a notice of an application to have the sale confirmed was served on Joseph Pimper, and that he made no effort to prevent the confirmation of the sale, nor made any appearance whatever in that action; that the land sold was worth about $2,400, and incumbered by mortgage of something over $600,—the mortgage in suit; and that at the dates of the levy, sale, and confirmation, the land was actually occupied by the Pimpers and their family as a homestead. The appellant's title, then, is whatever title Valentine had. The question is, What title did Valentine acquire by virtue of the levy upon, and sale and conveyance of, these premises to him by the sheriff? We think Valentine acquired no title whatever to these premises by virtue of the sheriff's sale and deed, and that, therefore, appellant has none.

Section 1, chapter 36, Compiled Statutes of 1893, provides: "A homestead not exceeding in value $2,000, consisting of the dwelling house in which the claimant resides, * * * and the land on which the same is situated, not exceeding 160 acres, * * * shall be exempt * * * from execution or forced sale, except as in this chapter provided."

In *McHugh v. Smiley*, 17 Neb., 626, it is said: "A party purchasing part of a homestead in actual occupation of the family, at a sale under an ordinary execution, will not acquire the title if the property was exempt."

In *Schribar v. Platt*, 19 Neb., 625, the facts were: A owned land occupied by himself and family as a homestead, and conveyed it to B. Prior to this time Platt had recovered judgment against A, caused the land to be levied upon, sold under execution, and the same was purchased by Platt, and the sheriff executed him a deed therefor. B then brought action to have the sheriff's deed canceled as a cloud upon his title, alleging that the land in contro-

versy was purchased by him from one Mesarvey; that at and before the conveyance to him, Mesarvey occupied the land with his family as a homestead; that the same was less in quantity than 160 acres, and of less value than $2,000; and this court held that the judgment of Platt and the proceedings thereunder were no lien or claim upon the land, and entered a decree canceling the sheriff's deed as a cloud upon B's title.

In *Giles v. Miller*, 36 Neb., 346, the facts were: One J. A. Giles and his wife and family owned and occupied as a homestead a piece of land in Phelps county, and on the 4th day of March, 1889, they conveyed this land to one William Giles. Prior to this conveyance one Miller had recovered a judgment against said J. A. Giles before a justice of the peace, and caused a transcript thereof to be filed in the office of the clerk of the district court on the 18th of October. Miller subsequently caused an execution to be issued upon this judgment and levied upon this land, and the sheriff having advertised and being about to sell the same, William T. Giles, the purchaser from J. A. Giles, brought a suit to enjoin the sheriff from making the sale. William Giles predicated his case upon the ground that the land purchased by him from J. A. Giles was, at the time he purchased it, the homestead of J. A. Giles, and as such was exempt from sale on execution, and that the judgment of Miller was not a lien upon it; and this court, on appeal, said: "As the real estate in dispute was the homestead of J. A. Giles at the time of the filing of the transcript of the judgment, and at the time of the plaintiff's purchase, Miller's judgment was not a lien on the property. The purchaser of the land, which is held and occupied by the owner and his family as a homestead, and which does not exceed in value $2,000, takes the same free from the lien of a judgment docketed prior to such purchase, but during the existence of the homestead right. In other words, a judgment is not a lien upon the homestead premises, and the owner can convey the same free from his previous judgment debts."

It appears then, from the statute and the decisions of this court above quoted, not only that a judgment is not a lien against the homestead of the judgment debtor, but that the homestead of the debtor, while actually occupied by him, is absolutely exempt from sale on an ordinary execution; and a sale of the debtor's homestead, at the time actually occupied by himself and family as such, by a sheriff on an ordinary execution, will not divest the debtor of his title to the homestead; nor will the sheriff's deed, made in pursuance of such sale and a confirmation thereof, convey any title to the purchaser of such homestead at such sale.

Appellant claims that he purchased these premises from Valentine, who was in possession of the same, for a valuable consideration, and for these reasons he should be held an innocent purchaser, and protected. We do not care to indulge in any extended discussion of the evidence. Suffice it to say that the facts in the record do not support appellant's claim. He was present when the levy was made. He acted as one of the appraisers. He appeared as Valentine's counsel, and on his motion, the sale made to Valentine was confirmed. He knew the land was all this time, and had been for a number of years, actually occupied by Joseph Pimper, his wife and family, as their homestead. The deed he accepted from Valentine was, practically, a quitclaim deed, and at the time he took Valentine's conveyance for these lands, there was on record in the office of the register of deeds of Cuming county an absolute warranty deed from Pimper and wife for these lands to the defendant Schmeiser. This deed and the record of it antedated the levy on which Valentine's deed was based. The date of this deed was identical with the date the judgment on which the land was sold was transcripted from the justice of the peace, and filed in the office of the clerk of the district court. No; appellant is not an innocent purchaser of these lands as a matter of fact or law.

It is also urged by the appellant that the conveyance of these lands to Schmeiser by Pimper and wife was to defraud their creditors, and an abandonment of their homestead. If this is true it does not help appellant. It has long been settled that exempt property is not susceptible of fraudulent alienation. The homestead was absolutely exempt from sale under this execution, and if the Pimpers desired to sell it or give it to Schmeiser and did so, it was still exempt from being sold under the execution against Joseph Pimper.

The appellees, the Pimpers, claim that this land was conveyed by them to the defendant Schmeiser for the sole purpose of having him convey the land to Mrs. Pimper; that he accepted such conveyance for that purpose, and promised at the time to at once deed to Mrs. Pimper. The court found this claim to be true, and the evidence supports the finding. Schmeiser did convey to Mrs. Pimper a part of the land, but wrongfully and without consideration, as the evidence shows, conveyed one forty-acre tract of the land to one Uldrich, and he, without any consideration, quitclaimed the same to the appellant Franse. Schmeiser held all these lands in trust for Mrs. Pimper, and as neither Uldrich nor Franse paid any valuable consideration for the forty-acre tract, the decree canceling the conveyance from Schmeiser to Uldrich and from Uldrich to Franse for the land was right.

It is useless to pursue the case any further. We have carefully examined all the points made and authorities cited by the appellant, and studied with much care all the evidence, and under no reasonable or fair construction of the testimony and the law applicable to it, can appellant's claim of title to these lands, or any of them, stand. The decree of the district court is in all things

AFFIRMED.

THE other commissioners concur.

WILLIAM R. JONES, SHERIFF, v. WILLIAM M. LOREE ET AL.

FILED OCTOBER 4, 1893. No. 5038.

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

2. ———: PREFERRED CREDITORS: VOLUNTARY ASSIGNMENTS. Several chattel mortgages made and delivered simultaneously to secure different creditors of the mortgagor, the delivery being to one of the mortgagees, who in the transaction acts for himself and on behalf of all the other mortgagees, do not constitute an assignment for the benefit of creditors.

3. ———: ———: ———. *Bonns v. Carter*, 20 Neb., 566, overruled.

4. ———: ———: FRAUDULENT CONVEYANCES. A mortgage taken by a creditor to secure a pre-existing debt will not be held void merely because the creditor, when he took the mortgage, had notice of an intent upon the part of the mortgagor to hinder, delay, or defraud his creditors. In order to avoid such mortgage the creditor must have participated in such intent.

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

6. ———: ———: ———: REPLEVIN: INSTRUCTIONS. Certain instructions requested, examined, and *held* to be rightly refused.

7. ———: ———: ———: ———: EVIDENCE: HARMLESS ERROR. Error committed in the admission in evidence of a written instrument, without proof of its execution, is cured where such proof is afterwards made before the party offering the instrument has rested his case.

8. ———: ———: ———: ———: INSTRUCTIONS. Where several mortgagees joined as plaintiffs in an action to replevy property covered by their mortgages, which had been taken from their possession under writs of attachment against the mortgagor, and the issue was as to whether these mortgages were void as to

creditors, the facts differing as to the different mortgages, an instruction to the jury to find generally for the plaintiffs, if they should find that any one of the mortgages was good, is erroneous.

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

The facts are stated in the opinion.

Griggs, Rinaker & Bibb, J. E. Cobbey, and *George B. Everitt,* for plaintiff in error:

If the several mortgages are construed separately and as independent transactions, then they and each of them are void as covering all of the property of the debtor, and property greatly in excess of the debt. (*Smith v. Boyer,* 29 Neb., 77; *Morse v. Steinrod,* Id., 108; *Brown v. Work,* 30 Id., 801; *Russell v. Lau,* Id., 805.) If the several mortgages are considered together as constituting one transaction, then the same amounts to an assignment for the benefit of creditors, and is void as not being in conformity with the assignment law. (*Bonns v. Carter,* 20 Neb., 566; *Mackie v. Cairns,* 5 Cow. [N. Y.], 547; *D'Ivernois v. Leavitt,* 23 Barb. [N. Y.], 63; *Bridges v. Hindes,* 16 Md., 101; *Richmond v. Mississippi Mills,* 11 S. W. Rep. [Ark.], 962; *Omaha Book Co. v. Sutherland,* 10 Neb., 335; *Kohn v. Clement,* 58 Ia., 593; *White v. Cotzhausen,* 129 U. S., 329; *Winner v. Hoyt,* 66 Wis., 227; *Norton v. Kearney,* 10 Id., 443*; *Freund v. Yaegerman,* 26 Fed. Rep., 814; *Martin v. Hausman,* 14 Id., 160; *Kellog v. Richardson,* 19 Id., 70; *Perry v. Corby,* 21 Id., 737; *Clapp v. Dittman,* Id., 15; *Clapp v. Nordmeyer,* 25 Id., 71; *Kerbs v. Ewing,* 22 Id., 693; *Bean v. Patterson,* 12 Id., 739; *Robinson v. Elliott,* 22 Wall. [U. S.], 523.) The court erred in giving the fourth instruction to the jury. (*Tootle v. Dunn,* 6 Neb., 99; *Savage v. Hazard,* 11 Id., 328; *Temple v. Smith,* 13 Id., 513; *Bollman v. Lucas,* 22 Id., 813; secs. 17, 21, ch. 32, Comp. Stats., 1889.) The

court erred in refusing to give the fifth instruction asked by defendant. (*Morse v. Steinrod*, 29 Neb., 108; *Brown v. Work*, 30 Id., 801.) The twelfth instruction asked by the defendant should have been given. (Bump, Fraudulent Conveyances [3d ed.], p. 54; *Comstock v. Rayford*, 20 Miss., 369; *King v. Moon*, 42 Mo., 551; *Dorn v. Bayer*, 16 Md., 144; *Venable v. Bank of United States*, 2 Pet. [U. S.], 107; *Pickett v. Piphin*, 64 Ala., 520.)

Rickards & Prout, contra, insisting that the mortgages are valid, cited: *West v. White*, 56 Mich., 126; *Brown v. Smith*, 7 B. Mon. [Ky.], 361; *Chase v. Walters*, 28 Ia., 469; *Davenport v. Cummings*, 15 Id., 225; *Hershiser v. Higman*, 31 Neb., 531. A debtor has the right to prefer his creditors, and to pay or secure those preferred. Chattel mortgages to preferred creditors, if made in good faith to secure *bona fide* debts, even if made to a considerable number of such creditors, are valid. (*Davis v. Scott*, 22 Neb., 154; *Kohn v. Clement*, 12 N. W. Rep. [Ia.], 550).

IRVINE, C.

Charles E. Briggs was the owner of a stock of boots and shoes in Beatrice. Upon the 23d day of December, 1890, he executed a chattel mortgage to William M. Loree for $1,723.55; one to Emeline M. Briggs for $1,035.62; one to Mary Higgins for $1,549, and one to Anne Higgins for $430.33. These four mortgages were all made to cover the stock of goods referred to, were recorded in the order named, and by the terms of the mortgages themselves were given priorities in that order. Subsequently, upon the 24th day of December, there was executed to W. V. Morse & Co., Smith, Blasland & Co., and the W. W. Kendall Boot & Shoe Co., another mortgage to secure indebtedness to the parties named, amounting to $601.30. Upon the delivery of the four mortgages first named, Loree, on his own behalf and as agent of the other three

mortgagees, took possession of the stock of goods. After the execution of the last mortgage he was requested to hold possession under that mortgage on behalf of the mortgagees named therein. Subsequently attachments and executions were issued against Charles E. Briggs on behalf of a number of creditors, and the plaintiff in error, as sheriff of Gage county, seized the stock of goods under these attachments and executions as the property of Charles E. Briggs.

This suit was brought in replevin by the mortgagees, and the goods were taken under the writ and delivered to the plaintiffs, in whose favor, upon the trial, there was a verdict and judgment. The plaintiffs, of course, claimed under their mortgages. The defendant justified under the attachments and executions, claiming the mortgages were fraudulent as against creditors whom he represented. Numerous errors are assigned.

The plaintiff in error undertakes to present a dilemma as follows: That if the several mortgages are to be construed separately and as independent transactions, then each of them is void, because covering all the property of the debtor and property greatly in excess of the debt; and upon the other hand, if the mortgages are to be taken together as constituting a single transaction, then the same amounts to an assignment for the benefit of creditors and is void because not in conformity with the assignment law.

Upon the first branch of this argument it is sufficient to say that the mortgages to Loree, Mrs. Briggs, and the two Higginses are shown conclusively by the evidence to have been given at one time as part of the same transaction, Loree acting, in taking the mortgages, on his own behalf and as agent for the other mortgagees. For the purpose of considering the proportion existing between the property mortgaged and the debts secured, the court instructed the jury that they were to be considered as one transaction. The reason of the rule avoiding, as against creditors, conveyances of property in value greatly in excess of a debt

secured by such conveyances is that such a conveyance necessarily operates to hinder and delay, if not to defraud, other creditors; that it evinces an intention upon the part of the debtor to do more than secure the creditor preferred, and practically conclusively proves an intent upon his part to deprive other creditors of their remedies. From the nature of the transaction the creditor preferred is chargeable with notice of such design, and is shown by his act of taking grossly disproportionate security to have participated in the fraudulent intent. But when a number of small debts are secured upon property not disproportionate to the aggregate amount of these debts no such effect follows and no such intention can be imputed either to grantor or grantees. This court has repeatedly sustained a series of conveyances of this character. Among such cases are *Hershiser v. Higman*, 31 Neb., 531; *Hamilton v. Isaacs*, 34 Neb., 709.

Upon the second branch of the dilemma, counsel rely upon the case of *Bonns v. Carter*, 20 Neb., 566, and 22 Neb., 495. There the decision was that a mortgage made to one person as trustee to secure debts owing several creditors amounted to an assignment because of the trust created.

In this instrument no such trust was created upon the face of the instrument, and such cases have not been held within the rule in *Bonns v. Carter*. (*Hershiser v. Higman, supra; Hamilton v. Isaacs, supra; St. Louis Wrought Iron Range Co. v. Meyer*, 31 Neb., 543.)

But if the case can be considered as falling within the rule of *Bonns v. Carter*, by reason of the fact of Loree's actual agency for all the mortgagees, still we do not think the transaction offended against the assignment law. *Bonns v. Carter* was decided by a divided court, upon a rehearing. The views expressed by Judge Maxwell, in announcing that the majority of the court adhered to its former judgment, show that in that adhesion the court was influenced chiefly by other elements rendering that particular transaction fraudulent.

Recently the case has not been adhered to, and in *Hamilton v. Isaacs, supra,* it was practically overruled. The views expressed by Judge REESE in the dissenting opinion, 22 Neb., 495, and by Judge POST in *Hamilton v. Isaacs, supra,* present very clearly and forcibly the reasons against the adoption of any such rule. *Bonns v. Carter,* in this respect, can no longer be considered as expressing the law of the state.

2. The next question presented is raised by the fourth paragraph of the court's instructions. In this instruction the jury was told: "If the mortgagor intended to hinder or defraud creditors and the mortgagee knew it, that would not make the mortgage void unless the mortgagee also intended, by taking the mortgage, to hinder or defraud creditors, and that was in part his purpose in taking it. A creditor has a right to take a chattel mortgage on a reasonable amount of his debtor's personal property as security for his *bona fide* pre-existing debt, and the debtor has a right to make such preference of his creditors, even though the effect thereof be to defeat, hinder, or delay other creditors in the collection of their debts; and this is so even if the parties knew that such would be the effect, and even though the property so taken as security was all the debtor had, but in value reasonably proportionate to the amount justly owing to the creditors so preferred."

Plaintiff in error argues that this instruction is in violation of the rule established in *Tootle v. Dunn,* 6 Neb., 99; *Savage v. Hazard,* 11 Id., 323; *Temple v. Smith,* 13 Id., 513; and *Bollman v. Lucas,* 22 Id., 813. These cases establish the rule that a purchaser of goods from a debtor knowing or chargeable with notice of the debtor's fraudulent intent is not a purchaser in good faith, and that the sale is void as against creditors.

Each of these cases was the case of a sale, and the rule is undoubtedly correct as applied to such cases. The court's instruction was given upon the theory that a distinction

exists between a sale or security given for a debt created at the time of the giving of security, and a security given for a pre-existing debt. We think the distinction is well founded. To give any effect at all to the rule established by so long a line of authorities that their citation would be useless,—that a debtor even in failing circumstances may secure a creditor to the exclusion of others, provided the transaction be *bona fide*,—we must draw the distinction pointed out by the trial judge.

To say that knowledge upon the part of an existing creditor of the debtor's intention to defraud creditors would render any security demanded by such creditor fraudulent would be equivalent to saying that the creditor is estopped from protecting himself by knowledge of the very facts which warrant him in seeking protection. A fraudulent intent may be very properly imputed to a stranger who knowingly assists the debtor in defeating his creditors by a purchase of the debtor's property, but no such intent can be imputed to an existing creditor because of his knowledge of such intent, when for the sole purpose of protecting himself he receives sufficient and reasonable security for that purpose. We think this instruction stated the law with perfect accuracy. The mere knowledge of the debtor's fraudulent intent would not defeat the mortgage; but the participating therein on the part of the mortgagee, or any motive upon his part not consistent with good faith, would have that effect. The following authorities sustain this view of the law: *Chase v. Walters*, 28 Ia., 460; *Kohn v. Clement*, 58 Id., 589; *York County Bank v. Carter*, 38 Pa. St., 446.

3. The refusal of the court to give certain instructions asked by the defendant is assigned as error.

The fifth instruction requested and refused is in the words of the opinion in *Morse v. Steinrod*, 29 Neb., 108: "The right of a debtor to prefer creditors is very much restricted in this state by virtue of the attachment, assign-

ment, and other laws, and will not be applied in any case where a just and fair distribution of the proceeds of the debtor's property can be made among all his creditors." To have given this instruction would have left the jury without any information as to the manner in which the right of a debtor to prefer his creditors is restricted, and would leave them to infer that they might arbitrarily set aside such preferences if they thought a fairer distribution of the property might be made. To have given such an instruction would have been manifest error.

The sixth instruction requested would have left to the jury the right to infer fraud from the fact that a preference was made. This is not the law of this state and it would be supererogatory to discuss the question further.

The twelfth instruction requested was that if Loree, "prior to the making of the mortgages in controversy in this case, took particular pains to exhibit the notes claimed to have been given him by the said Charles E. Briggs to a number of different persons in Vinton, Iowa, then the jury have the right to take this fact into consideration in arriving at their verdict." This instruction was not applicable to the evidence. There was no evidence whatever that Loree took particular pains to exhibit the notes to a number of different persons. Several witnesses testified that at different times they had seen the notes, but in each case the domestic or business relations of such witnesses with Loree were of such a character as to forbid an inference that Loree had exhibited the notes for the purpose of manufacturing evidence in his own behalf.

The fifteenth instruction was that the burden of proof was upon the plaintiffs to prove all the material allegations in their petition. The sixth instruction given by the court of its own motion is that the "burden of proof is now on the plaintiffs to sustain the validity of their mortgages by a preponderance of evidence. If they have shown that the making of the mortgages was accompanied by an

immediate delivery and was followed by an actual and continued change of possession of the things mortgaged, until the seizure by the sheriff under the writs of attachment, without otherwise discrediting the good faith of the mortgagees, then the burden of proof shifts and is on the defendants to show that the mortgage is not good; but if the mortgagees were not in actual possession of the things mortgaged at the time of the levy of the attachment, the mortgages are presumed to be fraudulent and void as to creditors, and the burden is upon the plaintiffs to prove the good faith of the mortgages, and that they were not taken by mortgagees to defraud creditors. Subject to the above statutory *prima facie* presumptions, the law is that fraud is not to be presumed without proof, but must be clearly established by evidence." This instruction clearly and accurately states the law as to the burden of proof upon the only issues in the case which proved to be disputed, and the instruction upon the burden of proof asked by defendant was rightly refused.

The seventeenth instruction requested submitted to the jury special findings in favor of the two Higginses and against the other plaintiffs. The good faith of all the mortgages was properly left to the jury, and the submission of these findings would, under the evidence, have been erroneous. The other instructions refused were either covered by others given or were in conflict with those we hold above to have been rightly given.

The admission in evidence of the mortgage to Loree is assigned as error. The objection urged is that there was no proof of its execution by Briggs. It is true that immediately before it was offered no question was asked as to who signed the paper, but the testimony in the case identified the instrument and elsewhere proves its execution. Any error in admitting it without such preliminary proof was cured by the making of proof before the case was rested.

4. The court instructed the jury that "if any of the plaintiffs' mortgages are good against the defendant, the verdict must be for the plaintiffs; but if none of the plaintiffs' mortgages are good against the defendant, the verdict must be for the defendant for the right of possession. Replevin is a legal possessory action. All adjustments of equitable interests and distribution of proceeds must be deferred to some subsequent proceeding." In this instruction we think the court erred. It is true that if any of the mortgages was good, the seizure by the sheriff was wrongful, and the mortgagee under the valid mortgage might alone maintain replevin for all the mortgaged property; so that the existence of any valid mortgage on behalf of any of the plaintiffs would require a judgment against the sheriff as to the right of possession of all the property, and there could be no judgment in such case in his favor requiring a restitution of the property. It is also true that under our Code all these mortgagees could properly join as plaintiffs. (*Earle v. Burch*, 21 Neb., 702.)

But it does not follow that mortgagees, under fraudulent mortgages, may join with *bona fide* mortgagees in an action of replevin and obtain judgment in their favor because of the valid mortgages in which they have no interest. The verdict and judgment in this case constitutes an adjudication in favor of each one of the plaintiffs against the sheriff as to the right of possession of the property; whereas, under the instructions given, the jury may have found for the plaintiffs generally because they found that one, and only one, of the mortgages was *bona fide*. The reason given by the trial judge for this instruction was, that replevin, being a legal possessory action, all questions of distribution must be reserved for other proceedings; but section 429 of the Code provides that judgment may be for or against one or more of several plaintiffs and may determine the ultimate rights of the parties as between themselves. This section applies to suits in replevin. (*Earle v. Burch*, 21 Neb., 702, *supra.*)

In replevin the plaintiff must recover on the strength of his own title and not upon the weakness of his adversary's. (Cobbey, Replevin, 99, and cases cited.) If, therefore, any of the plaintiffs failed to establish his own right of possession he was not entitled to a judgment adjudicating such right in his favor. The court should have instructed the jury that, in case they found any of the mortgages valid and some invalid, they should find in favor of such plaintiff or plaintiffs as had established the validity of his or their mortgages, and against the others. The error was prejudicial because of its result in adjudicating the rights between all the parties.

5. We believe we have covered all the assignments of error referred to in the briefs of counsel. The brief of plaintiff in error contains reflections upon the conduct of the trial judge which go so far as to insinuate that he was purposely unfair. Such remarks are always out of place; they are unprofessional, and when indulged in demand that they should be met with fitting censure. A careful examination of the record shows that the trial judge conducted the case with impartiality, dignity, and marked ability and precision. The judgment must be reversed upon the sole ground of the error in the eighth instruction.

REVERSED AND REMANDED.

THE other commissioners concur.

C. AULTMAN & COMPANY v. ELISHA L. MARTIN.

FILED OCTOBER 4, 1893. No. 4512.

Trial: CONTRACT IN EVIDENCE: CONSTRUCTION: INSTRUCTIONS. Where, upon a trial, it appears that the rights of the parties depend upon a contract between them in evidence, it is the duty

of the court to construe such contract according to its legal effect; and the refusal to give an instruction correctly construing such contract, and pertinent to the issues, is erroneous.

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

Sawyer & Snell for plaintiff in error.

Chas. H. Sloan and *Maule & McDonald, contra.*

IRVINE, C.

Elisha L. Martin sued C. Aultman & Company, alleging an indebtedness from Aultman & Company to Martin growing out of certain transactions connected with the sale of a threshing machine by Martin, as the agent of Aultman & Company. The defendant filed practically a general denial followed by a plea of the statute of limitations as to certain items claimed by plaintiff, and also a counter-claim based upon certain matters growing out of the same general transaction. The reply contained a denial of the affirmative matter and also matter in confession and avoidance.

There was a trial to a jury and a verdict for $211 in favor of Martin. Upon a motion for a new trial a remittitur for $11 was required as a condition of sustaining the verdict, the case having been begun before a justice of the peace, and the remittitur being for the purpose of reducing the judgment to an amount within the jurisdiction of the justice.

It appeared from the evidence that Martin acted as agent for Aultman & Company in the sale of machines under written annual contracts, two of which, covering the period of the transactions in question, are in evidence. One of the items claimed by Martin was $85 for freight paid for bringing the threshing machine to Fairmont. One of the provisions of the contract in force at that time was that

the agent agrees "to sell said machine at retail prices that should be furnished by the party of the first part, adding freight and charges," and, further, the agent agrees "to receive all machines and extras shipped, pay freight on the same." The plain object was to insure to Aultman & Company their retail prices for the machines as listed, without deduction for freight, by requiring the agent to pay freight and add this amount to the retail price of the machine. The evidence shows that this machine was sold at not more than $10 over the retail price as listed by Aultman & Company. The defendant requested the court to charge the jury as follows: "You are instructed that the plaintiff cannot recover the item of freight sued for as he agreed to pay it under his contract of agency."

This instruction was refused. In fact, the only instructions given were as follows: First, a statement in detail of the allegations of the pleadings; next, a general instruction as to the burden of proof; next, the usual instruction that the jury is the judge of the credibility of witnesses and the weight to be attached to the testimony; and, finally, that if certain notes taken by Martin had been made in accordance with the contract, then the plaintiff was not liable as guarantor. This related to the subject-matter of the counter-claim. The jury was left entirely free to charge Aultman & Company with the whole amount of the freight, where, under the plain provisions of the contract, they were not liable. In this the court erred.

If the record were otherwise free from objections we might permit the plaintiff to remit the amount of freight from the judgment, and should he so elect, affirm it for the remainder. But we think that justice demands that the case should be remanded for a new trial. The contracts sued upon are complicated, and the items of demand and counter-claim required a construction of various portions of the contracts. The instructions given wholly fail to present to the jury the law bearing upon any of these items, except

upon the single question whether plaintiff was liable as guarantor upon the notes referred to. The whole case was given to the jury upon a bare statement of the issues and general instructions as to the burden of proof and weight of evidence. The special law applicable to the different portions of the case was nowhere stated. The jury was left to judge both of the law and the facts. The legal effect of a contract is a question of law upon which it is the duty of the court to instruct the jury. A detailed examination of the different branches of the controversy would be fruitless at this time in the present state of the record. The refusal to give the instruction in regard to freight is sufficient to require a reversal of the case.

REVERSED AND REMANDED.

THE other commissioners concur.

JOSIAH S. MCCORMICK, APPELLANT, V. CITY OF OMAHA AND JOHN RUSH, TREASURER, APPELLEES.

FILED OCTOBER 4, 1893. No. 4950.

Metropolitan Cities: DAMAGES BY EXTENSION OF STREET: ASSESSMENT UPON PROPERTY SPECIALLY BENEFITED: LIABILITY OF OWNERS OF PROPERTY NOT ADJACENT TO IMPROVEMENT. A city of the metropolitan class has power, in order to provide funds for the payment of damages awarded the owners of property appropriated for extending a street, to levy a special assessment upon all the property specially benefited abutting on or adjacent to the street so extended, and is not confined for the purpose of such assessment to the property abutting upon or adjacent to that portion of the street which constitutes the extension.

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

The facts are stated in the opinion.

Ambrose & Duffie, for appellant, contending that appellant's property, two miles from that portion of the street opened and extended and not abutting on the street improved, is not "adjacent" within the meaning of the statute authorizing the assessment, and that no valid assessment can be made on account of special benefits, cited: Rapalje & L. Law Dic.; Anderson Law Dic.; Bouvier Law Dic.; *People v. Schermerhorn*, 19 Barb. [N. Y.], 556; *Scovill v. City of Cleveland*, 1 O. St., 130; *Curd v. Commonwealth*, 14 B. Mon. [Ky.], 386; *In re Ward*, 52 N. Y., 397; *Mattheissen v. City of La Salle*, 117 Ill., 411; *City of Indianapolis v. McAvoy*, 86 Ind., 557; *House v. Greensburg*, 93 Ind., 533; *Kemp v. Mitchell*, 29 Id., 225; *Continental Improvement Co. v. Phelps*, 47 Mich., 299; *Holmes v. Carley*, 31 N. Y., 289; *Wakefield Board of Health v. Lee*, 1 Exc. Div. [Eng.], 336; *City of Burlington v. Quick*, 47 Ia., 224; *United States v. Chaplin*, 31 Fed. Rep., 890; *United States v. Denver & R. G. R. Co.*, Id., 886; *In re Municipality No. 2*, 7 La. Ann., 76; *In re Jennings*, 6 Cow. [N. Y.], 544.

W. J. Connell, contra, cited: *City of Springfield v. Green*, 120 Ill., 269; *Weller v. City of St. Paul*, 5 Minn., 95; *In re Chestnut Avenue*, 68 Pa. St., 81.

A. J. Poppleton, also, for appellees.

IRVINE, C.

This case involves the construction of certain portions of the act relating to metropolitan cities, fixing the authority of such cities to levy local assessments for the purpose of paying damages awarded to owners of property taken for the opening of streets.

The petition, after alleging the corporate capacity of

Omaha as a metropolitan city and the official position of the defendant Rush, avers that the mayor and council, having declared the necessity of opening and extending Thirteenth street from Spring street to the south city limits, and having determined the damages therefor to the owners of property taken for such opening and extension, passed an ordinance assessing and levying upon the property extending from and including the corner of Thirteenth and Douglas streets south upon each block to the south city limits on Thirteenth street, a tax for the purpose of paying such damages; that said tax was assessed upon said property fronting and lying upon Thirteenth street upon either side thereof from Thirteenth and Douglas street to the south city limits as having been especially benefited to the full amount of the tax; that the plaintiff is the owner of two lots lying upon the corner of Harney and Thirteenth streets and having a frontage of 132 feet upon each street, and is also the owner of the south 88 feet of another lot lying upon the corner of Thirteenth and Howard streets, and all of said property is at least one and one-half miles from the south limits of the city; that said property does not abut on and is not adjacent "to the said street so as aforesaid opened and extended," and is not subject to taxation for paying the damages assessed; that nevertheless an assessment was levied upon each of said lots, and that defendants were proceeding to collect the taxes. An injunction was asked to prevent the collection of the taxes, and a decree sought declaring the tax illegal and not a lien upon the property.

To this petition a general demurrer was filed which was sustained, and the plaintiff electing to stand on his petition, there was a judgment of dismissal from which plaintiff appeals.

The sections relating to cities of the metropolitan class under which the defendant city must derive its authority to levy the assessment in question, so far as they are ma-

terial to the question involved, are as follows: Section 69 is a long section containing a grant of power to generally open and improve streets, and defining particularly the manner in which grading, curbing, guttering and paving shall be done and paid for. The only portion of the section referring to the opening and extension of streets is as follows:

"The mayor and council shall have power to open, extend, widen, narrow, grade, curb, and gutter, park, beautify, or otherwise improve and keep in good repair, or cause the same to be done in any manner they may deem proper, any street, avenue, or alley within the limits of the city, * * * and to defray the cost and expense of improvements or any of them, the mayor and council of such city shall have power and authority to levy and collect special taxes and assessments upon the lots and pieces of ground adjacent to or abutting upon the street, avenue, alley or sidewalk thus in whole or in part opened, widened, curbed, and guttered, graded, parked, extended, constructed, or otherwise improved or repaired, or which may be especially benefited by any of said improvements."

Section 73 provides that "All special taxes to cover the cost of any public improvement herein authorized shall be levied and assessed on all lots, parts of lots, lands and real estate bounding, abutting, or adjacent to such improvement, or within the district created for the purpose of making such improvement, to the extent of the benefits to such lots, parts of lots, lands, and real estate by reason of such improvement, such benefits to be determined by the council sitting as a board of equalization," etc.

Section 118 grants the power of eminent domain for streets, alleys, avenues, sewers, parks, boulevards, public squares, gas-works, water-works, and other purposes.

Section 119 provides that "The council shall have power and is hereby authorized to assess the damages awarded or recovered for grading, change of grade, or for the appro-

priation of private property upon the lots and lands benefited, which shall abut or be adjacent to the street, avenue, or alley graded, or for the opening, extending, or widening of which private property shall be appropriated."

It will be observed that the petition alleges in effect that the property of the plaintiff has a frontage upon Thirteenth street, but that it lies one mile and one-half north of the south city limits. The improvement for which the tax was levied was for the extension of Thirteenth street from Spring street to the south city limits. The distance from plaintiff's property to Spring street, the north end of the extension, is not alleged, and the judgment might be affirmed upon the ground that it does not appear from the petition that plaintiff's lots do not abut upon that portion of the street opened. It is assumed in both briefs, however, that Spring street is a considerable distance south of plaintiff's property, and, as the case was argued upon both sides upon this assumption, we prefer to base our decision upon the same ground.

The plaintiff's property, under any definition of the term "adjacent," is adjacent to Thirteenth street. In fact it abuts thereon, but it is more than doubtful whether under any circumstances it could be said to be adjacent to that portion of Thirteenth street for the opening of which the tax was levied. The precise question presented for determination is, therefore, whether under the statutes referred to, the city has the power, for the purpose of raising funds to pay the damages awarded to the owners of property appropriated for extending a street, to levy a special assessment upon any property benefited which abuts upon or lies adjacent to any portion of the street so extended, or whether, upon the other hand, the power of the city is restricted to the levy of assessments upon property abutting upon or adjacent to that portion of the street so opened, or, in other words, the extension itself.

This question is surrounded with difficulty. Good rea-

soning may be and in fact has been advanced in support of either view. Authority is of little value unless based upon statutes identical in language with our own. Such authority we have not been able to find, and in the construction of statutes quite similar to our own, eminent courts have reached different conclusions. Thus in Minnesota the statute provides that the cost of "grading * * * streets shall be chargeable to and payable by the lots fronting *on such streets.*" It was held that an assessment levied upon lots fronting only upon that portion of the street improved was void, and that it was imperative that the tax should be laid upon all the lots fronting upon the whole street. (*Weller v. City of St. Paul*, 5 Minn., 70.)

In *Re Chestnut Avenue*, 68 Pa. St., 81, a similar construction was given a similar statute, but in this case, it should be noted, Judge Sharswood dissented.

Upon the other hand, in the case of *In re Municipality No. 2*, 7 La. Ann., 76, the word "adjacent" was given the force of "contiguous," and it was held that only land contiguous to the *portion of the street improved* was subject to assessment. The language of the statute does not, however, appear in the report.

In *Scovill v. City of Cleveland*, 1 O. St., 126, Ranney, J., delivered the opinion construing a statute which granted power to levy a special tax to pay the cost of grading, paving, or otherwise improving any road, street, etc., by discriminating assessment upon the land and ground *bounding and abutting upon said road*, etc., or near thereto, in proportion to the benefit accruing therefrom to such ground or land. It was held that the city was restricted in this assessment to lands *abutting upon the improvement* or near thereto.

The foregoing cases are the only ones to which our attention has been directed, nearly enough in point to throw any real light upon the question, and the diversity of conclusions reached renders it necessary for us to consider this case upon general principles and with a view solely to the

construction of our own statutes. Of the sections applicable to street extensions, section 69 contains a general grant of power to levy and collect special taxes "upon the lands and pieces of ground adjacent to or abutting upon the street, avenue, alley, or sidewalk," in whole or in part, improved; and the improvement contemplated by this section is not only opening or extending, but also grading, paving, parking and beautifying. A later provision of the section expressly limits the tax for grading, curbing, guttering, and paving to the property abutting upon that portion of the street improved. The object of this section seems to be to provide funds for the actual making of such improvements, and not for the payment of damages arising out of the exercise of the right of eminent domain. It is, therefore, only applicable to this case in so far as similarity or difference of language may aid us in the construction of section 119. The same remark may be made as to section 73.

In section 119 is found the grant of power upon which this tax must be based. Here the authority is to assess the damages awarded for the appropriation of property "upon the lots and lands benefited which shall abut or be adjacent to the street, avenue, or alley * * * for the opening, extending, or widening of which private property shall be appropriated."

The legislature had in mind the opening of a portion only of a street. This is shown by the use of the word "extended," which clearly implies the prolongation of an existing street. This kind of an improvement being then clearly in view of the legislature, the exact language of the statute is very significant. The tax may be levied upon any lands benefited which shall "abut or be adjacent *to the street.*" It would seem that had the legislature intended to confine the tax to property adjacent to the *improvement*, it would have used appropriate language.

In the next place, by giving the statute the construction

for which defendants contend, greater force is given to the further limitation that the tax shall be confined to the lots and lands benefited. There is no other property subject to local assessments, and in the absence of the expression of this limitation, upon constitutional principles, the courts would read such language into the statute. The expression of this limitation, it may be inferred, was in view of a broad power granted to go beyond the region of the improvement itself and tax land upon the same street, provided such land was benefited.

A further reason for this construction is that it is more equitable. It is not in all cases that the extension of a street confers a special benefit upon all property abutting upon the street. In most cases, however, it is not the property abutting upon, or adjacent to the extension which receives the sole benefit. Property lying at a very considerable distance from the extension may, by the opening of a street beyond its former terminus, receive a benefit special in its nature and distinct from the benefit conferred upon the community at large. In such case such property ought to bear its proportionate burden. It would be unfair and unjust to impose the whole burden upon only a small portion of the property benefited.

In some of the authorities cited by plaintiff, the narrower construction is given statutes upon the ground that there existed no forum to determine benefits, and the acts themselves not restricting the tax to the property benefited, they must be so limited by construction as to confine the tax to such property as might conclusively be presumed to receive the benefits. No such obstacle exists in our statutes. A manner of equalizing such assessments is provided, and the council is made, in the first instance at least, the judge of benefits conferred. The statute restricts the council in determining what property shall be assessed to the property it shall determine was benefited.

It might be urged that section 73 limits the tax to the

lands bounding, abutting, or adjacent to such improvements, but the language of this section, when taken as a whole, clearly refers to section 69, which, as before pointed out, applies to the cost of actually making the improvement, and not to the payment of damages. Whether this section is a limitation upon the general grant quoted from section 69, and which would, in the absence of section 73, from similarity of language, receive the same construction as section 119, is not for us here to determine. The legislature may have deemed proper to provide different limits of taxation for the two different purposes. At any rate, if section 73 is to be construed for the purposes to which it is applicable, as limiting the power to tax to property adjacent to the *improvement*, is not applicable to the case under consideration, and the absence of such a limitation upon the imposition of taxes to pay awards of damages grounds an inference in favor of the broad construction rather than the narrow.

It is nowhere alleged in the petition that plaintiff's property was not specially benefited to the amount of the tax imposed, and as it abuts upon the street extended we think it was subject to taxation.

The judgment of the district court was right and is

AFFIRMED.

THE other commissioners concur.

CLEMENS OSKAMP V. WILLIAM H. CRITES ET AL.

FILED OCTOBER 4, 1893. NO. 4974.

Replevin: BUILDINGS AS CHATTELS: CONTRACT OF SALE: NOTES GIVEN BY PURCHASER: DEFAULT: INSTRUCTIONS. A, by contract in writing, agreed to sell to B an elevator and other build-

ings situated upon land leased to A for a term of years. B was put into possession, the buildings remaining in their original position. The contract provided for payment of the purchase money by B to A in certain installments; that time should be the essence of the contract, and in case default should be made, the contract should become void, and B be deemed a mere tenant at will, and payments made become forfeited as stipulated damages; that upon the strict performance of the contract A would make a good and sufficient bill of sale of the premises to B. Notes were given by B to A for the deferred payments. B made default in his payments, and A did not return or tender back the unpaid notes to B, either before suit or before or at the trial. *Held*, (1) That replevin would not lie to recover possession of the property without a return or tender of the unpaid notes; (2) that irrespective of the question of a return or tender of such notes the vendor could not proceed in replevin.

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

The opinion contains a statement of the case.

C. A. Baldwin and *John Patterson*, for plaintiff in error, to support the contention that to maintain replevin it was unnecessary to return or tender back the unpaid notes given by the purchaser, because the sale was conditional and the property belonged to the plaintiff when the defendants failed to perform the contract, cited: *Marston v. Baldwin*, 17 Mass., 605; *Harkness v. Russell*, 118 U. S., 663; *Albright v. Brown*, 23 Neb., 136; Benjamin, Sales [4th. ed.], sec. 320, and note; *Marquette Manufacturing Co. v. Jeffrey*, 13 N. W. Rep. [Mich.], 592; *Dunlap v. Gleason*, 16 Mich., 158; *Preston v. Whitney*, 23 Id., 260; *Germain v. Wind*, 13 Pac. Rep. [Wash.], 753; *Dodd v. Bowles*, 19 Id., 156; *New Home Sewing Machine Co. v. Bothane*, 38 N. W. Rep. [Mich.], 326; *Shoshonetz v. Campbell*, 24 Pac. Rep. [Utah], 672; *Tufts v. D'Arcambal*, 48 N. W. Rep. [Mich.], 497; Jones, Mortgages, secs. 256–270.

J. W. Sparks and *J. C. Martin*, *contra*.

IRVINE, C.

The plaintiff in error sued the defendants in error in replevin to recover the possession of a grain elevator, a two-story warehouse, an engine and boiler house, an engine, boiler, belting, machinery, and office building situated upon the right of way of the Union Pacific Railway Company at Clark's station.

Haddox filed a general denial. The two other defendants acquiesced in plaintiff's demand for the property and do not figure in the controversy. The proof shows that the plaintiff and one Hains at one time owned the property in question, and that it was situated upon land which is a part of the right of way of the Union Pacific Railway Company, and which had been leased to Oskamp and Hains. Two of the houses were erected upon permanent stone foundations. Oskamp and Hains entered into a written contract with Haddox for the sale of this property to the latter. This contract is framed in language commonly used in certain forms of contracts for the sale of land. By it the parties of the first part (Oskamp and Hains) "agreed to sell to the party of the second part" the property described in the petition, and Haddox "agreed to buy" and to pay for the property $6,000, $1,000 in hand, and $100 every thirty days for one year from the date of the contract, and $200 every thirty days thereafter; *provided*, that if $4,000 or more should be paid in the first year, then the vendors should allow Haddox a rebate of $500. Haddox also agreed to pay all taxes and to insure the buildings for the benefit of the vendors in the sum of $3,350. The contract then proceeds as follows: "Forthwith, after the payment of such purchase money, taxes and interest as aforesaid, time being the essence of this contract, the parties of the first part agree to execute or cause to be executed to the party of the second part a good and sufficient bill of sale for the said described premises."

It was then provided that in case default should be made in the performance of any of the conditions by the vendee to be performed, the contract should become void, and the party of the second part be deemed a mere tenant at will, and be liable to be proceeded against in a forcible entry and detainer case, and that all payments that might have been made should, in that case, become forfeited as stipulated damages.

It appeared that Haddox was put into possession under this contract; that in addition to the $1,000, a payment of $500 had been made; that Haddox had failed to insure the property; had defaulted in his payments, and that Hains' interest had been transferred to Oskamp. It also appeared that notes had been given by Haddox for the deferred payments; that these notes were, at the time of demand and institution of the suit, in the possession of the Omaha National Bank for collection. They were not tendered back to Haddox when the action was brought nor even at the trial. The property was delivered to the plaintiff, but the buildings were not moved from their original location.

These facts were all undisputed. The trial judge instructed the jury to find for the defendant upon the ground that plaintiff could not rescind the contract without tendering back the notes. There was a verdict accordingly, fixing the value of the property at $5,500.

All the assignments of error relate directly or indirectly to the propriety of the instruction given. The plaintiff contends that the contract with Haddox amounted only to a proposition to sell, or, at most, to a conditional sale; that no title had passed, and that under the strict terms of the contract, upon default the plaintiff became entitled to the immediate possession of the property without tendering back the notes.

It is very doubtful whether the plaintiff was entit'ed to maintain replevin even under his construction of the contract. It may be admitted that the buildings in question

were chattels, and the doubt remains just as serious. A lease for years is also a chattel, but if a tenant for years sublets and the sub-tenant holds over after his term, the remedy is clearly by forcible entry and detainer and not replevin. It is the nature of the thing itself, and not that of the plaintiff's property in the thing, which determines whether forcible entry and detainer or replevin will lie.

It is true, as pointed out by the plaintiff, that this court has held, under certain peculiar circumstances, that buildings may be chattels personal and subject to replevin; but to allow replevin to be maintained under such circumstances as these makes the writ in effect a writ of restitution for land, an office which it cannot be permitted to fulfill. Replevin is, in any case, a harsh remedy, permitting the plaintiff to take property upon his bare allegation of ownership, and before any opportunity to try the issue. The court should be very jealous of extending the action beyond the cases to which it was designed to apply.

We do not think the contract should be construed as plaintiff contends. Title was not expressly reserved in the vendor until the fulfillment of the conditions. The vendee was placed in full possession, clothed with all the indicia of ownership, and we are thoroughly satisfied that the intention of the parties was to constitute the transaction an actual sale, subject, however, to be defeated at the option of the vendors by failure upon the part of the vendee to perform certain conditions subsequent. We are quite positive that viewed in this light the vendee could not have been ousted in an action of forcible entry and detainer, for the reason that in such an action the equities between the parties could not be adjusted. Had the action taken this form it would be directly within the rule in *Chicago, B. & Q. R. Co. v. Skupa*, 16 Neb., 341. The same objections apply with even greater force to the action of replevin.

Finally, the verdict was right for the reason given by the trial judge in his instruction. It would be intolerable

to permit the vendor to insist upon the forfeiture in such a case and at the same time retain the evidences of indebtedness upon the failure to pay which the forfeiture is claimed. It is not a question of the vendee's right to have payments already made refunded, but the vendor could not rescind the contract or declare it forfeited, retake the property and at the same time hold the notes for the remaining payments and retain them in the hands of his agent for collection. We are cited to certain cases which it is claimed establish a contrary doctrine. In all of them distinctions exist which we think deprive them of applicability; but even were they in point we would not follow them because of the manifest injustice of the result. Even as against a fraudulent vendee the vendor must return or tender back a note given for the purchase money. (*Doane v. Lockwood*, 115 Ill., 490.)

In any view of the case the defendants were entitled to a verdict and the judgment is

AFFIRMED.

THE other commissioners concur.

ADAM N. SCHUSTER ET AL., APPELLANTS, V. GEORGE C. SHERMAN ET AL., APPELLEES, IMPLEADED WITH ENGLEHART, WINNING & COMPANY, APPELLANTS.

FILED OCTOBER 17, 1893. No. 3735.

Mortgages: FORECLOSURE: CONSIDERATION: EVIDENCE. Where certain mortgages given by a married woman to secure firm debts of the firm of which her husband was a member were introduced in evidence, a recital in the mortgages of the amount of consideration for which each was given, "in hand paid," is not overcome by proof that the mortgaged property was her separate estate, and that the debt was that of a firm of which her husband was a partner.

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

The facts are stated in the opinion.

Hoagland & Risse and *E. A. Cook*, for appellants:

The law gives a married woman the right to bargain, sell, and convey her property. It enlarges her rights by saying that she may enter into any contract with reference to her property in the same manner and with like effect as a married man may in relation to his property. (*Davis v. First National Bank of Cheyenne*, 5 Neb., 242; *Hale v. Christy*, 8 Id., 268; *Stevenson v. Craig*, 12 Id., 466; *Nelson v. Bevins*, 19 Id., 718.) The consideration for the mortgages was sufficient. (Jones, Mortgages, sec. 610; *Haden v. Buddensick*, 4 Hun [N. Y.], 649; *Jackson v. Jackson*, 7 Ala., 791; *Sharpe v. McPike*, 62 Mo., 304; *Carr v. Hays*, 25 Cen. L. J. [Ind.], 32; *Herbst v. Lowe*, 65 Wis., 316; *Bickford v. Gibbs*, 8 Cush. [Mass.], 154; *Veazie v. Willis*, 6 Gray [Id.], 90.)

C. W. McNamar, contra.

MAXWELL, CH. J.

This is an action in equity brought by Schuster, Hingston & Co. to foreclose a mortgage on the S. E. ¼ of N. W. ¼, and lots 3, 4, and 5 of section 6, in township 11 north, range 25 west, in Dawson county, which mortgage was executed and delivered to plaintiffs by defendants Anna E. B. Sherman and George C. Sherman, husband and wife, on December 21, 1886, to secure a promissory note of even date with said mortgage. The note was executed by the said George C. Sherman in the name of Bystrom & Co., he being a member of the firm, for $439.65, payable in six months after date, with ten per cent interest per annum thereon from date. The defendants Englehart, Winning

& Co. answered, setting forth a mortgage on the same real estate executed and delivered on December 21, 1886, by Anna E. B. Sherman and George C. Sherman to secure a promissory note of even date with said mortgage, which note was executed by said George C. Sherman in the name of Bystrom & Co. to said Englehart, Winning & Co. for $139.25, payable six months after date, with ten per cent interest thereon from date. The defendant George V. Courtright answered, setting up his note and mortgage on the same real estate for $600, executed and delivered to him by Anna E. B. Stinson August 1, 1886, and payable August 1, 1891, with seven per cent interest from date thereof. The defendant the Nebraska Farm Loan Mortgage Company answered, setting up its note and mortgage on the same property executed and delivered to it by said Anna E. B. Stinson August 1, 1886, for $90, with ten per cent interest thereon from date. The defendant George A. Hoagland answered, setting up a mechanic's lien for material furnished October 11, 1886, in the erection of improvements on said real estate in the sum of $364.81, with interest thereon at seven per cent from November 20, 1886. The defendant Anna E. B. Sherman (*nee* Stinson) answered the petition and seeks to avoid liability on the mortgages of plaintiff and Englehart, Winning & Co. by pleading that she was a married woman; that the property described in the pleadings was and is her sole and separate property; that said mortgages were given to secure the note of Bystrom & Co., a partnership; and that she received no consideration for the mortgages. She denies the claim of said George A. Hoagland and pleads usury on the part of the Nebraska Farm Loan Mortgage Company's mortgage and note. The defendant Sherman made no answer. The plaintiffs and Englehart, Winning & Co. each filed a general denial to the answers of Anna E. B. Sherman, George A. Hoagland, George V. Courtright, and the Nebraska Farm Loan Mortgage Company. The case was

referred to A. S. Baldwin to take testimony and report his findings of facts and conclusions of law. The referee took the testimony and made findings as follows:

"1. That the mortgage sought to be foreclosed by the plaintiffs herein, executed by defendants Anna E. B. Sherman and Geo. C. Sherman to plaintiffs, was executed to them in their partnership name, and no reformation thereof is sought by the plaintiffs.

"2. That the defendant Anna E. B. Sherman is the owner, and was the owner at the date and execution of said mortgage, in fee-simple of the real estate described therein, and that the same is and was her sole and separate property and estate; that she was, at the date of the execution of said mortgage, a married woman, the wife of the defendant Geo. C. Sherman; and that she received no benefit or consideration for executing the same.

"3. That the mortgage on said premises set up in the answer of defendants Englehart, Winning & Co., and executed by defendants Anna E. B. Sherman and George C. Sherman, was executed to said defendants Englehart, Winning & Co. in their partnership name, and no reformation thereof is sought by said defendants Englehart, Winning & Co.

"4. That the defendant Anna E. B. Sherman was, at the time of the execution of said mortgage, a married woman, the wife of defendant George C. Sherman; that she was, at the time, the sole owner of the real estate therein described as her separate and undivided property; and that she received no benefit or consideration for executing the same.

"5. That the note secured by the mortgages of plaintiff and defendants Englehart, Winning & Co. were the notes of a partnership firm, Bystrom & Co., and that defendant George C. Sherman was a member of said firm.

"6. That the note and mortgage set up by defendant George V. Courtright, and executed by defendant Anna

E. B. Sherman before her marriage, as Anna E. B. Stinson, is prior in point of time to all other liens on said premises, and is the first lien thereon, and that there is due thereon from defendant Anna E. B. Sherman to defendant George V. Courtright, February 4, 1889, the sum of $684.45, and that the said George V. Courtright is entitled to have said mortgage foreclosed as prayed for in his said cross-petition and answer.

"7. That the note and mortgage set up in the defendant Nebraska Farm Loan Mortgage Company's answer and cross-petition was executed by the defendant Anna E. B. Sherman before her marriage, as Anna E. B. Stinson, and that the same is the second lien on said premises; that said mortgage was given to secure three per cent per annum for five years on the amount loaned by defendant Courtright to said defendant Anna E. B. Sherman and is a part of the transaction; that the debt was to draw ten per cent per annum for five years; that by reason of the foreclosure of the Courtright mortgage before the expiration of the term of five years the said defendant Nebraska Farm Loan Mortgage Company is only entitled to secure the sum of $18 per annum from the date of said mortgage August 1, 1886, to-wit, the sum of $45.20.

"8. That the mechanic's lien set up in the answer and cross-petition of the defendant George A. Hoagland under the name of the Gothenburg Lumber Company is a valid lien on said premises and that the amount due thereon February 4, 1889, is $408.42, and that the same constitutes the third lien on said premises.

"9. That defendant Andrew P. Anderson was duly served with summons in this action and has not answered thereto, and that said defendant has no interest in said premises.

"10. That defendants A. Bystrom, L. E. Brunsburg, and G. L. Lindstedt were not served with summons nor by publication and are not in court.

"CONCLUSIONS OF LAW.

"1. That George V. Courtright is entitled to have the mortgage set up in his said answer and cross-petition foreclosed, and the premises therein described sold; and that the proceeds of said sale be distributed as follows:

"1st. To pay the costs of this action, taxed at $——.

"2d. To defendant George V. Courtright the sum of $684.45.

"3d. To defendant Nebraska Farm Loan Mortgage Company the sum of $45.20.

"4th. To defendant George A. Hoagland the sum of $408.42.

"2. That the plaintiffs Schuster, Hingston & Co. and the defendants Englehart, Winning & Co. are not entitled to any portion of the proceeds of said sale.

"All of which is respectfully submitted.

"Dated February 4th, 1889. A. S. BALDWIN,

"*Referee.*"

Exceptions were filed to the report, which were overruled and judgment entered on the report, from which the plaintiffs appeal.

The mortgage to the plaintiffs is as follows:

"Know all men by these presents, that we, Anna E. B. Sherman and George C. Sherman, her husband, of Dawson county, state of Nebraska, in the consideration of the sum of $439.65, in hand paid, do hereby sell and convey unto Schuster, Hingston & Co., of St. Joseph and state of Missouri, the following described premises, situated in Dawson county and state of Nebraska, to-wit: The S. E. ¼ of the N. W. ¼ and lots 3, 4, and 5 of section 6, in township 11 N., range 25 W. of the 6th principal meridian, the intention being to convey hereby an absolute title in fee-simple, including all the rights of homestead; to have and to hold the premises above described, with all the appurtenances thereunto belonging, unto the said Schuster, Hingston & Co., and to their heirs and assigns, forever;

provided always, and these presents are upon the express condition that if the said Anna E. B. Sherman and George C. Sherman, or Bystrom & Co., their heirs, executors, or administrators, shall pay, or cause to be paid, to the said Schuster, Hignston & Co., their heirs, executors, administrators, or assigns, the sum of $439.65 six months after this date, with the interest thereon from April 4, 1887, according to the tenor and effect of the one promissory note of said Bystrom & Co. bearing even date with these presents, then these presents to be void, otherwise to be and remain in full force.

"Signed the 21st day of December, A. D. 1886.

"ANNA E. B. SHERMAN.
"In presence of GEORGE C. SHERMAN.
"J. S. HOAGLAND.

"THE STATE OF NEBRASKA, } ss.
DAWSON COUNTY. }

"On this 21st day of December, A. D. 1886, before me, Vollrad Karlson, a notary public in and for said county, personally came Anna E. B. Sherman and George C. Sherman, personally to me known to be the identical persons whose names they affixed to the above deed as grantors, and acknowledged the same to be their voluntary act and deed.

"Witness my hand and notarial seal.

"[SEAL.] VOLLRAD KARLSON,
"*Notary Public.*"

The mortgage to Englehart, Winning & Co. is similar in form. In both of these mortgages there is an acknowledgment of the consideration "in hand paid." The only proof we find to contradict the receipt is the testimony of Sinclair, which is as follows:

Q. State if you know who comprised the firm of Bystrom & Co., doing business at Gothenburg in this county on or before the making of this note.

A. I do. A. Bystrom and George C. Sherman.

Q. Do you know where A. Bystrom was on or about December 21, 1886?

A. He had left the county and was reputed to have gone to Sweden.

Q. Where did Sherman reside on or about that time?

A. In Gothenburg, Nebraska.

It is very evident that this testimony fails to sustain the allegations of the answer and wholly fails to show a want of consideration for the mortgages in question. The findings, therefore, are against the clear weight of evidence, and the exceptions should have been sustained. The judgment of the district court is reversed, and a decree will be entered in this court for the amount due the plaintiff and Englehart, Winning & Co.

DECREE ACCORDINGLY.

THE other judges concur.

AMERICAN CENTRAL INSURANCE COMPANY OF ST. LOUIS V. OTTMAR P. HETTLER.

FILED OCTOBER 17, 1893. No. 5254.

1. **Fire Insurance Companies:** MONEY DUE POLICY HOLDER: GARNISHMENT IN ANOTHER STATE. An insurance company having sustained a loss in this state, which is adjusted and payable here, cannot be garnished in another state where it has neither property nor money of the debtor subject to the process of the court.

2. **Garnishment:** ATTACHED PROPERTY: JURISDICTION. Garnishment is an attachment by means of which money or property of a debtor in the hands of a third party, which cannot be levied upon, may be subjected to the payment of the creditor's claim. To subject such property to attachment it must be within the jurisdiction of the court.

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

The facts are stated in the opinion.

Abbott & Abbott, for plaintiff in error:

The plaintiff in error is so far a resident of Illinois as to be subject to garnishment in the courts of that state. (Wells, Jurisdiction, sec. 29; *Hannibal & St. J. R. Co. v. Crane*, 102 Ill., 249; *Burlington & M. R. R. Co. v. Thompson*, 47 Am. Rep. [Kan.], 497; *Connor v. Hanover Ins. Co.*, 28 Fed. Rep., 549; sec. 26, ch. 32, Hurd's Stats., Ill.; *German Bank v. American Fire Ins. Co.*, 50 N. W. Rep. [Ia.], 53; *Mollyneux v. Seymour*, 30 Ga., 440; s. c., 76 Am. Dec., 662.)

F. I. Foss, contra:

If it appears that the garnishee has no money or property of the debtor in the state, or that there is no money due from him to be paid therein, he will not be chargeable as garnishee. (*Smith v. Boston, C. & M. R. Co.*, 33 N. H., 342; *Green v. Farmers & Citizens Bank*, 25 Conn., 452; *Taft v. Mills*, 5 R. I., 393; *Tingley v. Bateman*, 10 Mass., 346; *Wright v. Chicago, B. & Q. R. Co.*, 19 Neb., 183.)

MAXWELL, CH. J.

This action was brought in the district court of Saline county by the defendant against the plaintiff to recover $500 for loss upon a policy of insurance issued by the plaintiff. To this the plaintiff in error answered, setting up that it had been garnished in the state of Illinois and the answer of the garnishees sustained. The service in that case on Hettler was by publication. A copy of the opinion of Gary, P. J., is set out in the record. The cause was submitted to the court below on the following

stipulation: "It is hereby stipulated and agreed by and between the parties plaintiff and defendant to this action that the plaintiff was insured by the defendant company, and that the loss occurred as stated in plaintiff's petition, and that the same was adjusted at the sum of $500, and no part of the same has been paid; that the plaintiff is a resident of Saline county, Nebraska, is the head of a family, residing with, and supporting the same, at Crete, Saline county, Nebraska, and has been for the last past five years, and has neither lands, town lots, nor houses subject to exemption as a homestead under the laws of this state; and that the plaintiff in his action has no personal property which would be subject to execution, or which would be exempt to him, except a few articles which would come under section 530 of the Code of Civil Procedure, such as household furniture, which are of but little value; and that the $500 which the plaintiff seeks to have as exempt to him in this action is all the personal property he has. The filing of an inventory as required by law is hereby waived, it being admitted that the $500 is exempt in addition to whatever property the plaintiff may have under the laws of the state of Nebraska; that the defendant company has its headquarters and principal office at St. Louis, Mo., but has a permanent agency at Crete, Saline county, Nebraska, does business there, and is so authorized by the laws of this state, and that said insurance was effected at that agency; that the agent at Crete is and was Jindra & Co., Joseph Jindra being the senior and principal member of that firm. It is also agreed that said defendant company has a general and permanent agency at the city of Chicago, in the state of Illinois, does an insurance business there, and has complied with all the laws of that state in that behalf, and that C. M. Rogers is its duly authorized agent at Chicago, and was such on and prior to the 29th day of May, 1891; that on that date August Beck & Co., a firm residing and doing business at Chicago, aforesaid, commenced an

action by attachment against this plaintiff on an account held by them against this plaintiff for goods ordered by plaintiff from them at Chicago and by them sent to plaintiff by railroad from that place, claiming the sum of $289.21; that the attachment writ ran against plaintiff as principal and this defendant as garnishee, and was duly served on said agent Rogers on said date; that defendant at once notified said Hettler of that fact by mail, and that all subsequent proceedings were had thereon as shown by the transcript of proceedings filed herewith; that the law and practice in Illinois is, that on filing of answer by a garnishee the plaintiff in garnishment may accept the answer as true, and have judgment accordingly, or may except to (deny) the answer, and thus raise an issue of fact, which is then tried as other issues of fact, and final judgment entered thereon, upon which execution issues as in other cases at law; that due publication was made and default entered against Hettler on the 10th day of July, 1891; that the defendant company answered on the 5th day of August, stating that it owed Hettler $500, and claimed for him $400 exemption, that being the amount allowed by the laws of that state; that Beck & Co. have not elected to take judgment on said answer nor yet filed any exceptions thereto but still have time to file the same; that the transcript hereto annexed and above referred to shows all the proceedings had in said matter up to this date, and that said proceedings are still pending and undetermined in said superior court, and that court is a court of general and superior jurisdiction and has full cognizance of said action and proceedings, and that defendant's answer in the district court of Saline county, Nebraska, may be so amended as to state that fact. It is also agreed that the 'Revised Statutes of Illinois,' edition of 1891, by Hurd, shall be authority for either party in this case, and may be read from as evidence by either party upon all questions arising in this case, whether the statute be pleaded or not,

and as fully as if pleaded; said statute to be marked as defendant's exhibit 'A,' and then be the property of both parties for the purpose of this trial. All of which is mutually agreed to by

"F. I. FOSS,
"Attorney for Plaintiff.
"ABBOTT & ABBOTT,
"Attorneys for Defendant."

On the trial of the cause in court below, judgment was rendered in favor of Hettler. The question presented to this court is the jurisdiction of the Illinois court to render judgment against the company. Garnishment is an attachment by means of which money or property of a debtor in the hands of third parties, which cannot be levied upon, may be subjected to the payment of the creditor's claim. To subject the property to attachment it must be within the jurisdiction of the court; otherwise, it would be powerless to condemn it, order a sale, and apply the proceeds to the payment of the judgment in favor of the creditor. This question was fully considered in *Mathews v. Smith*, 13 Neb., 178, and *Wright v. Chicago, B. & Q. R. Co.*, 19 Id., 175. In the latter case it was held that a foreign corporation, having no property of the debtor in this state, nor owing money payable to him therein, was not subject to garnishment in this state. The same doctrine was approved in *Turner v. Sioux City & P. R. Co.*, 19 Neb., 241. It nowhere appears in the record that the insurance company had any money or effects of the defendant in error in Chicago. It is true it was indebted to him in the sum of $500 for losses sustained by fire, but the losses had occurred in this state and the money was payable here. An officer with a writ of attachment and notice of garnishment in Saline county could receive the money. This an officer in Chicago could not do. Gary, P. J., says "that the construction of the law given by that court might subject the plaintiff to the payment of the debt twice." With due re-

spect to that honored judge, it seems to the writer that such a construction is abhorrent to our sense of justice. By what right do the courts—the conservators of rights—sanction the double payment of a debt and indifferently fold their arms and say in effect that "it is none of our business." It is the business of the courts to administer justice as far as possible and protect and enforce the rights of every one. The amount involved in this case is but a few hundred dollars, but the principle, if once established, will apply to all claims, even if they amount to tens of thousands or millions of dollars; and if a company may be robbed of a few hundred dollars, why may it not be of thousands, if the occasion arise, and the company thereby be rendered bankrupt. It is true the insurance company has many agencies for the transaction of its business. These are necessary to enable it to procure risks. It is true also that it is indebted to the defendant in error; and as the loss has been adjusted it is ready to pay the same where the contract requires it to be paid,—at Crete. The case, in some respects, resembles that of a note payable at a particular place, as the State Bank of Crete. In order to charge an indorser, demand of payment must be made at the place designated. If no place is named, then it should be made where the note was given and the maker has his home or place of business. (Daniel, Neg. Inst., sec. 635.) Suppose the company had given a note payable at the State Bank of Crete, Nebraska. Would demand at a bank in Chicago, or at any point except that designated, have been sufficient? So here there is an agreement to pay at the residence of the insured; and garnishment proceedings will not lie at any other point. The case of *Hamilton v. Plumer*, 34 N. W. Rep. [Mich.], 278, is similar in some respects to the one at bar, and it was held that the garnishment in Michigan of a debt payable in New Mexico was a nullity. In a case of this kind the remedy is simply to require the proceedings to be insti-

tuted where the debt is payable or the property delivered, and it can be instituted nowhere else. The Illinois court, therefore, had no jurisdiction and the judgment is

AFFIRMED.

THE other judges concur.

W. H. BEAGLE ET AL. V. FALL MILLER.

FILED OCTOBER 17, 1893. No. 5064.

Chattel Mortgages: CONSIDERATION. As to attachment creditors of the mortgagor, a pre-existing debt already due is a good consideration for a chattel mortgage and protects the mortgagee to the same extent as would a new consideration given at the time of making the mortgage.

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

The facts are stated in the opinion.

W. P. McCreary, John A. Casto, and *V. H. Stone,* for plaintiffs in error:

The mortgage was taken for a sum greatly in excess of the debt due the mortgagee, and for that reason is void as to creditors. (*Pettibone v. Griswold,* 4 Conn., 158; *North v. Belden,* 13 Id., 376; *Hart v. Chalker,* 14 Id., 77; *Youngs v. Wilson,* 24 Barb. [N. Y.], 510; *Divver v. McLaughlin,* 2 Wend. [N. Y.], 596; *Bailey v. Burton,* 8 Id., 339; *Butts v. Peacock,* 23 Wis., 360.) A mortgage which is executed not alone to secure an indebtedness to the mortgagee but to protect the property of the mortgagor and to hinder and delay his creditors, this fact being known at the

time by the mortgagee, is fraudulent as to creditors. (Jones, Chattel Mortgages, sec. 334; *Burley v. Marsh*, 11 Neb., 291; *Strohm v. Hayes*, 70 Ill., 41; *Crapster v. Williams*, 21 Kan., 109; *Herkelrath v. Stookey*, 63 Ill., 486; *Solberg v. Peterson*, 27 Minn., 431; *Rencher v. Wynne*, 86 N. Car., 268; *Moline Wagon Co. v. Rummell*, 2 McCrary [U. S.], 307.)

A. M. Robbins and *H. E. Babcock, contra:*

A pre-existing debt is a valuable and sufficient consideration for a mortgage and protects the mortgagee to the same extent that he would be protected if he had paid a new consideration at the time of the mortgage. (*Turner v. Killian*, 12 Neb., 584; *Kraucat v. Simon*, 65 Ill., 344; *Butters v. Haughwout*, 42 Id., 18; *Prior v. White*, 12 Id., 261; *McLaughlin v. Ward*, 77 Ind., 383; *Gilchrist v. Gough*, 63 Id., 576; *Bussenbarke v. Ramey*, 53 Id., 499; *Wright v. Bundy*, 11 Id., 398; *Machette v. Wanless*, 1 Col., 225; *Smith v. Worman*, 19 O. St., 145; *Paine v. Benton*, 32 Wis., 491; *Turner v. McFee*, 61 Ala., 468; *Steiner v. McCall*, Id., 406; *Cromelin v. McCauley*, 67 Id., 544.) The same consideration which was the life of the original mortgage became also the consideration for the second. (*Frey v. Clifford*, 44 Cal., 339; *Payne v. Bensley*, 8 Id., 260; *Robinson v. Smith*, 14 Id., 94; *Naglee v. Lyman*, Id., 450; *Work v. Brayton*, 5 Ind., 396; Story, Promissory Notes, 215, note 1; *Davis v. Russell*, 52 Cal., 616; *Sackett v. Johnson*, 54 Id., 109.)

MAXWELL, CH. J.

This is a contest between creditors of one Emil J. Fogth. It appears from the record that in April, in the year 1890, Fogth was indebted to Miller in the sum of $385. This was secured by a mortgage upon his stock of hardware. This mortgage was informal. The testimony also tends to show that during the same month Miller signed two notes

with Fogth, one for $369 and one for $282; that in April, 1890, Miller bought a tract of land of Fogth upon which there were mortgages, one for $1,400 and one for $300, and one for $200; that payments were made on the $1,400 so that it was reduced to $1,100. Miller was to pay Fogth $1,800 for the land, assume the mortgages and the second notes spoken of. These transactions appear to have been brought to the notice of Berger-Alexander Hardware Company, and a considerable part of the goods sold by that company to Fogth were sold after such notice. On the 5th day of December, 1890, Fogth made a second chattel mortgage on his stock of goods to secure the note first mentioned. On the 12th day of the same month the plaintiffs in error brought an action by attachment against Miller and Fogth to secure the possession of the goods mortgaged, and alleged, in effect, that a pre-existing debt was not a sufficient consideration for a mortgage, and this is the principal question in the case. The question here presented was before this court in *Turner v. Killian*, 12 Neb., 580. In that case it was held that as to attachment creditors of the mortgagor a pre-existing debt already due is a good consideration for a chattel mortgage and protects the mortgagee to the same extent as would a new consideration given at the time of making the mortgage. This, in our view, is a correct statement of the law, and will be adhered to. But let us suppose that a pre-existing debt is not a sufficient consideration for a mortgage. Still, the plaintiffs are not entitled to recover. They were fully aware of the existence of the mortgage made in April, 1890; that the Miller mortgage, although void as to creditors, was valid between the parties.

It is claimed that Fogth represented to the plaintiffs in July, 1890, that this mortgage had been paid, but no misrepresentations in regard to the same made by Fogth without the knowledge of Miller would affect the interests of the latter. It was not in fact paid, and the plaintiffs made no objections to the mortgage, and made no investigation

of the facts relating to the satisfaction of the mortgage. The new mortgage was given December 5, under which the mortgagee took possession. This took the place of the first mortgage and was made to cure all defects in that. The proof tends to show that it is based on a sufficient consideration. It is evident that there will be a surplus after the payment of the note in question, but no question as to its disposition is raised. The other questions of fact seem to have been fairly submitted to the jury and it is unnecessary to review them at length. There is no error apparent in the record and the judgment is

AFFIRMED.

THE other judges concur.

THOMAS MCKNIGHT, APPELLEE, V. KELSEY PHELPS ET AL., APPELLANTS.

FILED OCTOBER 17, 1893. No. 4971.

1. **Usury:** EVIDENCE. *Held*, That the proof failed clearly to establish the plea of usury.
2. **Mortgages:** FORECLOSURE: PURCHASER OF EQUITY OF REDEMPTION: RIGHT TO PLEAD USURY. A purchaser of the equity of redemption, being neither surety nor privy, who assumes a mortgage as a part of the purchase price of land, cannot set up the usurious contract of his grantor, and plead usury in such contract.

APPEAL from the district court of Antelope county. Heard below before NORRIS, J.

Simpson & Sornborger, for appellants, cited: *Darst v. Backus*, 18 Neb., 233; *Knox v. Williams*, 24 Id., 633.

N. D. Jackson, contra:

A purchaser of the equity of redemption who agrees to pay the mortgage indebtedness as part of the purchase price of the premises cannot plead usury as a defense in a foreclosure proceeding. (*Cheney v. Dunlap*, 27 Neb., 405; *Hough v. Horsey*, 36 Md., 181.)

MAXWELL, CH. J.

This is an action to foreclose two mortgages upon the same description of lands. The mortgages were executed by Phelps and wife. The loan was effected and the mortgages executed in 1883. On the 26th of March, 1885, Phelps and wife sold and conveyed the land to M. M. Sornborger, who assumed the mortgage in question. He was made a party, and the seventh paragraph of the petition is as follows: "On March 26, 1885, the defendant Miles M. Sornborger, purchased the above described real estate subject to the mortgages set out in this petition, and as a part of the consideration for such purchase assumed and agreed to pay the amounts secured thereby." Mr. Sornborger did not answer the petition, so those allegations may be taken as true. Phelps and wife were made defendants and answered, pleading usury. No judgment is sought against them, and as they had parted with the equity of redemption they would seem to have been unnecessarily made parties. The court below found there was no usury and rendered judgment for the plaintiff from which an appeal is now taken. The testimony is conflicting upon the questions of usury and in our view there is a failure to establish the same. But even if there was usury, a purchaser of the equity of redemption who assumes the mortgage as a part of the consideration for the land, cannot plead it. This question was fully considered in *Cheney v. Dunlap*, 27 Neb., 401, and it was held that a stranger to the contract, being neither surety nor privy to the usurious contract, cannot

plead usury. That case, in our view, states the law correctly, and will be adhered to. In any view of the case, therefore, the judgment is right and is

AFFIRMED.

THE other judges concur.

W. T. PRINE, APPELLEE, V. OLE SYVERSON ET AL., APPELLANTS.

FILED OCTOBER 17, 1893. No. 4942.

1. **Principal and Agent:** UNAUTHORIZED SALE OF LAND: RATIFICATION: EVIDENCE: SPECIFIC PERFORMANCE. One S., being the owner of certain real estate, executed a power of attorney to one H., authorizing him to sell the land, for either cash or partly on credit, for not less than $20 per acre. H. being unable to sell at $20 per acre, afterwards sold the land, subject to the approval of his principal, for $2,000 cash. *Held*, That the weight of the testimony sustained the finding and judgment of the court that the principal had ratified and confirmed the sale.
2. **Vendor and Vendee:** NOTICE OF EQUITIES. Persons who purchased while the land was in the actual occupancy of another are charged with notice of his rights in the premises.

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

Searles & Ellsworth and *Barnes & Tyler*, for appellants.

Allen, Robinson & Reed and *M. B. Foster, contra.*

MAXWELL, CH. J.

This is an action to enforce the specific performance of a contract for the sale of real estate. It appears from the record that the defendant Ole Syverson resided in this state from about the year 1870 to 1885; that he was the owner

of a quarter section of land at Newman's Grove, Madison county; that in May, 1885, he executed a power of attorney to George B. Hovland as follows:

"Power of attorney filed January 2, 1890, at 8 A. M.

"Know all men by these presents, that I, Ole Syverson, of the town of Newman Grove, in the county of Madison, and state of Nebraska, do hereby make, constitute, and appoint George B. Hovland, of the town of Newman Grove, and state of Nebraska, my true, sufficient, and lawful attorney, for me and in my name, place, and stead to conduct and carry on the business of selling for not less than $20 per acre, and giving a deed of general warranty therefor, to rent or to lease the following described real estate, to-wit: All the N. W. ¼ of the S. E. ¼ and the N. E. ¼ of the S. W. ¼ of sec. 29, township 21 west, north of range 4 west of the 6th principal meridian, Newman Grove, Madison county, Nebraska; to sell either for cash or on credit all such property as he may deem useful and proper connected with said business; to state accounts; to sue and compromise, collect, or settle all claims or demands due, or to become due, now existing or hereafter to arise in my favor; and to adjust, settle, and pay all claims and demands which now exist against me or may hereafter arise either as connected with the foregoing business or otherwise; to take the general management and control of my property and business, and to execute and enter into bonds, contracts, and deeds connected therewith; and to release all mortgages that are now on record in the state of Nebraska in my name; and to release any mortgages which may hereafter be given to me, either real or personal; and, in general, to do all other acts and things which he may consider useful or necessary connected with my business, property, and interests.

"(Signed) OLE SYVERSON.

"Signed in presence of

"A. J. THATCH.

"THE STATE OF NEBRASKA, }
MADISON COUNTY. } SS.

"On this 5th day of May, A. D. 1885, before me, the undersigned, a notary public duly commissioned and qualified for and residing in said county, personally appeared Ole Syverson, to me well known to be the identical person who subscribed said power of attorney as principal, and he acknowledged the said instrument to be his free and voluntary act.

"In testimony whereof, I have hereunto set my hand and affixed my notarial seal at Madison, Nebraska, in said county, the day and year last above written.

"[SEAL.] A. J. THATCH,
"Notary Public."

Syverson then went to Norway and resided there for several years. No opportunity to sell the land at $20 per acre seems to have occurred, but in May, 1889, Prine and Hovland entered into the following:

"Received of W. T. Prine the sum of $5.00 as part pay on E. ½ of S. W. ¼ and W. ½ of S. E. ¼ of sec. 29, T. 21, R. 4 west, in Madison county, Nebraska; price to be $2,000 cash, balance to be paid in about two months, more or less; George B. Hovland to furnish warranty deed and an abstract of title; said title to be clear and of such genuineness as any loan company will accept, otherwise Hovland to refund the above payment and this sale to be void.

"Dated at Newman Grove, Nebraska, the 28th day of May, 1889. GEORGE B. HOVLAND,
"Agent for Ole Syverson."

"Signed in presence of
"W. T. PRINE."

This, unless ratified by Syverson, would give the plaintiff no rights. A large number of letters of Syverson and also of Hovland are in the record, and translations of the same. That relating to the plaintiff's offer is as follows:

"NEWMAN GROVE, NEB., March 12, 1889.

"*Ole Syverson:* Once more I am sending you an offer that I got on your land, viz., $2,000 cash, if you will take it. This deed is ready if you will accept the bid. Write your wife's name where that red line is, and both of you shall sign below where the blue cross is, in the presence of witnesses, and get the signature of a constable of a parish or a (stipendiary) judge on the deed. Your mother needs money. I shall do my best to sell. The best regards from G. B. HOVLAND."

The answer to this is as follows:

"SKAIKER, Apr. 2, 1889.

"*Mr. Hovland:* I received your letter yesterday and see that you have a new offer; and that is very good if there should not be any more to be had. I will sign when convenient, but it takes time to go to the 'lensmand' (an officer similar to sheriff) or 'skriveren' (an officer competent to take acknowledgment); but I will ask if you would advance mother a little money until I get the deed sent, and the one that wants to buy can commence work at any time. You say that mother is in need of money, and if you could let her have $100 until we can get it fixed it would be well.

"With respect, OLE S. AABOEN."

"SKAIKER, May 2, 1889.

"*Mr. Hovland:* You will probably be surprised about me not sending the deed back, but I have been to 'skriveren' (an officer competent to take acknowledgment), but he himself was not at home, and the one which was in his place, probably a clerk or deputy, could do nothing with it. Then I went to 'lensmanden' (an officer similar to that of sheriff), but he said it was best it was 'skriveren'; but I think 'skriveren' may come up north next month. Here is such a big trouble with everything, that it is six Norwegian miles to 'skriveren,' and he has such large district that it is difficult to find him at home. But when

you get this word then you can write back and tell if any one has moved on the land. The first offer you had this winter was good. If you will, send a new deed, and mark where ours and 'skriveren' shall put his name.

"A kind regard. OLE S. AABOEN."

The plaintiff seems to have duly performed on his part so far as he was able to do so. He entered into possession of the land in pursuance of the directions of Syverson in his letter of April 2, 1889. Afterwards Syverson sold the land to Cutru and others, and they purchased while the plaintiff was in possession, and hence with notice. The court below found the issues in favor of the plaintiff and rendered a decree accordingly. In our view the decree is right. There is sufficient testimony in the record tending to show ratification of the contract to justify the court in finding that it had been ratified, and in our view that is sustained by the weight of evidence. The judgment of the court below is right and is

AFFIRMED.

THE other judges concur.

JOHN P. DAVIS V. MICHAEL HARTLERODE.

FILED OCTOBER 17, 1893. No. 4706.

Sales: BREACH OF WARRANTY: RESCISSION BY PURCHASER. Certain notes secured by chattel mortgages were given for a corn-sheller which was warranted to shell 6,000 bushels per day with eight horses to furnish power. On a trial the machine could not be made to work, and the expert sent by the company was unable to put it in running order. *Held*, That the purchaser was justified in returning it promptly after the discovery of the defects.

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

Thomas H. Matters, for plaintiff in error.

J. L. Epperson, contra.

MAXWELL, CH. J.

On the 22d day of December, 1888, the defendant in error, Michael Hartlerode, made, executed, and delivered to the Weir-Shugart Co., of Council Bluffs, Iowa, four promissory notes of that date, maturing as follows: The first on March 1, 1889; the second on May 1, 1889; the third on December 1, 1889, and the fourth on March 4, 1890. Each of said notes was for the sum of $125, and the same were secured by chattel mortgage on the following described property: "1 Ottawa mounted sheller, with feeder, elevator, and cob-stacker, and 1 ten-horse Woodbury mounted power; 1 black horse, about ten years old, with three white feet; 1 bay mare, about ten years old, weight about 1,100 pounds; 1 bay, horse about nine years old, weight about 1,300 pounds, has one white front foot; 1 bay horse, about eight years old, has stripe in face, weight 1,000 pounds; red cow, three years old; 1 heifer (red), two years old; 1 red heifer, two years old; 15 head of black shoats, will weigh from 50 to 100 pounds each." Immediately upon receipt of said notes the Weir-Shugart Co. indorsed and delivered the same, and assigned said mortgage to the appellant herein. On the 22d day of August, 1889, two of said notes having matured, and the appellee having failed to make payment, the appellant demanded the property described in the mortgage, which Hartlerode refused to deliver, and on said day the appellee caused a replevin summons to be issued out of the justice court of T. H. Spicer, justice of the peace within and for Clay county, Nebraska, and the following property was taken under the

writ: 1 black horse, ten years old; 1 bay horse, nine years old; 1 red heifer, two years old; 1 red heifer, two years old; 15 head of shoats. Said property was appraised at the sum of $141. On the return day of the summons the defendant filed an affidavit for a change of venue and by stipulation the cause was transferred to the docket of W. H. Canfield, county judge of Clay county, Nebraska, and the cause was set for trial September 24, 1889.

On the 24th day of September, 1889, a jury was called and trial had, which resulted in a verdict in favor of the defendant, in which it was found that the right of property and right of possession were in Michael Hartlerode. The value of the property was found to be $175, and damages in the sum of $25 were awarded for the wrongful detention thereof. The plaintiff in error filed an undertaking as required by law and appealed from the judgment rendered in the county court. The plaintiff in error filed a transcript of the proceedings, together with all the original papers, in the office of the clerk of the district court of Clay county.

At the May term, 1890, of the district court the cause was tried to a jury, who found a verdict in favor of the defendant Michael Hartlerode, and found that the right of property and right of possession at the commencement of this suit were in the defendant Michael Hartlerode, and that the value of the property was $220, and that his damage for the wrongful detention thereof was $11.70. The plaintiff filed a motion for a new trial containing ten assignments of error, which motion was by the court overruled, to which the plaintiff in error duly excepted, and now brings this cause into this court for review on the errors assigned. The notes in this case were given for a corn sheller. The defendant testifies in regard to his purchase of the sheller as follows:

Q. Did you have any business transaction with A. B. Smith?

A. Yes, sir.

Q. State what that was.

A. I bought an Ottawa corn thresher.

Q. State the circumstances connected with the purchase of it.

A. I don't know just how to get at that.

Q. Just tell about it, the conversation, and how you came to buy it.

A. I was in there one day and Smith said he wanted to sell me a corn thresher; and I said all right, I wanted to buy one; and he said "here is an Ottawa cylinder thresher. It will run with eight horses and shell 6,000 bushels of corn."

Q. Did he sign a written order for this?

A. Yes, sir.

Q. And you got a written warranty?

A. Yes, sir; I did have.

Q. Can you read?

A. No, sir.

Q. Do you know anything about this piece of paper? Look at it and see if you can tell.

A. I can tell something about it if you read it.

Q. You may go ahead and state what became of that warranty and what you did with it.

A. After the agent made the warranty and gave it he said he wanted to look at it, and then he said "I want to send it back to the company," and he never gave it back to me any more.

Q. Did he read it to you?

A. He read it himself.

The court:

Q. Can you read?

A. No, sir.

Q. And what was there on the paper he read to you?

A. Yes, sir; and then he took the warranty back, and said he had to send it back to the company, and they had to fix something on it.

Q. Did he read it to you?

A. Yes, sir.

Q. What did he read?

A. The sheller was warranted to shell 6,000 bushels and leave the cob in as good condition as any other machine; and I said if it would run that way I would take it; and he said that is what the warranty says. After that he told me the same thing again on the train. When it came we took it out home to try it, and it would not shell at all, and the next day he said he would send for the expert, and the next day Mr. Lewis and Joseph Renie came up and said they would make the sheller run with eight horses. I got the horses on, and they started the teams up. It run as much as five minutes and then it stopped. They then started it again, and I think they shelled about thirty-five bushels in half a day. They stayed for dinner and so did the teams, and when they got ready to go I said I would bring the machine in, and the next day I hauled it in his yard, and set it to work. I don't mind what Smith said; and after I had unhitched from the machine and returned it, I wanted my notes back, and he said, "I can't give up the notes until I telegraph the company. I want to save myself;" and after he was gone a little while, probably as much as a quarter of an hour, he came back, and said he wouldn't give up the notes.

Q. State whether or not Smith said he had them or not.

A. Yes, sir; Smith said he had them.

Q. When you returned the thresher?

A. Yes, sir; the thresher was out three days and I took it back the next morning.

William Johnson, a witness called by the defendant, testified:

Q. Are you acquainted with the defendant?

A. Yes, sir.

Q. Do you know about his buying a corn sheller of A. B. Smith in December, 1888?

A. Yes, sir.

Q. Tell the jury what you know about it.

A. I was working with Mike and he went to Fairfield one day and Smith wanted to know of Mike if he wanted to buy a corn machine, and he said he didn't know but what he did, and he said I have got a corn machine and I would like to sell you one, and so they kind of talked together and made a bargain. He said that it would shell 6,000 bushels a day.

Q. With how many horses?

A. Eight horse power.

Q. Do you know anything about the trial of the machine?

A. Yes, sir.

Q. Were you there working that day?

A. Yes, sir.

Q. Tell the jury how the thresher worked.

A. Well, sir, they set the machine and tried to thresh with it, and it stumped out ten horses. I was scooping, and I don't believe I scooped ten minutes before we would have to shut off the feed.

Four other witnesses testify to substantially the same facts. Several witnesses were called on the part of the plaintiff, but they fail to show that the machine was such as was called for by the warranty. It is very evident from the testimony that the machine was defective, and the defendant was justified in returning it promptly as he did, and his notes should have been returned to him. The judgment is right and is

AFFIRMED.

THE other judges concur.

JOHN C. BROWN V. NATHANIEL L. SYLVESTER.

FILED OCTOBER 17, 1893. NO. 5069.

1. **Cultivated Lands.** Where there is no actual enclosure and it is sought to bring lands within the provisions of section 8, chapter 2, article 3, of the Compiled Statutes, there must be a strip plowed around such land at least one rod in width; and two furrows plowed a rod from each other is not a compliance with the statute.

2. **Animals:** TRESPASS: DAMAGES: LIEN ON STOCK. Where cattle trespass upon the unenclosed land of another party and destroy the hay stacked thereon, the owner may recover the value of the property destroyed, but will have no lien on the stock which destroyed the same.

3. ———: ESTRAY LAW. *Quære*, Whether cattle which have strayed between the 20th of October and the 1st day of April are not subject to the provisions of the estray law.

ERROR from the district court of Sheridan county. Tried below before CRITES, J.

Wm. Mitchell and *W. H. Westover*, for plaintiff in error.

Thomas L. Redlon, contra.

MAXWELL, CH. J.

This is an action of replevin brought by the plaintiff against the defendant to recover the possession of about seventy head of cattle. On the trial of the cause the jury returned a verdict for the defendant, on which judgment was rendered. The testimony tends to show that the plaintiff and defendant reside in the southern part of Sheridan county, some six or seven miles from each other. Plaintiff is the owner of the cattle in dispute, and in January, 1891, said cattle strayed onto the defendant's homestead, where he had a considerable quantity of hay stacked which the cattle ate up or destroyed. The homestead was unimproved except

a small house built thereon. There were two furrows plowed about one rod apart around the hay. The court instructed the jury as follows:

"1. Section 8 of said act provides that cultivated lands, within the meaning of this act, shall include all forest trees, fruit trees, and hedge rows planted on said lands, also all lands surrounded by a plowed strip, not less than one rod in width, which strip shall be plowed at least once a year.

"2. The court instructs you that said term 'cultivated lands' also includes all plowed fields or gardens or other grounds which are in a state of cultivation or tillage upon which crops have been or may be raised and which do not require further reducing or subduing.

"3. But if on the contrary you find from the evidence that said cattle trespassed upon and damaged said defendant, but not upon his cultivated lands within the meaning of instructions Nos. 7 and 8 above, the defendant would not have any lien on said cattle or any right to take them up or any right to keep possession of them until his damages should be paid. His sole remedy for such damage would be by a civil action against the plaintiff for the recovery of the amount of such damage."

The cause was tried upon the theory that the furrows plowed around the stacks made the land within the furrows enclosed under the statute. We do not think so, however. Section 8, chapter 2, article 3, Compiled Statutes, provides "that cultivated lands, within the meaning of this act, shall include all forest trees, fruit trees, and hedge rows planted on said lands, also all lands surrounded by a plowed strip not less than one rod in width, which strip shall be plowed at least once a year." It is evident that the land does not come within the provisions of the statute, and therefore the defendant had no lien on the stock for the damages. It is probable, however, that he might acquire such lien under the law relating to estrays, but the case was not tried upon that theory and hence the question

is not before us. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

JOHN G. SALISBURY ET AL. V. FIRST NATIONAL BANK OF CAMBRIDGE CITY ET AL.

FILED OCTOBER 17, 1893. No. 4962.

Negotiable Instruments: INDORSEMENT IN BLANK: LIABILITY OF INDORSER. A person, other than a payee, who signs his name in blank upon the back of a promissory note at the time of its execution, and before its delivery to the payee, is, as to a subsequent *bona fide* holder for value, liable thereon as a joint maker.

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

The facts are stated in the opinion.

Brome, Andrews & Sheean, for plaintiffs in error:

The plaintiffs in error are liable upon the note as indorsers only. (*Ellis v. Brown*, 6 Barb. [N. Y.], 282; *Spies v. Gilmore*, 1 Comst. [N. Y.], 321; *Cottrell v. Conklin*, 4 Duer [N. Y.], 45; *Moore v. Cross*, 19 N. Y., 227; *Bacon v. Burnham*, 37 Id., 614; *Phelps v. Vischer*, 50 Id., 69; *Slack v. Kirk*, 67 Pa. St., 380; *Clouston v. Barbiere*, 4 Sneed [Tenn.], 336; *Fear v. Dunlap*, 1 Greene [Ia.], 331; *Pierce v. Kennedy*, 5 Cal., 138; *Jones v. Goodwin*, 39 Id., 493; *Jennings v. Thomas*, 13 Smedes & M. [Miss.], 617; *Coulter v. Richmond*, 59 N. Y., 479; *Jaffray v. Brown*, 74 Id., 394; *Lynch v. Levy*, 11 Hun [N. Y.], 145; *Paine v.*

Noelke, 53 How. Pr. Rep. [N. Y.], 273; *Whiting v. Pittsburgh Opera House Co.*, 88 Pa. St., 101.) The plaintiffs in error are not liable as makers. (*Webster v. Cobb*, 17 Ill., 459; *Blatchford v. Milliken*, 35 Id., 434; *Greenough v. Smead*, 3 O. St., 415; *Seymour v. Leyman*, 10 Id., 283; *Sturtevant v. Randall*, 53 Me., 154; *Lowell v. Gage*, 38 Id., 36; *Cook v. Southwick*, 9 Tex., 615; *Carr v. Rowland*, 14 Id., 275; *Chandler v. Westfall*, 30 Id., 477; *McGwire v. Bosworth*, 1 La. An., 248; *Chorn v. Merrill*, 9 Id., 533; *Killian v. Ashley*, 24 Ark., 511.) The court below should have permitted oral testimony on the part of plaintiffs in error, showing the intent with which they indorsed the note and the fact that they were not interested in the consideration. Where a stranger signs a note on the back before delivery to the payee he is only *prima facie* liable as an original promisor. (*Sylvester v. Downer*, 20 Vt., 355; *Schneider v. Schiffman*, 20 Mo., 571; *Childs v. Wyman*, 44 Me., 433; *Perkins v. Barstow*, 6 R. I., 505; *Currier v. Fellows*, 7 Fost. [N. H.], 366; *Carpenter v. Oaks*, 10 Rich. [S. Car.], 17; *Cecil v. Mix*, 6 Ind., 478; *Peckham v. Gilman*, 7 Minn., 446; *Vore v. Hurst*, 13 Ind., 555; *Orrick v. Colston*, 7 Gratt. [Va.], 189.)

Congdon & Clarkson, contra:

It being admitted that the names were upon the back of the note at its delivery to the payee, the liability of the irregular indorsers is fixed presumptively as that of joint makers, and in the absence of an allegation to support parol evidence combating the presumption, parol evidence is inadmissible, particularly against a *bona fide* holder for value before maturity. (*Robinson v. Bartlett*, 11 Minn., 410; *Cayuga County National Bank v. Dunkin*, 29 Mo. App., 442; *Melton v. Brown*, 6 So. Rep. [Fla.], 211; *Rothschild v. Grix*, 31 Mich., 150; *Weatherwax v. Paine*, 2 Id., 555; *Sibley v. Muskegon Nat. Bank*, 41 Id., 196; *Derry Bank v. Baldwin*, 41 N. H., 434; *Schroeder v. Turner*, 13 Atl. Rep.

[Md.], 331; *Stevens v. Parsons*, 14 Id. [Me.], 741; *Bellows Falls Nat. Bank v. Dorset Marble Co.*, 61 Vt., 106; *Cahn v. Dutton*, 60 Mo., 297; *Schmidt v. Schmaelter*, 45 Mo., 502; *Bradford v. Martin*, 3 Sand. [N. Y.], 647; *Western Boatman's Benevolent Association v. Wolff*, 45 Mo., 104; *Lowell v. Gage*, 38 Me., 35; *Woods v. Woods*, 127 Mass., 141; *Spaulding v. Putnam*, 128 Id., 363; *Austin v. Boyd*, 24 Pick. [Mass.], 64; *Hawks v. Phillips*, 7 Gray [Mass.], 284; *Semple v. Turner*, 65 Mo., 696; *Buchner v. Liebig*, 38 Id., 188; *Leonard v. Wildes*, 36 Me., 265; *Schley v. Merrit*, 37 Md., 352; *Nathan v. Sloan*, 34 Ark., 524; *Chandler v. Westfall*, 30 Tex., 477; *Syme v. Brown*, 19 La. Ann., 147; *Burton v. Hansford*, 10 W. Va., 470; *Way v. Butterworth*, 108 Mass., 512; *Union Bank of Weymouth v. Willis*, 8 Met. [Mass.], 504; *Brown v. Butler*, 99 Mass., 179; *Good v. Martin*, 95 U. S., 90; *Draper v. Weld*, 13 Gray [Mass.], 580; *Herbage v. McEntee*, 40 Mich., 337; *Pearson v. Stoddard*, 9 Gray [Mass.], 199; *Clapp v. Rice*, 13 Id., 403; *Woodman v. Boothby*, 66 Me., 389; *Third National Bank of Baltimore v. Lange*, 51 Md., 138; *Hoffman v. Moore*, 82 N. Car., 313; Tiedeman, Commercial Paper, sec. 271.)

NORVAL, J.

This action was brought in the court below by the First National Bank of Cambridge City, Indiana, against the plaintiffs in error and one Cora H. Sloman as makers, and the Bank of Omaha as indorser, of a promissory note, of which the following is a copy:

"$2,500.00. OMAHA, NEB., Feb. 15, 1889.

"Ninety days after date, we, or either of us, promise to pay to the Bank of Omaha, or order, twenty-five hundred and $\frac{no}{100}$ dollars, for value received, payable at the Bank of Omaha, Omaha, Neb., with interest at the rate of ten per cent per annum from maturity until paid.

"C. H. SLOMAN."

At the time of the making of said note and its delivery to the payee the names of J. G. Salisbury and S. A. Sloman appeared upon the back thereof. Subsequently, but before the maturity of the note, it was indorsed and transferred by the Bank of Omaha to the defendant in error, The First National Bank of Cambridge City. No notice of non-payment was given to J. G. Salisbury and S. A. Sloman at maturity. The note was sent by the plaintiff below to the Bank of Omaha for collection prior to its maturity, where it remained until after the same fell due. The Bank of Omaha made no defense. Cora H. Sloman set up two defenses: First, payment; and second, coverture. The former she withdrew upon the trial. Salisbury and S. A. Sloman each filed a separate answer, which "denies that he executed and delivered the promissory note described in the petition, but avers and charges the fact to be that the defendant, at the time of the delivery of said note to the Bank of Omaha, was simply accommodation indorser thereon, the name of this defendant being written across the back of said note. Nor did said defendant receive any part of the consideration for which said note was given." Each answer further alleged that the note was not protested for non-payment, nor was notice of non-payment given to the defendants at the time of the maturity thereof.

Plaintiff replied by a general denial.

Upon the trial the jury, under the instructions of the court, returned a verdict in favor of the plaintiff, and against all the defendants for the full amount of the note and interest. Separate motions for a new trial were filed by plaintiffs in error and Cora A. Sloman, which were overruled, and judgment entered on the verdict.

The question to be considered by this court is this: Were plaintiffs in error liable as makers of said note, or were they chargeable as accommodation indorsers, merely? If the obligation they assumed by indorsing their names

upon the back of the note, before its delivery to the payee, was that of maker, the judgment under review was right; otherwise, not, inasmuch as no notice of non-payment at maturity was given to plaintiffs in error. The kind of liability that the law presumes is assumed by one who signs his name in blank upon the back of a negotiable promissory note at the time of its execution, and before its delivery to the payee, has never been passed upon or decided by this court, and there is a great diversity of holding upon the question by text writers and courts in this country.

Several courts of high standing sustain the doctrine for which plaintiffs in error contend, namely, that, where a stranger writes his name across the back of a note before its delivery to the payee, he is liable thereon as an indorser. (*Moore v. Cross*, 19 N. Y., 227; *Phelps v. Vischer*, 50 Id., 69; *Slack v. Kirk*, 67 Pa. St., 380; *Clouston v. Barbiere*, 4 Sneed [Tenn.], 336; *Jennings v. Thomas*, 13 Smedes & M. [Miss.], 617; *Jones v. Goodwin*, 39 Cal., 493.)

There is another line of decisions which hold that a person so indorsing a note is chargeable, *prima facie*, as a grantor. (*Webster v. Cobb*, 17 Ill., 459; *Blatchford v. Milliken*, 35 Ill., 434; *Lowell v. Gage*, 38 Me., 36; *Sturtevant v. Randall*, 53 Id., 154; *Cook v. Southwick*, 9 Tex., 615; *Killian v. Ashley*, 24 Ark., 511.)

The decided weight of authority supports the rule adopted by the trial court in this case, and that is that plaintiffs in error are liable as joint makers. (Story, Promissory Notes, secs. 468, 469; *Good v. Martin*, 95 U. S., 90; *First Nat. Bank of Worcester v. Lock-Stitch Fence Co.*, 24 Fed. Rep., 221; *Bendey v. Townsend*, 3 Sup. Ct. Rep., 482; *Chaddock v. Vanness*, 35 N. J. Law, 517; *Quin v. Sterne*, 26 Ga., 223; *Sylvester v. Downer*, 20 Vt., 355; *National Bank v. Dorset Marble Co.*, 17 Atl. Rep. [Vt.], 42; *Robinson v. Bartlett*, 11 Minn., 410; *Peckham v. Gilman*, 7 Id., 446; *Schmidt v. Schmaelter*, 45 Mo., 502;

Cahn v. Dutton, 60 Mo., 297; *Melton v. Brown*, 6 So. Rep. [Fla.], 211; *Wetherwax v. Paine*, 2 Mich., 555; *Sibley v. Muskegon Nat. Bank*, 41 Id., 196; *Moynahan v. Hanaford*, 42 Id., 329; *Flint v. Day*, 9 Vt., 315; *Sandford v. Norton*, 14 Id., 228; *Stevens v. Parsons*, 14 Atl. Rep. [Me.], 741; *Schroeder v. Turner*, 13 Atl. Rep. [Md.], 331; *Bright v. Carpenter*, 9 O., 139; *Derry Bank v. Baldwin*, 41 N. H., 434; *Perkins v. Barstow*, 6 R. I., 505; *Baker v. Robinson*, 63 N. Car., 191; *Hoffman v. Moore*, 82 Id., 313; *Brown v. Butler*, 99 Mass., 179; *Way v. Butterworth*, 108 Id., 509.) Many other authorities to the same effect could be cited.

In *Bright v. Carpenter*, *supra*, Lane, C. J., observes: "If a person, not a party, give his name to a note already existing, his engagement is collateral only, and he is to be held as guarantor; but if such a person sign his name to such a paper at the time of its execution, without prescribing the limits of his responsibility, he authorizes the holder to treat him as a maker, and is as much bound as if his name was written under that of the principal."

Judge Story, in discussing the question in his valuable work on Promissory Notes at section 469, says: "The principle upon which all these cases turn is the same; and that is, to expound the particular transaction, without reference to the form which it has assumed, in such a manner as will best carry into effect the substantial intention of the parties, *ut res magis valeat quam pereat*, rather than by a close or technical interpretation, adhering to the letter, to defeat the very objects and purposes for which alone the transaction must have taken place, and thus to make it operate at once as a delusion and a fraud upon the ignorant or the unwary. Nor is there anything novel in this mode of interpretation applied to this class of cases. It stands upon the principle that two instruments of the same general nature, both executed at the same time and relating to the same subject-matter, are to be construed together, as forming but one

agreement. As he who signs on the face, and he who indorses his name on the back, both promise to do the very same thing, to-wit, to pay the money at the specified time, they may, without doing violence to the contract, be deemed as joint makers; and as, in point of form, each promises for himself, the undertaking may be treated as several as well as joint. In respect to the consideration, it has been thought sufficient that the indorsement purports to be 'for value received,' or that the consideration, if not expressed, is established in proof by the contemporaneous facts when the note was made."

There is no room for doubt that where a person not a payee places his name upon the back of a note in blank, before it has passed into the hands of the payee, he may be proceeded against as maker, indorser, or guarantor, according to the circumstances of the case and the intention of the parties at the time of the transaction; but as between the original parties, at least, parol evidence is admissible to show the real character of the obligation assumed by him; that is, whether his undertaking was that of a joint maker, guarantor, or indorser. We are constrained to adopt the rule sustained by the current of authorities, and the one which is in harmony with the decisions of the supreme court of the United States, namely, that when a third person indorses his name upon a note in blank at the time it is executed, and before delivery, the law presumes, in the absence of evidence showing the nature of his undertaking, that he intended to assume the liability of an original promisor. Applying this rule to the case at bar it will be presumed that the plaintiffs in error, by placing their names upon the back of the paper in suit, intended to incur the liability of a maker.

We do not think that the trial court erred in not permitting plaintiffs in error to show the intent with which they backed the note in controversy. The answer was not sufficient to admit of such proof. Besides, plaintiff below

purchased the paper in good faith, for value, before maturity; and as against such indorsee, parol evidence was inadmissible to show that the character or limit of the liability of plaintiffs in error was other or different from that which the law presumes it to be.

Cora H. Sloman filed a separate petition in error in the case in this court, but having failed to favor us either with a brief or oral argument upon her assignments of error, and no error appearing upon the record prejudicial to her rights, her petition in error is overruled. The judgment of the district court is

AFFIRMED.

THE other judges concur.

WILLIAM H. NOLL, APPELLANT, V. JAMES KENNEALLY ET AL., APPELLEES.

FILED OCTOBER 17, 1893. No. 4902.

1. **Mechanics' Liens: TIME TO FILE STATEMENT.** A statement for a mechanic's lien must be filed with the register of deeds of the proper county within the time prescribed by statute, or the right to a lien is lost.
2. **———: ———: EVIDENCE.** *Held*, That the evidence in this case fails to show that such a statement was ever filed.
3. **———: ASSIGNMENT OF CLAIM BEFORE FILING LIEN: RIGHTS OF ASSIGNEE.** The transfer by a material-man to another party of his account for materials furnished for the construction of a building, before the filing of his claim for a lien, destroys the right to a lien, and confers no authority upon the assignee to file and enforce a mechanic's lien for such materials. The assignee, after such assignment, cannot perfect the lien by complying with the requirements of the statute.
4. **———: ACCOUNT AND AFFIDAVIT: DATES OF MATERIAL FURNISHED.** The failure of an account filed to secure a mechanic's

lien to state the dates the various items of materials were furnished will not vitiate the lien, if it appears from the account and affidavit thereto attached that such materials were furnished within the requisite time to entitle the claimant to a lien therefor.

5. ———: ———: ———. An account for a mechanic's lien, after giving the items of materials for which a lien is claimed, states that "the above items were sold for $677.65, and delivered between July 10, 1888, and October 18, 1888," and the affidavit attached to the account alleges that said materials were furnished at the times mentioned in the account. *Held*, To sufficiently designate the time.

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

M. L. Easterday, for appellant, cited: *Skyrme v. Occidental Mill & Mining Co.*, 8 Nev., 220; Kneeland, Mechanics' Liens [2d ed.], sec. 8; *Hallahan v. Herbert*, 11 Abbott Pr. Rep., n. s. [N. Y.], 336.

Robert Ryan and *Harwood, Ames & Kelly*, *contra*, contending that the claim for a lien is insufficient, because it fails to give the dates when the material was furnished, cited: *Associates of the Jersey Company v. Davison*, 29 N. J. L., 415; *Lehman v. Thomas*, 5 Watts & S. [Pa.], 262; *Faulkner v. Reilly*, 1 Philadelphia Rep. [Pa.], 234; *Ayres v. Revere*, 1 Dutch. [N. J. L.], 481; *Wagar v. Briscoe*, 38 Mich., 592; *Noll v. Swineford*, 6 Pa. St., 191; *Rehrer v. Zeigler*, 3 Watts & S. [Pa.], 258; *Thomas v. James*, 7 Id. 381; *Witman v. Walker*, 9 Id. 186; *Cook v. Heald*, 21 Ill., 425; *Wade v. Reitz*, 18 Ind., 307; *Shackleford v. Beck*, 80 Va., 573; *Hayden v. Wulfing*, 19 Mo. App., 353; *Valentine v. Rawson*, 57 Ia., 179. The assignee should have shown that he became the owner after the lien was perfected. If he has not so shown, it is as reasonable to assume that it was before as after the perfecting of the lien. If before, the lien did not pass by the assignment. (*Goodman v. Pence*, 21 Neb., 462; *Tewksbury v. Bronson*, 48 Wis., 581.)

NORVAL, J.

This was an action brought by appellant to enforce a mechanic's lien for materials furnished by R. A. Handy & Co, under a verbal contract with the defendant James Kenneally, for the erection of a dwelling and barn on lot 10, in block 2, in Summerdale addition to the city of Lincoln. Plaintiff claims as assignee of the account and mechanic's lien. Kenneally was the owner of the lot when the materials were furnished. Subsequently, on August 28, 1888, he mortgaged the premises to the defendant James Woolworth to secure the payment of $800, at the time borrowed. On the 22d day of November, 1888, the defendant Thomas McAlpine purchased said premises from Kenneally, subject to the payment of said mortgage. The district court rendered a personal judgment in favor of plaintiff, and against Kenneally, for $743.37, and decreed that plaintiff was not entitled to a mechanic's lien for any amount. Plaintiff appeals.

No question is made in this court by any one as to the amount of the judgment rendered by the court below, the sole contention here being whether the court erred in not decreeing that plaintiff had a valid lien upon the real estate for the amount so found due him. Appellees urge numerous objections against the right of plaintiff to a lien, which we will notice.

It is claimed by counsel for appellees that there is neither proof that the materials charged in plaintiff's account and claim for lien were ever furnished by Handy & Co., nor is there any evidence of the value of the same. While the testimony on the subject is quite meager, we are of the opinion that it sufficiently appears that Handy & Co. furnished and caused to be delivered, on the lot in question, all the materials which were used in the construction of the house and barn. The only evidence as to value was that given by Mr. Sable, one of the carpenters who erected the

buildings, who estimated the value of the materials used in the construction of the house at $540, and the barn at $70.

It is said that there is no proof that a claim for lien was filed with the register of deeds. The petition alleges that on the 31st day of December, 1888, and within four months from the time of the furnishing of the materials, R. A. Handy & Co. made, under oath, an account in writing of the materials, and filed the same in the office of the register of deeds of Lancaster county, claiming a mechanic's lien therefor upon said premises, which lien was recorded in book D of mechanics' liens at page 349. The above allegation being put in issue by the general denial in the answers of appellees, it devolved upon the plaintiff to establish upon the trial, by competent evidence, the filing of the claim for lien. This he failed to do. The mechanic's lien records of Lancaster county were neither produced at the trial, nor offered in evidence. Plaintiff, over objections of defendants, introduced in evidence the lien attached to his petition as an exhibit. While it contains an indorsement purporting to have been made by the register of deeds, showing the filing and recording of the paper, yet the indorsement was not offered in evidence. Plaintiff should have made his offer sufficiently broad to have included the introduction of the indorsement of the filing of the statement of lien.

In this state one who seeks to enforce a mechanic's lien is required to file a verified account of the materials furnished or labor performed, for which a lien is claimed, in the office of the register of deeds, within four months after the furnishing of the last item of materials, or the performance of the labor. The filing operates as a creation of the lien, and unless this is done, his right to a lien is lost. As there is a total failure of proof that any claim for lien was filed by plaintiff's assignors with the register of deeds, plaintiff was not entitled to have a lien established on the premises in controversy.

There is another well founded reason why a decree of foreclosure was properly refused in this case. The undisputed testimony shows that Handy & Co. sold and transferred their account for the materials to the plaintiff in November, 1888, before any steps had been taken by them to perfect a lien. Afterwards, on the 31st day of December, 1888, they made out a sworn statement claiming a mechanic's lien on the lot for the amount of materials furnished for the building, and in January, 1889, made a formal assignment thereof to plaintiff.

The transfer of the debt before filing the claim for lien extinguished the right to a lien on the premises. Handy & Co. could not afterwards perfect a lien, for the reason they had disposed of their claim, nor could the plaintiff do so, since the assignment of the debt did not have the effect to transfer a right to perfect and enforce a lien therefor. (*Goodman v. Pence* 21 Neb., 459; *Tewksbury v. Bronson*, 48 Wis., 581.)

In *Goodman v. Pence, supra,* this court held that the mere assignment of the account for labor performed and materials furnished for the erection of a building will not give the assignee the right to assert a mechanic's lien therefor. The court in the opinion says: "The mere performance of labor or furnishing material to another is not sufficient to entitle a party to a mechanic's lien. His right to the same depends upon compliance with the statute. Until he has so complied he has no lien which he can assign. When, however, he has acquired a lien, he may assign the same with the account to another. In other words, a mere inchoate right to a mechanic's lien is not assignable, although the lien when acquired passes with an assignment. * * * If the mere assignment of the debt gave the assignee the right to assert the lien, then in cases where portions of the debt were assigned to different persons each must file a lien for the amount due to himself, and thus instead of one lien against the property, there might be fifty, or an in-

definite number, which would render the proceeding cumbersome and oppressive. Before the assignment of the debt, therefore, will carry the right to a mechanic's lien, it must be perfected by properly filing the same in the office of the county clerk before the assignment is made."

True, the mechanic's lien law should be liberally construed, so as to carry out the intent of the legislature in passing it; but the provisions of the law are not to be extended in their operations beyond the fair and reasonable sense of the terms employed. To obtain a lien there must be at least a substantial compliance with the requirements of the statute by the mechanic or material-man. It requires that the person entitled to the lien shall make out and file an account in writing of the items of labor or materials furnished. It contemplates that the person furnishing the materials or performing the labor shall perfect the lien, and this he must do before he transfers or assigns the debt to another, for, after such transfer, he no longer has such an interest as will authorize him, by complying with the statute, to obtain a lien.

It further claimed that the statement of the account is insufficient, in that it fails to state with sufficient particularity the times when the materials were furnished as the basis for the lien. The account, after giving the number and kinds of materials furnished, contains the following: "The above items were sold for $677.65, and delivered between July 10, 1888, and October 18, 1888." The affidavit attached to the account states "that said materials were furnished by R. A. Handy & Co. to said James Kenneally at the times stated in said account." Neither the account nor the affidavit contains any other reference as to the dates of the furnishing of the materials. Authorities are cited in brief of counsel for appellees which, at first blush, appear to sustain their contention that the specification of the times when the materials were furnished is so vague and uncertain as to invalidate the lien, as between the

claimant and good-faith purchaser or mortgagee without notice; but a more careful examination will disclose that they are based upon statutes which in express terms require that the dates of furnishing be set out in the lien statement. The mechanic's lien law of this state contains no such provision; hence, the decisions cited do not materially aid us in our investigation. The statute reads: "any person entitled to a lien under this chapter shall make an account in writing of the items of labor, skill, machinery, or materials furnished, or either of them, as the case may be, and after making oath thereto shall, within four months of the time of performing such labor and skill, furnishing such machinery or material, file the same in the office of register of deeds of the county," etc. The account and affidavit are for the purpose of furnishing notice that the party claims a lien. It is the better practice to give in the account the dates on which the items were furnished; but we are not willing to hold, as do the decisions in some of the states under statutes materially different from our own, that the failure to insert the dates in the account, or that the mere stating that the items were furnished between certain specified dates, as in the case at bar, invalidates the lien. When the days of performing the labor or furnishing the materials are not given in the account, it should be made to appear in the affidavit thereto attached that the materials were furnished, or labor performed, within the time prescribed by statute to entitle the claimant to a lien therefor. The fair inference to be drawn from the statement in the account for the lien we are considering is that the materials were furnished between the dates therein named, and that the last were furnished on the date last given. (See *Manly v. Downing*, 15 Neb., 637; *Hayden v. Wulfing*, 19 Mo. App., 353; *Bangs v. Berg*, 48 N. W. Rep. [Ia.], 90; *Johnson v. Stout*, 44 Id. [Minn.], 534.) The decree of the district court is right, and is

AFFIRMED.

THE other judges concur.

ROBERT M. PEYTON v. NILES JOHNSON.

FILED OCTOBER 17, 1893. No. 4704.

1. **Change of Venue**: SUFFICIENCY OF AFFIDAVIT: JUSTICE OF THE PEACE. Under sections 958*a* and 958*b* of the Code (sections 5428 and 5429, Consolidated Statutes) an affidavit by a defendant for a change of venue of a cause pending before a justice of the peace is sufficient if it is in the language of the statute.

2. ———: APPLICATION UNDER STATUTE: DUTY OF JUSTICE. Where a proper affidavit for a change of the place of trial is seasonably filed, and the provisions of the statute relating to the payment of costs have been complied with, it is the imperative duty of the justice of the peace before whom the objection is made to transfer the cause to the nearest justice of the county to whom the same objections do not apply.

3. ———: BIAS OF NEAREST JUSTICE: REVIEW. Where such affidavit also states that "F. A.W., the nearest justice to whom said cause could be transferred, is, as affiant verily believes, biased and prejudiced against affiant, so that a fair and impartial hearing cannot be had before him," it is error for the justice before whom the action is pending to order the venue changed to such nearest justice.

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

O. W. Rice, for plaintiff in error:

The question of bias or prejudice of other justices is a question of fact, and the justice before whom the objection is made is competent to decide the question from evidence, and is not conclusively bound by the statement of the applicant. (*McCrory v. McCrory*, 36 N. W. Rep. [Wis.], 604.)

G. T. Kelley, contra.

NORVAL, J.

This action was commenced by plaintiff in error before A. C. Logan, Esq., a justice of the peace of Knox county, to recover the sum of $110 and interest on a promissory note. On the return day of the summons the defendant applied for a change of venue, on the ground that the justice was biased and prejudiced against him, and filed his own affidavit in support of the application. The justice decided that the defendant was entitled to a change of venue, and ordered that the cause be transferred to the docket of F. A. Warrick, Esq., the nearest justice, upon the payment by the defendant of the costs of transcript, taxed at $1.

The defendant excepted to said ruling, and refused to pay the fees for making the transcript. Afterwards, Justice Logan tried the case, and rendered judgment against the defendant for $111.30, and costs, to all of which defendant excepted. The cause was taken by Johnson to the district court by writ of error, the assignments of error being:

1. The court erred in directing that the cause be transferred to Justice Warrick, for the reason that said Warrick was objected to in plaintiff's affidavit for change of venue.

2. In not directing the cause to be sent to the nearest justice to whom the objections in the affidavit did not apply.

3. In rendering judgment against the defendant.

The district court reversed the judgment of the justice, and to reverse said judgment of the district court the cause was brought to this court.

The application for a change of venue was based upon the following affidavit:

"THE STATE OF NEBRASKA, } ss.
KNOX COUNTY. }

"ROBERT M. PEYTON }
v. }
NILES JOHNSON. }

"Niles Johnson, being first duly sworn, upon his oath

says he verily believes that he cannot have a fair and impartial trial before A. C. Logan, justice of the peace, by reason of the bias and prejudice of the said justice; and F. A. Warrick, the nearest justice to whom said cause could be transferred, is, as affiant verily believes, biased and prejudiced against affiant, so that a fair and impartial hearing cannot be had before him. NILES JOHNSON.

"Signed in my presence and sworn to before me this 26th day of June, 1890. A. C. LOGAN,
"*Justice of the Peace.*"

The contention of plaintiff in error is that the above affidavit was insufficient to disqualify Warrick from trying the cause. If it was, the justice did not err in ordering the cause to be tried before Warrick; but if sufficient, the district court did not err in reversing the justice's judgment.

The motion to change the place of trial in this case was made under sections 958*a* and 958*b* of the Code, the same appearing in Cobbey's Consolidated Statutes as sections 5428 and 5429. These sections have more than once been construed by this court, and the precise question raised by this record has been decided adversely to the contention of plaintiff in error. Thus in *Re Garst*, 10 Neb., 78, it was held that when a proper affidavit is seasonably filed it is imperative on the justice to grant a change of venue, and the justice has no discretion in the premises. It was further ruled that the affiant may state in his affidavit for a change of venue any objections known to exist against the nearest justice to whom the cause could be transferred, and if he fail so to do before the same is changed, the objections would be waived; and that but one change can be made on the same ground in the same action.

Again, in *Osborn v. Shotwell*, 33 Neb., 348, the court, in construing said section, say: "These sections no doubt have been productive of much reckless swearing. In many cases where the oath is made and filed for a change of the place of trial, the justice must know that there is

no substantial ground for the oath, and yet he is required to make the change where the terms provided by law as to costs have been complied with. It is not for him to say whether or not he is biased, nor is it necessary to establish bias before a change can be ordered. All that is necessary is for the defendant, his agent or attorney, to make oath that the 'defendant cannot, as affiant verily believes, have a fair and impartial hearing in the case on account of the interest, bias, or prejudice of the justice,' and paying the costs now required of the defendant by section 958, the place of trial must be changed."

In *State, ex rel. Proctor, v. Cotton,* reported in the same volume of our reports at page 561, MAXWELL, J., after quoting sections 958*a* and 958*b*, observes: "Under the above sections of the Code it is the duty of the justice, upon the filing of the proper affidavit, to change the venue. The party moving for the change, however, cannot dictate to what justice the cause shall be transferred. He may, however, in his affidavit for a change, state any objections to the nearest justice that he may deem to be well founded."

There is no escaping the conclusion that these decisions are decisive of the case at bar. It is conceded, and there can be no doubt of it, that the application for changing the place of trial was made in due time and upon a sufficient affidavit to entitle the defendant to have the cause transferred from Justice Logan's court, as a matter of right. But it is claimed that the affidavit is not sufficient to establish the disqualification of Justice Warrick. It was settled by the cases to which reference has already been made, that objections to the nearest justice, to be available, must be made before the venue is changed. The statute provides, section 958*a*, that "thereupon the proceedings shall be transferred to the nearest justice of the peace, to whom the said objections do not apply, of the same county, to be proceeded with," etc.

"Said objections" refer to those mentioned in the prior portion of the section, namely, any interest, bias or prejudice of the justice as will prevent him from fairly and impartially hearing the case. How is such disqualification to be shown? Manifestly in the same manner as the objections to the justice before whom the case is pending are made to appear, by the applicant stating in his affidavit that he verily believes that he cannot have a fair and impartial hearing on account of the bias and prejudice of the nearest justice, naming him. The statute does not require that the facts or circumstances upon which he bases his belief shall be stated. If the facts were required to be set up, then it would follow that the justice before whom the objection is made would necessarily have to decide the question upon the evidence, and we would then have the spectacle of a justice, who was himself disqualified from trying the case by reason of his interest, bias, or prejudice, determining whether another justice was also disqalified from hearing the cause. We cannot believe that the legislature so intended. The allegation in the affidavit under consideration, as to the bias and prejudice of Justice Warrick, was just as conclusive on Justice Logan as was the averment of his own prejudice.

The case of *McCrory v. McCrory*, 36 N. W. Rep. [Wis.], 603, cited by counsel for plaintiff in error, is not in point. That case was decided upon a statute materially different from ours. It contained no provision similar to the one found in section 958*a* we have been considering, namely, "the proceedings shall be transferred to the nearest justice of the peace to whom the said objections do not apply."

The affidavit was sufficient, and the district court did not err in reversing the judgment of the justice. The judgment of the district court is therefore

AFFIRMED.

THE other judges concur.

GUSTAVE W. WILDE, APPELLANT, V. SUSAN P. WILDE, APPELLEE.

FILED OCTOBER 17, 1893. NO. 5130.

1. **Contracts Contrary to Public Policy:** ENFORCEMENT. Courts will refuse to enforce contracts which are manifestly contrary to public policy or sound morals.
2. **Divorce:** CONTRACTS OF SEPARATION: PLEADING: EVIDENCE. Where there is nothing on the face of a contract to suggest that it is founded upon an unlawful consideration the illegality thereof must, as a rule, be pleaded when relied upon as a defense. But if on the trial it is apparent from evidence material to the issues that the cause of action or defense rests upon an agreement *contra bonos mores* the court will of its own motion refuse to enforce such immoral agreement, even should both parties assent to its enforcement.
3. ———: CONTRACTS TO FACILITATE: VALIDITY: COLLUSION. A contract intended to facilitate the procuring of a divorce at the suit of either of the parties thereto is void.
4. ———: ALIMONY: DISCRETION OF TRIAL COURT. In the allowance of alimony upon the awarding of a divorce much discretion is necessarily conferred upon the district court, and this court will not interfere on the grounds that the amount allowed is excessive unless there appears to have been a clear abuse of discretion.
5. **Evidence** examined, and found to sustain the decree of the district court.

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

The facts are stated in the opinion.

Sullivan & Gutterson, for appellant:

A contract of separation between husband and wife is legal and should be enforced. (*Galusha v. Galusha*, 116 N. Y., 635; *Randall v. Randall*, 37 Mich., 563; *Desbrough v. Desbrough*, 29 Hun [N. Y.], 592; *Carpenter v. Osburn*,

102 N. Y., 552; *Dillinger's Appeal*, 35 Pa. St., 357; *Hutchins v. Dixon*, 11 Md., 29-40; *Jones v. Clifton*, 101 U. S., 225; *Squires v. Squires*, 53 Vt., 208.) Had the terms of the second contract been included in the first, the entire contract should not for that reason be declared void. (*Mercein v. People*, 25 Wend. [N. Y.], 64; *Allen v. Affleck*, 64 How. Pr. [N. Y.], 380.)

R. A. Moore, contra, contending that the contract is invalid, cited: 1 Bishop, Marriage and Divorce, sec. 724; *Hollowell v. Simonson*, 21 Ind., 398; *Bullard v. Briggs*, 7 Pick. [Mass.], 540; *Wilson v. Bull*, 10 O., 256; *Tapley v. Tapley*, 10 Minn., 448; *Stiles v. Stiles*, 14 Mich., 75; *Dickerson v. Dickerson*, 26 Neb., 318.

Thomas Darnall, J. S. Kirkpatrick, and *M. McSherry*, also for appellee.

POST, J.

This is an appeal from a decree of the district court of Custer county awarding to the defendant, appellee, a divorce and alimony. As the controversy in this court is confined to the question of alimony it is unnecessary to examine the petition, answer, or cross-bill. From the reply it appears that some nine months prior to the commencement of the action the parties entered into a written agreement as follows:

"Articles of agreement, made and entered into this 16th day of June, 1890, by and between G. W. Wilde, of Broken Bow, Nebraska, party of the first part, and Susan P. Wilde, party of the second part, witnesseth:

"That the said party of the first part hereby covenants and agrees, for and in consideration of the covenants and agreements hereinafter to be made and kept by party of the second part, to pay to party of the second part the sum of $2,600 at the dates and in the manner following, to-wit:

"Party of the first part agrees to transfer and indorse to party of the second part the sum of $1,315.39 in notes now held by party of the first part against H. H. Squires, said notes to be accepted by party of the second part at their face value with accrued interest added, and amounting to $1,373.40; to pay party of the second part the sum of $1,000 in cash on sixty days demand after August 1, 1890, said sum to be evidenced by a promissory note of even date herewith; and to pay to party of the second part the sum of $226.60 one year from date hereof, said sum to be evidenced by promissory note of even date herewith, drawing interest from date until paid at the rate of ten per cent. Party of the first part further agrees to execute and deliver to the party of the second part a lease of the residence property, together with the grounds adjacent thereto and belonging with the same, together with all outbuildings on said premises, the same being the residence property where the parties hereto now live. Said lease is to run for a period of one year from and after the date upon which the parties cease to live and cohabit together as man and wife. The party of the second part to have the right to the entire and exclusive control of said premises for the period of time above stated:

"Provided, however, that party of the second part has no right to sublease any portion of said premises without the consent of the party of the first part.

"Party of the first part further agrees to convey to party of the second part, by bill of sale having absolute title, one phaeton, and all right, title, and interest of the party of the first party in and to all the household goods and furniture of every kind belonging to the parties hereto now situate and being in their residence in Broken Bow, together with all carpets, pictures, cooking utensils, dishes, stoves, the intention of the parties being to convey the interest of the party of the first part in and to all the personal property belonging to the parties, and now situate in

their residence at Broken Bow, to the party of the second part.

"It is further agreed that party of the second part is to have all the clothing belonging to herself and daughter, and also all bed-clothes and bedding now owned and used by the parties.

"Party of the first part hereby agrees to convey by warranty deed to party of the second part all his interest in her homestead. It is further amply agreed between the parties that party of the first part shall convey by warranty deed to party of the second part the real estate standing in his name in the city of Tama in the state of Iowa, said deed to be deposited as an escrow by some person to be agreed upon, to be delivered to party of the second part when she delivers to party of the first part a certain note for the sum of $1,000, executed by party of the first part and made payable to Parisade Barrett, the ward and child of the party of the second part.

"In consideration whereof the party of the second part agrees to accept the above conveyances of money as payment in full of all her claims of dower and alimony, and all other interest of every kind in the property, both real and personal, of the party of the first part, and of all claims of every kind held by party of the second part against the party of the first part, including any claims for alimony, support, and maintenance after the parties have ceased to live together as man and wife, including all interest of any kind in and to the real estate belonging to the party of the first part.

"Provided, however, that if the parties continue to live together for more than one year after date hereof then this shall not in any way affect the rights of the party of the second part to said dower or other interest as provided by law in and to the property of the party of the first part acquired after the expiration of one year from date hereof.

"Party of the second part further agrees to convey by

deed and release to party of the first part all her interests of every kind in and to all real estate and property of every description owned by party of the first part. For the true and faithful performance of the above agreements, we bind ourselves, our heirs, executors, and assigns.

"Witness our hands the day and year last above written.

"(Signed) SUSAN P. WILDE.

"GUSTAVE W. WILDE."

It is alleged by the plaintiff that he has paid to the defendant the money mentioned in said agreement, and delivered to her the conveyances and evidences of indebtedness provided for therein, and that said money and property were received by her in full settlement and satisfaction of all claims against him or his estate, including alimony, and that she has now no interest in or claim upon his property. On the part of the defendant it is contended: First—That the money and property referred to in the above agreement had come into her hands as administratrix of the estate of her first husband, and had been turned over by her to the plaintiff; hence there was no sufficient consideration for the release of her interest in the plaintiff's property. Second—That said agreement was intended to facilitate the procuring of a divorce, and therefore void as against public policy. That the object of the parties was the termination of the marriage relation does not, we think, admit of a doubt. At the time of the execution of the contract set out above, a second agreement was entered into, of which the following is a copy:

"This article of agreement, made and entered into this 16th day of June, 1890, by and between G. W. Wilde, of Broken Bow, Nebraska, party of the first part, and Susan P. Wilde of the same place, party of the second part, witnesseth: That in consideration of another agreement of even date herewith, made between the same parties, and the full and complete fulfillment of all of its conditions by each of the parties, it is hereby mutually agreed that

neither party to this agreement shall in any manner resist the application of the other to obtain a divorce from the bonds of matrimony at any time when either party shall see fit to commence proceedings for that purpose. In witness whereof the parties have hereunto set their hands the day and year last above written.

"SUSAN P. WILDE.
"G. W. WILDE."

Construing the two instruments together it is very evident that their purpose was to facilitate the procuring of a divorce at the suit of one or the other of the parties. That all similar agreements are contrary to the settled policy of the law, and therefore void, is a proposition which will not seriously be controverted at this late day. From the multitude of cases in point in this country and England, it is sufficient to cite the following: *St. John v. St. John*, 11 Ves. [Eng.], 526; *Merryweather v. Jones*, 4 Giff. [Eng.], 509; *Sayles v. Sayles*, 21 N. H., 312; s. c., 53 Am. Dec., 208; *Durant v. Titley*, 7 Price [Eng.], 577; *Muckenburg v. Holler*, 29 Ind., 141; *Hamilton v. Hamilton*, 89 Ill., 349. (See also Addison, Contracts, p. 254; 2 Bishop, Marriage and Divorce [5th ed.], sec. 239.)

It is earnestly contended by the plaintiff that the last named agreement was not the inducement for the relinquishment by the defendant of her interest in his estate; and in support of that contention we are referred to her testimony, in which she says, on her cross-examination, that there was no reference to divorce proceedings until after the execution of the other agreement. It is a sufficient answer to this contention that courts will refuse their aid in enforcing similar agreements, not on account of any solicitude for the parties, but as a duty they owe to the cause of justice and the integrity of its courts. Whenever it is apparent that an agreement is contrary to public policy and sound morals, it will be ignored by the court, even though both parties should assent to its enforcement. (*Wight v.*

Rindskopf, 43 Wis., 344.) Here it is evident that the two contracts are parts of the same transaction and must be so construed; and neither party will be heard to say that they did not contemplate a dissolution of marriage in the face of the conclusive proof to the contrary in the written evidence of their agreement.

The remaining inquiry is, whether the amount of alimony, $2,000, awarded to the defendant is equitable in view of the facts as disclosed by the proofs. At the time of her marriage with the plaintiff the defendant was engaged as administratrix under the will of her first husband, —— Barrett, in conducting a hardware store at West Union, Custer county, with her brother, John Squires. The Barrett estate at said time owned a half interest in said business plus the sum of $135. By provision of the will the defendant was entitled to the income from said property so long as she remained single, but in case she remarried it was to be divided between her two daughters, issue of her first marriage. Shortly after the marriage of the parties hereto the defendant turned over to the plaintiff the property held by her belonging to the Barrett estate, and the latter became her successor, ostensibly as a member of the firm aforesaid, and which arrangement continued until the month of January 1889. According to the testimony of the defendant and Squires, the stock of hardware and bills receivable, as shown by an invoice taken at the time the plaintiff took possession thereof, amounted to $4,150 over and above the liabilities of the firm. To one-half of this amount she adds $135, the sum due from said firm to the estate, making a total of $2,210 as the amount turned over by her to the plaintiff at the time. She testifies also that she advanced to plaintiff $100 soon after their marriage, at another time $125, and at a third time $85; that he received $275, the proceeds of a house and lot owned by her at the time of her second marriage; that he subsequently

converted to his own use money belonging to said estate amounting in the aggregate to $219, making a total indebtedness to herself and to the said estate of $3,014. It is evident that the business was prosperous, since Mr. Squires testified that in January, 1889, he sold his half interest in the firm to the plaintiff for $6,700, and which amount was then the reasonable value of the plaintiff's interest.

Both the defendant and her attorney who participated in the settlement above referred to testified that the money and property mentioned therein were understood to be the proceeds of the property of the Barrett estate, for which she is required to account as administratrix, and which, according to the testimony of the attorney, Mr. Kirkpatrick, was between $300 and $400 less than the amount in which the plaintiff was in fact indebted to said estate. The finding of the district court was in accordance with this contention, and is, we think, fully warranted by the evidence. The court found that the plaintiff was, at the time of the trial, possessed of property, over and above all liabilities, of the value of $8,500, and which, according to the evidence, is not unreasonable. In fact the evidence shows him to be worth considerably more than the amount above named, and which, with the exception of two "claims" in Custer county estimated by him to be worth $4,500, was accumulated since their marriage, and the product of the property held by the defendant in trust for her children. There is also reason to doubt the completeness of the plaintiff's showing with respect to his assets and liabilities, while it is conclusively shown that he at one time attempted to make an assignment with the avowed purpose of defeating the defendant's claim of alimony. It cannot, in view of the facts stated, be said that the judgment of $2,000 is excessive. A large discretion is conferred upon the district court in such cases, and to warrant an interference by this court there must have been an evident

abuse of discretion. The decree of the district court is in all things

AFFIRMED.

THE other judges concur.

GEORGE W. FORBES v. EDWARD PETTY.

FILED OCTOBER 17, 1893. No. 4891.

1. **Pleading:** REMEDY FOR DEFECT. Where a pleading is sufficient in substance, but wanting in form or completeness, the remedy is by motion, and not by demurrer.
2. **Conversion:** PLEADING: DEFENSE OF ARBITRATION AND SETTLEMENT: EVIDENCE. In an action for the value of property alleged to have been converted by the defendant, the answer was "That * * * the defendant had a full and complete settlement, and a full and complete arbitration and settlement, of all matters and things in dispute, which settlement and arbitration included all matters and things in controversy between plaintiff and the defendant at the time, and, more especially, the matter referred to in the petition." *Held*, To present the issue of settlement as a distinct and separate defense, and that the defendant is not confined to proof of the arbitration alleged.
3. **Evidence** examined, and *held* sufficient to sustain the judgment of the district court.

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

H. D. Estabrook and *Charles E. Clapp*, for plaintiff in error.

Gregory, Day & Day and *W. W. Morsman, contra.*

POST, J.

This was an action by the plaintiff in error in the district court of Douglas county to recover the value of twenty-

two calves and their increase, alleged to have been converted by the defendant in error in the spring of 1880. The answer contains several defenses, but one of which will be noticed, viz.: "That in the year 1881 this defendant had a full and complete settlement, and a full and complete arbitration and settlement, of all matters and things in dispute, which settlement and arbitration included all matters and things in controversy between plaintiff and defendant at the time, and, more especially, the matter referred to in the plaintiff's petition."

The controversy concerning the calves grew out of the following facts: In the year 1878, Petty, the defendant in error, who was in the employ of Forbes, the plaintiff in error, caring for certain cattle on the range in the then territory of Dakota, made a contract to purchase from the latter twenty-five cows. Although said agreement was never consummated by payment or change of possession of the cows, Petty, in the spring of 1880, claiming to own them, branded their offspring, the calves in controversy, as his own. In the year 1881, there being other contentions between the parties, it was mutually agreed to submit certain matters, to arbitration. The allegation of the answer that all matters of difference were thus submitted is unsupported by the proof, since it is clear that the question now at issue was not thus submitted. At the trial below the defendant was permitted by the court to prove that at the time of the arbitration the plaintiff's claim on account of the calves was settled by an agreement of the parties, in substance, that the former should relinquish all claim to the cows and calves, and that the latter should take them as they then were on the range, gather them himself, and brand them with his own brand. Objection was made to the introduction of this proof, which was overruled, and the ruling of the court thereon presents the first question for our consideration.

It is claimed by the plaintiff that the only question at

issue is that of the arbitration. On the other hand it is contended by the defendant that he is not confined to the arbitration alleged, but that his answer presents as well the issue of settlement, as a distinct and separate defense in no way depending upon the question of arbitration. We agree with counsel for the defendant that the proof of settlement was rightly admitted under the issues. When tested by an objection in the nature of a demurrer it is clear that both defenses are sufficiently alleged in the answer. Had it been assailed by a motion for a more specific statement of the matters alleged therein, such objection would have been well taken. Where a pleading is sufficient in substance, but wanting in form or completeness, the remedy is by motion, and not by demurrer. This rule is too well settled to require the citation of authority.

It is argued that the verdict is against the clear weight of evidence, and that the motion for a new trial should have been sustained on that ground. The evidence is certainly conflicting. The defendant testifies substantially as above stated, and is corroborated by Fowler, an apparently disinterested witness, who says, referring to the alleged settlement: "And among other things, the cows or heifers that Petty was supposed to have agreed upon to purchase in 1879 or 1880, and their offspring, was determined not by the arbitrators, however, as Petty and Forbes, at the time of the arbitration, made an agreement that the cows and calves were not to go into the arbitration, but were to be turned back to Forbes on the ranch by Petty; Forbes having authority from Petty to counter-brand the calves that had been branded the year previous." They are, however, contradicted by the plaintiff, who is corroborated by the following letter:

"HOT SPRINGS, April 7, '83.

"*Mr. Forbes*—DEAR SIR: I have an offer to sell my cattle, and before I do so, and in order to have no hard feelings, I now write to you to know what you will take

for those eighteen head of two-year-olds in my brand, from the fact that if I sell it will be by book tally, and it will save lots of trouble for me to pay for those cattle. Please write soon, and oblige.

"Yours truly, E. PETTY."

This letter is explained by the defendant as follows: In the spring of 1883 he was about concluding a sale of his cattle as they ran on the range to the proprietor of a neighboring ranch when the manager thereof, who had heard of the controversy growing out of the branding of the calves above referred to, made the offer, otherwise satisfactory, conditioned that the defendant would "clear the matter up." He then, to use his own language, "wrote Mr. Forbes, expecting to pay him a certain amount of blood money to settle the difficulty,—to hush the matter up." This explanation, while not entirely convincing, evidently satisfied the jury, and is not so radically inconsistent with the theory of the defense as to warrant interference by us.

There are other assignments of error, but they merely present different phases of the two questions we have considered. We find no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

EZRA E. HOWARD ET AL. V. EZRA BROWN ET AL.

FILED OCTOBER 17, 1893. No. 4688.

1. **Public Highways: ESTABLISHMENT: CONSTRUCTION OF STATUTE.** The provision of section 7, chapter 78, Compiled Statutes, that roads must not be established through any burying ground, or any garden, orchard, or ornamental ground, etc., without the consent of the owner, applies only to roads established under the general provisions of the road law.

2. ———: ESTABLISHMENT ON SECTION LINES: POWER OF COUNTY BOARDS. The establishment of section-line roads is governed by the special provisions of section 46 of the road law, by which all section lines are declared to be public roads, and may be opened as such whenever, in the judgment of the county boards, the public interest demands.

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

S. W. Christy, for plaintiffs in error, cited: *Smart v. Hart*, 44 N. W. Rep. [Wis.], 514; *Clark v. Phelps*, 4 Cow. [N. Y.], 202; *People v. Judges of Dutchess County*, 23 Wend. [N. Y.], 360; *Harrington v. People*, 6 Barb. [N. Y.], 612; *Tompkins v. Hyatt*, 28 N. Y., 355.

Wm. M. Clark and *M. S. Edgington, contra.*

POST, J.

This was a proceeding in equity in the district court of Clay county, by the plaintiffs in error, to enjoin the defendants in error, the county clerk and members of the board of supervisors, from opening a road along the section line between sections 26 and 35 in township 5, range 6, adjoining the city of Edgar, in said county. The ground upon which the relief is sought is that the plaintiffs are the owners in fee-simple of the west half of the northeast quarter of section 35, and the southwest quarter of the southeast quarter of section 26; that they have a valuable orchard of apple trees on the line between the two sections, which would be destroyed by the opening of the threatened road along said line; also that it would necessitate the digging of a new well and the removal of their tanks, windmill, feed yards, and sheds, to their great damage and inconvenience. A demurrer to the petition was sustained by the district court and the action dismissed, whereupon the cause was brought into this court by petition in error.

The only question which calls for notice is whether the petition states a cause of action. The reliance of plaintiffs in error is upon the provisions of section 7, chapter 78, Compiled Statutes, entitled "Roads," as follows: "The commissioner is not confined to the precise matter of the petition, but may inquire and determine whether that or any road in the vicinity, answering the same purpose and in substance the same, be required; but such road must not be established through any burying ground which is exempt from execution, nor through any garden, orchard, or ornamental ground contiguous to any dwelling house, so as to cause the removal of any building without the consent of the owner."

From a careful reading of the chapter above referred to, it is evident that sections 4 to 35 thereof, inclusive of both sections, have reference to the ordinary proceeding for the establishment of roads in which a petition and notice are essential in order to give the county board jurisdiction to act, and are not applicable to section-line roads, which are governed by the special provision contained in section 46, as will be observed hereafter. Sections 6, 7, 8, and 9 have especial reference to the appointment, powers, and duties of the commissioners to examine the route proposed by the petition, and determine the expediency of the road as well as the location thereof. The provision of section 7, that "such road must not be established through any orchard * * * so as to cause the removal of any building," etc., was designed as a limitation upon the discretion of the county board in cases of roads established by petition.

Provision is made for public roads on all section lines by section 46 as follows: "The section lines are hereby declared to be public roads in each county in this state, and 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; *Provided*, That any damages claimed

by reason of the opening of any such road shall be appraised and allowed as nearly as practicable in manner hereinbefore provided; *And provided further*, That the county board before opening such section-line road shall direct the county surveyor to perpetuate the existing government corners along such line by planting monuments of some durable material with suitable witnesses, whenever practicable, and make a record of the same." The effect of this provision is to make section lines public highways, to be opened for use whenever, in the opinion of the county board, the public good requires. Here there is no limitation upon the discretion of the board, and no such exception with respect to gardens, orchards, or buildings as is found in section 7.

The special provision of the section last quoted must prevail rather than the general provisions of the road law. Such is the well settled rule in this state. (See *Albertson v. State*, 9 Neb., 430.) One who, since the adoption of the present road law, erects buildings or plants trees on a section line does so at his peril, and with the knowledge that the county, which is but the agent of the state in the exercise of the sovereign power of eminent domain, may, whenever the interest of the public demands, compel their removal. It appears from the petition that the county board, in the exercise of their discretion, have, in due form, adjudged that the necessities and convenience of the public will be best served by the opening of a highway along this particular section line. That tribunal is by law clothed with exclusive jurisdiction of the subject, and its judgments and orders are final and conclusive, at least when assailed in a collateral proceeding. The judgment of the district court is right and must be

AFFIRMED.

THE other judges concur.

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4. Where land is especially adapted to the purposes of grazing and hay-growing, and one claiming ownership thereto has every year for a period of more than ten years cut the grass, and harvested and disposed of the hay from such portions of the land as its character permitted, so using the land in connection with, and in the same manner as he used other tracts owned or claimed by him and adjacent thereto, there being at different periods fences or plowed strips not entirely enclosing the whole, but of such a character as to indicate a connection between the tracts, and where the person so using the land paid all the taxes thereon, and at intervals warned off trespassers and distrained cattle thereon found grazing, *held*, that such acts constituted actual, continuous, notorious, and adverse possession for the statutory period. *Id.*

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Amendments. SEE ATTACHMENT, 2. ELECTIONS, 4. IMPEACHMENT, 7. PLEADING, 2. REVIEW, 25.

Animals.

1. Under the herd law, ch. 2, art. 3, Comp. Stats., a person having the custody of cattle for the purpose of depasturing the same, although without compensation from the general owner, is liable for damage done by them upon the cultivated land of another. *Laflin v. Svoboda*..... 368

Animals—*concluded.*

2. In such case the person injured is not confined to the lien provided by statute, but may maintain an action for damages. *Id.*
3. Where cattle trespass upon the unenclosed land of another party and destroy the hay stacked thereon, the owner may recover the value of the property destroyed, but will have no lien on the stock which destroyed the same. *Brown v. Sylvester* 870
4. Where there is no actual enclosure and it is sought to bring lands within the provisions of sec. 8, ch. 2, art. 3, Comp. Stats., there must be a strip plowed around such land at least one rod in width. The plowing of two furrows a rod from each other is not a compliance with the statute. *Id.*

Appeal. See COUNTIES, 1. LIQUORS, 4, 5. REVIEW.

1. In a civil action in the county court an appeal is to be taken in the same manner as if before a justice of the peace. *McKinley v. Chapman* 378
2. A party appealing from a judgment of a justice of the peace to the district court may dismiss his appeal without the consent of the appellee, at any time before the cause is submitted to the court or jury. *Eden Musee Co. v. Yohe*, 452
3. On appeal from the county court to the district court the issues to be tried should be confined to those tried in the county court, except that new matter arising in the interim may be pleaded in the district court. *Spurgin v. Thompson*.. 43
4. The supreme court is without jurisdiction to try a case on appeal where the transcript therefor is not filed within six months after the rendition of the judgment sought to be appealed from. *Withnell v. City of Omaha*..... 622
5. An undertaking for an appeal delivered to the county judge at 9:30 P. M. of the tenth day after the judgment is rendered is within ten days, and the appeal is taken within the time fixed by the statute. *McKinley v. Chapman* 378
6. It is not the practice, where cases are brought into the supreme court by appeal, to receive evidence offered by the appellant and rejected by the district court. If evidence material to the issues in an equitable proceeding is rejected by the district court the remedy therefor is by petition in error. *Phœnix Mutual Life Ins. Co. v. Brown*..... 705
7. A defeated party to an action in the county court, who

Appeal—*concluded.*

promptly orders a transcript of the proceedings to be prepared for the purpose of appealing the case, will not be denied the right of appeal because the county judge fails to prepare the transcript within thirty days after the rendition of judgment. *Omaha Coal, Coke & Lime Co. v. Fay*..... 68

8. Where a transcript for the purpose of appealing a case to the district court is filed after the statutory period has elapsed, the appellee by filing pleadings and contesting the case on its merits waives his right to object to the delay, even though this action be taken after the overruling of a motion by him made challenging the validity of the appeal. *Id.*

Appearance. See GARNISHMENT, 4.

Appropriation Bills. See STATUTES, 9.

Appropriations. See IMPEACHMENT. LEGISLATIVE APPROPRIATIONS.

Arbitration. See ACCORD AND SATISFACTION.

Articles of Impeachment. See IMPEACHMENT.

Assessments. See METROPOLITAN CITIES, 1.

Assets. See SET-OFF AND COUNTER-CLAIM, 4. TRUSTS.

Assignments. See MERGER. RAILROAD COMPANIES, 3.

Assignments for Benefit of Creditors. See VOLUNTARY ASSIGNMENTS.

Assignments of Claims. See MECHANICS' LIENS, 12.

Assumpsit. See EVIDENCE, 7.

Attachment. See GARNISHMENT. REPLEVIN, 1. RES ADJUDICATA, 2. SHERIFFS AND CONSTABLES, 2.

1. An action can be maintained on a claim before it is due only in the exceptional cases enumerated in section 237 of the Code. *Caulfield v. Bittenger*..... 542

2. An affidavit for the issuance of an attachment may be amended by leave of the court, even after a motion to quash the proceedings is filed, because of that particular defect. *Clarke Banking Co. v. Wright*..... 382

3. Where a plaintiff in attachment claims the debt for which he sues was fraudulently contracted, and, to sustain such claim, offers in evidence a statement made by the debtor to his banker, and by the latter communicated to plaint-

Attachment—*concluded.*

iff, to render such communication admissible it must be identical with the statement made, or the substance of it, and not the banker's conclusion deduced therefrom. *Kilpatrick v. McPheely* 800

4. Under section 946 of the Code, where several attachments are levied upon the same property, or the same persons are made garnishees in several cases, the justice issuing the order first served may, upon motion of any of the plaintiffs, determine the amounts and priorities of the several attachments; and he has authority to do this as well when the validity of some of the attachments or garnishments is disputed as when their validity is unquestioned. *State v. Duncan* 631

Attorney and Client. See PLEDGES, 2. REVIEW, 28.

Extreme caution should be observed by an attorney in dealing in any manner with property in which his clients are interested. *Raben v. First Nat. Bank of Aurora* 367

Attorney General. See IMPEACHMENT.

Attorneys' Fees. See COSTS, 1.

Auditor of Public Accounts. See LEGISLATIVE APPROPRIATIONS.

Australian Ballot Law. See ELECTIONS.

Ballots. See ELECTIONS.

Banks and Banking. See EVIDENCE, 6. NEGOTIABLE INSTRUMENTS, 5. PARTIES. RECEIVERS. SET-OFF AND COUNTER-CLAIM, 4. TRUSTS

1. A banking corporation, organized under the laws of Nebraska, has no power to become a stockholder in an insurance company. *Bank of Commerce v. Hart* 197

2. The cashier of a banking corporation has, by virtue of his office, no authority to accept, in payment and discharge of a debt due the bank, certificates of the capital stock of an insurance company. *Id.*

3. The acts of the directory of a banking corporation, in dealing with and investing the funds of the stockholders, to bind the bank, must be confined to the expressed purposes for which the bank was incorporated, and to purposes necessarily incidental thereto in the successful conduct of its legitimate business. *Id.*

4. Saturday, May 31, 1890, about the close of banking hours, a person indorsed in blank and deposited to his credit in a bank in Wymore certain checks drawn to his order on a bank in Cortland. Wymore and Cortland are twenty-

Banks and Banking—*concluded.*

seven miles apart, but connected by telegraph, telephone, and railroad lines. A mail left Wymore at 6 P. M. daily, arriving at Cortland at 9 P. M. The Wymore bank made no inquiry of the Cortland bank as to whether the checks were good, nor did it at any time advise the Cortland bank that it held the checks, but on the day of their receipt mailed said checks to a bank in St. Joseph, which bank sent them by mail to a bank in Omaha, and this latter bank sent them by mail to the bank in Cortland, at which they arrived on June 5, and were then protested for non-payment. *Held*, That the Wymore bank did not present the checks for payment to the Cortland bank in a reasonable time, and that the indorser was thereby discharged. *First Nat. Bank of Wymore v. Miller* 500

Bastardy.

The prosecution of the father of a bastard child, under ch. 37, Comp. Stats., does not abate by the death of the child pending the prosecution. *Hanisky v. Kennedy*..... 618

Bias. See VENUE.

Bill of Exceptions. See REVIEW, 14, 22.

1. The evidence embraced in a stipulation of facts between parties to a case tried in the district court must be embodied in the bill of exceptions. Otherwise it will not be examined by the supreme court. *Perry v. State* 623
2. Upon the consideration of a motion for a new trial where there were used several affidavits identified by the clerk of the court, and counsel for the respective parties having stipulated that the affidavits contained all the evidence offered on either side on said motion, and counsel, upon whom was served the proposed bill of exceptions, having returned the same without suggestion or amendment, and the said clerk having settled the proposed bill of exceptions, a motion to strike out said affidavits because not shown to have been used on the determination of said motion, or identified in the bill of exceptions, must be overruled. *Wheeler v. Olson*..... 562

Bills. See STATUTES, 8.

Bills of Exchange. See CHECKS, 2.

Board of Public Lands and Buildings. See IMPEACHMENT. STATUTES, 6.

The functions of the board of public lands and buildings, in passing upon claims against the state, and in the selection of subordinate officers and agents authorized by law, are in their nature *quasi*-judicial. *State v. Hastings*..... 97

Board of Public Works. See METROPOLITAN CITIES.

Bona Fide Purchasers. See CHATTEL MORTGAGES, 4. CORPORATIONS, 1. EQUITY. HOMESTEADS, 1. VENDOR AND VENDEE, 3.

Bonds. See APPEAL, 5. RAILROAD COMPANIES, 1, 2, 3. RES ADJUDICATA, 1.

Boundaries.

1. Where a government corner between two adjoining land-owners has been obliterated, the exact location of the corner may be determined by the jury from the evidence in an action of ejectment, and it is unnecessary first to establish the corner by an action in equity. *Kittell v. Jenssen*... 685

2. The original government corner had been tampered with, and there were three points alleged to be the true corner. There being no one to identify positively any point as the correct corner established by the government, *held*, that surveys from known government corners both north and south and east and west of the corner in dispute, by which it was located on a line with other corners on both of said lines, and each land-owner would thereby be given the full amount of land called for by his patent, would be preferred to a survey which was not begun at a known government corner and lacked many of the elements of certainty, and which gave one of the land-owners much more than he was entitled to under his patent, and the other less. *Woods v. West*..... 400

Breach of Contract. See CONTRACTS, 7. WATER COMPANIES.

Breach of Warranty. See DAMAGES, 2, 3. SALES, 6, 7, 9.

Bridge Contracts. See COUNTIES, 2.

Briefs. See REVIEW, 26.

Builders' Bonds. See RES ADJUDICATA, 1.

Burden of Proof. See CORPORATIONS, 3. DURESS, 1. REVIEW, 27.

Carriers. See RAILROAD COMPANIES, 4. TELEGRAPH COMPANIES.

Cashiers. See BANKS AND BANKING, 2.

Cattle. See ANIMALS.

Certificates. See ELECTIONS, 6.

Challenge. See JURY, 2-4.

Change of Venue. See VENUE.

Chattel Mortgages. See FRAUDULENT CONVEYANCES, 2–7. REPLEVIN, 1. REVIEW, 27. VOLUNTARY ASSIGNMENTS, 1.

1. Instructions on question of presumption of fraud in a chattel mortgage arising from the fact that there was no change of possession of the chattels, set out in the opinion, *held*, to fairly state the law. *Houck v. Heinzman*..... 466
2. The evidence of good faith to overcome presumption of fraud, arising from the fact of continued possession by the mortgagor of property conveyed by a son to his mother, discussed in the opinion, *held* sufficient to support a verdict in favor of the validity of the mortgage. *Id*..... 467
3. Whether the description of property in a chattel mortgage and the other inquiries which the mortgage itself suggests are sufficient to enable third persons to identify the mortgaged property is a question of fact for the jury. *Iowa Savings Bank v. Dunning*..... 322
4. A description of property covered by a chattel mortgage which will not enable third persons, aided by inquiries which the mortgage itself suggests, to identify the mortgaged property is not constructive notice to good-faith purchasers thereof for a valuable consideration. *Id.*

Chattels. See REPLEVIN, 2.

Checks. See BANKS AND BANKING, 4. NEGOTIABLE INSTRUMENTS, 2. STATUTE OF LIMITATIONS, 1.

1. An ordinary check is not designed for circulation, but for immediate presentment, and to charge an indorser must be presented with all due dispatch and diligence consistent with the transaction of other commercial business. *First Nat. Bank of Wymore v. Miller*..... 500
2. Greater diligence is required in presenting ordinary checks for payment than in presenting bills of exchange. Whether an ordinary check has been presented for payment by the indorsee thereof in such a reasonable time as to hold the indorser must be determined from the facts and circumstances of each particular case. *Id.*

Children. See PARENT AND CHILD.

Cities. See METROPOLITAN CITIES. MUNICIPAL CORPORATIONS. VILLAGES.

Citizenship. See INDIANS.

Claims. See IMPEACHMENT.

Code. See COURTS, 3.

Collateral Attack. See JUDGMENTS, 5, 10.

Collateral Security. See MORTGAGES, 5. PLEDGES.

Collusion. See CONTRACTS, 2.

Color of Title. See ADVERSE POSSESSION, 2.

Commission. See USURY, 2.

Commission Merchants. See GAMBLING CONTRACTS. USURY, 3.

Commissioner General. See LEGISLATIVE APPROPRIATIONS, 1.

Commissioner of Public Lands and Buildings. See IMPEACHMENT.

Commodities. See SALES, 5.

Common Carriers. See RAILROAD COMPANIES. TELEGRAPH COMPANIES.

Condonation. See DIVORCE, 1.

Confessions. See CRIMINAL LAW, 1, 4.

Conflict of Laws. See RES ADJUDICATA, 2.

Consequential Damages. See DAMAGES, 2, 3. SALES, 7, 9.

Consideration. See CONTRACTS, 5. EQUITY. FRAUDULENT CONVEYANCES, 3.

Constitutional Law. See CORPORATIONS, 2, 4. IMPEACHMENT. INDIANS. STATUTES, 1, 2, 7.

1. Chapter 16, Session Laws of 1893, providing for supreme court commissioners, is not in conflict with the constitution. *In re Supreme Court Commissioners*..... 655
2. The power of impeachment conferred by the constitution upon the legislature extends only to civil officers of the state, and this power cannot be exercised after the person has gone out of office. *State v. Hill*..... 80
3. The provision of the statute authorizing suit to be maintained against the party legally bound for the support of an insane person, by the county which has paid for the care, board, and treatment of such insane person at the insane hospital of this state, upon the finding of such insanity by the commissioners of said county, is in conflict with sec. 1, art. 9, of the constitution of Nebraska, and is, therefore, inoperative and void. *Baldwin v. Douglas County*..... 283

Construction. See ELECTIONS, 2.

Constructive Notice. See CHATTEL MORTGAGES, 4.

Constructive Service. See COURTS, 4. DIVORCE, 5.

Contests. See ELECTIONS, 4.

Continuance. See NEW TRIAL, 2.

Contractors. See RES ADJUDICATA, 1.

Contracts. See ACTIONS, 1. GAMBLING CONTRACTS. MECHANICS' LIENS, 13. MORTGAGES, 2. PRINCIPAL AND SURETY, 2. REPLEVIN, 2. SALES, 5, 7, 9. STATUTE OF FRAUDS, 3. USURY, 3. VENDOR AND VENDEE, 2. WATER COMPANIES.

1. Courts will refuse to enforce contracts which are manifestly contrary to public policy or sound morals. *Wilde v. Wilde*, 891
2. A contract intended to facilitate the procuring of a divorce at the suit of either of the parties thereto is void. *Id.*
3. Where a contract is capable of two constructions, the one making it valid and the other void, the law will adopt the construction that upholds the contract. *Morrissey v. Broomal*..... 784
4. Ordinarily where the right to terminate a contract on notice is reserved in the instrument itself, without fraud or mistake, and with the actual knowledge and consent of all the parties thereto, such reservation is valid, and the exercise thereof will be enforced by the courts, if not contrary to equity and good conscience. *Id*..... 766
5. A telegraph company had printed on its message blanks: "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message." *Held*, An attempt on the part of the telegraph company to limit its liability; that this clause, if regarded as a contract, was without consideration, unjust, unreasonable, and violative of sec. 12, ch. 89*a*, Comp. Stats. *Pacific Telegraph Co. v. Underwood*..... 315
6. Where there is nothing on the face of a contract to suggest that it is founded upon an unlawful consideration, the illegality thereof must, as a rule, be pleaded when relied upon as a defense. But if on the trial it is apparent from evidence material to the issues that the cause of action or defense rests upon an agreement *contra bonos mores* the court will of its own motion refuse to enforce such immoral agreement, even should both parties assent to its enforcement. *Wilde v. Wilde*..... 891

Contracts—*concluded.*

7. A person held a mortgage upon certain lots upon which the owner desired to negotiate a loan for the purpose of erecting a building thereon. The contractors promised in writing if the mortgagee would release his mortgage they would pay him the amount thereof out of payments made to them for material as the building progressed. *Held*, That a release by the mortgagee was a sufficient consideration for the promise of the contractors. *Henry & Coatsworth Co. v. Fisherdick*..... 207

Contributory Negligence. See NEGLIGENCE, 4.

Conventions. See ELECTIONS, 6.

Conversion. EVIDENCE, 5. TROVER AND CONVERSION.

Copies. See EVIDENCE, 4.

Coroners.

1. A coroner can lawfully hold an inquest upon the dead bodies of only such persons as are supposed to have died by unlawful means. *Lancaster County v. Holyoke*..... 328
2. Without the impaneling of a jury as provided by the statute, a coroner is not entitled to any fees for inspection and examination of the body of a person found dead in his county. *Id.*
3. The word "viewing," as found in sec. 7, ch. 28, Comp. Stats., means something more than looking, seeing, beholding. It means inspection and investigation, an inquiry by a coroner and a jury. *Id.*

Corporate Franchises. See QUO WARRANTO. STREET RAILWAYS.

Corporations. See BANKS AND BANKING. EVIDENCE, 6. NEGOTIABLE INSTRUMENTS, 5.

1. An officer of a corporation for pecuniary profit, who in good faith purchased at judicial sale the property of the corporation, will be protected in such purchase, provided he shows affirmatively that he has, as indicated, paid the full value of the property of which he so became the purchaser. *Horbach v. Marsh*..... 22
2. Under sec. 4, art. 11, of the constitution of Nebraska the original subscribers for stock of a corporation or joint stock association are liable to the creditors of such corporation or association for the amount unpaid on said subscription, and such liability shall follow the stock without releasing such subscriber. *Commercial Nat. Bank of Omaha v. Gibson*..... 750

Corporations—*concluded.*

3. A stockholder of a corporation who seeks as such to impress with an express trust the property of such corporation regularly sold at judicial sale to an officer of such corporation should commence proceedings within a reasonable time after such sale, and must, when such proceedings are unreasonably delayed, establish by a preponderance of the evidence the facts upon which such trust is based. *Horbach v. Marsh*..... 22

4. The constitutional requirements, that the exact amount justly due shall be first ascertained, and that the corporate property shall have been exhausted before enforcing individual liability for unpaid subscription for stock, are sufficiently met by the rendition of a judgment and the return of an execution *nulla bona* against the corporation whose stockholders are sought to be held liable to its creditors. *Commercial Nat. Bank of Omaha v. Gibson*..... 750

Co-Servant. See MASTER AND SERVANT.

Costs.

1. Under the valued policy insurance act of 1889, an attorney's fee to be taxed as costs can only be allowed upon proof of what constitutes a reasonable fee. The petition in an action upon an insurance policy should contain a demand for such fee, and the question should be presented to the trial court. *German Ins. Co. v. Eddy*..... 461

2. A defendant in a criminal case confined in jail for the nonpayment of costs assessed against him, and who is unable to pay the same, is not entitled to be discharged from further imprisonment for such costs, under section 528 of the Criminal Code, where it appears he has not been imprisoned at least one day for each three dollars of the costs. *In re Dobson*..... 449

3. Where a person is convicted of a criminal offense it is the duty of the court in which the conviction was had to render judgment against the prisoner for the costs of prosecution, and the court may make it a part of the sentence that the party be imprisoned in jail until the costs are paid, or secured to be paid, or he is otherwise legally discharged. *Id.*

Council. See METROPOLITAN CITIES.

Counties. See CONSTITUTIONAL LAW, 3. CORONERS. HIGHWAYS. RAILROAD COMPANIES, 2, 3.

1. The county board, in the examination of claims against the county, acts judicially, and its judgments or orders in

Counties—*concluded.*

such cases are conclusive unless reversed or set aside on appeal. *State v. Churchill*..... 702

2. Where the cost for a county bridge exceeds $100, contracts for the erection of the same must be let to the lowest competent bidder after due advertisement stating the general character of the work. *State v. Cunningham*..... 687

County Boards. See COUNTIES. HIGHWAYS.

County Courts. See APPEAL, 1, 5. JUDGMENTS, 7–10.

County Judge.

By neglecting to prepare transcript when ordered, cannot thereby defeat appeal. *Omaha Coal, Coke & Lime Co. v. Fay*..... 68

Court of Impeachment. See IMPEACHMENT.

Courts. See LIQUORS, 1. OFFICE AND OFFICERS. STATUTES, 4. SUPREME COURT. VILLAGE BOARDS.

1. Where courts of equity have assumed jurisdiction of a particular class of cases their jurisdiction in such cases will continue notwithstanding, in the development of legal means, redress becomes attainable in courts of law. *Smithson v. Smithson*..... 535

2. State courts have jurisdiction in actions brought to recover the penalty provided by the acts of congress for the charging and taking by national banks, for the loan of money, a greater rate of interest than allowed by the laws of the state of their domicile. *Schuyler Nat. Bank v. Bollong* ... 620

3. It is not the object of the Code to abolish existing remedies in cases where no provision is made therein for the prosecution of actions. Cases involving substantial rights, which are clearly outside the provisions of the Code, may be prosecuted in accordance with the practice previously recognized in courts of common law and equity. *Smithson v. Smithson*..... 535

4. A person procured a divorce from his wife by decree of the district court of Fillmore county in 1878 upon constructive service. In 1889 the latter commenced an action in the district court of Douglas county to set aside and annul the said decree on the ground that it was procured by means of perjury, and for a divorce on the ground of desertion and failure to support. *Held*, That the cause of action is primarily to vacate the decree of the district court of Fillmore county, and that the district court of Douglas county does not have jurisdiction thereof. *Id*..... 536

Criminal Law. See BILL OF EXCEPTIONS, 1. COSTS, 2, 3. HOMICIDE.

1. Any circumstance tending to establish the prisoner's guilt may be proved, although it was brought to light by an admission of the prisoner, inadmissible of itself as having been obtained by improper influences. *Taylor v. State*..... 788
2. Assignments of error involving rulings on the admission of testimony cannot be considered in the supreme court unless the rulings and testimony have been preserved by a bill of exceptions. *Vincent v. State*..... 672
3. Before a person can be lawfully convicted of being an inmate of a house of prostitution there must be introduced in evidence a valid ordinance forbidding persons from being inmates of such houses. *Perry v. State*..... 625
4. A confession receivable in evidence, only after proof that it was made voluntarily, is restricted to an acknowledgment of the defendant's guilt, and the word does not apply to a statement made by the defendant of facts which tend to establish his guilt. *Taylor v. State*..... 788
5. Only such intimate acquaintances of a person accused of crimes as have seen him almost daily for several months preceding the date upon which the alleged crime occurred are competent as non-expert witnesses to testify as to the sanity or insanity of the accused. *Shults v. State*..... 481
6. Such testimony, however, must be strictly limited to such sanity or insanity, and confined to those occasions upon which the witness testifies to having observed the conduct and appearances of the individual whose sanity is the subject of inquiry. *Id*..... 482
7. It is reversible error to instruct the jury in a criminal case that "evidence of good character is entitled to great weight when the evidence against the accused is weak or doubtful, but is entitled to very little weight when the proof is strong," as it invades the province of the jury. *Vincent v. State*..... 672
8. Grounds for a new trial based upon the inability of a court reporter to transcribe his notes of testimony should be presented to the trial court. The jurisdiction of the supreme court to grant a new trial in a case tried in the district court is appellate only. *Id*..... 674
9. Where a person has been convicted at the same term of court of several distinct offenses, each punishable by imprisonment in the penitentiary, whether charged in separate informations or in separate counts of the same information, the court may impose a separate sentence for each

Criminal Law—*concluded.*

offense of which the prisoner has been found guilty. *In re Walsh*..... 454

10. In such case the judgment should not fix the day on which each successive term of imprisonment should begin, but should simply direct that each successive term should commence at the expiration of the one imposed by the previous sentence. *Id.*

11. If the same offense is charged in different counts of an information, and there is a conviction on each count, but a single sentence should be pronounced upon all the counts for the one entire offense. *Id.*

12. To an information containing two counts, one charging the defendant with the forgery of a certain bank check, and the other with the uttering of the same instrument, a general plea of guilty was entered. Thereupon the court sentenced him upon the first count to imprisonment in the penitentiary for the period of one year from the 9th day of May, 1892, and upon the other count a like imprisonment was imposed for the term of one year from May 9, 1893. By good conduct the prisoner saved two months of his first sentence, and having served out the term under such sentence, he applied for his release on *habeas corpus*. *Held*, That the second sentence was illegal and void, and that he was entitled to be discharged from further imprisonment. *Id*..... 455

Criminal Negligence. See RAILROAD COMPANIES, 4.

Crops. See LANDLORD AND TENANT.

Cultivated Lands. See ANIMALS, 4.

Custody of Infants. See PARENT AND CHILD.

Custom and Usage.

No custom or usage among bankers as to the manner of presenting ordinary checks for payment will relieve them from the legal duty of presenting such checks for payment within a reasonable time. *First Nat. Bank of Wymore v. Miller*..... 501

Damages. See ANIMALS, 1–3. DEATH BY WRONGFUL ACT. EVIDENCE, 5. NEGLIGENCE, 2. NEGOTIABLE INSTRUMENTS, 2. REPLEVIN, 2. SALES, 7, 9. WATER COMPANIES.

1. In an action for personal injuries, mental suffering and anxiety caused by a physical injury are elements of damage whether or not the injury was due to the willful act of the defendant. *American Water-Works Co. v. Dougherty*, 373

Damages—*concluded.*

2. Consequential damages from breach of warranty in the sale of chattels cannot be recovered where the purchaser, by exercising ordinary prudence and judgment, could have avoided the consequences complained of. *Omaha Coal, Coke & Lime Co. v. Fay* 69

3. In an action for breach of warranty in a sale where only consequential damages are claimed they must be specially pleaded, and in such cases the jury should be confined by the instructions in assessing the amount of recovery to the consideration of such damages as are so pleaded. *Id.*

4. Where the law provides a definite measure of damages the court should instruct the jury specifically how the damages should be assessed, and an instruction stating a general principle in the admeasurement of damages, broader than is applicable to the particular case presented, and not qualified by other instructions, is erroneous. *Id.* 68

Death by Wrongful Act.

In an action by an administrator under the provisions of ch. 21, Comp. Stats., to recover damages for the death of his intestate, it is proper to prove the value of the services of the deceased, which the next of kin of the deceased could reasonably expect, but for the injury, would have been rendered in their behalf, the natural expectancy of life of the deceased just previous to receiving the injury which resulted in her death, having been duly shown. *Missouri P. R. Co. v. Baier* 235

Deceit. See FALSE REPRESENTATIONS.

Declarations. See EVIDENCE, 3, 6.

Decrees. See JUDGMENTS.

Deeds. See EJECTMENT, 1. EQUITY. INSANITY. MORTGAGES, 3.

Default. See JUDGMENTS, 6. NEGOTIABLE INSTRUMENTS, 3.

Defect of Parties. See PARTIES.

Defective Pleadings. See PLEADING, 1.

Delivery.

Unauthorized delivery of written contract does not bind obligee. *Henry & Coatsworth Co. v. Fisherdick* 209

Demurrer. See PLEADING, 1.

Descent. See STATUTES, 1, 7.

Description. See CHATTEL MORTGAGES, 3, 4.

Detainer. See FORCIBLE ENTRY AND DETAINER.

Diligence. See BANKS AND BANKING, 4.

Discovery of Fraud. See STATUTE OF LIMITATIONS, 2.

Discretion of Trial Court. See PLEADING, 2. TRIAL, 5.

Dismissal. See ELECTIONS, 4. JUDGMENTS, 6.

1. An appellant in the district court may dismiss his appeal from a justice court without the consent of the appellee any time before the cause is submitted to the court or jury. *Eden Musee Co. v. Yohe*..... 452
2. Where it does not appear from the transcript that a final order has been rendered, the petition in error in such a case will be dismissed. *Smith v. Johnson*..... 675

Disorderly Houses. See CRIMINAL LAW, 3. MUNICIPAL CORPORATIONS.

District Courts. See COURTS, 4.

Divorce. See CONTRACTS, 2. COURTS, 3, 4.

1. A wife may condone the cruelty of her husband, but the husband, to avail himself of such condonation, must establish the same by clear and satisfactory proofs. *McConnell v. McConnell*..... 58
2. When the evidence upon which a decree has been entered is conflicting, the finding of the district court will not be disturbed upon appeal if there is sufficient evidence upon which such decree may be fairly based. *Id*..... 57
3. In a proceeding for a divorce the statutes of Nebraska recognize the right of each party to reside in a county different from that in which the other resides. Whether or not they so reside, is a question of fact to be determined upon the evidence. *Id.*
4. In the allowance of alimony upon the awarding of a divorce much discretion is necessarily conferred upon the district court, and the supreme court will not interfere on the ground that the amount allowed is excessive unless there appears to have been a clear abuse of discretion. Allowance stated in opinion sustained. *Wilde v. Wilde*... 891
5. A petition alleged that the defendant therein, plaintiff's husband, in the year 1878, procured a decree of divorce in this state by means of fraud and perjured testimony. At said time and until recently the plaintiff resided in Pennsylvania; that the only service upon her was by publication in a local newspaper; and that she was not aware of the whereabouts of her husband or of said action or

Divorce—*concluded.*

decree until the time of the filing of her petition eleven years later. *Held*, To state a cause of action, since the remedy by petition for a new trial under the Code is inadequate, and that the court which allowed the decree may, in the exercise of its general equity powers, vacate it upon proper showing of fraud and imposition. *Smithson v. Smithson* 536

Duress.

1. Where a defendant pleads duress, the burden of proving it is upon him. *Horton v. Bloedorn* 670
2. In an action where it was alleged that a bill of sale and transfer were void because they had been obtained by threats of prosecution and imprisonment, it was *held* proper to instruct the jury that the threats, if any were in fact made, must have been of such a character as to naturally overcome the mind and will of a person of ordinary firmness and deprive him for the time being of the power of mind and will to resist the demand by the person making such threats; that the threatened injury, in order to amount to duress, must be immediate; that a mere threat to prosecute at some indefinite time in the future, particularly if the person who made the transfer, at the time, knew the other had no present means of carrying the threats into execution by actually taking him into custody, and he still had within his own knowledge the power and opportunity to make a defense to the threatened prosecution, would not avoid the contract on the ground of duress. *Id.* 670, 671

Ejectment. See BOUNDARIES.

1. Where one in possession of land under an executory contract for the purchase of the same conveys to a railroad company a strip of said land for its right of way, and afterwards by *mesne* assignments of the interests of the respective holders of said executory contract, the right to a deed thereunder vests in one who takes such an assignment, and a deed thereunder with full knowledge of the conveyance of said right of way and of the operation of a railroad line thereon for almost ten years, with full acquiescence of all parties concerned, it was properly adjudged by the district court that ejectment would not lie in favor of the holder of such deed against said railroad company for the possession of said right of way strip. *Stratton v. Omaha & R. V. R. Co.* 477
2. In an action of ejectment to recover fourteen feet of land between lot 2 and Douglas street, the defendant's pleadings

Ejectment—*concluded.*

and proof showed that he had bought said lot from plaintiff, but that the description in the deed did not include said fourteen feet; that at the time of the purchase Douglas street was not opened in front of said lot; that said street was eighty feet wide where it had been opened; that it was subsequently opened in front of said lot at a width of sixty-six feet; that the understanding was that the property conveyed was to abut on said street. Plaintiff testified that he thought the street was to be eighty feet wide, and relied upon the description in the deed. *Held*, That a judgment for plaintiff could not be sustained. *Emery v. Johnson*..... 53

Elections. See INDIANS. RAILROAD COMPANIES, 1–3.

1. Innocent irregularities of election officers which are free from fraud and have not prevented a free and fair expression of the popular choice, will not vitiate the result of an election unless the legislature has expressly so declared. *State v. Norris*..... 300
2. Such a construction of an election law as would result in the disfranchisement of large bodies of voters, because of an error of some public officer, should not be adopted where the language of the statute is susceptible of any other. *Id.*
3. The indorsement of the name "Eagleham," he not being one of the election judges, upon a ballot, was within the inhibition of the statute forbidding the marking of a ballot by an elector, and vitiates said ballot. *Spurgin v. Thompson*..... 39
4. In an election contest the incumbent, having dismissed before judgment, a paragraph of his answer alleging the improper refusal to count certain ballots, cannot by an original amendment in the district court, over the contestant's objection, set up the same matters as to which he had entered a dismissal in the county court. *Id.*
5. While the statute requires that the cross which signifies the preference of the elector shall, in ink, be placed in a space designated for that purpose, a ballot upon which such preference is indicated by a cross made with a lead pencil, outside the space designated, but opposite the name of the choice of the elector, should be counted according to such manifest intention. *Id.*
6. An objection that the "convention," "primary meeting," "committee," or "electors" nominating a candidate for a public office had not the legal authority to make such

Elections—*concluded.*

nomination, must be made before the election and in the manner provided by sec. 136, ch. 26, of the Comp. Stats.; and if not so made, the legal authority to make such nomination, the certificate thereof being in apparent conformity with the provisions of the election law, will, in the absence of fraud, be conclusively presumed. *State v. Norris*..... 299

7. By the provisions of sec. 141, ch. 26, Comp. Stats., a candidate may make objection to the ballots as printed by the county clerk, and invoke the power of the courts to correct any error or omission in the name or description of his competitor; but if such candidate neglects to make such objection until after the election, he cannot then object to the result because of any error in the political designation of his competitor on said ballots, without a showing of fraud, and that the error, by deceiving the electors, prevented a full and fair expression of the voters' will. *Id.*..... 300

Eminent Domain. See EJECTMENT, 1.

Enactment of Laws. See STATUTES, 9.

Enrolling Clerk. See STATUTES, 9.

Equity. See CONTRACTS, 4. COURTS, 1. JUDGMENTS, 4, 11. JURY, 1. MORTGAGES, 1, 5. PLEDGES, 1.

The deed of an insane person may be avoided as against a grantee without notice of the grantor's insanity, and against an innocent purchaser from such immediate grantee. In the latter case it is not necessary to restore the consideration paid by such purchaser to the immediate grantee. *Dewey v. Allgire*..... 6

Error of Judgment. See IMPEACHMENT, 5, 11.

Error Proceedings. See REVIEW.

Estoppel. See RATIFICATION.

1. The owners of a tract of land, having platted it as an addition to an adjacent town, so as to show what appeared to be the prolongation of its streets, though not so designated, and having for the period of eight years acquiesced in the grading and public use of such apparent streets, the erection of sidewalks thereon, and the construction of costly improvements upon adjacent private property in such manner that if the existence of such streets is denied these improvements will be rendered comparatively useless; and having represented to one party, who, on the

Estoppel—*concluded.*

faith thereof, purchased a portion of said addition adjoining said apparent streets, that such portion would abut upon the same as streets, are estopped to deny the existence of the streets through such addition of which they have thus superinduced such belief, and the reliance thereon of the parties who have acted upon the faith of such appearances, acts, and representations. *Likes v. Kellogg*..... 259

2. In an action by contractors to foreclose mechanics' liens it appeared that a mortgagee had released his mortgage upon the premises in consideration of a promise by them to pay him the amount of his mortgage out of funds received by them for materials as the building progressed, which they failed to do. *Held*, That the contractors were estopped from claiming liens on the property prior to that of the mortgagee. *Henry & Coatsworth Co. v. Fisherdick*..... 207

Evidence. See ATTACHMENT, 3. BILL OF EXCEPTIONS, 1. BOUNDARIES. CRIMINAL LAW, 1–7. DEATH BY WRONGFUL ACT. FRAUDULENT CONVEYANCES, 8. HOMICIDE. INSANITY, 2. MECHANICS' LIENS, 10. MORTGAGES, 4. NEGLIGENCE, 2, 5. NEGOTIABLE INSTRUMENTS, 2. PRINCIPAL AND SURETY, 1. REVIEW, 10, 27. SHERIFFS AND CONSTABLES, 2. WITNESSES, 2, 3.

1. The courts of this state will not take judicial notice of the laws of other states, and, in the absence of proof, such laws will be presumed to be the same as our own. *Scroggin v. McClelland*..... 644

2. If it is within the discretion of this court to receive original evidence in appeal cases, the exercise of such a discretion can be justified only in extreme and exceptional cases, where the injured party is without fault and would be otherwise without a remedy. *Phœnix Mutual Life Ins. Co. v. Brown*..... 705

3. A declaration, to be a part of the *res gestæ*, need not necessarily be coincident in point of time with the main fact proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause. *Missouri P. R. Co. v. Baier*..... 235

4. A copy of letters of administration, when duly certified to be true and correct copies of such letters as appear from the original on file in the county court, wherein such let-

Evidence—*concluded.*

ters of administration were granted, is admissible in evidence with the same effect as the original. *Id.*

5. In an action for the value of property alleged to be wrongfully detained by the defendant, and for damages for such wrongful detention, it is reversible error for the plaintiff, over proper objections, to testify as a conclusion the amount of damages she has sustained independently of the value of such property. *Wellington v. Moore*..... 560

6. In a case where a bank sues the makers of a note indorsed to it by the secretary of the payee, a corporation, the declarations of officers of such corporation, made after the transfer to the bank, are inadmissible, for the purpose of showing want of authority in the secretary to make the transfer. *Commercial Nat. Bank of St. Paul v. Brill*..... 626

7. In an action to recover upon an account for flour sold, where the defendant pleads a breach of warranty, a person engaged in selling flour in the different markets of the state, and knows what flour is worth at defendant's place of business, may testify as to the quality of the flour sold. *Reed v. Davis Milling Co.*..... 394

8. In a trial where there is an issue as to whether a mortgage upon real estate was taken instead of other security or merely as additional security for a chattel mortgage, the value of the land is proper evidence to show the probable sufficiency of the real estate security for the debt due. *Cortelyou v. McCarthy*..... 746

9. An employe brought suit against the purchaser of his employer's business to recover wages due from his employer at the time of the sale, alleging that in part consideration for the purchase price the defendant agreed to pay employer's debt to the plaintiff; that the agreement was omitted from an instrument in the form of a receipt set out in the petition, and containing other terms of the transfer; and that the omission was to prevent a third person from learning of the promise. *Held*, That such a promise may be proved by parol where the promisee was induced to execute the writing on the faith of the oral promise. *Barnett v. Pratt*..... 349

Exceptions. See BILL OF EXCEPTIONS. TRIAL, 4.

Executions. See HOMESTEADS. SHERIFFS AND CONSTABLES, 1.

Executors and Administrators. See PARTNERSHIP, 2.

Exemptions. See SHERIFFS AND CONSTABLES, 1.

1. A judgment debtor's right to exemption under sections 522 and 523 of the Code of Civil Procedure is in no way dependent upon the mere intent with which the exemption is claimed, provided that in making his claim for exemption the execution debtor complies strictly with the statute conferring his right thereto. *Kriesel v. Eddy*..... 63

2. An affidavit filed as required by section 522 of the Code of Civil Procedure, which states that the affiant has certain enumerated property of the value therein detailed, which value in the aggregate is less than $500, and that the affiant has no other property, sufficiently complies with the requirements as to enumeration and value of said execution debtor's property to entitle him to the benefit of the said section of the statute. *Id.*

3. Where there were due a resident of Nebraska from a railroad company operating a line of railroad through Iowa and Nebraska, wages, which, in Nebraska, were exempt from execution and attachment, but which, by means of an assignment to a resident of Iowa, were procured, by the garnishment of said company in Iowa, to be applied to the payment of said claim, the assignor of such claim is liable to such debtor for the amount so appropriated. *O'Connor v. Walter*..... 267

Exhibits. See REVIEW, 14.

Ex-Officers. See IMPEACHMENT, 4.

Explosives. See NEGLIGENCE, 2.

Factors and Brokers. See USURY, 2.

False Representations.

To maintain an action for damages for false representations, the plaintiff must allege and prove what representation was made; that it was false; that plaintiff believed the representation to be true, relied on it, and was thereby injured. *Stetson v. Riggs*..... 797

Fees. See CORONERS, 2. COSTS.

Final Order.

An order denying a motion for a new trial is not final in such a sense as to constitute a final judgment, nor is a mere judgment for costs. *Smith v. Johnson*..... 675

Findings. See JUDGMENTS, 10. REFEREES. REVIEW, 16.

Fire Insurance. See INSURANCE.

Forcible Entry and Detainer. See SUMMONS.

1. An action for the forcible detention of real property may be maintained by one whose complete possession thereof has been ended by the wrongful entry of another, even though such entry was made under claim of a paramount title. *Brown v. Feagins*..... 256

2. A person who claims the paramount title to real property in the undisputed possession of another cannot, by surreptitiously obtaining possession thereof, place such former possessor at any disadvantage as to the assertion of his rights or the enforcement of his remedies in respect thereto. *Id.*

Foreclosure. See MORTGAGES. PLEDGES, 1. USURY, 2.

Foreclosure Sale. See PLEDGES, 2.

Foreign Courts. See GARNISHMENT, 2.

Foreign Laws. See RES ADJUDICATA, 2.

In absence of proof, will be presumed to be same as our own. *Scroggin v. McClelland*..... 644

Forfeiture. See INSURANCE, 2. REPLEVIN, 2.

Forgery.

An information which charges the forgery of an instrument and the fraudulent uttering of the same instrument by the same person charges but one crime, and in case of conviction but one penalty can be inflicted. *In re Walsh*, 454

Franchises. See QUO WARRANTO. RAILROAD COMPANIES, 3. STREET RAILWAYS.

Fraud. See CORPORATIONS, 3. DIVORCE, 5. FALSE REPRESENTATIONS. RAILROAD COMPANIES, 1. SET-OFF AND COUNTER-CLAIM, 4. TRUSTS. VILLAGES.

Frauds. See STATUTE OF FRAUDS.

Fraudulent Bills. See IMPEACHMENT.

Fraudulent Conveyances. See CHATTEL MORTGAGES, 1, 2. REPLEVIN, 1. VENDOR AND VENDEE, 3. VOLUNTARY ASSIGNMENTS, 2. WITNESSES, 3.

1. An intention to defraud cannot be inferred merely from the fact that a preference was given to a certain creditor. *Jones v. Loree*..... 816

2. A debtor in failing circumstances has a right to secure or pay in full a portion of his creditors to the exclusion of the others; and whether in so doing he is actuated by a fraudulent purpose, is a question of fact and not of law. *Kilpatrick v. McPheely*..... 800

Fraudulent Conveyances—*concluded.*

3. As to attachment creditors of the mortgagor, a pre-existing debt already due is a good consideration for a chattel mortgage and protects the mortgagee to the same extent as would a new consideration given at the time of making the mortgage. *Beagle v. Miller* 855
4. Where the facts relied upon to render a mortgage fraudulent as to creditors appear upon the face thereof or are undisputed, the question of fraud is one of law for the court. In all other cases it is a question of fact for the consideration of the jury. *Houck v. Heinzman* 463
5. A mortgage taken by a creditor to secure a pre-existing debt will not be held void merely because the creditor, when he took the mortgage, had notice of an intent upon the part of the mortgagor to hinder, delay, or defraud his creditors. In order to avoid such mortgage the creditor must have participated in such intent. *Jones v. Loree* 816
6. Where several chattel mortgages are executed simultaneously for the purpose of securing debts owing by the mortgagor to the mortgagees, the aggregate of such indebtedness not being unreasonably less than the value of the property mortgaged, such mortgages will not be held void merely because no one of such debts is in itself sufficient to justify so great a security. *Id.*
7. A mortgage will not be declared fraudulent as to creditors on the sole ground that among a large number of separate chattels included therein is a small amount of perishable property which it is impossible to preserve until the maturity of the mortgage debt, although such fact may be considered as evidence of fraud. The question of good faith in such case is one of fact and not of law. *Houck v. Heinzman* 463
8. Direct proof of fraud can seldom be obtained, nor is such evidence absolutely essential to establish the fraudulent purpose of the parties to a pretended transfer of property; but such fraudulent purpose may be shown by the conduct of the parties, the details af the transaction, and all the surrounding circumstances. The evidence discussed in the opinion *held* sufficient to sustain a finding that an alleged transfer of a stock of goods was made for the purpose of hindering, delaying, and defrauding creditors. *Sonnenschein v. Bartels* 592

Gambling Contracts.

1. An agreement to sell grain for future delivery is not, on its face, a gambling contract. *Morrissey v. Broomal* 784

Gambling Contracts—*concluded.*

2. An agreement by a grain dealer to pay commission merchants interest on all money deposited as margins in his behalf does not make a contract to sell grain for future delivery void on its face. *Id.*

3. A grain dealer sold for future delivery as much grain as he had on hand, and when the time arrived to make delivery, instead of shipping the grain he had in his cribs, he bought grain on the market to fill or offset the sales made, and resold the grain on hand for future delivery. *Held*, Not gambling transactions. *Id* 786

Gaming. See GAMBLING CONTRACTS.

Garnishment. See RES ADJUDICATA, 2.

1. In order to found proceedings in garnishment in aid of an attachment, it is necessary that the affidavit required by law be filed in the court issuing the process before notice is served upon the garnishee. *State v. Duncan*..... 631

2. An insurance company having sustained a loss in this state, which is adjusted and payable here, cannot be garnished in another state where it has neither property nor money of the debtor subject to the process of the court. *American Central Ins. Co. v. Hettler*..... 849

3. Garnishment is an attachment by means of which money or property of a debtor in the hands of a third party which cannot be levied upon may be subjected to the payment of the creditor's claim. To subject such property to attachment it must be within the jurisdiction of the court. *Id.*

4. In order that proceedings in garnishment may be pleaded against third parties, it must affirmatively appear from the record that the steps were taken necessary to confer jurisdiction, and a voluntary appearance and answer by the garnishee does not supply the place of such jurisdictional proceedings. *State v. Duncan*..... 631

Good Time. See CRIMINAL LAW, 12.

Good-Will. See PARTNERSHIP, 2, 3.

Government Corners. See BOUNDARIES.

Grain Dealers. See GAMBLING CONTRACTS. USURY, 3.

Habeas Corpus. See COSTS, 2. CRIMINAL LAW, 12. PARENT AND CHILD.

Harmless Error. See INSTRUCTIONS, 7. REVIEW, 25. TRIAL, 2.

Herd Law. See ANIMALS.

Highways. See ESTOPPEL, 1.

1. The establishment of section-line roads is governed by the special provisions of section 46 of the road law, by which all section lines are declared to be public roads and may be opened as such whenever in the judgment of the county boards the public interest demands. *Howard v. Brown* 903
2. The provision of sec. 7, ch. 78, Comp. Stats., that roads must not be established through any burying ground, or any garden, orchard, or ornamental ground, without the consent of the owner, applies only to roads established under the general provision of the road law. *Id.*..... 902

Homesteads.

1. The purchaser of title to real estate derived through a sheriff's sale thereof on ordinary execution, with actual knowledge that the same was at the time of sale the homestead of the execution debtor, and actually occupied by himself and family as such, is not an innocent purchaser. *Baumann v. Franse*..... 807
2. A sale of a debtor's homestead, at the time actually occupied by himself and family as such, by a sheriff on an ordinary execution, will not divest the debtor of his title to the homestead; nor will the sheriff's deed, made in pursuance of such sale and a confirmation thereof, convey any title to the purchaser of such homestead at such sale. *Id.*

Homicide. See CRIMINAL LAW, 4, 7.

The rule permitting a non-expert witness to testify as to the sanity or insanity of a party whose legal accountability is the sole matter in issue does not allow such witness to testify that at a certain date such party knew the difference between the right and wrong of an act at that time committed by him. *Shults v. State* 482

Husband and Wife. See WITNESSES, 3.

Identification. See CHATTEL MORTGAGES, 3.

Impeachment. See WITNESSES, 1, 2.

1. The constitution of this state confers the sole power of impeachment upon the senate and house of representatives in joint convention, and the legislature cannot delegate that power to others. *State v. Leese*..... 92
2. The provision of sec. 14, art. 3, of the constitution for the trial of impeachments before the supreme court was intended to insure a strictly judicial investigation in such cases according to judicial methods. *State v. Hastings* 96

Impeachment—*continued.*

3. Impeachment is, with respect to the production of evidence and *quantum* of proof required to warrant a conviction, essentially a criminal prosecution, hence the guilt of the accused must be established beyond a reasonable doubt. *Id.* 97

4. The power of impeachment conferred by the constitution upon the legislature extends only to civil officers of the state, and this power cannot be exercised after the person has gone out of office. Private citizens are not amenable to impeachment. The legislature has no authority to prefer articles of impeachment against ex-officials. *State v. Hill* 80

5. Where an act of official delinquency results from a mere error of judgment or omission of duty without the element of fraud, or where negligence is attributable to a misconception of duty rather than a willful disregard thereof, it is not impeachable, although it may be highly prejudicial to the interests of the state. *State v. Hastings* 97

6. It is not a misdemeanor in office to advance money appropriated by the legislature to a disbursing agent to enable him to procure material and labor for the erection of a public building of the state where such advancement is not prohibited by law, especially where the state is protected by a sufficient bond. *Id.* 98

7. Where the legislature has adopted articles of impeachment, which have been filed in the supreme court, no amendment thereof, in any matter of substance, can be made by the managers appointed by the legislature to prosecute the impeachment. The authority to adopt and present other or amended articles of impeachment or specifications rests alone with the joint convention of the two houses of the legislature. *State v. Leese* 92

8. Where in an impeachment proceeding the act of official delinquency consists in the violation of some positive provision of the constitution or statute which is denounced as a crime or misdemeanor, or where it is a mere neglect of duty willfully done with a corrupt intention, or where the negligence is so gross and the disregard of duty so flagrant as to warrant the inference that it was willful and corrupt, it is a misdemeanor in office within the meaning of sec. 5, art. 5, of the constitution. *State v. Hastings* 96

9. The board of public lands and buildings, out of funds appropriated for the building of a cell house, paid the expenses of the warden and chaplain of the penitentiary

Impeachment—*continued.*

as delegates to the National Prison Congress. While such expenditure was not within the scope of the authority of the board, and the respondents are liable to the state for the money so appropriated, they acted in good faith and from motives of humanity without the possibility of personal gain, and such facts are not sufficient in law to warrant their impeachment. *Id.*..... 99

10. Through the negligence, incompetency, or fraud of a superintendent of construction, the state was charged for building material greatly in excess of the reasonable or market value thereof, and for labor which had not been performed. The bills rendered therefor were presented in the usual course of business and allowed by the board of public lands and buildings, acting in good faith and in the belief that such claims were legitimate charges against the state. *Held*, That the allowance of such claims is not a misdemeanor in office for which the members of the board are impeachable. *Id.*..... 98

11. The legislature made an appropriation for the building of a cell house at the penitentiary by days' work. The board of public lands and buildings having said building in charge selected for superintendent of construction a person known to be the agent and manager of the lessee of the prison labor, with the understanding that he would have to contract with his principal, the lessee, in behalf of the state for the necessary labor, and fix the price to be paid therefor. It did not appear that the labor could have been procured for less than the rate allowed, and it was admitted to have been worth more than that amount. *Held*, That the action of the board in selecting the agent of the lessee as the representative of the state was, at most, an error of judgment not amounting to a misdemeanor in office. *Id.*..... 97

12. The board of public lands and buildings used money appropriated for the building of a cell house at the penitentiary to defray the cost of visiting prisons in neighboring states to gain information with respect to the character and quality of cells, the best systems of ventilation, and other methods of bettering the sanitary condition of the prison. They were advised by the attorney general that said money could be lawfully used for the purpose named. *Held*, That if they in good faith construed the law as authorizing them to apply the money to the object named and actually used it for such purpose, they cannot be ad-

Impeachment—*concluded.*

judged guilty of a misdemeanor in office solely because the court may differently construe the law. *Id.* 98

13. Extensive frauds were practiced upon the state by contractors for coal at the asylum for the insane at Lincoln. Following the practice which had prevailed for many years the board of public lands and buildings required all vouchers for supplies to be certified by the superintendent of the asylum as correct. When so certified they were compared with the contracts on file, and if found to correspond, and the extensions correct, they were allowed. Through the negligence or credulity of the superintendent, he was induced to certify to accounts largely in excess of the coal actually received, and which were allowed by the board relying in good faith upon such certificates. The board were required to disburse large sums of money annually for current expenses and the erection of public buildings, which necessitated the examination of hundreds of vouchers monthly. *Held*, That the failure to detect and prevent the frauds in question is not *per se* a misdemeanor in office. *Id.* 99

14. The legislature investigated a portion of the fraudulent bills and made an appropriation to pay the same. Subsequently the bills were certified by the superintendent and allowed by the board in the belief that they were proper charges against the state. *Held*, That the action of the legislature is a complete justification of the act of the board. *Id.*

Implied Warranty. See SALES, 5.

Incorporation. See VILLAGES.

Indemnity Bonds. See PRINCIPAL AND SURETY, 2. RES ADJUDICATA, 1.

Indians.

1. The act of congress approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes," is not in conflict with art. 1, sec. 8, of the constitution of the United States, which provides that congress shall have power "to establish an uniform rule of naturalization." *State v. Norris* 299

2. By the provisions of said act all Indians born within the territorial limits of the United States to whom allotments

Indians—*concluded.*

of land in severalty have been made under the provisions of said law or other law or treaty, and all Indians, born as aforesaid, who have voluntarily taken up their residence in the United States separate and apart from any tribe of Indians therein, and adopted the habits of civilized life, are made citizens of the United States, and such Indians residing in this state are citizens thereof. *Id.*

3. The actual issuance or receipt by an Indian of a patent for lands allotted to him under said act is not necessary to constitute him a citizen of the United States. When he has accepted the land allotted, taken possession thereof and otherwise complied with the law, he becomes entitled to his patent and citizenship attaches. *Id.*

Indictment and Information. See FORGERY.

Indorsements. See NEGOTIABLE INSTRUMENTS, 1, 5.

Indorsers. See BANKS AND BANKING, 4.

Infancy.

The promise of an infant to dismiss an action after a settlement with him of the matters in controversy may be relied upon by the defendant, the infant possessing apparently good judgment and discretion, and having been by his father, who appeared in the action as his next friend, permitted to transact the business out of which the action arose. *Cadwallader v. McClay*..... 360

Infants. See PARENT AND CHILD.

Inheritance. See STATUTES, 1, 2.

Injunction. See RAILROAD COMPANIES, 2, 3.

Inquest. See CORONERS, 3.

Insanity. See CONSTITUTIONAL LAW, 3. CRIMINAL LAW, 5, 6. EQUITY.

1. 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. *Dewey v. Allgire*..... 6

2. The record of proceedings under ch. 40, Comp. Stats., whereby a person has been adjudged insane and a fit subject for treatment in the hospital for insane, is not admissible for the purpose of proving insanity in an action brought to avoid a conveyance made by such person. *Id.*

Insolvency. See PARTIES. RECEIVERS. VOLUNTARY ASSIGNMENTS.

Installments. See NEGOTIABLE INSTRUMENTS, 3.

Instructions. See CRIMINAL LAW, 7. DAMAGES, 3, 4. DURESS, 2. INSURANCE, 1. NEGLIGENCE, 5. REPLEVIN, 1. SALES, 7, 8.

1. Instructions must be applicable to the issues made by the pleadings. *Farmers & Merchants Bank of Ainsworth v. Upham*..... 417
2. A party has a right to have his case submitted to the jury upon the issues in his favor as presented by his pleadings and proof. *Hartwig v. Gordon* 657
3. An instruction requested by a party need not be given if the essential principle therein stated is otherwise fairly enunciated to the jury by the court. *Hodgman v. Thomas*, 568
4. An instruction requested, which directed a verdict for either party upon an issue of fact, which ignored the material question of fact in issue, was properly refused. *Cortelyou v. McCarthy*..... 743
5. A party asking the court to give an instruction to the jury cannot complain because this request is complied with, even though such instruction incorrectly states an issue to be tried. *Dawson v. Williams*..... 1
6. The statute requires all instructions to a jury and modifications thereof to be in writing, and where oral instructions are given, to which exceptions for that cause are taken, it is ground of error. *Hartwig v. Gordon*..... 657
7. A judgment will not be disturbed because of an instruction submitting to the jury an issue not within the pleadings, where the only effect of such an instruction must have been in favor of the party complaining. *Fitzgerald v. Meyer*..... 50
8. The trial court cannot properly be requested to instruct the jury what comparative importance shall by the jury be attached to instructions given, even though a portion of such instructions was given at the request of one of the parties to the action. *Cortelyou v. McCarthy*..... 743
9. Where, upon a trial, it appears that the rights of the parties depend upon a contract between them in evidence, it is the duty of the court to construe such contract according to its legal effect, and the refusal to give an instruction correctly construing such contract and pertinent to the issues is erroneous. *Aultman v. Martin*..... 826
10. The instructions of the court should direct the attention of the jury only to facts in support of which evidence has been introduced upon the trial. When an instruction is not founded upon the evidence, and is calculated to mis-

Instructions—*concluded.*

lead the jury in considering the facts of the case, the judgment must be reversed. *Kilpatrick v. Richardson*..... 731

11. A defendant pleaded that the note upon which suit was brought was given for a flock of sheep which were warranted to be sound; that the sheep were diseased, by reason of which the warranty was broken, and the consideration failed. There was no allegation of fraud. At the request of the defendant the court gave consecutively three instructions, each of which contained the following language: "That a failure of consideration, breach of warranty, or fraud constitutes a valid defense." *Held*, That the instructions were erroneous and prejudicial. *Farmers & Merchants Bank of Ainsworth v. Upham*..... 417

Insurance. See COSTS, 1. GARNISHMENT, 2.

1. In an action upon an insurance policy to recover damages caused by fire to insured household furniture and wearing apparel in actual use, it was not error to instruct the jury that of the property destroyed they should, if possible, find the fair market value, otherwise that they should find the fair value from the evidence, and that such value was not what a junk-shop or second-hand dealer would give for them or what they would bring under extraordinary circumstances or at a forced sale. *Sun Fire Office v. Ayerst*, 184

2. A policy of insurance provided that upon the failure of the insured to pay the premium note therein described in full at maturity, such policy should cease to be in force and continue null and void while said note remained unpaid. Said note not having been paid at maturity the insurance company accepted as a credit thereon an amount of money largely in excess of the premium earned, and left the note with its local agent for collection. Subsequently, and before the premium so paid had been earned and before the note had been paid in full, the property insured was destroyed by fire. *Held*, That the policy was voidable only at the election of the insurance company, and that by receiving and retaining the part payment after default and retaining the note for collection, it waived the right to insist upon a forfeiture thereof. *Phenix Ins. Co. v. Dungan*..... 468

Intoxicating Liquors. See LIQUORS. MANDAMUS, 2.

Journal Entries. See REVIEW, 18.

Judgments. See COUNTIES, 1. FINAL ORDER. RES ADJUDICATA. REVIVOR.

1. A determination of priorities under section 946 of the

Judgments—*continued.*

Code constitutes an adjudication which cannot be collaterally attacked. *State v. Duncan*..... 631

2. The limitation of one year in which to revive an action on motion does not apply to a proceeding to revive a judgment. *Boyd v. Furnas*..... 387

3. Will not be set aside on account of the admission of immaterial testimony in cases tried to a court where testimony, properly admitted, justifies the finding. *Dewey v. Allgire*..... 6

4. Where none of the special proceedings provided by the Code is available an action in equity will lie to enjoin against the enforcement of a judgment taken by default in violation of a promise by the plaintiff to dismiss the action. *Cadwallader v. McClay*..... 360

5. A judgment or decree procured by fraud is not void in the sense that it can be assailed in a strictly collateral proceeding, but is voidable merely at the election of the party defrauded thereby. *Smithson v. Smithson*..... 536

6. A judgment will be set aside where it was taken after a settlement between the parties, and contrary to plaintiff's promise to dismiss the action, the defendant having relied upon the promise and so suffered default. *Cadwallader v. McClay*..... 359

7. The county court, acting within its special jurisdiction, has power to vacate judgments and final orders during the term at which they were rendered. *State v. Duncan*... 631

8. In cases within the jurisdiction of a justice of the peace a county judge possesses only the powers of a justice, and can only vacate judgments and final orders in cases where justices are expressly authorized so to do. *Id.*..... 632

9. A county court acting within its special jurisdiction may vacate its judgments or final orders for irregularity in obtaining the same upon proceedings had in pursuance of sections 602 to 610, inclusive, of the Code. *Id.*

10. An order vacating such judgment or final order is not void for want of a finding that the applicant had a valid defense or cause of action. The want of such finding renders the proceedings at most only irregular or erroneous, and they are not on that account open to collateral attack. *Id.*

11. A court of equity will not vacate a judgment at law merely on the ground that the officer's return, that he had served the summons on the defendant to the judgment by leaving a copy of the process at his usual place of residence,

Judgments—*concluded.*
was false. It must also be averred and proved that the defendant to the judgment has a meritorious defense to the same. *Janes v. Howell*..... 320

Judicial Acts. See BOARD OF PUBLIC LANDS AND BUILDINGS. MANDAMUS, 1. OFFICE AND OFFICERS.

Judicial Notice. See EVIDENCE, 1.

Judicial Sales. See CORPORATIONS, 1, 3.

Jurisdiction. See COURTS. CRIMINAL LAW, 8. GARNISHMENT, 2, 4. REVIEW, 12. REVIVOR, 1.

Jury. See NEW TRIAL, 3. TRIAL, 1.

1. A defendant in an equity suit is not entitled, as a matter of right, to a jury for the trial of a counter-claim for damages which he has voluntarily pleaded in the case. *Morrissey v. Broomal*..... 766
2. Where the examination of a juror raises a doubt as to his being an elector of the county where the action is brought, there is no error in sustaining a challenge for cause. *Omaha & R. V. R. Co. v. Cook*..... 436
3. Where a fair and impartial jury is secured, error cannot be predicated on the rejection of persons who may have been qualified. Some discretion must be allowed to the trial court in the selection of jurors. *Id.*
4. In a personal damage case against a railway a juror stated in his examination on his *voir dire*, in substance, that he had an elevator on the line of railway and was engaged in the business of buying and shipping grain over the railroad; that he had received favors from the railway company and desired to retain its favorable consideration; that he had no personal feeling in the matter and could render a fair and impartial verdict. *Held*, That a challenge for cause was properly sustained. *Id*..... 435

Justices of the Peace. See ATTACHMENT, 4. VENUE.

Laborers' Liens. See MECHANICS' LIENS.

Laborers' Wages. See RES ADJUDICATA, 2.

Laches. See APPEAL, 8.

Land Contracts. See MORTGAGES, 5.

Landlord and Tenant.
A tenant had been in possession of a tract of land for several years under a lease from the owner. He claimed possession for the season of 1889, also, and planted a portion of

Landlord and Tenant—*concluded.*

the land in corn. After the corn was planted, another claimed to be the lessee for the same period and entitled to possession of the same land under a written lease from the owner, and brought a forcible entry and detainer suit, which terminated in a judgment against the defendant, the former tenant. Pending the litigation the defendant had cultivated the corn. After it was ready to harvest the plaintiff took possession of the land under the judgment, and refused to surrender the corn to the defendant. *Held*, That the defendant in the former suit may replevy the corn, and a verdict in his favor in a replevin suit should be upheld. *McKean v. Smoyer*..... 694

Legislative Appropriations. See IMPEACHMENT, 14. STATUTES, 9.

1. The original vouchers approved by the commissioner general are to be presented to the auditor so that he may see that the claim is one for which an appropriation has been made. *State v. Moore*..... 507

2. Under the provisions of sec. 9, art. 9, of the constitution, all claims upon the state treasury are to be examined and adjusted by the auditor and approved by the secretary of state before any warrant for the same shall be drawn. This applies to all appropriations, specific as well as general. *Id.*

3. Under house roll No. 207, passed and approved April 8, 1893, making appropriation for current expenses of the state government, nothing was appropriated for the payment of indebtedness owing by the state for "arrest and return of fugitives, or for officers' fees and mileage for conveying prisoners to and from the penitentiary," unless such indebtedness was incurred after March 31, 1893. *Id.*, 229

Legislature. See IMPEACHMENT, 4.

Letters of Administration. See EVIDENCE, 4.

Licenses. See LIQUORS. MANDAMUS, 2.

Liens. See ANIMALS, 3. ESTOPPEL, 2. MECHANICS' LIENS. MORTGAGES, 5.

A contractor paid for materials purchased by a subcontractor, annulled his contract with the latter, and sued him upon his bond for the amount thus paid. Under the facts discussed in the opinion, *held*, that the contractor had no lien upon the unused material left in the building by the subcontractor, and was not entitled to the possession of the said material. *Walther v. Knutzen*..... 420

Limitation of Actions. See DIVORCE, 5. MECHANICS' LIENS, 10. STATUTE OF LIMITATIONS.

Liquors.

1. In considering whether or not a license to sell liquor should be granted, a village board acts in a judicial capacity, and its refusal to hear competent testimony relevant to objections made in remonstrance against the granting of such license, presents a sufficient reason for the reversal of an order granting a license. *Hollembaek v. Drake*..... 681
2. After a village board has jurisdiction of the subject-matter of an application to sell liquors, and the time has fully expired for filing a remonstrance, and one has been filed, the petitioners and remonstrators may consent to a hearing at as early a time as they choose, and in such case cannot be heard to allege that such hearing was premature. *Id*... 680
3. Due notice having been published for the full time fixed by the statute, precedent to the hearing of an application for a license to sell liquors, the village board, before which such application is pending, has jurisdiction of the subject-matter, and in case a remonstrance has been filed within the statutory time, should fix an hour of some subsequent day for hearing the application and remonstrance. *Id.*
4. An appeal by a remonstrant from an order of a village board under the provisions of sec. 4, ch. 50, Comp. Stats., in order to have the effect of a stay and prevent the issuing of a license to the applicant, must be taken immediately and perfected as soon as a transcript can with reasonable diligence be procured and filed in the district court. *State v. Village of Elwood*..... 473
5. The remonstrant immediately gave notice of an appeal, knowing that the district court for the county would convene pursuant to adjournment on the 18th day of the same month, and that the next session thereof would be in September following. A transcript was demanded for the first time on the 19th, after the final adjournment of the district court, and filed on the 20th. It appears that a transcript could with reasonable diligence have been procured and filed within twenty-four hours from the time the license was allowed. *Held*, That the appeal was not taken in time to have the effect of a stay, and a peremptory *mandamus* should not be allowed to compel the village board to revoke and cancel a license issued on the 18th after the final adjournment of the district court. *Id.*

Loan Agents. See USURY, 2.

Managers of Impeachment. See IMPEACHMENT, 7.

Mandamus. See LIQUORS, 5.

1. Will not lie to compel officers exercising judicial functions to make a particular decision or to set aside or vacate a decision already made. *State v. Churchill* 702
2. A board upon which is imposed the duty of hearing and determining applications for licenses to sell liquors will be compelled by *mandamus* to convene and revoke a license granted, where the essential proceedings requisite to the granting of a lawful license have not been complied with. *State v. Johnson*..... 362
3. Where an application for a *mandamus* is submitted for final determination upon the petition and a general demurrer thereto, no briefs being filed, and the petition appearing upon original examination to sufficiently state a cause of action, a peremptory writ may be awarded as prayed. *State v. Sadilek*..... 580
4. Where the cost of a county bridge exceeds $100, contracts for the erection of the same must be let to the lowest competent bidder after due advertisement, stating the general character of the work. *Mandamus* will issue to a county board to cancel a contract executed in violation of these requirements. *State v. Cunningham*..... 687

Margins. See GAMBLING CONTRACTS.

Married Women. See MORTGAGES, 4.

Master and Servant.

Where a foreman, having charge of laborers, directs one of them to perform certain work, in such manner and under such circumstances as to subject the said laborer to great danger of injury, the company for whom the said foreman is acting cannot shield itself from liability for damage under such circumstances caused directly to such laborer by the negligent order of such foreman, upon the ground that the only negligence imputable to the foreman consisted in the performance of an act of mere manual labor in setting in motion the agency which caused the injury, and that thereby the foreman, as to such act, was reduced to the grade of a co-servant of the injured party. *Crystal Ice Co. v. Sherlock* 19

Material-Men. See MECHANICS' LIENS.

Maxims.

"*Caveat emptor*" does not apply where there is no opportunity to inspect a commodity. *Omaha Coal, Coke & Lime Co. v. Fay* 74

Measure of Damages. See DAMAGES. DEATH BY WRONGFUL ACT.

Mechanics' Liens. See ESTOPPEL, 2. MERGER. RES ADJUDICATA, 1.

1. The oath required by sec. 3, ch. 54, Comp. Stats., may be made by the agent of the claimant of a lien, whether a person or corporation. *Henry & Coatsworth Co. v. Fisherdick*..... 208
2. A statement for a mechanic's lien must be filed with the register of deeds of the proper county within the time prescribed by statute, or the right to a lien is lost. *Noll v. Kenneally*..... 879
3. Where a person entitled to a mechanic's lien expressly agrees to, and does, accept a note of a third person in full discharge of the amount due, he thereby abandons his lien. *Smith v. Parsons*..... 677
4. A party taking a mortgage on real estate is bound, at the time, to know whether material has been furnished or labor performed in the erection, reparation, or removal of improvements on the premises within the four prior months. *Henry & Coatsworth Co. v. Fisherdick*..... 207
5. The lien of a mechanic attaches at the commencement of the furnishing of material, or at the commencement of the performance of labor by him, and not from the beginning of the construction of the improvement on which he labors or for which he furnishes material. *Id.*
6. The vendor in an executory contract for the sale of land will subject his rights in the property to be conveyed to a mechanic's lien by directly, though in conjunction with the vendee, contracting for those improvements for the construction of which such mechanic's lien is sought to be enforced. *Pickens v. Plattsmouth Investment Co*..... 272
7. Under the Nebraska statute there are no priorities among liens for material furnished or labor performed; but this rule of equality applies only to those lienors who commenced the furnishing of material, or commenced the performance of labor on the faith of the same estate. *Henry & Coatsworth Co. v. Fisherdick*..... 208
8. The failure of an account filed to secure a mechanic's lien to state the dates the various items of materials were furnished will not vitiate the lien if it appears from the account and affidavit thereto attached that such materials were furnished within the requisite time to entitle the claimant to a lien therefor. *Noll v. Kenneally*..... 879

Mechanics' Liens—*continued.*

9. A person commencing to furnish material for, or commencing to labor on, an improvement on real estate must at the time take notice of the interest and title in the premises of the person with whom he contracted, as shown by the public records, as his lien for labor or material, aside from the improvement itself, attaches only to such interest. *Henry & Coatsworth Co. v. Fisherdick*..... 207

10. When more than four months intervene between items of an account for material furnished, a mechanic's lien will not attach for the items preceding the hiatus, unless it is made to appear by competent evidence that all the items were furnished pursuant to one contract; and the affidavit attached to the "account of the items" is not competent evidence to prove that fact. *Id*..... 208

11. An account for a mechanic's lien, after giving the items of materials for which a lien is claimed, states that "the above items were sold for $677.65, and delivered between July 10, 1888, and October 18, 1888," and the affidavit attached to the account alleges that said materials were furnished at the time mentioned in the account. *Held*, to sufficiently designate the time. *Noll v. Kenneally*..... 880

12. The transfer by a material-man to another party of his account for material furnished for the construction of a building, before the filing of his claim for a lien, destroys the right to a lien, and confers no authority upon the assignee to file and enforce a mechanic's lien for such materials. The assignee, after such assignment, cannot perfect the lien by complying with the requirements of the statute. *Id*..... 879

13. A vendor of an elevator furnished for and put up in a hotel in process of erection by contract with the owner retained in himself the title until the fixture should be paid for, and reserved the right to retake possession thereof if default should be made in the payment for the same. *Held*, Not a waiver of the vendor's right to a material-man's lien on the hotel and the land occupied by it. *Henry & Coatsworth Co. v. Fisherdick*..... 209

14. The acceptance by a mechanic or material-man of the note of the debtor, or of a third person, for the amount of the debt maturing within the time fixed by statute for the enforcement of a mechanic's lien, is not alone sufficient to raise any presumption of the extinguishment of the original debt, or of the abandonment or relinquishment of the statutory right to a lien, but an agreement must be shown that it should have that effect. *Smith v. Parsons*... 677

Mechanics' Liens—*concluded.*

15. The oath attached to an "account of the items" for material furnished, and for which a lien was claimed, was as follows: "J. A. B., being first duly sworn," * * * Signed, "Capital City Planing Mills, per J. A. B., Sec'y." The account of the items was headed, "M. I. B., To Capital City Planing Mills, Dr." *Held*, To show that the lien was claimed by the Capital City Planing Mills and not by J. A. B., and a substantial compliance with the statute. *Henry & Coatsworth Co. v. Fisherdick*..... 208

16. The lien of a mortgage on real estate, taken while a building is in process of erection thereon, is subject to the claims of material-men and laborers for material already and thereafter furnished, and for labor already and thereafter performed in the erection of such building, when the commencement of such furnishing of material, or the commencement of the performance of such labor was prior to the record of said mortgage. *Id.*

Memorandum. See STATUTE OF FRAUDS, 2.

Mental Suffering. See DAMAGES, 1.

Merger.

The assignee of a mechanic's lien is subrogated to all the rights of his assignor; and the taking of a mortgage by the assignee on the property affected by the lien, the consideration of which mortgage was used in the purchase of the lien, will not merge the latter in the mortgage, unless it appears that such was the intention of the parties and justice requires it. That intention may be established not only from the acts and declarations of the assignee, but from a view of the situation as affecting his interests. *Henry & Coatsworth Co. v. Fisherdick*..... 209

Messages. See TELEGRAPH COMPANIES.

Metropolitan Cities.

1. A city of the metropolitan class has power, in order to provide funds for the payment of damages awarded the owners of property appropriated for extending a street, to levy a special assessment upon all the property specially benefited abutting on or adjacent to the street so extended, and is not confined for the purpose of such assessment to the property abutting upon or adjacent to that portion of the street which constitutes the extension. *McCormick v. City of Omaha*..... 829

2. The mayor and council of a city of the metropolitan class have jurisdiction to create paving districts without a petition of the property owners being presented to the

Metropolitan Cities—*concluded.*

city council, except where the entire improvement is to be done at the cost of the lot owners, in which case they have no power to act unless petitioned to do so by the owners of the majority of the feet frontage of the lots in such proposed district. *State v. Birkhauser*..... 521

3. To confer jurisdiction upon the mayor and counsel of such a city to pass an ordinance ordering the paving of streets in a paving district, a petition praying for such improvement, signed by the owners representing a majority of the front feet of the lots abutting upon the portion of the street to be improved, must be first submitted to the city council. *Id.*

4. The kind of material to be used in the paving, repaving, or macadamizing of streets shall be such as the majority of the property owners in the paving district shall determine; and in case such owners fail to designate the material they desire to use in such improvement within thirty days, the mayor and council have authority to make the selection. *Id*..... 522

5. Bids for paving may be advertised for and received either before or after the selection of material is made, and if made before such selection it is not necessary that the board of public works should readvertise for and receive bids after such designation, although they may do so. *Id.*

6. By section 104 of the act incorporating metropolitan cities, it is made the duty of the board of public works to make contracts on behalf of the city for the performance of such works, and the erection of such improvements as shall be ordered by the mayor and city council, but subject to their approval. *Id.*

Minutes of Trial Judge. See REVIEW, 18.

Misconduct of Jury. See NEW TRIAL, 3.

Misdemeanors in Office. See IMPEACHMENT.

Mortgages. See CONTRACTS, 7. MECHANICS' LIENS, 4. MERGER. PARTNERSHIP, 1. PLEDGES, 2. STATUTE OF FRAUDS, 3. VENDOR AND VENDEE, 3.

1. The provision of the Code, that the plaintiff shall state in his petition whether any proceedings have been had at law for the recovery of the debt, or any part thereof, applies alone to formal mortgages, and not to mortgages or liens arising out of the equities between the parties. *Dimick v. Grand Island Banking Co.*..... 394

2. A contract in an installment note giving the holder author-

Mortgages—*concluded.*

ity to declare the whole note due upon default in any payment will, in the absence of a showing of fraud or want of consideration, be enforced in an action to foreclose a mortgage given to secure the payment of such a note. *Morling v. Bronson* 608

8. Where a conveyance of property is shown by the contemporaneous written contract of the parties thereto, to have been intended solely as security for the payment of money, or as indemnity against liability, such conveyance as between said parties must be treated as, and in fact is, a mere mortgage. *Nelson v. Atkinson* 577

4. Where certain mortgages given by a married woman to secure firm debts of the firm of which her husband was a member were introduced in evidence, a recital in the mortgages of the amount of consideration for which each was given, "in hand paid," is not overcome by proof that the mortgaged property was her separate estate and that the debt was that of a firm of which her husband was a partner. *Schuster v. Sherman* 842

5. In 1881 a person purchased from a railroad company a certain tract of land on credit. The land was sold to various persons prior to 1887. In that year the owner of the contracts mortgaged the same and conveyed the land to a bank and soon afterwards assigned the contracts to the bank. The mortgagee began an action to foreclose the mortgage, and made the bank a party. After the answer of the bank was filed, the bank, at the request of the mortgagee, paid a sum of money to the railroad company then due on the contracts. No claim was made for this in the foreclosure proceeding. In an action by the mortgagee's devisee to have the bank deliver up the contracts and quiet the plaintiff's title in the land, *held*, that the bank was entitled to the sum paid by it to the railroad company, and interest thereon, and a decree of foreclosure to that effect was right. *Dimick v. Grand Island Banking Co.* 394

Motions for New Trial. See REVIEW, 20, 28.

Motions for Rehearing. See SUPREME COURT, 1.

Municipal Corporations. See LIQUORS. METROPOLITAN CITIES. RAILROAD COMPANIES, 1. VILLAGES. WATER COMPANIES.

The mayor and council of a city of the second class have authority to prohibit by ordinance persons from being inmates of houses of prostitution, and to punish them for the violation of such ordinance. *Perry v. State* 623

Murder. See HOMICIDE.

National Banks. See COURTS, 2.

Naturalization. See INDIANS.

Negligence. See BANKS AND BANKING, 4. IMPEACHMENT. MASTER AND SERVANT. RAILROAD COMPANIES, 4. TELEGRAPH COMPANIES.

1. In a personal damage case against a railroad company the evidence, discussed in opinion, *held* to be conflicting and that it was properly submitted to the jury. *Omaha & R. V. R. Co. v. Cook* 436

2. To sustain a verdict for damages on account of an injury suffered by reason of alleged negligence of the defendants, there must be evidence that such injury resulted from the negligence charged. Such causation cannot be left to the mere conjecture of the jury. *Kilpatrick v. Richardson* 731

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

4. When one is placed by the negligence of another in a situation of peril, his attempt to escape danger, even by doing an act which is also dangerous and from which injury results, is not contributory negligence such as will prevent him from recovering for an injury, if the attempt was one such as a person acting with ordinary prudence might, under the circumstances, make. *Lincoln Rapid Transit Co. v. Nichols* 332

5. The existence of negligence should be proved and passed upon by the jury as any other fact. It is improper to state to the jury a circumstance or group of circumstances as to which there has been evidence on the trial, and instruct that such fact or group of facts amounts to negligence *per se*. At most, the jury should be duly instructed that such circumstances, if established by a preponderance of the evidence, are properly to be considered in determining the existence of negligence. *Missouri P. R. Co. v. Baier* 236

Negotiable Instruments. See BANKS AND BANKING, 4. INSTRUCTIONS, 11. SET-OFF AND COUNTER-CLAIM, 1–3.

1. A person, other than a payee, who signs his name in blank upon the back of a promissory note at the time of its execution, and before its delivery to the payee, is, as to a

Negotiable Instruments—*concluded.*

subsequent *bona fide* holder for value, liable thereon as a joint maker. *Salisbury v. First Nat. Bank of Cambridge City,* 872

2. In a suit by an indorsee against the indorser of an ordinary check, where the defense is that the check was not presented for payment within a reasonable time, inquiry as to whether the indorser was damaged by reason of the failure to present the check for payment is immaterial. *First Nat. Bank of Wymore v. Miller*..... 501

3. A provision in an installment note permitting the holder to declare the whole debt due upon default in payment of any installment is valid. After default, the holder of such a note is under no legal obligation to notify the maker that by reason thereof he has elected to declare the whole note due. *Morling v. Bronson*..... 608

4. Where persons other than the payee had signed their names on the back of a promissory note at time of its execution, and were, after its maturity, sued by a *bona fide* purchaser of the note as joint makers, it was *held* that parol evidence could not be admitted to limit the character of their liability or show it to be different from what the law presumed it to be. *Salisbury v. First Nat. Bank of Cambridge City*..... 878

5. Where a bank has an arrangement with a corporation whereby the bank agrees to discount notes held by the corporation, and in pursuance of such agreement such notes have customarily been brought to the bank and been negotiated by the secretary of the corporation, such facts are sufficient evidence of the authority of the secretary to transfer a particular note and of the genuineness of the indorsement upon such note, the proceeds of the note having been placed by the bank to the corporation's credit and paid out on the corporation's checks. *Commercial Nat. Bank of St. Paul v. Brill*..... 626

New Trial. See REVIEW, 6, 28.

1. The supreme court has no original jurisdiction or authority to vacate a judgment and grant a new trial in a cause tried and determined in a district court. The jurisdiction of the supreme court to grant a new trial in such case is appellate only. *Vincent v. State*..... 672

2. The ruling of the trial court upon a motion for a new trial, predicated upon the inability of the defeated party to attend the trial with his witnesses because of the impassable condition of the public highways, will not be disturbed when a counter showing has been made which raises seri-

New Trial—*concluded.*

ous doubts as to the existence of the facts upon which the defeated party relies to excuse his non-attendance at the trial. *Wheeler v. Olson* 562

3. In support of a motion for a new trial an attorney made an affidavit wherein he stated that he saw one of the jurors go into a certain saloon just after court had adjourned for dinner; that he immediately went into the saloon and passed through it and heard the order given, and that on affiant's return through the saloon he observed an empty glass on the counter. *Held*, Insufficient evidence to justify an order setting aside the verdict on the ground that one of the jurors drank whiskey during a recess of the court. *Cortelyou v. McCarthy* 744

Nominations. See ELECTIONS, 6.

Non Compos Mentis. See INSANITY.

Non-Expert Witnesses. SEE CRIMINAL LAW, 5, 6.

Non-Residents. See ADVERSE POSSESSION, 3.

Notes. See NEGOTIABLE INSTRUMENTS.

Notice. See NEGOTIABLE INSTRUMENTS, 3. VENDOR AND VENDEE, 1.

Objections. See ELECTIONS, 6, 7. TRIAL, 3.

Office and Officers. See BOARD OF PUBLIC LANDS AND BUILDINGS. CORONERS. IMPEACHMENT.

An officer is not liable for a judicial act, except where he acts willfully, maliciously, or corruptly. This is a rule of great antiquity, and rests upon the soundest public policy, and in its application is not limited to judges, but extends to all officers and boards charged with the decision of questions *quasi*-judicial in character. *State v. Hastings* ... 97

Officers. See MANDAMUS, 1. TRUSTS.

Onus Probandi. See CORPORATIONS, 3. DURESS, 1. REVIEW, 27.

Options. See GAMBLING CONTRACTS.

Oral Agreements. See EVIDENCE, 9.

Oral Instructions. See INSTRUCTIONS, 6.

Order. See FINAL ORDER.

Ordinances. See METROPOLITAN CITIES.

Ouster. See QUO WARRANTO.

Overruled Cases. See TABLE, *ante*, p. xxix.

Paramount Title. See FORCIBLE ENTRY AND DETAINER.

Parent and Child.

When the infant daughters of the relator, their father, are in the custody of the step-mother of the deceased mother of such infants, which step-mother and her husband have demonstrated that they are able, willing, and intend to, and have so far provided for the said infants in all respects as they should for their own grandchildren, and it clearly appears that it is for the best interest of said infants that they remain where they now are, such infants will not be delivered to the custody of their father, who has no place, means, or assistance suitably to provide for them. *State v. Schroeder* 571

Parol Contracts. See STATUTE OF FRAUDS, 2, 3.

Parties. See REVIEW, 28. REVIVOR, 2.

1. *Deranlieu v. Jandt* 532
2. It is not necessary in proceedings to obtain possession of the assets of an insolvent bank wrongfully withheld by one of its former officers, to join as parties to the proceeding other individuals for whose benefit the misappropriation took place. *State v. Commercial & Savings Bank* 174

Partnership.

1. Where there is no sufficient reason for making a sale of the whole of the partnership property, one partner, without consultation with or consent of his copartner, cannot sell the firm property. If, however, the firm is insolvent, one partner in the firm name may in a proper case give security on a stock of goods to secure a *bona fide* debt of the firm. *Horton v. Bloedorn* 666
2. Where the legal representative of a deceased member of a partnership firm, as such, without words of limitation, joins in the sale of all the stock and fixtures of such firm to the surviving members thereof, such legal representative cannot maintain an action against such survivors for the good-will of said firm or for any portion thereof. *Lobeck v. Lee* 158
3. Upon the dissolution of a partnership firm by the death of one of its members, the surviving partners may carry on the same line of business at the same place as was transacted the firm business, without liability to account to the legal representative of the deceased partner for the good-will of said firm, in the absence of their own agreement to the contrary. *Id.*

Passengers. See RAILROAD COMPANIES, 4.

Patents. See INDIANS.

Paving. See METROPOLITAN CITIES.

Perishable Goods. See FRAUDULENT CONVEYANCES, 7.

Personal Injuries. See MASTER AND SERVANT. NEGLIGENCE. RAILROAD COMPANIES, 4.

Pleading. See ACCORD AND SATISFACTION. DIVORCE, 5. ELECTIONS, 4. EVIDENCE, 1, 9. FALSE REPRESENTATIONS. JUDGMENTS, 11. MORTGAGES, 1. REVIEW, 25. STATUTE OF FRAUDS, 1.

1. Where a pleading is sufficient in substance, but wanting in form or completeness, the remedy is by motion, and not by demurrer. *Forbes v. Petty*..... 899

2. After the issues have been fully made up it rests within the judicial discretion of the trial judge either to permit amendments of the pleadings in furtherance of justice, and on such terms as may be proper, or absolutely to refuse the right of amendment. *Commercial Nat. Bank of Omaha v. Gibson*..... 750

Pledges. See MORTGAGES, 5.

1. An action to foreclose a lien of certain warehouse receipts, on grain in storage, pledged to secure the payment of a promissory note, is a suit in equity. *Morrissey v. Broomal*, 766

2. The owner of a note secured by mortgage pledged it to a bank to secure an indebtedness. A senior mortgagee brought a foreclosure suit in which the pledgor appeared by his own attorney and filed a cross-bill. A decree foreclosing both mortgages was rendered and the land was sold to a stranger. Thereafter the bank bought the land from the purchaser, the pledgor's attorney in the foreclosure case negotiating the purchase and receiving a bonus. Later the bank sold at a profit. *Held*, That the pledgor could not recover from the bank the amount of the note out of such profits. *Raben v. First Nat. Bank of Aurora*..... 364

3. Plaintiff, his brothers, and the defendant contributed to a fund which they entrusted to an agent for investment in school land leases. The contributions were in form of notes on which the agent realized by discounting on the indorsement of himself and the defendant. The agent absconded, and defendant, as indorser, paid the notes, whereupon plaintiff assigned to defendant, as security for the note so paid, certain company stock. Subsequently

Pledges—*concluded.*

plaintiff sued to cancel the note and assignment of the stock, alleging fraud in obtaining them, and the use of unfair means by defendant to supplant plaintiff in the company. The proofs failing to show fraud or bad faith on part of defendant, it was *held*, plaintiff's only remedy was to redeem the company stock by payment of the sum for which it was pledged, and, on refusing to redeem, the defendant's right to the stock should be confirmed. *Rathman v. Peycke*..... 384

Possession by Agent. See ADVERSE POSSESSION, 3.

Practice. See APPEAL, 6. COSTS, 1. MANDAMUS, 3. REVIEW, 26.

Preferred Creditors. See FRAUDULENT CONVEYANCES, 2. VOLUNTARY ASSIGNMENTS.

Prejudice. See VENUE.

Premium Notes. See INSURANCE, 2.

Presentment. See BANKS AND BANKING, 4.

Presumption of Negligence. See RAILROAD COMPANIES, 4.

Principal and Agent. See INSTRUCTIONS, 9. RAILROAD COMPANIES, 3.

1. *Hartwig v. Gordon*..... 657
2. The owner of certain real estate executed a power of attorney to one who was thereby authorized to sell land for either cash or partly on credit for a certain price. The agent being unable to sell at that price afterwards sold the land, subject to the approval of his principal, for a smaller amount than the sum named in the power of attorney. The principal wrote to the agent, *inter alia*, that the offer was a good one if none better could be had; that he would execute a deed, and authorized the purchaser to take possession. *Held*, That the principal had ratified and confirmed the sale. *Prine v. Syverson*..... 860

Principal and Surety.

1. The extension of time of payment of a note to the principal, by the payee, upon sufficient consideration, without the knowledge of the surety, releases the surety; and evidence clearly directed to proof of such facts properly pleaded is competent. *Lee v. Brugmann*..... 232
2. Where sureties on an indemnifying bond signed on an agreement that the bond should be invalid unless also

Principal and Surety—*concluded.*

signed by other persons designated, and the bond was delivered to the obligee without obtaining such additional sureties, and without the knowledge of the sureties who had signed on such agreement, it was *held* that the delivery was unauthorized and the sureties not liable on the bond; *and held further*, that the sureties by afterwards taking security to protect themselves, being then ignorant of the fact that the other sureties had not signed, did not ratify the delivery of the bond. *Henry & Coatsworth Co. v. Fisherdick* 209

Priorities. See ATTACHMENT, 4. ESTOPPEL, 2. MECHANICS' LIENS.

Private Citizens.

Are not amenable to impeachment. *State v. Hill*..... 80

Privity of Contract. See ACTIONS. WATER COMPANIES.

Proceedings in Error. See REVIEW.

Process. See SUMMONS.

Promissory Notes. See PLEDGES, 2. PRINCIPAL AND SURETY, 1. SET-OFF AND COUNTER-CLAIM, 1–3.

Public Highways. See HIGHWAYS.

Public Improvements. See ESTOPPEL, 1. METROPOLITAN CITIES.

Public Policy. See CONTRACTS, 1.

Quieting Title.

When both parties to a suit by their pleadings claim title to the same tract of land, and each asks to have his title quieted, it is too late, after decree, for the losing party to urge for the first time that the proper remedy was by an action of ejectment. *Baumann v. Franse*..... 811

Quo Warranto.

Is the proper remedy to oust persons who are exercising the powers of corporate offices when the corporation has no legal existence. *State v. Uridil*..... 371

Railroad Companies. See EJECTMENT, 1.

1. A proposition to vote bonds in aid of the construction of a railroad, when accepted, is in the nature of a contract, and if the electors, through false or fraudulent representations of the officers of the donee, have been induced to vote such aid, a court of equity in a proper case will relieve as against such bonds. *Nash v. Baker*..... 714

2. Fifty freeholders of Midland township, in Gage county,

Railroad Companies—*concluded.*

petitioned the board of supervisors to call an election in said township and submit to the electors thereof a proposition to vote bonds to aid a certain railroad company to construct its railroad into and through said county. The supervisors called an election and submitted to the electors of said township the proposition to vote bonds to aid said railroad company in the construction of its road into and through said township. *Held*, As no part of the railroad was built in the township, the railroad company was not entitled to the bonds voted. *Township of Midland v. County Board of Gage County* 582

3. The electors of a township, by a vote, authorized the county supervisors to issue and deliver the bonds of the township to a railroad company designated, upon the construction by it of a certain railroad. The railroad company named as donee failed to build the road, sold out its property and franchises, and its vendee built the improvement and claimed the bonds. *Held*, That the electors of the township are entitled to stand upon the very letter of their promise; that the supervisors of the county were special agents of the electors of the township with limited powers, and would be enjoined at the suit of the township from delivering the bonds to the vendee of the company named as donee in the election proceedings. *Id.*

4. Under the provisions of sec. 3, art. 1, ch. 72, Comp. Stats., it is only necessary to a right of recovery against a railroad company to show that the person injured was at the time being transported as a passenger over the defendant's line of railroad, and that the injury resulted from the management or operation of said railroad. A presumption thereupon arises that such management or operation was negligent, and it can be met only by showing that the injury arose from the criminal negligence of the party injured, or, that the injury complained of was the result of the violation of some express rule or regulation of said railroad company actually brought to the notice of the party injured. *Missouri P. R. Co. v. Baier* 236

Ratification. See PRINCIPAL AND AGENT, 2.

Knowledge of the existence of a right or defense, and the intention to relinquish it, must concur in order to estop a party by waiver. *Henry & Coatsworth Co. v. Fisherdick*.... 209

Real Estate Agents. See PRINCIPAL AND AGENT, 2.

Receivers.

In winding up the affairs of an insolvent bank under the

Receivers—*concluded.*

statutes of this state, the receiver of such bank, when so ordered by this court, may take such steps as shall be necessary to enable him to secure possession of the assets of such bank, or their value. *State v. Commercial & Savings Bank*..... 174

Recitals. See MORTGAGES, 4.

Records. See INSANITY, 2. SHERIFFS AND CONSTABLES, 2.

Referees.

The findings of fact in the report of a referee will not be disturbed, unless manifestly contrary to the weight of the evidence. *State v. Commercial & Savings Bank*..... 174

Registration. See MECHANICS' LIENS, 2.

Rehearing. See SUPREME COURT, 1.

Release. See CONTRACTS, 7.

Remedies. See COURTS, 3.

Remittitur.

Where a jury includes in a verdict for a plaintiff a sum for attorney's fees for which defendant should not be held liable, a judgment entered thereon will be reversed upon review in the supreme court unless the plaintiff files a remittitur for said sum. *Jones Nat. Bank v. Price*..... 298

Remonstrance. See LIQUORS, 1, 3.

Repeal by Implication. See STATUTES, 6.

Replevin. See LANDLORD AND TENANT. LIENS.

1. Where several mortgagees joined as plaintiffs in an action to replevy property covered by their mortgages, which had been taken from their possession under writs of attachment against the mortgagor, and the issue was as to whether these mortgages were void as to creditors, the facts differing as to the different mortgages, an instruction to the jury to find generally for the plaintiffs, if they should find that any one of the mortgages was good, is erroneous. *Jones v. Loree*..... 816

2. The owner contracted to sell an elevator and other buildings situate upon land leased to him for a term of years. The purchaser was put into possession. The contract provided that the purchase money was to be paid in installments; that time should be the essence of the contract; that in case default should be made, the contract should become void and the purchaser should be deemed a mere

Replevin—*concluded.*

tenant at will, and payments made become forfeited as stipulated damages; that upon the strict performance the owner would make a good and sufficient bill of sale. Notes were given for the deferred payments. Default was made by the purchaser, and the owner did not return or tender back the notes. *Held*, That replevin would not lie to recover possession of the property. *Oskamp v. Crites*..... 837

Reputation of Witness. See WITNESSES, 2.

Res Adjudicata.

1. The owner of a building brought an action to cancel mechanics' liens filed by the contractor. The defendant pleaded a claim for extra work. This claim was disallowed and the liens canceled by a judgment. The plaintiff then sued the contractor on his bond for damages for failure to protect her building against liens and complete the building within the time fixed by the contract. *Held*, That the contractor could not maintain in the latter suit the same claim for extra work he had pleaded in the former case, and that the decree in the former action in plaintiff's favor was not a bar to the latter case. *Latta v. Visel*..... 612

2. Where there were due a resident of Nebraska from a railroad company operating a line of railroad through Iowa and Nebraska, wages, which in Nebraska were exempt from execution and attachment, but which by means of an assignment to a resident of Iowa were procured by the garnishment of the company in Iowa, to be applied to the payment of said claim, the assignor of such claim is liable to such debtor for the amount so appropriated. As between said assignor and the party entitled to the benefits of such exemption in Nebraska the proceedings in Iowa were in no sense *res adjudicata*. *O'Connor v. Walter*..... 267

Rescission. See SALES, 6.

Res Gestæ. See EVIDENCE, 3.

Residence. See DIVORCE, 3.

Review. See APPEAL, 6. BILL OF EXCEPTIONS. CRIMINAL LAW, 2, 8. DIVORCE, 2. INSTRUCTIONS, 6, 7, 10. LIQUORS, 1. NEGLIGENCE, 2. NEW TRIAL, 2. REFEREES. REMITTITUR. TRIAL.

1. Evidence examined, and *held* sufficient to sustain the judgment of the district court. *Forbes v. Petty*..... 899
Phœnix Mutual Life Ins. Co. v. Brown..... 705
Wilde v. Wilde 891

Review—*continued.*

2. Where there is no question of law involved and the judgment is unsupported by evidence it will be reversed. *Latta v. Visel* 612
3. A judgment cannot be reviewed on error by the supreme court unless a petition in error has been filed in said court therefor. *Wistedt v. Beckman* 499
4. Where a record presents only a question of fact to be reviewed upon conflicting evidence, the judgment of the district court will be affirmed. *Filley v. Scollard*..... 749
5. Assignments of error involving rulings on the admission of testimony cannot be considered unless the rulings and testimony have been preserved by a bill of exceptions. *Vincent v. State*..... 672
6. The supreme court will not review alleged errors of law occurring in a trial to the district court unless a motion for a new trial is made there and a ruling had on such motion. *Withnell v. City of Omaha*..... 621
7. The verdict of the jury will not be disturbed unless clearly against the preponderance of the evidence upon which the cause was tried. *Lee v. Brugmann*..... 232
   Sun Fire Office v. Ayerst..... 184
8. A verdict will not be set aside as unsupported by the evidence if there is competent evidence to support it. *Hodgman v. Thomas*..... 568
9. Upon appeal, as to equitable issues, the decree of the district court will be reversed when it is clearly against the preponderance of the evidence, upon which such issues were determined. *Emery v. Johnson*..... 53
10. A judgment in a case tried without a jury will not be disturbed because of the admission of immaterial testimony, where the testimony properly admitted justifies the finding. *Dewey v. Allgire* 6
11. The rulings of the district court cannot be reviewed in the supreme court before final judgment has been entered upon the merits of the case in the court below. *Smith v. Johnson*, 675
12. To give the supreme court jurisdiction to review a case on appeal the transcript of the proceedings must be filed within six months after the rendition of the decree sought to be reviewed. *Wistedt v. Beckman*..... 499
13. The supreme court, though trying a case *de novo* on appeal, will not disturb the finding of the district court unless the finding and decree cannot be reconciled with any reasonable construction of the testimony. *Gadsden v. Phelps*..... 590

Review—*continued.*

14. Exhibits, which the record shows were offered in evidence, will not be presumed to have been withheld from the consideration of the jury, in support of a contention that the verdict was unsupported by the evidence. *Dawson v. Williams* 1

15. In an action on account for flour sold and delivered, a number of defenses were set up which the proof failed to sustain, and the jury having found for the plaintiff, *held*, that the judgment was right and no error in the record. *Reed v. Davis Milling Co.* 391

16. Where averments of the answer are met in the reply by matter in avoidance conjointly with a denial of such averments, the special finding of a jury sustaining such denial will not be set aside as foreign to the issues joined. *Sun Fire Office v. Ayerst* 184

17. Where the admissibility of evidence is for the first time called in question by a motion to strike it out of the record, it is very questionable whether, under any circumstances, a review can be had of the ruling of the district court upon such motion. *Lee v. Brugmann* 232

18. On proceedings by petition in error to review a judgment of the district court, the minutes of the judge on the trial docket will not be received to impeach the judgment as entered at large upon the journal and approved by the judge. *Gage v. Bloomington Town Co.* 699

19. Where only questions of fact are involved, as respects either the ruling of the trial court upon motions supported and resisted by affidavits, or upon the sufficiency of the evidence to sustain the verdict, such rulings will not be disturbed unless clearly wrong. *Cortelyou v. McCarthy* 742

20. To obtain a review upon error of matters occurring upon a trial in the district court a motion for a new trial must have been made in that court, but in the absence of such a motion this court will examine the question as to whether the petition states a cause of action. *Schmid v. Schmid* 629

21. When a jury has decided a question of fact properly submitted, and the trial judge has overruled a motion for a new trial, then, if the record discloses competent evidence on which the finding may have been based, such finding cannot be disturbed by the supreme court. *Sonnenschein v. Bartels* 592

22. If the bill of exceptions discloses that without doubt important evidence has been therefrom omitted, the settle-

Review—*continued.*

ment and authentication of the bill of exceptions will not control, though therein the recitations are to the contrary, and in such case the verdict will not be disturbed as contrary to the evidence. *Dawson v. Williams*..... 1

23. Where incompetent evidence is admitted against objections, but the admission of such evidence is not specifically assigned as error, this court will nevertheless disregard such incompetent evidence in considering the question whether the verdict is sustained by the evidence. *Commercial Nat. Bank of St. Paul v. Brill*..... 626

24. The question of the allowance of an attorney's fee under the valued policy act of 1889 in an action upon an insurance policy cannot be raised in the first instance in the supreme court. Such fee should be demanded in the petition and the matter presented to the trial court. A ruling upon that question may be reviewed. *German Ins. Co. v. Eddy*, 461

25. After the submission of an equitable action for final determination, there was no prejudicial error in refusing an amendment of plaintiff's petition proposed to meet the alleged proofs, where, upon a full consideration of all the evidence upon appeal in the supreme court, it is found that the relief prayed must in any event be denied. *Horbach v. Marsh*..... 22

26. Where no briefs are filed by either party in the case brought into this court on error the court will examine the pleadings and evidence, and if the judgment conforms thereto it will be affirmed. Particular errors in a record must be pointed out in a brief of the party complaining. *Phenix Ins. Co. v. Reams*..... 423

27. Where the burden of proof is upon the plaintiff to establish the *bona fides* of a chattel mortgage whereunder he claims, a verdict in favor of defendant will not be set aside on the ground that the verdict is not sustained by the evidence, unless the evidence offered by plaintiff is of a clear and convincing character. *Fitzgerald v. Meyer*..... 50

28. In an action in the district court where there were a number of defendants, part of them united in an answer signed by an attorney. Subsequently the others, by a different attorney, filed an answer alleging a different defense. After a finding and judgment against all the defendants a motion for a new trial was signed by the attorney last referred to, as "attorney for defendants," and filed. *Held*, In the absence of evidence that he appeared for the defendants who joined in the first answer, the

Review—*concluded.*

parties for whom the first answer was filed have no standing in the supreme court and are not entitled to have the judgment reviewed. *Gage v. Bloomington Town Co*..... 699

Revivor. See JUDGMENTS, 2.

1. The courts have power to revive a judgment which has become dormant by lapse of time. *Boyd v. Furnas*..... 390
2. Upon the facts discussed in the opinion, *held*, that the action to revive a dormant judgment was properly brought in the name of an administrator and warranted a judgment of revivor. *Id.*

Right of Way. See EJECTMENT, 1.

Roads. See HIGHWAYS.

Sales. See CORPORATIONS, 1, 3. DURESS, 2. EVIDENCE, 7, 9. MECHANICS' LIENS, 13. MORTGAGES, 5. PARTNERSHIP, 2. REPLEVIN, 2. SHERIFFS AND CONSTABLES, 1.

1. *Hartwig v. Gordon*..... 657
2. Where there is no opportunity to inspect the commodity, the rule of *caveat emptor* does not apply. *Omaha Coal, Coke & Lime Co. v. Fay*..... 74
3. One partner, where there is no sufficient reason for making a sale, cannot sell the whole of the firm property without consultation with or consent of his partner. *Horton v. Bloedorn*..... 671
4. In an action upon an account for goods sold and delivered a question arose as to whom the credit was extended. The defendant insisted that the credit was extended to a firm; and the plaintiff that it was extended to a member of the firm individually. The evidence discussed in the opinion *held* sufficient to sustain a verdict in favor of the plaintiff. *Deranlieu v. Jandt*..... 532
5. Where one contracts to supply a commodity in which he deals, to be applied to a particular purpose of which he is aware, under such circumstances that the buyer necessarily trusts to the judgment of the vendor, there is an implied warranty that the commodity shall be reasonably fit for the purpose to which it is to be applied. *Omaha Coal, Coke & Lime Co. v. Fay*..... 68
6. Certain notes secured by chattel mortgages were given for a corn-sheller which was warranted to shell 6,000 bushels per day with eight horses to furnish power. On a trial the machine could not be made to work, and the expert

Sales—*concluded.*

sent by the company was unable to put it in running order. *Held*, That the purchaser was justified in returning it promptly after the discovery of the defects. *Davis v. Hartlerode*..... 864

7. In the sale of a special kind of a known general material for a particular purpose, the circumstances implying a warranty that the material is reasonably fit for the purpose intended, if the special material sold requires a different manner of use or treatment in applying it to the purpose intended than that required in the use or treatment of the same general material of other kinds, and this different requirement is known to the seller and not to the buyer, the warranty is broken if the buyer uses and treats the material as similar material is customarily treated, and if so used it does not prove reasonably fit for the purpose. *Omaha Coal, Coke & Lime Co. v. Fay*..... 69

8. An instruction is erroneous which states the foregoing rule but omits the requirement of a warranty in the sale, the fact of such warranty being in issue, and leaves the jury to infer that there may in such case be a recovery in the absence of a warranty. *Id.*

9. A person sold lime for the purpose of plastering a building, the circumstances justifying a finding that the seller impliedly warranted the lime to be reasonably fit for the purpose intended. The lime was used by the purchaser in plastering the building. The work proved defective, and the evidence sustained a finding that the defect was in the quality of the lime. The purchaser thereupon papered the side walls and replastered the ceilings with another material. He then brought suit against the seller to recover the cost of such papering and replastering. *Held*, That in such case this expense could not be recovered unless it was shown (1) that the defect in the lime could not, by a person accustomed to use such materials, have been discovered before it was used in making plaster and applied to the walls; and (2) that the mode of remedying the defect was reasonable and did not exceed in cost that of replastering with the same kind of material of good quality. *Id.*

Secretary of State. See IMPEACHMENT.

Section Lines. See HIGHWAYS.

Security. See FRAUDULENT CONVEYANCES, 6.

Sentence. See CRIMINAL LAW, 9-11.

Separation. See CONTRACTS, 6.

Servants. See MASTER AND SERVANT.

Set-Off and Counter-Claim.

1. In a suit on a note by the indorsee thereof after due, against the maker, the latter may set off a judgment owned by him against the plaintiff's assignor and others, such judgment debtors being insolvent. *Wilbur v. Jeep*... 604
2. Any set-off to a promissory note which would have been good between original parties may be pleaded against an indorsee who acquires it after maturity, as he takes it subject to any set-off which the maker had against any prior holder. *Id.*
3. In a suit on a note by the indorsee thereof after due, against the maker, the latter may set off a past due note owned by him, made by others, and on which the plaintiff's assignor is liable to the defendant as indorser, such makers and indorsers being insolvent. *Id.*
4. In a proceeding to obtain possession of the assets of an insolvent bank wrongfully withheld by one of its former officers, such officer cannot require the allowance of a set-off or counter-claim as a condition precedent to the delivery of the possession of such assets. *State v. Commercial & Savings Bank* 174

Settlement. See ACCORD AND SATISFACTION. JUDGMENTS, 6.

Sheriff Sales. See HOMESTEADS.

Sheriffs and Constables.

1. Where a sufficient inventory has been filed to entitle an execution debtor to the exemptions provided in sections 522 and 523 of the Code of Civil Procedure, it is the duty of the officer to proceed further only as provided in said sections, and if, notwithstanding the due filing of the inventory, the officer holding an execution, without compliance with the statute in such case made and provided, sells the property held by him under his execution, he is liable on his bond for the value of the property so sold, at least to the limit of $500. *Kriesel v. Eddy*..... 63
2. Where a suit in attachment was brought against a vendor of a stock of goods on the ground that the sale was fraudulently made to defeat creditors, a sheriff seized the goods, judgment was rendered sustaining the attachment, and ordering the goods sold. *Held*, That the record of said attachment proceedings, the same being in force, was competent evidence on behalf of the sheriff in a suit

Sheriffs and Constables—*concluded.*

brought against him for the unlawful conversion of said stock of goods, in which suit he pleaded justification under said attachment proceedings, and that the sale to plaintiffs with their knowledge was fraudulently made to defeat the creditors of their vendors. *Sonnenschein v. Bartels* 592

3. A mortgagee of chattels, in possession, was garnished by a judgment creditor of the mortgagor, and ordered to pay into court, as garnishee, any surplus remaining after payment of his mortgage debt and expenses, which he failed to do. Pending foreclosure of the mortgage a writ of attachment was levied on the mortgaged goods subject to the mortgage debt; and the proceeds of the sale made under the mortgage, after payment of the mortgage debt, were paid to the attaching creditor. The sale not having been made by the officer levying the attachment, and the proceeds not having come into his hands, it was *held* the officer levying the attachment was not liable to the first garnishing creditor for conversion of the goods. *Downing v. Overmire* 412

Special Findings. See REVIEW, 16.

Specific Performance. See PRINCIPAL AND AGENT, 2.

State Banks. See RECEIVERS. TRUSTS.

State and State Officers. See IMPEACHMENT. LEGISLATIVE APPROPRIATIONS, 2, 3.

Statute of Frauds.

1. A petition alleging an agreement within the statute of frauds, but not alleging that such agreement was in writing, is sufficient after judgment. *Schmid v. Schmid*..... 629
2. An oral promise, omitted from a written memorandum to prevent a third person from learning of it, by a purchaser to pay an employe of the seller wages due at the time of sale, as part consideration for the property, is not within the statute of frauds, where the promisee was induced to execute the writing on the faith of the oral promise. *Barnett v. Pratt*..... 349
3. A parol contract provided that plaintiff should enter his voluntary appearance to a suit then pending to foreclose a mortgage on real estate owned by him and waive the nine months' stay of sale of the premises allowed by law, in consideration of which, defendant should bid in said premises at the sale under the foreclosure proceedings at the amount of the decree, interest, and costs, resell the same

Statute of Frauds—*concluded.*

at private sale, and pay plaintiff the amount realized in excess of the bid. *Held*, A valid contract and not within the statute of frauds. *Jones Nat. Bank v. Price*..... 291

Statute of Limitations. See ADVERSE POSSESSION. CORPORATIONS, 3. DIVORCE, 5. JUDGMENTS, 2.

1. Begins to run in favor of the drawer of a check at the latest after the lapse of a reasonable time for the presentment of the check. *Scroggin v. McClelland*..... 644

2. A stockholder of a corporation who seeks as such to impress with an express trust the property of such corporation regularly sold at judicial sale to an officer of such corporation should commence proceedings within a reasonable time. The lapse of four years after the discovery of the alleged fraud, or of such facts as were sufficient to demand such investigation by plaintiff as would have disclosed the alleged fraud, bars an action brought for relief upon the ground of such fraud. *Horbach v. Marsh*, 22

Statutes. See CONSTITUTIONAL LAW, 1, 3. ELECTIONS, 2. LEGISLATIVE APPROPRIATIONS, 3. TABLE, *ante*, p. xlvii.

1. The decedent law, chapter 57, Session Laws of 1889, is void because its object is not expressed in its title, and because it is in effect amendatory of other acts which it does not contain. *Trumble v. Trumble*..... 340

2. Under the title of an act to amend a certain other act no amendment can be enacted which is not germane to the subject of the original act. *Id.*

3. When portions of an act are invalid because not within the title, the whole act must be declared void if it is apparent from an inspection of the act itself that the invalid portions formed an inducement to its passage. *Id.*

4. When the journals of the two houses of the legislature and the acts of the governor clearly manifest the intention of the law-making branches of the government, the courts will not permit the will of the people so manifested to be thwarted by the error or dishonesty of an enrolling clerk. *State v. Moore*..... 13

5. Where a bill has been attested by the signature of the presiding officers of both branches of the legislature, and signed by the governor, it will not be declared invalid because of irregularities in the proceedings of the legislature where no express provision of the constitution has been violated. *Id.*

Statutes—*concluded.*

6. The title of the act of February 15, 1877, "to regulate the purchase of supplies for the public institutions and executive officers of the state," is not broad enough to include a repeal by implication of the provisions of the act of February 13, 1877, for the auditing by the board of public lands and buildings of accounts for money disbursed for the support of the public institutions of the state. *In re Board of Public Lands and Buildings* 425

7. Chapter 57, Session Laws of 1889, providing for the descent of real property and the distribution of personal property of intestates, the disposition of homesteads of intestates, the barring of an insane wife's interest in the lands of her husband by deed of her guardian, and the abolition of the estates of dower and curtesy, is void, because it contains more than one subject. *Trumble v. Trumble*..... 340

8. "A bill for an act making an appropriation for the current expenses of the state government, * * * and to pay miscellaneous items of indebtedness owing by the state of Nebraska," is a title broad enough to include an item for expenses of impeachment in an appropriation bill. *State v. Moore*..... 17

9. Where a general appropriation bill, carrying an item for a specific purpose, was duly passed by both houses of the legislature, but by a clerical error of an enrolling clerk the amount was afterward increased, and the bill was in this condition presented to and signed by the presiding officers of the two houses, and approved by the governor, *held*, that the bill appropriated for the purpose specified therein the amount stated before the error was made. *Id*..... 13

Stay. See LIQUORS, 4.

Stipulations. See BILL OF EXCEPTIONS, 1.

Stockholders. See CORPORATIONS, 2–4.

Street Railways.

The granting of a franchise by the electors of a city to a corporation to build and operate a street railway in the streets of the city does not exempt the street railway company from liability for injuries caused by its negligence, whether such negligence consists in the improper and careless management of its property or in the character of the motive power employed in propelling its cars. *Lincoln Rapid Transit Co. v. Nichols*..... 332

Streets. See ESTOPPEL, 1. METROPOLITAN CITIES.

Subrogation. See MERGER.

Subscription. See CORPORATIONS, 2, 4.

Summons. See JUDGMENTS, 11.

A summons in an action of forcible detainer, issued and served three days prior to the day appointed for trial, including the day of service, is sufficient to confer jurisdiction over the person of the defendant. *Messick v. Wigent*, 692

Supreme Court. See CONSTITUTIONAL LAW, 1. NEW TRIAL, 1.

1. Motions for a rehearing in cases examined by the commissioners may be filed as in cases where the opinions have been prepared by the court, and such motions will be considered by the court. If there is probable error a rehearing will be granted. *In re Supreme Court Commissioners* 655

2. It is the duty of the supreme court commissioners to examine records, hear arguments, consider the authorities bearing upon the questions involved, and write opinions conforming to their views. In all these respects they are to act independently of the court, but their opinions have no force or effect until the syllabus of each case is approved by the court and filed by it. *Id.*

Surveys. See BOUNDARIES, 2.

Taxation. See CONSTITUTIONAL LAW, 3. METROPOLITAN CITIES, 1.

Telegraph Companies.

The legal status of a telegraph company is practically that of a common carrier of intelligence for hire, and such company is bound to correctly and promptly transmit and deliver messages entrusted to it, and cannot by contract relieve itself, either in whole or in part, from liability for injury or loss resulting from its own negligence. *Pacific Telegraph Co. v. Underwood* 315

Tenancy. See LANDLORD AND TENANT.

Time. See APPEAL, 4, 5, 7, 8. BANKS AND BANKING, 4. MECHANICS' LIENS, 4. REPLEVIN, 2. SUMMONS.

Titles of Acts. See STATUTES, 1–3, 9.

Torts. See DEATH BY WRONGFUL ACT.

Township Bonds. See RAILROAD COMPANIES, 2, 3.

Transcripts. See APPEAL, 7, 8.

Trespassing Animals. See ANIMALS, 3, 4.

Trial. See INSTRUCTIONS. JURY, 1. REVIEW, 14, 19, 25. SALES, 7, 8.

1. It is not reversible error to permit a jury to remain in charge of a deputy sheriff while deliberating upon their verdict without his being specially sworn by the court in that behalf. *Deranlieu v. Jandt*..... 532
2. Error committed in the admission in evidence of a written instrument, without proof of its execution, is cured where such proof is afterwards made before the party offering the instrument has rested his case. *Jones v. Loree*..... 816
3. An objection interposed to a question not answered by a witness does not present for review in this court the propriety of a similar question asked at a later stage of the examination and answered without objection. *Wheeler v. Van Sickle*..... 651
4. It is the duty of the court on its own motion to state the issues as presented by the pleadings to the jury. If, however, it fails to do so, a request to that effect must be made, and upon the failure an exception taken. If no exceptions are taken and the objection not assigned in the motion for a new trial, it will be waived. *Barney v. Pinkham*..... 664
5. The trial court may, in its discretion, require that offers of evidence, objected to, be made in such a manner as not to reach the ears of the jury, and should adopt this course where the offer to be made threatens to prejudice the party objecting if heard by the jury. A verdict will not, however, be disturbed because of the refusal of the trial court to so order, unless it is apparent from the record that there was an abuse of discretion. *Omaha Coal, Coke & Lime Co. v. Fay*..... 69

Trover and Conversion. See EVIDENCE, 5. SHERIFFS AND CONSTABLES, 2.

1. To render an officer liable on his official bond for the conversion of chattels it must appear that he has made sale of the property levied on, or received the proceeds of a sale made under his writ. A mere formal levy of the writ on goods in the possession of a mortgagee, where they are not actually removed or taken into custody, or sold by the officer, or the proceeds of sale paid to the officer, will not render the officer liable for their conversion. *Downing v. Overmire*..... 412
2. A petition in an action in the nature of trover averred ownership generally of certain chattels in the plaintiff. The defendant denied plaintiff's ownership and alleged

Trover and Conversion—*concluded.*

ownership in one B. F. S., and a seizure by defendant under proceedings against B. F. S. *Held*, That the title to the chattels was properly put in issue by these pleadings and that plaintiff's case was sustained by proof of ownership in Mrs. S., and a chattel mortgage made by Mrs. S. to the plaintiff. *Kavanaugh v. Oberfelder* 647

Trusts. See PLEDGES, 2. STATUTE OF LIMITATIONS, 2.

Where persons have, by the fraudulent conduct of themselves or their agents, obtained possession of the assets of an insolvent bank, and are unable to return to the receiver of such insolvent bank the said assets in kind, such persons will be held to strict accountability for the value thereof. *State v. Commercial & Savings Bank*..... 174

Undertaking. See APPEAL, 5.

Usage. See CUSTOM AND USAGE.

Usury. See COURTS, 2.

1. A purchaser of the equity of redemption, being neither surety nor privy, who assumes a mortgage as a part of the purchase price of land, cannot set up the usurious contract of his grantor and plead usury in such contract. *McKnight v. Phelps*..... 858
2. In an action to foreclose a mortgage executed to secure a note given in payment for procuring a loan the court will not, on motion of a stranger, in default of an appearance by the maker and a plea of usury by him, add the amount of the commission note to the interest on the loan for five years in order to taint the transaction with usury. *Morling v. Bronson*..... 608
3. A written contract, by the terms of which a commission merchant in Chicago advances money to a grain dealer in Nebraska, for which the latter agrees to pay interest at the rate of seven per cent per annum, and also to pay the commission merchant a stated sum as commissions for the sale of all grain purchased with the money borrowed, whether the borrower sold his grain through the commission merchant or elsewhere, is not on its face usurious, although the profits to the commission merchant may exceed the highest lawful rate of interest. *Morrissey v. Broomal*..... 766

Vendor and Vendee. See CORPORATIONS, 1, 3. EQUITY. MECHANICS' LIENS, 13. MORTGAGES, 3. PARTNERSHIP, 2, 3. PRINCIPAL AND AGENT, 2. SALES.

1. Persons who purchase while land is in the actual occu-

Vendor and Vendee—*concluded.*

pancy of another are charged with notice of his rights in the premises. *Prine v. Syverson*..... 860

2. If a vendee in possession of real property by virtue of an executory contract for the purchase of the same, erects improvements thereon, the rights of the vendor in said property are not thereby, of necessity, postponed to the lien of the mechanic or material-man under the mechanics' lien law. *Pickens v. Plattsmouth Investment Co*..... 272

3. One who attempts, in an action against the equitable owner of land, to assert a mortgage executed in fraud of the defendant's rights by the holder of the legal title, is required to show affirmatively that he took such mortgage for value, without notice of the equities of the defendant, relying upon the apparent ownership of the mortgagor. *Phœnix Mutual Life Ins. Co. v. Brown*..... 705

Venue. See REVIEW, 19.

1. Under sections 958*a* and 958*b* of the Code, an affidavit by a defendant for a change of venue of a cause pending before a justice of the peace is sufficient if it is in the language of the statute. *Peyton v. Johnson*..... 886

2. Where an affidavit for change of venue states that the nearest justice to whom said cause could be transferred is, as affiant verily believes, biased and prejudiced against affiant so that a fair and impartial hearing cannot be had before him, it is error for the justice before whom the action is pending to order the venue changed to such nearest justice. *Id.*

3. Where a proper affidavit for a change of the place of trial is seasonably filed, and the provisions of the statute relating to the payment of costs have been complied with, it is the imperative duty of the justice of the peace before whom the objection is made to transfer the cause to the nearest justice of the county to whom the same objections do not apply. *Id.*

Village Boards. See LIQUORS. MANDAMUS, 2.

Villages.

An order incorporating a village is void when it is obtained from the county board by means of a paper purporting to be a petition signed by a majority of the taxable inhabitants of the territory sought to be incorporated, but the signatures attached to which were not by the signers thereto appended, but were given for some other purpose and fraudulently thereto attached. *State v. Uridil*..... 371

Voir Dire. See JURY, 2-4.

Voluntary Appearance. See GARNISHMENT, 4.

Voluntary Assignments.

1. Several chattel mortgages made and delivered simultaneously to secure different creditors of the mortgagor, the delivery being to one of the mortgagees, who in the transaction acts for himself and on behalf of all the other mortgagees, do not constitute an assignment for the benefit of creditors. *Jones v. Loree*..... 816

2. The assignment law does not deprive insolvent debtors of their common law right to prefer creditors. The law merely prohibits preferences, with certain exceptions named in the act, when made in the assignment itself, and preferences made within thirty days before an assignment actually executed, with notice upon the part of the creditor preferred that the debtor was then insolvent or contemplating insolvency. *Kavanaugh v. Oberfelder*.... 647

Voters. See ELECTIONS. INDIANS.

Vouchers. See LEGISLATIVE APPROPRIATIONS, 1.

Wages. See RES ADJUDICATA, 2.

Waiver. See APPEAL, 8. ELECTIONS, 7. INSURANCE, 2. MECHANICS' LIENS, 13, 14. RATIFICATION. TRIAL, 4.

Warehouse Receipts. See PLEDGES, 1.

Warranty. See EVIDENCE, 7. SALES, 5-9.

Water Companies.

1. A provision in the ordinance of a city granting a franchise to supply water to the city requiring that "the grantee shall constantly, day and night, except in the case of an unavoidable accident, keep all fire hydrants supplied with water for instant service, and shall keep them in good order and efficiency," did not confer upon the owner of property destroyed by fire a right of action against said grantee on account of its failure to furnish water as stipulated, although thereby the loss by such fire would have been obviated. *Eaton v. Fairbury Water-Works Co*..... 546

2. Under such circumstances such grantee is not liable by reason of assuming the functions which might properly belong to the city, for the reason that under the facts stated, the city, if performing the same functions, would not be liable. *Id*..... 547

Witnesses. See CRIMINAL LAW, 5, 6. EVIDENCE, 7. HOMICIDE.

1. Upon a second trial of a case it cannot be shown for the

Witnesses—*concluded.*

purpose of impeachment that upon a former trial a witness failed to testify as to certain facts covered by his examination upon the second trial, unless it be also shown that he was interrogated as to such facts or that his attention was otherwise directed thereto. *Wheeler v. Van Sickle*, 651

2. Evidence of the general reputation of a witness for truth and veracity, to be available for the impeachment of such witness, must have reference to such reputation at his present or recent place of residence. It should not relate to a residence which had ceased two and a half years before such witness testified. *Sun Fire Office v. Ayerst*..... 184

3. Under the provision of section 331 of the Code of Civil Procedure, a wife, over her husband's objection, cannot be required to testify as to facts which, it is claimed by the adverse party, would show that a transfer of property from her husband to herself was fraudulent. Neither can the husband under like circumstances be compelled to testify as against his wife. *Niland v. Kalish*..... 47

Words and Phrases.

"Adjacent." *McCormick v. City of Omaha* 829
"*Caveat emptor*." *Omaha Coal, Coke & Lime Co. v. Fay*..... 74
"Owner." *Laflin v. Svoboda*..... 370
"Viewing." *Lancaster County v. Holyoke*..... 328

Writs. See SUMMONS.