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JAMES CONWAY v. JOHN ROBERTS.

FILED NOVEMBER 21, 1893. No. 5610.

Exemptions: RIGHT OF FARMER TO SELECT HORSES. By the provisions of section 530 of the Code of Civil Procedure a debtor, resident of this state, the head of a family, and engaged in the business of agriculture, is entitled to select and hold as exempt from execution "a pair of horses;" and he may exercise his own discretion in the selection of such horses, and is not limited to any particular horses, but may make such selection from any horses owned by him.

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

Daniel F. Osgood, for plaintiff in error, cited: *Keybers v. McComber*, 67 Cal., 395; *Kilpatrick v. Callender*, 34 Neb., 727.

S. P. Davidson, contra, cited: Code, sec. 530; *Williams v. Golden*, 10 Neb., 434; *Frazier v. Syas*, 10 Neb., 117; *State v. Sanford*, 12 Neb., 430; *Chesney v. Francisco*, 12 Neb., 626; *Desmond v. State*, 15 Neb., 439.

RAGAN, C.

This is an action in replevin brought in the district court of Johnson county by John Roberts against James Conway, a constable of said county. Roberts alleged in his petition that he was a resident of said county; the head of a family; engaged in the business of agriculture; the owner of and entitled to the possession of one two-year-old horse, which had been taken by Conway on an execution against him, Roberts, but that said horse was exempt under the law. Roberts had a verdict and judgment, and Conway comes here on error.

It appears from the record that Johnson was a resident

of said Johnson county, the head of a family, engaged in the business of agriculture, and possessed of no real estate whatsoever, either as a homestead or otherwise; that Conway seized the horse sued for by virtue of an execution against Roberts, who thereupon made inventory under oath of the whole of his, Roberts', personal property, and demanded an appraisement of all such property as was not specifically exempt, in order that he might select his other exemptions. The record does not show that any appraisal was had, but Conway appears to have released all the property levied upon, except the horse in question.

Section 530, Code of Civil Procedure provides: "No property hereinafter mentioned shall be liable to attachment, execution, or sale, on any final process issued from any court in this state, against any person being a resident of this state and the head of a family. * * * Sixth. * * * and if the debtor be at the time actually engaged in the business of agriculture, in addition to the above, one yoke of oxen, or a pair of horses in lieu thereof. * * * All of which articles hereinbefore intended to be exempt shall be chosen by the debtor, his agent, clerk, or legal representative, as the case may be." This law exempted from sale on execution "a pair of horses" and left it to Roberts to choose out of all the horses he owned a pair he desired to retain. Roberts having done this, the officer should have released the horses selected.

Conway requested the trial court to instruct the jury as follows:

"1. The court instructs the jury that the law in exempting a team to a person engaged in the business of farming contemplates a team actually used by him, if he has more than two horses.

"2. The court instructs the jury that a two-year-old colt is not a horse and is not exempt if the person claiming the exemption owns horses four years old and over, which he actually uses in carrying on his business of farming.

"3. The court instructs the jury that if the plaintiff owned a team which he actually used in carrying on his business of farming, then a two-year-old colt owned by the plaintiff not used in carrying on his business of farming is not specially exempt as a team, under the provisions of our statute."

Conway assigns as error the court's refusal to give these instructions. There was no error in the refusal of the court to so charge. It is not a team that the statute exempts, but "a pair of horses." The statute does not select, or attempt the selection of what particular horses shall be exempt, but leaves that to the execution debtor.

Conway also excepted to and assigns as error the giving of an instruction given by the court as follows: "The jury are instructed that the head of a family, being a resident of this state, and engaged in the business of agriculture, is entitled to hold as exempt a pair of horses specially exempt, in addition to his other exemptions, as provided by law; and this pair of horses said head of a family may select himself." This was correct, and a succinct statement of the law applicable to the facts of the case.

Conway also assigns as error the refusal of the court to permit him to prove the value of certain corn and wheat alleged to belong to Roberts. We are unable to see how this evidence was material in this case. It was not denied that Roberts was the head of a family and a resident of the state, and engaged in the business of agriculture. He selected the horse in controversy as one of the pair exempt to him by law, and whether he owned corn or wheat, or both, and their value, were all immaterial. There is no error in the record and the judgment of the district court is

AFFIRMED.

W. O. RUSSELL ET AL. v. ANDREW A. GILLESPIE.

FILED NOVEMBER 21, 1893. No. 4662.

Wrongful Seizure and Sale Under Writ of Attachment: LIABILITY OF SHERIFF: REVIEW. There being no disputed question of law in this case, and the verdict of the jury being in all respects in accordance with the evidence, the judgment of the district court is affirmed.

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

W. S. Summers, for plaintiffs in error.

J. Byron Jennings, contra.

RAGAN, C.

This suit was brought in the district court of Red Willow county by Andrew A. Gillespie against W. O. Russell, the sheriff of said county, and V. Franklin and H. Trowbridge, the sureties on said sheriff's official bond. The cause of action alleged is that on May 11th, 1889, said sheriff held an attachment writ sued out before a justice of the peace, in favor of Studebaker & Welch, against one A. W. Gillespie, and that by virtue of said writ said sheriff seized and sold "one bay horse, one set double harness, and one lumber wagon," then and there the property of Andrew A. Gillespie. The answer admitted Russell was the sheriff, Franklin and Trowbridge were his sureties, the seizure and sale of the property, and denied the other allegations of the petition, and alleged that the property so seized was the property of A. W. Gillespie, the defendant in the attachment suit. The one issue in the case, aside from the value of the property, was whether Andrew A. or A. W. Gillespie owned the property seized. The

plaintiff below had a verdict and judgment, and the sheriff and his sureties bring the case here for review.

It appears that Andrew A. Gillespie lived in Colby, Kansas, and A. W. Gillespie was his son living in McCook, Nebraska. Andrew A. Gillespie, at the request of another son of his, John W., also living in McCook, sent the property sued for to John W. Gillespie, at McCook, Nebraska, for him to sell. He rented a barn of one Hart in McCook, put the property in the same and had A. W. Gillespie, his brother, take care of it and try to find a purchaser for it. It appears also that both John W. and A. W. Gillespie did try to find purchasers for their father's property, and offered it at private sale and public auction, and among other persons to whom they offered to sell it was the sheriff. The sheriff says he was led to believe the property seized was A. W. Gillespie's by his having charge of it at the barn. When the sheriff took it he was informed that the property was Andrew A. Gillespie's, and the evidence shows his title to this property to be clear and without a shadow of fraud or suspicion. Indeed, it would seem from the record that the seizure of this man's property was a high-handed outrage. The sheriff knew the day he seized this property that it did not belong to the defendant; yet, in utter disregard of this old man's rights, and in violation of his duties as sheriff, he took a bond from Studebaker & Welch to indemnify him, and committed an act of oppression. The sheriff and his sureties now assign as error that the verdict is contrary to the law and the evidence. It is not contrary to the law or the evidence, but in perfect accord with both.

It is also insisted that the court erred in refusing to give to the jury this instruction: "The court instructs the jury that if you find from the evidence that the plaintiff Andrew A. Gillespie, at the time and prior to the levy of the attachment, under which the property described in the petition was seized and sold, had clothed his son, A. W. Gil-

lespie, with the possession and apparent ownership of said property, and that said son was at the time, with the knowledge and consent of the plaintiff, holding himself out as the real owner thereof, and that the plaintiff permitted him to manage and deal with said property as his own, and the sheriff acted thereon to his injury, that the plaintiff is estopped to assert his ownership of the property in dispute, and your verdict will be for the defendant." There was no error in refusing this instruction, for the reason that there was no evidence in the case to which it was applicable. The plaintiffs in error in their answer did not plead an estoppel, nor did they prove one. Under the evidence no other verdict than the one for the defendant in error could be sustained. There is no error in the record and the judgment of the district court is

AFFIRMED.

W. O. RUSSELL ET AL. V. JOHN W. GILLESPIE.

FILED NOVEMBER 21, 1893. No. 4660.

Wrongful Seizure and Sale Under Writ of Attachment: LIABILITY OF SHERIFF: REVIEW. There is no question of law involved in this case, and the verdict of the jury being the only one that should have been rendered on the testimony, the judgment is affirmed.

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

W. S. Summers, for plaintiffs in error.

J. Byron Jennings, contra.

RAGAN, C.

This suit was brought in the district court of Red Willow county by John W. Gillespie against William O. Russell, sheriff, V. Franklin and H. Trowbridge, sureties on the sheriff's official bond. The cause of action alleged in the petition is that on the 11th day of May, 1889, the sheriff held a writ of attachment issued by a justice of the peace in favor of Studebaker & Welch and against one A. W. Gillespie, and that under said writ said sheriff seized and sold one brown mare and one black horse, then and there the property of the said John W. Gillespie. The answer admitted the seizure and sale of the property and alleged that it belonged to A. W. Gillespie, the defendant in attachment. John W. Gillespie had a verdict and judgment, and the sheriff and his sureties bring the case here.

The only question litigated below was whether the horses seized belonged to John W. Gillespie or A. W. Gillespie. The evidence was substantially all one way. John W. Gillespie traded an interest in a saloon in Colorado for the horses, and then took or sent them to his father in Colby, Kansas. John W. then located in McCook, Nebraska, and then had these horses brought there. He rented a barn of one Hart in which to keep the horses, and placed his brother, A. W. Gillespie, the defendant in the attachment suit, in charge of them. There is nothing to contradict this evidence. The sheriff was advised when he seized the horses that they belonged to John W. Gillespie and that A. W. Gillespie had no interest in them. The jury could have rightfully found only as they did. The sale of this property by the sheriff was a willful and malicious trespass. There is no error in the record and the judgment of the district court is

AFFIRMED.

ST. JOSEPH & GRAND ISLAND RAILROAD COMPANY v. DE WITT W. PALMER.

FILED NOVEMBER 22, 1893. No. 4644.

1. **Carriers:** INTERSTATE SHIPMENTS: JURISDICTION OF STATE COURTS. The state courts have not lost their jurisdiction of the subject-matter of actions against carriers because of interstate shipments by reason of the fact that congress has legislated upon the subject.

2. **Railroad Companies:** COMMON CARRIERS: CONTRACTS TO LIMIT LIABILITY. A railroad company, in the carriage of goods, is subject to the liability of a common carrier, and must answer for all losses not occasioned by the act of God or the public enemy, and cannot in this state by special contract limit or relieve itself from this liability.

3. ——: ——: ——: INTERSTATE SHIPMENTS. The fact that the contract was for the carriage of goods from a point in this state to a point in another state does not change the rule.

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

The facts are stated in the opinion.

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

The bill of lading was the written contract of the parties. Parol evidence to prove a prior verbal agreement contradicting its provisions was inadmissible. (*Delaney v. Linder;* 22 Neb., 280; *Goss v. Lord Nugent,* 5 Barn. & A. [Eng.], 64*; *McNish v. Reynolds,* 95 Pa. St., 483; *Clarke v. Omaha & S. W. R. Co.,* 5 Neb., 322; *Hamilton v. Thrall,* 7 Neb., 210; *Dodge v. Kiene,* 23 Neb., 216.)

The court erred in submitting to the jury the question of the existence of any other contract for the shipment of the goods than that shown by the written bill of lad-

ing. (*Taylor v. Fox*, 16 Mo. App., 527; *Mulligan v. Illinois C. R. Co.*, 36 Ia., 181; *St. Louis, K. C. & N. R. Co. v. Cleary*, 77 Mo., 634; 2 Rorer, Railroads, p. 1319; 3 Wood, Railways, p. 1578, note; Hutchinson, Carriers, pp. 240, 241; *Cincinnati, H. & D. & D. & M. R. Co. v. Pontius*, 19 O. St., 222; *Hopkins v. St. Louis & S. F. R. Co.*, 29 Kan., 388; *Bank of Kentucky v. Adams Express Co.*, 93 U. S., 175; *Norwich Co. v. Wright*, 13 Wall. [U. S.], 113; *Squire v. New York C. R. Co.*, 98 Mass., 239; *Grace v. Adams*, 100 Mass., 505; *Steers v. Liverpool, N. Y. & P. Steamship Co.*, 57 N. Y., 1; *Long v. New York C. R. Co.*, 50 N. Y., 77; *Kirkland v. Dinsmore*, 62 N. Y., 171; *Belger v. Dinsmore*, 51 N. Y., 166; *McMillan v. Michigan S. & N. I. R. R. Co.*, 16 Mich., 79.)

The instructions proceed upon the theory that the constitution prohibits a railroad company in this state from limiting its liability to its own line. There was no common law duty in a common carrier to contract to carry beyond its own line. It had the power at common law to make a contract by which it was not to be held liable beyond its own line. The contract alone fixed the measure of its duty beyond its own line. The constitution does not create any new burden not existing in the common law. At common law and in this country a carrier is not a common carrier beyond its own line or chartered line of transportation. Any engagement beyond this must be measured only by the contract it may make in relation thereto. A railroad company may limit its liability as a common carrier to the line of its own road by express contract. (*Detroit & M. R. Co. v. Farmers & Millers Bank of Milwaukee*, 20 Wis., 130; *Mulligan v. Illinois C. R. Co.*, 36 Ia., 181; *Jones v. Cincinnati S. & M. R. Co.*, 45 Am. & Eng. R. Cas. [Ala.], 321; *Piedmont Manufacturing Co. v. Columbia & G. R. Co.*, 19 S. Car., 353; 2 Wood, Railways, p. 1572, and note; *Ortt v. Minneapolis & St. L. R. Co.*, 31 N. W. Rep. [Minn.], 519; *Hunter v. Southern P. R. Co.*,

13 S. W. Rep. [Tex.], 190; *Harris v. Grand Trunk R. Co.*, 5 Atl. Rep. [R. I.], 305, and note.)

State interference with the regulation of commerce, interstate in its character, cannot be sustained or upheld. (*Hart v. Pennsylvania R. Co.*, 112 U. S., 331; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S., 557; *Robbins v. Shelby County Taxing District*, 120 U. S., 492; *Leloup v. Port of Mobile*, 127 U. S., 640; *Bowman v. Chicago & N. W. R. Co.*, 125 U. S., 465.)

The court erred in refusing to mark the instruction for special findings requested by defendant either "given" or "refused" before submitting the same to the jury. (Secs. 54, 56, ch. 19, Comp. Stats.; *Tagg v. Miller*, 10 Neb., 443; *Fry v. Tilton*, 11 Neb., 456.)

It was error for the court to receive the general verdict, for the reason that the jury was unable to agree upon the questions submitted for special findings. (Sec. 293, Code; *Doom v. Walker*, 15 Neb., 339.)

John M. Ragan, contra:

The bill of lading was not the contract entered into for the shipment of the goods. The contract under which the parties acted was verbal. The rule forbidding the admission of parol evidence to contradict or vary the terms of a written agreement does not apply. The evidence of the parol contract was competent. (*Baker v. Michigan S. & N. I. R. Co.*, 42 Ill., 73; *Mobile & M. R. Co. v. Jurey*, 16 Am. & Eng. R. Cas. [U. S.], 132; *Pereira v. Central P. R. Co.*, 66 Cal., 92; *Bostwick v. Baltimore & O. R. Co.*, 45 N. Y., 712; *Strohn v. Detroit & M. R. Co.*, 21 Wis., 554; *Missouri P. R. Co. v. Beeson*, 30 Kan., 298.)

The law of the state in which the contract is made for the transportation of goods must control as to its nature, interpretation, and effect. (*Michigan C. R. Co. v. Boyd*, 91 Ill., 268.)

The company having contracted to carry the goods to

Grant's Pass, Oregon, and having accepted part of the freight, knowing what the car contained, could not limit its liability to its own line. (*Chicago & N. W. R. Co. v. Monfort*, 60 Ill., 175; *Wilde v. Merchants Dispatch Transportation Co.*, 47 Ia., 247; *Atchison & N. R. Co. v. Washburn*, 5 Neb., 117; *Missouri P. R. Co. v. Vandeventer*, 26 Neb., 222; sec. 4, art. 11, Constitution; sec. 111, ch. 16, Comp. Stats., 1887; *Jones v. Voorhees*, 10 O., 145; *Baltimore & O. R. Co. v. Campbell*, 36 O. St., 647; *Hale v. New Jersey Steam Navigation Co.*, 15 Conn., 539; *Derwort v. Loomer*, 21 Conn., 245; *Western Transportation Co. v. Newhall*, 24 Ill., 466; *Union P. R. Co. v. Marston*, 30 Neb., 241; *Illinois C. R. Co. v. Frankenberg*, 54 Ill., 88; *Adams Express Co. v. Steltaners*, 61 Ill., 184; *Ogdensburg & L. C. R. Co. v. Pratt*, 89 U. S., 123; *New York C. R. Co. v. Lockwood*, 84 U. S., 357; *Chicago, R. I. & P. R. Co. v. Conklin*, 32 Kan., 55; *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. [U. S.], 262.)

A judgment rendered on a special verdict will not be reversed for a failure to determine one or more of the issues, if the uncontradicted evidence proves that issue in favor of the prevailing party. (*Williams v. Porter*, 41 Wis., 423.)

The special questions submitted must be so material that answers to them would establish the case or the defense, and judgment will not be reversed for the failure of the jury to answer questions where, if answered, the answers could not have affected the result. (*McDermott v. Higby*, 23 Cal., 489; *Sage v. Haines*, 76 Ia., 581; *Louisville & N. R. Co. v. Brice*, 1 S. W. Rep. [Ky], 483; *Osborne v. Pennsylvania R. Co.*, 11 S. W. Rep. [Ky.], 207; *Seekell v. Norman*, 43 N. W. Rep. [Ia.], 190; *Schneider v. Chicago, B. & N. R. Co.*, 43 N. W. Rep. [Minn.], 783; *Dively v. City of Cedar Falls*, 27 Ia., 227; *Greenleaf v. Illinois C. R. Co.*, 29 Ia., 14; *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill., 132.)

IRVINE, C.

The plaintiff in error was a railroad company operating a line of railroad between St. Joseph, Missouri, and Grand Island, Nebraska, and passing through the city of Hastings, Nebraska. In December, 1889, certain goods were loaded into a car at Hastings for shipment to Grant's Pass, Oregon. These goods consisted of furniture, wearing apparel, and household goods belonging partly to one Pardee and partly to one Hart, and of a stock of drugs and drug store fixtures belonging to the defendant in error, Palmer. The goods were carried to Grand Island by the plaintiff in error, and there turned over to the Union Pacific Railway Company, on the line of whose road the car was wrecked and no part of the goods was ever delivered at Grant's Pass. Pardee and Hart assigned their claim to Palmer, who brought this suit in the district court of Adams county to recover damages for the loss of the goods.

The petition of the plaintiff below, in addition to the foregoing facts, which are undisputed, pleads, among other things, that Palmer, Pardee, and Hart entered into a verbal contract with the defendant to transport said goods and property to Grant's Pass and there safely deliver them in ten days in consideration of the sum of $200, and that after the goods were loaded into the car a paper was presented to Pardee for signature, and he signed it, believing it to be a receipt and in ignorance of certain clauses therein contained; that after the goods were turned over to the railroad company for shipment, and the freight of $200 paid, the railroad company's agent stated to the owners that the $200 might not be enough to pay the freight and extorted from the owners a promise that in case the freight should exceed $200, they would pay the excess; that the paper referred to was not the contract of shipment, but that the contract was as first stated, and that the contents and limitations of the paper were fraudulently concealed from the

owners of the goods. The paper referred to was in fact a bill of lading, and the clauses in regard to which fraud was alleged were two: The first was that the railroad company assumed no liability beyond the end of its own line; that is, at Grand Island, Nebraska. The other is as follows: "One car emigrant outfit O. R. Rel'd val. of $5 per cwt. in case of total loss. S. L. & C."

The answer, so far as it is material, may be analyzed as follows: First—That the railroad was engaged in the business of interstate commerce, and that this was an interstate shipment and not within the jurisdiction of the state courts. Second—That the bill of lading constituted the contract between the parties; that the first provision quoted exempted the defendant beyond the end of its own line, and that there was no fraud or concealment. Further, that the somewhat cabalistic letters and words quoted from the bill of lading meant and were understood to mean owner's risk released to the value of $5 per cwt. in case of total loss, and that the shippers were to load and count the goods. Third—That the contract between the parties contemplated merely the shipment of an emigrant outfit, which was understood to mean household goods alone, and that the stock of drugs was fraudulently loaded into the car; the established rate on a car containing drugs being very much greater than the established rate on an emigrant outfit. Fourth—That under the interstate commerce law false representations as to the contents of the package, with the consent and connivance of the carrier or its agent, are constituted a misdemeanor and bar the plaintiff from relief.

The evidence upon the part of the plaintiff tends to show that Pardee and Hart went to the agent of the company at Hastings, stating to him that they wished to ship their household goods and stock of drugs, and asked him for the rate to Grant's Pass upon the car load; that the agent informed them that the rate would be $200, and that there would be nothing to pay at the other end of the

line; that thereupon the goods were loaded upon a car furnished by the railroad company for that purpose; that after the loading was complete, Pardee and Palmer went to the agent for the bill of lading; that the agent then told them that inasmuch as the drugs had been loaded upon the car, he was not sure that $200 would pay the freight, but that he would mark upon the bill of lading a receipt for the $200, to apply on the freight, and if there was more to pay it must be paid at the other end; that they consented to this, because there was no other course left open to them; that the bill of lading was then handed to them, and Pardee signed it, none of the owners reading its conditions or having his attention called thereto.

Upon the part of the railroad company the testimony tends to show that at the first interview nothing was said about the stock of drugs, but that when Pardee came for the bill of lading the agent told him that he would not give him a clear bill of lading for he had reason to believe that "there was other stuff in the car besides household goods," but would accept $200, to be applied, the owners to pay the difference at the other end; that Palmer then handed him $200, and Pardee signed the bill of lading in duplicate.

The case was submitted to the jury under long instructions, the general effect of which was to submit the question as to whether the oral agreement pleaded or the bill of lading constituted the contract between the parties; further, to instruct the jury that under the laws of this state no limitations upon the liability of a common carrier could be imposed except upon proof that such limitations had been called to the attention of the shipper and by him expressly assented to, and submitting to the jury whether or not attention had been called to the limitations and assent obtained. There was a verdict for the plaintiff in the sum of $5,461.53.

1. The question of jurisdiction was first raised by de-

murrer to the petition and then by answer. The theory of the railroad company in this regard seems to be that the shipment being from one state to another, it became subject solely to the laws of the United States. If that were so, it would not oust the court of jurisdiction. It would only determine upon what principles of law the rights of the parties would depend. The record shows that an attempt was made to remove the case to the federal court; that the court refused to order the removal. Nevertheless, it would appear that an order of removal must have been obtained from some source, for there is in the record an order of the federal court remanding the case to the district court of Adams county. These proceedings are a part of the law of the case and conclusively determine the question of jurisdiction in favor of the plaintiff.

2. The questions of law in regard to the transaction are discussed in the briefs under a number of heads relating to objections to the evidence and to the instructions of the court. To state each in its order would consume much space, and a detailed consideration is unnecessary, for the reason that all these exceptions and assignments of error relate to a very few main questions. Great stress is laid upon the point that the bill of lading must be treated as the conclusive evidence of the contract between the parties, and that parol evidence was not admissible to show a prior verbal contract contrary to the terms of the bill of lading. In this connection it is also urged very strenuously that the court erred in submitting the question raised by this evidence to the jury. Further, it is urged that the instructions of the court are conflicting; and still further, that the limitations imposed by the bill of lading upon the carrier's liability are, upon principles of common law, valid obligations, and that they must be enforced in the absence of actual misrepresentations or concealment, which it is contended the evidence does not establish. Numerous authorities are cited upon both sides upon these points. A single

consideration disposes of all of these questions. Under the law of Nebraska, whatever the law may be elsewhere, it is beyond the power of a common carrier, by such provisions as appear in the bill of lading, assuming it to be the contract of the parties, to so limit its liability.

In *Atchison & N. R. Co. v. Washburn*, 5 Neb., 117, it is said: "The common law fixed the degree of care and diligence due from railroad companies as common carriers, and a failure to exercise this care and diligence is negligence, without any legal distinction as being gross or ordinary; and the better rule of law, sustained by the weight of authority, is that 'it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them for negligence in the performance of that duty.'" This case arose before the constitution of 1875 went into force. By article 11, section 4, of that constitution, it is provided that "the liability of railroad corporations as common carriers shall never be limited." While the writer might, if the question were a new one, construe this provision as simply a restriction upon the legislature against the limitation of carriers' liabilities by law, and not as preventing such limitation by special contract, the question is no longer an open one and has otherwise been determined. In *Missouri P. R. Co. v. Vandeventer*, 26 Neb., 222, by contract the railroad company sought to relieve itself from liability for injury to live stock unless notice in writing were given before the removal of the stock from its place of delivery. This provision of the constitution was there considered and discussed. The court, speaking through Judge COBB, says: "So I conclude that the object and intent of the convention in proposing, and of electors in adopting, this provision of the constitution here referred to was to put it out of the power of railroads, as common carriers, to limit their liability as such by special agreements with shippers, and thus remove

from their officers and agents all temptation to effect such exemption from liability, and the loss and damage to property which might of necessity follow the release of their responsibility and that of their agents therefor. (See *Atchison & N. R. Co. v. Washburn,* 5 Neb., 117, a case which arose under the old constitution, but heard in this court under the new.)" In addition to this constitutional provision, section 111 of chapter 16, Compiled Statutes, provides that "any railroad company receiving freight for transportation shall be entitled to the same rights and be subject to the same liabilities as common carriers." This is a portion of the general incorporation act under which the plaintiff in error derives its existence as a corporation. Compiled Statutes, chapter 72, article 1, section 5, provides: "No notice, either express or implied, shall be held to limit the liabilities of any railroad company as common carriers, unless they shall make it appear that such limitation was actually brought to the knowledge of the opposite party and assented to by him, or them, in express terms, before such limitation shall take effect." This section was discussed by the court in *Union P. R. Co. v. Marston,* 30 Neb., 241, and held to apply to just such a case as this, where the limitation was contained in a bill of lading which the shipper alleged was given after the making of an oral contract for shipment. Irrespective, then, of the question as to whether there was an oral contract, or whether such oral contract or the bill of lading constituted the final arrangement between the parties, the law of this state is settled that a common carrier cannot, even by the terms of an express contract, relieve itself of its common law liability.

It is said that at common law the common carrier is not liable for loss, in the absence of special contract, beyond the point at which it delivered the goods to a connecting carrier. To this it should be added that the contract of the shipper was with the carrier first receiving the goods, and

if such carrier undertook to deliver the goods at their destination, even though it contemplated doing so through intermediate carriers, it assumed a liability of such character for every part of the route. Many cases hold that receiving goods marked for a point beyond the end of the receiving carrier's route is evidence of a contract to deliver them as marked. In this case the bill of lading was executed in duplicate. In one of the copies the destination was left blank; in the other the language was: "Received of Palmer & Pardee the following described package, in apparent good order, marked and consigned as noted below, contents and value unknown, to be transported to Grant's Pass, Or., and delivered at the railroad depot at that point." Both copies in writing show that the goods were consigned to Pardee at Grant's Pass, Oregon. The negotiations as to the freight were, according to the uncontradicted testimony, with a view to prepayment all the way through. Hastings was only twenty-four miles from Grand Island, where the car was delivered to the Union Pacific; and the $200 received by the railroad company, if not intended as a full prepayment of the freight to Oregon, was certainly intended to apply on the freight throughout the whole distance. There is no possible view of the evidence from which it could be inferred that the railroad company had only contracted to deliver the goods to the next carrier.

3. The plaintiff in error seeks to avoid the effect of these constitutional and statutory enactments and judicial construction by pleading and arguing the effect of the act of congress known as the "interstate commerce law" and amendments thereto. The particular provision relied upon is from the act of 1889, as follows: "Any person, or any officer or agent of any corporation or company, who shall deliver property for transportation to any common carrier subject to the provisions of this act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classi-

fication, false weighing, false representations of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or servant, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof, in any court of the United States of competent jurisdiction within the district within which such offense was committed, be subject, for each offense, to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term not exceeding two years, or both, in the discretion of the court."

Conceding that the construction of such acts into misdemeanors should render the contract contrary to public policy to such an extent as to deprive the shipper of his remedy against the carrier, the evidence wholly fails to make out a case within the section quoted. Whatever false billing there may have been was by the company itself, as all the evidence shows that the agent knew before the car was moved after loading that it contained articles other than household goods. Under the most favorable construction of the evidence on behalf of the railroad company, if there was any false representation as to the contents of the "package," its true contents were known before the railroad company took charge of the car, and an agreement was made for the payment of any additional freight by reason of the introduction of drugs into the car. We cannot see, therefore, how this section, conceding it to have the effect claimed for it by plaintiff in error, could affect the right of recovery. To give it such effect would be to declare that the section quoted absolutely protects a railroad company from liability in any case where the shipper uses general terms in describing the goods to the carrier or agent, and the agent paraphrases such language into a technical phrase and such phrase does not correctly

describe the goods, or where the carrier's agent, of his own volition, makes false statements of the character of the shipment. The section referred to was chiefly designed as a restriction upon the carrier. Its whole aim was to prevent false billing or false representations in order to conceal discriminations in favor of particular shippers. It was not intended, and should not be construed, as a means of relieving a carrier from liability because its own agents have committed an error.

But it is argued that upon general grounds the whole subject-matter of interstate transportation was by the constitution placed within the power of congress, and that congress, having enacted the interstate commerce act, assumed such jurisdiction and thereby nullified existing state laws; that not only the acts of congress must be treated upon these subjects as the supreme law of the land, but that the decisions of the federal courts must be accepted as the final statements of the law, prevailing against state statutes and state decisions. Without discussing the question as to whether the federal decisions are opposed to the constitutional and statutory provisions of this state referred to, it is sufficient to say that we cannot accept the theory of the railroad company as above outlined. It is admitted in the pleadings that the company is a corporation organized under the laws of the state of Nebraska. The time of its organization does not appear, but the statutory provisions date from the very earliest period of the state's history. One statute quoted above is a portion of the general incorporation act relating to railroads, the act under which this company derives its right to exist. To say that an act of congress, especially one not in express terms contrary to these provisions, shall be given the effect of nullifying them would be to say that this state must cease to exercise its sovereign power of creating corporations for railroad purposes, else it must content itself with creating such corporations absolutely untrammeled by con-

ditions, or permit them to exist subject only to such conditions as the congress of the United States may see fit to impose. While this state forms a constituent part of the Union under its present constitution, this court should never yield its consent to such a doctrine. If such be the law, it must be declared by another tribunal; and in case it should be so declared, the exercise by the state of its sovereign power of creating such corporations should, from every motive of self-preservation, cease.

4. In addition to the general verdict rendered by the jury there was an attempt to have certain special findings returned. One of the errors assigned is the refusal of the court to mark upon the margin of the submission of those findings the word "given." If the submission of these findings amounted to an instruction the objection would be purely technical, and the refusal of the court to use the word "given" could not operate to the prejudice of the plaintiff in error. Instead of marking the submission given, the court made a note as follows: "As I have said in the attached submission, I submit these special findings for you to pass upon; and, in the opinion of this court, it would be the grossest kind of error to attempt to control your discretion in passing on these special findings." There also appears to have been indorsed upon the questions submitted a quotation of that portion of the statutes whereby it is permitted to the jury in its discretion to return a general or special verdict. Of the special questions submitted the first related to the value of the goods at Hastings and was answered. The second related to the value of the goods at Grant's Pass, Oregon, at the time when they should have been received there. In answer to this the jury stated: "We do not know." The other questions related to the freight rates under different circumstances. All these questions were answered: "We do not know." By the instructions the jury was told that if it should find for the plaintiff, the verdict should be for the market value

of the goods at Grant's Pass at the time they should have been there delivered, together with interest. The second question submitted was material to the case. The others were entirely immaterial, and the discharge of the jury without answering them was in no way prejudicial. It is urged, however, that when the jury answered that they did not know the market value of the goods at Grant's Pass, it, in effect, stated that it was unable to fix the measure of damages and that the general verdict could not, therefore, have been founded on the evidence and in obedience to the instructions. But under the evidence given as to the value of the goods at Grant's Pass, no verdict less than that returned could be sustained. There is evidence tending to show that the value of the goods at Hastings was less than the value marked upon an inventory offered in evidence, and one witness testified that the goods were worth no more at San Francisco than at Hastings, but there is nothing to show that he even had any knowledge of the value at San Francisco. The only competent evidence of the value of the goods at Grant's Pass, Oregon, fixes it at more that $7,000; so that the verdict rendered could not have been affected by any findings based upon the evidence in answer to the special question submitted.

Some of the instructions do not state the law correctly. Some of them are apparently conflicting, but in any view of the evidence, for the reasons already stated, no verdict different in character or less in amount could be sustained. The judgment is therefore

AFFIRMED.

RAGAN, C., took no part in the consideration or decision of this case.

LIND NELSON V. COLONEL J. HIATT.

FILED NOVEMBER 23, 1893. No. 5224.

Good-Will: SALE: BREACH OF CONTRACT: DAMAGES. A party sold his business and the good-will of the same to another, and agreed not to do a general business at that point. He violated his agreement, and engaged in business at the place named. The matter was then submitted to arbitration, and an award made assessing damages and restraining the vendor from again doing business at that place. Afterwards he carried on business at the place named. *Held*, That the purchaser was entitled to compensation for a violation of the agreement, and the damages could not be considered excessive.

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

Griggs, Rinaker & Bibb, for plaintiff in error, cited: *Holmes v. Boydston*, 1 Neb., 346; *French v. Ramge*, 2 Neb., 254; *Sycamore Co. v. Sturm*, 13 Neb., 215; *Bridges v. Lanham*, 14 Neb., 369; *Denver, T. & G. R. Co. v. Hutchins*, 31 Neb., 572.

Hardy & Wasson, contra.

MAXWELL, C. J.

This is an action for a breach of the following agreement:

"This agreement, entered into this 22d day of August, 1889, by and between Lind Nelson and C. J. Hiatt, witnesseth: That the said Lind Nelson, for and in consideration of the covenants to be performed by C. J. Hiatt, do promise and agree not to buy hogs or cattle to ship from this place of Odell, Gage county, Nebraska, except said Lind Nelson has a part of car load of cattle to ship, then said Nelson has the privilege to buy to fill said car and ship the same. This agreement to be in force so long as

C. J. Hiatt is in the business of buying and shipping from Odell, and no longer.

LIND NELSON.
"C. J. HIATT.

"Witness: MAT BROOKS."

The price paid by Hiatt seems to have been $1,000. Lind seems to have continued to purchase stock in violation of the agreement, and the parties submitted the matter to arbitration, the award being as follows:

"BEATRICE, NEB., June 11, 1890.

"We, the undersigned arbitrators in the case of *C. J. Hiatt v. Lind Nelson*, find:

"1. That above named defendant shall pay all court costs and the costs of this arbitration.

"2. That said defendant Lind Nelson shall pay the sum of $125 to the plaintiff C. J. Hiatt, as damages in full to date.

"3. That the defendant Lind Nelson shall hereafter abstain from engaging, either directly or indirectly, in the business of buying and shipping hogs or cattle at the village of Odell, Gage county, Nebraska, in accordance with the articles of agreement entered into on the 22d day of August, 1889, by and between above named plaintiff and defendant.

"In witness whereof, we have hereunto set our hands this 11th day of June, 1890.

L. E. WALKER,
"G. L. COLE,
"E. C. SALISBURY,
"*Arbitrators.*"

After this award was made the plaintiff continued to purchase stock in violation of his agreement, and this action was brought to recover for the damages.

In his answer to the petition the defendant below, Lind Nelson, alleges:

"1. That he admits that on August 22d, 1889, he entered into the written agreement with plaintiff set forth in plaintiff's petition as Exhibit 'A.'

"2. That there was no consideration for the said contract; that the property sold by defendant to plaintiff was well worth the sum paid by plaintiff to defendant at said time.

"3. That prior to and ever since the 11th day of June, 1890, the said plaintiff quit and ceased the business of buying and shipping of cattle and hogs from Odell, Gage county, Nebraska.

"4. That he denies each and every allegation in the first cause of action in said plaintiff's petition contained not herein expressly admitted or denied."

The second cause of action was withdrawn from the jury and need not be considered.

The principal errors relied upon are that the damages are excessive, and that the verdict is not sustained by sufficient evidence. These are considered together in the plaintiff in error's brief and will be so considered here.

Hiatt testified as a witness in his own behalf as follows:

Q. Are you the party that made the contract, Exhibit A, attached to the petition, with Mr. Nelson?

A. Yes, sir.

Q. You may now state what you purchased of Mr. Nelson under that contract, and what you paid for it.

A. I purchased his shipping yard and scales, and there was an old corn-crib in the yard and a shanty for a kind of office he had there, he had been using it for a hog pen part of the time, and the good-will of the business.

Q. What did he say to you in regard to the value of his business?

A. He said his business was worth $100 a month. He said the reason he wanted to sell——

Q. (By Mr. Bibb.) Was there any written contract of sale between you—any written bill of sale?

A. Yes, he gave me a deed to the land.

Q. This contract was in writing, then?

A. Yes.

Q. How much did you pay him, by the way?

A. I paid him the sum of $1,000.

Q. When did you take possession of the property?

A. Some time in August, 1889.

Q. How long after you made the contract?

A. The next day.

Q. Then what did you do there?

A. Well, I was living on the farm at the time.

Q. You may state whether or not you continued in business there up to the time you commenced the first action in the case of *Hiatt v. Nelson.* What business were you engaged in?

A. I was shipping from Odell.

Q. Shipping what?

A. Cattle and hogs.

Q. How did you get them to ship?

A. I bought them of farmers.

Q. Now, skip down to the 11th of June, 1890. What occurred about the 11th of June, 1890, after the commencement of the suit?

A. I got word that our suit was set for a certain day, and Nelson came to me and wanted to settle before we came up. I asked him how he wanted to settle, and he said he wanted to leave it to arbitrators; and I asked him who he wanted to pick for as arbitrators, and he said we would take three men out of the Masonic lodge at Odell. I objected to it. I told him I didn't want to mix any of our members up in the business, but was willing to go to Beatrice and pick men within the lodge there, and we agreed to it and came.

Q. What was done after you got here?

A. Well, we chose arbitrators.

Q. Do you know who they were?

A. L. E. Walker, G. L. Cole, and a Mr. Steele—I forgot his first name. Any way, he couldn't serve, and we chose Mr. Salisbury in his place.

Q. Was there any written obligation made before this was arbitrated?

A. Yes.

Q. On the 11th day of June, 1890, what business were you engaged in?

A. Engaged in the shipping business,—live stock, from Odell, Nebraska.

Q. How long had you been engaged in the business prior to that time at that place?

A. Since August.

Q. At the time of making that contract?

A. Yes, sir.

Q. State what year it was that you made the contract to commence business.

A. In the year 1889.

Q. And the 11th of June you were engaged in the same business up to January first?

A. Yes.

Q. Go on and tell the court how you were engaged in business, and what you were doing from that time up to January, 1891.

A. I was shipping hogs and cattle from Odell to market.

Q. Where did you get them to ship?

A. I bought them from farmers in that county.

Q. State to what extent you were engaged in it.

A. I was engaged in it all the while. I put in all my time to that business, and have ever since I bought the business.

Q. What was defendant Nelson doing from the 11th of June, 1890, up to the 17th of January, 1891?

A. He was engaged in the same kind of business.

Q. Where?

A. At Odell.

Q. In this county?

A. Yes.

Q. Where did he get his stock to ship?

A. Well, he got part of them from the same men that I got mine of, and different farmers around.

Q. How did he get them of the farmers?

A. I suppose he bought them.

Q. Now, he during this time was carrying on business there in competition with you?

A. Yes, he was.

Q. Tell how that affected you in regard to your buying. Go on and tell the jury.

A. Whenever he got a chance to overbid me on anything he would go and buy it regardless of the market. If I had bid on a bunch of stock all the market would afford, if the same men gave him a chance to bid he would go and buy it, to keep me from buying it, regardless of the market.

Q. State whether or not he compelled you to bid for stock more than it was worth. How did that affect your buying?

A. It caused me to have to pay more for stock than I could afford to and ship them to get my money back. It caused me to lose money in buying.

Q. How has his buying there in competition with you affected your business and trade?

A. Well, it has taken off the profit of the business. He caused me to ship a good many less stock than I would if he hadn't been in the business.

Q. How has what you had to pay for stock there,—has it been increased?

Q. You may state how in particular circumstances or cases that you know of, where he has bought stock from under you and caused you to bid more for it than it was worth?

A. There has been quite a number ot aoses, and I believe it was the 5th of November I went out and bought a car load of hogs, and he came along behind me and went to every man I bought of and offered them ten cents more a hundred than I bid for them, and told the men they were

worth that to ship. When they came in with the hogs they wanted me to give the rise on the market, and I told them I bid all I could afford to pay and ship them, and I showed them the market, and I don't think there was a man but was satisfied to let me have the hogs, except one man, Payne, who told me if he could not get any more when he brought them in he would let me have them. Nelson paid him sixty cents, and I bid $3.50. That was the only load of hogs he got out of the car load I bought.

Q. Where did he keep himself; where did he stay during this time?

A. He staid on the street and riding around the country.

Q. What was he doing there?

A. Bidding on stock and buying and shipping.

Q. To what extent did he buy and ship?

A. I don't know just how many car loads he bought and shipped. He was shipping right along,—he and Raney. He had a partner, and one would go one way and the other the other.

Q. How has it affected the business there at Odell as regards the business being profitable or not?

A. Well it has affected it so there has been no money in it to me.

Q. Now you are acquainted with the extent of that business at Odell, buying and shipping hogs that come in at that point, are you?

A. Yes, sir.

Q. You say at the time you made the contract and bought him out he told you how much the business was worth per month?

A. He told me there was about $100 a month in the business.

Q. How much have you been damaged for the seven months from June 11, 1890, to January 17, 1891, by reason of his buying and shipping hogs at Odell in competition with you?

Q. How much under ordinary circumstances, were not Mr. Nelson purchasing and shipping hogs and cattle from Odell, would the business have been worth from that particular month, from the 11th day of June to the 17th of January?

A. I think it would have been worth $100 a month to me if he hadn't been buying against me.

The material facts above set forth are not denied. The testimony thus proves, without contradiction, that the plaintiff in error, having sold his business and the good-will thereof to the defendant in error, with an agreement not to do business at that point, deliberately violated his agreement.

In *Carey v. Gunnison*, 17 N. W. Rep., 885, the supreme court of Iowa thus speaks of good-will: "The good-will connected with the establishment of any particular trade or occupation may be the subject of barter and sale. It is a valuable right, and if it be unlawfully destroyed or taken away, the law will award compensation to the injured party. It is defined to be 'the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stocks, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity, or reputation for skill, affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudice.' (Bouv., Law Dict.; Story, Partn., sec. 99.) We do not understand that counsel for defendant claims that what may be properly called 'good-will' is not the subject of contract, and that one acquiring it may not maintain an action for its deprivation. But he insists that that for which defendant seeks to recover in this action is not properly good-will, but rather profits of trade. The distinction between the two is obvious. Profits are the gains realized from trade; good-will is that which brings

trade. A favorable location of a mercantile establishment, or the habit of customers to resort to a particular locality, will bring trade. This advantage may be designated by the term 'good-will.' What the trader gains from the trade so acquired are profits. If by any means customers are driven from a particular locality to which they resort for trade, it is plain that the trade loses that which we have described as good-will."

In *Churton v. Douglas*, Johns. Eng. Ch., 174, it is said: "It was argued that in *Shackle v. Baker*, 14 Vesey, 468, *Cruttwell v. Lye*, 17 Vesey, 335, and *Kennedy v. Lee*, 3 Mer., 452, Lord Eldon has laid down the principle that an assignment of the 'good-will' of a trade, *simpliciter* carries no more with it than the advantage of occupying the premises which were occupied by the former firm, and the chance you thereby have of the customers of the former firm being attracted to those premises. But it would be taking too narrow a view of what is there laid down by Lord Eldon to say that it is confined to that. 'Good-will,' I apprehend, must mean every advantage, every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself, that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business. When Lord Eldon, in speaking of a nursery garden or a locality which the customers must frequent to look at the plants or other things, and when Sir Thomas Plumer, in another case, in speaking of a retail shop which a person must enter in order to buy the goods there exposed, they are only, as it appears to me, giving those as illustrations of what good-will is. But it would be absurd to say that where a large wholesale business is conducted, the public are mindful whether it is carried on at one end of the Strand or the other, or in

Fleet street, or in the Strand or any place adjoining, and that they regard that and do not regard the identity of the house of business, namely, the firm."

In *Sheppard v. Boggs*, 9 Neb., 257, and *Wallingford v. Burr*, 17 Neb., 137, this court held that the good-will of a business was an element of value which was the subject of sale in connection with the sale of the business. In the case at bar the plaintiff in error sold his business with the good-will to the defendant in error for $1,000, and was paid the consideration. One provision of the agreement was that he was not to do business at that point. He also reported that the business was worth $100 per month. He engaged in business again at Odell, in violation of his contract, and evidently sought to break up the business of the defendant in error. Thus, after a number of farmers had sold their hogs to the defendant in error for as high a price as the market would bear, the plaintiff in error came in and offered the sellers a greater price. The évident object was to create dissatisfaction and injure the defendant in error's business. The plaintiff in error complains that he made no money in the purchase of stock during this time. This merely corroborates the testimony of plaintiff below, that he was paying all that the market would bear, and that the defendant in error frequently offered more. The latter was clearly in the wrong. He not only violated his agreement, but the award of the arbitrators, and we cannot say that the damages are excessive. They do not amount to $50 per month. The plaintiff in error should do business at some other point, or else repurchase the business from the defendant in error. Honesty and fair dealing require him to adhere to his contract. Upon the whole case there is no material error in the record, and the judgment is

AFFIRMED.

UNION STOCK YARDS COMPANY OF OMAHA V. CHARLES M. CONOYER, ADMINISTRATOR.

FILED NOVEMBER 28, 1893. No. 5417.

1. **Negligence:** DEFECTIVE APPLIANCES: NOTICE: PLEADING. Where an action is brought by an administrator against a stock yards company for the death of a switchman, caused by defects in the railway track, it is unnecessary to allege in the petition that he had no knowledge of these defects. That is a matter of defense which, to admit proof, must be pleaded.
2. **Admission of Evidence.** There was no error in the admission of evidence.
3. **Motion to Direct Verdict for Defendant:** EVIDENCE. Where at the close of the testimony of the plaintiff a motion is made by the defendant to instruct the jury to return a verdict for the defendant, every fact alleged in the petition which there was testimony tending to prove will, for the purpose of the motion, be considered as proved; and if the testimony as a whole shows a liability of the defendant to the plaintiff the motion should be overruled.
4. **Instructions.** No error in giving or refusing instructions.

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

The opinion contains a statement of the case.

Breckenridge, Breckenridge & Crofoot, for plaintiff in error:

A petition in an action to recover for personal injuries, where the person injured sustains the legal relation of a servant to the person sought to be charged, must show that plaintiff or the injured person did not know, or had no reasonable means of knowledge, and that the defendant did know, or should have known, of the danger or defect causing the injury. (*Bogenschutz v. Smith,* 1 S. W. Rep. [Ky.], 578, 3 S. W. Rep., 800; *Louisville N. A. & C. R. Co. v.*

Sanford, 19 N. E. Rep. [Ind.], 770; *Louisville N. A. & C. R. Co. v. Corps*, 24 N. E. Rep. [Ind.], 1046; *Philadelphia & R. R. Co. v. Hughes*, 13 Atl. Rep. [Pa.], 288; *Norfolk & W. R. Co. v. Jackson's Admr.*, 8 S. E. Rep. [Va.], 370; (*Minty v. Union P. R. Co.*, 21 Pac. Rep. [Idaho], 663; *Mad River & L. E. R. Co. v. Barber*, 5 O. St., 541; *Buzzell v. Laconia Mfg. Co.*, 48 Me., 113; *Hayden v. Smithville Mfg. Co.*, 29 Conn., 548; *International & G. N. R. Co. v. Doyle*, 49 Tex., 190; Beach, Contributory Negligence, sec. 123; Wood, Master and Servant, sec. 414; 2 Thompson, Negligence, p. 1052; Black, Proof and Pleading in Accident Cases, secs. 18, 21.)

Mahoney, Minahan & Smyth, contra:

It is unnecessary for the servant to plead and prove want of knowledge of the defect. (*Mayes v. Chicago, R. I. & P. R. Co.*, 63 Ia., 562; *Wells v. Burlington, C. R. & N. R. Co.*, 56 Ia., 520; *Hulehan v. Green Bay, W. & St. P. R. Co.*, 58 Wis., 319, 68 Wis., 520; *Dorsey v. Phillips & Colby Construction Co.*, 42 Wis., 583; *Cummings v. Collins*, 61 Mo., 520; *Dale v. St. Louis, K. C. & N. R. Co.*, 63 Mo., 455; *Flynn v. Kansas City, St. J. & C. B. R. Co.*, 78 Mo., 195; *Colbert v. Rankin*, 72 Cal., 197; *Sanborn v. Madera Flume & Trading Co.*, 70 Cal., 261; *Snow v. Housatonic R. Co.*, 8 Allen [Mass.], 441; *Missouri P. R. Co. v. Lee*, 7 S. W. Rep. [Tex.], 857; *Pidcock v. Union P. R. Co.*, 1 L. R. A. [Utah], 131; *Shanny v. Androscoggin Mills*, 66 Me., 420; *Unotilla v. Duluth Lumber Co.*, 33 N. W. Rep. [Minn.], 551; *Smith v. Peninsular Car Works*, 27 N. W. Rep. [Mich.], 662; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578; *Stevens v. Howe*, 28 Neb., 547; *Village of Orleans v. Perry*, 24 Neb., 831.)

MAXWELL, C. J.

This is an action brought by the defendant in error against the plaintiff in error to recover for the death of

W. J. McAnnelly, caused, it is alleged, by the negligence of the plaintiff in error. On the trial of the cause the jury returned a verdict for $5,000 in favor of the defendant in error and made special findings as follows:

"The jury are directed to make the special findings in answer to the following interrogatives:

"1. What was the condition of the track at the point where the forward trucks of the next to the last car in the train left the rails?

"A. Covered by coal and cinders and other rubbish.

"2. Did the defendant know the condition of the track as it was on the morning of the accident?

"A. Not known.

"3. Did Mr. McAnnelly have knowledge, or means of knowledge, of the condition of things at the place where the accident occurred?

"A. Not known.

"4. What caused the forward trucks of the car next to the last one to jump the rails?

"A. Cinders and coal.

"5. Was or was not the death of Mr. McAnnelly accidental?

"A. It was not accidental.

"6. How did Mr. McAnnelly come to be thrown under the cars?

"A. It was caused by the jar received from the trucks leaving the rails.

"7. What caused the death of Mr. McAnnelly?

"A. He was crushed beneath the cars."

A motion for a new trial was overruled and judgment entered on the verdict.

1. The principal ground of the action is that the death was caused by the defective condition of the track, and it is objected by plaintiff in error that there is no allegation in the petition that the deceased "did not know, or had any means of knowledge, of the defective condition of the

track complained of." These facts are a matter of defense and need not be alleged or proved in the first instance. This question was before the supreme court of Iowa in *Mayes v. Chicago, R. I. & P. R. Co.*, 14 N. W. Rep., 342 and *Wells v. Burlington, C. R. & N. R. Co.*, 9 N. W. Rep., 364, and it was held to be a matter of defense, and unless pleaded by the defendant, proof could not be given on that point. There are many other cases sustaining the decisions of the Iowa court, but it is unnecessary to burden this opinion with them. Substantially the same rule was adopted by this court in *City of Lincoln v. Walker*, 18 Neb., 244, and other cases since decided. The first objection is untenable.

2. A number of objections are made to the introduction of evidence. It is unnecessary to review these at length. No material error has been pointed out, and no material error in that regard was committed by the court.

3. At the close of the testimony of the plaintiff below, defendant below asked the court to instruct the jury to return a verdict in its favor. This the court refused to do, to which the defendant below excepted and now assigns the ruling of the court for error. The record shows that there was testimony tending to sustain every proposition in the petition. Where this is the case, and a motion is made to direct a verdict, the rule is that every point which the evidence tends to prove, for the purposes of the motion, must be considered as established. Such a motion can only be sustained where there is a failure to prove some material fact in the case by reason of which no liability of the defendant to the plaintiff is shown. The motion, therefore, was properly overruled.

4. Errors are assigned in giving various instructions, and also in refusing to give several instructions asked by the defendant below. It is unnecessary to review these at length. The instructions given seem to be applicable to the testimony, and those asked were properly refused.

There is no material error in the record and the judgment is

AFFIRMED.

UNION STOCK YARDS COMPANY OF OMAHA V. ALBERT P. LARSON.

FILED NOVEMBER 28, 1893. No. 5460.

Master and Servant: DEFECTIVE APPLIANCES: PERSONAL INJURIES: EVIDENCE: REVIEW. In an action for personal injuries, the only question being the sufficiency of the testimony to sustain the verdict, and the testimony being ample on every material point, the verdict will not be set aside.

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

Charles J. Greene and *Breckenridge, Breckenridge & Crofoot,* for plaintiff in error.

Cowin & McHugh, contra.

MAXWELL, C. J.

This is an action for personal injuries sustained by the defendant in error by reason of the alleged negligence of the plaintiff in error. The injury is stated in the petition as follows:

"That he went into the employ of the defendant company in the year 1888 as a railroad switchman in and about the yards of the said defendant company and its tracks in and about South Omaha, and remained in the employ of the company until the 22d day of November, 1889, as such switchman. At the latter date, and for some time before, he was receiving wages from the defendant company as such switchman, to the amount of from $3.15

to $3.50 per day. Among other duties devolving upon the plaintiff as such switchman was the coupling and uncoupling of cars, car to and from car, and car to and from engine. It was the duty of the company in this behalf to furnish suitable cars, engines, and appliances, whereby and wherewith the plaintiff was required to do and perform said services. On the 22d day of November, 1889, the plaintiff, in the performance of his duty for the defendant, was called and required to uncouple a car from one of the engines of said defendant company, and while attempting to perform the said service his left hand was caught between the top lip of the draw-bar of the engine and the head-pin in the draw-bar on the car, and bruised and crushed the same so that he lost one finger, the second finger, and substantially the use of his left hand, which loss of use of hand is permanent, so that by reason of said injury the plaintiff is permanently disabled to a great extent to perform manual labor; that he suffered by reason of said injury great pain, mental and physical, and that up to the present time he is rendered wholly unable to perform any labor, and that his services were reasonably worth the sum of from $3.15 to $3.50 per day; that he has always performed manual labor for support and is not qualified in any other department to earn a livelihood. He has incurred large expense in connection with said sickness by incurring doctor bills to the amount of $100; that the said injury was caused wholly by the negligence of the said defendant company, in this: that the draw-head of the engine and the draw-head of the car that were coupled, and which the plaintiff attempted to uncouple, were worn out and defective and unfit for use, and had been so worn out and unfit for service for three months before the injury complained of, and were unfit for use and should have been removed and new ones placed in their stead; and by reason of being thus worn out and defective, the top lip of the draw-head of the engine, when slack was made for

uncoupling, reached back to the pin which had to be removed to make the uncoupling, while, if the said draw-heads had been in reasonably good condition, the draw-head of the engine would not, when slack was made, reach within an inch or an inch and one-half of the coupling pin when in place; and it was by reason of the fact of the draw-head extending back to the coupling pin and coming in contact with it that the said injury resulted. The defects were that the heads of the draw-heads were so worn out and defective as to cause the contact aforesaid, which would not have occurred had they been in reasonable and proper condition; that he did not know of the said defects until immediately after the injury aforesaid, but that before the injury the defendant company did know of such defects, but carelessly and negligently continued to use said appliances; that his injuries as aforesaid were caused wholly by the negligence and carelessness of the said company defendant; and that he, the plaintiff, was free from any and all carelessness, negligence, or blame in the premises."

To the petition the defendant below, after denying certain facts, answered as follows: "For its further answer to plaintiff's petition this defendant states: That the plaintiff was, at or about the time stated, an employe of this defendant and was a switchman in its yards in the city of South Omaha, Nebraska; that if said plaintiff received any injuries of any kind whatsoever while in the employ of this defendant, such injuries were received by and through the carelessness and negligence of the plaintiff and not because of any negligence or carelessness of this defendant. This defendant denies specifically that the draw-bar of the engine mentioned in his petition was defective and worn as therein alleged, and also denies that the draw-bar of the car referred to in plaintiff's petition was defective and worn as therein alleged, but states that the same, and particularly the draw-bar of the engine of the defendant, were in good

condition. That the employment of the plaintiff was in itself of a dangerous character, and the plaintiff was fully aware of the dangers incident thereto."

The reply is a general denial. On the trial of the cause the jury returned a verdict for the defendant in error for the sum of $3,900, upon which judgment was rendered.

The sole question presented is the sufficiency of the evidence to sustain the verdict. One Anthony Donohue was called as a witness on behalf of the defendant in error and testifies as follows:

Q. Did you know the character, the nature and conditions, of the front draw-head of engine No. 1?

A. Yes, sir; I did.

Q. At the time that Mr. Larson was hurt?

A. Yes, sir.

Q. You may state what the condition of that draw-head was.

A. It was worn out from working towards the hill. It was worn so that the draw-bar extended out far enough for the pin to——

Q. How long had it been in that condition?

A. I can't say how long. My attention was called to it two or three weeks before this man Larson was hurt.

Q. By whom?

A. F. E. Norris.

Q. Under what circumstances?

A. He got his glove caught when he was drawing the pin, but it didn't happen to catch his hand.

Q. Were you close by there?

A. I was sitting out about fifteen or twenty feet, where my office was nights.

Q. After he called your attention to it did you examine the draw-head?

A. Was there. I went out and looked at it.

Q. Who looked at it with you?

A. Well, there was this man Norris and one or two others.

Q. Did you, Mr. Donohue, say anything to Mr. Shropshire about this?

A. Yes, sir.

Q. When was that?

A. About two or three——

Q. No, with respect to Norris?

A. The next morning.

Q. What did you say to Shropshire about the draw-bar on No. 1?

A. I told him it would take the hand off of some one. I don't know just what I told him, but told him about the draw-bar being worn out and would catch somebody.

Donohue was the foreman of the night force in the yards, and he testifies that he informed Shropshire, the overseer of the yards, of the defective draw-head, and he is amply corroborated. So upon every other point in the case. It was one proper to submit to a jury, and the finding is suppported by ample evidence. There is no material error in the record and the judgment is

AFFIRMED.

STATE OF NEBRASKA, EX REL. VICTOR H. COFFMAN, v. W. C. WALTON, JUDGE, ET AL.

FILED NOVEMBER 28, 1893. No. 6541.

Bill of Exceptions: MANDAMUS TO REQUIRE SIGNATURE OF JUDGE: LACHES. A negotiable promissory note secured by a mortgage on real estate was made and delivered by one W. to C. C. duly indorsed the note and delivered the same to F., who thereafter brought an action of foreclosure, and obtained a decree finding the amount due on the note and mortgage, and that W. and C. were liable for any deficiency after the sale of the mortgaged premises. The decree was rendered April 18, 1892,

to which no objection was made, and the judgment for deficiency rendered June 26, 1893, whereupon it is sought to compel the judge before whom the case was tried, or his successor, to sign a bill of exceptions of the evidence introduced on the trial of the foreclosure suit to show that no evidence was introduced except the note and mortgage. *Held*, That the application came too late.

ORIGINAL application for *mandamus* to compel the respondents to sign a bill of exceptions. *Writ denied.*

John O. Yeiser, for relator, cited: *Cobb v. Thornton*, 8 How. Pr. [N. Y.], 66; *Bank of Rochester v. Emerson*, 10 Paige [N. Y.], 115; *Davidson v. Myers*, 24 Md., 538.

MAXWELL, C. J.

This is an application for a writ of *mandamus* to compel the defendants to sign a bill of exceptions. It is alleged, in substance, in the petition, that on the — day of October, 1891, Charles F. Fohs filed his petition in the district court of Douglas county against Charles W. White, Victor H. Coffman, *et al.*, the object of which was to foreclose a mortgage on certain real estate therein described; that on the 18th day of April, 1892, a decree of foreclosure and sale was duly rendered in said cause for the sum of $2,822.23, of which no complaint is now made; that the mortgaged property was sold, to which no objection is made; but after the sale of such property, to-wit, on the 26th day of June, 1893, a judgment for deficiency was duly entered against Coffman, and it was then sought to have the defendants sign a bill of exceptions in the original decree rendered April 18, 1892. A statement of the case will show that no authority exists for the preparation and signing of said bill after so great a lapse of time, and the defendants properly refused to sign the same. The case is somewhat similar to that of *Stover v. Tompkins*, 34 Neb., 465, but the question as to the effect of the original decree

is not before the court. The defendants did right in refusing to sign the bill and the

WRIT IS DENIED.

GEORGE Z. WORK ET AL., APPELLANTS, V. HARVEY E. BROWN ET AL., APPELLEES.

FILED NOVEMBER 28, 1893. No. 4967.

1. **Garnishment:** SUFFICIENCY OF ANSWER OF GARNISHEE: FAILURE TO OBEY ORDERS OF COURT. A garnishee who answers fully and in good faith as to the matters in garnishment proceedings and obeys the orders of the court will be fully protected; but if his answer is evasive, equivocal, and in the interests of one or more creditors, and he fails to obey the orders of the court in relation to the property or money in his hands, he acts at his peril.

2. **Liability of Garnishee for Interest on Funds in His Hands.** *Held*, That the plaintiffs were entitled to interest on $223.57, and the judgment so modified.

3. **The lien of transcripts of judgments** rendered in the county court is governed by section 18, chapter 20, Compiled Statutes.

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

S. P. Davidson, for appellants, cited: *Russell v. Lau*, 30 Neb., 812.

Clarence K. Chamberlain, contra:

Transcripts of judgments rendered in the county court become liens when filed in the office of the clerk of the district court. (Sec. 18, ch. 20, Comp. Stats.; *Eaton v. Ryan*, 5 Neb., 47; *Lamb v. Sherman*, 19 Neb., 681.)

Daniel F. Osgood, also for appellees.

MAXWELL, C. J.

This is an action in the nature of a creditor's bill to set aside a mortgage alleged to be fraudulent, and to have the priority of the liens claimed by the respective parties determined, and to have the real estate covered by such liens sold, and the proceeds applied in satisfaction of said liens, according to their priority. Plaintiffs allege in their petition that on the 18th day of August, 1888, they commenced an action in the district court of Johnson county, Nebraska, against said Harvey E. Brown, to recover the sum of $420.63 and interest and costs, and caused an order of attachment to issue therein, which was on same day, at 4 o'clock P. M., levied upon the undivided one-half of lot 6, in block 2, in the village of Elk Creek, Johnson county, Nebraska, as the property of said Brown, and the same then became and still is a subsisting lien upon said property; that on the 23d day of May, 1889, said cause came on for hearing in said court, and judgment was entered in favor of said plaintiffs for $434.63 and costs, taxed at $44.48, and that the property attached be sold and the proceeds of sale be applied in satisfaction of said judgment remaining unpaid by the proceeds of the garnishment process; that at the commencement of said action plaintiffs caused garnishment process to issue, which was served upon James D. Russell as garnishee, and in compliance with the command thereof said Russell answered that under a chattel mortgage executed by Brown to him he had taken possession of the property of Brown covered by the mortgage, and in accordance with its terms had sold enough thereof to satisfy his claim secured by said mortgage, and $237 more, which sum of $237 he still held in his hands, and the court thereupon ordered said Russell to pay said surplus so remaining in his hands into court, to be applied upon said judgment and costs, which sum the court erroneously found amounting to $260 with interest; that afterwards one H.

P. Lau, claiming a lien upon said surplus in the hands of Russell, prior to the garnishment lien of these plaintiffs, brought suit therefor against Russell in said district court, and on the 19th day of November, 1889, after a full hearing of all the facts in said last mentioned case, it was adjudged by the court that the lien of Lau upon the surplus in Russell's hands was prior and superior to the garnishment lien of these plaintiffs, and Russell had been compelled by said judgment to pay said surplus to said Lau; by reason whereof these plaintiffs have been compelled to surrender all claim upon the surplus by reason of said garnishment order, and rely exclusively upon their attachment lien upon said real estate to satisfy their said judgment, which remains wholly unpaid, and there is due thereon $513.53, and interest from February 14, 1891. The petition sets out a mortgage executed by said Harvey E. Brown to his wife Ellen Brown, and alleges that the same was given without consideration, fraudulently, for the purpose of hindering and delaying his creditors, and that Harvey E. Brown is insolvent, and that execution was issued upon said judgment in favor of these plaintiffs and returned unsatisfied for want of property whereon to levy; that W. V. Morse & Co., R. L. McDonald & Co., and the other defendants, naming them, claim some interest in or lien upon said real estate, as judgment creditors of said Harvey E. Brown, the true nature of which is unknown to plaintiffs, but the same is second, subordinate, and inferior to said attachment lien of these plaintiffs. The prayer is that said mortgage may be canceled, annulled, and set aside; that said order in garnishment be vacated and set aside; that plaintiffs' said attachment lien be declared the first and best lien upon said real estate for the full amount alleged to be due thereon as above mentioned; that said attached real estate be sold and the proceeds applied in satisfaction of said plaintiffs' attachment lien and costs, and the balance, if any, be applied as this court may direct; and that plaintiffs may have general relief.

Neither Brown nor his wife answered. W. V. Morse & Co., and the other defendants, who are judgment creditors of said Brown, each filed an answer setting up their respective judgments against said Brown and claiming the priority of lien by reason thereof, and allege that by reason of the garnishment proceedings set out in plaintiffs' petition, plaintiffs' attachment lien has been satisfied to the amount of $237, the surplus in the hands of the garnishee. To each of these answers plaintiffs file general denials.

At the April term, 1891, of the district court this cause was tried. Mr. Russell made an equivocal answer in the garnishment case and did not pay the money into court as ordered, and it does not clearly appear that he acted in good faith with other creditors of Brown. A garnishee, so far as different creditors are concerned, is a mere stakeholder. He should have no interest in the disposition of the funds to one creditor more than another. If he acts in good faith and answers fully and unequivocally in regard to the matters on which the garnishment is based, he will be protected. If he fails to do this, he does so at his peril. If he is garnished in more than one case, he must bring that fact to the knowledge of the court by answer or supplemental answer and invoke its protection. (Drake, Attachment, sec. 630*a*.) The court did not err, therefore, in refusing to credit him with the $237.50, which he claims to have paid as garnishee. Plaintiffs were entitled to interest, however, on the residue at the legal rate, and the clerk is directed to compute interest on $223.57 to the date of the judgment in the district court, and to that extent the judgment of the court below is modified.

The lien of a judgment rendered in the county court and a transcript filed in the district court is created by section 18, chapter, 20, Compiled Statutes, as follows: "Any person having a judgment rendered by a probate court may cause a transcript thereof to be filed in the office of the clerk of the district court in any county of this

state, and when said transcript is so filed, and entered upon the judgment record, such judgment shall be a lien on real estate in the county where the same is filed, and when the same is so filed and entered upon such judgment book, the clerk of such court may issue execution thereupon in like manner as execution is issued upon judgments rendered in the district court." The section above quoted makes a transcript of a judgment of the county court a lien from the date of filing in the district court. The lien of a judgment is created by statute and depends for its validity thereon. The statute in question is a special provision applicable to judgments in county courts and applies in this case. The court did not err, therefore, in establishing the priority of liens. The judgment as modified is affirmed.

JUDGMENT ACCORDINGLY.

IN RE BARRETT SCOTT.

FILED NOVEMBER 28, 1893. No. 6562.

1. **Upon an application for reduction of bail** by a prisoner, after indictment and before trial, the guilt of the accused will be presumed, but evidence may be received to repel that presumption.

2. **Review by Habeas Corpus.** An order of the district court fixing the amount of bail a prisoner shall give will not be disturbed by the supreme court in a proceeding by *habeas corpus* for reduction of bail, unless it clearly appears *per se* that the amount is unreasonably great and disproportionate to the offense charged.

3. **In fixing the amount of bail** the court or judge may take into consideration the nature of the offense; the penalty which the law authorized to be inflicted should there be a conviction; the probability of the accused appearing to answer the charge against him, if released on bail; his pecuniary condition, and the circumstances surrounding the case.

4. **Amount of Bail Required Under Indictment for Embezzlement.** *Held*, That the bail fixed by the district court for the appearance of the petitioner is not excessive.

ORIGINAL application for writ of *habeas corpus.*

The facts are stated in the opinion.

E. W. Adams and *J. H. Broady*, for petitioner:

The purpose of holding a person in custody to answer at a trial according to the law of the land, is not to punish him, but to secure his attendance at the trial. The constitution provides for release on bail, and that excessive bail shall not be required. (Constitution of Nebraska, sec. 9, art. 1.)

It is substantially a denial of bail and a violation of the constitutional guaranty against excessive bail to require a larger sum than from his circumstances the prisoner can be reasonably expected to give. (*United States v. Brawner*, 7 Fed. Rep., 86.)

Whether the bail is excessive, in effect, depends largely upon the pecuniary condition of the accused. Bail, to be reasonable in amount, should correspond to the financial condition of the country where the prisoner lives, and of himself and his friends. (*Ex parte Hutchings*, 11 Tex., App., 28; *McConnell v. State*, 13 Tex. App., 390; 2 Am. & Eng. Ency. Law, 12, 13, and cases cited.)

In considering the question of the amount of bail required, the presumption of guilt does not attach. (2 Bishop, Criminal Procedure, sec. 708.)

H. M. Uttley, *R. R. Dickson*, and *J. B. Barnes*, also for petitioner.

H. E. Murphy and *M. B. Reese, contra:*

The constitutional question sought to be presented is not to be applied to this case. It belonged to the district court alone. (Cooley, Const. Lim., p. 377.)

The presumption of innocence does not obtain, and the accused must be presumed to be guilty. The presumption changes after the indictment from that of innocence to that of guilt. Had the district court refused to admit the accused to bail, or to exercise any discretion, a different question would have been presented from what we have before us. The court did act, and decided. It acted judicially. This was final. (*Ex parte Duncan*, 53 Cal., 410, 54 Cal., 75; *In re Williams*, 23 Pac. Rep. [Cal.], 118; *Ex parte Ryan*, 44 Cal., 555; *People v. Dixon*, 4 Parker's Crim. Rep. [N. Y.], 651; *Ex parte Bryant*, 34 Ala., 270.)

NORVAL, J.

This was an application by Barrett Scott for a writ of *habeas corpus* to procure a reduction of the amount of his bail bond, alleging his inability to give a bond in the sum of $70,000, the amount fixed by the district court of Holt county, and that said sum is excessive. At the September, 1893, term of the district court of the county of Holt the grand jury returned an indictment charging the petitioner on the 4th day of August, 1893, as county treasurer of said county, with embezzling the sum of $70,000 of the public moneys belonging to said county. On the 7th day of October, 1893, on application of the prisoner to be admitted to bail, the district court fixed the amount of his recognizance at $24,000. Subsequently, on the 16th day of the same month, on motion of the county attorney, the district court, Judge Kinkaid presiding, increased the amount of recognizance to the sum of $70,000; and Scott refusing to give a bond in such sum, it was ordered by the court that he be remanded to the county jail until such recognizance be given.

There is no room for doubt that the district court has the power to increase or diminish the amount of bond a prisoner shall give for his appearance before said court and to answer to a criminal charge preferred

against him, at least during the term at which the original order fixing the amount of bail was made, and before any recognizance has been given. It is too well settled to require the citations of authorities, that courts of general jurisdiction, like district courts, have the authority to change, vacate, and set aside their own orders and judgments during the term at which they are entered, unless rights have become vested thereunder; and this power is a discretionary one, and cannot be controlled, unless there has been an abuse of discretion. In case a prisoner has been released on his giving a recognizance, the power of the court afterwards to raise the amount of the bond and require the accused to enter into a new recognizance, perhaps does not exist. In the case we are considering, however, the record conclusively shows that after the amount of the bond was first fixed at $24,000, and during the same term of court, but before the accused had succeeded in procuring a sufficient number of persons to sign his bond as security, the court increased the penalty of the bond to $70,000. The order in that behalf was not void.

It is insisted by counsel for the petitioner that the amount at which his bail was finally fixed is unreasonable and excessive, and a violation of the constitutional guaranty which declares that "all persons shall be bailable by sufficient sureties, except for treason and murder, where the proof is evident or the presumption is great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (Constitution, art. 1, sec. 9.)

Before entering upon a discussion of the question whether excessive bail has been required in this case, there are two other questions which we will first briefly consider, namely: Is the order of the district court fixing the amount of the recognizance final and conclusive? On an application to bail, after indictment, what presumption, if any, does the law raise as to the guilt or innocence of the accused?

Section 346 of the Criminal Code provides that "when any person charged with the commission of any bailable offense shall be confined in jail, whether committed by warrant under the hand and seal of any judge or magistrate, or by the sheriff or coroner, under any warrant upon indictment found, it shall be lawful for any judge of the supreme court, judge of the district court within his district, * * * to admit such person to bail by recognizing such person in such sum and with such securities as to such judge shall seem proper, conditioned for his appearance before the proper court to answer the offense wherewith he may be charged."

Section 358 of chapter 34 of the Criminal Code, entitled "Habeas Corpus," declares that "when the said judge shall have examined into the cause of the caption and detention of the person so brought before him, and shall be satisfied that the person is unlawfully imprisoned or detained, he shall forthwith discharge such prisoner from said confinement; and in case the person or persons applying for such writ shall be confined or detained in a legal manner, on a charge of having committed any crime or offense, the said judge shall, at his discretion, commit, discharge, or let to bail such person or persons; and if the said judge shall deem the offense bailable on the principles of law, he shall cause the person charged as aforesaid to enter into recognizance with one or more sufficient securities, in such sum as the judge shall think reasonable, the circumstances of the prisoner and the nature of the offense charged considered, conditioned for his appearance at the next court where the offense is cognizable," etc.

The section first above quoted confers authority upon a judge of the district court to let a prisoner to bail, when the offense charged is a bailable one, and to determine in what sum the bond shall be given. Of course, a discretion rests with the judge in fixing the amount of the recognizance; but this discretion is a judicial one. The decision

of the judge, however, is not necessarily final and conclusive. Suppose in violation of the constitutional provisions excessive bail be demanded and the prisoner required to give a recognizance in a sum greatly in excess of that which the nature of the offense and the circumstances of the case demand. Would it for a moment be contended that the prisoner is without a remedy? Certainly not. He may in such a case in a proceeding by *habeas corpus* have the amount of bail reduced or fixed anew under the section last above quoted. (*Jones v. Kelly*, 17 Mass., 116; *State v. Best*, 7 Blackf. [Ind.], 611; Church, Habeas Corpus, 398; *Miller v. State*, 43 Tex., 579.)

Counsel for the respondent insist that, on the determination of an application to admit to bail after indictment, the presumption of innocence does not obtain, but that the accused is presumed to be guilty of the offense laid in the indictment. The authorities upon the subject are conflicting. The following sustain the contention of counsel: *People v. Dixon*, 4 Park. Crim. Rep. [N. Y.], 651; *Ex parte Ryan*, 44 Cal., 555; *Ex parte Duncan*, 53 Cal., 410, 54 Cal., 75. Other cases uphold the doctrine that even after indictment found, in an application for reduction of bail, the court or judge will receive evidence as to the probable guilt of the prisoner. (*Yarbrough v. State*, 2 Tex., 519; *Drury v. State*, 25 Tex., 45; *Ex parte Bryant*, 34 Ala., 270; *Ex parte Hammock*, 78 Ala., 414; *Ex parte Vaughn*, 44 Ala., 417; *Commonwealth v. Rutherford*, 5 Randolph [Va.], 646; *Lynch v. People*, 38 Ill., 494; *Lumm v. State*, 3 Ind., 293; *Ex parte Kramer*, 19 Tex. App., 123; *Wray's Case*, 30 Miss., 681; *Street v. State*, 43 Miss., 1; *State v. Summons*, 19 O., 141; *Ex parte Kittrel*, 20 Ark., 499; Church, Habeas Corpus, sec. 403*a*.) The rule which occurs to us as being the most reasonable and most likely to aid in the administration of justice is this: That on application for bail by a person held in custody under an indictment found by a grand jury, the presentment of an indictment makes out

a *prima facie* case of guilt; but this presumption may be overcome by proof. In other words, the court, on *habeas corpus*, is not concluded by the finding of the grand jury, but may go behind the indictment and take evidence as to the truthfulness of the charge. This rule is fully supported by the cases last cited, and by the weight of the decisions in this country. In the case at bar the legal presumption of guilt is not overthrown by the evidence.

We will next consider whether excessive bail was required of the petitioner by the district court within the meaning of that term as used in our bill of rights. The question is not whether the amount of bail required is high, or whether we would have fixed so large a sum had the application been made to us in the first instance, but rather, was the bail demanded, *per se*, unreasonable, and disproportionate to the crime charged in the indictment. This, in substance, is the rule governing applications like the one before us as laid down in the decisions already cited.

From the evidence in the record it is not improbable that the petitioner will be unable to procure bail in the sum of $70,000; but that alone is not sufficient to establish that the amount is excessive or should be reduced. We do not question that the pecuniary circumstances of a prisoner should be considered in determining the amount of bail, yet that should not in itself control. If it did, a prisoner who is without means or friends would be entitled to be discharged on his own recognizance. (*People v. Town*, 3 Scam. [Ill.], 19; *Ex parte Duncan, supra.*) The object of requiring bail is to secure the attendance of the prisoner to answer to the offense charged, and abide the judgment and sentence of the court, should he be found guilty. Many things should be taken into consideration in fixing the amount of bail, such as the atrocity of the offense; the penalty which the law authorizes to be inflicted in case of a conviction; the probability of the accused appearing to answer the charge against him, if released on bail; his pe-

cuniary condition and the nature of the circumstances surrounding the case. This petitioner is charged with embezzling $70,000 of the public funds of Holt county,—a grave and heinous offense. Under the statute, in case a conviction is had, there may be imposed as a punishment an imprisonment in the penitentiary for twenty-one years, besides a fine of double the amount of money embezzled. Bail was not required in this case for a larger amount than the sum alleged to have been obtained by the commission of the offense. In *Ex parte Duncan, supra,* the petitioner had been held to bail by the municipal court of San Francisco in the sum of $112,000 on several indictments for forgery, grand larceny, and embezzlement, the sums alleged to have been received by him by reason of the commission of such felonies aggregating that sum. In a proceeding on *habeas corpus,* for reduction of bail, the supreme court of California held that the amount of bail demanded was not excessive.

Something was said on the argument of the case under consideration about the petitioner having once forfeited his recognizance. If this were true, that would be a proper matter for consideration in fixing the amount of his bond. The evidence shows a complaint was filed by one W. F. Hays before the county court of Holt county, charging Scott with embezzling county funds. The accused waived a preliminary examination and gave a bond in the sum of $15,000 for his appearance at the March, 1893, term of the district court of the county. At said term the county attorney filed an information charging Scott with the crime of embezzlement. The accused attended the March term of the district court and demanded trial, but the case was not reached. At the following term of said court, Scott having failed to appear, his bail was declared forfeited. It is probable, and for the purpose of this case we shall assume, without deciding the question, that, under the recognizance, the petitioner was only legally bound to personally

appear during the March term. The testimony, however, discloses that the petitioner, while the said charge of embezzlement was pending against him in the district court of Holt county, absconded from the county and state and fled to the republic of Mexico. Subsequently, after the expenditure of a large sum of money, the state procured his return to the county. The fact that he absconded is an important circumstance which should be considered, and it doubtless had great weight with the district court in determining the amount of the petitioner's bond. Upon the whole case we are constrained to hold that the amount of the recognizance required of the petitioner, although high, is not excessive. The writ, therefore, is denied.

WRIT DENIED.

STATE OF NEBRASKA, EX REL. ALBERT E. WYCKOFF, V. MARION G. MERRELL ET AL.

FILED NOVEMBER 28, 1893. No. 4666.

Mandamus: FORUM OF ORIGINAL JURISDICTION. The supreme court will not entertain an original application for *mandamus* brought by a private individual for the enforcement of private rights, unless some good reason is shown why the application was not made to the district court.

ORIGINAL application for *mandamus*.

Chas. T. Dickinson, for relator.

N. J. Sheckell, contra.

NORVAL, J.

This is an original action in the name of the state, on the relation of Albert E. Wyckoff, for a *mandamus* to

Marion G. Merrell, as county clerk of Burt county, to compel him to execute and deliver to relator a warrant upon the county treasurer for the sum of $893.55 for excavating a public ditch, and to E. F. Sisson and others, as the board of county commissioners of said county, to require them to levy a special assessment upon the lands benefited by said improvement to pay the expenses thereof.

This court will not entertain an original application for a *mandamus* brought by a private citizen for the enforcement of a private right merely, unless some good reason is shown for not making the application to the district court. (*State v. Lincoln Gas Co.*, 38 Neb., 33; *State v. School District No. 24, Chase County*, 38 Neb., 237.) The several district courts of the state have concurrent jurisdiction with this court in *mandamus* cases, and applications like the one before us ordinarily should be made in the first instance to the district court. There may be cases where the application shows that it would be unavailing if made to the proper district court, and that it is necessary that the writ should issue here. When this is made to appear, this court will entertain jurisdiction. This case, however, does not fall within the rule. It is manifest that the ends of justice would be equally as well promoted, and the convenience of the parties would be as well subserved, if the application were made to the district court of Burt county. The proceeding dismissed without prejudice.

DISMISSED.

FOWLER ELEVATOR COMPANY V. L. R. COTTRELL ET AL.

FILED NOVEMBER 28, 1893. No. 5447.

1. **Statute of Frauds:** SUFFICIENCY OF MEMORANDUM. The written memorandum required by section 9 of our statute of frauds (ch. 32, Comp. Stats.) may be made out by connecting two or more separate papers, such as the written correspondence between the parties.

2. ———: ———. It is not essential in such case that each paper be signed by the party sought to be charged, provided those not thus signed are referred to with reasonable certainty in those which are signed.

3. ———: ———: PAROL EVIDENCE. But the relation to each other of the documents relied upon to satisfy the requirement of the statute must appear on their face and cannot be established by parol evidence.

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

Wharton & Baird, for plaintiff in error.

Ed. P. Smith, contra.

POST, J.

This is a petition in error from the district court of Douglas county. A demurrer was sustained to the petition in that court, and the plaintiff refusing to plead further the action was dismissed with costs. The controversy in this court, therefore involves but one inquiry, viz., does the petition state a cause of action? The material allegations thereof are as follows: On the 4th day of March, 1891, the plaintiff, a corporation doing business in the city of Omaha, entered into an agreement by telephone with the defendants, then residing and doing business in the city of

Seward, by which the latter sold and agreed to deliver to plaintiff, or its representative, in the city of St. Louis, Mo., within thirty days thereafter, 10,000 bushels of No. 3 corn at 54½ cents per bushel. On the same day plaintiff addressed the defendants the following communication, which was in due course of mail received by the latter at Seward:

"OMAHA, Neb., March 4, 1891.

"*Mess. Cottrell, Alden & Co., Seward, Neb.*—DEAR SIRS: This confirms purchase of you by telephone to-day of 10,000 bu. No. 3 corn or better, at 54½c per bu., delivered at St. Louis, Mo., Pac. Ry., 30 days shipment, St. Louis terms. Please ship as follows:

Order Fowler Elevator Co.
Notify John A. Warren & Co.
St. Louis, Mo.
Care Mo. Pac. Ry., Lincoln, Neb.

"Make drafts, B. of L. attached, on Fowler El. Co., Omaha, Neb. Order and use Mo. Pac. cars to avoid transferring the grain.

"Yours truly, FOWLER ELEVATOR CO.,
"E."

To which, on the 30th day of March, the defendants replied as follows:

"SEWARD, NEB., March 30, 1891.

"*Fowler Elevator Co., Omaha, Neb.*—GENTS: It will be impossible for us to ship you, or your St. Louis firm, Jno. A. Warren & Co., any corn. We hope this will not seriously inconvenience you.

"Yours, etc., COTTRELL, ALDEN & CO."

On the following day plaintiff wrote defendants as follows:

OMAHA, NEB., March 31, 1891.

"*Cottrell, Alden & Co., Seward, Neb.*—DEAR SIRS: Your favor of the 30th at hand stating that it will be im-

possible to ship us any corn and hoping that it will not seriously inconvenience us.

"We do not understand just what you mean, as your Mr. Cottrell was here a few days ago and asked for an extension of time of shipment, and we agreed to allow him ten days extension. Mr. Cottrell at the time said that you had the corn, and twenty-five to thirty cars besides, as yet unsold. We are willing to grant you an extension until April 14, but can see no reason why you should not be able to get the corn out by that time; and considering the present condition of the cash corn market we think we are treating you very liberally. It most certainly would inconvenience us not to have you ship this corn, as you must know that to protect ourselves we must sell each day against all purchases, and of course our St. Louis firm look to us for this corn. Please let us hear from you more fully on the subject.

"Yours truly, FOWLER EL. CO.,
"E."

And on the 2d day of April, the defendants replied as follows:

"SEWARD, NEB., April 2, 1891.

"*Fowler Elevator Co., Omaha, Neb.*—GENTS: Replying to your letter of March 31, at the time corn sale in question was made, we supposed we had control of the corn and could handle it and sell it. Since then obstacles have presented themselves, and circumstances over which we have no control will prevent us from filling the sale. We cannot, therefore, fill the sale, much to our chagrin, and you will have to look elsewhere for the corn.

"Yours, etc., COTTRELL, ALDEN & CO."

The other allegations relate to the subject of damage and do not call for notice in this opinion, since it is conceded that the only question presented by the record is the sufficiency of the correspondence set out above to satisfy

the requirements of section 9 of our statute of frauds (ch. 32, Comp. Stats.). The provisions of the section referred to are as follows: "Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void unless: First—A note or memorandum of such contract be made in writing and be subscribed by the party to be charged thereby; or, Second—Unless the buyer shall accept and receive part of such goods or the evidences, or some of them, of such things in action; or, Third—Unless the buyer shall, at the time, pay some part of the purchase money." It is not essential that a contract be evidenced by a single document in order to bring it within the first exception contained in the foregoing section. All writers agree that it is a sufficient compliance with the statute if the terms of the agreement can be determined with reasonable certainty from two or more separate papers. Nor are they all required to be signed by the party sought to be charged, provided those not thus signed are referred to in those which are signed. But the connection between such documents must appear from the signed memoranda, and cannot be established by parol evidence. (See *Boydell v. Drummond*, 11 East [Eng.], 142; *Coles v. Trecothick*, 9 Ves. [Eng.], 250; *Ridgeway v. Wharton*, 6 H. L. Cases, [Eng.], 237; *Blair v. Snodgrass*, 1 Sneed [Tenn.], 1; *Thayer v. Luce*, 22 O. St., 62; *Johnson v. Buck*, 35 N. J. Law, 338; *Tice v. Freeman*, 30 Minn., 389; *Ridgway v. Ingram*, 50 Ind., 145; *North v. Mendel*, 73 Ga., 400; *Brown v. Whipple*, 58 N. H., 229; *Carter v. Shorter*, 57 Ala., 256; *Boardman v. Spooner*, 13 Allen [Mass.], 353; Benjamin, Sales, 222; Reed, Statute of Frauds, 341; Wood, Statute of Frauds, 364.) Assuming the written correspondence in this case to be otherwise a sufficient compliance with the demand of the statute, it is entirely insufficient, as a memorandum, to charge the defendants, for the reason that no reference is therein made by the latter to the first and only communication in which mention is made of

the terms or conditions of the alleged agreement. True, it is charged in the petition that the letter of defendants, under date of April 2, refers to the contract mentioned in plaintiff's first communication, but it is apparent from the other allegations thereof that the foregoing correspondence is the only written evidence of the agreement sued on. It is evident, too, when tested by the authorities cited, that such correspondence does not amount to a memorandum in writing within the meaning of the statute. It may be observed further that had the letters of the defendants referred in the most unequivocal terms to the plaintiff's communication of March 4, the statute is still applicable, since we find therein no acknowledgment of the alleged parol agreement, but on the other hand an express repudiation thereof. It follows that the petition does not state a cause of action, that the order sustaining the demurrer is right, and that the judgment of the district court should be

AFFIRMED.

NEBRASKA LOAN & TRUST COMPANY V. CHRISTINA SMASSALL ET AL., APPELLANTS, IMPLEADED WITH CHARLES W. MOSHER, APPELLEE.

FILED DECEMBER 22, 1893. No. 6212.

Validity of Mortgage Upon Life Estate. Under the provisions of section 17, chapter 36, Compiled Statutes, if the homestead was selected from the separate property of either husband or wife, it vests on the death of the person from whose property it was selected in the survivor for life, and afterwards in his or her heirs forever, etc. This life estate the survivor may mortgage, and the purchaser under the decree of foreclosure will acquire the life estate.

APPEAL from the district court of York county. Heard below before BATES, J.

George B. France, for appellants, cited: *Butterfield v. Wicks*, 44 Ia., 310; *Smith v. Eaton*, 50 Ia., 488.

Sedgwick & Power, *contra*, cited: *Schuyler v. Hanna*, 31 Neb., 307; *Dorsey v. Hall*, 7 Neb., 465; *Holbrook v. Wightman*, 31 Minn., 172; 6 Am. & Eng. Ency. Law, 881.

MAXWELL, C. J.

In May, 1892, the Nebraska Loan & Trust Company brought this action in the district court of York county, Nebraska, against Christina Smassall and the heirs of Joseph Smassall, deceased, and also Charles W. Mosher, who held a second mortgage upon the premises hereafter described in the decree. There is no dispute in regard to the plaintiff's claim, but the controversy in this case arises upon that of Charles W. Mosher, who claims a second mortgage upon the premises, signed by defendant John Faul, and one of the appellants, Christina Faul, formerly the wife of Joseph Smassall, deceased, and who had intermarried with John Faul. The note, which was secured by this mortgage, was signed by John Faul. At the time of the death of Joseph Smassall, and for some time prior thereto, he and his family, consisting of his wife and five children, were, and had been, residing upon this land, and the same was their homestead. The appellant Christina Smassall afterwards intermarried with John Faul, and she with her family have resided on said land ever since the death of Joseph Smassall, and are now residing thereon. The appellants claim that the appellee Charles W. Mosher obtained no lien upon the land by virtue of the mortgage given by Christina Faul and her husband to the appellee Charles W. Mosher. The court entered the following decree upon the mortgage of Mosher:

"Now on this 14th day of January, 1893, this cause came on for hearing on the answer and cross-petition of

Charles W. Mosher and the answer thereto of Christina Faul and Christina Faul, guardian of the minor heirs of Joseph Smassall, deceased, and the answer of George B. France, guardian *ad litem* of the said minor heirs, and the evidence, and was submitted to the court, on consideration whereof the court finds that the defendants Christina Faul and John Faul are husband and wife, and that they, on the 6th day of October, 1891, executed and delivered to Stark & Mosher the mortgage deed described in the answer and cross-petition of Charles W. Mosher, on the west half of the northeast quarter of section 25, in township 10 north, of range 4 west, in York county, Nebraska. Said mortgage was duly recorded in the office of the clerk of said county on the 21st day of March, 1892, in book 55 of mortgages, at page 487. The court finds that afterwards the payees, Stark & Mosher, sold, indorsed, and delivered the said mortgage and the note secured thereby to said Charles W. Mosher, who then became, and now is, the owner and holder thereof. The court finds that there is due the said Charles W. Mosher from the said John Faul and Christina Faul the sum of $316, with ten per cent interest from the date of this decree. The court finds that John Faul, who signed said mortgage, had no title to, and did not own, the land described therein at the time of the execution of said mortgage; that the defendant Christina Faul, as the widow of Joseph Smassall, had at the time of executing said mortgage a life estate in said premises and was possessed of a dower interest therein; and said mortgage executed by said John Faul and Christina Faul to said Stark & Mosher became, and is still, a lien on the life estate interest of the said Christina Faul and John Faul in said premises.

"It is hereby ordered that unless the said Christina Faul and John Faul, within twenty days from the entry of this decree, pay, or cause to be paid, to the said Charles W. Mosher the sum of $316, with interest, that an order

of sale issue to the sheriff of said York county, directing him to appraise, advertise, and sell the interest of the said Christina Faul and John Faul in the said premises, and of his doings in the premises he make due return to this court; to which the defendants Christina Faul and George B. France, guardian *ad litem* for the minor heirs, duly excepts."

Section 17, chapter 36, of the Compiled Statutes of 1887, provides: "If the homestead was selected from the separate property of either husband or wife, it vests, on the death of the person from whose property it was selected in the survivor for life, and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor by will. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter." The homestead thus becomes a life estate in the survivor. This estate the survivor may mortgage where there is no restriction in the statute, and as there is no such restriction in the laws of this state the mortgage is valid. (*Schuyler v. Hanna*, 31 Neb., 307; *Durland v. Seiler*, 27 Neb., 33; *Holbrook v. Wightman*, 31 Minn., 168.) There is no error in the record and the judgment is

AFFIRMED.

MOLINE, MILBURN & STODDARD COMPANY v. H. J. CURTIS ET AL.

FILED DECEMBER 22, 1893. No. 4909.

1. **A motion to dissolve an attachment,** to be available, must be made before final judgment in the action. Where such a motion has been made and heard before the trial of the cause, and taken under advisement, the court may, after judgment for the plaintiff, rule upon the motion.

2. **An affidavit for attachment** is not void, although purporting in its opening clause to be that of a corporation plaintiff, where it sufficiently appears from the whole affidavit that it is that of the agent of the corporation, and that such agent in fact made oath thereto and signed it.

3. **An affidavit for an attachment** may be amended by leave of court, even after a motion to quash the writ is filed, because of that particular defect. (*Struthers v. McDowell*, 5 Neb., 491.)*

4. **Bill of Exceptions.** A COUNTY JUDGE has no power or authority to sign a bill of exceptions preserving the evidence used in the hearing of a motion to discharge an attachment. (*Baer v. Otto*, 34 O. St., 11.) MAXWELL, C. J., dissenting.

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

Switzler & McIntosh and *L. C. Chapman*, for plaintiff in error.

S. P. Davidson and *Corydon Rood, contra.*

NORVAL, J.

This was an action brought in the county court by plaintiff in error, aided by attachment, against the defendants in error. Prior to the trial a motion was made and

* If the plaintiff, at the date of issuing an attachment, does not own the claim for which he seized the defendant's property, he cannot afterwards, by purchasing such claim, assert it by amendment against the property seized. (*Farwell v. Wright*, 38 Neb., 445.)

submitted to the county court to vacate the attachment, which was taken under advisement. Some time after judgment was rendered in favor of plaintiff in the main case, the defendants' motion to discharge the attachment was denied by the county court; and to reverse said order defendants prosecuted a petition in error to the district court, where the decision of the county court sustaining the attachment was reversed, and the attachment dissolved. Plaintiff thereupon prosecuted a petition in error to this court.

Three questions are presented for our determination, namely:

1. Where a motion to dissolve an attachment has been submitted to the court and taken under advisement before trial and judgment in the action, can the court, after judgment has been rendered for the plaintiff, pass upon such motion?

2. Did the county court err in permitting plaintiff to amend the original affidavit for attachment?

3. Has a county judge authority to sign and allow a bill of exceptions embodying affidavits used on the hearing of a motion to discharge an attachment?

Plaintiff insists that the order of the county court sustaining the attachment was without authority of law and void, for the reason the same was not made until after final judgment in the action. The statute bearing upon the question, section 235 of the Code, declares that "the defendant may, at any time before judgment, upon reasonable notice to the plaintiff, move to discharge an attachment, as to the whole or a part of the property attached." The most that can be claimed for this provision is that a motion to dissolve an attachment, to be available, must be made before final judgment has been rendered for the plaintiff in the action. Of course, a final judgment in favor of a defendant on the merits terminates the attachment proceedings, and vacates the attachment; but a final judgment in

favor of the plaintiff does not have the effect to sustain the attachment in all cases. The only reasonable construction of the section quoted is that the authority of the court to dissolve an attachment is limited to cases where a motion to discharge is filed before judgment. In other words, where such a motion is seasonably made and submitted to the court for its decision thereon, but through inadvertence or otherwise no ruling has been made before final judgment on the merits, the court has jurisdiction to rule upon the motion after such judgment. The question now before us was not raised or decided in *Rudolf v. McDonald*, 6 Neb., 163. In that case the motion to dissolve the attachment was not made until after final judgment, and it was held to be too late to be of any avail to the party making it. In the case before us, not only was the motion made before judgment, but a hearing thereon was had, and the same taken under advisement. The failure of the court to rule thereon sooner is not chargeable to the defendants, but was the fault of the court alone. Under the circumstances it was the duty of the county judge to pass upon the motion after judgment had been entered for plaintiff in the action.

Was the original affidavit on which the attachment was issued defective, and did the county judge err in permitting plaintiff to amend the same? We answer in the negative. The original affidavit for attachment is as follows:

"STATE OF NEBRASKA, }
JOHNSON COUNTY. } SS.

"The said plaintiff, the Moline, Milburn & Stoddard Company, makes oath that the claim in this action is for a recovery of a judgment for money in the sum of nine hundred and seventy-five dollars and $\frac{36}{100}$, and the said S. W. Croy, agent of the Milburn, Moline & Stoddard Company, also makes oath that said claim is just, and that the Moline, Milburn & Stoddard Company ought, as affiant believes, to recover thereon nine hundred and seventy-five dollars and $\frac{36}{100}$. He also makes oath that the said Har-

rison J. Curtis, Henry B. Curtis, and Mary E. Curtis, parties composing the firm of H. J. Curtis & Co., defendants, are about to convert their property, or a part thereof, into money, for the purpose of placing it beyond the reach of their creditors; that said Harrison J. Curtis, Henry B. Curtis, and Mary E. Curtis has property and rights in action which they conceal; that the said Harrison J. Curtis, Henry B. Curtis, and Mary E. Curtis have assigned, removed, and disposed of, and they are about to dispose of, their property, or a part thereof, with intent to defraud their creditors. S. W. CROY,

"*Agent for Moline, Milburn & Stoddard Company.*

"Subscribed in my presence and sworn to before me this 30th day of October, A. D. 1889.

"JOHN WILSON,
"*County Judge.*"

Although the affidavit in the opening clause, relating to the nature of plaintiff's claim, standing alone, purports to be that of the corporation, but when read in connection with what follows, and construing the paper as a whole, as we must, it sufficiently appears that S. W. Croy makes oath to each averment contained in the affidavit, and that he is plaintiff's agent. A similar affidavit was sustained by this court in *Whipple v. Hill*, 36 Neb., 720. (See also *Rudolf v. McDonald*, 6 Neb., 163; *Tessier v. Englehart*, 18 Neb., 167, and *Jansen v. Mundt*, 20 Neb., 320.)

The county court permitted plaintiff to amend the affidavit by inserting "S. W. Croy, Secretary and Treasurer of" after the word "plaintiff" in the first line. The alleged defect was thereby cured. It is not error to permit an affidavit for attachment to be amended, even after a motion to dissolve has been filed. (*Struthers v. McDowell*, 5 Neb., 491; *Rudolf v. McDonald, supra.*)

It appears that the motion to vacate the attachment was heard upon affidavits filed by the plaintiff, and on counter-affidavits submitted by the defendants. The county judge

signed a bill of exceptions embodying all these affidavits, and in the district court plaintiff moved to quash the bill, on the ground that there is no authority of law for signing a bill of exceptions in such cases. The motion was overruled, and this ruling is assigned as error.

Before entering upon the consideration of this branch of the case, it should be stated that the cause was originally submitted to the supreme court commissioners for examination and report. Subsequently, an opinion prepared by Commissioner IRVINE, covering every proposition presented by the record, which was concurred in by both the other commissioners, was submitted to the court, and the members thereof being divided in opinion upon one proposition, viz., the jurisdiction of the county judge to sign the bill of exceptions, I will give my views upon the subject.

Commissioner IRVINE, in discussing the question, says: "It is not doubted that an order sustaining an attachment is, at least after judgment in the action, a final order, which the defeated party may have reviewed on error. (*Walker v. Morse*, 33 Neb., 650.) The question is not whether such an order may be reviewed, but whether the evidence used on the hearing of the motion in the county court may be preserved by a bill of exceptions for use in the error proceedings.

"By chapter 20, Compiled Statutes, section 2, it is provided that the Code of Civil Procedure, relative to justices of the peace, shall, where no specific provision is made by that subdivision, apply to the proceedings in all civil actions prosecuted before such county court. This is the same section which confers upon the county court jurisdiction concurrent with the district court in all civil cases not exceeding one thousand dollars, except upon certain specific subjects. By section 11 of the same chapter it is provided that where the amount exceeds the jurisdiction of the justice of the peace, motions and demurrers shall be allowed, and the rules of practice concerning pleadings and

processes in the district court shall be applicable, as far as may be, to pleadings in the county court. This section is a specific provision changing the general rule established by section 2 only in regard to pleadings and processes. By section 16, orders for arrest and for attachment may issue from the county court, and where the demand exceeds the jurisdiction of a justice, the proceedings upon such orders shall be the same, as near as may be, as in the district court. This section makes the proceedings upon orders of attachment analogous to those of the district court, but has no reference to proceedings in the district court to review such orders. By section 26 it is provided that in civil actions either party may appeal or prosecute a petition in error in the same manner as provided by law in cases tried and determined by justices of the peace. Section 31 provides that the county judge shall keep a docket in which all of his proceedings in civil actions shall be entered, in like manner, as near as may be, as before justices of the peace, and that the provisions of the Code relating to justices' dockets shall, as near as may be, apply to the docket of the county judge. This section should be construed in connection with section 1086 of the Code, which provides specifically what shall be entered upon the dockets of justices. Among other things so required to be entered is the affidavit upon which an order of attachment is made, and also exceptions to the rulings of the justice on questions of law; but this latter provision, taken in connection with its context, shows that it applies to cases tried by a jury.

"The result of the statutes so far is that the procedure in the county court in all civil actions must conform with the procedure before justices of the peace, except in certain particulars specially provided by the statutes, and not embracing bills of exceptions; and that the record of a proceeding in the county court must contain the affidavit upon which an attachment is founded, but not the affidavits or proof used on the hearing of a motion to dissolve such at-

tachment. Such affidavits cannot, therefore, be considered in error proceedings unless embodied in a bill of exceptions, and they cannot be embodied in a bill of exceptions unless the law authorizes such a bill.

"In *Taylor v. Tilden*, 3 Neb., 339, Judge GANTT reviews the statutes upon the subject, and holds that the provision allowing justices of the peace to sign bills of exceptions embodying questions of law arising during a trial by jury is exclusive, and that there is no authority for a bill of exceptions in other cases. He says that 'the petition in error brings up to the appellate court a judgment or decision of the inferior court together with a transcript of the record, and bills of exceptions constitute no part of such record unless made so by some statutory provision.' This case was reaffirmed in an opinion by Judge LAKE in *Kellogg v. Huntington*, 4 Neb., 96, and the same rule of construction was followed in *Nickerson v. Needles*, 32 Neb., 230, and in *Chicago, B. & Q. R. Co. v. Goracke*, 32 Neb., 90. In the latter case it was held that the authority for a bill of exceptions was so restricted that such bill could be made to embody only the rulings of the justice upon questions of law arising during a trial by jury, and did not permit the preservation of all the evidence in order to permit a review upon the ground that the verdict was not sustained by the evidence.

"The first authority for a bill of exceptions is found in the statute of 13 Edward I, chapter 31. The purpose of that statute, as well as all other statutes upon the subject, was to provide a method for bringing into the record what otherwise would not appear there. These statutes have received a uniformly strict construction, as may be seen from an examination of the cases cited in 1 Troubat & Haly, Practice, 570 *et seq.* They have never been extended beyond their letter. It cannot be argued that the authority to have the case reviewed on error implies an authority to have a bill of exceptions settled, because cases were re-

viewed on error long before such a thing as a bill of exceptions was known; and cases are now reviewed in this court, and in others, where error appears upon the record, without the aid of a bill of exceptions.

"It is also urged that the right to a bill of exceptions should be implied from sections 586 and 587 of the Code. Section 586 requires the plaintiff in error to file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed. Section 587 provides that county judges, justices of the peace, and others, upon request and upon being paid the lawful fees therefor, shall furnish an authenticated transcript of their proceedings, including the judgment or final order. The term "transcript" implies that the document referred to shall be a copy of some original document, and the language, taken in connection with chapter 20, section 26, above referred to, and other sections relating to the filing of transcripts in the district court, plainly refers to a transcript of the entries required to be made upon the docket, and does not require a transcript of all papers filed or of all evidence offered in the case. We think, therefore, that there is no authority of law for the county judge to sign a bill of exceptions embodying affidavits used as evidence on motions to dissolve an attachment. We regard the Nebraska cases cited as decisive of this question. Even were we convinced that the earlier cases were wrong, we would hesitate to overrule so long a line of authority, especially upon a question of practice where it is perhaps more important that the law should be stable and certain than that it should be right. It is probable that the legislature intended to make findings of fact in the court of first instance decisive upon such matters, and that that policy accounts for the omission. At any rate it is the legislature, and not the courts, which should supply the omission. In the long line of decisions directly or indirectly affecting this question there are but two cases which cast any doubt upon the correctness of the conclu-

sions we have reached. One is *Walker v. Morse*, already cited, where this court held that such a bill of exceptions should not have been quashed in the district court because the motion to quash the same was not sufficiently specific. It is plain from an inspection of that case that the motion was urged upon some technical ground not expressed in the motion, and that the attention of the court was not challenged to the question now before us. The other is *Osborne v. Canfield*, 33 Neb., 330, where the distinction between the right to review a judgment on error and the right to a bill of exceptions was evidently overlooked. We cannot regard those cases as overruling all the others upon the subject. The district court erred in overruling the motion to quash."

I fully concur in the conclusion reached by Commissioner IRVINE. His argument in support of the proposition that a county judge is without authority to settle a bill of exceptions embodying the evidence adduced on the hearing of a motion to vacate an attachment is, to my mind, unanswerable. In what I shall say upon the subject I shall refrain from going over the ground covered by that opinion.

The chief justice says, in substance, that the decisions of this court in *Taylor v. Tilden*, 3 Neb., 339, and *Kellogg v. Huntington*, 4 Neb., 96, holding that a bill of exceptions cannot be taken from the ruling of a justice, except in cases tried to a jury, have been adhered to, and are the law of this state, but these "cases rest, to some extent, upon the ground that an adequate remedy is given by appeal." An examination of the opinions in the cases mentioned fails to disclose that either was predicated upon the fact that there existed a remedy by appeal. On the contrary they are placed squarely upon the ground that there is no statute in this state authorizing a county judge or justice of the peace to allow a bill of exceptions in a case, unless such cause is tried by a jury. The right to a bill of exceptions is purely statutory, and where it is not authorized by law, a party is

not entitled to one. GANTT, J., in the first case says: "The statute does not give the right of a bill of exceptions to the ruling of the probate judge, or justice of the peace, upon questions of law arising during the trial before them, in cases not tried before a jury, and hence, such bill of exceptions cannot be considered in an appellate court, because it is an act without authority of law, and a nullity." That action, like this, was commenced in the county court, and the decision ought to be decisive of the question under consideration. The same doctrine has been held and applied in *Kellogg v. Huntington, supra; Rudolf v. Winters*, 7 Neb., 125; *Burlington & M. R. Co. v. Dick*, 7 Neb., 244, besides the two cases in 32 Neb., cited by Commissioner IRVINE.

The supreme court of Ohio, in *Baer v. Otto*, 34 O. St., 11, has placed the same construction upon the statute of that state. In that case the question arose whether a justice of the peace has any power to sign a bill of exceptions containing the evidence taken before him on the hearing of a motion to discharge an attachment, and the court in the opinion say:

"In the case now before us, it might be said that there is no such preponderance of evidence against the order refusing to discharge the attachment as would justify its reversal.

"But, in order to settle the practice in such cases, we now decide that there is no provision made by legislation, as it now stands, for preserving the evidence offered on such motion, or for reviewing the decision of the justice, upon the ground that such order, either in granting or refusing the motion, is contrary to the evidence.

"The statute prescribing the contents of a justice's docket (section 203 of the Justices' Code; S. & C., 804, 805) does not require any evidence to be recorded. And the only statute which authorizes a bill of exceptions to be signed by a justice is the act of February 11, 1869 (66 Ohio L., 7), and the sole object of the bill of exceptions provided

for in this act, is to authorize a review of the questions of law arising during a trial of the cause before the justice."

After the decision in *Baer v. Otto, supra,* the legislature of Ohio passed a law authorizing a bill of exceptions where an order discharging or refusing to discharge an order of attachment is made. (Revised Statutes of Ohio, sec. 6524.)

There is no room for doubt that it is the settled law of this state that a justice of the peace is not authorized to sign a bill of exceptions preserving the testimony on which he acted in sustaining or overruling a motion to dissolve an attachment; and the above opinion of the commissioner satisfies the writer that the rule is the same in such cases in the county courts. Such has been the scope of the decisions in cases originating in county courts, and that too where the amount exceeded the jurisdiction of a justice of the peace. (See *Rudolf v. Winters, supra,* and *Nickerson v. Needles, supra.*)

Had this suit originated in the district court, and the motion to discharge the attachment been there made and the same had been either sustained or denied, the defeated party, it is true, would have been entitled to have the evidence taken on the hearing incorporated in a bill of exceptions. The power of the district court to sign bills of exceptions is not limited to cases tried to a jury; but the statute confers ample authority upon that court to sign a true bill in all cases, whether tried to a court or to a jury; and it is no argument to say that because the attaching creditor, where the attachment is discharged by the district court, may have the evidence preserved by a bill of exceptions, another party in a similar case, upon a like ruling made by the county court, is likewise entitled to a bill of exceptions. The authority of the two courts to settle and allow bills of exceptions rests upon entirely dissimilar statutory provisions.

Attention has been called to section 236*e* of the Code. We cannot yield assent to the proposition that said section,

either in express terms or impliedly, confers the power for settling a bill of exceptions in any case, or the right to review the order of the court discharging an attachment. That the section was not passed by the legislature for any such purpose is clearly manifest from a reading of the language of the provisions, as well as the purpose of the act expressed in the title. The act is entitled "An act to provide for the retention of attached property pending a review on error of an order discharging the attachment." The object named in the title is carried into the body of the statute. As was said by the present chief justice in his opinion in *Adams County Bank v. Morgan*, 26 Neb., 149, in considering section 236*e* of the Code, "this section applies alone to the retention of the lien of the attachment; that is, if the attaching creditor desires to retain his attachment lien upon the property attached until the ruling on the motion to discharge can be reviewed in the appellate court, he must, within such time as the court shall fix, not exceeding twenty days, give an undertaking to the adverse party, with approved sureties, in double the appraised value of the property, conditioned," etc. It cannot be doubted that the sole purpose the legislature had in adopting the section under consideration was to provide for preserving the lien of the attachment pending the review of the order dissolving the attachment in the appellate court. The act confers no authority, nor does it attempt so to do, to prosecute error from the ruling of the court in sustaining or vacating an order of attachment. Such power already existed at the time the section became a law. The discharging of an attachment is a final order, and is reviewable under sections 581 and 582 of the Code. (*Turpin v. Coates*, 12 Neb., 321.) Even though it should he held that section 236*e* confers the right to review the ruling on a motion discharging an attachment and to the evidence upon which the decision is based, the section has no application to the case at bar, since the county court did not dissolve the attachment, but sus-

tained the writ. By no process of reasoning can it be held that the section authorizes a county judge to sign a bill of exceptions where the attachment is upheld. The section applies alone to cases in which the attachment is discharged.

Mention has been made of the writ of *certiorari*, and it is claimed that under such a writ a party at common law was entitled to bring up for review both the evidence upon which the inferior tribunal acted and the question of jurisdiction. We concede that section 599 of the Code confers upon courts the same power to compel the proceedings of an inferior tribunal to be brought up for review as existed at common law, and that by section 901 of the Code the common law remedies are continued in force in this state, where the Code has failed to provide a remedy. But we are unwilling to admit that as a general rule a court upon a common law writ of *certiorari* will examine the evidence for the purpose of determining whether it sustains the judgment sought to be reviewed. It is my understanding that the office of a common law *certiorari* is only to bring up for review the question of jurisdiction or power, and errors on the face of the record, and that the reviewing court will not inquire whether the decision of the inferior tribunal was right upon the merits. (*Corrie v. Corrie*, 42 Mich., 509; *Hyslop v. Finch*, 99 Ill., 171; *Rawson v. McElvaine*, 49 Mich., 194; *Central P. R. Co. v. Placer County*, 43 Cal., 365; *Ex parte Nightingale*, 11 Pick. [Mass.], 168; *McAllilley v. Horton*, 75 Ala., 491; *Rayner v. State*, 52 Md., 368; *Lapan v. Commissioners of Cumberland County*, 65 Me., 160; *De Rochebrune v. Southeimer*, 12 Minn., 78; *Conover v. Davis*, N. J. Law, 112; *In re Kensington & Oxford Turnpike Co.*, 97 Pa. St., 260.) There is considerable conflict in the authorities upon the question, but we think the rule just stated is the scope of *certiorari* as applied to judgments of justice courts, and other similar tribunals. (*Frederick v. Clark*, 5 Wis., 191; *Baizer v. Lasch*, 28 Wis., 268; *Smith*

v. Bahr, 62 Wis., 244; *Owens v. State*, 27 Wis., 456; *State v. Huck*, 29 Wis., 202; *Paulsen v. Ingersoll*, 62 Wis., 312; *Callon v. Sternberg*, 38 Wis., 539; *Milwaukee Iron Co. v. Schubel*, 29 Wis., 444; *Driscoll v. Smith*, 17 N. W. Rep. [Wis.], 876; *Tiedt v. Carstensen*, 61 Ia., 334; *Healy v. Kneeland*, 48 Wis., 497; *Schall v. Bly*, 43 Mich., 401; *Carver v. Chapell*, 37 N. W. Rep. [Mich.], 879.)

In *State v. Huck*, *supra*, a justice of the peace, under a writ of *certiorari*, certified up all the evidence, as well as the record, to the circuit court, where the judgment of the justice was reversed as being against the evidence. On error to the supreme court the judgment of the circuit court was reversed, and that of the justice affirmed; the court holding that upon *certiorari* issued to a justice of the peace, only jurisdictional errors and defects disclosed by the record would be examined.

In *Carver v. Chapell*, *supra*, plaintiff sued out an attachment. The writ was dissolved on motion of the defendant. The supreme court of Michigan held, on review of the case, that on *certiorari* it would not review the facts or pass upon the weight of the testimony upon which the lower court based its ruling.

In *Milwaukee Iron Co. v. Schubel*, *supra*, Cole, J., in speaking of *certiorari*, says: "In this state the common law writ has almost invariably been brought to review the proceedings and judgments of justices of the peace; and this court has, with much uniformity, declined to consider upon such writ any but jurisdictional questions, or such questions of law as might arise upon the docket entries of the justice. The court has refused to try the merits of the action by a common law writ, or to examine any alleged error of the justice in his rulings on the trial, or to consider any objection which involved an inquiry into the evidence. There was no way provided by which such decisions and rulings became a matter of record; and, besides, an adequate remedy was afforded for a review of these judicial

acts by means of the statutory writ of *certiorari* or by appeal."

It is perfectly plain that *certiorari* will not lie where the statute affords a remedy by error or appeal. The decision of a justice of the peace, or county court, in sustaining or dissolving an attachment can be reviewed by proceedings in error. True, the ruling of said courts on a motion to discharge an attachment cannot be reviewed on the ground that the decision is against the weight of the evidence; but that is not the fault of the court, but of the law, in failing to provide for preserving the evidence by a bill of exceptions. *Osborne v. Canfield*, 33 Neb., 330, is overruled. In the case we are considering, the district court reversed the decision of the county court upon the ground that it was contrary to the evidence. As the bill of exceptions was without authority of law, the district court erred in not quashing the same. It follows that the judgment of the court below should be reversed, and that of the county court affirmed.

REVERSED.

MAXWELL, C. J., dissenting.

This cause was submitted to the commission, and a decision of a majority of that body not conforming to the views of this court upon one point, it is necessary to state the law upon the subject, as I understand it. The action was brought by the plaintiff against the defendants in the county court by attachment. The defendants thereupon filed a motion to dissolve the attachment and supported the same by various affidavits. It was also claimed that the affidavit of one Croy, the agent of the plaintiff, was insufficient and an amendment was permitted. On all these questions the opinion of the majority of the court, in my view, is right. The county court sustained the attachment. The cause was taken on error to the district court and a bill of exceptions, duly signed, containing the affidavits and

evidence submitted on a motion to dissolve the attachment. A motion was made in the district court to strike the bill of exceptions from the files because there was no authority of law for the granting of the same. The motion was overruled, and the attachment was sustained. The ruling of the court is the principal question involved.

Section 236*e* of the Code provides: "That when an order discharging an order of attachment is made, and any party affected thereby shall except thereto, the court, or judge, shall fix the number of days, not to exceed twenty, in which such party may file his petition in error, during which time the property attached shall be held by the sheriff or other officer, during which period the petition in error shall be filed, and the party filing the same shall give an undertaking to the adverse party, with surety or sureties, to be approved by the court, in double the amount of the appraised value of the property attached, conditioned to pay said adverse party all damages sustained by such party in consequence of the filing of said petition in error in the event that such order of attachment shall be discharged by the court, in which said petition in error shall be filed, as having been unlawfully obtained." This provision of the Code was adopted in 1873, and applies to all cases of attachment where an order is made discharging the same. Now is it possible that in a certain case the attaching creditor may, when the attachment is discharged, have the evidence on which he predicates his right preserved in a bill of exceptions and in a similar case in another court would be denied that privilege? It is true in an early day in the judicial history of the state this court held that a bill of exceptions could not be taken from the ruling of a justice of the peace in cases not tried by a jury. (*Taylor v. Tilden*, 3 Neb., 339; *Kellogg v. Huntington*, 4 Neb., 96.) Those decisions have been adhered to and are the law of this state. These cases rest to some extent upon the ground that an adequate remedy is given by appeal. They refer to causes

tried before a justice of the peace upon the merits. In my view, they do not refer to special proceedings, as by attachment. In such case the only mode of review provided in the Code is on error. This is expressly provided for; but how can the case be reviewed unless the evidence upon which it was heard in the trial court is carried up to the reviewing court? The authority to review the action of the trial court carries with it the right to have all the testimony before the reviewing court. Otherwise, the right of review would be a vain proceeding, a delusion, and mockery of justice. As I understand the rule, statutes are, if possible, to be so construed as to give them force and effect, and not to annul their operation.

Section 16, chapter 20, Compiled Statutes, provides: "Orders for arrest and for attachments of property may issue in actions brought under this chapter, but when the demand in such action exceeds the jurisdiction of a justice of the peace, the proceedings upon such orders shall be the same, as near as may be, as in actions brought in the district court. The return day of such orders shall, when issued at the commencement of the action, be the same as that of the summons; when issued afterwards, they shall be made returnable forthwith." In the case at bar the amount involved amounts to nearly $900, and the statute declares that where the amount exceeds $200 "the proceedings upon such orders *shall* be the same, as near as may be, as in actions brought in the district court." What orders? All orders for arrest or attachments. Now by what authority does the court limit the word "proceedings"? All proceedings relating to the attachment, as I understand the meaning, include all that is done in relation to the same in the county court. If the case was tried in the district court, the preparation and signing of a bill of exceptions would be a part of the proceedings in that court. Is not the same true where the action is brought in the county court, where the amount involved exceeds $200? I be-

lieve the construction placed upon this language is forced and unnatural, and not only works injustice in the case at bar, but is calculated to do injustice. The precise question here involved was before this court in *Osborne v. Canfield*, 33 Neb., 330; and it was held by a unanimous court that a county judge "may sign a bill of exceptions in any case where an attachment has been discharged by him." That question was the principal one presented in that case, and the right was sustained, and the rule should be adhered to.

But let us suppose that the Code provides no remedy. Then we have recourse to the remedies which existed under the former practice. Section 901 of the Code provides: "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 heretofore in use may be adopted so far as may be necessary to prevent a failure of justice." Under the former practice a writ of *certiorari* would be issued to certify up the record where there was no remedy by appeal or writ of error. All attachment proceedings in this state are purely statutory, and if no other remedy exists, are reviewable by *certiorari*. (*Hartshorn v. Wilson*, 2 O., 28; *Learned v. Duval*, 3 Johns. Cas. [N. Y.], 141; *Dougan v. Arnold*, 4 Dev. L. [N. Car.], 99; *Branson v. Shinn*, 13 N. J. Law, 250; *Wilson v. Ray*, T. U. P. Charlt. [Ga.], 109; *Fryer v. Blackmore*, 1 Murph. [N. Car.], 94; 2 Spelling, Extraordinary Relief, sec. 1939.) It is very clear to my mind that the parties are entitled to have the record certified up, and that the judgment of the court below is right and should be affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1894.

PRESENT:

HON. SAMUEL MAXWELL, CHIEF JUSTICE.*
HON. T. L. NORVAL, CHIEF JUSTICE.

HON. A. M. POST,
HON. T. O. C. HARRISON, } JUDGES.

HON. ROBERT RYAN,
HON. JOHN M. RAGAN, } COMMISSIONERS.
HON. FRANK IRVINE,

GEORGE KARLL, CONSTABLE, v. ROBERT E. KUHN.

FILED JANUARY 2, 1894. No. 5654.

Fraudulent Conveyances: RIGHTS OF CREDITORS: NOTICE TO PURCHASERS: EVIDENCE. In an action which involved the good faith of the purchaser of an entire stock of goods of the value of $4,500, which were paid for by the transfer of eight lots in an addition to Sioux City, of the alleged value of $2,400, to the seller's wife, and the remainder in notes of third parties, having some time to run, *held*, that the proof and instructions were too much restricted to submit the matter in full to the consideration of the jury.

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

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*Term expired January 3, 1894.

McCabe, Wood & Elmer, for plaintiff in error, cited: *Kaine v. Weigley*, 22 Pa. St., 179; *Kersenbrock v. Martin*, 12 Neb., 374; *Fitzgerald v. Meyer*, 25 Neb., 77; *Wasson v. Palmer*, 13 Neb., 376; *Beels v. Flynn*, 28 Neb., 575; *Judson v. Courier Co.*, 15 Fed. Rep., 541; *Reed v. Maben*, 21 Neb., 695.

Davis, Gantt & Briggs, contra, cited: *Thornburgh v. Hand*, 7 Cal., 554; *Noble v. Holmes*, 5 Hill [N. Y.], 194; *Van Etten v. Hurst*, 6 Hill [N. Y.], 311; *Mathews v. Densmore*, 43 Mich., 461; *Williams v. Eikenberry*, 25 Neb., 721; *Schars v. Barnd*, 27 Neb., 94; *Bartlett v. Cheesebrough*, 32 Neb., 340.

MAXWELL, C. J.

On the 29th day of January, 1890, plaintiff in error, as constable, seized the property in controversy as that of W. C. Ryan, defendant in attachment, at the suits of Darrow & Logan, Schneider & Loomis, and J. T. Robinson Notion Company, under three orders of attachment; the demands of these plaintiffs, subsequently reduced to judgment, being $99.25, $415.92, and $235.80, respectively. The day following the levy the defendant in error seized the property under an order of replevin issued from the district court of Douglas county, averring ownership by purchase from W. C. Ryan prior to the issuance of the attachments. The plaintiff in error justified under his orders of attachment and alleged that the purchase by R. E. Kuhn from W. C. Ryan was in fraud of the latter's creditors, and upon this issue the case was tried and a verdict rendered in favor of Kuhn for the sum of $43.70. This sum the court required the plaintiff to remit, which was done, and judgment was entered in favor of Kuhn for five cents damages.

The testimony shows that in 1883 Kuhn began the banking business in Emerson, about eighty miles from Omaha,

removing to South Omaha in 1889. From 1884 or 1885 he was acquainted with W. C. Ryan, who, until 1887 or 1888 was a farmer living five or six miles from Emerson. In the latter part of 1887, or early part of 1888, Ryan moved to Emerson, and, in partnership with one Clark, opened a country store, Kuhn being banker of the firm. In the fall of 1888 Clark retired. Ryan continued the business, his father and one Berben indorsing his paper for goods bought and unpaid for to the amount of $3,000. In January, 1890, Ryan was insolvent, but continued to do business and purchased the goods in question on credit. The debt of Darrow & Logan was about due; that of J. T. Robinson Notion Company was overdue, while the Schneider & Loomis claim had not yet matured, January 27, 1890. Ryan owed, on January 27, 1890, for goods bought, $2,400, on paper indorsed by his father and another in October, 1888, $3,000; mortgage indebtedness, $3,200.

In 1889 Kuhn started, in South Omaha, a grocery store. A few days prior to January 27, 1890, Ryan approached him with a proposition to sell his stock, and an inventory was made without closing business, and that seems to have been known only to the parties engaged. This inventory could not be produced at the trial. Ryan continued in possession, selling goods as usual, until the close of business on the 27th, when he and Kuhn commenced packing, working all night, and for twenty-four consecutive hours, when the goods were shipped to South Omaha. Kuhn was to pay the cost price, less freight and a trifling reduction for damaged goods, for a stock adapted to a country trade, consisting of clothing, boots and shoes, hats and caps, dry goods, notions, hardware, groceries, etc. The amount of the stock is claimed to have been $4,500. The only reason assigned for the sale was the intention of Ryan to remove to the farm. The consideration paid was eight lots in Sioux City, Iowa, at $300 each, aggregating $2,400; a note executed by one Spiker to Kuhn, not due for fourteen months, $1,080; a

similar note executed by one Rhoady, $680, without security, and a note of one Rhoady not due for two or three years; a note executed by one Beringhoff, $267. About $75 interest had accumulated on these notes. On the 27th Kuhn and Ryan went to Sioux City, where deeds to Mrs. Ryan were executed for the lots there, but were not delivered until the bill of sale for the stock was executed that evening. They did not start from Sioux City until 4 P. M., but between 7 and 8 P. M. of that day a messenger filed with the recording officer at Ponca, eighteen miles distant, a bill of sale of the stock, and a deed to Ryan's father for a half section of land. This messenger was Kuhn's, who was then in possession of the stock.

The defendants offered in testimony a duly certified copy of a warranty deed executed by Kuhn and wife to Mrs. M. A. Ryan on the 11th day of January, 1890, and filed for record on the 27th day of January, 1890, at 7 o'clock P. M.

It certainly was relevant and material to inquire into the dealings between Kuhn and Ryan, and Ryan's wife, at or near the time when the testimony disclosed that Ryan was making a disposition of his property, and manifestly making a disposition of his property to his wife. The court, however, excluded this upon the theory that it had been executed, as appeared upon the face of it, some sixteen days prior to the conveyance to Kuhn. In this the court clearly erred. In a transaction of this kind all the facts relating to the transfer of the property, the consideration therefor and by whom paid, the manner of payment and to whom the transfer was made, may be proved to enable the jury to determine the true nature of the transaction.

In view of the many assignments of error it would consume too much space to particularize the specific errors. The court seems to have restricted the examination to too narrow limits, and again in the instructions to have restricted the inquiry as to the good faith of the transaction. The undisputed testimony shows that Kuhn had sufficient

notice that the goods were not paid for to put him upon inquiry, yet he aided in putting the property of Ryan in a position, the inevitable effect of which was, to hinder and delay, if not defraud creditors of Ryan. This he cannot do and be treated as a *bona fide* purchaser.

In *Beels v. Flynn*, 28 Neb., 575, it was held: "A purchaser of an entire stock of goods, all the property of the debtor, cannot close his eyes to the circumstances under which he purchases the stock and the probable effect the means of payment (in this case mostly a note of the purchaser) will have upon creditors of the seller in hindering, delaying, or defrauding them of the payment of their claims." What is said in that case is applicable in this, and all the facts and circumstances should be submitted to the jury, which they were not, either by the proof or the instructions. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CHARLES C. RITTENHOUSE V. C. B. BIGELOW ET AL.

FILED JANUARY 2, 1894. No. 6477.

Cities of the First Class: TOWNSHIP BOARDS: TAXATION

In cities which contain 10,000 inhabitants the taxes must be equalized by the town board, and the appointment of a clerk of such board is not illegal and unauthorized.*

ORIGINAL application for injunction to restrain the collection of taxes.

Tibbets, Morey & Ferris, for plaintiff, cited: *South Platte Land Co. v. Buffalo County*, 7 Neb., 257; *Burlington &*

Overruled. See following case, 38 Neb., 547.

M. R. R. Co. v. Cass County, 16 Neb., 138; *Touzalin v. City of Omaha*, 25 Neb., 817; *Earl v. Duras*, 13 Neb., 234; Sutherland, Statutory Construction, secs. 235, 237, 238.

George H. Hastings, Attorney General, B. F. Smith, and *W. P. McCreary, contra*, cited: *McGee v. State*, 32 Neb., 149.

MAXWELL, C. J.

This is an action brought by the plaintiff against the defendants to restrain the enforcement of a tax alleged to be void. Hastings is a city which, according to the last census, contained more than 10,000 inhabitants. The county of Adams is under township organization, and Hastings constitutes a township. On the 12th of July, 1893, the township board of Hastings appointed a clerk and treasurer, and taxes were thereupon levied on the property of the city to pay for the services of said officers, and these are the illegal taxes complained of.

Section 4, article 4, chapter 18, Compiled Statutes of 1893, provides: "That in wards of cities of the first and second class, whose limits are co-extensive with precincts, the electors thereof shall only choose supervisors, assessors, and judges and clerks of election." Section 5 of the same chapter provides: "No city of over 6,000 inhabitants shall be included within the corporate limits of any township, but the territory occupied by such city of over 6,000 inhabitants shall constitute a town by the name of such city for the purpose of town meetings and organization as hereinafter provided." Section 42 of the same is as follows: "Assistant supervisors, and supervisors elected in the cities of the first and second class, shall have no power or duties as town officers, but shall be members of the county board of their respective counties, and shall have and enjoy the same powers and rights as other members." Section 62 provides: "None of the provisions of this act in regard to

meeting of electors of their respective towns and their powers shall apply to towns whose limits are co-extensive with cities of the first and second class, but such cities and the inhabitants thereof shall continue to be governed by the laws specially applicable thereto, with such power only as conferred by law or election in the choosing of supervisors, assessors, judges and clerks of election, and other county officers."

Section 62, article 1, chapter 18, is as follows: "The county boards of the several counties in this state that may adopt township organization shall be composed of the supervisors of the organized townships thereof, and the supervisors from the cities of the first and second class and villages; such supervisors shall hold two regular meetings in each year at the county seat in their respective counties, for the transaction of general business as a board of supervisors. They may hold special meetings at such times as they may find convenient, and shall have power to adjourn from time to time as they may deem necessary. They may also hold such other meetings as are by law provided."

In 1891 the legislature amended the general election law by providing that "in counties under township organization one town clerk, one town treasurer, three judges and two clerks of election, one assessor, and one overseer of highways in each road district shall be elected annually thereafter; and two justices of the peace and two constables shall be elected at said election and every second year thereafter, except as hereafter in this section provided; and at said election one supervisor shall be elected in each township," etc. "In each city and village having 1,000 inhabitants or over, one supervisor for each 4,000 inhabitants therein, one asssesor, three judges and two clerks of election."

Section 148, article 1, chapter 14, Compiled Statutes, provides: "That in all cities of the second class in the state in counties under township organization and in counties that may come under such organization, the city coun-

cil and supervisors of such cities shall constitute a board of equalization for such city, whose duty it shall be to meet and equalize the assessments of such city at the same time and in the same manner as now provided by law for townships in counties under township organization."

Section 62, chapter 77, is as follows: "In counties under township organization the assessor, with his assessment book and the schedules and statements of property by him assessed, together with the town board, shall meet on the first Monday of June, for the purpose of reviewing the assessment of property of said town. And on the application of any person considering himself aggrieved, or who shall complain that the property of another is assessed too low, they shall review the assessment and correct the same as shall appear to them just. No complaint that another is assessed too low shall be acted upon until the person so assessed, or his agent, shall be notified of such complaint, is a resident of the county." There is also a provision "that in each town the supervisor, town clerk, and justices of the peace of the town shall constitute the town board." It will thus be seen that there is no special provision for equalizing assessments in cities of the first class, which Hastings is. Section 62, chapter 77, therefore provides the only mode for equalizing taxes in cities of the first class having 10,000 inhabitants. The plaintiff, therefore, is not entitled to any relief, so far as the action relates to the clerk, and the action is

DISMISSED.

CHARLES C. RITTENHOUSE V. C. B. BIGELOW ET AL.

FILED APRIL 3, 1894. No. 6477.

1. **Cities of the First Class:** TOWNSHIP BOARD: TAXATION. There is no authority of law for the election, appointment, or existence of a township board, nor for the election or appointment of a township treasurer or township clerk in a township, when such township is a city of the first class having more than ten thousand and less than twenty-five thousand inhabitants.

2. *Rittenhouse v. Bigelow*, 38 Neb., 543, overruled.

REHEARING of preceding case, 38 Neb., 543.

RAGAN, C.

This is a rehearing of *Rittenhouse v. Bigelow*, 38 Neb., 543, an action brought originally in this court, and decided January 2, 1894. The suit was brought to perpetually enjoin the county clerk and county treasurer of Adams county from extending upon the public records and collecting certain taxes levied by an alleged township board of Hastings township. Adams county is under township organization; the city of Hastings is situate therein, and is a city having more than ten thousand and less than twenty-five thousand inhabitants, and such city constitutes Hastings township.

The sole question presented by the record in this case is: Is there any authority of law for the existence of a township board in Hastings township? If no express statutory provisions existed affording a negative answer to the question, we are of opinion that the statutes governing cities of the subclass to which the city of Hastings belongs, and article 4, chapter 18, Compiled Statues, 1893, the township organization act, would afford such a negative answer without a strained construction of such statutes by the courts. The object of township organization law is to

enable the people of every locality to make rules and regulations for the government of affairs, local in their nature. These rules and regulations, or by-laws, as they are sometimes called, in townships are framed by the people in their collective capacity at meetings called for that purpose; while the rules and regulations, or ordinances, governing cities of the subclass to which the city of Hastings belongs are framed by delegates or councilmen chosen by the electors of such cities. In a township containing a few hundred inhabitants it is entirely practicable for the voters in their collective capacity to frame such by-laws as they may think will best regulate their local affairs; but this legislation by voters collectively would be wholly impracticable in a city of ten thousand inhabitants.

But we do not have to depend upon a construction of the statutes aforesaid for an answer to the question raised by this record. By section 4, article 4, of said chapter 18 it is provided that the electors in wards of cities of the first and second class, whose limits are co-extensive with a precinct, shall only choose supervisors, assessors, and judges and clerks of election. By section 5 of said article and chapter it is provided that no city of over six thousand inhabitants shall be included within the corporate limits of any township, but that the territory embraced within said city shall constitute a township by the name of said city. By section 42 of said article and chapter it is provided that the supervisors elected in cities of the first class shall have no power or duties as township officers, but shall be members of the board of supervisors of the county; and by section 62 of said article and chapter it is declared that none of the provisions of the act in regard to the meeting of electors of the various townships shall apply to townships whose limits are co-extensive with cities of the first and second class; but that such cities and inhabitants thereof shall continue to be governed by the laws specially applicable thereto; reserving, however, to such cities the

power of choosing supervisors, assessors, judges and clerks of election, and other county officers. These sections of this township law need no construction. They speak for themselves; and it is perfectly clear that the legislature never intended that the municipal or local affairs of a city of the subclass to which Hastings belongs, though made a township, should be conducted by a township board. It is true that the act speaks of cities of the first and second class, and the city of Hastings is a city of the first class having more than ten thousand inhabitants and less than twenty-five thousand inhabitants; but the city of Hastings did not cease to be a city of the first class because subclassed as one having more than ten thousand inhabitants. There is no authority of law for the election, appointment, or existence of a township board as such, nor for the election or appointment of a township treasurer or township clerk in a township, when such township is a city of the first class having more than ten thousand and less than twenty-five thousand inhabitants. It follows that the levy of taxes made by the township board of Hastings township is void. The former opinion of this court is reversed, and a decree will be entered perpetually enjoining the county clerk and county treasurer of Adams county from extending upon the books of their office and collecting any of the taxes sought to be levied by the said alleged township board of Hastings township.

DECREE ACCORDINGLY.

POST, J., not sitting.

BRETTA SVANSON V. CITY OF OMAHA.

FILED JANUARY 2, 1894. No. 5387.

Municipal Corporations: DAMAGES BY CHANGING GRADE OF STREET. After the grade of a street had been established a lot-owner adapted his building on his lot to conform to the grade. Afterwards a new grade was established, by reason of which the front of his building was left more than fifteen feet above the street. *Held*, That a clear preponderance of the evidence showed that the damages to the property greatly exceeded the special benefits.

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

B. G. Burbank, for plaintiff in error.

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

MAXWELL, C. J.

The plaintiff in June, 1890, was the owner of the south half of lot 15, in block 8, in Kountz & Ruth's addition to Omaha, and had erected thereon a large wooden building, nearly two stories in height, with a brick basement. It appears from the evidence that the grade was established in 1883 and a change made in 1887, and she built a basement wall under the house to adapt it to the change of grade of 1887; and the front of the house seems to have been but two or three feet above the level of the street. In June, 1890, a new grade was established, by which the street in front of the house was cut down fifteen and one-half feet. The persons appointed to appraise the damages allowed the plaintiff nothing, and on appeal to the district court the award was affirmed.

On the trial of the cause David Smeaton testified that the property, before the change of grade, was worth $4,500,

and from $3,000 to $3,200 afterwards. Anthony Johnson testified to substantially the same facts. E. F. Seaver testified that the property was worth about $4,150 before the grading and about $2,900 afterwards. Mark A. Upton placed the value before the grading at $4,500, and after the grading at about $3,000. Otto Johnson testified that the property was worth before the grading about $4,500, and after such grading about $3,000. These men are shown to have been well acquainted with the value of real estate in Omaha at the time stated. The defendant called three witnesses, two of whom were in its employment, one apparently being a professional appraiser, if not a professional witness, who testified, in substance, that the special benefits were about equal to the damages. When required to particularize as to the benefits they failed to show special benefits that were of any great value. None of these witnesses testified to facts that showed that the property would be worth more after the grading, and the lot and building lowered to grade, than it would be before the change of grade. This would seem to be the test. Is the property, taken as a whole, deducting the cost of lowering the buildings, diminished in value by the improvement? If it is, the owner should be compensated for the diminution in value.

It is very desirable and commendable even for a city, within reasonable limits, to improve its streets, but it is of equal importance to protect the rights of its citizens. When a grade is established, a lot owner on such street may justly assume that it was made in good faith, and may build according to grade or raise or lower his buildings to conform to the grade. If the grade is thereafter changed so that his buildings are left on top of a high bank, it would seem but justice that he should be paid for lowering the same to the second grade, unless the special benefits are clear and manifest and fully equal the damages. If damages for a material change of grade made from time to time can be paid

for in alleged benefits, it is possible to bankrupt persons of moderate means or greatly injure their financial ability, and they may be required, at the whim or caprice of a municipal council, to raise or lower their buildings to conform to changes which are often unnecessary. The true policy of every municipality and community is to deal justly with all property owners within its boundaries. If the public require the use of private property, or that it shall be damaged for public use, why should not the party who requires this sacrifice for its own benefit bear the burden and pay for the injury? This might impose a slight burden on all the tax-payers, but would be more than compensated by the assurance to every property owner that if his property was taken or injured for public use he would be duly compensated for the injury. In the case at bar the proof clearly shows that the plaintiff has been greatly injured in excess of the special benefits shown by the proof. The verdict, therefore, does not respond to the evidence, and the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

SARAH N. STANWOOD V. CITY OF OMAHA.

FILED JANUARY 2, 1894. No. 5639.

On an appeal from an award of damages for the construction of a viaduct it appeared from the proof that the damages were grossly inadequate. The verdict and judgment, therefore, are set aside and the cause remanded for further proceedings.

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

Charles B. Keller, for plaintiff in error.

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

MAXWELL, C. J.

This is a petition in error to review the judgment of the district court of Douglas county on an award of damages to the plaintiff for injuries to lot 4, block 204, in the city of Omaha, by the erection of the viaduct on Tenth street in said city. The lot in question has a frontage on Tenth street of 132 feet, and on Leavenworth street of sixty-six feet. The viaduct at the point indicated is about thirty feet above the street. The verdict below was $500, in favor of the plaintiff.

The principal objection is that the verdict is against the weight of evidence, the amount of the award being greatly beneath the damages proved. W. V. Morse, a witness in the case, placed the value of the lot before the construction of the viaduct, in round numbers, at $59,000, and afterwards $31,000. J. B. Carmichael at $49,000 before and $24,000 afterwards. George C. Ames placed the value before at $46,000, and afterwards at $23,000. Lewis S. Reed placed the value before at $39,000, and after such construction at $26,000. George Hobbie placed the value before at $66,000, and after the erection at $33,000. John T. Dillon placed the value before at $52,000, and after the erection at $26,000. These witnesses are shown to be well acquainted with the value of real estate in Omaha, and in that particular part of the city, and we do not think this testimony is overcome by that on behalf of the city. But the testimony as to the rental of the buildings is much stronger in favor of the plaintiff. Before the erection of the viaduct the plaintiff received as rental for the ground alone the sum of $1,200, the taxes being paid by the lessee, and the lessee sublet the premises for nearly or quite twice that sum; but after the erection of the viaduct the rents were greatly reduced, more than one-half, and it was difficult to find paying tenants even at the reduced rate. These facts show that the property has been greatly injured for

either sale or lease, and that $500 is a grossly inadequate sum for the damages sustained. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

DODGE COUNTY V. CHARLES KEMNITZ.

FILED JANUARY 2, 1894. No. 4391.

Bastardy: BOND FOR SUPPORT OF CHILD: JUDGMENT. When for the deceased mother of a bastard child the proper county has been substituted as complainant in proceedings under chapter 37, Compiled Statutes, the judgment and order of the court, upon a verdict of guilty, should require defendant to "give security to save the county harmless from any expense which may be incurred in the support of said child."

REHEARING of case reported in 32 Neb., 238.

C. Hollenbeck and *George L. Loomis*, for plaintiff in error.

Frick & Dolezal, contra.

MAXWELL, C. J.

This action was brought by Lena Martin against Kemnitz as the father of her bastard child. The mother died while the action was pending, and the county of Dodge was substituted as plaintiff on the trial. The defendant was found guilty. Upon error proceedings in this court this judgment was affirmed (32 Neb., 238). A motion for a rehearing was afterwards sustained, and there is upon such rehearing presented but one question for consideration, and that is the sufficiency of the bond required by the judgment of the district court. The condition of the bond prescribed was that the defendant "will save the county of

Dodge free from all expense on account of the support of said bastard child." COBB, J., delivering the opinion of this court on a former review of this case (28 Neb., 224), said that though the action had been revived in the name of Dodge county, every proceeding should be governed, so far as is required, by the same provisions and rules of law as though it had never abated.

Section 6, chapter 37, Compiled Statutes, 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 adjudged 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, and in case the said reputed father shall neglect or refuse to give security as aforesaid, and pay the costs of prosecution, he shall be committed to the jail of the county, to remain until he shall comply with the order of the court." Section 2 of the same chapter provides "that, when any woman has a bastard child and neglects to bring a suit for its maintenance, or commences a suit and fails to prosecute to final judgment, the county commissioner, in any county interested in the support of any such bastard child, where sufficient security is not offered to save the county from expense, may bring a suit in behalf of the county against him who is accused of begetting such child, or may take up and prosecute a suit begun by the mother of the child." It will thus be seen that the county may prosecute "when sufficient security is not offered to save the county from expense." If a sufficient bond is given to save the county from expense in caring for the child, the putative father will be entitled to his liberty. In the case at bar such bond seems to have been given. The judgment is therefore

AFFIRMED.

DAVID P. FARQUHAR ET AL. V. LEWIS O. HIBBEN.

FILED JANUARY 2, 1894. No. 5644.

1. **Exemptions.** The testimony sustains the claim of the debtor, that the property levied upon was exempt and not subject to sale upon execution.

2. **An inventory** of all the property of a debtor, who describes his property in general terms as "three barrels of liquor, saloon and fixtures, and cigars, and stock, consisting of bar, liquors, glassware, and mirror, at No. 220 South Thirteenth street, Omaha," is not void. Although informal, the court will look at the substance, and hold it sufficient when it appears that all the property described was found at the place designated.

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

Cornish & Robertson, for plaintiffs in error.

E. W. Simeral and *William Simeral, contra.*

MAXWELL, C. J.

On March 11, 1890, defendant in error filed his petition claiming of plaintiffs in error damages in the sum of $350, and for his cause of action alleges that the plaintiff in error Farquhar was, at the time the defendant in error claimed to have been damaged, a constable in and for Douglas county, Nebraska, and that his co-plaintiffs in error were his bondsmen; that on the 24th day of February, 1890, an execution was issued on a judgment obtained in the county court of Douglas county, in favor of Riley & Dillon and against defendant in error, for the sum of $300.92, and was placed in the hands of Constable Farquhar, who on said day levied the same upon three barrels of whiskey belonging to the defendant in error; that on the 7th of March, and before the time of sale of said property under said execution, the defendant in error made out and placed in the

hands of said officer Farquhar an affidavit of exemptions. The petition also alleges that said affidavit contained a list of all the personal property of which the defendant in error was possessed, and that he demanded of said officer that the three barrels of liquor be released as exempt. In addition to the above, the petition contains the following allegation:

"5. Plaintiff further states to the court that said affidavit of exemptions shows, and plaintiff alleges the fact to be, that he, long prior to said levy or the issuing of said execution, (had) given a mortgage for the sum of $2,000 upon all the property set forth in said affidavit; * * * that notwithstanding said property was exempt by law in lieu of a homestead, said constable did, on the 8th day of March, 1890, sell said whiskey under said execution, to the damage of said plaintiff in the sum of $350."

In answering, the defendants Thomas and Brennan adopt the answer of the defendant Farquhar. The defendant Farquhar first denies each and every allegation contained in the petition, except such as is specifically admitted in the answer. It is admitted that Farquhar was a constable, as alleged, and that his co-plaintiffs in error were his bondsmen. It is also admitted that an affidavit was filed with the officer by the defendant in error on the 7th day of March, 1890, but denied that the same gave a list of all the personal property of which the defendant in error was at that time possessed, and that he demanded said three barrels of whiskey as exempt. The answer also contains the following: "Defendant states that on the 4th day of March, 1890, after levy was made as aforesaid, and prior to the sale of said property under said execution, * * * said plaintiff was the owner of seven barrels of whiskey, five thousand cigars (and other personal property described in the answer), * * * which property, except the three barrels of whiskey levied upon by this defendant, was clear and free from all incumbrance and liens, and exceeded in value the sum of one thousand dollars;

that on the 4th day of March, 1890, prior to filing any affidavit with this defendant, and prior to giving any notice whatever to this defendant that he intended to claim his exemptions, said plaintiff fraudulently, for the purpose of cheating and defrauding his creditors, and especially the plaintiffs in execution, and for the purpose of hindering and delaying said plaintiffs in execution in the collection of their judgment, and for the purpose of placing his property subject to levy on execution out of his hands, sold and transferred all of said above described property, except the three barrels of whiskey levied upon as aforesaid, by a chattel mortgage, and in other ways to this defendant unknown, and did not at any time between the time of the levy of the execution, to-wit, the 24th day of February, 1890, and the sale of said property under the same, to-wit, the 8th day of March, 1890, point out, or offer to point out, property other than the three barrels of whiskey levied upon as aforesaid on which the defendant could levy execution; that by reason of the premises the said plaintiff elected to choose, and did choose, said property disposed of as aforesaid as exempt in lieu of the three barrels of whiskey held by this defendant." It is also denied that the property described in the petition was mortgaged prior to the date of the levy.

The reply is a general denial of the new matter.

On the trial of the cause a verdict was rendered in favor of the defendant in error for the sum of $272.90, after which a motion for a new trial was overruled and judgment rendered on the verdict.

The testimony shows that after the levy the debtor filed an inventory of his property with the officer as follows:

"In County Court of Douglas County.

"RILEY & DILLON
v.
L. O. HIBBEN.

"Inventory of the whole of the personal property owned

by L. O. Hibben, of Omaha, Douglas county, Nebraska.

3 bbls. of liquor $270 00

Necessary wearing apparel.

Saloon and fixtures, and cigars, and stock, consisting of bar, liquors, glassware, and mirror, at No. 220 South 13th street, Omaha..... 2,000 00

"There is a mortgage upon the entire saloon for $2,442.80, which covers the entire value thereof, given to Isaac Brown.

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

"L. O. Hibben, being first duly sworn, deposes and says that he is a resident of the state of Nebraska, and the head of a family, and that I have neither houses, lands, nor town lots subject to exemption as a homestead under the laws of this state, and that the above inventory contains a true and correct list of all the personal property owned by me.

"(Signed) L. O. HIBBEN.

"Subscribed in my presence and sworn to before me, this 7th day of March, 1890.

"(Signed) WM. SIMERAL,
"[SEAL.] *Notary Public.*

"Filed March 7, 1889. D. P. FARQUHAR,
"*Constable.*"

Thereupon an appraisement was made as follows:

"An inventory and appraisement of the personal property of L. O. Hibben, made this 8th day of March, 1890, by R. M. Patterson, J. E. Van Gilder, and W. C. Van Gilder, three disinterested freeholders, residents of Douglas county, Nebraska, being duly sworn by D. P. Farquhar, constable of said county.

"Assessed value of the property as follows, to-wit:

1 mirror and cupboard.....$150

Glassware and silverware 60

3 bbls. liquor..... 270

25 bottles liquor	$25
7 pictures	18
2 small mirrors	16
1 ice box and contents	18
6 demijohns and contents	20
6 bottles of wine	10
1,200 cigars	30
Front bar and working board and attachments	65
Hot water urn	5
1 stove	12
6 cuspidors	3
4 chairs	2
1 lunch counter and fixtures	15
1 gasoline stove, etc	5
1 ice box and contents	10
Bottles, barrels, etc	5
Total valuation	$739

"(Signed) R. M. PATTERSON,
"J. E. VAN GILDER,
"W. C. VAN GILDER,
"*Appraisers.*"

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

"I, D. P. Farquhar, constable of said county, do hereby certify that R. M. Patterson, J. E. Van Gilder, and W. C. Van Gilder, three freehold residents of said county were called by me to assess the value of said property, and appraise the same as above.

"Given under my hand this 8th day of March, 1890.

"_____ _____,
"*Constable.*"

The testimony tends to show that there was a mortgage upon the saloon fixtures and contents for a large amount, and that this mortgage was executed and filed before the levy of the execution, and, in our view, the jury would be

warranted in finding that it was made in good faith to secure a valid debt. It is very evident, also, that the debtor had neither lands, town lots, nor houses, and that he was entitled to the benefit of the exemption of $500 in personal property, to be selected by him in addition to the specific articles exempt.

Technical objections are made to the form of the inventory. It is not a model by any means, but the officer seems to have found and appraised the property, and we must consider the substance more than the form. Taking all the testimony, it is very clear that the property sold by the officer was exempt and that he is liable therefor. There is no material error in the record and the judgment is

AFFIRMED.

EDWARD MCBRIEN ET AL. V. BEN RILEY ET AL.

FILED JANUARY 2, 1894. NO. 5455.

1. **A district court is without power to vacate or modify its own judgments** subsequent to the term at which they are entered, except for the grounds enumerated in section 602 of the Code.
2. **Where an appeal is taken to the district court** from a judgment of a justice of the peace, the appellant is not required to give notice of the appeal to his adversary.
3. **When a defendant moves to vacate a judgment** rendered against him by default, he must accompany his application with an answer setting up a meritorious defense to the action.

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

The opinion contains a statement of facts.

Switzler & McIntosh, for plaintiffs in error:

Judgments regularly entered become final at the end of the term. The court thereafter has no power to vacate the same except upon the grounds enumerated in section 602 of the Code. (Freeman, Judgments [3d ed.], sec. 96; *Carlow v. Aultman*, 28 Neb., 672.)

Upon appeal from a justice court the appellant is not obliged to notify the appellee. (*Rich v. Stretch*, 4 Neb., 186.)

In vacating the judgment entered by default it was necessary for the defendants at the time of their application to present an answer showing a good defense to the action. (*Spencer v. Thistle*, 13 Neb., 227; *Fritz v. Grosnicklaus*, 20 Neb., 413; *Mulhollan v. Scoggin*, 8 Neb., 202; *Hale v. Bender*, 13 Neb., 66.)

The defendants, in their application to have the judgment set aside, made no showing of diligence on their part, and assigned no good reason why they did not plead to the plaintiffs' petition within the time prescribed by statute. Without a satisfactory showing in this behalf, it was error for the court to vacate said judgment. (*Dixon County v. Gantt*, 30 Neb., 885; *Burke v. Pepper*, 29 Neb., 320; *Mulhollan v. Scoggin*, 8 Neb., 202.)

Mahoney, Minahan & Smyth, contra.

NORVAL, J.

This is a proceeding in error to review an order made by the court below vacating and setting aside a judgment by default rendered against defendants in error. The action originated before a justice of the peace. From a judgment in favor of defendants plaintiffs appealed to the district court, filing their petition therein on the 8th day of August, 1890. Afterwards, at the September, 1890, term of said court, to-wit, on the 27th day of December, no answer

having been filed, a judgment by default was rendered against defendants for the sum of $209.20. Subsequently, at the May, 1891, term of said court, and on the 15th day of July, defendants filed a motion to vacate the judgment, alleging the following grounds:

1. Irregularity in obtaining the judgment.

2. That said defendants never had any notice of the application of plaintiffs for a default and judgment in said cause.

3. That plaintiffs (*sic*) have a good defense to the amount of said action.

The motion was supported by the affidavit of the defendant, which stated, in substance, that prior to July 11, 1891, neither of the defendants had any notice said cause had been appealed, or that any proceedings would be, or had been, taken in the district court in said action; that defendants have a good defense to the suit; that John Riley never had any dealings or transactions with plaintiffs; and that Ben Riley is indebted to plaintiffs upon their first cause of action, but denies any liability upon the second cause of action set out in the petition. On the 22d day of July, 1891, the court sustained the motion, vacated the judgment, and gave defendants ten days in which to answer, to which order and ruling plaintiffs took an exception.

It will be noticed that the order vacating the judgment, of which complaint is now made, was entered at a term subsequent to the one at which the judgment was pronounced. This court held in *Carlow v. Aultman*, 28 Neb., 672, that a district court has no power to vacate or modify its own judgments after the term at which they are entered, except for the grounds mentioned in section 602 of the Code; and there can be no doubt of the soundness of the rule there announced. The third ground for setting aside a judgment after the term, enumerated in said section, is "mistake, neglect, or omission of the clerk, or irregularity in

obtaining a judgment." It is obvious that defendants were not entitled to relief under said section. No mistake, neglect, or omission of the clerk of the district court is alleged. There was no irregularity in procuring the judgment. True, the defendants were not notified that plaintiffs had taken an appeal from the judgment of the justice to the district court. The statute does not require that an appellant shall give notice of appeal to his adversary. None was therefore required to confer jurisdiction upon the appellate court. (*State Bank of Nebraska v. Green*, 8 Neb., 297; *Schuyler v. Hanna*, 28 Neb., 601.) There is no statutory provision requiring a plaintiff to give notice of an application for a default and judgment. The defendants were bound to take notice of all proceedings in the case after the appeal was docketed in the district court. Default was not entered until long after the statutory time for filing an answer had elapsed. Defendants being in default of an answer, judgment was properly rendered against them. Again, the defendants failed to accompany their motion to vacate the judgment with an answer. This was necessary. (*Spencer v. Thistle*, 13 Neb., 227.) The order of the district court is

REVERSED.

HENRY LEVI ET AL. V. DAVID FRED.

FILED JANUARY 2, 1894. No. 5057.

1. **Appeal:** ISSUES IN APPELLATE COURT. It is a well settled rule in this state that an appeal to the district court must be tried on the same issues as in the court from which the appeal was taken.

2. **Exception to Pleading Raising New Issue on Appeal:** WAIVER: REVIEW. An objection that a petition filed

in the district court introduced a new cause of action will not be considered by this court, where it appears that no objection was made or exception taken on that ground until after the trial in the lower court.

3. **Appeal:** PLEADING. While on appeal to the district court the plaintiff must prosecute the same cause of action as in the court of original jurisdiction, yet, in drafting his petition, he is not confined to the allegations contained in his pleading in the court below, so long as the identity of the original cause of action is preserved.

4. **Failure to Except to Instructions:** REVIEW. Instructions will not be reviewed by this court where no exceptions were taken by the party complaining at the time the charge was read to the jury.

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

Charles Offutt, for plaintiffs in error:

On appeal to the district court from a lower one, the cause must be tried *de novo*, with the issues precisely the same as at the trial below. (*O'Leary v. Iskey*, 12 Neb., 136; *Baier v. Humpall*, 16 Neb., 127; *Union P. R. Co. v. Ogilvy*, 18 Neb., 638; *Fuller v. Schroeder*, 20 Neb., 631; *Bishop v. Stevens*, 31 Neb., 786.)

Slabaugh, Lane & Rush, contra.

NORVAL, J.

This was an action for damages for breach of contract brought by David Fred against Henry Levy and Davis Skolinkowski before a justice of the peace. From a judgment in plaintiff's favor the defendants appealed to the district court, where Fred obtained a judgment against the defendant Skolinkowski.

After the selection of the jury in the district court plaintiff was permitted to file an amended petition, and this ruling of the court is assigned as error. It is insisted by counsel for plaintiffs in error that the amended petition in-

troduced a new and different cause of action from that tried in the justice court. The principle has been frequently stated in the decisions of this court that a party has a right to have the action tried on the same issues as in the court from which the appeal was taken; but this is a right that can be waived. The objection, to be available, must be made at the proper time. The defendants below did not at the time state any ground of objection to the filing of an amended petition, but simply excepted to the ruling being made. It was in the motion for a new trial that complaint was first made that the issues had been changed. A party will not be permitted to wait until he ascertains that the verdict is against him, and then urge that the identity of the issues was not preserved on appeal. Fairness to the trial court, and the opposite party, requires that the objection should be urged at the earliest opportunity. (*O'Leary v. Iskey*, 12 Neb., 136; *Sawyer v. Brown*, 17 Neb., 171.)

The rule which forbids new issues being raised in an appellate court has not been violated in this case. The cause of action set up in the amended petition is the same as declared on before the justice. It is true the facts are more fully stated in the amended petition than in the bill of particulars, but the identity of the cause of action was preserved. This was all that was required. (*Sells v. Haggard*, 21 Neb., 357.)

The original petition failed to state sufficient facts to entitle plaintiff to a judgment against Henry Levi. This defect was covered by proper allegations in the amended pleading. The only person affected by the amendment was Levi, and as the verdict was in his favor, no one was prejudiced by permitting an amendment to be made.

Complaint is made that certain instructions were misleading and prejudicial to the rights of plaintiffs in error. Objections to the charge of the court cannot be considered, for the reason no exceptions were taken by the party now complaining at the time the instructions were read to the

jury. The only exceptions in the court below to the charge were taken by defendant in error.

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

AFFIRMED.

HOWELL LUMBER COMPANY V. CAMPBELL & DEERSON.

FILED JANUARY 2, 1894. No. 4805.

1. **It is the province of the jury** to determine the credibility of witnesses and the weight which should be given their testimony.

2. **Credibility of Witnesses:** REVIEW. A jury is not required to decide a disputed proposition of fact merely by a count of witnesses, but should determine which are the most worthy of credit; and, where the evidence is conflicting, a verdict based upon the testimony of the minority of the witnesses will not be disturbed by this court on error or appeal, unless it is manifestly wrong.

3. **Action on an Account:** PAYMENT: INSTRUCTIONS. *Held*, That the instructions fairly submitted to the jury the disputed question of fact in the case.

ERROR from the district court of Sarpy county. Tried below before CLARKSON, J.

Martin Langdon, for plaintiff in error.

C. L. Hover, contra.

NORVAL, J.

This suit was commenced in the county court by the Howell Lumber Company, a corporation, against Campbell & Deerson, on an account for lumber sold and delivered. From a verdict and judgment in favor of defendants

plaintiff appealed to the district court, where the defendants again obtained a verdict, and judgment was rendered thereon.

It is undisputed that on and prior to December 30, 1888, defendants were indebted to plaintiff in the sum of $647.82, for lumber purchased by the former of the latter. The defense in the court below, as well as here, was that the account had been settled by the defendants turning over to plaintiff farmers' notes aggregating the sum of $650.06. Plaintiff admits receiving notes from defendants to said amount, but insists they were accepted merely as collateral security for the defendants' indebtedness, and not in payment thereof. The testimony introduced upon the trial on behalf of plaintiff is to the effect that on the 30th day of December, 1888, James E. Campbell, one of the firm of Campbell & Deerson, for the purpose of securing an extension of the time of payment of the indebtedness, entered into an arrangement with Herbert N. Jewett, manager of the Howell Lumber Company, by which the defendants were to deliver to plaintiff, as collateral security, notes to the amount of $1,000; that the notes subsequently turned over by Campbell were received under said contract, and that all sums collected on said notes have been placed to the credit of the defendants, reducing their indebtedness to the plaintiff to the sum of $415.97. The defendant Campbell, while upon the witness stand, denied *in toto* making any such arrangement, but on the other hand testified, positively and unequivocally, that the understanding between him and Jewett was that he should pay the account with farmers' paper, and in pursuance of such arrangement, and as soon as he procured the notes, they were delivered to the Howell Lumber Company, he taking receipts therefor. All of the receipts except one were in form like this:

"Received of Campbell & Deerson, one hundred six and $\frac{96}{100}$ dollars, in notes, as follows, to-wit: * * *

"(Signed) B. F. THOMAS."

One of the receipts specified that the note therein described was received as security on account. The notes were indorsed by Campbell & Deerson, either "Protest and notice waived," or "Protest waived." The evidence would have justified the jury in returning a verdict for either party, depending upon which set of witnesses was believed. The conflicting testimony has been submitted to two different juries, and each time the verdict was for defendants. Under the circumstances we do not feel warranted in disturbing the verdict as being against the evidence, although the greater number of witnesses sustain the position of the plaintiff, and notwithstanding we might not have decided as did the jury had we been sitting in their places. Plaintiff is not without remedy. It has recourse against defendants by action upon their indorsements upon the notes.

Complaint is made of certain instructions to the jury, given at the request of defendants, numbers 1 and 2 of which being as follows:

"1. You are instructed that the credibility of the witnesses is a question exclusively for the jury; and the law is that where a number of witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, and from all the other surrounding circumstances appearing on the trial, which witnesses are more worthy of credit, and to give credit accordingly.

"2. You are instructed that the testimony of one credible witness may be entitled to more weight than the testimony of many others, if, as to those witnesses, you have reason to believe, and do believe, from the evidence and all the facts before you, that such other witnesses have knowingly testified untruthfully, and are not corroborated by other credible witnesses, or by circumstances proven in the case."

The foregoing are above criticism. They not only state the rule correctly, but are applicable to the testimony. The credibility of the witnesses was alone for the jury to determine, and the above instructions did not authorize the triers of fact to go outside of the record, as counsel for plaintiff contends, to determine which witness should be believed and which disbelieved. The witnesses on one side had testified to a state of facts entirely opposite to that related by those on the other side, and it is obvious that the jury could not, if they reached a conclusion at all, give all the witnesses equal credit. A greater number of persons had testified on the trial on behalf of one party than did on the other, and, in view of this fact, it was not improper to charge the jury as to the rules for determining the weight to be given conflicting evidence. The jury was not obliged to decide the case by a count of witnesses. Defendants' request stated the rule as to their liability upon their indorsements on the notes. It certainly could not have misled or confused the jury, especially when considered in connection with the fourth request to charge, which was given, and which reads as follows:

"4. You are instructed that if you find from the evidence that the defendants delivered to the plaintiff, or its agents, promissory notes in the sum of six hundred fifty and $\frac{06}{100}$ dollars, indorsed 'protest waived,' and the plaintiff, or its agents, accepted the same in payment of the claim which the plaintiff had against the defendants, then your verdict should be for the defendants."

The issue in the case was whether or not the notes were accepted and received in payment of plaintiff's demand, and the charge fairly submitted that question to the jury. By an instruction given by the court on its own motion the jury were told, in effect, that if the notes were given and received as collateral security, the plaintiff was entitled to a verdict. Plaintiff has no just ground for complaint of the charge. The judgment is

AFFIRMED.

JOHN H. HARTE, RECEIVER, APPELLEE, V. ABRAM CASTETTER ET AL., APPELLEES, IMPLEADED WITH CHARLES A. HARVEY, APPELLANT.

FILED JANUARY 2, 1894. No. 6166.

1. **Motion to Dismiss Appeal:** NOTICE. A motion filed in this court to dismiss an appeal, on the ground that the appellant has drawn from the clerk of the district court the money awarded him by the decree sought to be reviewed, will be heard, notwithstanding notice of said motion was not served on the opposite party until after the expiration of the time prescribed by the rules of this court for serving briefs in the case, when it appears appellee had no notice or knowledge of the facts upon which the motion was based before the briefs were due.

2. ———. Rule 8 *held* not to apply to such a motion.

3. **Acceptance by Appellant of Benefits of Decree:** DISMISSAL OF APPEAL. A party who, after appealing from a decree in his favor, voluntarily accepts the benefits, or receives the advantage, of the decree is thereby precluded from afterwards prosecuting his appeal.

MOTION to dismiss appeal from a decree of the district court of Washington county, and motion to strike the motion to dismiss from the files. Heard below before SCOTT, J. *Appeal dismissed.*

Switzler & McIntosh, for appellant.

De France & Richardson, E. Wakeley, B. G. Burbank, Charles Offutt, L. W. Osborn, W. E. David, W. C. Walton, J. W. West, John O. Yeiser, and *Jesse T. Davis,* for appellees.

NORVAL, J.

On September 30, 1893, appellees filed in this court a motion to dismiss the appeal, on the ground that after the rendition of the decree sought to be reviewed the appellant

Charles A. Harvey received and accepted the benefits of said decree. Subsequently appellant filed a motion to strike from the files the motion to dismiss the appeal, alleging that said motion was not filed in this court until Saturday, the 30th day of September, 1893, and that notice of said motion was not served in time, either upon the appellant or his attorneys.

The cause was submitted upon the motions. We will first pass upon appellant's motion to strike.

It is insisted that the motion to dismiss the appeal comes too late, inasmuch as the same was not filed, nor was notice thereof served upon either the appellant, or his attorney, until after the time fixed by rule 9 of this court, for serving briefs in said cause, had expired. Appellant relies upon rule 8, which declares that "neither motions to dismiss, unless for the want of prosecution, nor to strike a bill of exceptions, will be heard, unless notice thereof shall be served upon the opposite party, or his attorney, or the attorney who tried the cause for him in the trial court, at or before the expiration of the time for serving briefs in the case." While the language just quoted will justify the construction placed thereon by appellant, namely, that no motion to dismiss a cause out of this court, except for want of prosecution, will be entertained, where notice of such motion is not served prior to the expiration of the time specified in rule 9 for serving briefs, it was never contemplated that the rule should be held applicable to motions to dismiss, like the one in this case, based upon matters *dehors* the record, but rather to motions to dismiss, framed to take advantage of mere errors, defects, and irregularities, not affecting the jurisdiction of the court, appearing upon the face of the record itself. To hold that the rule applies to every motion to dismiss, except for failure to prosecute the cause, would preclude this court from hearing a motion to dismiss a petition in error or appeal where the transcript of the judgment sought to be reviewed

is not filed in this court within the time prescribed by statute, unless notice of the motion has been served before the expiration of the period for serving briefs; yet this court has frequently dismissed proceedings in error and appeals because not taken in time, although the motion therefor was not made until after the service of the brief of the plaintiff in error or appellant. Suppose, after an appeal is perfected in this court and the briefs on both sides are prepared and served, the appellant accepts the benefits of the decree, or the parties settle the controversy. Would not the court, on the motion, and against the will of the other party, dismiss the appeal for that reason, notwithstanding the provisions of the rule of this court under consideration? To suggest the question is to evoke an affirmative answer. This court will not knowingly sit to hear a cause where it satisfactorily appears that the subject-matter of the suit has been settled, or where the party seeking a reversal of a judgment has accepted the money awarded him by the trial court. The case at bar, in principle, does not differ from the supposed case. Here the ground of the motion to dismiss is that appellant has received the amount found due him under the decree. It appears that neither the appellees nor their attorneys had any actual notice or knowledge that the money had been drawn by appellant until after the convening of the last term of this court, and after the time for serving briefs had elapsed. The fact that the receipt of the attorneys for appellant for the money was filed with the clerk of the district court long after the rendition of the decree does not amount to actual notice. Appellees were not bound to examine the records and files of the lower court to ascertain whether the money had been received by appellant. Appellees were diligent in filing their motion to dismiss after the discovery of the fact upon which the same is based. Appellant's motion to strike must be overruled.

As to the motion to dismiss, it may be stated as a gen-

eral rule that a party who accepts the benefit of a decree waives the right to prosecute an appeal from it. This principle has been declared and enforced by this court in the following cases: *Hamilton County v. Bailey*, 12 Neb., 56; *Gray v. Smith*, 17 Neb., 682; *Saxon v. Cain*, 19 Neb., 488, 492. The same doctrine has been asserted too frequently by other courts to be longer questioned. (*Babbitt v. Corby*, 13 Kan., 612; *Rasure v. McGrath*, 23 Kan., 597; *Babcock v. Banning*, 3 Gil. [Minn.], 123; *Mississippi & M. R. Co. v. Byington*, 14 Ia., 572; *Borgalthous v. Farmers & Merchants Ins. Co.*, 36 Ia., 250; *School District of Altoona v. District Township of Delaware*, 44 Ia., 201; *Cogswell v. Colley*, 22 Wis., 399; *Flanders v. Merrimac*, 44 Wis., 621; *Smith v. Coleman*, 46 N. W. Rep. [Wis.], 664; *Newman v. Kizer*, 26 N. E. Rep. [Ind.], 1006; *Glackin v. Zeller*, 52 Barb. [N. Y.], 147; *Bennett v. Van Syckel*, 18 N. Y., 481; *Knapp v. Brown*, 45 N. Y., 207; *Murphy v. Spaulding*, 46 N. Y., 556; *People v. Mills*, 109 N. Y., 69; *Murphy v. United States*, 104 U. S., 464; *Neal v. Field*, 68 Ga., 534; *Cassell v. Fagin*, 11 Mo., 208; *Smith v. Jack*, 2 Watts & S. [Pa.], 103; *Laughlin v. Peebles*, 1 Pen. & W. [Pa.], 114; *Hall v. Lacy*, 37 Pa. St., 366; *Gibson v. Hale*, 57 Tex., 405.)

It would be manifestly unjust to permit a party who has accepted the fruits of a decree, by taking all the money the decree gives him, to prosecute his appeal. A party who is dissatisfied with a decree in his favor should have the same reviewed by proper proceedings. He has the option to do that, or to proceed to enforce the decree and receive the benefits therefrom; but he cannot pursue both, since one course is inconsistent with the other. The acceptance of the money found due by a decree must be deemed an abandonment of an appeal previously taken. This view is fully sustained by the foregoing authorities.

Does this case fall within the rule above stated? The record shows that on the 5th day of December, 1892, a decree was rendered in this cause in the district court of

Washington county, distributing certain moneys in controversy among the numerous parties to the action. A portion of said fund was awarded to Charles A. Harvey, one of the defendants therein, and the remainder was distributed between the other parties. Harvey being dissatisfied with the sum given him by the decree, appealed the cause. All of the parties, unless it be Harvey, have drawn from the clerk of the district court the full amounts due them under the decree. On the 30th day of December, 1892, Messrs. Switzler & McIntosh, attorneys for appellant, sent to the clerk of the district court a letter, a copy of which is as follows:

"WARREN SWITZLER. JAMES H. McINTOSH.

"SWITZLER & McINTOSH, ATTORNEYS AT LAW,
"NEW YORK LIFE INSURANCE BUILDING,
"OMAHA, NEB., Dec. 30, 1892.

"*Clerk District Court Washington County, Blair, Nebraska.*—DEAR SIR: Kindly send us check for any moneys in your hands as clerk of the county available for payment to our client, Charles A. Harvey, in his claim against Washington county, In re Richards & Company in litigation in Harte, receiver, etc., v. Castetter et al., and this letter, together with your canceled check, will be your receipt for the same, and greatly oblige,

"Yours truly, SWITZLER & McINTOSH."

In compliance with said letter the clerk of the district court sent to Messrs. Switzler & McIntosh on December 31, 1892, his check on the Blair State Bank, payable to their order, for $850.84, which was received by appellant's attorneys, and they received the money thereon. Counsel for appellant insist that they did not receive or accept any money under the decree. The money in litigation had been paid to the district clerk prior to the trial in the court below to abide the decision of the court. On the trial a portion of the fund was found due, and decreed appellant.

In view of these facts, the only construction that we can place upon the letter above alluded to, and the receiving of the money on the check, is that the $850.84 was drawn in pursuance of the terms of the decree. Moreover, the clerk of the district clerk testifies that the money was so paid, and there is not a scintilla of testimony to the contrary.

But it is said that appellant did not receive, and was not sent, the full amount allowed him by the decree. The only evidence offered on this point is that given by the clerk of the district court, who, in his testimony, states that: "I mailed a check to said attorneys (Switzler & McIntosh) in compliance with their request, for $850.84, the amount due Harvey under said decree." From the foregoing it would seem that appellant has been paid all he was entitled to by the decree, but whether he has or has not, in our view, is quite immaterial. The doctrine that a party who accepts the benefit of a decree in his favor waives the right to prosecute an appeal, is not limited in its application to those alone who have accepted the full amount awarded, but applies as well where there has been part acceptance. A party, by voluntarily accepting under a decree a portion of the amount found due him, thereby as fully and completely recognizes the validity of the decree as if he had drawn the full amount allowed him. If appellant desired to prosecute his appeal he should not have accepted any portion of the fund paid into court, which was adjudged to be his. He was not compelled to accept the money, but could have allowed it to remain with the clerk of the district court until his appeal was decided. The acceptance of the money, under the circumstances disclosed by this record, precludes appellant from challenging the correctness or validity of the decree. The appeal therefore must be

DISMISSED.

PATRICK EGAN v. THOMAS BONACUM, BISHOP.

FILED JANUARY 2, 1894. No. 5048.

Action Upon Subscription Contract: PARTY PLAINTIFF. A subscription contract having provided that each subscriber thereto became bound to pay such sum as should be placed opposite his name, to enable a designated committee to erect one building and repair another, both buildings being sufficiently designated, *held*, that suit was properly brought for the collection of such subscription in the name of the official or dignitary in whom was vested the title of the real property proposed to be improved, as plaintiff; the title being held, and the suit being brought, for the use of an unincorporated association and its individual members, too numerous to be named, as beneficiaries.

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

The facts are stated in the opinion.

Pound & Burr, for plaintiff in error:

A member of a voluntary unincorporated association cannot maintain an action in his own name upon a contract made with the association. (*McMahon v. Rauhr*, 47 N. Y., 67; *Habicht v. Pemberton*, 4 Sandf. [N. Y.], 657; *Austin v. Searing*, 16 N. Y., 112; *Wilkins v. Wardens*, 52 Ga., 351; 1 Bates, Pleadings, Parties & Forms, p. 40; *Lloyd v. Loaring*, 6 Ves. [Eng.], 773.)

The bishop and others of a committee as members of the church were made the trustees of an express trust as to the subscription fund, and they should have brought the action. (*Slocum v. Barry*, 34 How. Pr. [N. Y.], 320; *Hutchins v. Smith*, 46 Barb. [N. Y.], 235.)

Charles E. Magoon, contra.

RYAN, C.

This action was brought for the recovery of the full amount pledged by Patrick Egan by his subscription to a written instrument signed by himself and seventy-three other persons, promising to pay such amount as was placed opposite the name of each signer. Opposite the subscription of Mr. Egan were placed the character and figures "$500." This written instrument, omitting the several signatures and amount opposite each, was in the following language:

"LINCOLN, NEBRASKA, February 28, 1888.

"Whereas the Rt. Rev. Thomas Bonacum, Rev. M. A. Kennedy, John Fitzgerald, William McLaughlin, Patrick Egan, Thomas Heelan, James Daley, James Kelley, F. S. Potvin, James Ledwith, P. W. O'Connor, J. J. Butler, John P. Sutton, A. Halter, and Charles McClave have been appointed a building committee of St. Theresa's church, in the city of Lincoln and state of Nebraska; and whereas, it is the intention of said building committee to enlarge the said St. Theresa's church and to erect a parochial school building in the city of Lincoln and state of Nebraska:

"Now, therefore, we the undersigned, do hereby promise and bind ourselves individually to pay the sum of money placed opposite our individual names, to enable the said committee to carry out their said intentions in reference to the aforementioned church and school, which sum of money is to be paid in installments as follows: One-fifth on demand; one-fifth on the 1st of May; one-fifth on the 1st of July; one-fifth on the 1st of October, and one-fifth on or before the 1st of January, 1889."

Upon a trial without the intervention of a jury the district court of Lancaster county rendered judgment against Mr. Egan, the plaintiff in error, for the full amount of his subscription with interest. The only question pre-

sented by the record is whether or not the action could be maintained by the plaintiff in the trial court in the form, and for the reasons indicated by the title of the case as in the petition set forth. This title was as follows: "Thomas Bonacum, Bishop of the Roman Catholic church for the Lincoln Diocese, who sues for himself and the St. Theresa's Catholic Church, of Lincoln, Nebraska, a religious association unincorporated, and the members of said religious association, who are too numerous to be brought before the court, plaintiff, v. Patrick Egan, defendant." It is observable that the subscription paper heretofore referred to did not designate a payee. It merely indicated the purposes to which, when collected, the several amounts should be applied by the committee referred to, which purpose was the repairing of one building and the erection of another. It was fully alleged in the petition, and fairly shown by the proofs upon the trial, that the title of all real property of the kind upon which the designated improvements were to be made was held by the bishop of the diocese in which such property was situated; was held for the unincorporated association heretofore mentioned; that Thomas Bonacum, at the time of the trial and for the whole time covered by the transactions therein involved, was, and had been, such bishop; that the improvements contemplated in the subscription contract had been fully completed at a cost, as shown by competent evidence, of $44,000; and that the plaintiff in error had refused to make any payment whatever upon his said subscription. There was not only a proper plaintiff in the action, but there was sufficient proof as well, to sustain the judgment, which is therefore

AFFIRMED.

WARD S. MILLS V. GEORGE LEAVITT.

FILED JANUARY 2, 1894. No. 5437.

Real Estate Agents: REVIEW OF JUDGMENT FOR COMMISSION. In an action by a real estate agent to recover a commission alleged to have been earned by himself in procuring a satisfactory purchaser of the real property of the defendant, the sole matter in controversy having been whether payment was essentially conditioned upon the happening of a subsequent event, the verdict of a jury upon that point, being supported by competent evidence under proper instructions of the court in respect to the matters in controversy, will not be disturbed.

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

Mockett, Rainbolt & Polk, for plaintiff in error.

Leese & Stewart, contra.

RYAN, C.

This suit was brought by George Leavitt, a real estate agent of Lincoln, Nebraska, against Ward S. Mills, by whom Leavitt alleged he was employed as such agent to sell certain lots owned by Mills, on terms specified; and Leavitt having, as he averred, fully complied with all prerequisites necessary thereto, was, as he alleged, entitled to recover $180 as fair compensation, and interest thereon, for his said services. There seems to be no contention made by plaintiff in error, except as to whether or not an essential part of the contract was that Leavitt was to receive no payment unless sufficient was paid by the purchaser to serve that purpose. Upon this point the court instructed the jury as follows:

"If you believe from the evidence that the defendant agreed to pay said commission upon getting a loan on the

several houses and lots, and if you find from the evidence that said loans were obtained, then your verdict should be for the plaintiff for $180, with interest at seven per cent per annum from date said loans were obtained to February 1, 1892, the first day of this term of court.

"If you believe from the evidence that by agreement of the parties to this action the said commissions were not to be paid by defendant until he had obtained from the purchaser, Algur, the first payments to be made by said purchaser on said lots, and if you find from the evidence that such first payments have not yet been made, then your verdict should be for defendant."

If the verdict had been for the defendant, it is at least doubtful whether or not the first paragraph above quoted would have vitiated it, for plaintiff's right of recovery was thereby governed by considerations much narrower than were proper under the evidence. Whatever criticism might justly be made upon that paragraph is not material, for in any event only the defendant in error could complain. The second paragraph quoted very fairly stated the law as applicable to the defense made in the answer, and had the support of sufficient evidence to render it proper to be given. The verdict of the jury thereon was fully justified and the judgment of the district court is therefore

AFFIRMED.

FRANK L. DUNN V. CHARLES N. DIETZ.

FILED JANUARY 2, 1894. No 5027.

Review: THE ONLY ASSIGNMENT OF ERROR in this case being that the trial judge was wrong in a certain conclusion of fact, the evidence examined, and *held* to support the court's finding, and its decree affirmed.

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

Adams & Scott, for plaintiff in error.

Talbot & Bryan and *T. S. Allen, contra.*

RAGAN, C.

Charles N. Dietz brought suit in the district court of Lancaster county against Wilmer Mayes, Frank L. Dunn and others, to foreclose a lien for material furnished to build a house on lot 9, block 3, Sherwin's addition to the city of Lincoln. The lien of Dietz was filed on the 15th day of August, 1888. Dunn held a mortgage against the same property executed to him by the owner, Mayes, and filed in the office of the register of deeds on the 31st day of May, 1889. Dunn defended against the lien of Dietz on the ground that the material mentioned in the lien in suit did not go into the house built on lot 9, but went into a house built by Mayes on lot 1, block 2, Sherwin's addition, and that his, Dunn's, mortgage was a first lien on lot 9, block 3. Mayes made no defense. The court found that the material mentioned in the lien entered into the construction of the house on lot 9, block 3, and that Dietz had a first lien on the property. From this finding and decree Dunn prosecutes error. His counsel say: "We insist that in this case there was no evidence showing that the lumber mentioned in the mechanic's lien, or any part of it, ever went into the building on lot 9, block 3, but that the testimony all shows that the material went into lot 1, block 2."

We have carefully read all the evidence and cannot agree that there is no evidence to support the court's finding. We think it is supported by competent evidence, and therefore we cannot disturb it. There is no question of law involved in the case, and the decree of the district court is

AFFIRMED.

SAMUEL G. DAMON, APPELLEE, V. CITY OF OMAHA ET AL., APPELLANTS.

FILED JANUARY 2, 1894. No. 3492.

Review: NO BRIEFS HAVING BEEN FILED by either party, and the judgment conforming to the pleadings and evidence, it is therefore affirmed. *Phenix Ins. Co. v. Reams*, 37 Neb., 423, followed.

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

John L. Webster, *A. J. Poppleton*, and *W. J. Connell*, for appellants.

Charles B. Keller, *contra.*

IRVINE, C.

This was an appeal from a decree of the district court of Douglas county perpetually enjoining the defendants from working a street in that city to a grade alleged in the petition not to have been legally established, facts being alleged from which it would follow that plaintiff's property abutting upon the street would be seriously injured, and it also being alleged that no lawful assessment or tender of damages had been made to plaintiff, and that no petition had been made for a change of grade.

No briefs have been filed on behalf of either party. We have examined the pleadings and the evidence; and as they are sufficient to support the judgment, it is accordingly

AFFIRMED.

STATE OF NEBRASKA V. GEORGE H. HASTINGS ET AL.

FILED JANUARY 3, 1894. No. 6090.

MOTION for rehearing of case reported in 37 Neb., 96. The motion was referred to the supreme court commissioners, and, upon their recommendation, was overruled. MAXWELL, C. J., dissented from the order overruling the motion, and filed the opinion following:

MAXWELL, C. J.

In my view the motion for a rehearing should be sustained. A careful examination of the majority opinion as reported in 37 Neb., 96, 55 N. W. Rep., 778, shows that the majority of the court really sustained the principal charges against the defendants. Thus it is said: "At the time of the appointment of Dorgan to superintend the construction of the cell house he was the agent and manager of Mosher, the lessee of the penitentiary, and charged with the duty of subleasing the prison labor. In view of that fact his selection by the board as the representative of the state, knowing, as will hereafter appear, that it would be obliged to depend upon Mosher for labor to carry on the work, is highly censurable, and should, to say the least, be characterized as unbusinesslike, and utterly wanting in that intelligent regard for the interests of the state which the law demands of public officers under like circumstances." Could there be a more serious charge against public officers than that they "were utterly wanting in that intelligent regard for the interests of the state which the law demands of public officers under like circumstances"? We must remember that the man appointed by the board, against whom this language is used, is W. H. Dorgan, at the time the overseer and manager of Mosher in the penitentiary. This man, on mere estimates and in violation of the duty of

the board, was permitted by them to draw more than $32,000 out of the treasury by their approval of his estimates and accounts, while the whole amount of labor and material furnished by him did not exceed, if performed by citizen labor, more than $13,260, and probably did not cost more than $8,000. There was no money in the treasury, so that the warrants have presumably been drawing interest at seven per cent. It is true that Dorgan afterwards paid to Hopkins about $6,000, but he still retains in his hands in the neighborhood of $15,000, with two years' interest thereon. If there has been any attempt on the part of the board to recover this money we are not advised as to the fact. The truth appears to be that this money was either loaned or practically donated to Mr. Dorgan, and this occurred by the want of intelligent regard for the interests of the state, which the majority of the court find to be the fact in the appointment of Dorgan.

David Butler, the first governor of this state, was impeached and removed from office because he had appropriated about the same amount of money as Dorgan has in this case. Butler, however, offered to secure the state, and afterwards did secure it, and finally the debt was paid. Notwithstanding this fact, the proposed security, he was removed from office because his appropriation of the money was in fact embezzlement, which it was the duty of the house of representatives and senate to condemn; otherwise, the state would be liable to be plundered by its own officers. It was contended then, as now, that the offense did not justify impeachment; that that was a heroic remedy to be applied only in extreme cases; but after full argument, and a careful investigation of the law, the senate, which contained a number of capable lawyers, held the act proved was sufficient cause for impeachment and removal from office; and no intelligent lawyer at the present time will question the conclusion reached in that case.

In the case at bar the state, through these defendants,

has been deprived of this money; and it either directly or indirectly forms a part of the debt of the state to the school fund on which it is paying interest. So in regard to the other principal charges, they are admitted to be true, but the offenses are condoned. It is claimed that they do not justify impeachment. The object of impeachment in this state is to secure the removal of the delinquent officers. The findings in this case are practically a verdict of guilty. It is unnecessary to set them aside, but simply to vacate the conclusions of law. Will any one contend that the acts complained of are not misdemeanors? They were acts in disregard of their duty, by which the state was defrauded. Suppose the officers spoken of were county commissioners and let contracts and allowed claims against the county as these respondents have done. Would they not be subject to removal from office? No court would hesitate for a moment to direct such removal. Yet removal of a county officer from office for these offenses is but another form of impeachment. It may be said that a state officer will not be impeached for as small an offense as a county officer. Why not? Both take substantially the same oath, and the law requires the same duties of both, viz., that they shall perform the same faithfully and to the best of their ability. It would seem if any discrimination is to be made it should be to require more strictness of the state officers than the officers of a county. This much is certain: if these men are justified for these acts, or they are held to constitute no ground of offense, it will be a direct invitation to other state officers to repeat these and similar acts, and will injuriously affect every department of business. The government of a state is a great business institution, and should be conducted on business principles, the same as a well managed mercantile establishment. If it is not, if money can be stolen with impunity and appropriated by the parties, I fear that it will be difficult to persuade the employe of any other establishment that what is not pun-

ishable in a state official is punishable if committed in a private establishment. There can be but one standard for the carrying on of business, whether it is carried on in the state house or private establishment, and that is equal and exact justice to all.

D. H. NOLL V. STATE OF NEBRASKA.

FILED JANUARY 3, 1894. No. 5159.

A second forfeiture of a recognizance, incurred because the principal a second time failed to appear according to the condition of his obligation, will not be vacated and canceled on the return of the principal after such forfeiture, where sufficient excuse is not shown for his failure to appear before the forfeiture taken, and the record shows that the prosecution has been deprived of proofs by the delay. Rule applied.

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

A. D. McCandless, for plaintiff in error.

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

NORVAL, J.

This is a proceeding to review the decision of the district court in refusing to vacate and set aside the forfeiture of a recognizance. The facts in brief are: That at the February term, 1890, of the district court of Gage county the grand jury presented an indictment against plaintiff in error charging him in each of the several counts thereof with selling intoxicating liquors without a license. Notwithstanding he had given bond for his appearance at and during said term of court, he left the state and did not re-

turn until after the trial jury had been excused. While thus absent his bond was forfeited by the court; but subsequently, upon his motion, and a very weak showing, the forfeiture was vacated and the cause reinstated upon the docket. At the September term, 1890, of the court, the cause was tried, but the jury being unable to agree upon a verdict, they were, with consent of the defendant, discharged without verdict, and the defendant entered into recognizance for his appearance at the March term, 1891, of said court. When the criminal docket for said term was called, said cause was set for trial by the court on Monday, March 16th, on which day the accused and his witnesses were in attendance upon the court, but the cause was not on that day reached, owing to the fact that another state case was then on trial. The county attorney, Mr. Dobbs, however, personally notified the defendant on March 16th that his cause would be pushed for trial on the following day. On the morning of the 17th day of March the defendant being present in the court room, was informed by the prosecutor, in the presence and hearing of the court, that his said cause would be called for trial immediately after the convening of the court at 1:30 o'clock P. M. of said day; and the cause was thereupon, in defendant's presence and hearing, set for trial at that time. There was a breach of the condition of defendant's recognizance by his failure to appear when his case was called on the afternoon of the last named date; and his recognizance was then declared forfeited by the court, which was duly entered of record; and thereupon the witnesses for the state were excused, and left the court room. On April 3d a motion was filed by defendant to set aside the default, which, at a subsequent term of court, was overruled, and an exception taken to the decision.

The primary object in requiring a defendant in a criminal case to give bail is to save the county the expense of keeping him in jail until trial, as well as to insure his per-

sonal attendance to answer the charge against him, and to abide the judgment of the court relating thereto. Our statute, section 384 of the Criminal Code, provides that "when any person under recognizance in any criminal prosecution, either to appear and answer, or testify in any court, shall fail to perform the conditions of such recognizance, his default shall be recorded, and the recognizance forfeited in open court." The forfeiture of the recognizance in this case was strictly within the provision just quoted. The power of a court to vacate the forfeiture of a recognizance, which has been declared by said court, is not questioned in this case, and there can be no doubt of it. A district court has ample power to discharge the forfeiture of a recognizance in a criminal case upon a sufficient showing, to the same extent that it can set aside the default of a party in a civil action; and in neither case will the ruling be disturbed by a reviewing court, unless it appears that there has been an abuse of discretion. We are unable to discover any error in the overruling of the motion to set aside the forfeiture. The defendant had the second time failed to appear when the case was reached for trial, and his recognizance was forfeited the second time. The only excuse he offers for his absence the last time is that when he left the court room before noon there was a criminal cause being tried, and he was told that said cause would take all the afternoon. He fails to tell who so informed him. Certain it was that neither the county attorney nor the court so informed him, for it is uncontradicted that the former, in presence of the court, notified the defendant that his case would be called for trial on the convening of court that afternoon. It was his duty to be present at that time. The state was ready with its witnesses to proceed with the trial, but upon the forfeiture of the recognizance the state witnesses were discharged; and the record shows that at the time of the ruling on the motion to vacate and cancel the forfeiture said witnesses were scattered, many

of them being out of the state and their whereabouts unknown. There is another significant fact, and that is the defendant, although he knew of the taking of the forfeiture a few minutes afterwards, did not complain of the action of the court, or apply to have his default set aside, until after the trial jury for that term of court had been discharged. He was aware that the case could not be tried before the next term. This delay in asking for relief, unexplained as it is, is suggestive that in absenting himself he did so for the purpose at least of putting the case over the term. Had the defendant been more prompt in seeking relief, and had he not been once before in default, he would appear in a more favorable attitude before the court. Plaintiff in error violated the conditions of his recognizance, and no valid excuse being given for his failure to appear before the forfeiture was taken, the decision of the district court is

AFFIRMED.

M. L. RAWLINGS V. STATE OF NEBRASKA.

FILED JANUARY 3, 1894. No. 5158.

A forfeiture of a recognizance will be vacated and canceled on the payment of costs, where, after the default and on the same day, the principal voluntarily appears in court, in case sufficient cause is shown for his failure to appear according to the obligation of his recognizance.

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

A. D. McCandless, for plaintiff in error.

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

NORVAL, J.

The facts in this case are substantially the same as in the case of *Noll v. State*, 38 Neb., 587, except in the following particulars: The absence of plaintiff in error from the court room on March 17th, 1891, was the only time he failed to be in attendance when wanted, and the forfeiture of his recognizance on that day was the only one ever taken against him; that the case against Noll was first upon the docket and was set down for trial first on said March 17th; that Rawlings was in attendance upon court with his witnesses during the day previous, and when court adjourned that evening he was informed by his attorney that his case would not be reached until afternoon of the next day, if that soon, and plaintiff in error returned to his home in Wymore, where he remained during the forenoon of March 17th, and went to Beatrice on the afternoon train for the purpose of having his case tried, arriving at 2:30 o'clock, when, owing to the failure of Noll to appear, he found that his case had been called sooner than was expected, and his recognizance forfeited; that he would have been promptly on hand if he had not believed that the Noll case would be tried before his case would be reached. Plaintiff in error filed a motion in the district court to have the forfeiture of his recognizance vacated, and supported the same by his own affidavit and the affidavit of Mr. McCandless, his attorney. The motion was overruled.

The testimony in the record convinces us that plaintiff in error acted in the utmost good faith. There is no claim that he was aware, or had any intimation, that Noll would fail to appear. He was justified in supposing that the case against Noll would be tried; and had it been, plaintiff in error would have been in court in ample time to have heard his own case called, and prevented a forfeiture of his recognizance. There are not presented facts showing such gross laches on the part of plaintiff in error as will pre-

clude him from having the forfeiture vacated; but the relief should be granted conditional upon his payment of costs, since it appears that Gage county has incurred considerable expense in procuring attendance of witnesses for the state, and said witnesses having scattered, it is not certain that their testimony can be procured. In case plaintiff in error shall pay to the clerk of the district court within thirty days all the costs in the criminal case in which forfeiture of his recognizance was taken, and file with the clerk of this court the receipt of such payment, the order of the district court will be reversed and the forfeiture vacated and canceled. In the event all of said costs are not paid within the time stated, the order of the court below, overruling the motion to set aside said forfeiture, will be affirmed.

JUDGMENT ACCORDINGLY.

CHARLES VANDEVENTER V. STATE OF NEBRASKA.

FILED JANUARY 3, 1894. No. 6304.

Criminal Law: REASONABLE DOUBT: INSTRUCTIONS. The rule which requires proof in criminal cases, such as will exclude all reasonable doubt of the guilt of the accused, in order to authorize a conviction, is not limited to prosecutions for felonies, but applies as well to misdemeanors.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

Beeson & Root, for plaintiff in error.

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

POST, J.

This is a petition in error from the district court of Cass county. From the transcript it appears that the

plaintiff in error was tried upon an information charging him with maliciously shooting with intent to wound the complaining witness, one Stull. A trial resulted in a verdict of not guilty of the offense charged, but guilty of an assault and battery. A motion for a new trial having been overruled, judgment was entered on the verdict, to which exception was taken, and which presents the questions to be determined by this court. The facts disclosed by the record are substantially as follows: Stull, the complaining witness, and the plaintiff in error were neighbors occupying adjoining farms. On the land of the former was a quantity of old lumber, the remnant of a packing house formerly operated there, to which each claimed title by purchase. Steps had been taken by the county board to establish a public road through the land of Stull, the lumber above mentioned being within the proposed right of way thereof, but at the time of the shooting charged said road had not been opened for the use of the public, and the fences of Stull had not been removed therefrom. On Sunday, the 26th day of June, 1892, the plaintiff in error opened the wire fence and went upon the premises of Stull with his team to secure a load of the lumber in controversy. When the latter discovered him in the act of loading the lumber, he closed the fence, and commanded him to unload the lumber then on the wagon. Plaintiff in error was armed with a revolver and an axe, while Stull was unarmed, although during the altercation which ensued he procured a willow club, but for what purpose does not clearly appear. It is shown, and is not disputed, that the plaintiff in error shot twice at Stull, one shot taking effect in the arm of the latter, and the other causing a slight wound in his hip. The contention of the plaintiff in error was that he had retreated before Stull, who was endeavoring to strike him with the club above mentioned, until farther retreat became impossible by reason of a steep bank, when he fired the shots in question in defense of his own person. It is

necessary to notice but one of the questions argued by counsel, viz., that presented by the following instructions given by the court on its own motion:

"5½. Should the jury find from the evidence that there is a reasonable doubt of the accused's guilt as he stands charged in the information, still, if they believe from the evidence that the defendant is guilty of an assault and battery, you may return a verdict of not guilty of the offense charged in the information, but that the defendant is guilty of assault and battery.

"6. The defendant is entitled to every presumption of innocence compatible with the evidence in the case, and in law is always presumed to be innocent until his guilt is established by evidence, and such guilt must be established beyond a reasonable doubt; a mere preponderance of the evidence is not sufficient; and in this connection you are further instructed that a reasonable doubt which entitles an accused to be acquitted is a doubt of guilt of the crime charged in the information, arising from all the evidence in the case. The proof is to be deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment of ordinary minds with a conviction on which they would act, without hesitation in the most important concerns of life."

"8. You are instructed that in order to warrant a verdict of guilty in this case as charged in the information, it is necessary for the state to prove, beyond a reasonable doubt, that defendant deliberately and maliciously made the assault and shot the prosecuting witness with intent to wound him, and that with such deliberately formed intentions he entered the premises of the prosecuting witness. In this connection the intent may be inferred by the jury from the acts committed by the accused, if the evidence warrant it; that is, the fact that the accused shot and wounded the prosecuting witness is sufficient in itself, unexplained by other circumstances, to establish the felonious

intent, unless you find from the evidence and facts surrounding the shooting and wounding that the accused had sufficient provocation for the assault or shooting to warrant him in shooting the prosecuting witness in self-defense."

The particular vice imputed to these instructions is that while they require the jury to be satisfied of the guilt of the accused beyond a reasonable doubt in order to convict of the crime charged in the information, they authorize a conviction for an assault and battery on a bare preponderance of the evidence. A careful examination of the charge above set out has satisfied us that it is subject to the criticism aforesaid. Not only are the jury authorized by paragraph 5½ to convict of an assault and battery, notwithstanding the evidence may be insufficient to establish guilt beyond a reasonable doubt, but the term "reasonable doubt," wherever used in the other paragraphs, is limited to the crime charged, and cannot by any reasonable or natural construction be said to apply to the offense of which the accused was convicted. There formerly existed a diversity of opinion upon the question whether the presumption of innocence was available to one accused of a mere misdemeanor in the sense that the prosecutor was required to establish guilt beyond a reasonable doubt; but the decided weight of authority may now be said to sustain the proposition that the rule which requires proof of guilt beyond a reasonable doubt applies to all criminal prosecutions, to misdemeanors as well as to felonies. (1 Bish., Crim. Proc., 1093; *Commonwealth v. Intoxicating Liquors*, 115 Mass., 142; *Fuller v. State*, 12 O. St., 433; *People v. Potter*, 89 Mich., 353.) For the reasons stated the judgment is reversed and the case remanded for further proceedings in the district court.

REVERSED AND REMANDED.

ROBERT G. BROWN, APPELLEE, V. H. E. STEIN, COUNTY CLERK, ET AL., APPELLANTS.

FILED JANUARY 3, 1894. NO. 6084.

1. **Highways:** DEDICATION: PROOF. In order to establish the existence of a public highway over private property by dedication the *animus dedicendi* is essential, and must be clearly proved.

2. **Evidence** examined, and *held* insufficient to establish a dedication of the property in controversy as public streets.

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

The facts are stated in the opinion.

J. L. Epperson & Sons, for appellants, cited: *Likes v. Kellogg*, 37 Neb., 259.

Leslie G. Hurd, contra:

To constitute a dedication of private property for public streets an intention on the part of the owner to dedicate is absolutely essential, and unless such intention can be found in the facts and circumstances, no dedication exists. (2 Dillon, Municipal Corporations, sec. 636; *Irwin v. Dixion*, 9 How. [U. S.], 31; *Harding v. Jasper*, 14 Cal., 643; 2 Herman, Estoppel, sec. 1142; *City of Chicago v. Stinson*, 124 Ill., 610; *City of Chicago v. Hill*, 124 Ill., 646; *Gentlemen v. Soule*, 32 Ill., 271; *Harding v. Town of Hale*, 83 Ill., 506; *Kyle v. Town of Logan*, 87 Ill., 66; *Saulet v. City of New Orleans*, 10 La. Ann., 81.)

POST, J.

This was a proceeding in the district court of Clay county, by the appellee Brown, to restrain the defendant Stein, as county clerk, from recording an alleged plat of the

first addition to the city of Clay Center, and the defendant city from using and claiming the property hereafter described as public streets.

From the uncontroverted allegations of the pleadings it appears that in the year 1884 the plaintiff and two others caused to be laid out and platted the first addition to the said city. Said parties at the time named were the owners of a strip of land 93 feet in width at the north end and 113 feet wide at the south end thereof, adjoining the city on the west, and conforming in length with the west line of the city as originally laid out. The strip thus described is designated on the plat as block 18, and subdivided into lots marked consecutively from 1 to 54, inclusive of both numbers. Of said lots those marked from 21 to 23, inclusive, are 25 feet wide, all others being 50 feet wide, except lots 6, 20, and 40, the property in controversy, which are 80 feet, and correspond in width with the east and west streets of the city on which they abut. The plaintiff, who has by purchase acquired the rights of the other parties interested in said lots, alleges that he now holds them by title in fee-simple; that he has never dedicated or otherwise appropriated them to the use of the city, but that said city now uses and claims them as public streets, to-wit, as extensions of Glenville, Fairfield, and Harvard streets, upon which they abut, and has prepared a new plat of said addition, on which they are designated as parts of said streets, and which it threatens to file in the office of the county clerk, thereby casting a cloud upon his title. It is also alleged by the plaintiff, and not denied, that ever since said land was laid out and platted as aforesaid the property in controversy has been listed and assessed for taxation as lots 6, 20, and 40 of block 18, in the said addition, and that he has paid all taxes thus assessed against them for state, county, and city purposes. There is no claim by the city that the property in controversy, or any part thereof, has been acquired for public use by purchase or condemnation;

nor is it seriously contended that the act of laying out and platting the strip known as "Block 18" amounts to a dedication of the lots or tracts in question as highways, notwithstanding they conform in width to the streets of the city, and, but for their designation as lots, might seem to be extensions thereof. The reliance of the city as already indicated is upon a common law dedication. In addition to the facts above stated it appears from the bill of exceptions that block 18 was bounded on the west by the property described in the record as the "Kincaid Pasture," and used for agricultural purposes by the proprietor.

In the month of September, 1886, certain other parties purchased a part of the property last mentioned and laid out Eller's addition, adjoining block 18. Afterward the Kansas City & Omaha Railroad Company located its depot and side tracks in Eller's addition, which rendered access thereto across said block desirable, if not necessary. It seems to have been understood at the time the last-named addition was laid out that the streets of the city did not extend through block 18, since Eller, one of the proprietors thereof, who held the title to the premises by deed from Kincaid, represented to the latter, at the time of the purchase from him, that it would cost about $2,000 to open the streets through block 18; and at another time Messrs. Martin and Dixon, who were also interested in said addition, visited plaintiff at his home in Sutton to negotiate for the opening of said streets. It is shown that since the construction of the railroad through the city, in 1877, one or more of the lots in controversy have been in constant use as a street by the public, and continues to be the only road connecting Eller's addition with the city proper. It is further shown that the city has graded one of the lots, to-wit, lot No. 20, claiming it to be an extension of Fairfield street, and has caused some sidewalks to be constructed on each of them, but neither the date, amount, nor value of such improvement is apparent from the record.

It does not appear that the plaintiff ever recognized the claim which the city now asserts to the lots. On the other hand, he testifies, without contradiction, that he always asserted his title thereto; that he has frequently urged the city authorities to purchase or condemn them for use as streets, but that no action was taken, for the alleged reason that there were no funds available for that purpose. In the month of July, 1877, he caused a stout board fence to be built across the front of lot 20, apparently the one most used by the public, after notifying the city authorities of his intention to do so, but which was removed a few hours later by parties unknown to him. He admits that the purpose of the proprietors of the addition in making the lots in question conform in width to the streets was to subsequently dispose of them to the city. He testifies further as a reason for demanding compensation for them, that as one of the proprietors of the original town he had been obliged to give away a large number of lots in order to secure the location there of the county seat. The proof fails to show that any person was induced to purchase or improve property in the city, or either of the additions named, in the belief that the streets extended through block 18. The most that can be claimed is, that a general understanding existed that in consequence of the extension of the city in that direction, a corresponding extension of the streets would eventually be required. The district court found for the plaintiff upon all of the issues and entered a decree in accordance with the prayer of the petition. With that decree we are entirely satisfied. It is clear from the record that the *animus dedicendi*, which is essential in order to create an easement in favor of the public, is wanting. The rule is too well settled to now admit of controversy, that in such cases the intention to dedicate is essential and must be clearly shown. (See *Graham v. Hartnett*, 10 Neb., 517; 2 Dillon, Municipal Corporations, 499.) In this state private property cannot, without the

consent of the owner, be taken or used for public purposes without compensation therefor. (Bill of Rights, sec. 13.) It was incumbent upon the city in this case to show affirmatively the intention of the plaintiff to appropriate the lots in controversy to the use of the public as streets, or such facts as would in equity estop him to now deny such intention; but, as we have shown, there is upon that proposition a failure of proof.

2. We are referred as sustaining the contention of the city to the case of *Likes v. Kellogg*, 37 Neb., 259. That case we think differs essentially from the one under consideration. There the intention to dedicate is evident from the facts stated. The tracts or parcels of land there in controversy were not designated as lots, nor were there any facts apparent from the recorded plat, or otherwise, indicating private ownership, or that they had been listed or assessed for taxation. On the other hand, numerous persons, nineteen or more, were induced by the conduct of Stone, the proprietor, and his agent to purchase property and make valuable and lasting improvements in the addition therein named, in the belief that the spaces between the blocks as laid out and platted were, in fact, streets.

3. Proof was offered tending to show that the original plat of block 18 bears evidence of having been altered. The evidence of the county clerk is that shortly after the filing of the plat of Eller's addition some one inquired for the plat of the first addition, and, on producing it, he observed that the east line of the lots in controversy had been erased, but whether before the filing of the plat or subsequent thereto he cannot say. He subsequently examined the plat and found the lines in question had been restored. It is not shown that the plaintiff, or his agents, had access to the records, nor does the city attempt to explain such apparent alterations, while the plaintiff testifies positively that the exterior lines of the said lots were all shown upon the plat as originally prepared and filed. On that point he

is strongly corroborated by the surveyor who prepared the plat, Mr. Groff. The finding of the district court upon that, as well as upon all controverted propositions, was for the plaintiff, and is clearly in accordance with the evidence. The decree is right and is

AFFIRMED.

LEONIDAS K. HOLMES ET AL., APPELLANTS, V. JANE G. HUTCHINS ET AL., APPELLEES.

FILED JANUARY 3, 1894. NO. 5359.

1. **Mechanics' Liens**: MORTGAGES: PRIORITIES. The proviso in section 6, chapter 54, Compiled Statutes (the mechanic's lien law of the state), that "this law shall not be so construed as to interfere with prior *bona fide* liens on grounds on which such buildings shall be erected as a fixture," *held*, to forbid subordinating the priority of a recorded mortgage on such grounds to a subsequently attaching mechanic's lien.

2. ———: STATEMENT: DESCRIPTION OF LAND. One who claims the benefits of the mechanic's lien law must show a substantial compliance with each essential requirement thereof, one of which is that the sworn statement to be filed shall contain a description of the land upon which the labor was done or material was furnished for the purpose contemplated by such law. A description of property in such statement which is entirely inapplicable to the land actually benefited cannot be made effective to any extent for the purpose of subjecting the land actually built upon to the operation of the lien claimed.

3. ———: ———: RECORD OF LIEN: NOTICE. The binding force of the law creating and regulating mechanics' liens in favor of a lienor, as against a purchaser of the premises sought to be subjected to such lien, depends upon the required sworn statement being filed of record within the time fixed by the statute for that purpose. As between such parties, and for the purpose stated, the notice imparted by filing the prescribed statement is an essential prerequisite, the want of which can neither be supplied by other proof, nor supplemented by a decree of court.

4. ———: MORTGAGE PRIORITIES. The mere knowledge of a grantor that his grantee intends to build upon the lot which is the subject-matter of the conveyance between them will not operate to postpone the priority of a purchase-money mortgage in favor of such grantor to a mechanic's lien for material subsequently furnished for the erection of a building on said lot. To bring about this result, the grantor must in some manner be a promoter of the improvement contemplated.

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

J. R. Webster, for appellant L. K. Holmes *et al.:*

The vendor who sells his property with stipulation that the vendee build, subjects his property to liens for such construction. This liability he cannot absolve by afterwards conveying and taking a mortgage for purchase money. By the mere device of circuity he cannot free the property of the equity of lien fastened upon it by his contract. (*Bohn Mfg. Co. v. Kountze*, 30 Neb., 719; *Rollin v. Cross*, 45 N. Y., 767; *Botsford v. New Haven, M. & W. R. Co.*, 41 Conn., 454; *Seitz v. Union Pacific R. Co.*, 16 Kan., 133; *Pickens v. Plattsmouth Investment Co.*, 37 Neb., 272; *Hill v. Gill*, 40 Minn., 443; *Paulsen v. Mausker*, 126 Ill., 78; *Henderson v. Connolly*, 123 Ill., 98; *Hackett v. Badeau*, 63 N. Y., 476; *Hilton v. Merrill*, 106 Mass., 528; *Smith v. Norris*, 120 Mass., 58; *Davis v. Humphrey*, 112 Mass., 309; *Bickel v. James*, 7 Watts [Pa.], 9; *Woodward v. Leiby*, 36 Pa. St., 437; *Keller v. Denmead*, 68 Pa. St., 449; *Clark v. Parker*, 12 N. W. Rep. [Ia.], 554; *Moore v. Jackson*, 49 Cal., 109; *Parker v. Bell*, 73 Mass., 429; *Weber v. Weatherby*, 34 Md., 661; *Tanner v. Bell*, 61 Ga., 584.)

As to lien covering two properties, the lien will not fail because the material was used in two separate buildings, nor because of error of description as to one of them. The mechanic's lien law is liberally construed, and was framed with view to get rid of all technical difficulties, and will

be construed and enforced to effect its purpose. (*Great Western Mfg. Co. v. Hunter*, 15 Neb., 36; *Rogers v. Omaha Hotel Co.*, 4 Neb., 59; *Knutzen v. Hanson*, 28 Neb., 595; *White Lake Lumber Co. v. Russell*, 22 Neb., 129; *Doolittle v. Plenz*, 16 Neb., 156; *Ballou v. Black*, 17 Neb., 398.)

The owner and mechanic, by convention between themselves, can bind the property, and subsequent purchasers with notice, or a vendee, by convention with his vendor, would be bound by it. It makes no difference whether the lien was good or not. It was assumed and made good by the convention of the parties. (*Kruger v. Harvester Co.*, 9 Neb., 533; *Skinner v. Reynick*, 10 Neb., 324; *Knutzen v. Hanson*, 28 Neb., 596: *Keedle v. Flack*, 27 Neb., 839; *Cooper v. Foss*, 15 Neb., 520; *Koch v. Losch*, 31 Neb., 627.)

S. L. Geisthardt, for appellant Abner Heater:

There can be no mechanic's lien for materials furnished on a general account, solely on the credit of the person ordering them, even though they are afterwards used in the construction of a building on which a lien is claimed. (2 Jones, Liens, secs. 1326, 1327, 1330; *Holmes v. Richet*, 56 Cal., 307; *Talbott v. Goddard*, 55 Ind., 496; *Crawfordsville v. Brundage*, 57 Ind., 262; *Campbell v. Furness*, 1 Phila. Rep., 372; *Wisconsin Planing Mill Co. v. Grams*, 72 Wis., 275.)

There can be no mechanic's lien on separate and disconnected parcels, by virtue of a general claim filed jointly against all, without a separation of the items so as to show what materials are justly chargeable to each parcel. (Phillips, Mechanics' Liens, secs. 376, 377, and cases cited; *Chapin v. Persse*, 30 Conn., 461; *Girard P. S. Co. v. Southwark F. Co.*, 105 Pa. St., 248; *Morris County Bank v. Rockaway Mfg. Co.*, 14 N. J. Eq., 193, 16 N. J. Eq., 150; *Dalles L. & M. Co. v. Wasco W. M. Co.*, 3 Ore., 527; *Gor-*

gas v. Douglas, 6 S. & R. [Pa.], 512; *Weaver v. Sells*, 10 Kan., 609.)

A substantial compliance with the statute is a condition precedent of a mechanic's lien. The recorded statement must, with substantial accuracy and certainty, describe the property upon which a lien is claimed. (2 Jones, Liens, secs. 1389, 1391, 1421; Phillips, Mechanics' Liens, secs. 377, 378, 386; *Meyer v. Berlandi*, 39 Minn., 438; *Lindley v. Cross*, 31 Ind., 109; *Knox v. Starks*, 4 Minn., 7; *White Lake Lumber Co. v. Russell*, 22 Neb., 129; *Girard P. S. Co. v. Southwark F. Co.*, 105 Pa. St., 248.)

An error in the statement claiming a mechanic's lien cannot be corrected, nor an omission supplied, after the expiration of the time for filing the claim. A mechanic's lien claim is not an instrument which can be reformed by a court of equity. The court cannot dispense with a compliance with the statute, or create a substitute. (2 Jones, Liens, secs. 1389, 1390, 1391; Phillips, Mechanics' Liens, sec. 386; *Meyer v. Berlandi*, 39 Minn., 438; *Lindley v. Cross*, 31 Ind., 109; *Simpson v. Murray*, 2 Pa. St., 76.)

A mechanic's lien cannot be created by agreement or convention between the parties. (*Lyon v. Elser*, 72 Tex., 304.)

Samuel J. Tuttle, for appellee Clark & Leonard Investment Company *et al.*:

In our state the lien of a mechanic dates from the commencement of labor or furnishing of material. (Comp. Stats. Neb., ch. 54; *Choteau v. Thompson*, 2 O. St., 114.)

The mechanic's lien law cannot be so construed as to interfere with prior *bona fide* liens on grounds on which the building shall be erected as a fixture. (Comp. Stats. Neb., ch. 54, sec. 6.)

The fact that the mortgage was made in contemplation of building, and the money covered thereby was to be advanced from time to time, does not render the interest of the mortgagee inferior, or postpone the lien of the mortgage

to mechanics' liens attaching after the registration of the mortgage. (*Platt v. Griffith*, 27 N. J. Eq., 207; *Moroney's Appeal*, 24 Pa. St., 372; *Taylor v. La Bar*, 10 C. E. Greene [N. J.], 222; *Macintosh v. Thurston*, 10 C. E. Greene [N. J.], 242; *Martsolf v. Barnwell*, 15 Kan., 461.)

Our law provides that the contract, the basis of the lien, must be made "with the owner." A mortgagee is not an owner within the meaning of the statute. (*McHugh v. Smiley*, 17 Neb., 623; *Fuquay v. Stickney*, 41 Cal., 583; *Hazelton v. Webb*, 4 Neb., 308.)

John H. Ames, for appellee Emma H. Holmes, administratrix, on the question of priority of the purchase-money mortgage over the mechanics' liens, cited: *Hill v. Aldrich*, 50 N. W. Rep. [Minn.], 1020; *Haupt Lumber Co. v. Westman*, 52 N. W. Rep. [Minn.], 33; *Martsolf v. Barnwell*, 15 Kan., 612; *Chicago Lumber Co. v. Schweiter*, 45 Kan., 207; *Taylor v. La Bar*, 25 N. J. Eq., 222; *Newark Lime & Cement Co. v. Morrison*, 13 N. J. Eq., 133; *Bridwell v. Clark*, 39 Mo., 170; *Hoover v. Wheeler*, 23 Miss., 314; *Morse v. Dole*, 73 Me., 351; *Brown v. Morison*, 5 Ark., 217; *Getto v. Friend*, 46 Kan., 24.

Lamb, Ricketts & Wilson, Davis & Hibner, Mockett, Rainbolt & Polk, and *Harwood, Ames & Kelly*, for other appellees.

RYAN, C.

1. Leonidas K. Holmes and the First National Bank of Lincoln began this action against Jane G. Hutchins and C. H. Hutchins, as the owners of lot 12, in block 41 of said city, and the west half of lot 13 in Little & Alexander's subdivision of lot 63 of S. W. Little's subdivision of the west half of the southwest quarter of section 24, township 10, range 6 east. The other defendants named were originally joined by reason of having claims for, and liens upon, the above described property, with such exceptions

as will demand separate notice by reason of special circumstances. The First National Bank of Lincoln was joined as plaintiff with Leonidas K. Holmes solely by reason of having obtained under Holmes a right to payment out of the proceeds of such recovery as said Holmes might ultimately be decreed entitled to. The action, therefore, in general terms, should be treated as—in effect it simply was—an action on behalf of Leonidas K. Holmes against the real property above described for the enforcement of a lien under our mechanic's lien law, by reason of his having furnished material for the erection of buildings thereon. While there were many liens adjudicated by the judgment of the trial court, there are but two defendants with whom Leonidas K. Holmes has serious contention in this court. One of these adversaries is the representative of W. W. Holmes, who died while this action was pending; the other is Abner Heater.

2. The petition contained all proper and necessary averments for the foreclosure of a mechanic's lien as against the real property involved. In respect to the claim of L. K. Holmes for a lien, which was filed in the proper office on July 13, 1889, against lot 12, block 41, above named, there was a sufficient compliance with the statute to entitle the claimant to a lien thereon from the date of furnishing the first material described, to-wit, March 1, 1889. The contract, in pursuance of which the materials were furnished by L. K. Holmes, was, as he averred, with J. G. and H. C. Hutchins, the owners of the property sought to be subjected to the lien. In respect to the rights and interest of the defendant W. W. Holmes, who was living when the petition was filed, the sole allegations of the petition were as follows: "The other defendants, the Clark & Leonard Investment Company, Pennsylvania Company of Insurance on Lives, Philadelphia Mortgage & Trust Company, Badger Lumber Company, National Lumber Company, and W. W. Holmes, are holders of sundry mortgages on portions

of said premises, * * * some of them having liens on one piece only of said property, and some on both pieces of property; and they are therefore made defendants to this action. The exact amount and the priority of the liens in said property claimed by said defendants, if any amount is due, the plaintiff is unable accurately to state." The prayer of the petition was (omitting language not now necessary to quote) as follows: "Wherefore the plaintiff prays the court that an accounting may be taken of and concerning the liens on said property, and the amount due the plaintiff may be ascertained, as well as the amounts due the several defendants, and that the priority of the liens may be adjudicated and determined; and that unless the sum due the plaintiff be paid by a short day to be named by the court, that said premises be sold and the proceeds applied by the court to pay the liens in the order of their priority; that in the meantime a receiver may be appointed to take charge of said property and collect the rents thereof, and to hold the same subject to the order of the court, to be applied in proportion on the liens on said property in the order of their priority, * * * and for such other, further, or different relief as plaintiff in equity is entitled to have, and for costs." The mortgage to W. W. Holmes was of date February 19th, 1889, and was filed for record two days thereafter, and, as already observed, the first item furnished by L. K. Holmes was March 1st following.

Tested by these considerations alone, the mortgage to W. W. Holmes created in his favor the first lien. It is insisted, however, that this order of priority is reversed by the fact that W. W. Holmes sold the lot in question with the expectation, and it might further be said with the hope, that a building, which he expected would be erected on the lot in question by the grantees, would give increased value to the property upon which his mortgage operated as a lien. The case of *Bohn Mfg. Co. v. Kountze*, 30 Neb., 719, is con-

fidently relied on as sustaininig the views contended for, and it is likewise insisted that *Pickens v. Plattsmouth Investment Co.*, 37 Neb., 272, reinforces the contention made on this head. In the case last referred to it was said that the company making the conveyance probably had knowledge of the design of the grantee to boom the property conveyed by the erection thereon of the Park House. Whether or not the grantor company was more directly interested than to the extent of having knowledge of the design ascribed to grantee company was, in the opinion, declared to be the question essential to the determination of the appeal under consideration. As to this very important proposition it was said: "It seems to us, upon a review of all the facts in the case, that the conclusion is unavoidable that these companies were engaged in a joint enterprise, to-wit, the booming of this property; that in furtherance of the interest of both parties this contract was made for the erection of the Park House by the Plattsmouth Investment Company, as well as by the Plattsmouth Land & Improvement Company," the grantor and grantee companies above referred to. The decision of the case from which we have just quoted was based upon the conclusion reached; *i. e.*, that the two companies were really participants in the erection of the Park House for the furtherance of the interests of both companies; that one was more obviously so than the other, being the only real difference. In *Bohn Mfg. Co. v. Kountze, supra*, the action was against Herman Kountze, the owner of the fee, and Z. B. Berlin, the equitable owner, in possession under a contract of purchase with Kountze. This contract contained the following provisions: "And it is hereby expressly understood and agreed, and is a part of the consideration for the sale of said lot to said Z. B. Berlin, that the said Z. B. Berlin agrees and binds himself, his heirs, executors, and assigns, to build, or cause to be built, on said lot a good, substantial, new dwelling house, costing not less than twenty-five hun-

dred dollars, and if more than one dwelling is erected on said lot, then each such dwelling shall cost not less than twenty-five hundred dollars, exclusive of all other improvements that may be put on said lot, such house or houses to be built on good substantial brick or stone foundations. The said dwelling shall be commenced within eight months from the date hereof, and be fully completed within twelve months from the date hereof, time being of the essence of this contract, and the improvements provided for being a part of the consideration to be paid for said lot. Therefore, should said Z. B. Berlin for any reason fail or neglect to build such building as herein provided for, and within the time specified, then, at the option of said first party, and for the reason that said improvements have not been made as stipulated, this contract may be declared forfeited by said first party, with all the penalties herein provided for." In addition to the provisions contained in the language just quoted, the contract provided that upon request Kountze would advance not to exceed $2,200, to be used in paying for labor and material for use in the house required to be built, said money to be subject to check by Berlin as soon as Kountze should receive notice of the commencement of work on the building. These checks were required to be countersigned by Kountze before the bank upon which they were drawn should be authorized to pay them. The conveyance by warranty deed, contemplated by the contract, was only to be made upon full compliance with the several terms of the contract, time being of the essence of the contract. In the consideration and determination of this case no new doctrine of law was announced. It was simply held that the facts of that case constituted such a relation between the parties to said contract that the interest of each of such parties in the property thereby required to be improved was liable as the interest of an owner under the provisions of the mechanic's lien law. The contract itself required Berlin to build upon the land, Kountze in the

meantime holding the title; and it was not in violation of this language, rather the contrary, to assume that in this manner, as owner, Kountze authorized the erection by him required. If, as the court found, Kountze was privy to the contract for the erection of a building on the premises, the legal title of which was in himself, his interest in the land was directly affected by the provisions of the mechanic's lien law in force, because, as an owner, he had in effect contracted for the material and labor indispensable to the building of the house required to be erected.

A quotation relative to this case from the opinion in *Pickens v. Plattsmouth Investment Co., supra,* though it may be open to the objection that it is a vain repetition, has at least the advantage that it cannot be considered as a new departure from propositions of law previously recognized and enforced. With no other apology, therefore, the following language is reproduced: "By this it was not held that where the owner of the land sells it, and simply takes back a mortgage for the purchase price without in any way becoming a party to a contract for the erection of improvements, one who furnishes materials or labor upon a contract with the vendee alone can assert thereon a lien superior to that of the said mortgage duly recorded. Quite to the contrary it has recently been held by this court, in *Henry & Coatsworth Co. v. Fisherdick,* 37 Neb., 207, that where one furnishes money to build a house, for which he took a mortgage upon the premises whereon the erection was to be made, the record of such mortgage gave it a priority to the rights of material-men and mechanics who began to confer value upon the mortgaged property after the record of the mortgage. To subject a vendor's rights in the subject-matter of the sale to the claim of a mechanic's lienor it must appear that, with respect to the value conferred by the labor or material of such lienor, there was a privity of contract through the vendee between the vendor and such lienor. This privity will not be im-

plied from the mere fact that the mechanic's lienor, upon the faith of a contract between himself and such vendee, furnished labor or material; it must be established by the proofs, or be as fairly inferable from the facts as any other independent fact or proposition."

The same result is reached upon a careful consideration of the pleadings in the case at bar. It has already been shown that the petition was one solely for the foreclosure of a mechanic's lien. It contained no averment of any agreement or understanding between W. W. Holmes on the one part and J. G. and H. C. Hutchins on the other, that the latter were even expected, much less required, to erect a building upon the premises sold to them.

The deed of W. W. Holmes, and the mortgage back for security of the purchase price unpaid, embraced all understandings between the parties, and in them was contained no intimation of any such relation as was shown to exist between the parties to the contract described in *Bohn Mfg. Co. v. Kountze, supra;* hence any proof to establish that relation was irrelevant as well as immaterial. This want of averment is not cured by the reply of L. K. Holmes, which was in the following language: "Now come the said plaintiffs, and for reply to the answer and cross-petitions of the several parties hereto deny all new matter set up therein and allege said W. W. Holmes sold said lot 12, in block 41, to C. H. Hutchins and Jane G. Hutchins with condition and obligation to build thereon, and Clark & Leonard Investment Company made said loan with obligation and agreement to build, and thereby subjected their interests to the lien of the plaintiff." It is not the province of a reply to introduce a new or different cause of action from that stated in the petition. (*Savage v. Aiken*, 21 Neb., 605; *Hastings Sch. Dist. v. Caldwell*, 16 Neb., 68.) The averments of the petition, even if each is conceded true, only entitle the plaintiff to the foreclosure of a mechanic's lien. The action being therefore reduced to a contest be-

tween the claimant of a mechanic's lien on the one hand, and the holder of a mortgage, the lien of which had attached before the mechanics' lien had its existence, on the other, as against the lot mortgaged, improved, and sought to be subjected to the payment of both claims, it would seem that the proviso closing section 6, chapter 54, Compiled Statutes, is not wholly irrelevant. This section, it is true, refers in the main to the power of the court in which foreclosure proceedings are pending to cause the property sought to be affected by the mechanic's lien being foreclosed to be leased *pendente lite.* At the close of the section, however, is this language: "*Provided,* This law shall not be so construed as to interfere with prior *bona fide* liens on grounds on which such buildings shall be erected as a fixture." As this language is properly applicable to the whole law regulating mechanics' liens and their enforcement, is contained in the very statute under which such lien claimants derive their rights and remedies, and is but the enunciation of a rule just in itself, it must be held an inhibition on the power of courts to postpone to mechanics' liens prior existing valid liens on grounds on which improvements have subsequently been made. It follows from all these considerations that the district court properly held the lien of the mortgage to W. W. Holmes paramount to that of Leonidas K. Holmes for materials furnished.

3. It is not required that what has already been said as to the general purport of the petition of L. K. Holmes should be repeated. After reciting the filing of an itemized statement of account for material furnished for use in the erection being made upon said lot, the petition referring to said filed statement used the following allegation:

"In the drafting of said mechanic's lien the scrivener, by whom said lien was drawn, erroneously described one of said lots in this: that in said lien was written 'Richards' subdivision of lot 64' instead of 'Little & Alexander's subdivision of lot 63,' which was intended and was the real

description of said property, and the error was not discovered until on or about the 11th day of September, 1890; but the said building on the west half of lot 13 of Little & Alexander's subdivision of lot 63 of Little's subdivision carried prominently upon its front the names of J. G. and C. H. Hutchins, and was known as 'Hutchins Block,' and was the only building owned by the said J. G. and C. H. Hutchins on the north side of O street between Fourteenth and Seventeenth streets, and was the only brick building owned by J. G. and C. H. Hutchins anywhere in Little's subdivision of the west half of the southwest quarter of said section 24; and the said J. G. and C. H. Hutchins are still the owners of said property, and the rights of no innocent purchaser have attached, and all parties claiming an interest in said property have obtained the same with full notice of plaintiff's rights."

A part of the prayer of said petition has already been set out and needs now only to be referred to for consideration in connection with the remainder of said prayer, which, referring to the above erroneous description, was as follows:

"That at the hearing of this cause the erroneous description in said lien may be corrected, and said lien held and adjudged to be a good and valid lien upon the west half of lot 13, in Little & Alexander's subdivision of lot 63 of Little's subdivision of the west half of said section 24, instead of lot 13 in Richards' subdivision of lot 64 of Little's subdivision as in said lien written; and that the rights of the plaintiff therein may be saved to him, and the proceeds of said lien be applied on said note of $3,400 and interest; and that in event said reformation be not granted by the court, that the defendants having liens upon both pieces of property may be required to first exhaust the piece of property on which the plaintiff is not permitted to have a lien, so that the plaintiff's security may be impaired as little as may be by such mistake in description;

and for such other, further, or different relief as plaintiff in equity is entitled to have, and for costs."

There was proper issue joined in respect of the matter of the erroneous description above alleged, and in respect to this branch of the case the action of the court is thus recited in a journal entry, which constitutes part of the record:

"This cause came on for hearing on the motion of the plaintiff to correct the entry of the findings and decree heretofore made in this cause and was submitted to the court, on due consideration whereof the court finds that at the rendition of the decree heretofore entered herein, to-wit, on November 27, 1891, and of record in Journal X at page 597, it was actually determined and found by the court that a part of the real estate on which plaintiff claims a mechanic's lien is correctly described as the west half of lot 13, in Little & Alexander's subdivision of lot 63 of S. W. Little's subdivision of the west half of the southwest quarter of section 24, township 10, range 6 east; that in drafting the mechanic's lien of plaintiff mentioned in the petition, the scrivener by whom the same was drawn, in writing said description, erroneously used the words 'Richards' subdivision of lot 64' instead of 'Little & Alexander's subdivision of lot 63,' as was by plaintiff intended to be written, and which was the true and proper description of said property; that the building upon the west half of said lot 13 bore prominently upon its front the names of J. G. and C. H. Hutchins, and was known as the 'Hutchins Block,' and was the only building owned by J. G. and C. H. Hutchins in Little's subdivision of the west half of the southwest quarter of said section 24; that said J. G. and C. H. Hutchins were still owners of said property at the commencement of this suit; that defendant Heater purchased said premises from said J. G. and C. H. Hutchins since the commencement of this suit, and the sum of $1,700 and accrued interest on account of the plaintiff's claim of

mechanic's lien was deducted from the purchase price as a part of the consideration by him paid, and that plaintiff is entitled to have the said error in his mechanic's lien corrected; but that in entering up said decree all of the said findings of fact so determined by the court were, by inadvertence and mistake, omitted therefrom.

"It is therefore considered and ordered by the court that the entry of said findings and decree be corrected and reformed so as to include the said findings, and to correct plaintiff's mechanic's lien as follows: A part of the real estate on which plaintiff claims a mechanic's lien is correctly described as the west half of lot 13 in Little & Alexander's subdivision of lot 63 of S. W. Little's subdivision of the west half of the southwest quarter of section 24, township 10, range 6 east; that in drafting the mechanic's lien of plaintiff mentioned in the petition, the scrivener by whom the same was written erroneously used the words 'Richards' subdivision of lot 64' therein instead of said 'Little & Alexander's subdivision of lot 63,' as was by plaintiff intended to be written, and which was the true and proper description of said property; that the building on the west half of said lot 13, on which plaintiff claims a mechanic's lien, bore prominently upon its front the names of J. G. and C. H. Hutchins, and was known as 'Hutchins Block,' and was the only building owned by J. G. and C. H. Hutchins in Little's subdivision of the west half of the southwest quarter of said section 24; that said J. G. and C. H. Hutchins were still owners of said property at the commencement of this suit; that defendant Heater purchased said premises from said J. G. and C. H. Hutchins since this suit was commenced, and the sum of $1,700 and accrued interest, on account of the plaintiff's claim of mechanic's lien, was deducted from the purchase price thereof as a part of the consideration by him paid therefor, and that the plaintiff is entitled to have the said error in his mechanic's lien corrected.

"It is further considered by the court that the error in the description of said premises appearing in the mechanic's lien of plaintiff be corrected and reformed so as to read 'Little & Alexander's subdivison of lot 63' instead of 'Richards' subdivision of lot 64,' as erroneously written, and that said decree in all other respects stand as heretofore entered. To all of which defendant Heater excepts."

The appellant, Abner Heater, contends that the court, in a proceeding of this kind, had no authority to subject to the mechanic's lien claimed by L. K. Holmes the half of the lot against which the claim for a lien by being reformed was made operative, the said Heater in the interim having purchased the property thus subjected to the claim of L. K. Holmes. It is insisted by counsel for L. K. Holmes that as Heater bought the property with the constructive knowledge of the pendency of a suit to reform the erroneous description alleged necessarily incident to filing a notice *lis pendens*, the reformation of the claim for a lien decreed as prayed became as fully operative against Heater as though the original filing of the claim for a lien was as void of mistake as it was after its reformation by the court. Without doubt the mechanic's lien law should receive a liberal construction with a view to effectuate the remedy given by statute. In the early history of legislation upon this subject, courts seemed hostile to the remedies given by this statute, and were astute in discovering means whereby its operation might be avoided. In this respect other innovations by statute have met with as little encouragement, as in respect to the statute of limitations and others that might be cited. The most noted instance of this kind was the opposition to the adoption of the code of civil procedure in the several states wherever it has been adopted, notably in the early legislation on that subject. In many adjudications under such innovations of statute it was necessary again and again to insist that the several statutes enacted, being remedial in their nature, should receive a liberal con-

struction to effectuate the remedies provided. It has never been held, so far as we are aware, that in aid of such statutes new rights were by the court to be created, nor existing rights deemed destroyed. It is but equitable that one shall be recompensed for his labor or material contributed for the improvement of the property of another. (*Miller v. Hollingsworth*, 36 Ia., 163.) The mechanic's lien law recognizes this equity of the contributor as against the property benefited for the repayment of the value of his contribution. The provisions of the mechanic's lien law, aside from the recognition of this equity, are devoted, first, to the manner of enforcing the right recognized, and second, to providing for the protection of third parties in respect to notice of this claim for remuneration. For the period of four months from the date of the last item furnished, the progress of the work, or its recent completion, is supposed to impart ample notice that the laborers and material-men contributing to the erection have a lien on the property thereby rendered more valuable. If such material-man or laborer desires to prolong his lien for two years, he is required only to file a sworn statement containing such facts as would fully advise the public of the nature and amount of his lien, as well as indicate the property thereby to be affected. Within the four months given the notice is chargeable upon presumed ocular observation; after the expiration of that time it is implied from an *ex parte* statement, sworn to, and filed in a public office as one of its records. This recorded statement creates no new rights as against third parties; it only gives constructive notice to them of a claim to a lien recognized by the statute; and by giving such notice the right to enforce the lien claimed is perpetuated for two years. If the required statement is not filed, or if it is so defective as not to impart notice of the property sought to be charged, there survives after the four months no right to such lien as against purchasers. As to third parties, the filing of the statement entitling to

a lien is a matter of substance with which there must be a substantial compliance to entitle to the enforcement of the lien claimed as against third parties dealing with the property sought to be charged. (Jones, Liens, secs. 1389 *et seq.;* Phillips, Mechanics' Liens, sec. 378; *Lindley v. Cross,* 31 Ind., 109; *Knox v. Starks,* 4 Gil. [Minn.], 7; *Simpson v. Murray,* 2 Pa. St., 76; *White Lake Lumber Co. v. Russell,* 22 Neb., 129.)

In *Keith v. Tillford,* 12 Neb., on page 273, occurs this language of COBB, J.: "There can be no doubt of the correctness of the proposition to which plaintiffs in error cite numerous authorities, that where the statute confers a right and prescribes adequate means of protecting it the proprietor of the right is confined to the statutory remedy." In *Simpson v. Murray, supra,* it was held that where a mistake of the nature of that made in filing the statement of L. K. Holmes had originally been made, it could not be cured in *scire facias* or other proceedings to enforce the lien claimed. It seems therefore, ordinarily, to result that as between L. K. Holmes and Abner Heater, the filing of such a defective statement as was filed could not be cured by evidence of actual notice to Heater that Holmes claimed such a lien, nor from such notice as was necessarily implied by the pendency of a suit to reform the contents of such statement to a compliance with the statute.

4. It is insisted, however, that part of the consideration for the conveyance of this property to Heater was his agreement to pay this claim of L. K. Holmes. In the deed of conveyance to Heater it was recited that he assumed and agreed to pay all liens and incumbrances upon the property conveyed. It has already been shown, however, that this was neither a lien nor an incumbrance upon the property; hence, this language does not bind Heater to pay the claim of L. K. Holmes. The finding of the trial court was not that Heater assumed or agreed to pay the claim of L. K. Holmes, but it was that as part of the

consideration paid for the property Heater deducted $1,700 and accrued interest on account of the claim of L. K. Holmes to a mechanic's lien. It is not at all clear from this finding whether a right of action exists in favor of any one for the recovery of this $1,700 and accrued interest. The most natural inference to be drawn from the language used is, that if such cause does exist, it is rather in favor of Heater's grantors than in favor of the holder of the alleged lien, for there is no proof of an agreement by him to assume, become liable for, or pay this claim made by L. K. Holmes. The finding goes as far as the evidence justifies, and upon it L. K. Holmes could base no right of action against Heater. If such right of action existed, however, between the parties to whom reference has just been made, it would not justify granting the relief sought by the petition in this case, for, as already noted, that relief was confined to the enforcement of a mere lien against the property for the payment for material furnished upon a contract with J. G. and C. H. Hutchins. Incidentally, to be sure, the reformation of the statement filed for such lien was sought, and yet the relief was solely the enforcement of a specific lien. There was no prayer for a personal judgment against Heater, as there should have been to sustain any proper claim for relief founded upon his alleged liability for the amount of this lien. Indeed, there was no averment from which it could be inferred that Heater was at all personally liable. It may be possible that Heater assumed payment of this claim of L. K. Holmes as part of the consideration, and in an action for the recovery of the same upon the said undertaking of Heater that he should be held liable, but upon this proposition no guess will be hazarded, for it would be foreign to any issue tendered or joined in this case, to say nothing of the unsatisfactory nature of the proof to justify it. Clearly, however, the decree rendered in favor of L. K. Holmes as against the west half of lot 13, in Little & Alexander's

subdivision of lot 63 of S. W. Little's subdivision of the west half of the southwest quarter of section 24, township 10, range 6 east, sixth P. M., must be reversed and said half lot adjudged the property of Heater, free of any lien in favor of L. K. Holmes. For the reasons given, the judgment of the district court is reversed and a decree directed in this court in accordance with this opinion.

DECREE ACCORDINGLY.

JOHN D. KILPATRICK ET AL., APPELLEES, V. KANSAS CITY & BEATRICE RAILROAD COMPANY ET AL., APPELLEES, IMPLEADED WITH NEW YORK SECURITY & TRUST COMPANY, APPELLANT, AND E. P. REYNOLDS & COMPANY, INTERVENORS.

FILED JANUARY 3, 1894. No. 5034.

1. **Mechanics' Liens:** MORTGAGES: PRIORITIES. Between an investment company and certain individuals it was agreed that the former should furnish, substantially, all the money necessary for, and to be used in, the construction of a proposed railroad and take their notes therefor, their payment to be guarantied by an existing railroad company, controlled by such individuals; that they should execute and file a certificate of incorporation of the proposed railroad, and execute, or cause to be executed, in its name, a mortgage on its anticipated property to secure its negotiable bonds, to be issued by it and deposited with the investment company as collateral security for said notes. At the date of the execution and delivery of such bonds and mortgage, pursuant to said agreement, and at the date of the record of such mortgage, such proposed railroad company had acquired no property, right of way, or franchises, and had taken no step towards the acquisition of either, further than the filing of its certificate of incorporation and the naming of its board of directors and officers, of all which facts the investment company had knowledge. The money agreed to be furnished by the investment company was by it paid over to the individuals afore-

said, they then being officers of the proposed railroad company, to be by them expended in the construction of said proposed railroad; and such individuals entered into contracts in the name of such railroad company for labor and material used in the building of its said road, but failed to pay therefor. *Held*, That the investment company should be regarded as a promoter and builder of the railroad, and was not entitled to have the mortgage decreed a lien upon the property and franchises of the railroad constructed, superior to the statutory liens against the same for labor and material furnished in its construction. POST, J., with RYAN and IRVINE, CC., dissenting.

2. **A waiver of a mechanic's lien** will not be inferred merely from the taking of collateral security from another, and in a manner not inconsistent with the retention of the lien.

3. **A former adjudication** in the federal courts on the subject-matter of a controversy cannot be taken notice of in the state courts unless properly presented by the pleadings and proofs.

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

Hornblower, Byrne & Taylor, Warner, Dean & Hagerman, and *Griggs & Rinaker,* for appellant.

Harwood, Ames & Kelly, I. P. Dana, and *R. S. Bibb,* for appellees.

Marquett, Deweese & Hall, for intervenors.

See opinions for authorities upon the propositions discussed.

RAGAN, C.

This is an appeal from a decree of the district court of Gage county, rendered July 17, 1891. The action was brought by the appellees, Kilpatrick Bros. & Collins, to foreclose a mechanic's lien against the property of the Kansas City & Beatrice Railroad Company (hereinafter called the "Beatrice Company") for a balance due for labor and material furnished in the grading of that company's rail-

road. The appellant, The New York Security & Trust Company (hereinafter called the "Trust Company"), was made a party defendant, as it held a mortgage on the road of the Beatrice Company, given by it to secure an issue of $400,000 of its negotiable bonds. The appellee, The Kansas City, Fort Scott & Memphis Railroad Company (hereinafter called the "Fort Scott Company"), was also made a party and filed its answer, claiming a lien for a balance due it for ties sold and delivered to the Beatrice Company, and used in the construction of its road. The appellee, The Kansas City, Wyandotte & Northwestern Railroad Company (hereinafter called the "Wyandotte Company"), was made a party defendant, as it was in the possession as lessee of the road of the Beatrice Company. By the decree of the district court Kilpatrick Bros. & Collins were given a lien upon the property in question for the sum of $29,445.17; and the Fort Scott Company was given a lien for the sum of $33,864.79. The two were declared first liens of equal rank and to prorate one with the other. The Trust Company, by the decree, was also given a lien on the property, subject to the first two liens, for the sum of $278,267.85. The decree also provided that in case of default in the payment of these amounts within a time fixed, the property and franchises of the Beatrice Company should be sold and the proceeds of the sale applied to the satisfaction of the liens in the order of their priority. The Trust Company brings the case here and avers that the decree is erroneous, in the fact that its lien is postponed to those of the Kilpatrick Bros. & Collins and the Fort Scott Company.

It is conceded that the value of the property in controversy is insufficient to pay the amount of all the liens adjudged against it. The facts disclosed by the record before us, so far as they are deemed material, are these: That some time prior to the 29th day of May, 1889, the Wyandotte Company, a foreign corporation, had constructed a line of

railroad from Kansas City, Missouri, to the line between the state of Kansas and the state of Nebraska, at a point called Summerfield. For the prosecution of this undertaking, money had been furnished by the Philadelphia Investment Company (hereinafter called the "Investment Company"), a Pennsylvania corporation, having its place of business in the city of Philadelphia, in said state, upon terms and security which are not disclosed by the record, and which are immaterial except as showing that the Investment Company was familiar with the affairs of the Wyandotte Company, which shortly thereafter proved to be insolvent, and was, at the date of the negotiations hereinafter mentioned, financially unable to carry out an enterprise involving an outlay of considerable sums of money. Previous to this time, however, and during the progress of the construction of the road of the Wyandotte Company, and probably as a part of that undertaking, it was proposed to extend this line of road to Beatrice, Nebraska. At the time this project was first undertaken, it was supposed and intended that this extension would be made in the name and under the authority of the Wyandotte Company. Subsequently, however, pursuant to correspondence between one Erb, the president of the Wyandotte Company, and one Brockie, the president of the Investment Company, the plan was so changed as to require the formation of a Nebraska corporation, and accordingly a certificate of incorporation of the Beatrice Company was executed and recorded on the 19th day of June, 1889. On the first day of July, 1889, a mortgage was executed by the Beatrice Company upon all its property and franchises then existing, or thereafter to be acquired, purporting to be given to secure its negotiable bonds to the amount of $400,000. This mortgage, which was filed for record on the 13th day of July, 1889, contained, among other things, the following:

"Whereas, the said party of the first part is the owner of a line of railroad constructed, and in process of construc-

tion, from a point on the line of the Kansas City, Wyandotte & Northwestern railroad where the same intersects the state line between Kansas and Nebraska, thence extending in a northerly direction through Pawnee county, state of Nebraska, to the city of Beatrice, in Gage county, in said state, all of said line of railroad being of the estimated length in the aggregate of thirty-five miles, or thereabouts; * * *

"Whereas, for the purpose of building, furnishing, equipping, and operating said railroad, the party of the first part is desirous of borrowing money and has resolved to execute bonds of said company in amounts of $500 each, as hereinafter stated: * * * Upon the execution and delivery of this mortgage, and from time to time thereunder, the trustee shall, as requested by resolution of the board of directors of the railroad company, certify the bonds hereunder to the extent of and not exceeding $400,000, and on said resolutions of said board of directors shall sell all bonds requested to be certified, and their proceeds shall actually be used for and applied, under the direction of said board, to the construction, completion, maintenance, and operation of said railroad, and not otherwise."

On the 17th day of July, 1889, all these bonds were delivered to the Investment Company under an agreement as finally perfected, that the latter company should advance, from time to time, to the Wyandotte Company, or to Erb, as its president, money for the construction of the proposed Beatrice Company, upon the notes of the Beatrice Company, guarantied by the Wyandotte Company, for the payments of which these bonds should be held as collateral security. The entire amount of the capital stock of the Beatrice Company was subscribed by and issued to the Wyandotte Company; but it is evident that nothing was ever paid or intended to be paid therefor. During the earlier weeks of these negotiations, and until about the time of the execution of the bonds and mortgage, it had

not been decided whether a Nebraska corporation should be formed or not; nor if so, what should be its name; nor had the right of way been secured, or the route, or the Nebraska terminus of the road determined upon.

Elias Summerfield, the treasurer and general manager of the Wyandotte Company, testified on the trial as follows:

Q. Was there a note for this money?

A. Yes, sir.

Q. Who executed it?

A. It was first executed by the Kansas City & Northwestern road. Afterwards the attorney of the Trust Company suggested that it had better be changed, and returned the note to us to be executed by the Kansas City & Beatrice road, and indorsed by the Kansas City, Wyandotte & Northwestern road, and by the Northwestern Construction Company.

Q. When was that exchange made?

A. I can't tell you now. It was after the first note was signed, and we had gotten some of the money on it.

Q. Was it as late as October?

A. I can't remember. I possibly might find out at my office.

Q. But the original notes were made by the Kansas City, Wyandotte & Northwestern Railroad Company, and indorsed by the Construction Company?

A. Yes sir. We hadn't even incorporated the Kansas City & Beatrice road.

Q. It hadn't been incorporated?

A. No, sir; I think not, when the arrangement was made for the loan.

Q. The money was borrowed by the Kansas City, Wyandotte & Northwestern road, and placed in its treasury?

A. The exchange of notes was made before we got all the money. We might have got one payment, or the second, I can't tell which.

Q. Did you have a treasurer for the Kansas City & Beatrice road?

A. Yes, sir, a nominal one.

Q. But none of this money went into his hands?

A. No, sir.

Q. And these bonds of the Kansas City & Beatrice road were placed as collateral, after issued, to these notes?

A. Yes, sir.

Q. Do you know when the bonds were issued, as a matter of fact?

A. I think it was some time after we got the first issue, —the first $65,000.

Q. After that?

A. Yes, sir.

Q. How long after?

A. I think some time after the latter part of July, 1889; I am not sure.

Q. At the time these first notes were executed, what, if anything, had been done by the Kansas City & Beatrice road towards the organization for the building of such road?

A. Nothing at all.

Q. Had the grade stakes been set?

A. No, sir; we had not even concluded on the final location at that time, nor even the name of the road.

Q. And the right of way had not been procured?

A. No, sir.

Q. So that nothing, in fact, had been done at the time you executed these first notes and got the first money?

A. I think not. Of course we had made preliminary surveys.

Q. But had not established your lines?

A. We had not done anything until the 8th day of August, 1889, the date of the vote for municipal bonds was had at Beatrice. If we hadn't gotten the bonds we would not have built. We intended going to Wymore. * * *

Q. Are you able to state approximately the amount of actual cash you received from the Philadelphia Investment

Company or from the Wyandotte & Northwestern Company?

A. I think something about $250,000. There was about three per cent commission paid for the loan.

Q. Money was constantly taken out for interest on these notes from month to month?

A. No, sir, they were not due. The road went into the hands of a receiver before the notes became due, I think; that is my impression. We might have made one payment of interest, I am not sure—I expect we did; I think we paid the interest on the six months installment; I have forgotten about that.

It was estimated that the proposed construction would cost $350, 000. Of this sum $260,000 was to be furnished by the Investment Company upon the notes of the Wyandotte Company, afterwards changed to the notes of the Beatrice Company, guarantied by the Wyandotte Company, and collaterally secured by the bonds of the Beatrice Company, to the amount of $400,000, secured by a mortgage on its anticipated property. These bonds, when executed, were to be placed in the possession of the Investment Company. Sixty-five thousand dollars of the cost of the proposed road was expected to be realized from municipal donations, and any deficiency was to be made up from the treasury of the Wyandotte Company. The success of the enterprise depended upon the co-operation of the Investment Company, and its officers and attorneys were consulted at every step in the organization and progress of the enterprise. Pursuant to this arrangement money was furnished from time to time by the Investment Company to Erb and his associates, which it was intended by the Investment Company should be used in the building of the road. However, the Investment Company does not know how much thereof was in fact so employed, nor how much, if any, was diverted to other purposes. Erb and his associates proceeded to make contracts, as officers of and in the name of

the Beatrice Company, for work and material for the construction of the road of that corporation, and, among others, entered into a contract with Kilpatrick Bros. & Collins for grading, and with the Fort Scott Company for ties. The parties thus contracted with fulfilled their respective obligations, performing the labor and furnishing the material contemplated, until the 8th day of January, 1890, when the same was completed. For the balance remaining unpaid on both their accounts notice of liens against the property of the Beatrice Company was duly filed. It is not denied that all of the bonds, together with the notes for which they were deposited as collateral, remain in the possession of the Investment Company.

The important and controlling question in this case is whether the liens of the men who furnished the material and labor that entered into the construction of this railroad are superior to the lien of this mortgage made thereon before the road had any existence, except on paper, and made for the benefit of the Investment Company, which knew, at the time of its execution, that the property which it purported to cover had in fact no existence. The statute relative to mechanics', material-men's, and contractors' liens upon property of this character is found in chapter 54, article 2, Compiled Statutes, 1893, sections 2 and 3 of which are as follows:

"Sec. 2. And when material shall have been furnished, or labor performed, in the construction, repair, and equipment of any railroad, canal, bridge, viaduct, or other similar improvement, such labor and material-man, contractor or subcontractor, shall have a lien therefor, and the said lien therefor shall extend and attach to the erections, excavations, embankments, bridges, road-bed, and all land upon which the same may be situated, including the rolling stock thereto appertaining and belonging, all of which, including the right of way, shall constitute the excavation, erection or improvement provided for and mentioned in this act.

"Sec. 3. Every person, whether contractor or subcontractor, or laborer or material-man, who wishes to avail himself of the provisions of the foregoing section shall file with the clerk of the county in which the building, erection, excavation, or other similar improvement to be charged with the lien is situated, a just and true statement or account of the demand due him after allowing all credits, setting forth the time when such material was furnished or labor performed, and when completed, and containing a correct description of the property to be charged with the lien and verified by affidavit; such verified statement or account must be filed by a principal contractor within ninety days, and by a subcontractor within sixty days, from the date on which the last of the material shall have been furnished, or the last of the labor is performed; but a failure or omission to file the same within the periods last aforesaid shall not defeat the lien, except against purchasers or incumbrances in good faith without notice, whose rights accrued after the thirty or ninety days, as the case may be, and before any claims for the lien was filed."

It is urged that this statute is not unlike other enactments of the same general character, in that it entitles the contractor, laborer, or material-man to a lien only upon the interest of the party or parties at whose instance the work may be done or material furnished; and that, therefore, if at the time the work of the construction or reparation is begun the property is subject to existing liens shown on the public records, such liens will be entitled to precedence over any claim that may be asserted for labor or material furnished for improvements on the property after the date of the filing of said liens; and it is argued, therefore, that the appellant is entitled to a first lien upon the property in question for the amount of the advances made by the Investment Company to Erb and his associates, because the mortgage of the Beatrice Company was executed and filed for record at a date prior to that at which the

contracts for labor and material were entered into. To sustain this contention the learned counsel for the appellant cite many authorities. Of the authorities so cited, the one most relied upon, perhaps, is *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S., 296, in which it is said: "A recorded mortgage, given by a railroad company on its road-bed and other property, creates a lien whose priority cannot be displaced thereafter, either directly by a mortgage given by the company, or indirectly by a contract between the company and a third party for the erection of buildings or other works of original construction." It appears from the reported opinion in this case that January 17, 1880, the railroad company executed a mortgage on this property to the Central Trust Company of New York to secure the payment of $1,250,000 of six per cent bonds. The mortgage was to cover all the property then owned or that might thereafter be acquired by the railroad company. The trust company accepted the trust created by the mortgage and the railroad company issued its bonds. They were certified by the trust company and sold on the market. On March 20, 1883, Hamilton entered into a contract with the company, under and by which he furnished material and erected for the company a dock on the Maumee river, and having received only a partial payment, he filed a claim for a mechanic's lien for the balance due him. The land on which the dock was built was a part of the railroad and covered by the mortgage made to the Central Trust Company. Brewer, justice, speaking for the supreme court of the United states, said: "It will be noticed, and it is a fact which lies at the foundation of this case, that the contracts for the construction of the dock were not made till more than three years after the execution and record of the mortgage. The record imparted notice to Hamilton and to all others of the fact and terms of the mortgage; and the question is thus presented, whether a railroad company, mortgagor, can, three years after creating by a recorded

mortgage an express lien upon its property, by contract with a third party, displace the priority of the mortgage lien. It would seem that the question admits of but a single answer. Certainly as to ordinary real estate no one would have the hardihood to contend that it could be done, and there is in this respect no difference between ordinary real estate and railroad property. A recorded mortgage, given by a railroad company on its road-bed and other property, creates a lien whose priority cannot be displaced thereafter, directly by a mortgage given by the company, nor indirectly by a contract between the company and a third party for the erection of buildings or other works of original construction."

By the judgment of the court pronounced in that case Hamilton's lien was held to be subject to the lien of the mortgage executed by the railroad company in January, 1880. But in that case the railroad company had a real franchise. It owned, and had owned for some time, the lands upon which the docks were built. The mortgage had been of record on a railroad in existence for some years prior to the performance of this work by Hamilton.

In our opinion, the principles of law announced by the supreme court of the United States in that case are inapplicable to the facts disclosed by the record in the case we have under consideration. When the mortgage of the Beatrice Company was executed, that company had, at most, but a nominal existence and nothing whatever upon which a mortgage or other conveyance could operate. Property or property rights it did not have; but it is said that it had a franchise, and that this could be mortgaged, and that the mortgaging of it, together with the after-acquired property, drew with it the subsequently constructed road and appurtenances. How can it be said with any degree of accuracy that the Beatrice Company, at the time of the execution of this mortgage, was possessed of a franchise? At that time nothing had been done, or certainly determined upon, in its

behalf, excepting the mere execution and filing of its certificate of incorporation. No map of its proposed line of road had been filed or prepared. No right of way had been procured, nor steps been taken towards its acquisition; nor had the proposed route or Nebraska terminus of the road been determined upon, further than if the road should be built at all, which was a matter still in abeyance and dependent upon certain contingencies, it would extend through and into certain counties. It is quite certain at least, prior to the location of the line of the proposed road and the procurement of its right of way, either actually or by the beginning of proceedings therefor, under the statutory enactments for such purposes, any other five persons might have filed a like certificate of incorporation, and if possessed of the inclination and necessary pecuniary ability, might have constructed, maintained, and operated the very line of road now in controversy.

A franchise which not only imposes upon its possessor no obligation, but confers upon him no right or privilege not enjoyed by every other person, is so singular as to defy classification. Mankind are prone to mistake words for things, and are often pardonable for the fault; but it is difficult to form a sufficient excuse when there is nothing in existence for which the word is in any sense descriptive. Be that as it may, it is evident from the facts disclosed in this record that the Beatrice Company never had, or was intended to have, either by the Investment Company or by Erb and his associates, any beneficial interest in or control over its franchise or property, at least not until after the building and equipment of the line. The controlling motive and intent of the parties, and the sole purpose from the inception of the scheme, was not that the Beatrice Company should build the road, borrowing such sums as in addition to its own means should be necessary, but that the Investment Company should construct the road through the instrumentality of the Wyandotte Company and Erb

and his associates, as its agents, retain at all times, by means of the bonds and mortgage, the practical possession and control of its franchise, property, and revenues. Doubtless, it was hoped by the Beatrice stockholders and incorporators that something would be realized in the way of dividends, or otherwise, over and above what would be required for the satisfaction of the principal and interest of the advances made by the Investment Company; and this sum, whether great or small, would accrue to them upon the sale of the Beatrice road, or otherwise, as a compensation for their participation in the undertaking. But they embarked nothing in the venture, and cannot, with any propriety, be said to have had any interest in its success, except the contingent and speculative one just mentioned. Practically, the Investment Company undertook to construct the railroad of the Beatrice Company, furnishing the requisite means therefor, and employing Erb and his associates, as its agents, to effect a technical organization, procure such municipal donations as were obtainable, look after and make the requisite contracts for the procurement of the material and construction of the road; see to the disbursement of the money, they assuming no personal obligation or responsibility in the matter, and accepting as compensation for their services such profits, if any, as should be realized out of the speculation. To regard such a transaction in the same light as that of the erection of a building by a mortgagor upon mortgaged lands for which he retains the title, is, it seems to us, false reasoning.

It is urged with much force by counsel for the appellant that the record of the mortgage was constructive notice to persons dealing with the railroad, of the rights of the mortgagee. True, but that is the extent of its effect. The recording of the mortgage created no rights or obligations. Under the circumstances of this case, the facts that the bonds which the mortgage purported to secure were negotiable is of no significance. The rights of the parties and

the legal effect of the transaction would be precisely the same had no such bonds been executed or contemplated, and had the mortgage recited at length the transactions and agreements between the Investment Company and Erb and his associates, and simply pledged the proposed road and franchise to the Investment Company as security for its advances for the construction of the road. Had the mortgage contained such a recital, no one would doubt, it seems to us, that the Investment Company was the real promoter and builder of this road, and that Erb and his associates, and the officers of the Beatrice Company were in reality, though not nominally, the Investment Company's agents, and that the contracts and obligations incurred by them, even in their own names, in and about the construction of this road, would be binding upon the Investment Company.

It is admitted by counsel for the appellant that if the bonds had remained in the hands of Erb or the Wyandotte Company into whose possession they first came, the mortgage would not have been entitled to priority over the mechanic's lien claimants, and we are unable to see that anything subsequently occurred which improves the status of these bonds. What recourse or remedy, if any, the lien holders would have had if the bonds had been sold to innocent purchasers, or whether prior to the completion of the road and filing of the liens there could have been any such purchasers, we are not called upon to determine.

Another case relied upon by counsel for the appellant is *Porter v. Pittsburg Bessemer Steel Co.*, 120 U. S., 649. The syllabus of that case is as follows: "In this case unsecured floating debts, due by a railroad company for construction, were, in the absence of a statutory provision, held not to be a lien on the railroad superior to the lien of a valid mortgage on it, duly recorded, and of bonds secured thereby, and held by *bona fide* purchasers for value." It will be seen from an examination of the opinion in that

case that it differs from the one at bar in many important particulars. There the railroad company, at the time of the execution of the mortgage, owned not only its franchises, but the road-bed and right of way and township aid voted for the construction of the road; and the bonds which the mortgage was intended to secure were delivered by the railroad company to one Crawford in consideration of his agreement to construct the road, and he, and not the company, negotiated and pledged the bonds for money with which to perform his contract; and the lien claimants contracted, not with the railroad company, but with Crawford, with actual knowledge of the existence of the mortgage and of the consideration upon which the bonds were delivered to Crawford, and of the fact that they were negotiated by him, and that the proceeds belonged to him and were being expended in the fulfillment of his contract. Of course the fact that the parties to whom he sold the bonds took precautions to have the proceeds actually expended in the coustruction, could not have the effect, equitably or otherwise, to postpone the lien of the mortgagee to that of the other persons, who, with full knowledge of all the circumstances, were selling Crawford material for use under his contract, for the railroad company, for the procurement of which, on his part, he had been paid by the very securities which they sought to have deferred for their benefit.

A case very much like the one at bar is the *Farmers Loan & Trust Co. v. Canada & St. L. R. Co.*, 26 N. E. Rep. [Ind.], 784, where it is said: "The remaining question may be thus stated: Is the lien of the appellant's mortgage superior to the liens of the appellees? In order to intelligently discuss this question it is necessary to state the material facts out of which it arises. Those facts may be thus summarized: On the 28th day of May, 1888, the railway company entered into a contract with the Burns Construction Company to build and equip its road. Burns

was the president of the railway company, and also the general manager of the construction company. On the 28th of August, 1888, the railway company ordered the execution of a trust deed, and the instrument was written and signed in duplicate. One of the duplicates was delivered by Burns to the Farmers Loan & Trust Company on the 18th day of October, 1888. The other was retained by the railway company. The bonds which the trust deed was executed to secure were retained by the company that executed the mortgage; but from time to time bonds were delivered to Burns upon estimates issued to him by the railway company's engineer. Ten of the bonds were transferred to William Dallin, and sixty-six were transferred to John Fitzgerald, a subcontractor. The remainder of the bonds, three hundred and sixty-four in number, were hypothecated by the Burns Construction Company, but when, where, to whom, or for how much, is not shown. In considering the question of priority, one of the important things to be kept in mind is that the mortgage was executed upon property that had, in fact, no existence, for the railroad mortgaged had not been built. That there is a material difference between a case such as this, where the railroad had not been built, and a case where the railroad has been constructed, is so evident that no one can fail to perceive it the instant his attention is directed to the matter. As held in *Brooks v. Railway Co.*, 101 U. S., 443, parties must in such a case as this be deemed to have contracted with reference to the existing condition of things so far as they were open to observation. The mortgagee must have known that its security was valueless as long as there was no road in existence, and it must have known also that labor, material, and money would be required to build the road. It was bound to know, too, what the law was, for 'it entered into and became a part of their contract.' This general rule has been repeatedly declared and enforced by this court. The principle we are discussing was ap-

plied to the case of a lien asserted by a miner, and it was held that the lien was superior to a mortgage. But the present case is much stronger than the one referred to, for here there was in fact no property in existence when the mortgage was made. The property upon which the mortgage finally fastened was created by the labor, materials, and the money of the appellees. We are strongly inclined to doubt whether the mortgage lien would be paramount even if the bonds which the mortgage was executed to secure had been delivered before any notices of liens were filed. Very strongly reasoned decisions declare that the liens of the mechanics are superior to the lien of the mortgage in cases where the mortgage is executed before the construction of the railroad. (*Neilson v. Iowa E. R. Co.*, 44 Ia., 71; *Equitable Life Ins. Co. v. Slye*, 45 Ia., 615) We need not, however, decide this question, but it is proper to say that as the labor, materials, and money of the appellees gave all there is of value to the property claimed under the mortgage, the mortgagee ought to show a clear and strong superior right in order to defeat the claims of those who, in reality, brought the property into existence. The doubt in our minds is whether the mortgagee's lien can, in any event, be justly held to be the prior one. We have no doubt that if the mortgagee can succeed at all it must be because it is shown clearly and strongly that the mortgagee is a *bona fide* purchaser. In our judgment the appellant has shown no such right as entitles it to the paramount lien. It is true that the trust deed or mortgage was placed in the hands of the mortgagee or trustee before some of the notices were filed, but the instrument securing the bond was a mere shadow; for had no bonds ever been delivered to *bona fide* holders the instrument would never have been effective against these lien holders. We are far within the authorities in asserting this, as they carry the doctrine much further. * * *

"The delivery of the mortgage or trust deed alone did

not destroy the priority of the liens of the appellees, for the delivery of such an instrument cannot of itself defeat equitable or legal claims, since it is essential that one who asserts a right against a legal or equitable claim should show that he parted with value before notice of such equitable or legal right. (*Anderson v. Hubble*, 93 Ind., 570, and cases cited; *Hunsinger v. Hofer*, 110 Ind., 390, 11 N. E. Rep., 463.) This is the rule in ordinary cases, and certainly it must govern a case like this, where the mortgagee seeks to defeat the claims of those whose labor, materials, and money created the property which it is sought to subject to the lien of the mortgage. The mortgagee must succeed, if at all, as a *bona fide* holder of bonds executed under the mortgage. It cannot, as against the claims of the laborers, mechanics, and material-men, be deemed a *bona fide* holder unless it affirmatively shows that it paid value for the bonds before notice of the liens. The rule in analogous cases is well settled in this state, and the strong equities of the appellees call for its liberal application in this instance. * * * There is reason for saying that it was the duty of the party buying the bonds to ascertain whether a lien had been placed on the property prior to the time of its acquisition of those instruments, but we do not go as far as that in this case. * * * We are not here seeking a general rule that shall apply to every case resembling the present, nor do we attempt to lay down any such rule. We simply adjudge that in such a case as this the mortgagee cannot prevail over laborers and material-men without showing that it is a *bona fide* holder of the principal debt in all that the term '*bona fide* holder' implies. It cannot, in a case like this, where there was no railroad in existence when the mortgage was delivered, be deemed a *bona fide* holder as against laborers, mechanics, and material-men without showing that before notice of the acquisition of the liens under the statute a fair value was paid for the bonds."

We concur in both the reasoning and the conclusion of the foregoing opinion. It is not to be denied that the supreme court of the United States distinguishes between the rolling stock and chattels of a railroad company, which it characterizes as "loose property susceptible of separate ownership and separate liens," and the road-bed, station houses, tracks, etc., and upon this distinction holds that while the doctrine as to the after-acquired property applies to the former it does not apply to the latter. The basis of this distinction is the doctrine relative to fixtures to real property. It is not denied that if one owns real estate which is subject to a valid mortgage or other lien, and another sells him personal property which he permits to be affixed to or incorporated into the real estate, he, by so doing, waives any right he might otherwise have to claim a lien for the purchase price superior to the prior mortgage; and this arises out of the necessity of the case, because, otherwise, the mortgagee might be deprived of his security by the depreciation of values or by extravagant or exorbitant improvements without his knowledge or consent. But how can this be the case when a mortgage is made and the money advanced upon it for the sole purpose of bringing into existence the entire property upon which the mortgage is intended to rest? The case at bar is a good illustration. The Investment Company knew that its bonds and mortgage were, and would remain, of no value unless the railroad should be constructed; it knew that in order that such a road should be constructed that material and labor were indispensable, and that the Nebraska statute guaranties a lien to those who should furnish them. The Investment Company made Erb and the Wyandotte Company its agents for the purposes of this construction, and it owed the duty to persons furnishing material and labor in the building of this railroad to see that the money advanced was applied to the payment of their claims.

Another point made by the appellant is that Kilpatrick Bros. & Collins, by their conduct, have waived their rights to a lien. It appears that after the completion of the work, one Strohm, who was their accountant and book-keeper, together with Erb, the president of both railroad companies, made a computation and agreement as to the amount remaining unpaid under the contract, and received from the latter accepted drafts upon the Wyandotte Company for that amount; but he testified, without contradiction, that it was expressly agreed that these drafts were not taken or to be considered as payment, but only as collateral security therefor, and as constituting a record of the computation and accord; and that there was no agreement for the relinquishment of any existing or prior obligation in favor of his principals, and that no such release was intended by him, nor, so far as he was aware, by Erb. We do not think that the mere receipt of the drafts under such circumstances amounted to a waiver, which, in the absence of an express agreement, will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his own conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended, or consented to; and it is not claimed that such was the case here.

In *Farlow v. Ellis*, 15 Gray [Mass.], 229, it is said: "Waiver is a voluntary relinquishment or renunciation of some right, a foregoing or giving up of some benefit or advantage which, but for such waiver, he [the party relinquishing] would have enjoyed. It may be proved by express declaration, or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage, or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was his intention and purpose to waive. Still, voluntary choice not to claim is of the essence of waiver, and not mere negligence."

In Jones, Liens, sec. 1011, it is said: "The mere taking

of security for the amount of a debt for which a lien is claimed does not ordinarily destroy the lien. To have this effect there must be something in the facts of the case, or in the nature of the security taken, which is inconsistent with the existence of the lien and destructive of it."

"Sec. 1013. The taking of a mortgage upon the same property upon which the creditor claims a statutory lien, may not displace the lien. The mortgage is regarded as a cumulative security, and the creditor may enforce either the lien or the mortgage. So also the taking of the collateral obligation of another person for the payment of the lien debt does not ordinarily debar the lien-holder from claiming the security of his lien, unless the circumstances are such that an intention to waive the lien may be reasonably inferred." (*Payne v. Wilson*, 74 N. Y., 348).

The appellant pleaded, by way of cross-petition to the claim of the Fort Scott Company, that the latter had intervened in an action still pending in the United States circuit court for this district, concerning the same matter, and that that court, by an interlocutory decree, had adjudged the lien of the intervenor to be superior to that of appellant. An interlocutory order or finding in a pending suit in equity in a federal court is not a final determination of the rights of the parties, but one which may be modified or discharged at any time before the enrollment of the final decree. (*Ayres v. Carver*, 17 How. [U. S.], 592; *Thomas v. Wooldridge*, 23 Wall. [U. S.], 283; *Forgay v. Conrad*, 6 How. [U. S.], 201; *Ex parte Jordan*, 94 U. S., 248.) This order, therefore, did not merge the claim of the Fort Scott Company, and was not a bar to the litigation of the same matters in the state court. The mere pendency in the courts of another jurisdiction of an action between the same parties, and concerning the same subject-matter, cannot be successfully pleaded in bar or abatement. (*Gordon v. Gilfoil*, 99 U. S., 168; *Sharon v. Hill*, 22 Fed. Rep., 28; *Stanton v. Embrey*, 93 U. S., 548, and authorities there

cited.) A demurrer to this answer was therefore properly sustained.

The foregoing conclusions we regard as decisive of the case and as rendering unnecessary the determination of other questions, some of them important and far-reaching, which are discussed in the briefs. The judgment of the district court is therefore in all things

AFFIRMED.

POST, J., dissenting.

I am unable to concur in the conclusions of the majority of the court in this case. In my judgment the law is correctly stated in the following opinion submitted by Commissioner IRVINE, in which Commissioner RYAN concurs:

IRVINE, C.

With most of the conclusions stated in the opinion of the court the writer concurs. He has been unable, however, to reach the same conclusion as to the priority between the mortgage and construction liens. In his view this question must be determined upon principles somewhat different from those upon which the majority opinion is based, and in order that the writer's views may be properly understood it will be necessary to discuss not only the grounds upon which the majority opinion is based, but also other questions arising in argument.

In the first place it is to be observed that our statutes expressly permit railroad companies to mortgage their property and franchises for the purpose of securing money borrowed by them for the construction and equipment of their roads. (Comp. Stats., ch. 16, sec. 117.) And it is also provided that such mortgages may by their terms include and cover not only the property of the companies making them at the time of their date, but property, both real and personal, which may thereafter be acquired by them. (Comp. Stats., ch. 16, sec. 119.)

In the next place the legislature has provided for liens upon railroads to secure laborers and material-men for labor performed and material furnished for the construction, repair, or equipment of such railroads. This lien is created by an act somewhat similar to the general mechanic's lien law, but passed at a different time, and as a distinct act, and differing in many of its particulars from the general law creating mechanics' liens. These liens are wholly the creatures of statute, and depend upon the statute for their existence, extent, and construction. While the statute does not in express terms fix the time when such liens shall be deemed to accrue, the law is so far analogous to the general mechanics' lien law that it is almost a necessary conclusion that the construction placed upon that law should apply to this, to-wit, that the lien attaches from the time labor is begun, or the first material furnished; but as between two or more lienors upon the same improvement there is no priority, unless it be where intervening rights of third persons require a different rule.

A further general observation may be made. A railroad is an entity. Its whole line, including right of way, roadbed, stations, shops, equipment, and all property necessary for the effective operation of the road, in its entirety, constitutes a single property, which cannot, in the absence of statute or of peculiar equities of a very controlling character, be dismembered by selling different portions separately. This general doctrine or policy is too well settled by the uniform current of authorities to permit any extended discussion. The mortgage here in question and the liens must be treated as co-extensive in regard to the property upon which they operate, unless a separation of this property is practicable and required by the equities of the case. Applying the ordinary rule governing the priorities of such incumbrances, the lien of the mortgage would take effect upon the date of its record, July 13, 1889, while the construction liens would not attach until August

20. It is claimed, however, that under the facts of this case the mortgage should be subordinated to the construction liens. The principal ground upon which this contention is based is that a mortgage upon after-acquired property attaches to such property only to the extent of the mortgagor's interest therein, and subject to any liens existing thereon at the time of its acquisition by the mortgagor. This principle is equitable, and is established by the authorities, but is subject to a broader law, that existing liens cannot be displaced in its application. The cases upon this subject appear at first inspection to be somewhat in conflict, but a close inspection of the leading cases establishes a real harmony in the decisions.

In *Galveston R. Co. v. Cowdrey*, 11 Wall. [U. S.], 459, there were several mortgages upon the same railroad, the last in point of time being given to secure a debt for rails used in the construction of the road. It was there held that this mortgage was junior to those which had priority of time. It was held that the junior mortgagee occupied the position of an assignee of the mortgagor, and that by allowing his property to go into the road he had consented that the senior mortgages should attach, to his exclusion. The impracticability of dismembering the railroad and selling its different parts was also emphasized, and so was the fact that the property acquired through purchase from the junior mortgagee had become a part of the real estate and subject to all existing liens thereon.

In *United States v. New Orleans R. Co.*, 12 Wall. [U. S.], 362, the railroad company had purchased certain rolling stock, the vendor in the contract of purchase retaining a lien thereon for the purchase money. It was there held that a blanket mortgage, in existence at the time the rolling stock was purchased, attached to the rolling stock in the condition in which it came into the mortgagor's hands, and only to such interest as the mortgagor acquired, and that, therefore, the lien of the vendor of the

rolling stock was superior to the lien of the mortgage upon the rolling stock alone. This seems to be the case where the doctrine contended for by the appellees was first applied, and in this case the court said: "Had the property sold by the government to the railroad company been rails as in the case of *Galveston R. Co. v. Cowdrey*, or any other material which became affixed to and a part of the principal thing, the result would have been different; but being loose property, susceptible of separate ownership and separate liens, such liens, if binding upon the railroad company itself, are unaffected by a prior general mortgage by the company and paramount thereto." In *Fosdick v. Schall*, 99 U. S., 235, and in *Fosdick v. Car Co.*, 99 U. S., 256, the doctrine of *United States v. New Orleans R. Co.* was reaffirmed in regard to rolling stock sold to the mortgagor under a contract of conditional sale, and in *Fosdick v. Schall* a portion of the language just quoted from the New Orleans case was repeated.

The case of *Brooks v. Burlington & S. W. R. Co.*, 101 U. S., 443, was decided upon the statutes of Iowa, which in terms allow to mechanics a lien upon the building, erection, or improvement prior to that of a pre-existing mortgage upon the land. Our statutes are not in this respect similar to those of Iowa. The distinction will be hereafter referred to.

Myer v. Car Co., 102 U. S., 1, was another case of a conditional sale of cars, and reaffirmed *Fosdick v. Schall.*

In *Thompson v. White Water Valley R. Co.*, 132 U. S., 68, a mortgage covering after-acquired property was held superior to the liens of persons furnishing money for the construction of a portion of the road upon the profits of that portion, the portion constructed being within the original charter of the railroad.

Williamson v. New Jersey S. R. Co., 28 N. J. Eq., 277, and the same case on appeal, 29 N. J. Eq., 311, is much relied upon by appellees. In that case certain

docks were constructed for the Long Branch & Seashore Railroad Company, and the lien claim was filed against the New Jersey Southern company as builder, and the Seashore road as owner. The Southern company seems to have owned a controlling interest in the stock of the Seashore company, but there had been no consolidation of the roads, nor any formal purchase or conveyance. The lien for the construction of the docks was held to be superior to a blanket mortgage given by the New Jersey Southern company, and this priority was established upon the ground that the mortgage of the Southern company attached to the whole of the property of the Seashore company, subject to existing liens. It is plainly intimated that had the work been done for the Southern company upon land then owned by it, the decision would have been different.

In *Botsford v. New Haven, M. & W. R. Co.*, 41 Conn., 454, the lien was for the construction of a depot upon land whose owner agreed to give it to the company, provided that it would build a depot thereon. No conveyance was in fact made, and the lien for construction was held superior to a blanket mortgage upon the railroad, because the legal title had never vested in the railroad and the equitable title did not vest in it until the depot was completed and after the lien attached.

In *Farmers Loan & Trust Co. v. Canada & St. L. R. Co.*, 127 Ind., 250, the court expresses a grave doubt as to whether under the law of Indiana a mortgage can be made to attach to after-acquired property in any event, and the authority of the case upon this question is weakened by the existence of that doubt. Moreover, the court disclaims any attempt to lay down a general rule, but holds that under the special facts of that case the construction lien was superior to the mortgage, and the court was undoubtedly right in its conclusion. The bonds, to secure which the mortgage was given, were issued to a construction company, and the court held that this construction company

could not set up the bonds, given to it under these circumstances, as superior to the liens of material-men for debts which the construction company itself owed them. It appeared that the construction company had hypothecated a portion of the bonds, but when, where, and to whom these bonds had been pledged did not appear, and the court could not in that litigation consider the rights of the pledgees.

Perhaps the best elucidation of the whole question is found in the case of *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S., 296, where Mr. Justice Brewer reviews the authorities and holds that a blanket mortgage creates a lien whose priority cannot be displaced by a contract between the company and a third party for the erection of buildings or other works of original construction. In this case the lien was for the construction of a dock upon land of which the mortgagor was the equitable owner, and the case was distinguished from the case of *Botsford v. Railroad Co.* upon that ground.

In the *Farmers Loan & Trust Co. v. Kansas City, W. & N. R. Co.*, 53 Fed. Rep., 182, Judge Caldwell in an exceedingly lucid, vigorous, and learned opinion discusses the relative equities of such mortgages and liens, but (so far as the case is analogous to this) upon the basis of what the law ought to be rather than what it has heretofore been declared to be, and gives priority to certain liens as against a mortgagee of the railroad because of conditions imposed upon the mortgagee in the appointment of a receiver at its instance, the conditions receiving the assent of the mortgagee. While we are not disposed to question the correctness of the abstract opinions expressed by Judge Caldwell, nor of his determination of the law as applied to that case, his conclusions are not applicable to this case, where the mortgagee stands upon its vested rights and has not consented to any displacement of its lien nor asked the court for any relief authorizing the court to impose upon it similar conditions.

Other cases might be cited, but the general principles applicable are well illustrated by those referred to, and we do not think that any well considered case can be found in opposition to these principles, which may be briefly stated as follows:

A mortgage covering after-acquired property attaches to such property as it is acquired by the mortgagor. Where such property remains separable and susceptible of separate ownership, the mortgage only attaches to the interest of the mortgagor therein, and does not displace existing liens thereon. Where, however, the after-acquired property becomes inseparably a portion of the real estate to which the mortgage has attached, the mortgage extends to such property, as in the familiar case of a house erected upon a lot burdened by a mortgage. In that case, no one would now have the hardihood, under our statute, to claim that liens for the construction of the house should displace the mortgage, in the absence of special circumstances operating by way of estoppel.

In this case substantially the whole of the right of way had been acquired by the Beatrice road before any work was done by the Kilpatricks, or any ties furnished by the Fort Scott road. The statute gives power to railroad companies to mortgage the whole or any part of their property and franchises, and such mortgage is made binding upon the lands, roads, or other property of the railroad company mentioned in such mortgage. (Comp. Stats., ch. 16, secs. 117 and 118.) This mortgage expressly described the right of way as a part of the property mortgaged. This right of way was real estate to which the mortgage attached the instant it was acquired by the Beatrice road. The work performed and the materials furnished by the lienors were distinctly improvements upon the real estate and inseparable therefrom; in the language of the supreme court of the United States, "not susceptible of separate ownership or separate liens." To give the lienors priority would

compel us to displace the priority of a mortgage existing upon the real property at the time the liens accrued. This is something which we do not think any court has the right to do.

But the appellees contend that, notwithstanding the principles just stated, they cannot be urged in support of this mortgage, because the bonds, to secure which the mortgage was given, were not in the hands of *bona fide* holders for value. We can see no force in this contention. In one sense it might be said that the Investment Company does not occupy the position of a *bona fide* holder; that is, it took the bonds with full knowledge of the facts. It knew that the railroad had not been constructed; it was bound to know that under the law persons furnishing material or performing labor in the construction of the road might become entitled to liens thereon; and if the rights of the bond holders depended upon their ignorance, at the time of receiving the bonds, of outstanding equities in favor of third persons, they certainly could not be considered *bona fide* holders without notice. But their rights do not depend upon their establishment of such ignorance. The Investment Company is a holder for value. It has advanced the whole loan of two hundred and sixty thousand dollars, and we take it that no one will question the doctrine that a pledgee of such securities is a holder for value to the extent of the indebtedness for which they stand pledged. The case of *Farmers Loan & Trust Co. v. Canada & St. L. R. Co.*, 127 Ind., 250, is not opposed to this view. The pledgees in that case were not protected, because, in the language of the court, there was no evidence as to "when, where, or to whom these bonds had been pledged." The Investment Company advancing its money in good faith and promptly recording its mortgage had a right to rely upon its priority in time, and the lienors, by the record of that mortgage, were notified of the existence of its lien, and entered into their contracts and into their

performance with such notice. Many of the cases in the supreme court of the United States heretofore cited support this view. (See, too, on this point *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207.)

It is argued at great length that the peculiar provisions of section 3 of the act providing for construction liens on railroads, Comp. Stats., ch. 54, art. 2, subject the mortgage to the liens. This section requires for the perfecting of the lien the filing with the proper county clerk of a statement of account setting forth the time when the material was furnished or labor performed, and containing a correct description of the property to be charged with the lien, and verified by affidavit. It is further provided that this statement must be filed by a principal contractor within ninety days from the date on which the last material shall have been furnished, or the last of the labor performed, and continues as follows: "But a failure or omission to file the same within the periods last aforesaid shall not defeat the lien except against purchasers or incumbrancers in good faith without notice, whose rights accrued after the thirty or ninety days, as the case may be, and before any claim for the lien was filed." The construction that the appellees place upon this language is that the only liens which can under any circumstances be superior to the construction liens are those which accrue during such default in the filing of claims, and without notice of the claims. It is quite clear that this construction is not correct. The object of the section referred to is principally to provide for the perfecting of the lien by filing a verified claim, and the proviso is inserted with reference to this objection alone. Prior incumbrancers cannot be affected by the lien at all, much less by a failure to perfect it within time; but for the protection of *bona fide* creditors, whose claims accrue after a default in filing the claim, this proviso is inserted, defeating the lien so in default where necessary to protect such creditors. The language has no reference to incum-

brances prior in time to such liens. To give the section the construction contended for would be to nullify the whole policy of our statutes in regard to recording and the priority of incumbrances, and would conflict with the spirit at least of section 120 of chapter 16, Compiled Statutes, providing that the recording of a railroad mortgage shall be notice to all the world of the rights of all parties under the same.

This point has been much discussed on behalf of some of the appellees and also by counsel interested in a similar question, who, by leave of the court, have filed a brief. Attention is called by all of counsel who argue this question to the similarity existing between the Iowa statutes and our own, but the arguments made differ widely. In one brief it is argued that the similarity of the statutes makes the Iowa decisions closely in point, if not controlling, and that the Iowa decisions favor the priority of the construction liens. But counsel in another brief argue the question upon general principles as to the construction of statutes, reach the same conclusion, but contend that the differences in the statutes render the Iowa decisions inapplicable. The similarities which exist warrant the inference that our law was largely taken from that of Iowa, and were the statutes in all points essentially similar we should feel bound to give our law the construction placed upon the Iowa law by the courts of that state before ours was adopted; but the statutes differ in at least one very important feature, and the decisions do not support the contention of the appellees.

Section 3 of our law, relating to the filing of a claim of lien and the effect of the failure to file the same within the time provided, is similar to section 6 of the Iowa law. Section 9 of the Iowa law, however, contains provisions establishing the position of liens in respect to other incumbrances. One of these provisions is the following: "The liens for the things aforesaid or the work, including

those for additions, repairs, and betterments, shall attach to the buildings, erections, or improvements for which they were furnished or done in preference to any prior lien or incumbrance or mortgage upon the land upon which said erection, building, or improvement belongs is erected or put." There is no such provision in our statute. It was because of that provision or a similar one, of which that is amendatory, that the supreme court of the United States in *Brooks v. Railroad Co., supra,* held the construction liens paramount to the mortgage. In all the Iowa cases where such liens have been held prior to existing mortgages the decision has been based upon section 9. In all the cases wherein section 6 has been construed the question was not between construction liens and prior mortgages, but between construction liens and subsequent mortgages; and the course of decisions has been exactly in accordance with the construction which we have above placed upon section 3 of our law. The case of the *National Lumber Co. v. Bowman,* 42 N. W. Rep. [Ia.], 557, clearly states the combined effect of these two sections, and shows that in the absence of section 9 the superiority of a mortgage prior in time to the construction liens could not be denied.

It is also urged that the bonds are void, or at least non-negotiable, as not conforming with that portion of section 117, chapter 16, Compiled Statutes, which authorizes railroad companies to "issue their corporate bonds, * * * secured by said mortgages or deeds of trust, * * * convertible into stock or not, as shall be plainly expressed on the face of each and every bond so issued by said company." These bonds are on their face an absolute obligation for the payment of money. Their language in this respect is as follows: "Promises to pay in gold coin of the United States of America of the present standard, weight, and fineness, or at the option of the holder, in sterling money at the fixed rate of 49½ pence per dollar." The objection made is that this bond fails to express on its face whether or not

it is convertible into stock. We construe the statute as requiring that if the bonds be convertible into stock, such fact shall be plainly expressed on their face. A more distinct and absolute obligation to pay money alone could not be expressed than is expressed on the face of the bonds in question.

Another contention is that the mortgage is in excess of the power conferred upon the corporation, in that the authority to execute mortgages is confined to roads which already have some portion of their line constructed. This contention is based upon the clause in section 120, already referred to, requiring such mortgages to be recorded in each organized county "through which said road mortgaged or deeded may run in this state." The construction given to this language is too narrow. The word "run" in the statute is an unfortunately inexact term, but its meaning is reasonably clear, and the language taken in connection with the rest of the statute requires that it should be given a future as well as a present construction. In other words, that the word "may" should be construed in the sense of "shall hereafter." No other construction is reasonable.

A further argument urged to sustain the position that the bonds are void is based upon the allegation that their amount is in excess of the maximum indebtedness permitted by law. It is claimed in argument that no lawful stock was issued by the Beatrice Company, or if any was issued, that its amount was not sufficient to sustain the indebtedness created, or attempted to be created, by the bonds. Whether or not evidences of indebtedness of a corporation beyond the limit permitted by law are absolutely void, as the appellees contend, need not here be determined. We cannot see how the appellees could avail themselves of such defense. The bonds were all issued before the contracts were made with the appellee, and if the issue of bonds was beyond the power of the corporation in the incurring of indebtedness, *a fortiori*, the indebtedness to the lienors

was *ultra vires*. The lienors and bondholders would stand in precisely the same position, and it does not lie in their mouths to raise the objection. (*Porter v. Pittsburg Bessemer Steel Co.*, 120 U. S., 649.) Furthermore, the proof does not sustain the appellees' contention. Section 5 of article 11 of the constitution prohibits railroad corporations from issuing any stock or bonds except for money, labor, or property actually received and applied to the purposes for which such corporation was created. The articles of incorporation of the Beatrice road fix the capital stock at one million dollars. The only evidence in the record as to the issuance of stock is found in the contract of lease between the Beatrice road and the Wyandotte road, and in letters passing between officers of the Investment Company and officers of the Beatrice and Wyandotte roads. These letters, except in so far as they amount to admissions binding upon the corporation by whose authority they were written, do not constitute competent evidence upon the subject. The inference from the documents, however, is that the Beatrice road has issued seven hundred and fifty thousand dollars of stock; sufficient, if properly issued, to carry the bonds. It does not appear that any of this issue was illegal, unless it be certain stock issued to the Wyandotte Company in consideration of the covenants in the contract between the Beatrice and Wyandotte companies. Among these covenants was that of guarantying the bonds, and also of paying certain rentals, and performing many other duties in connection with the lease. It is not questioned by counsel that between companies occupying such relations one may hold the stock of the other, and in the absence of evidence, at least, as to the value of the covenants obtained from the Wyandotte road, it cannot be said that this stock was not issued for money, labor, or property actually received.

The majority opinion is largely based upon the conclusion that the Investment Company made itself a promoter

or principal in the construction of the road. This conclusion is reached upon the doctrine first established in this state in the case of *Bohn Mfg. Co. v. Kountze*, 30 Neb., 719. The principle decided in that case has recently been much discussed in the cases of *Pickens v. Plattsmouth Investment Company*, 37 Neb., 272; *Holmes v. Hutchins*, 38 Neb., 601, and *Sheehy v. Fulton*, 38 Neb., 691. It is not necessary to repeat that discussion. We do not think the facts of this case warrant the court in applying that doctrine. Wherever it has been applied it has been for the purpose of charging the estate of the owner in fee on account of improvements made by his executory vendee. The court has in all cases for its application required the proof of facts sufficient to create the vendee the agent of the vendor expressly or by implication. Its application to this case requires a far-reaching extension of the principle. The Investment Company had no estate in the railroad company; it was not even a stockholder in the corporation; and we do not think it can be deemed an "owner" within the meaning of the mechanic's lien law. It is true that the Investment Company in making the loan insisted upon the method to be adopted for the construction of the road, and had extended negotiations with its promoters in regard to the organization of the company and the form of the loan and its security. We cannot see in these acts anything more than precautionary measures to secure the loan about to be made, and we believe that if the opinion of the majority be adhered to in future cases and carried to its logical conclusion, every one who lends money to another with the knowledge, or at least with the intention, that the borrower shall use the money to erect improvements upon land pledged to secure the debt, must be held to have rendered his security subject to any mechanics' liens arising out of the construction. This result would be contrary to the reason of past adjudications and we think unwarranted in principle.

JOHN LEAN V. JOSEPH K. ANDREWS.

FILED JANUARY 3, 1894. No. 5456.

Error Proceedings: RECORD FOR REVIEW. Where a proceeding in error is prosecuted from the judgment of a justice of the peace to the district court, a petition in error must be filed in that court, specifically enumerating the errors relied on for a reversal of such judgment; and to enable the supreme court to review the judgment of the district court on said error proceeding, the petition in error, on which the district court acted, must be incorporated into the record brought here.

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

H. D. Travis, for plaintiff in error.

Wooley & Gibson, contra.

RAGAN, C.

It appears from the finding and judgment of the district court in this record that John Lean sued Joseph K. Andrews and others before a justice of the peace of Cass county; that the case was tried to a jury on January 17, 1891, and a verdict returned in favor of Andrews; that the justice of the peace afterwards set aside this verdict and on June 22, 1891, rendered a judgment in favor of Lean and against Andrews. Andrews then prosecuted a proceeding in error to the district court to reverse this judgment of June 22, 1891. The district court sustained the error proceeding, affirmed the judgment of January 17, 1891, and reversed the judgment of the justice of the peace rendered on June 22, 1891. Lean brings the judgment of the district court here for review on error.

We cannot examine the errors alleged here by Lean, because the record contains no petition in error or other

paper informing us what errors were alleged by Andrews in his error proceeding from the justice of the peace and on which Andrews invoked the action of the district court. Where a proceeding in error is prosecuted from the judgment of a justice of the peace to the district court, a petition in error must be filed in that court specifically enumerating the errors relied upon for the reversal of the ruling or judgment of the justice of the peace; and to enable the supreme court to review the action of the district court on such error proceeding, such petition in error must be made a part of the record in the error proceeding brought here. The record before us sustains the judgment of the district court, and the same is

AFFIRMED.

LOIS R. GODMAN ET AL., APPELLANTS, V. MARGARET F. CONVERSE, APPELLEE.

FILED JANUARY 3, 1894. No. 5607.

O-43 Neb. 463. O.C.

Executors and Administrators: PROBATE COURTS: ALLOWANCE TO WIDOW. Under subdivision 2, section 176, chapter 23, Compiled Statutes, 1893, a probate court has authority to make an allowance to a widow out of the personal estate or income of the real estate of her deceased husband, necessary for her maintenance, according to her circumstances, during the settlement of the estate, although the husband, by his will, lawfully disposed of all his property and the widow has accepted the provisions of such will.

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

Charles O. Whedon, for appellants.

Marquett, Deweese & Hall, contra.

RAGAN, C.

Dr. Joel N. Converse died in Lancaster county, Nebraska, in 1890, leaving a will, since duly probated, in and by which he bequeathed to his wife, the appellee here, the use during her life of certain lands in Lancaster county, and bequeathed to her, absolutely, his library, household goods, furniture, jewels, one buggy and harness, five head of horses, five cows, and $6,000 in money. The sixth paragraph of the will provides: "All other property, whether personal or real, must be converted into money, and all my debts collected, and the proceeds thereof applied to funeral and court expenses, together with my indebtedness and bequests. Whatever may be remaining thereof will be divided between my two daughters." The eighth paragraph of the will contained this provision: "The bequest of my wife, Mrs. M. F. Converse, is in lieu of all appropriations as the law would give her, except one year's support, which I desire she shall have." The appellee duly accepted and consented to all the provisions of the will, and received as one year's support for herself $600, allowed to her by the probate court out of the estate of her husband. December 24, 1891, the probate court made her a further allowance of $75 per month, to be paid out of the doctor's estate, such allowance to begin October 11, 1891, and continue until the settlement of the estate. The case is here on appeal from this order.

This appeal challenges the authority and jurisdiction of the probate court to charge the estate of a decedent, pending the settlement of the estate, with the support of the widow, when such decedent has disposed of his personal estate by will and his widow has accepted the provisions thereof. Counsel for appellants say: "The probate court has no jurisdiction to make an allowance when the personal estate has been lawfully disposed of by will, and that the appellee could not take both under the will and the stat-

ute." The counsel bases his argument on section 176, chapter 23, Compiled Statutes, 1893. So much of it as we quote is as follows: "When any person shall die possessed of any personal estate, or of any right or interest therein not lawfully disposed of by his last will, the same shall be applied and distributed as follows: First—The widow, if any, shall be allowed all the articles of apparel and ornament, and all the wearing apparel and ornaments of the deceased, the household furniture of the deceased, not exceeding in value $250, and other personal property, to be selected by her, not exceeding in value $200; and this allowance shall be made as well when the widow receives the provision made for her in the will of her husband as when he dies intestate. Second—The widow and children, constituting the family of the deceased, shall have such reasonable allowance out of the personal estate, or out of the income of the real estate, as the court of probate may adjudge necessary for their maintenance during the progress of the settlement of the estate, according to their circumstances, which in case of an insolvent estate shall not be longer than one year after granting administration, nor for any time after the dower and personal estate shall be assigned to the widow." It would seem that the intention of this section of the statute was to provide for the distribution of the personal estate of a decedent, not disposed of by his will; that by the first subdivision of said section the widow is given the apparel, ornaments, two hundred and fifty dollars' worth of the household furniture and two hundred dollars' worth of such other personal property as she might select; and that a disposition of it to another by the will of the husband is made inoperative. In other words, the property enumerated in this first subdivision is exempt from the operation of the will of the husband, and belongs, on his death, to his widow; that by the second subdivision of this section the probate court could make to the widow and children constituting the family a reasonable allowance out of the

estate during the pendency of its settlement, only in cases where the husband died intestate, the legislature indulging the presumption that a testator would, by his will, set apart money or property, which, when added to the property given to the widow by law under the first subdivision of this section 176, would be sufficient to support herself and family during the time the estate might be in process of settlement. A probate court must have the authority of statute law to support an order by which the estate of a testator is charged with the support of his widow and family. The statute relied on to sustain the allowance in controversy here is section 176, quoted above, and, uninfluenced by authority, we would say that by this section the probate court had no authority or jurisdiction to make the order appealed from. We find, however, on investigation, that section 3935 of the statute of Wisconsin is, in all material respects, the same as said section 176.

In *Baker v. Baker*, 57 Wis., 382, a decedent left a will disposing of all his property. The will was duly probated. The probate court allowed the testator's widow for her support $50 per month for one year after her husband's death; and, at the expiration of the year, by a second order, allowed her for her support an additional sum of $50 per month, to continue during the pendency of the settlement of the estate. An appeal to the supreme court of Wisconsin was taken from this order, the appellants contending that the action of the probate court was a nullity, and section 3935 was relied on to sustain such objection. On the other hand, the appellees argued that said section 3935 was of itself statutory authority to support the order of the probate court. The supreme court said: "The argument is that under the provisions of section 3935 R. S., no allowance can be made to a widow in any case, when the deceased has died testate, and by his will disposed of all his property, both real and personal, unless the widow renounces all rights under the will. * * * The con-

struction of the clause contended for by the learned counsel for the appellant would as effectually prevent the payment of expenses of the administration, funeral charges, and debts in a case where the will of the deceased disposed of his entire estate as it would the setting apart and payment of the allowances to the widow and minor children. A construction put upon this provision of the law which would lead to such radical injustice certainly ought not to be adopted." And the court squarely decided that under subdivision 2, section 3935, a widow may have an allowance out of the estate of her deceased husband, although by his will he has disposed of all his property. For the construction of statutes similar to the Nebraska statute, section 176, *supra*, see *Moore v. Moore*, 48 Mich., 271; *Williams v. Williams*, 71 Mass., 24. We feel bound by the construction placed by the supreme court of Wisconsin on the statute under consideration, and following *Baker v. Baker, supra*, affirm the judgment of the district court.

AFFIRMED.

JOHN H. HOPKINS V. BARRETT SCOTT, TREASURER.

FILED JANUARY 3, 1894. No. 5492.

1. **Statutes:** TITLES: PUBLIC FUNDS: DEPOSITORIES. Chapter 50, Session Laws, 1891, relating to the keeping of state and county funds, is not in conflict with the constitution, either as containing more than one subject, or because of its providing that it shall not apply until the expiration of the terms of office of the state treasurer and of the several county treasurers in office at the time of its passage.

2. **Repeal of Statutes.** That act did not operate to repeal article 2, chapter 18, Compiled Statutes, relating to the removal of county officers.

3. ———. Nor was article 2, chapter 18, Compiled Statutes, repealed by the act of 1879, specifying powers of county boards.

4. **Where, in proceedings to remove a county officer,** the officer complained against makes an appearance, obtains a continuance, and at the time to which the continuance was had proceeds to trial without further objection because of the time of hearing, he cannot upon proceedings in error be heard to urge that sufficient time was not allowed to prepare his defense.

5. **Removal of County Officers:** PROCEEDINGS OF SUPERVISORS. In such proceedings the fact that some of the supervisors who tried the case were also witnesses does not invalidate the judgment.

6. ———: ———: QUORUM. Nor is it necessary that all the members of the board of supervisors be present at the hearing. A quorum is sufficient.

7. **Bill of Exceptions.** There is no authority of law for the settlement of a bill of exceptions embodying the evidence taken on such hearing. MAXWELL, C. J., dissenting.

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

The facts are stated in the opinion.

Reese & Gilkeson, H. E. Murphy, and *M. F. Harrington,* for plaintiff in error:

In the absence of statutory power a board of supervisors is without authority to sign, settle, and allow a bill of exceptions. (*Taylor v. Tilden,* 3 Neb., 339; *Kellogg v. Huntington,* 4 Neb., 96; *Rudolph v. Winters,* 7 Neb., 127; *Nickerson v. Needles,* 32 Neb., 230; *State v. Oleson,* 15 Neb., 247; *Donahue v. Will County,* 100 Ill., 94.)

The board could act without all members being present. (*State v. Board of Supervisors of Saline County,* 18 Neb., 422.)

John H. Ames, amicus curiæ, filed a printed argument in favor of the validity of the act to provide for depositing state and county funds in banks.

H. M. Uttley and *R. R. Dickson, contra:*

A bill of exceptions can be properly and legally authen-

ticated and certified to by each member of the board of supervisors individually, and when certified to by a majority of the members constituting said board of supervisors, the same should be upheld, and considered by the courts. (Maxwell, Pleading & Practice [4th ed.], p. 717; *Law v. Jackson*, 8 Cow. [N. Y.], 746; *Kennedy v. Trustees of Covington*, 4 J. J. Marshall [Ky.], 543; *Darling v. Gill*, Wright [O.], 73.)

When a new statute is evidently intended to cover the whole subject to which it relates, it will by implication repeal all prior statutes on that subject. (*United States v. Barr*, 4 Sawyer [U. S.], 254; *United States v. Claflin*, 97 U. S., 546; *Dowdell v. State*, 58 Ind., 333; *State v. Rogers*, 10 Nev., 319; *Tafoya v. Garcia*, 1 N. M., 480; *Campbell v. Case*, 1 Dak., 17; *Andrews v. People*, 75 Ill., 605.)

The law under which the proceeding before the county supervisors was commenced has been repealed by implication. The board had, therefore, no jurisdiction over the subject-matter of the action, and was without power to conduct the examination. (*Stewart v. Otoe County*, 2 Neb., 177; *Sioux City & P. R. Co. v. Washington County*, 3 Neb., 42; *Sexon v. Kelley*, 3 Neb., 107; *People v. Commissioners of Buffalo County*, 4 Neb., 157; *Hamlin v. Meadville*, 6 Neb., 233; *State v. Buffalo County*, 6 Neb., 460; *McCann v. Otoe County*, 9 Neb., 330; *Walsh v. Rogers*, 15 Neb., 311; *State v. Lincoln County*, 18 Neb., 283.)

G. M. Lambertson, also for defendant in error:

The judgment of ouster rendered by the board of supervisors is fraudulent and invalid, because some of the supervisors sat as judges to try the accused, gave testimony against him, and then voted in support of the judgment of ouster. (*Vanderlip v. Derby*, 19 Neb., 165; *Foster v. Devenney*, 25 Neb., 73; *State v. Kaso*, 25 Neb., 608; *State v. Weber*, 20 Neb., 467; *Burnett v. Burlington & M. R. Co.*,

16 Neb., 334; *Ensign v. Harney*, 15 Neb., 330; *Tomlinson v. Derby*, 14 Am. Law Reg. [Conn.], 543; *Stockwell v. Township Board of White Lake*, 22 Mich., 341.)

There should have been a full board present to hear the case. (*Hutchinson v. Ashburn*, 5 Neb., 402.)

Chapter 50 of the Laws of 1891 is unconstitutional, because it provides that the law shall not be enforced until 1893. Section 24 of article 3 of the constitution, providing that no act shall take effect until three calendar months after the adjournment of the session at which it was passed, unless in case of emergency, is a limitation upon the legislative power to say when laws shall take effect. (Cooley, Constitutional Limitations, p. 188; *Wheeler v. Chubbuck*, 16 Ill., 361; *Board of Supervisors v. Keady*, 34 Ill., 293.)

The law is unconstitutional, because the bill contains more than one subject. It applies to the public funds of both the county and state. (*White v. City of Lincoln*, 5 Neb., 505; *Burlington & M. R. R. Co. v. Saunders County*, 9 Neb., 507.)

IRVINE, C.

On March 1, 1892, John H. Hopkins filed his complaint before the board of supervisors of Holt county, charging that in November, 1891, Barrett Scott was elected county treasurer and qualified January 7, 1892, and then entered upon the duties of his office; that since the 7th day of January, 1892, Barrett Scott had been guilty of official misdemeanors and willful maladministration in his office in certain particulars specified in the complaint. The matters particularly charged may be summarized as depositing in and loaning to certain banks different sums of money, being the moneys of Holt county which came into his hands as county treasurer, and receiving interest upon such money for his own use and benefit, and that said moneys were deposited to the individual credit of Scott and without any bond for the repayment thereof. It was further

charged that Scott unlawfully removed the sum of $50,000 of the public moneys of Holt county upon the 26th day of February, 1892, and delivered $35,000 thereof to a certain bank in Omaha; and further, that he had received $150 in payment for certain certificates and had only entered one-eighth of the fees received therefor upon the books. A notice was served upon Scott requiring him to appear before the board of supervisors upon March 2, 1892, to answer the complaint. At the hour named, upon motion of Scott, the hearing was continued until the following morning, when, in the absence of Scott, a plea of not guilty was entered for him, and thereafter Scott filed objections to the jurisdiction of the board to try the case. These objections were overruled, whereupon further objections were made because every member of the board was not present. The record shows that two of the members were absent. Certain other objections were filed, some of which will be noticed hereafter, and finally it was determined that no further motions or pleadings be received except a motion to reject the complaint, a demurrer, or an answer. The board then proceeded to try the case. Scott was found guilty of the charges, and a judgment of ouster was entered. An attempt was made to secure a settlement of a bill of exceptions. Certain members of the board refused to sign the proposed bill, and upon *mandamus* proceedings they were compelled to do so. The case was taken on error to the district court, where it was heard upon the record, including the bill of exceptions settled in obedience to the writ of *mandamus*. In the district court a motion was made to quash the bill of exceptions, one of the grounds being that the allowance of the bill was not authorized by law. This motion was overruled. Upon the final hearing the judgment of the board of supervisors was reversed on the following grounds: First, that the board of supervisors had no jurisdiction of the subject-matter; second, that there was no evidence to sustain such judgment. There

are certain other findings in the judgment of the district court, but they all resolve themselves under the foregoing heads. The case is brought to this court upon error by Hopkins.

A great many questions are raised in regard to the accuracy of the bill of exceptions, and as to whether or not its allowance was regular; as to whether the district court had any authority to grant a writ of *mandamus* compelling its allowance; whether its signature by the majority of the supervisors, and not by every member, was sufficient; and as to whether there is any authority for a bill of exceptions in such a case. The conclusion reached upon the last of these questions removes all others from the case. It may be taken as settled that the right to a bill of exceptions is not implied from the right to prosecute proceedings in error, and that a bill of exceptions cannot be allowed except in pursuance of statutory authority. (*Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520.) In the case cited the whole question is discussed at length and the authorities reviewed. There is no statutory authority for a bill of exceptions in such a case as this, and while the case last cited and those therein discussed are not exactly similar in their facts, the principles upon which they rest are precisely the same. We think, therefore, that the district court should have sustained the motion to quash the bill of exceptions, and erred in considering it as a part of the record in the case. It may be that the law should provide a method for bringing up the evidence in such cases as this as well as others, but, as said in *Moline, Milburn & Stoddard Co. v. Curtis, supra*, this rests with the legislature, and if the law is defective, the court cannot supply its defects.

With the questions raised by the bill of exceptions eliminated, few of the many questions presented in the briefs remain for decision. The first of these, however, is of vital importance, and is probably the point upon which the dis-

trict judge based his decision. Compiled Statutes, chapter 18, article 2, provides for the removal of county officials for official misdemeanors, classified under eight heads, one of which is willful maladministration in office, and provides that any person may make such charge, and that the board shall have exclusive original jurisdiction thereof. Questions of fact must be tried as in other actions, and if the accused is found guilty, judgment shall be entered removing him from office.

By chapter 50 of the Laws of 1891 it was provided that county treasurers shall deposit in state or national banks doing business in the county, and of responsible standing, the amounts of moneys belonging to the several current funds of the county treasury; that said deposits shall be subject to check, and that interest shall be paid to the county of not less than three per cent per annum of the amounts so deposited. The act also provided for the keeping of accounts thereof and the giving of bonds by the depository for the safe keeping and payment of such deposits. The act also forbade the making of profit, directly or indirectly, by the county treasurer out of any money belonging to the county, and forbade the removal of any part of the county funds except for the payment of warrants or making deposits in pursuance of the act, and made such unlawful removal a felony. It also made a willful failure or refusal of the treasurer to perform his duties under the act a misdemeanor.

It is urged that the act of 1891 is unconstitutional, as containing more than one subject. The act provided both for the depositing of state funds and for the depositing of county funds, and it is contended that each of these forms a separate subject of legislation. The general object of the act is to provide for the safe custody of public funds, and it seems to us that this is a single subject of legislation, whether the funds are state or county. The object of the act is plainly expressed in its title, and the combination of

provisions in regard to both state and county funds presents none of those objections which influenced the adoption of the constitutional inhibition against uniting two or more subjects in a single act. In the recent case of *Trumble v. Trumble*, 37 Neb., 340, the effect of the clause of the constitution referred to was considered, its object discussed, and former decisions of this court reviewed. It is not deemed necessary to repeat the discussion here. We think the object of this act is single. If it had related to the custody of all public funds of whatever description without separately naming them, no question could well be raised upon the point now urged; and the fact that the act, instead of using general language applicable to all public funds, in terms specified separately state and county funds, does not render it subject to the objection of duplicity.

It is also claimed that the act of 1891 is unconstitutional, because it provides that it shall not take effect until the expiration of the terms of the county treasurers current at the passage of the act. It is said that this is in conflict with the constitutional provision that all acts shall take effect upon the expiration of three calender months after the adjournment of the legislature. We think the limitation was one which could be properly made by the legislature. The act, as an act, did go into effect under the constitutional provision referred to. It became the law of the state from that time. But the classes of persons to whom it applied only came into existence upon the expiration of then current terms of office. Until three months after the adjournment of the legislature the act could not have taken effect, even though terms of treasurers might have expired during the interval. After the constitutional period for the act to take effect had expired, it became the law, and has, as fast as the terms of treasurers expired, become operative. It was the law from that time, although it may have been without practical effect for want of subject-matter to act upon.

The further contention is made that conceding the act of 1891 to be constitutional, it operated to repeal article 2, chapter 18, Compiled Statutes, and left the county board without jurisdiction to try the case. This argument is based upon the fact that the act of 1891 renders criminal a failure or refusal of the treasurer to obey its provisions, and it is argued that inasmuch as maladministration in these particulars was made a criminal offense, the remedy provided by the act is exclusive. Repeals by implication are not favored, and an act will not be held to repeal a former act unless the repugnancy between the two is plain and unavoidable. (*Lawson v. Gibson*, 18 Neb., 137; *State, ex rel. Berry, v. Babcock*, 21 Neb., 599.) There is no repugnancy between these two acts. The commission by a treasurer of crimes created by the act of 1891 would not, *ipso facto*, remove him from office. It would require a conviction at least to do so, and the county need not await such conviction before removing him from office. The object of article 2, chapter 18, Compiled Statutes, is not to punish an officer for criminal acts, but simply to protect the county by removing him from office. The proceedings thereunder are in some ways analogous to proceedings in impeachment, and by the express terms of the constitution a conviction upon impeachment is no bar to a prosecution for the same offense as charged in the impeachment. (Constitution, art. 3, sec. 14.) There is no reason why an unfaithful county officer should not be removed from office because of his infidelity and also be punished criminally for the same act, provided it amounts to a crime. We repeat that there is no repugnancy between the provisions of the Compiled Statutes referred to and the act of 1891. They can both be enforced without conflicting with one another, and upon well established principles they should both be held to be in force.

For similar reasons we cannot concur in the views of defendant in error, that the act of 1879, specifying certain

powers as belonging to the county board, operated, by omitting reference to the powers conferred by article 2, chapter 18, to repeal that article.

The transcript of the proceedings of the board of supervisors shows the rulings of the board upon certain questions of evidence. In no case, however, does it state more than the question asked to which objection was made and the ruling thereon. This is not sufficient to enable the court to pass upon the admissibility of the evidence. The answers do not appear. The offers of proof do not appear, and there is not sufficient to enable the court to determine the nature of the evidence. It is even doubtful whether as much as does appear was properly incorporated into the minutes of the board.

Some objection was made because of the insufficiency of the time allowed to the defendant before the trial. It does appear that the action of the board was somewhat summary, but the defendant seems to have obtained a continuance upon his own motion, and we do not think that after such proceedings he can be allowed to urge this objection. At the time when the case was taken up for trial he proceeded without objection upon this ground.

The objection that all the members of the board were not present at the trial is not well taken. There is no express provision of the statute in this regard, and in the absence of special provisions, the general laws in regard to proceeding by a quorum must be held applicable. The constitutional provisions relating to the supreme court sitting as a court of impeachment are not applicable.

Counsel for Scott made objections to the board's deciding the case, because certain members of the board were witnesses. Regarding the proceeding as a strictly judicial inquiry, this would not oust the court of jurisdiction. A judge or juror may be called as a witness, and is not from that fact alone disqualified from sitting in judgment on a case. (Thompson, Trials, sec. 77, note 5, and cases there cited.)

Certain other objections appear in the record, but the facts upon which they are based do not, and their merits, therefore, cannot be considered.

We do not think that the record of the proceedings of the board of supervisors discloses any error. The complaint sufficiently charges offenses amounting to maladministration in office, and the evidence must be presumed to support the complaint and judgment. The judgment of the district court is reversed and that of the board of supervisors affirmed.

JUDGMENT ACCORDINGLY.

WILLIAM J. MAXWELL, APPELLANT, V. STEPHEN H. HIGGINS ET AL., APPELLEES.

FILED JANUARY 3, 1894. No. 5149.

1. **The record of a deed** is not admissible in evidence unless the certificate of acknowledgment is substantially in accordance with the statute.

2. **Pleading.** Facts pleaded in a petition will be taken as admitted where not specifically denied in the answer, and the answer avers as to such facts that the defendants, for want of knowledge, neither admit nor deny the averments of the petition.

3. **Tenancy in Common.** A conveyance to two or more persons not acting in a fiduciary capacity will be presumed to create a tenancy in common, and not a joint tenancy.

4. **Adverse Possession.** Where one has been in possession of land, claiming ownership, and permits the land to be sold for taxes, and the grantee in the tax deed, although it was void on its face, enters into possession and remains in possession for a period of more than a year, such possession interrupts that of the prior occupant.

5. **Estoppel.** Where a claimant of land acts under a power of attorney from an adverse claimant, and as such attorney leases the land in the name of the adverse claimant, he and his grantees

are by such acts estopped from asserting that the possession of the tenant inured to him and not to the adverse claimant.

6. **Action Quia Timet.** One cannot in the same action to quiet title assert against one defendant that conveyances to such defendant were adverse to plaintiff's title and a cloud thereon, and ask that they be canceled, and against another defendant assert that the possession of the first defendant was in subordination to plaintiff's title and a link in the establishment of adverse possession.

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

The opinion contains a statement of the case.

Cornish & Robertson and *James F. Morton*, for appellant:

Where one of two tenants in common conveys the entire estate by warranty deed to a purchaser, and the purchaser enters into possession under such deed and receives the rents and pays the taxes, his possession is construed as co-extensive with the estate conveyed by the deed, and becomes adverse to his co-tenant from the moment of entry. (*Unger v. Mooney*, 63 Cal., 586; *Culler v. Motzer*, 13 S. & R. [Pa.], 356; Buswell, Limitations and Adverse Possession, secs. 299-301, and notes; Sedgwick & Wait, Trial of Title to Land, sec. 287, and cases cited.)

Ellen McKelligon, being a mortgagee, is conclusively presumed in law to have purchased the tax title, or redeemed, as the case may be, to protect her security, and her possession is presumed to be subordinate and not adverse to the title of her mortgagor. (*McKeighan v. Hopkins*, 19 Neb., 38; *Comstock v. Michael*, 17 Neb., 300; *Young v. Brand*, 15 Neb., 604; *Hall v. Westcott*, 5 Atl. Rep. [R. I.], 629; *McLaughlin v. Green*, 48 Miss., 175; *Woodbury v. Swan*, 59 N. H., 22; *Christy v. Fisher*, 58 Cal., 256; *Moore v. Titman*, 44 Ill., 367; *Connecticut Mutual Life Ins. Co. v. Bulte*, 45 Mich., 113; *Martin v. Swofford*, 59 Miss., 328; *Fisk v. Brunette*, 30 Wis., 102; *Chickering v. Failes*, 26

Ill., 507; *Brown v. Simons*, 44 N. H., 475; *Schenck v. Kelley*, 88 Ind., 444; *Fair v. Brown*, 40 Ia., 209; *Middleton Savings Bank v. Bacharach*, 46 Conn., 513; *Whitney v. Gunderson*, 31 Wis., 359; *Moss v. Shear*, 25 Cal., 38; *McPherson v. Hayward*, 17 Atl. Rep. [Me.], 164.)

Ellen McKelligon redeemed from the tax sale October 22, 1879. Jolliffe, Price, and Sayer filed a motion asking leave to intervene in this action January 18, 1890. Between said dates the land was in possession of parties recognized and held in subordination to the title of plaintiff and his grantors. The date prior to which plaintiff must show ten years' adverse possession is the date of bringing the new parties into court. (*Jeffers v. Cook*, 58 Cal., 148; *Shaw v. Cook*, 78 N. Y., 196; *Miller v. McIntyre*, 6 Pet. [U. S.], 61; *Dudley v. Price*, 10 B. Mon. [Ky.], 84; *Corder v. Dolin*, 4 Bax. [Tenn.], 240; *Augusta Mfg. Co. v. Vertrees*, 4 Lea [Tenn.], 83; *Lugow v. Neilson*, 10 Ind., 183, *Thomas v. Fame Ins. Co.*, 108 Ill., 92; *Atkinson v. Amador & Sacramento Canal Co.*, 53 Cal., 102; *Brown v. Goalsby*, 34 Miss., 437; *Sweet v. Jeffries*, 67 Mo., 420.)

A. S. Churchill, contra.

IRVINE, C.

This was a suit to quiet title to block 21, West Omaha. It was originally begun by Maxwell against Stephen Hewitt Higgins, Maurice J. McKelligon, the unknown heirs of Ellen McKelligon, the unknown heirs of Mehitable Higgins, and the unknown heirs of M. Swinny. The original petition alleged title in the plaintiff as follows: That on January 9, 1867, Stephen Hewitt Higgins and Mehitable Higgins became joint owners of the land; that during 1867 Mehitable Higgins died intestate; that on January 27, 1870, Stephen Hewitt Higgins conveyed to Maurice J. McKelligon, and on February 11, 1887, McKelligon conveyed to plaintiff; that from 1870, until the conveyance to plaintiff,

McKelligon remained in the continuous and uninterrupted possession of the land; that since the conveyance to plaintiff, plaintiff had remained in peaceful and quiet possession thereof. The petition further alleged that on March 4, 1878, the treasurer of Douglas county executed a deed to M. Swinny for the taxes of 1874; that the tax deed was void for certain reasons set out in the petition; that Swinny died intestate, and that certain persons claiming to be her heirs conveyed by a series of conveyances to Ellen McKelligon; that Ellen McKelligon died testate, by her will attempting to devise to the children of Maurice McKelligon. The petition prayed that the tax deed, and other deeds made in pursuance thereof, be declared void.

Upon January 18, 1890, a motion was made by Laura Jolliffe, Samuel S. Price, Jr., and Edward Sayre, asking that they be made parties defendant. No order seems to have been made upon this motion, but upon February 15, 1890, an order was made granting the plaintiff leave to file a supplemental petition making these persons defendants. This supplemental petition alleged, in brief, that Price, Sayre, Laura Jolliffe, Sarah A. Selden, and Mehitable Higgins had conspired to cast a cloud upon plaintiff's title, and in pursuance of that conspiracy a deed had been made by Sarah A. Selden to Mehitable Higgins of an undivided one-half of the property, and that thereafter certain other deeds were executed, set forth in particular, whereby it was attempted to convey this interest to Price, Sayre, and Jolliffe. It is further alleged that all of Sarah Selden's title had been conveyed to Mehitable Higgins and Stephen Hewitt Higgins January 9, 1867, but the deed of conveyance was defective in acknowledgment, through a clerical error, only; that Mehitable Higgins never had any equitable title, but that Stephen Hewitt Higgins paid all the purchase money for the property, and that the subsequent deeds to the new defendants were made without consideration and with notice of the facts. The supplemental petition also

averred peaceable, continuous, open, notorious possession in plaintiff and his grantor from May 17, 1869, and prayed for an annulment of the deeds from Sarah Selden, Mehitable Higgins, and subsequent deeds in that chain of title.

The new defendants, Price, Sayre and Jolliffe, answered alleging that Mehitable Higgins was the owner until December 17, 1889, when she conveyed to Jolliffe. They admit the tax deed was void, deny the possession of plaintiff and his grantor, aver that they bought for value and without notice, and ask for an establishment of their title to an undivided one-half.

The reply is quite long, but amounts to a reassertion of the allegations of the supplemental petition, a denial of all other facts alleged in the answer, and the pleading of certain other facts not necessary here to notice in detail.

The decree recites that the cause was heard on the supplemental petition, the answer of Jolliffe, Price, and Sayre, and the reply thereto, and the evidence. It finds for the defendants named as to the undivided one-half, quiets the title of that one-half interest in those defendants and the other one-half in the plaintiff.

The foregoing statement of the pleadings discloses a somewhat complicated state of title and a rather anomalous series of issues. Their statement has been necessary because of the importance of the pleadings in determining some of the questions arising in the case. In its further consideration it will be convenient to follow out the title as disclosed by the pleadings and evidence with occasional references to averments not heretofore stated.

It appears inferentially from the pleadings, and directly by a formal admission in the bill of exceptions, that one Oscar B. Selden was the patentee of the land in controversy. There was offered in evidence the record of a deed dated January 9, 1867, from Oscar B. Selden and wife purporting to convey the land to Mehitable Higgins and Stephen Hewitt Higgins. This record was objected to and properly

excluded, for the reason that the deed appeared to have been acknowledged by the grantees and not by the grantors. This deed is not very material, however, because it appears from the answer of the defendants that they claim a one-half interest under Mehitable Higgins. The deed is pleaded in the petition, and there is no denial of its execution in the answer, but on the contrary an averment that the defendants, not knowing the facts, neither admit nor deny the allegations of the petition in regard to conveyances therein alleged. The deed must therefore be taken as admitted.

The reply avers that Mehitable Higgins and Stephen Hewitt Higgins were coparceners, or joint tenants, and not tenants in common. There is not a particle of evidence to establish such facts. In the United States joint tenancies are not favored, and except in case of trustees or others acting in a fiduciary capacity, an estate in two or more persons is generally construed as a tenancy in common where joint tenancies have not been abolished by statute. (Tiedeman, Real Property, sec. 237, and cases cited.) It would, therefore, be presumed that Stephen Hewitt Higgins and Mehitable Higgins were tenants in common, but the distinction is of doubtful importance, in view of the fact clearly established that Mehitable Higgins was not dead at the time of the conveyance next referred to.

It is also alleged in the supplemental petition that Stephen Hewitt Higgins paid all the purchase price to Selden, and that Mehitable Higgins never had any equitable interest in the property. In the reply these allegations are modified by pleading that the money was paid by "—— Higgins" and Stephen Hewitt Higgins. There is no evidence in support of either of these averments; upon the contrary the testimony of Mehitable Higgins, which stands uncontradicted, is that a considerable portion, probably the greater portion, of the purchase money was paid out of her own funds.

In 1867, then, Mehitable Higgins and Stephen Hewitt Higgins became legally and equitably tenants in common of the property. In May, 1869, a bond for a deed was executed by Stephen Hewitt Higgins, whereby he bound himself to convey the entire estate to Maurice J. McKelligon, and upon January 27, 1870, Stephen Hewitt Higgins executed to Maurice J. McKelligon a deed purporting to convey to him the entire estate. In 1887, McKelligon executed a deed to plaintiff purporting to convey to him the entire estate. From what has been said it is clear that McKelligon acquired from Higgins and conveyed to plaintiff only an undivided one-half interest, and plaintiff has no other paper title. A paper title to the other undivided one-half is established in the defendants by a series of deeds not necessary to recite in detail, but beginning with one dated December 17, 1889, from Mehitable Higgins to Laura Jolliffe. There is also in this chain a deed from Sarah Selden, widow and sole devisee of Oscar B. Selden, to Mehitable Higgins. This purports to convey the whole estate, but must be rejected as immaterial because of the conveyance in 1867 to the Higginses standing admitted by the pleadings. So far, then, as the paper title is concerned, one-half was thus far shown in the plaintiff and the other one-half in the defendants, as established by the decree. The plaintiff claims, however, title to the whole by adverse possession. The evidence shows quite clearly that McKelligon, at the time he took the conveyance from Higgins, and probably in 1870, went into possession of the land, lived upon it for some time himself, leased it to different tenants, and that it was occupied either by actual residence or by tenants cultivating the land with such occasional brief intervals as were required by changes in tenants, and without interruption on the part of adverse claimants until 1878. It may also be assumed for the purposes of this case that a conveyance by one of two tenants in common purporting to convey the whole estate, the

placing of the deed on record, and possession taken by the grantee, constitute an ouster of the other co-tenant and establish a possession adverse to him. (*Culler v. Motzer*, 13 S. & R. [Pa.], 356; *Foulke v. Bond*, 41 N. J. Law, 527; *Kinney v. Slattery*, 51 Ia., 353; *Kittredge v. Locks & Canals*, 17 Pick. [Mass.], 246; *Unger v. Mooney*, 63 Cal., 586.)

There is some question as to whether McKelligon's possession began in 1869 or 1870. At any rate it had not continued for a period of ten years, when the facts occurred which we are next called upon to notice. Upon March 4, 1878, a tax deed was issued to M. Swinny. This deed is admitted to have been void on its face, but such a deed is sufficient to establish color of title in cases where color of title is necessary. (*Gatling v. Lane*, 17 Neb., 77; *Lantry v. Parker*, 37 Neb., 353.) J. R. Hendrix was Mrs. Swinny's agent in the matter. He, at the time, made some trifling repairs on the premises, which seem then to have been unoccupied. Upon May 5, 1878, Hendrix leased the premises to one Campbell, who entered into possession and held until the following February, when one Tatom moved on as the tenant of Swinny. Upon October 22, 1879, the heirs of Swinny executed a quitclaim deed to Ellen McKelligon, the mother of Maurice. At this time Ellen McKelligon seems to have held a mortgage upon the premises executed by Maurice in 1878. There is evidence tending to show that the money paid to the Swinny heirs was furnished by Maurice and not by his mother; and it is claimed that the transaction amounted in effect to a redemption by McKelligon from the tax sale.

It is also claimed that McKelligon re-entered and leased the premises to different tenants, collecting the rents, and paying the taxes down to the time he conveyed to plaintiff. This is not, however, borne out by the evidence. Upon the contrary, it appears that McKelligon was acting under a power of attorney from Ellen McKelligon, and at least one of the leases made after the conveyance from the

Swinny heirs was made in the name of Ellen McKelligon by virtue of that power of attorney. The original petition charged that the tax deed was void and that the conveyance by the Swinny heirs to Ellen McKelligon was made without any interest in the grantors, and that Ellen McKelligon's will, devising the property to the children of Maurice, passed no title; and the prayer of the original petition was to set aside the tax deed and the deeds and wills in pursuance thereof, not for the reason that Ellen McKelligon was a trustee for Maurice and the plaintiff, but because it was an adverse, ill-founded claim and a cloud upon plaintiff's title. The plaintiff cannot therefore tack the two years' possession of the tax claimant to the subsequent possession or the prior possession of McKelligon in order to establish possession for the statutory period, nor can he claim that the possession subsequent to the deed from the Swinny heirs was Maurice McKelligon's own, in the face of the admission upon the pleadings and in face of the fact that Maurice, in making the lease on behalf of Ellen McKelligon, acted as her attorney in fact, and not on his own behalf. The plaintiff, therefore, failed to establish title by adverse possession.

It appears from the evidence that in 1878 Maurice McKelligon was declared a bankrupt, and a deed was made conveying his property to an assignee, and that there is no record of any discharge from bankruptcy. This matter is not important, in view of the conclusion reached that upon other grounds the defendants were entitled to have their title established to an undivided one-half. This is all they claim, and imperfections, if any, existing in plaintiff's title to the other one-half cannot be taken advantage of by these defendants. The matter is merely referred to here in order that it may be understood that we do not and cannot upon appeal from this decree adjudicate the effect of the bankruptcy proceedings.

JUDGMENT AFFIRMED.

JACOB SCHNEIDER V. PATTERSON, MURPHY & COMPANY.

FILED JANUARY 3, 1894. No. 5029.

1. **Evidence of Partnership.** The record of the certificate provided for in sections 27 to 29, chapter 65, Compiled Statutes, is not the only evidence by which the existence of a partnership may be established. Notwithstanding that statute, a partnership may be proved by any method permissible before the enactment.

2. **Landlord and Tenant:** DESCRIPTION OF LAND IN LEASE: PAROL EVIDENCE. A written lease described the demised land as "four acres out of lot four," in a certain governmental subdivision "lying north of the railroad track." *Held*, That in an action between the lessor and lessee's assignee parol evidence was admissible to show that the lessor and lessee, about the time the lease was made, had gone upon the land and agreed upon certain lines and monuments as defining its boundaries.

3. **In an action by the lessee's assignee against the lessor to recover damages** because the lessor had subsequently leased a portion of the land to a third person, placed such third person in possession and excluded the plaintiff therefrom, *held*, that it was no defense to show that the assignee, at the time of the assignment, knew of the subsequent lease, or of the original lessee's exclusion, the assignee standing in the place of the original lessee and being entitled to all his rights.

4. **Landlord and Tenant:** BREACH OF LEASE: MEASURE OF DAMAGES. Where such lease was made for the purpose of enabling the lessee to mine sand from the land, the measure of damages is the value of the occupancy of the land for that purpose; and evidence showing the quantity of sand upon the land, the cost of removing the sand, and its market value is admissible for the purpose of ascertaining the damages.

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

W. L. Browne and *E. H. Wooley*, for plaintiff in error.

A. N. Sullivan, contra.

IRVINE, C.

Patterson, Murphy & Co., by that name, brought this action in the district court of Cass county, alleging that the plaintiffs were a partnership formed for the purpose of doing business in this state; that the defendant Schneider leased a tract of land of four acres in Cass county for the term of five years to one Jerry L. Farthing and received the full rent therefor; that the lease was made with the privilege of taking sand from the land; that Farthing assigned the lease to plaintiffs, and then, at some length, the petition alleges that Schneider leased two and one-quarter acres of said land to another company and put the lessee in possession, and prays damages for the exclusion of plaintiffs from that portion of the land. Two answers appear in the record. It may be assumed that the later one filed was intended as an amended answer and will be treated as such. By that answer, Schneider avers that the "full amount of ground claimed by plaintiffs in this action was by them taken, occupied, and used, and that no part of the ground sold to the Omaha Gravel Company was included in the purchase so made by plaintiffs or their assignor herein. Defendant, therefore, denies each and every material allegation in said cause alleged and avers that plaintiffs have nothing to complain of. The defendant denies that there is in existence any such person or firm as plaintiff alleged herein." There was a verdict and judgment for plaintiffs.

The first assignment of error to be noticed relates to the admission of parol testimony to prove the existence of the partnership. This evidence was objected to as incompetent, for the reason that sections 27, 28, and 29 of chapter 65, Compiled Statutes, provide for filing in the office of the county clerk a certificate showing the names of individuals doing business under a firm name and make that record evidence. It is claimed that such certificate is the only

competent evidence of the existence of a partnership. It is doubtful whether this issue was really presented by the pleadings. The affirmative averment that plaintiffs had occupied all the land leased seems to be inconsistent with the denial of the existence of plaintiffs. However, the trial court treated the issue as properly raised, and the question is one of importance and will be considered upon its merits.

The statute referred to provides in section 27 that any association of persons doing business in any county under a firm, partnership, or corporate name, and not incorporated under the laws of this state, shall have recorded in the office of the county clerk of the county where the place of business is located, a certificate signed by each member of said association showing, first, the name of the association; second, the general nature of the business and principal place of doing business; and third, the full name and residence of each individual member of the association. Section 28 provides for the recording of such certificates and makes the record or a certified transcript *prima facie* evidence of the facts therein set forth. Section 29 provides a penalty against any person who shall, for the space of twenty days, fail, neglect, or refuse to comply with the provisions of the act. This statute has several times been called to the attention of the court. In *Shriver v. McCloud*, 20 Neb., 474, the same objection seems to have been urged as presented in this case, but that was an action between the persons alleged to be partners, and the court disposes of the question by saying that the parties were *in pari delicto*, and, whatever might be the true construction of the act, its provisions could not be invoked by one partner against the other, both being equally responsible for the failure to make and file such certificate. A doubt, however, is expressed as to whether the statute applies in any case where the partnership name is that of one or all of the partners. In *Milligan v. Butcher*, 23

Neb., 683, somewhat curiously the objection seems to have been directly the opposite of that here urged; that is, the record of the certificate was objected to as incompetent, and the court merely held that such record was admissible. These decisions do not assist greatly in disposing of the question before us. It is, perhaps, worthy of consideration, that in a number of cases arising since the passage of the statute in question the existence of a partnership has been proved by the usual parol evidence, and the court has decided a number of questions in regard to the admissibility of evidence for that purpose, without, so far as we are aware, once alluding to this statute as affecting the common law rules in regard to such proof. An inspection of the statute discloses that there is no prohibition against forming a partnership or transacting a partnership business except in compliance with the act, but merely a penalty for failing or refusing to file the certificate within a certain period after the formation of the partnership or commencement of business. The object of the act was to make a matter of public record the names of persons composing unincorporated associations, and it was chiefly no doubt to enable persons doing business with such associations to ascertain the responsible individuals. In enforcing this object, undoubtedly, cases might arise presenting estoppels against partners by reason of statements in the certificates or by reason of the failure to file certificates; but the act was not intended to restrict the power of individuals to form partnerships or to provide an exclusive method for their formation. The statute makes the certificate only *prima facie* evidence upon the subject, and we do not think that it has the effect of making it the sole or exclusive evidence. This assignment of error must, therefore, be overruled.

Another assignment of error is the admission in evidence of the assignment of the lease from Farthing to the plaintiffs, upon the ground that it was not witnessed. A refer-

ence to the answer shows that the defendant avers that the plaintiffs occupied all the land "included in the purchase so made by plaintiffs or their assignor herein." This averment admits the fact of the assignment, and the subsequent general denial cannot be taken as countervailing against such admission.

The principal contention arises out of the admission of evidence to identify the land demised. The description in the lease is as follows: "Four acres out of lot four in S. E. ¼ of the N. W. ¼ of sec. 5, T. 12, R. 11, in Cass county, Neb., lying on the north side of the railroad track." Parol evidence was admitted over defendant's objections, which disclosed that the lessor owned more than four acres lying north of a certain railroad track and which tended to show on the part of the plaintiffs that the lessor and original lessee had gone upon the land, plowed a furrow along a portion at least of what was intended to be one of the lines of the tract demised, "stepped off" the rest of the tract and agreed as to the boundaries of the tract. The question is, was such evidence admissible? The plaintiff in error contends that the description in the lease is uncertain upon its face and cannot be helped out by parol evidence. Parol evidence doubtless would have been admissible to show that the lessor owned only four acres in lot four, or to show that only four acres in lot four lay north of the railroad track. (*Adams v. Thompson*, 28 Neb., 53; *Ballou v. Sherwood*, 32 Neb., 666.) So, too, had the evidence shown that the lessor owned two distinct tracts in lot four north of the track, each of four acres, so that the description would apply to each, parol evidence would have been admissible to show the intention of the parties. "If a man levies a fine of the Manor of Soure or of the Manor of Dirtleby, and in truth there is the Manor of North Soure and South Soure or Great Dirtleby and Little Dirtleby, in this case issue may be taken *dehors* which manor the conusor intended to pass." (*Altham's Case*, 8 Coke's Rep. [Eng.],

155.) These principles seem to indicate that the description is not upon its face void for uncertainty. If certain parol evidence would directly ascertain the description, there can be little doubt that when parol evidence, as in this case, first discloses the facts which render the description uncertain, such uncertainty arising by parol may be removed in like manner. As between the parties to a conveyance, the conveyance should not be permitted to fail for uncertainty in description, except as a matter of necessity; and we think it is established by the numerous adjudications bearing upon the subject that whatever description may be agreed upon by the parties as designating a definite tract agreed upon between them, is sufficient to bind the parties. Thus, such descriptions as "my farm," "barren island," and other general terms, understood by the parties to refer to a particular definite tract of land, have been held sufficient. In older states not favored by government surveys and recorded plats, as a matter of necessity such descriptions are resorted to, referring to monuments, recognized by the parties, but frequently not capable of being identified by others without resort to the acts or expressed intentions of the parties. Had there been any reference, however vague, in the lease to the demarcation resorted to by the parties, there could be no doubt that the proof of such demarcation might be shown by parol. From the terms of this lease it does appear that they had in mind a particular tract of four acres, and we see no reason why extrinsic evidence to identify the tract was inadmissible. It must be remembered, however, that we are discussing this question only as it affects the immediate parties to the instrument, or persons representing such parties. Did the case involve a question of the effect of recording the lease, as notice to third persons, or questions similar to that, entirely different considerations would control the decision, and a different conclusion might be reached.

The plaintiff in error also seeks to avoid responsibility

upon the ground that the defendants in error, the plaintiffs below, knew when they took the assignment from Farthing that a portion of the land was in the possession of the gravel company. This is no defense to an action for breach of covenant. If the lease was valid, Farthing had a right of action against the lessor for his breach of contract. By the assignment his rights were transferred to the plaintiffs. They claim no other rights.

A question is raised as to the admission of certain evidence to prove damages. It will be remembered that the lease expressly granted the privilege of removing sand from the land. The petition alleges that plaintiffs carried on the business of shipping sand to adjoining cities and selling the same, and prepared the ground for such business, and that by defendant's acts the profits of such business were greatly diminished, all to defendant's knowledge. The evidence objected to related to the cost of mining sand, the value of sand on the track, the profits per car, and the number of car loads per acre. Upon this subject the court instructed the jury that the measure of damages would be the value of occupying the land and taking away the sand for the period of five years. No exception was taken to this instruction, and under the familiar rule in *Hadley v. Baxendale*, 9 Exch. [Eng.], 341, the instruction was correct. The lease being made for the purpose of removing sand, the damages arising by reason of plaintiffs not being permitted to remove the sand must have been in the contemplation of the parties, and the evidence objected to was all material for the purpose of enabling the jury to determine the value of the occupancy of the land for that purpose. (Sedgwick, Damages, secs. 987, 1022.)

There is in the record the usual assignment that the verdict is not sustained by the evidence. We are not able to understand all the evidence very perfectly. At the commencement of the trial a plat was introduced that the witnesses constantly referred to, sometimes by words indicating

points upon the plat which can be identified, but more frequently by the words "here" and "there," accompanying these words apparently by indicating in the presence of the jury the points referred to. The jury and the trial judge observed these witnesses, and by the aid of such indications undoubtedly were enabled to understand points in the evidence which are wholly unintelligible upon the written record. In this condition of the record we cannot say that there was not evidence to support the verdict, the identity of the land leased and the relative possessions of the plaintiffs and the gravel company being the points upon which it is urged that the evidence was insufficient.

AFFIRMED.

MARY J. HOUSTON ET AL. V. JOHN GRAN ET AL.

FILED JANUARY 3, 1894. No. 5041.

1. **Damages Resulting from Sale of Liquors:** INSTRUCTIONS. Under the "civil damage act," the fact that minor children are able to support themselves, and had done so prior to the death of the father, is a proper fact for the jury to consider in ascertaining the amount of damages to be allowed; but it is error to instruct the jury that to the extent that a child had in the past supported himself, the law precludes any recovery; the duty to support and the probability of future support, as well as the fact of past support, being elements for consideration.

2. ——: ——. In such an action the fact that the deceased in his lifetime accumulated property which, upon his death, went to the plaintiffs, does not go to mitigate damages, but rather to enhance them, and an instruction from which the jury would infer that such facts go in mitigation of damages is misleading and erroneous.

3. ——: ——: EVIDENCE. The fact that a saloon-keeper, prior to the sales complained of in a civil damage case, had instructed his servants not to sell liquor to the deceased, is inadmissible in evidence as not tending to prove that such sales were not in fact made.

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

The facts are stated in the opinion.

Lamb, Ricketts & Wilson, for plaintiffs in error:

The fact that the deceased may have left some estate which contributes to the support of his family, and the fact that some members of his family have the ability and are capable in whole or in part of supporting themselves, will not reduce but rather increase the amount the plaintiffs should recover, and an instruction by the trial court to the contrary is error. (Sec. 15, ch. 50, Comp. Stats.; *Roose v. Perkins*, 9 Neb., 313; *Hackett v. Smelsley*, 77 Ill., 120; *Schneider v. Hosier*, 21 O. St., 112; *Thill v. Polman*, 41 N. W. Rep. [Ia.], 385.)

G. M. Lambertson, contra, cited: *Kerkow v. Bauer*, 15 Neb., 150; *Warwick v. Rounds*, 17 Neb., 416.

IRVINE, C.

Mary J. Houston, as widow, and the other plaintiffs in error, as minor children of James H. Houston, deceased, brought this action against John Gran, a saloon-keeper, and the sureties upon his bond, charging the sale of liquor by Gran to Houston, causing intoxication, in consequence of which intoxication Houston wandered upon the tracks of a railroad and was killed. There was a verdict and judgment for the plaintiffs in error for $100. Many errors are assigned, of which we shall notice only two.

The court gave the following instruction upon the measure of damages:

"If you should find in favor of the plaintiffs in determining the amount of damages, if any you find the plaintiffs entitled to, you are at liberty to consider the habits, health, and the estate of the husband of the plaintiff prior to his

death, and the profits of his labor, if any, and the condition of his family at such time, as elements in deciding what the amount of the injury or damages may have been from the loss of such support; but in no case of this kind can the amount of damages exceed the value of such support, whatever may be the necessities of such family. If you find for the plaintiffs, and that the plaintiffs have lost the means of support to them by the death of the father, in assessing your damages at the actual loss of support to the plaintiffs, if you find the deceased was a strong, healthy man, you can estimate his expectancy of life upon the Carlisle table, which may have been introduced in evidence before you. This action being brought for loss of means of support which would have been supplied the plaintiffs by the deceased father and husband had he lived, the extent of such loss is to be considered and measured by you by the kind, character, and value of the services of the deceased to plaintiffs in his vocation or business when living; and as to the value of the loss of such means of support to the minor children of the deceased, it will depend in some degree upon the age and ability of the different children to support themselves, bearing in mind that you cannot take into consideration and assess remote, speculative, or exemplary and punitive damages. If you should find from the evidence that any of the children have the ability and are capable of wholly or in part supporting themselves, and did so prior to the death of the father, then as to the amount of such support such child could not recover. If you should find that the deceased left property to the plaintiffs, which wholly or in part goes to their support, then you should take such fact in consideration in determining the amount of damages, if any, the plaintiffs are entitled to."

The last two sentences of this instruction are objectionable. By one of these the jury was told that if any of the children had the ability and were capable of wholly or in part supporting themselves, and did so prior to the death

of the father, then as to the amount of such support such child should not recover. This language was too strong. In ascertaining the damages, to-wit, the loss of support, the fact that any of the children did, as a matter of fact, support themselves, or assist in so doing, was a proper fact for the consideration of the jury as tending to show to what extent damage was caused by the death of the father. But the mere fact that a child was able to support himself, and did so, would not exclude all right to recover on behalf of that child. The right to support, and the probability of future support, as well as the fact of past support, were elements for consideration, and the most that could properly be said was that the fact that a child had habitually supported himself was an element to be considered by the jury in ascertaining the damages from the father's death. By the last sentence of the instruction the jury was told that if they should find that the deceased left property to the plaintiffs, which, wholly or in part, went to their support, then they should take such fact in consideration in determining the amount of damages. The plain inference from this language, framed as it was and in the connection it appeared, was that the fact the father and husband left an estate should mitigate damages. The contrary is true. If a man deserts his family, leaving nothing to their support, and has accumulated no property, those facts constitute evidence tending to show that very slight, if any, damage results to the family from his death. If, on the contrary, a man is of industrious and economical habits, of business sagacity, and has in the past supported his family and accumulated property, the natural presumption is that such habits will continue if his life be prolonged, and that the damage to his family by reason of his untimely death is enhanced by those very facts. The estate left to the family would presumably be not less productive in the hands of the husband and father himself had he lived, and its income would inure to the benefit of the fam-

ily as much had he lived as after his death. While this instruction does not directly state a contrary rule, its clear influence upon the jury must have been to lead them to infer that the contrary rule existed.

By the ninth instruction the jury was told that it was proper for them to consider in determining whether or not the defendant Gran, or his employes, did furnish intoxicating liquors, certain evidence tending to show that Gran had directed his servants not to sell intoxicants to the deceased. It is true this language was qualified by the further instruction that Gran was nevertheless responsible for acts performed by his servants, although contrary to his instructions; but we think the court erred in admitting evidence of these instructions and in directing the jury that this evidence should be considered. We do not think the fact that Gran had directed his servants not to sell Houston intoxicants tends at all towards proving the issue in the case, that is, the fact of such sale. Were exemplary damages allowed the evidence might have been material in mitigation of damages; but under our rule of conferring compensation alone Gran was liable for such compensation for his servants' acts, although done against his instructions, and the giving of those instructions does not tend to disprove the fact of the sale.

REVERSED AND REMANDED.

JAMES F. SHEEHY, APPELLANT, V. HUGH FULTON ET AL., APPELLEES.

FILED JANUARY 3, 1894. No. 5260.

1. **Mechanics' Liens:** VENDORS' LIENS: PRIORITIES. The vendor in an executory contract for the sale of land subjects his estate in the property to a mechanic's lien for improvements

erected thereon by the vendee where his agreement with the vendee is of such character as to require the construction of the building and to constitute the vendee his agent in such construction.

2. **Persons claiming mechanics' liens** are not in such cases restricted by the terms of the written contract of sale, but may, by parol evidence, establish the true terms of the contract.

3. **Statute of Frauds:** MEMORANDUM. WHERE A VERBAL PROMISE is made, upon sufficient consideration, to answer for the debt of another, and subsequently a memorandum is executed sufficient to answer the requirements of the statute of frauds, such promise may be enforced, although no new consideration passes upon the execution of the written memorandum.

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

The opinion contains a statement of the case.

Marquett, Deweese & Hall, for appellant:

The plaintiff is entitled to a prior lien for the balance of his purchase money under and by virtue of the terms of the contract of sale. (*Neil v. McKinney,* 11 O. St., 58; *Zeigler, Baker & Co.'s Appeal,* 69 Pa. St., 471; *Logan v. Taylor,* 20 Ia., 297; *Wilkerson v. Rust,* 57 Ind., 172; *Bohn Mfg. Co. v. Kountze,* 30 Neb., 719; *Henderson v. Connelly,* 123 Ill., 98; *Hickox v. Greenwood,* 94 Ill., 266.)

No attempt is made to reform the contract. The evidence admitted attempting to show there was a verbal agreement that a building should be erected was incompetent. (*Bast v. First Nat. Bank of Ashland,* 101 U. S., 93; *Martin v. Berens,* 67 Pa. St., 459; *Barnhart v. Riddle,* 29 Pa. St., 96; 1 Greenleaf, Evidence, sec. 275; *First Nat. Bank of St. Paul v. Nat. Marine Bank of St. Paul,* 20 Minn., 63.)

F. A. Boehmer and *W. A. Williams,* for appellee Sterling P. Smith *et al.:*

The decree of the court below giving the mechanics

prior liens is correct. (*Bohn Mfg. Co. v. Kountze*, 30 Neb., 719; *Henderson v. Connelly*, 123 Ill., 98; *Hill v. Gill*, 42 N. W. Rep. [Minn.], 294; 2 Jones, Liens, secs. 1255, 1256, and cases cited.)

Talbot & Bryan and *T. S. Allen*, for appellee Pomeroy Coal Company:

The promise of plaintiff to pay for materials was an original promise and not within the statute of frauds. (*Waters v. Shafer*, 25 Neb., 225; *Lindsey v. Heaton*, 27 Neb., 668.)

Stevens, Love, Cochran & Teeters, for other appellees.

IRVINE, C.

Upon September 25, 1890, the plaintiff contracted to sell a lot in the city of Lincoln to the defendant Fulton, $5 of the purchase price being paid in cash, and the remainder, $3,495, to be paid November 1, 1890. The construction of a building upon the lot was begun by Fulton a few days after the execution of this contract. This suit was brought by the plaintiff to foreclose his lien for the purchase money. A number of defendants set up mechanics' liens growing out of the performance of labor and furnishing of material for the building. The decree of the district court established these liens as prior to the plaintiff's lien for the unpaid purchase money. The principal controversy is as to the propriety of the decree in so subordinating the vendor's lien to the mechanics' liens. The mechanics' lienors, to support the decree, rely upon the doctrine of *Bohn Mfg. Co. v. Kountze*, 30 Neb., 719. The plaintiff contends, first, that no agreement charging the owner of the fee appears in the written contract of sale, and that parol evidence was inadmissible to establish such agreement; second, that the evidence admitted was insufficient to show such an agreement.

As to the first contention, it is to be observed that the controversy here is not between the parties to the written contract. The lienors, being strangers to that contract, are not bound by the terms of the writing; but they are at liberty to enforce the real understanding and contract between the parties, the question being not whether there was an agreement between the vendor and vendee capable of enforcement between them, but whether the vendor by his acts had constituted himself a principal in the construction of the building and so charged his estate in the land.

As a preliminary to a consideration of the other branch of the question, that is, the sufficiency of the evidence to bring the case within the rule of *Bohn Mfg. Co. v. Kountze*, we think it is proper to say that in some instances that rule seems to have been misunderstood. An impression seems to have been created that the general effect of *Bohn Mfg. Co. v. Kountze*, 30 Neb., 719, and *Millsap v. Ball*, 30 Neb., 728, was to charge the vendor's estate in every case where by the nature of his contract or otherwise he has knowingly permitted the erection of a building by the vendee upon the land sold. A proper understanding of these cases leads to no such conclusion. The true rule is well stated in the case of *Pickens v. Plattsmouth Investment Co.*, 37 Neb., 272, as follows: "By this it was not held that where the owner of the land sells it and simply takes back a mortgage for the purchase price without in any way becoming a party to a contract for the erection of improvements, that one who furnishes materials or labor upon a contract with the vendee alone can assert thereon a lien superior to that of the said mortgage duly recorded. Quite to the contrary it has been recently held by this court in *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207, where one furnished money to build a house for which he took a mortgage upon the premises whereon the erection was to be made, that the record of such mortgage gave a priority to the rights of material-men and mechanics who began to con-

fer value upon the mortgaged property after the record of the mortgage. To subject a vendor's rights in the subject-matter of the sale to the claim of a mechanic's lienor, it must appear, that, with respect to the value conferred by the labor or material of such lienor, there was a privity of contract through the vendee between the vendor and such lienor. This privity will not be implied from the mere fact that the mechanic's lienor, upon the faith of a contract between himself and such vendee, furnished labor or material. It must be established by the proofs, or as fairly inferable from the facts as any other independent fact or proposition." The real question in this case, then, was whether or not such a privity had been established here between lienor and vendor under the rule as above stated. Upon this point there was evidence tending to show that when the contract of sale was made it was understood between the parties that the building should be erected; that the purchase price of the land was to be paid out of the proceeds of a loan which had been negotiated or which it was understood could be made upon the security of the property, but that the loan could not be consummated until the excavations of the building were made and the foundations were in. It was for these reasons that a nominal payment of $5 was accepted, and that the whole of the remainder of the purchase money was to be paid November 1, it being understood that at that time the building should have advanced far enough to permit the consummation of the loan. There was also evidence tending to show that the vendor endeavored to have the vendee substitute other contractors for those who were performing the work because the latter were proceeding so slowly that a completion of the transaction could not be had within the stipulated time. There was also some evidence tending to show that the vendor exercised some control or direction over the building operations, but this evidence is of an uncertain character and leaves it very doubtful as to whether the vendor intended

more in these matters than to prevent the vendee from encroaching upon other land of the vendor and to advise the vendee in some particulars. Such evidence is, therefore, of very little weight; but the evidence already adverted to, if believed, would lead to the conclusion that the transaction was a joint arrangement between vendor and vendee whereby a building should be erected from the proceeds of a loan obtained by the vendee, and out of the proceeds of the same loan the vendor should receive the purchase money of the lot. When one sells land to another and places that other in possession, in the absence of any restrictive covenants there is always an implied license that the vendee may make improvements on the land. The expression of direct authority to do so, independent of other circumstances, would not charge the vendor's estate; but, accepting the evidence already referred to, there was in this case not merely an implied or expressed permission to construct the building, but a distinct arrangement between the parties that the building should be constructed, and this, so far as the vendor was concerned, was for the purpose of obtaining funds out of which he should be paid for the land. While the case is near the border line, we think these facts were sufficient to sustain the trial court in finding that the vendor had established the vendee as his agent in the building operations sufficiently to charge the vendor's estate with the burden of mechanics' liens arising out of such construction. Indeed, the case in this view would be closely analogous to the case of *Millsap v. Ball, supra.* We conclude, therefore, that the court did not err in admitting parol testimony as to this arrangement, and that its findings are supported by the evidence.

Complaint is made because of the court's entering a personal judgment against the plaintiff on the claim of the Pomeroy Coal Company. Upon this claim there is evidence tending to show that the Pomeroy Coal Company refused to extend credit to the vendee for certain materials

which he desired to purchase for the foundation of the building; that the vendor then went with the vendee to the agent of the coal company and told him to furnish the material as it was going upon his (the vendor's) land, and that "he would protect" the coal company for the material. Subsequently, and after the material was furnished, the vendor signed a written instrument whereby he agreed "to protect Pomeroy Coal Company in case they have to take a lien for stone, lime, and sand sold to H. Fulton." It is claimed that this portion of the agreement was fraudulently inserted after it was signed by the vendor; but we think the evidence justified the trial court in finding that such was not the fact. Taking the plaintiff's evidence upon this point, it would appear that when he signed the agreement it was left incomplete, in order that the correct description of the property might be inserted, and that he signed some distance below the part already written, in order that this might be filled in. In view of the relations of the vendor to the contractors already referred to it is probable that in any view of the case the agreement to pay the Pomeroy Coal Company must be considered an independent and not a collateral promise. Still, viewed as a collateral promise, the memorandum satisfies the statute of frauds. It is said that there was no consideration for the written memorandum. The consideration for the promise was the original sale and delivery of the material; and it is too well established to justify us in referring to authorities that the statute of frauds relates only to the form of evidence, and a writing made after the transaction, if otherwise sufficient, renders such promise enforceable, although no new consideration passes.

JUDGMENT AFFIRMED.

STATE OF NEBRASKA V. JOHN E. HILL ET AL.

FILED JANUARY 3, 1894. No. 6407.

Action on Bond of State Treasurer: VENUE: CONVERSION. Suit was brought in the district court of Douglas county upon the bond of a former state treasurer. Some of the sureties upon the bond resided in Douglas county and were there served with summons, and summonses were issued and served upon the other parties elsewhere. The petition alleged, first, the failure and refusal of the treasurer to account for and pay over to his successor a certain sum of money; second, the loaning to and deposit in the C. Bank, in Lancaster county, of a similar sum; third, the loaning to and deposit in the M. Bank, in Douglas county, of a certain sum; fourth, the loaning to and deposit in the U. S. Bank, in Douglas county, of a still further sum. Judgment was asked for the amount averred not to have been paid over, and averred to have been deposited in the C. Bank. *Held*, (1) that section 174 of the revenue law applies only to proceedings for the purpose of distributing revenues upon their collection to the proper funds, and not to such suits as that at bar; (2) that the proceeding was one upon an official bond or undertaking of a public officer and must be brought in the county where the cause or some part thereof arose; (3) that it was the duty of the treasurer to account for and pay over moneys in his hands at the close of his term of office to his successor in the county where the seat of government is located, and that an action for failing to do so must be brought in that county; (4) that it was the duty of the treasurer to keep the moneys of the state in the treasury at the seat of government, except as he should disburse them or otherwise dispose of them as provided by law; that a conversion took place upon his removal of moneys from the treasury with the intention of making an unlawful use of them by depositing them in the bank, and that the cause of action for such conversion arose upon his removal of the moneys from the treasury, and not upon their deposit.

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

George H. Hastings, Attorney General, and *E. Wakeley,* for the state:

By the amended petition four breaches are alleged: First, the failure to pay over the sum of $236,361.60; second, the deposit in and loan to the Capital National Bank of Lincoln, in Lancaster county, of $236,361.60 and over; third, the deposit in and loan to the Merchants National Bank, in Douglas county, of $80,510 and over; fourth, the deposit in and loan to the United States National Bank, in Douglas county, of $159,748 and over. Therefore the cause of action did not arise in any particular county. The facts alleged constituted a conversion for which the state can recover, and the action "must be brought in the county in which the defendants, or some of the defendants reside, or may be summoned," and need not be brought in the county where the officer is elected and performs his official duty. (*McNee v. Sewell*, 14 Neb., 532; *State v. Keim*, 8 Neb., 63; *First Nat. Bank v. Gandy*, 11 Neb., 431; *Cedar County v. Jenal*, 14 Neb., 254; *Seward County v. Cattle*, 14 Neb., 144; *Bank v. Lanier*, 11 Wall. [U. S.], 369, 375; *Commercial Bank of Albany v. Hughes*, 17 Wend. [N. Y.], 94, 100; *Southern Loan Co. v. Morris*, 2 Barr [Pa.], 175; *Swartwout v. Mechanics Bank, New York*, 5 Denio [N. Y.], 555; Morse, Banking, sec. 289.)

J. H. Broady, for defendant in error John E. Hill:

Suit being on the official bond of the state treasurer, is covered by section 54 of the Code, and cannot be brought in Douglas county, unless the cause of action arose there. (Sec. 54, Code; *Clay v. Hoysradt*, 8 Kan., 80, 81.)

The petition does not show that any part of the cause of action arose in Douglas county, but on the contrary shows that all thereof arose in Lancaster county. The state treasurer must reside and keep his office at the seat of government, and if the taking of the public moneys from his office for deposit in banks was a conversion, the cause arose when, at his office at the capital, he removed it with intent to put it in a bank. Even if the depositing of public money in

banks be held a violation of official duty, there can be no cause of action against the treasurer for conversion, unless it appears that he failed to put it back into the treasury. (Constitution, sec. 1, art. 5; Con. Stats., sec. 3091; *State v. Baetz*, 44 Wis., 624; *Perley v. Muskegon County*, 32 Mich., 132.)

Utilizing banks in keeping the money of the state violated no law, nor duty of the treasurer, but was the proper thing to do, because it was the safest way to keep it, and was justified on the highest grounds of public policy. (*State v. McFetridge*, 54 N. W. Rep. [Wis.], 1.)

T. M. Marquett, John H. Ames, Griggs, Rinaker & Bibb, and *W. Q. Bell*, for bondsmen, filed printed arguments upon the same propositions discussed in brief of defendant Hill.

IRVINE, C.

John E. Hill was the treasurer of the state of Nebraska for the term ending in January, 1893. The other defendants herein were alleged in the petition to be the sureties upon his bond, which was conditioned that he should well and truly in all things perform the duties of his office during the continuance of his term as provided by law. This action was brought upon the bond in the district court of Douglas county, where some of the sureties resided, and the petition charges as breaches of the bond, substantially, as follows: That at the time of entering upon the duties of his office Hill had in his possession $1,524,554.74, received and collected as the moneys of the state of Nebraska, held as such, and belonging to the state, and that thereafter during his term Hill received moneys of the state, and that the said sums amounted to $4,200,834.50, making in all $5,725,389.24; that out of said moneys he paid and disbursed divers sums for lawful purposes, but that at the end of his term, when he surrendered his office to his successor, there still remained in his possession and control

$1,144,556.42, which it was his duty to pay over and deliver to his successor; that he failed and refused to pay over said moneys, except that, as plaintiff is informed, he did pay over some small sums of money, the amount of which is unknown to plaintiff, and delivered to his successor sundry certificates of deposit in certain banks or choses in action which he in some manner induced his successor to accept in place of money, amounting in the aggregate to the sum last mentioned; that Hill's successor has since received, by means of such certificates or choses in action, certain sums, the amount of which is unknown to the plaintiff, but that Hill failed and refused to pay over, disburse, or account for the sum of $236,364.60 and more, whereby the state has sustained damages in the sum last mentioned. The defendants residing in Douglas county were served with summons there, and the other defendants were served in the counties of their respective residences. The defendants not residing in Douglas county, by several different instruments, entered special appearances and objected to the jurisdiction of the court. Subsequently, by leave of court, an amended petition was filed, which, so far as it alleges the breach complained of in the original petition, is substantially similar thereto, except that it alleges that the sum which Hill failed and refused to pay was $236,361.60. The amended petition alleges a further breach of the bond by charging that Hill, during his term of office, deposited in and loaned to the Capital National Bank of Lincoln, located and doing business in Lancaster county, $236,361.60, thereby converting the said moneys to his own use; and for a further breach, that he also deposited in and loaned to the Merchants National Bank of Omaha, located and doing business in Douglas county, $80,510 and over; and for a still further breach, that he deposited in and loaned to the United States National Bank of Omaha, located in and doing business in Douglas county, $159,748 and over. The amended petition closes with an allegation that by

reason of the premises the plaintiff has sustained damages in the sum of $236,364.60, and prays judgment for that amount. The defendants, non-residents of Douglas county, renewed their special appearance and objections to the jurisdiction of the court. While the objections of these defendants are set forth in different language, they are all to the effect that the petition shows upon its face that the action is one within section 54 of the Code of Civil Procedure, and that the transactions complained of occurred in Lancaster county and not in Douglas. The district court sustained these objections and dismissed the action for want of jurisdiction.

The state prosecuted error, assigning numerous errors, all of which, however, present the single question as to whether or not the district court erred in holding that it had no jurisdiction of the action.

The statutes which it is claimed relate to the subject are sections 54 and 60 of the Code of Civil Procedure, and section 174 of the revenue act. Sections 54 and 60 are in title 4 of the Code relating to counties in which actions are to be brought. By section 54 it is provided: "Actions for the following causes must be brought in the county where the cause or some part thereof arose. * * * Second—An action against a public officer, for an act done by him in virtue or under color of his office, or for a neglect of his official duty. Third—An action on the official bond or undertaking of a public officer." Sections 51 to 59, inclusive, all relate to the places where different classes of actions therein specified are to be brought. Section 60 provides: "Every other action must be brought in the county in which the defendant, or some of the defendants, resides, or may be summoned." The first portion of section 174 of the revenue act is as follows: "When suit is instituted in behalf of the state, it may be in any court of record in this state having jurisdiction of the amount; and process may be directed to any county in the state."

Which of these statutes applies to the case at bar? It is urged by plaintiff in error that the case is to be governed by section 174 of the revenue act, as being a special provision relating to this class of actions. That section must be taken with its context. The title of the act is, "An act to provide a system of revenue." The act, in its different parts, relates to the listing and assessment of property for taxation; the levying and collecting of taxes, including the seizure and sale of property for taxes; the distribution of taxes, when collected, to the proper funds and to the proper custodians. The custody of such funds, their disbursement, and the accounting therefor by officers charged with their custody and disbursement, are subjects neither within the title nor the provisions of the act, but are provided for in other statutes. The sections immediately preceding section 174 provide for the settlement by treasurers and other collectors of taxes with the custodians of the funds for the supply of which the taxes were levied and collected, and for the payment of taxes, when collected, to such custodians. Section 173 provides for a suit by the auditor against county treasurers for failure to make settlements on account of taxes collected for the state. Then follows the provision quoted from section 174. The remainder of section 174 provides for summary procedure against officers or persons "whose duty it is to collect, receive, settle for, or pay over any revenues of the state." Section 175 extends the remedy by suit to cities, towns, villages, etc., against treasurers or other officers collecting or receiving funds for their use. We think it is manifest, from the purpose of the whole act and the subject-matter of its immediate context, that section 174 relates only to suits for the purpose of getting the revenue out of the hands of the collectors into the treasury and not to actions based upon the misappropriation of funds after they have reached the treasury. An additional reason for so construing the section is that to extend it further would inject into the act

a subject not within its title and expose it to the constitutional objections discussed in *Holmberg v. Hauck*, 16 Neb., 337; *Foxworthy v. City of Hastings*, 23 Neb., 772; *Touzalin v. City of Omaha*, 25 Neb., 817; *Trumble v. Trumble*, 37 Neb., 340.

As between section 54 and section 60, it would seem clear that the action was one of those designated in section 54, and that, therefore, that section would govern rather than section 60, which is simply a general provision meant to apply to such cases as should not fall within any of the preceding special provisions. But it is said that, in so far as the action is based upon the failure of Hill to account for and pay to his successor, the breach is purely negative in its character, and cannot be said to be at all localized; that the cause of action did not, therefore, arise at any particular place, and that the case must fall within the general provision of section 60. In support of this proposition it is argued that a petition merely alleging the failure to account and pay over in Lancaster county would be demurrable, because it would not appear that there was not an accounting and payment elsewhere. This may be true. An accounting and payment elsewhere than at the capital might protect the state and discharge the treasurer from liability, but we entertain no doubt that it was his duty to account and pay over at the capital, and that the state could insist upon his doing so there and not elsewhere. By section 1, article 5, of the constitution it is provided that the treasurer shall reside at the seat of government during his term of office and keep the proper records, books, and papers there. It is only at the capital, therefore, that the books and accounts could rightfully be for the purpose of an accounting. This constitutional provision is re-enforced by article 4 of chapter 83, Compiled Statutes, wherein the treasurer is required to reside, and keep his office at the seat of government, to account for and pay over all moneys received by him as such treasurer to

his successor in office, and deliver all books, vouchers, and effects of office to him. This could only be done where such office, books, and vouchers are kept. The breach charged, therefore, was the failure to do an act which the law required him to do at a particular place, and the case falls squarely within the rule established in *McNee v. Sewell*, 14 Neb., 532. In that case the action was upon the bond of the sheriff of Thayer county, who had neglected to return executions issued out of the district court of Lancaster county. The suit was held to have been rightfully brought in Lancaster county, because the judgments were recovered and executions there issued, and the executions should have been there returned. In other words, the breach of the bond was the failure to do what the law required to be done in Lancaster county, precisely the same kind of a breach as is here averred, by reason of the failure to pay over the money.

The case, then, falls within section 54 of the Code of Civil Procedure, and the question thus arises, did the cause of action, or any part thereof, arise in Douglas county? For the reasons just stated the cause of action, so far as it is based upon the failure of Hill to account for and pay over to his successor in office the moneys coming into his hands as treasurer, must be determined to have arisen in Lancaster county, where the seat of government is fixed. No other breach of the bond is alleged in the original petition. The amended petition added what is charged as three additional breaches: First, the deposit in the Capital National Bank of $236,361.60 and over. It is clear that this does not state a cause of action, any part of which arose in Douglas county. Second, the deposit in the Merchants National Bank of Omaha of $80,510 and over; and third, the deposit in the United States National Bank of Omaha of $159,748 and over. If jurisdiction is vested in the district court of Douglas county it must be because of the averments of deposits in the two Omaha banks, and two

questions are presented upon this aspect of the case: (1) Do the averments of the Omaha deposits set forth facts constituting a cause of action upon the bond? (2) Do these averments show that part of the cause of action arose in Douglas county?

Upon examination of the original petition it is found that it averred a failure to pay over the amount of $236,364.60, and judgment was asked for that amount. In the amended petition the amount stated is $236,361.60, which is the same amount as the amended petition avers was deposited in the Capital National Bank of Lincoln. The prayer for judgment is still for $236,364.60. It is also averred that Hill turned over to his successor and induced his successor to accept sundry certificates of deposit, upon which were realized certain sums of money unknown to plaintiff, but of the whole amount for which Hill was accountable, $236,361.60 and more, remains unaccounted for. While, perhaps, under the Code the common law rule that pleadings are to be taken most strongly against the pleader may not retain all its original force, still pleadings must be construed reasonably; and it is not to be inferred that a pleader will omit averments manifestly to his advantage, or insert those manifestly to his disadvantage. It is a reasonable and almost necessary inference from the amended petition that the moneys deposited in the Omaha banks were eventually received by the state, and that the amount for which Hill failed to account was the amount deposited in the Capital National Bank. The state could suffer no damage and could recover nothing upon the bond by reason of the Omaha deposits if, before action brought, Hill had paid over to the state the money so deposited. The object of requiring bonds from officers is to have such bonds as security for damages sustained, and no cause of action arises upon such a bond because of a technical breach unaccompanied by damage. (*Commonwealth v. Reed*, 3 Bush [Ky.], 516; *Jones v. Biggs*, 1 Jones' Law [N. Car.], 364;

State v. Baetz, 44 Wis., 624.) Possibly a petition simply alleging the deposit without averring non-payment might state a cause of action; but should it aver in terms, as it does here by plain inference, that no loss whatever had resulted, no cause of action would be stated.

Finally, assuming that these averments set out actionable breaches of the bond, did the cause of action, or any part thereof, arise in Douglas county? From the statutes already quoted and from the decisions of this court (*State v. Keim*, 8 Neb., 63; *First Nat. Bank of South Bend v. Gandy*, 11 Neb., 431; *Cedar County v. Jenal*, 14 Neb., 254; *Wayne County v. Bressler*, 32 Neb., 818), it is clear that it is the duty of both state and county treasurers to keep the money coming into their official custody in specie, except where by recent statutes they are permitted to invest or deposit it, and then such investment or deposit must be made only in the manner provided by law. Hill's duty was to keep the money in the treasury at Lincoln. He had no right to invest it in any manner, or to deposit it. Assuming, then, that he took the money from the treasury and deposited it in the Omaha banks and the state had not received it back, when did the conversion take place? As stated by Alderson, B., in *Fouldes v. Willoughby*, 8 M. & W. [Eng.], 540, "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion," and, as said by Lord Abinger in the same case, "In order to constitute a conversion it is necessary either that the party taking the goods should intend some use to be made of them by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed, to the prejudice of the rightful owner," and, as stated in *McPartland v. Read*, 11 Allen [Mass.], 231, "Every tortious taking with intent to apply chattels to the use of the taker or some other person than the owner is a conversion." When Hill removed the money from the treasurer's office with the intent of depositing it contrary to law, he was guilty of a

conversion and a cause of action accrued. Suppose, instead of depositing the money in Omaha, he had deposited it in New York or Chicago, could it be said that it was only upon the deposit of the money that a cause of action accrued, and that no suit would lie in this state? The wrong was done and completed, so far as the state was concerned, when the money was removed from its treasury at Lincoln. It is said there is nothing in the petition to show that the money had ever reached the treasury, but that it was probably money collected in Douglas county and turned over to the treasurer there. The answer to this is that there is nothing in the petition from which it can be inferred that the latter was the fact. It was the duty of the Douglas county treasurer to make a settlement and pay over the money in Lincoln. It is to be presumed that he did so there.

It is argued that section 124 of the Criminal Code makes it a crime to lend the state funds to any corporation or individual, and that the deposit of money in banks is lending money within the prohibition of this section. But it does not follow, because the depositing of money may constitute or be evidence of a crime, that the civil cause of action arose only upon that deposit. The same section makes it a crime to convert the money to his own use. As we have shown, the conversion took place in Lancaster county, and the civil cause of action arose upon the commission of the first offense and did not in anywise depend upon the commission of the second.

The case of *Clay v. Hoysradt,* 8 Kan., 74, is relied upon by the plaintiff in error. In that case suit was brought in Douglas county to enjoin the enforcement of certain judgments obtained before a justice of the peace in Leavenworth county in favor of Hoysradt against Clay, and which judgments, it was alleged, had been satisfied. It was held that the justice of the peace and constable being officers of Leavenworth county, and the illegal acts complained of

committed there, the case fell within the section of the Kansas Code, identical in language with section 54 of our Code, and that the cause of action arose in Leavenworth county, notwithstanding the fact that Hoysradt himself lived in Douglas county and was there served with summons. We cannot see how this case militates against the view we have taken. On the contrary, if it has any bearing upon this case, it rather tends to confirm our views. So, too, the case of *Fay v. Edmiston*, 28 Kan., 108, cannot be regarded as authority, because it is directly in conflict with the case of *McNee v. Sewell* already cited. We think the judgment of the district court was right and it should be

AFFIRMED.

MAXWELL, C. J., dissenting.

This is an action on behalf of the state of Nebraska to recover from the defendant, a former state treasurer, and his sureties, the sum of $280,510. The action was brought in Douglas county, and each of the defendants objected to the jurisdiction of the court of that county; that the action was not brought in the proper county. Immediately after said objections were filed the state filed an amended petition, wherein it alleges: "Of the said moneys so received and held by the said John E. Hill as such state treasurer and belonging to the state of Nebraska, he, the said Hill, during his said last term of office, and after the execution and delivery of the said bond, unlawfully, and contrary to his duty as such state treasurer, deposited in and loaned to the Capital National Bank of Lincoln, Nebraska, located and doing business in the county of Lancaster, in the state of Nebraska, the aggregate sum of $236,361.60 and over; and in the United States National Bank of Omaha, Nebraska, located and doing business in the county of Douglas, in the state of Nebraska, the aggregate sum of $159,748 and over; and in the Merchants National Bank of Omaha, Nebraska,

located and doing business in the county of Douglas, in the state of Nebraska, the aggregate sum of $80,510 and over, thereby converting said moneys to his own use. The said moneys were so deposited and loaned from time to time in sums less than the said aggregate sums, but the plaintiff is not informed, and has not the means of ascertaining, the precise dates and amounts of the said several sums making up the said aggregate, and cannot more particularly set forth the same." A notice was duly served on each of the defendants of said amendment. The objections to the jurisdiction were sustained by the court and the action dismissed for want of jurisdiction.

The sole question presented is the right to bring the action in Douglas county. Section 54 of the Code provides: "Actions for the following causes must be brought in the county where the cause, or some part thereof, arose: First —An action for the recovery of a fine, forfeiture, or penalty imposed by a statute; except that, when it is imposed for an offense committed on a river, or other stream of water, or road which is the boundary of two or more counties, the action may be brought in any county bordering on such river, water-course, or road, and opposite to the place where the offense was committed. Second—An action against a public officer, for an act done by him in virtue or under color of his office, or for a neglect of his official duty. Third—An action on the official bond or undertaking of a public officer." Now, where did the cause of action arise? If the allegations of the petition are true, the defendant Hill took the money of the state and, in the face of a direct prohibition in the statute, converted the same to his own use by depositing it in two banks in Omaha. Section 124 of the Criminal Code declares: "If any officer or other person charged with the collection, receipt, safe keeping, transfer, or disbursement of the public money, or any part thereof, belonging to the state or to any county, or precinct, organized city or village, or school district in the state, shall con-

vert to his own use, or to the use of any other person or persons, body-corporate, association or party whatever, in any way whatever, or shall use by way of investment in any kind of security, stock, loan, property, land, or merchandise, or in any other manner or form whatever, or shall loan, with or without interest, to any company, corporation, association, or individual, any portion of the public money, or any other funds, property, bonds, securities, assets, or effects of any kind, received, controlled, or held by him for safe keeping, transfer, or disbursement, or in any other way or manner, or for any other purpose; or, if any person shall advise, aid, or in any manner participate in such act, every such act shall be deemed and held in law to be an embezzlement of so much of the said moneys or other property, as aforesaid, as shall be thus converted, used, invested, loaned, or paid out as aforesaid, which is hereby declared to be a high crime, and such officer or person or persons shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and also pay a fine equal to double the amount of money or other property so embezzled as aforesaid, which fine shall operate as a judgment at law on all of the estate of the party so convicted and sentenced, and shall be enforced to collection by execution or other process, for the use only of the party or parties whose money or other funds, property, bonds, or securities, assets, or effects of any kind as aforesaid, has been so embezzled." We were told on the argument by the attorneys for the defendants that this section was practically nullified and that no conviction had ever taken place on it. This may be true, but still it is the law of this state, as much so as that against larceny, robbery, or murder, and it is not in the power of this court to nullify it.

The above section is substantially the act of the Ohio legislature, approved April 12, 1858. (S. & C., 1610.)

This act was passed for the express purpose of prohibiting the loaning of the public funds. The experience of other states has been that the loaning of such funds tends to foster corruption in its worst forms by placing the surplus funds of the state in the hands of a few persons to be used for their personal benefit. These persons stand in with the public official, whoever he may be, and manage to keep on hand a much larger surplus than necessary, which is used for private gain. Prior to 1835 the surplus funds of the United States were kept in banks. The effect was found to be favoritism and corruption, which had a demoralizing effect upon not only party organization, but upon free government itself. The president in that year ordered the public funds withdrawn from the depositories and kept in the treasury. From that time till now the surplus funds of the United States, except in certain special cases, as where depositories are designated for certain purposes, are kept in the hands of the treasurer. It is true that a sub-treasury act was afterwards passed for the greater security of the public funds, and that they are now principally kept in the sub-treasury or some of its branches. Now, suppose the United States treasurer should loan the funds on his personal account and receive the interest thereon. He would be clearly guilty of converting the public funds to his own use. So far as I am aware, no attempt of that kind has ever been made. The statute of Nebraska places an absolute prohibition upon the loaning of public funds or depositing the same in a bank. Stronger language could not be used. The offense is declared to be embezzlement, and the punishment is fixed at not less than one nor more than twenty-one years' imprisonment in the penitentiary. But it is said that the treasurer is guilty of conversion by carrying the funds out of Lancaster county, and, therefore, that county is the only one where the action can be brought. The answer is, the prohibition of the statute is not against carrying the funds into another

county, but in loaning the same to one or more banks. The overt act, the loaning, took place in Douglas county, and there alone can a prosecution be had, and no prosecution for that offense could be instituted and maintained in Lancaster county.

In 1879 the legislature passed an act "to provide for the safe keeping of the moneys belonging to the state," the first three sections being as follows:

"Section 1. Whenever there shall have accumulated in the hands of the state treasurer moneys of the state to an amount in excess of the sum of $100,000, the state treasurer shall, in writing, notify the governor and auditor of the state of that fact, and thereupon, within three days after the service of such notice, the governor, auditor, and treasurer shall meet and determine whether such excess is necessary to be retained in the treasury for the purpose of meeting the current demands thereon; and the record of said notification, and the proceedings of said meeting, and of its finding, shall be made and signed by each of such officers, and preserved in the office of the auditor, who shall act as the secretary of such meeting.

"Sec. 2. In case said officers shall find that said excess is not necessary to meet the current demands upon the treasury, the same shall be immediately invested in United States four per cent bonds, by the treasurer, who shall deposit the same in some safe deposit, to be designated by the governor, auditor, and treasurer, in writing, signed by them and made of record in the auditor's office, and there kept until it shall become necessary to convert the same into money, which necessity shall be determined and the record thereof kept in like manner as hereinbefore provided, and a statement of any such investment or sale under oath shall be published within ten days after the same is made, in some newspaper published at the capital, to be designated in writing by the governor. There shall also be published in the same paper a monthly statement, under oath, of the amount

of cash balance in the state treasury and of the amount invested as aforesaid.

"Sec. 3. Any officer charged with the duties hereinbefore mentioned who shall make or publish any false statement, or swear falsely in respect to any matter or thing, in respect to which a sworn statement is herein required, shall be deemed guilty of perjury, and shall be prosecuted and punished accordingly." (Laws 1879, 152.)

This act was amended in 1891, the first two sections being as follows:

"Section 1. The state treasurer shall deposit, and at all times keep in deposit for safe keeping, in the state or national banks, or some of them doing business in the state, and of approved standing and responsibility, the amounts of money in his hands belonging to the several current funds in the state treasury, and any such bank may apply for the privilege of keeping on deposit such funds or some part thereof; all such deposits shall be subject to payment when demanded by the state treasurer on his check and by all banks receiving and holding such deposits as aforesaid, shall be required to pay, and shall pay, to the state for the privilege of holding any such deposit not less than three per cent per annum upon the amounts so deposited, as hereinafter provided, and subject also to such regulations as are imposed by law and the rule adopted by the state treasurer for receiving and holding such deposits.

"Sec. 2. The amount to be paid by any and all banks under the provisions of this act for the privilege of keeping public funds on deposit shall be computed on the average daily balances of the public moneys kept on deposit therewith, and shall be paid and credited to the state quarterly on the first days of January, April, July, and October of each and every year, and the treasurer shall require every such depositary to keep separate accounts of such several funds of the state as may be deposited, showing the name of each fund to which the same belongs and the amounts

and sums paid to the state for the privilege of keeping the same on deposit as aforesaid, and to each of said funds respectively shall be credited directly to the account of the fund or funds so held on deposit, in proportion to the amount of such funds so held."

There is also a provision for designating the bank where deposits are to be made. The act did not take effect until the expiration of the term of the then treasurers.

This act, therefore, qualifies section 124 of the Criminal Code, and provides for the safe keeping of the public money, and is no doubt a valid law. If the treasurer, therefore, without such directions, deposits money in a bank, the statute declares him guilty of embezzlement, and it is a diversion of the money to his own use. This question was before the court in *First Nat. Bank of South Bend v. Gandy*, 11 Neb., 431, and it was held that public money thus deposited was subject to garnishment for the private debt of the officer.

In *State v. Keim*, 8 Neb., 67, a former state treasurer had deposited $2,000 in a bank at Falls City; and the bank failed, and an attempt was made to saddle the loss on the state. The court, by COBB, J., held that the treasurer and his sureties must make the loss good, as the depositing was in violation of law. It is said: "The depositing of the $2,000 in the bank of the defendants was a loan in its legal effect. (*Commercial Bank of Albany v. Hughes*, 17 Wend. [N. Y.], 100; *Southern Loan Co. v. Morris*, 2 Barr [Pa.], 175.) The state could not have made this loan in point of fact without the intervention of some officer or agent. No officer or agent of the state could make such loan or deposit without a violation of the law above referred to, which violation would render such officer or agent both personally and officially liable to the state for the money so loaned or deposited, while no such unauthorized act would bind the state." The same rule was adhered to in *Cedar County v. Jenal*, 14 Neb., 254,

and is a general rule. (*Seward County v. Cattle*, 14 Neb., 144; *Commercial Bank of Albany v. Hughes*, 17 Wend. [N. Y.], 94; *Swartwout v. Merchants Bank*, 5 Denio [N. Y.], 555; *Perley v. County of Muskegon*, 32 Mich., 132.)

Now, where did the cause of action arise? In my view, where the breach of the condition occurred. We are referred to the case of *Clay v. Hoysradt*, 8 Kan., 58–74, as establishing a different rule. In that case Hoysradt recovered three judgments against George P. Clay before a justice of the peace of Leavenworth county, Kansas. These were receipted for in full by Hoysradt upon the payment of but little more than one-half of the face of the judgments. After giving such receipt, Hoysradt, who seems to have been a resident of Douglas county, Kansas, caused an execution to be issued upon the judgments for the residue thereof and given to a constable of Leavenworth county, who levied upon property of Clay in that county. The action was brought against Hoysradt in Douglas county, and the justice by whom the judgments were rendered and constable were joined with him, and the court held properly, I think, that the action must be brought in the county where the acts were performed.

In *Fay v. Edmiston*, 28 Kan., 109, this question again came before the supreme court of that state. In that case Judge Valentine says: "Where the action is against the officer and his sureties upon his official bond, we should think that the action might properly be commenced in the county where the cause of action arose, that is, in the county where the breach of the bond was committed, and that the court from which the writ was issued would not have the sole and exclusive jurisdiction, even if it had jurisdiction at all." The same rule was applied in this court in the case of *McNee v. Sewell*, 14 Neb., 532. In that case McNee was sheriff of Thayer county and executions were issued on certain judgments against one Gray in the district

court of Lancaster county and sent to McNee as sheriff of Thayer county, who neglected to execute or return the same. Afterwards, proceedings in amercement were instituted against him in Lancaster county, and the court of that county found that he was liable and amerced him in the amount of each of the said executions; and this court held that the action was properly brought in Lancaster county, and that the sureties were liable on the judgment. The leading case in regard to local and transitory actions is *Mostyn v. Fabrigas*, 1 Cowp. [Eng.], 161, 1 Smith, Leading Cas. [6th Am. ed.], part 2, 934, where there is a very clear statement of the law in regard to actions that are local and transitory; and a fair deduction from the cases therein referred to shows that officers may be sued in the county where the alleged wrongful act was committed, unless the statute expressly requires it to be brought elsewhere. Stephen, in his work on Pleading, says that at common law the plaintiff "may lay the venue in the action in any county, and upon issue joined the venire issues into the county where the venue in the action is laid," but the "defendants were enabled to protect themselves from any inconvenience which they may apprehend" by showing that the cause of action arose wholly in the county to which it was proposed to change the venue. If, however, the plaintiff would undertake at the trial to give ample evidence that a part of the cause of action arose in the county where the venue was laid the venue could not be changed. (Steph., Pl. [4th Am. ed.], 290.) At common law, "actions against constables, headboroughs, church-wardens, and persons aiding and assisting them, are to be laid within the county where the injury complained of has been committed." (3 Phillips, Ev. [4th Am. ed.], 727*.) At common law, therefore, the action was to be brought where the cause of action arose, and that is the case under our statute. Now, where did the cause of action arise in this case? If the allegations of the petition are true, the defendant

Hill, in violation of law, deposited in Omaha banks a very large amount of money belonging to the state. As declared by statute and the decisions of this court he thereby converted it to his own use. This was done in Douglas county and not in Lancaster county, and it is very clear that the district court of Lancaster county could have no jurisdiction of that embezzlement. The case, therefore, is clearly within the provisions of section 54 of the Code, and the action being rightly brought upon the official bond, all causes of action upon such bond may be included in the petition, as the case falls within the familiar rule that where jurisdiction is entertained for one purpose the court will entertain jurisdiction and render complete relief. (Story, Eq. Juris., sec. 64*k*, and cases cited.)

The title of the revenue law of 1879 is, "An act to provide a system of revenue." The third definition of the word given by Webster is "The annual produce of taxes, excise, customs, duties, rents, &c., which a nation or state collects and receives into the treasury for public use." The money in question is that of the state levied and collected from the taxpayers, but which the treasurer has wrongfully appropriated to his own use. In other words, it is a part of the revenue of the state, placed where the treasurer is reaping a private benefit from its use. As I understand the law, all matters which properly relate to the revenue of the state may be included in the act. If that is not so, then there is no power for any county, city, municipality, school district, or other subdivision of the state to sue for the wrongful conversion and misappropriation of its funds, because the prohibition applies to each of them equally with the state. But no one will contend for such a construction as that.

Section 174 provides: "When suit is instituted in behalf of the state, it may be in any court of record in this state having jurisdiction of the amount; and process may be directed to any county in the state. If any proceeding

against any officer or person whose duty it is to collect, receive, settle for, or pay over any of the revenues of the state, whether the proceeding be by suit on the bond of such officer or person, or otherwise, the court in which such proceeding is pending shall have power, in a summary way, to compel such officer or person to exhibit on oath a full and fair statement of all moneys by him collected or received, or which ought to be settled for or paid over, and to disclose all such matters and things as may be necessary to a full understanding of the case, and the court may, upon hearing, give judgment for such sum or sums of money as such officer or person is liable in law to pay. And if, in a suit upon the bond of any such officer or person, he or his sureties, or any of them, shall not for any reason be liable upon the bond, the court may, nevertheless, give judgment against such officer and such of his sureties as are liable, for the amount he or they may be liable to pay, without regard to the form of the actions or pleadings."

Section 175 provides that cities, towns, villages, or corporate authorities, or persons aggrieved, may prosecute suit against any treasurer or other officer collecting or receiving funds, for their use, by suit upon the bond of the treasurer, in any court of competent jurisdiction, whether the bond has been put in suit at the instance of the auditor or not. Cities, towns, villages, and other corporate authorities or persons, shall have the same rights in any suits or proceedings in their behalf as is provided in case of suits by or in behalf of the state.

These are special provisions which control general provisions. Under these provisions the state is expressly authorized to sue the treasurer in any county where service can be had. Would it not be a strange anomaly that a city, village, or other municipality—in other words, a small part of the people in their corporate capacity—may sue in any county where service can be obtained, but the state,

the whole people in their corporate capacity, are restricted to one county? I do not so understand the law and cannot give my consent to so narrow a construction of the statute. If the facts stated in the amended petition are true, and for the purpose of the motion they are presumed to be so, it is very clear to my mind that the district court of Douglas county has jurisdiction, and that the judgment of the court below should be reversed and the cause remanded for trial.

CHARLES GRAFF, APPELLANT, V. CHRISTIAN ACKERMAN, COUNTY TREASURER, APPELLEE.

FILED JANUARY 4, 1894. No. 6555.

1. **Taxation of Land Purchased from Government Before Issuance of Patent.** When land has been fully earned or paid for, so that the clerical act of issuing the patent only is required in order to invest the purchaser or donee with the full legal title thereto, the jurisdiction of the state attaches, and it is taxable like other property; but where the conditions of the purchase or donation have not been performed, and the general government continues to have such a beneficial interest therein as will justify it in withholding a patent, it is not taxable by the agencies of the state.
2. The case of *Edgington v. Cook*, 32 Neb., 551, overruled.

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

The opinion contains a statement of the case.

George D. Meiklejohn and *George G. Bowman*, for appellant:

The land in controversy is not subject to taxation by the state while the legal title thereto is in the United States

and held to secure unpaid purchase money not yet due. (*Van Brocklin v. Tennessee*, 117 U. S., 151; *Wisconsin C. R. Co. v. Price County*, 133 U. S., 496; *Kansas P. R. Co. v. Prescott*, 16 Wall. [U. S.], 603; *Union P. R. Co., v. McShane*, 22 Wall. [U. S.], 444; *White v. Burlington & M. R. R. Co.*, 5 Neb., 393; *Donovan v. Kloke*, 6 Neb., 124.)

George H. Hastings, Attorney General, and *P. M. Moodie, contra*, cited: *Edgington v. Cook*, 32 Neb., 551.

POST, J.

This was an action by the appellant in the district court of Cuming county against the appellee as county treasurer to restrain the sale by the latter of the southwest quarter of section 17, town 24, range 7 east, in said county, for taxes assessed in the years 1892 and 1893. A demurrer was sustained to the petition, and judgment entered dismissing the action, whereupon an appeal was taken by the plaintiff to this court.

It appears from the petition that the property above described is a part of the territory recently included within the Omaha Indian reservation; that in pursuance of an act of congress approved August 7, 1882, a part of said reservation, including the tract above described, was surveyed, appraised, and offered for sale to actual settlers on the following terms, to-wit: one-third of the appraised price one year from the date of entry, one-third in two years thereafter, and one-third in three years thereafter, with interest at the rate of five per cent per annum. By said act it is provided that "in case of default in either of said payments, the person thus defaulting for a period of sixty days shall forfeit absolutely his right to the tract which he has purchased and any payment or payments he may have made." It is further provided that "when purchasers shall have complied with the provisions of this act as to

payment, improvement, etc., proof thereof shall be received by the local land office at Neligh and patents issued as in case of public lands offered under the homestead and pre-emption acts." In the month of June, 1884, the plaintiff settled upon the premises described and made valuable and lasting improvements thereon; and in the month of July of said year, having fully complied with the conditions imposed by said act, he purchased said property from the United States on the terms above named, and has since said last named date continued to reside on and cultivate the same. In the years 1885, 1886, 1888, and 1890, congress, by supplemental acts, extended the time for the payment of the purchase price of said land, so that the first payment therefor will become due on the 1st day of December, 1894, and the balance in equal installments one and two years thereafter. By each of said supplemental acts the interest on the principal sum was required to be paid annually, and the plaintiff has paid in full all interest chargeable to him under the provisions of the several acts; but the principal sum is not due, and is wholly unpaid.

It is obvious from the foregoing statement that the title to the property above described was, at the time of the levy of the taxes in controversy, in the United States, and that the plaintiff has at most an equitable interest therein. It is true that the payment in full of the purchase price will invest him with the entire equitable title to the premises; but at present he is in effect a tenant in possession under a contract of purchase in which time is made the essence of the contract. His title, whether equitable or legal, depends upon the payment for the land, and until the performance of that condition the title remains in the United States. The settled rule in the state and federal courts is that where land has been fully earned or paid for, so that the clerical act of issuing the patent only is required in order to invest the purchaser or donee with the full legal title thereto, the jurisdiction of the state attaches and it is

taxable like other property; but where the conditions of the donation or purchase have not been complied with, and the general government continues to have such a beneficial interest therein as will justify it in withholding a patent, it is not taxable by the state. (See *Union P. R. Co. v. McShane*, 22 Wall. [U. S.], 444; *Van Brocklin v. Tennessee*, 117 U. S., 151; *Wisconsin C. R. Co. v. Price County*, 133 U. S., 496; *White v. Burlington & M. R. R. Co.*, 5 Neb., 393; *Donovan v. Kloke*, 6 Neb., 124.) In *Union P. R. Co. v. McShane* Justice Miller uses the following language:

"That the payment of these costs of surveying the land is a condition precedent to the right to receive the title from the government, can admit of no doubt. Until this is done, the equitable title of the company is incomplete. There remains a payment to be made to perfect it. There is something to be done without which the company is not entitled to a patent. The case clearly is not within the rule which authorizes state taxation of lands, the title of which is in the United States.

"The reason of this rule is also fully applicable to this case. The United States retains the legal title by withholding the patent for the purpose of securing the payment of these expenses, and it cannot be permitted to the states to defeat or embarrass this right by a sale of the lands for taxes. If such a sale could be made, it must be valid if the land is subject to taxation and the title would pass to the purchaser. If no such title could pass, then it is because the land is not liable to the tax; and the treasurers of the counties have no right to assess it for that purpose."

In concluding the learned judge says: "Under these views we are of opinion that the state had no right to tax the lands for which the cost of surveying had not been paid, and for which no patent had been issued."

We feel under especial obligation to recognize the rule thus stated, for the reason that the people of Nebraska, at

the time of its admission into the Union as a state, entered into a solemn compact with the general government by which it is provided that "no taxes shall be imposed by said state on lands or property therein belonging to, or which may hereafter be purchased by, the United States." (See Enabling Act, sec. 4.)

The only obstacle we have encountered in holding the property described to be exempt from taxation by the agencies of the state is the case of *Edgington v. Cook*, 32 Neb., 551. That was an original action to restrain the collection of taxes assessed against lands in Nance county within the limits of the former Pawnee Indian reservation. It appears that the terms of sale were substantially the same as those enumerated in the petition in this case; that the plaintiff therein had made payment of but one of the three equal installments of the purchase price, and was not at the time of the levy of the taxes in controversy entitled to a patent, the title being in the United States. It was held that the lands were taxable from the date of their purchase. It is conceded that that case is directly in point, and, if it is to be regarded as authority, is decisive of the present controversy. But in determining its value as a precedent it should be observed, first, that the court therein appear to have overlooked the case of *Donovan v. Kloke, supra*, in which it is expressly held that lands purchased from the United States at private entry are not taxable until after payment in full of the purchase money, and that every step before that time taken by way of assessment or levy of taxes is void; second, the decision therein rests upon the authority of *Hagenbuck v. Reed*, 3 Neb., 17, which involved no question of the power to tax property belonging to the United States, but the right of the state to tax its own school lands held by individuals under contracts of purchase; and, third, the force of *Hagenbuck v. Reed* as authority is greatly impaired, if indeed it is not overruled, by subsequent decisions of this court. (See

Washington County v. Fletcher, 12 Neb., 356.) The last named case recalls the controversy, as serious as amusing, between the court and the legislature, which grew out of the decision in *Hagenbuck v. Reed.* It was contended by the legislature that school lands which had been sold by the state on credit were not taxable until fully paid for, notwithstanding the holding of this court to the contrary; and by an act approved February 20, 1879, under a preamble stating that said lands "have not been and are not now taxable for any purpose whatever," provision was made for the refunding to purchasers of all money paid as taxes thereon. That act was upheld in *Washington County v. Fletcher*, apparently upon the ground that it was a legislative construction of prior acts inconsistent with *Hagenbuck v. Reed.* While the question of the soundness of the conclusion in the last named case is not now before us, that case is clearly not authority for the proposition asserted by the appellee in this. Since we concur without hesitation in holding that the lands in this case were not taxable at the time in question, it follows that the case of *Edgington v. Cook* cannot longer be accepted as authority. The judgment of the district court is reversed and the case remanded with instructions to enter a decree in accordance with the views herein expressed.

REVERSED.

ELMA R. MCLAUGHLIN, APPELLANT, V. EQUITABLE LIFE ASSURANCE SOCIETY, APPELLEE.

FILED JANUARY 4, 1894. No. 5424.

1. **Life Insurance Contracts.** In the absence of fraud or mistake all previous verbal understandings are merged in the written contract of insurance, which is conclusively presumed to

contain the entire engagements of the parties with all the conditions of their fulfillment.

2. **Agreement to Issue Paid-up Policy:** ANNUAL PREMIUMS. It was stipulated in a life insurance policy that in case of default of payment of the annual premium therein named, after the payment in full of three of such premiums, the insurance company would issue in favor of the beneficiary therein, a paid-up policy for as many parts of the amount insured as equaled the number of premiums paid, provided such policy should be surrendered duly receipted within six months from the date of such default. *Held*, That the surrender of the receipted policy within six months after default is a condition precedent to the right to demand paid-up insurance.

3. **Specific Performance of Contract to Issue Paid-up Policy.** The insured, having failed to surrender the policy until more than eleven months after default, is not entitled to paid-up insurance, and an action by the beneficiary to compel specific performance of the contract therefor by the insurance company was rightfully dismissed for want of equity, although the insured had paid three of the annual premiums previous to the default.

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

The opinion contains a statement of the case.

Isaac Adams, for appellant:

Appellant did not forfeit her right to paid-up insurance through failure to surrender to appellee her original policy within six months from date of default. Time was not made essential by the terms of the policy. (Waterman, Specific Performance, sec. 462; May, Insurance, secs. 342, 343; *Mutual Life Ins. Co. v. French*, 30 O. St., 240; *Tutt v. Covenant Mutual Life Ins. Co.*, 19 Mo. App., 677; *Northwestern Mutual Life Ins. Co. v. Little*, 56 Ind., 504; *Ohde v. Northwestern Life Ins. Co.*, 40 Ia., 357; *Symonds v. Northwestern Mutual Life Ins. Co.*, 23 Minn., 491; *Hull v. Northwestern Mutual Life Ins. Co.*, 39 Wis., 397; *Franklin Life Ins. Co. v. Wallace*, 93 Ind., 17; *Northwestern Mutual*

Life Ins. Co. v. Fort's Admr., 82 Ky., 269; *St. Louis Mutual Life Ins. Co. v. Grigsby*, 19 Bush [Ky.], 310; *Eddy v. Phœnix Mutual Life Ins. Co.*, 65 N. H., 27.)

Appellant's default was not long continued. It is explained. It did not occasion any damage to appellee. The default does not therefore constitute laches. (May, Insurance, sec. 469; *Barnes v. McMurtry*, 29 Neb., 178; *Symonds v. Northwestern Mutual Life Ins. Co.*, 23 Minn., 499.)

Upon the payment of the third annual premium the contract for paid-up insurance became mutual and should be enforced. (*Chase v. Phœnix Mutual Life Ins. Co.*, 67 Me., 85; *Montgomery v. Phœnix Mutual Life Ins. Co.*, 14 Bush [Ky.], 51; *Johnson v. Southern Mutual Life Ins. Co.*, 79 Ky., 403; *Southern Mutual Life Ins. Co. v. Montague*, 84 Ky., 653; *Smith v. National Life Ins. Co.*, 103 Pa. St., 177; *Hexter v. United States Life Ins. Co.*, 15 S. W. Rep. [Ky.], 863; *Attorney General v. Continental Life Ins. Co.*, 93 N. Y., 70; Waterman, Specific Performance, sec. 465; *Barnes v. McMurtry*, 29 Neb., 178; 2 Story, Equity, secs. 1314–1316.)

Isaac E. Congdon, contra:

The written contract supersedes prior statements made by the insurer. (*Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y., 516; *Mutual Benefit Life Ins. Co. v. Ruse*, 8 Ga., 534; *Fowler v. Metropolitan Life Ins. Co.*, 116 N. Y., 389; *Smith v. National Life Ins. Co.*, 103 Pa. St., 177; *Knickerbocker Life Ins. Co. v. Heidel*, 8 Lea [Tenn.], 488; *Mutual Life Ins. Co. v. Bratt*, 55 Md., 200; *Continental Life Ins. Co. v. Hamilton*, 41 O. St., 274; *Union Mutual Life Ins. Co. v. Mowry*, 96 U. S., 544; *Thompson v. Knickerbocker Life Ins. Co.*, 104 U. S., 252; *Mobile Life Ins. Co. v. Pruett*, 74 Ala., 487.)

The time of the surrender of the policy is of the essence of the contract. (*Sheerer v. Manhattan Life Ins. Co.*, 20

Fed. Rep., 886; *Attorney General v. Continental Life Ins. Co.*, 93 N. Y., 74; *Hudson v. Knickerbocker Life Ins. Co.*, 28 N. J. Eq., 168; *Bussing's Executors v. Union Mutual Life Ins. Co.*, 34 O. St., 222; *Coffey v. Universal Life Ins. Co.*, 10 Ins. L. J. [Wis.], 525; *Smith v. National Life Ins. Co.*, 13 Ins. L. J. [Pa.], 330; *Hanthorne v. Brooklyn Life Ins. Co.*, 5 Mo. App., 73; *Michigan Mutual Life Ins. Co. v. Bowes*, 42 Mich., 19; *Wheeler v. Connecticut Mutual Life Ins. Co.*, 82 N. Y., 543; *Dorr v. Phœnix Mutual Life Ins. Co.*, 67 Me., 438; *Universal Life Ins. Co. v. Whitehead*, 58 Miss., 226; Cooke, Life Ins., sec. 84; *Union Central Life Ins. Co. v. McHugh*, 7 Neb., 68.)

Joseph R. Clarkson, also for appellee.

POST, J.

This was an action by the plaintiff in the district court of Douglas county to enforce the specific performance of an agreement by the defendant to issue a paid up policy of insurance. There was a finding for the defendant, and a decree dismissing the petition, from which the plaintiff has prosecuted an appeal to this court. There is no controversy with respect to the material facts, which are as follows:

In the year 1884 the defendant company issued a policy of insurance on the life of Andrew W. McLaughlin in favor of his wife, the plaintiff herein. Said policy was for $5,000 current insurance, upon the payment of an annual premium of $314.90 on the 26th day of August of each year, to be fully paid up after fifteen of such payments. It was stipulated in said policy that in case of default by the insured after the payment of not less than three of such annual premiums, the defendant company would issue a paid up policy in favor of the plaintiff for as many fifteenth parts of the sum of $5,000 as equaled the number of premiums so paid, provided said policy should be surrendered duly receipted within six months from the date of

such default. The provisions of the policy with respect to paid up insurance are as follows:

"And further, that if premiums upon this policy, for not less than three complete years, of assurance shall have been duly received by said society, and this policy should thereafter become void in consequence of default in payment of a subsequent premium, said society will issue, in lieu of such policy, a new paid up policy, without participation in profits, in favor of said Elma R. McLaughlin, if living, and if not living to the children of said Andrew W. McLaughlin or their guardian for their use, or if there be no children surviving, then to the executors, administrators, or assigns of said Andrew W. McLaughlin, for as many fifteenth parts of the original amount hereby assured as there shall have been complete annual premiums received in cash by said society upon this policy at the date when such default shall first be made; provided, however, that this policy shall be surrendered duly receipted within six months of the date of default in payment of premium as mentioned above."

In case of default in payments of premiums by the assured the contract contained the following provision:

"And if any premium or installment of a premium on this policy shall not be paid when due, this policy shall be void; and no credit for surplus accumulated on this policy shall be deemed applicable to the payment of any premium; nevertheless, nothing herein contained shall be construed to deprive the holder of this policy of the privilege to demand and receive paid up insurance in accordance with the agreement contained in this policy."

It is conceded that three of the annual payments were made by Mr. McLaughlin, to-wit, those for the years 1884, 1885, and 1886, but that he failed to make the payment due in August, 1887. It is further admitted that said policy was not surrendered within six months thereafter, nor was a demand made for paid up insurance until the month

of July, 1888, when the insured addressed a communication to the defendant company, in which he inquired what steps were necessary in order to preserve his rights under the contract. In reply to that inquiry he received a communication from the defendant informing him that his policy had been forfeited for the non-payment of the premium, and had then no surrender value. It is shown by the testimony of Mr. McLaughlin that he was, at the dates of both the applications and the policy, cashier of the First National Bank of Plattsmouth, and that Mr. Guyon, the agent who wrote his application, had his headquarters in the same bank. He testifies that he was informed by Guyon, in whom he had great confidence, that after the payment of three premiums his policy would be absolutely non-forfeitable, and that he could not lose the money thus paid. It also appears that he held a second policy for a like amount issued by the defendant company; that, being pressed for money to pay the premiums as they matured, he requested an extension of payments on the last named policy, which request was granted, but after making one or two payments thereon, it was suffered to lapse. This witness, in answer to questions by counsel for the plaintiff and the court, testified as follows:

Q. If I understand you, the payment that lapsed was due in August, 1887?

A. Yes, sir.

Q. You wrote them in July, 1888.

A. Yes.

Q. And they answered saying that your policies had lapsed?

A. Yes, sir.

Q. That they had no surrender value and were forfeited?

A. Yes, sir; that is what they said.

Q. You may state, Mr. McLaughlin, if you have not already, whether you knew of the clause, the proviso, in

the policy respecting the surrender of it within six months after failure to pay. Why did you not know it?

A. Well, I suppose because I hadn't read it is the only particular reason. I took the word of the agent. I know I made a pretty strong effort to raise the third annual premium.

Q. Did you make any effort to raise this money within six months?

A. Yes, sir.

Q. Why didn't you present your policy within six months?

A. The reason why I didn't present it was because I kept thinking all the time I would raise the money and pay it and keep the policy alive; that was the reason. When I found I couldn't do it I wrote to the company.

Q. And the reason you didn't present and surrender the policy within the time provided by the policy was in the hopes that you could raise the money?

A. Yes, sir.

And on cross-examination he testified:

Q. When did you first read the policy?

A. When I wrote the company and got their reply that my policies were lapsed and no good, I then put it in the hands of my attorney. As near as I can remember, I believe it was in August, 1888.

Q. After you had written to the company?

A. Yes.

Q. And the first that you knew of the six months clause was when you read the policy, which reading was brought about through the receipt of this letter that you have spoken of as having received from the company?

A. Yes, sir.

Q. Did you ever offer to surrender the policy to them?

A. I don't know that I made a formal offer to surrender it. I only wrote them asking what was necessary for me to do.

Q. You couldn't have offered to surrender it at the time because you didn't know of this six months clause?

A. No, sir.

* * * * * * *

Q. When you read this policy, as you say you did, a little before you wrote to the company, after you got an answer from the company, you then read the policy?

A. Yes, sir.

* * * * * * *

Q. You have had a good deal to do as a business man with different kinds of transactions?

A. Yes, sir.

Q. Especially contracts that you signed?

A. Yes, sir.

Q. Being cashier of a company you were pretty careful about these matters?

A. Yes, sir.

The contract contemplates two conditions precedent to the right of the insured to demand a paid up policy in favor of the beneficiary, viz.: First, the payment of three of the annual premiums; and second, the surrender of the policy, duly receipted, within six months after the default of further payments. Those conditions are not unreasonable, nor do they conflict with any provision of statute or principle of public policy; and courts cannot, without the most flagrant usurpation of legislative powers, refuse to give effect to such engagements where not tainted with fraud, unless the conditions thereof are waived by the act of the party entitled to insist upon their performance. The surrender of the receipted policy within six months after default cannot, on principle, be said to be less essential than the payment of the three yearly premiums. Both are necessary in order to entitle the holder to the paid-up insurance. He might elect, as he apparently did, to take the chances of raising the money to keep this policy alive, trusting to the leniency shown him in the other case; but in doing

so he took the risk of forfeiting his policy in case he continued in default for more than six months. It may be conceded from his statements, and he testifies with evident candor and firmness, that he was unaware of the provision for the surrender of the policy within six months; but that fact does not alter the legal status of the case. The overwhelming weight of authority, if indeed there can be said to exist a diversity of opinion on the subject, is that in the absence of fraud or mistake all previous verbal agreements are merged in the written contract of insurance, which is conclusively presumed to contain the entire engagement of the parties with all the conditions of its fulfillment then contemplated. (*Union Mutual Life Ins. Co. v. Mowry*, 96 U. S., 544; *Thompson v. Knickerbocker Life Ins. Co.*, 104 U. S., 252; *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y., 516; *Fowler v. Metropolitan Life Ins. Co.*, 116 N. Y., 389; *Mobile Life Ins. Co. v. Pruett*, 74 Ala., 487; *Mitchell v. Universal Life Ins. Co.*, 54 Ga., 289; *Smith v. National Life Ins. Co.*, 103 Pa. St., 177.)

It is not necessary, however, to invoke the rule above stated in this case, for the reason that the representation of the agent upon which reliance is placed does not relate to the existence of any fact or include even a definite promise for the future. It is at most the statement of an opinion, a mere conclusion that the policy was non-forfeitable, and that the insured could not lose the money invested, in case he made three annual payments. We would feel constrained to hold from the evidence in the record, if that question was essential to the present inquiry, that in the making of the contract in question there was no disparity between the parties. The occupation and experience of the insured certainly rendered him as capable of interpreting and understanding the condition of the policy as Guyon, the agent of the company. It cannot be said that the condition under consideration was not discoverable by the exercise of reasonable care, since it appears in bold type upon

the face of the policy, and is apparent from the most casual examination thereof. The dictates of common prudence would suggest the reading of an agreement involving so much as did this policy to the insured and his family, while it is difficult to conceive how an experienced business man could invest nearly $1,000 upon a written contract committed to his own custody, relying exclusively upon the statements of the adverse party as to its terms and provisions in a material respect. It is evident that the insured was unacquainted with the conditions of the policy, and that his ignorance was due to his own negligence and in no sense attributable to the fraud or misrepresentation of the defendant company.

We come now to an examination of authorities which have a direct application to the condition relied upon by the defendant. Of the reported cases which have a bearing upon the subject, a decided majority sustain the proposition that where provision is made in the policy for paid up insurance for part of the amount named, upon the surrender thereof within a given time after default, such right must be exercised within the time named. (See *Hudson v. Knickerbocker Life Ins. Co.*, 28 N. J. Eq., 167; *Attorney General v. Continental Life Ins. Co.*, 93 N. Y., 74; *Bussing's Executors v. Union Mutual Life Ins. Co.*, 34 O. St., 222; *Coffey v. Universal Life Ins. Co.*, 10 Ins. L. J. [Wis.], 525; *Smith v. National Life Ins. Co.*, 13 Ins. L. J. [Pa.], 330; *Sheerer v. Manhattan Life Ins. Co.*, 20 Fed. Rep. 886; *Universal Life Ins Co. v. Devore*, 14 S. E. Rep. [Va.], 532; *Hexter v. United States Life Ins. Co.*, 15 S. W. Rep. [Ky.], 863; *Northwestern Mutual Life Ins. Co. v. Barbour*, 17 S. W. Rep. [Ky.], 796; Cooke, Life Ins., sec. 84 and note on page 152.) We have been referred as authority for the opposing view to *Chase v. Phœnix Mutual Life Ins. Co.*, 67 Me., 85, *Montgomery v. Phœnix Mutual Life Ins. Co.*, 14 Bush [Ky.], 51, and *Southern Mutual Life Ins. Co. v. Montague*, 84 Ky., 653. Of the above cases, *Chase v.*

Phœnix Mutual Life Ins. Co. is the only one, as we shall presently see, which can be relied upon to sustain the contention of the plaintiff, and it is severely criticised by the author of Cooke on Life Insurance. (See note above cited.) Of the Kentucky cases it may be said that in *Sheerer v. Manhattan Life Ins. Co., supra,* which was a case in the United States circuit court for that district, *Montgomery v. Ins. Co.* is declared to be against the overwhelming weight of authority, and Mr. Justice Mathews, in a concurring opinion, declares the language of the policy too plain for interpretation, and holds that time must be deemed to be the essence of the contract, but in *Hexter v. United States Life Ins. Co.,* and *Northwestern Mutual Life Ins. Co. v. Barbour, supra,* the conditions, which were substantially like the one here involved, were held to be essential, and that it was necessary to surrender the policies within the time named in order to render the insurer liable. We are referred in the very able brief submitted by counsel for the plaintiff to the case of *Barnes v. McMurtry,* 29 Neb., 178. It is not claimed for that case that the proposition decided, viz., the validity of a provision limiting the right of action on the policy to six months from the date of the loss has any direct bearing upon the present controversy; but it is argued from the language there used that the plaintiff herein has by his contract acquired an undefined but substantial equity, which may be enforced by decree in this action. The terms "substantial right" and "substantial justice," as used in this connection, are indefinite and illusive, and not susceptible of a precise legal definition. It would seem, however, that one to whom has been awarded the full measure of relief for which he has himself stipulated, is the recipient of substantial justice within the most liberal interpretation of the term, and should not be heard to ask more at the hands of an earthly tribunal. The equities of the case being with the defendant, the decree of the district court is

AFFIRMED.

R. E. W. SPARGUR V. JAMES S. ROMINE ET AL.

FILED JANUARY 4, 1894. No. 6070.

1. **Restraining Collection of Taxes.** A court of equity will not interfere to prevent the collection of taxes on the ground that the assessment and levy thereof are irregular or invalid, unless they are clearly inequitable and the enforcement thereof would be against conscience.

2. **In the construction of pleadings** the facts alleged or admitted, when material, will control rather than the conclusions of the pleader.

3. **Res Adjudicata.** A party asserting an estoppel by means of a former judgment must allege facts which show that his relation to the former action was such as to make the judgment therein conclusive in his favor.

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

The facts are stated in the opinion.

Allen G. Fisher, for plaintiff in error.

Albert W. Crites and *D. B. Jenckes, contra:*

The petition in this case shows that there was some kind of an assessment, some sort of a levy of taxes, and some kind of a tax list, which, for some reason not stated, was, in point of law, not good as such. This is not sufficient. There must be some facts stated from which the court can see that the assessment is in fact a legal nullity. When a party seeks to enjoin the collection of a tax upon real estate, he must set forth such facts in his petition as will show the collection of the tax unjust and inequitable. (*Southard v. Dorrington*, 10 Neb., 119; *Dillon v. Merriam*, 22 Neb., 151; *Dundy v. Richardson County*, 8 Neb., 508; *South Platte Land Co. v. Buffalo County*, 7 Neb., 253; *South Platte Land Co. v. City of Crete*, 11 Neb., 344.)

There is no offer in the petition to pay the amount of taxes justly and equitably chargeable upon the land. The pleading therefore is defective. (*Wood v. Helmer*, 10 Neb., 65; *Southard v. Dorrington*, 10 Neb., 119; *Hunt v. Easterday*, 10 Neb., 165; *Boeck v. Merriam*, 10 Neb., 199; *Dillon v. Merriam*, 22 Neb., 151; *Wygant v. Dahl*, 26 Neb., 562; *Los Angeles County v. Ballerino*, 32 Pac. Rep. [Cal.], 581; *Welch v. Clatsop County*, 33 Pac. Rep. [Ore.], 934; *German Nat. Bank of Chicago v. Kimball*, 103 U. S., 732.)

Under the form of the allegations of the petition the assessment and subsequent tax proceedings were, at most, merely irregular. Under section 141, chapter 77, revenue law, the tax was not void. (*Wilson v. City of Auburn*, 27 Neb., 435.)

POST, J.

This was an equitable proceeding in the district court of Dawes county, where a demurrer to the petition was sustained and the action dismissed. The sustaining of the demurrer is the only error assigned in this court; hence our inquiry is limited to one proposition, viz., the sufficiency of the petition to entitle the plaintiff therein to equitable relief. From the allegations thereof it appears that the plaintiff is the owner of twenty-two quarter sections of land in said county, which were all taxable for the years 1888, 1889, 1890, 1891, and 1892; that there was a pretended assessment and levy of taxes thereon for the years named, which pretended taxes are void for reasons hereafter stated, but which cast a cloud upon his title, and will, unless canceled and the collections thereof perpetually enjoined, result in tax deeds being executed for his said property. The defendant Reynolds is the county treasurer and the other defendants are holders of tax certificates issued upon the sale of said land for the taxes above described. The only allegations with respect to the assessment and levy of the taxes and sale thereof are contained

in the third and seventh paragraphs of the petition, which are as follows:

"3. That the said defendant Reynolds, by virtue of his office as treasurer aforesaid, is in possession of certain books claimed by defendants to be duplicate tax lists for the years 1888, 1889, 1890, 1891, and 1892, and claiming the right and threatening thereunder to collect taxes against the aforesaid tracts of land, and to certify as pretended liens for taxes against the tracts of land aforesaid certain entries claimed by defendants to have been made in the said pretended tax lists, and to execute thereunder tax deeds for the above described tracts of land to his co-defendants.

"7. Plaintiff alleges that there has never been any description of said tracts of land set forth or contained in any assessment list of the said county; that the assessments upon which the tax lists of the years above mentioned are based are void, and all proceedings based thereon are void; that the pretended descriptions contained in the pretended tax certificates of purchase of the defendants and of the books in the possession of the defendant Reynolds, whereon said pretended certificates are claimed to be founded, are void and are wholly improper, irregular, indefinite, defective, and uncertain, and are not expressed in good language, nor are the characters and abbreviations employed such as are used by conveyances in describing real estate, nor do the people generally use such combinations of words, letters, and figures in referring to and describing land; that the various assessors, clerks, and collectors have wholly and entirely failed and neglected to comply with any of the provisions of the following sections of Cobbey's Consolidated Statutes of Nebraska, viz., sections 3943, 3950, 3961, 3963, 3979, 3981, 3982, 3997, 3999, 4008, 4011, and 4012; that the pretended tax books for the years above mentioned in the possession of the defendant treasurer and his predecessors in office were and are void and without warrant, and conferred no authority upon the defendant

Reynolds or his predecessors in office to collect any taxes, or to make any sale, or to issue any certificates of sale; that none of the above described tracts of land have ever been put in the assessment roll, nor any assessment thereof been made, nor has any of the said above described land had any levy of tax made against it, nor has there been any tax list containing the description thereof, nor has there ever been any advertisement of notice of tax sale thereof, nor has there ever been any return of public sale, nor has there ever been any private sale of the real estate above described."

The sections of the revenue law above enumerated provide, in the order named, for the listing and valuation of real estate for taxation, the preparation of the tax lists, the collection of taxes levied, notice and sale of lands for delinquent taxes and return thereof. The grounds upon which relief is demanded may be thus summarized: The plaintiff is the owner of lands which were taxable for the several years above named; that an attempt was made to assess and tax them in each of said years; that some kind of a tax list was prepared each year, and that said lands have been sold for taxes claimed to have been thus levied; but by reason of some neglect or omission on the part of the various assessors, clerks, and collectors who were charged with the listing and valuation of property and the collection of taxes thereon, said taxes are void, and a deed executed in pursuance of such sale would not divest him of his title. It will be observed that there is no charge that the assessment is unreasonable or fraudulent, that the taxes claimed are for an "illegal or unauthorized purpose," that the amount thereof is more than the plaintiff is in equity bound to contribute to the public revenue for the support of the state, county, and municipal governments, and the public schools of the county, or that he has paid or tendered the amount justly due; nor does he now, as a condition to the relief sought, offer to make contribution of the amount with

which he is in equity chargeable. Our revenue law, section 144, provides: "No injunction shall be granted by any court or judge in this state to restrain the collection of any tax, or any part thereof, hereafter levied, nor to restrain the sale of any property for the non-payment of any such tax, except such tax, or the part thereof enjoined, be levied or assessed for an illegal or unauthorized purpose." It is not claimed that the foregoing provision applies to cases in which there has been neither an assessment of the property nor levy of taxes; that is, where there has been no attempt on the part of the officers charged with that duty to to levy and collect the funds required for public use by taxation. In such cases it may be assumed that the jurisdiction of courts of equity to grant relief within certain limitations has not been ousted by the statute; but the ground of equitable interference is that there is in such cases no tax which the plaintiff is in equity bound to pay. In the case under consideration the infirmities relied upon are at most irregularities. For instance, the allegation that the tax lists "are wholly improper, irregular, indefinite, and uncertain, and not expressed in good language," also that the characters and abbreviations employed are "not such as are used by conveyances in describing real estate, and that people do not generally use such combination of words, letters, and figures in referring to and describing land," may be, and for the purpose of the demurrer are admitted to be, true. It does not follow, however, that the plaintiff is entitled to relief at the hands of a court of equity. And the statement that the various assessors, clerks, and collectors have failed and neglected to comply with the provisions of the several sections of the Consolidated Statutes enumerated is certainly not consistent with the other allegations of the petition, since it is evident therefrom that there was some kind of an assessment and some kind of a levy of the taxes for each of the years named, and that tax lists of some kind were prepared and delivered to

the treasurer of the county, who has sold the plaintiff's lands for the taxes thus levied. It may also be said of such statement that it is but the conclusion of the pleader, and, according to the well settled rule in the construction of pleadings, will be controlled by the allegations of fact, or admissions therein. (See 1 Boone, Code Pleading, 276.) This case does not differ essentially from the case of *South Platte Land Co. v. City of Crete*, 11 Neb., 344, where it is said: "We conclude, therefore, that the taxes in question were not, as claimed, void, and although perhaps so affected by infirmities as to render them illegal and incapable of enforcement as against the plaintiff's property, there is no visible consideration leading us to say that they are inequitable and should be enjoined." The doctrine of that case has been subsequently approved in *Dillon v. Merriam*, 22 Neb., 151, *Wygant v. Dahl*, 26 Neb., 562, and *Wilson v. Auburn*, 27 Neb., 435; and it may be asserted as a settled rule, even in the absence of a statutory provision on the subject, that courts of equity will not interfere to prevent the collection of taxes on the ground of irregularity or illegality in the proceeding, unless they are also inequitable, and to enforce payment thereof would be against conscience. In some jurisdictions that rule has been extended so far as to deny even a temporary restraining order against the collection of taxes until after payment in full of so much thereof as the court can see ought in equity to be paid, or may be shown by affidavits or otherwise to be due. For instance, in *State Railroad Tax Cases*, 92 U. S., 575, it is said by Justice Miller: "It is not sufficient to say in the bill, that they (complainants) are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted." In the case before us there is no controversy with respect to the amount of taxes equitably chargeable

against the plaintiff's lands, which are the amounts shown by the several tax lists. The defendants who have purchased the lands for delinquent taxes appear to be satisfied, and, as we have seen, the plaintiff will not be heard to complain.

It is further alleged by the plaintiff that the question of his right to the relief sought has been determined in his favor by the judgment of the district court of Dawes county and is now *res judicata.* Accompanying the petition are the records of two causes which are relied upon to support the plea of former adjudication. In one of the causes mentioned a decree was entered in which the tax lists here involved were declared to be irregular and void and the taxes appearing thereon not to be a lien upon any personal property of the plaintiff therein. That plea is, however, not available to this plaintiff, notwithstanding the decree referred to, for the sufficient reason that he was not a party to the former action, nor was he, so far as this record discloses, in privity with either party thereto. The rule is elementary, that the party asserting an estoppel by means of a former judgment must allege facts which show his relation to the former action was such as to make the judgment therein conclusive in his favor. (See *Hartley v. Gregory,* 9 Neb., 279.) It is clear that the petition fails to state a cause for equitable relief, and that there is no error in the ruling complained of, and that the judgment of the district court should be

AFFIRMED.

HABIG & SPILER V. JOHN LAYNE ET AL.

FILED JANUARY 4, 1894. No. 5583.

1. **Trial:** DIRECTING VERDICT. It is error for a trial court to instruct a jury to return a verdict for the defendants when there is any competent evidence adduced which, if believed by the jury, would support a verdict for the plaintiff.

2. **Question for Jury.** Where the evidence is uncontradicted, and reasonable men might honestly draw different inferences therefrom, it is for the jury, and not the court, to say what inference such evidence warrants.

3. **Partnership.** In an action against several defendants impleaded as partners, the plaintiff is entitled to lay all the facts before the jury and have their opinion as to whether the transaction is not that of a partnership, or does not, at least, entitle the plaintiff to charge the defendants as partners.

4. **Liability of Firm for Contract of Partner.** Where two persons, copartners, took a contract from the state to build for it a building, and one of the partners purchased material used in the construction of such building under a contract in writing, made in his own name with the vendor of such material, there being no understanding with the vendor that the material was furnished to the partner on his individual account, *held*, that the copartnership was liable for the value of the material furnished and used in the construction of said building.

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

Leese & Stewart, for plaintiffs in error:

Where any evidence is adduced tending to prove the allegations of the plaintiff's petition, the cause should be submitted to the jury. (*Smith v. Sioux City & P. R. Co.*, 15 Neb., 583.)

The fact that the partnership receives the benefit of a contract tends to prove that it is a partnership contract. (*Stecker v. Smith*, 46 Mich., 14; 1 Lindley, Partnership,

177, 189; Abbott, Trial Evidence, 216; Bates, Partnership, sec. 437; *Booe v. Caldwell*, 12 Ind., 12.)

By the terms of the contract between Layne & Krone and the state, the sureties were liable if the material purchased was used in the building. (*Sample v. Hale*, 34 Neb., 220; *Abbott v. Morrissette*, 48 N. W. Rep. [Minn.], 416; *Sepp v. McCann*, 50 N. W. Rep. [Minn.], 246; *Freeman v. Berkey*, 48 N. W. Rep. [Minn.], 194.)

Pound & Burr and *W. E. Stewart, contra.*

RAGAN, C.

On the 10th day of September, 1887, the state of Nebraska entered into a contract with John Layne and Fred W. Krone, copartners, by which the latter agreed to furnish the material and labor and construct a building for the state on the grounds of the Nebraska institution for the feeble minded youth, near the city of Beatrice. In this contract Layne & Krone promised to pay in full all parties who should furnish any material or perform any labor for them on said building. Layne & Krone, as principals, and George Martin, M. Westover, George Sherrer, A. B. Beach, and J. E. Stockwell, as sureties, gave bond to the state, conditioned that Layne and Krone would faithfully perform all the stipulations of their contract.

The plaintiffs in error, Habig & Spiler, brought this suit against Layne & Krone and the sureties on their bond, alleging the copartnership of Layne & Krone; the contract between them and the state for the erection of said building; their giving bond to pay for materials furnished and used by them in carrying out their contract with the state; that on December 8, 1887, plaintiffs in error entered into a written contract with John Layne, of the firm of Layne & Krone; that said contract was by Layne made for and on behalf of Layne & Krone; that by the terms of such contract plaintiffs in error, for the consideration of $——,

agreed to furnish the labor and material and construct the galvanized iron cornice, tin roofing, down-spouts, patent shingle roof, ridging tunnels, tower, and porch roofs on the new addition to the building for the feeble minded about to be erected by the state at Beatrice; that they complied with their contract, and that a balance remained due thereon.

The only issue of fact tendered by the answer of the defendants was whether the contract between plaintiffs in error and John Layne was made for and on behalf of Layne & Krone, or on Layne's personal account. The evidence shows that at the date of the contract Habig & Spiler lived in Beatrice and Layne & Krone in Lincoln, and that they were unacquainted; that plaintiffs in error, learning that Layne & Krone had been awarded the contract for the construction of the building for the use of the feeble minded, sent a bid to Layne & Krone at Lincoln for the galvanized iron cornice work, etc., having first figured their bid from the plans and specifications prepared for such building; that some weeks afterwards John Layne was in Beatrice and met Habig, one of the plaintiffs in error, who asked Layne if the bid of Habig & Spiler was low enough, to which Layne replied, "No;" that they, Habig & Spiler, would have to do a little better and offered to accept a bid from them at $——, which plaintiffs in error then and there accepted. Layne then told Habig to draw up a contract between John Layne and Habig & Spiler and it would be all right. Habig then drew the contract sued on here as the contract of Layne & Krone; that Habig & Spiler performed their contract; that Layne made a payment to them, and that the state made them another payment on the contract; that the labor performed and material furnished by Habig & Spiler went into the construction of the building which Layne & Krone contracted with the state to build. There was no evidence that Layne & Krone had ever dissolved partnership, or that their contract with the state was ever canceled, or that the contract for such

building was ever awarded to any one else than Layne & Krone. After this evidence was given by the plaintiffs in error, they asked the court to instruct the jury as follows:

"1. If you find from the evidence that plaintiffs furnished to Layne & Krone, or either of them, any material to complete the contract of Layne & Krone with the state, and such materials, or any part thereof, have not been paid for, then said Layne & Krone, and the sureties on their bond, are liable for the amount found to be due.

"2. You are instructed that although the contract of the plaintiffs was made in the name of John Layne, yet if it was so made for and in behalf of Layne & Krone in the execution of their contract with the state, then such firm would be bound thereby and all of the defendants herein would be liable for any balance remaining due for material furnished by plaintiffs thereunder."

The court declined to instruct as requested, and instructed the jury to return a verdict for all the defendants except Layne, which the jury did.

The motion of the plaintiffs in error for a new trial was overruled and judgment of dismissal of their case against all the defendants, except Layne, rendered, and Habig & Spiler bring the case here on error.

The court erred in instructing the jury to return a verdict for the defendant, as the evidence adduced was sufficient to support a finding of the jury that Layne made a contract with Habig & Spiler on behalf of Layne & Krone, and for the same reason the court erred in refusing to instruct the jury as requested by the plaintiffs in error. In *Smith v. Sioux City & P. R. Co.*, 15 Neb., 583, this court said: "After the introduction of the testimony of the plaintiff to a jury impaneled to try the cause, the court has no authority to dismiss a case and discharge the jury without a verdict upon the merits. If the evidence so introduced tends in any degree to sustain the allegations of the plaintiff's petition, the action of the court in summarily

dismissing the action will be deemed prejudicial to the plaintiff, and a new trial will be ordered." In *Stecker v. Smith*, 46 Mich., 14, it is said: "Where several persons put up a building as partners, and one of them buys brick for the purpose, without an express understanding with the vendor that it is an individual purchase, and the brick is actually used in the building, the partners are liable as such for its value. In an action against several defendants impleaded as partners, the plaintiff is entitled to lay all the facts before the jury and have their opinion as to whether the transaction was not that of a partnership, or did not, at least, entitle plaintiff to charge the defendants as partners." To the same effect, see *Booe v. Caldwell*, 12 Ind., 12; Bates, Law of Partnership, sec. 437. But if the labor and material of Haebig & Spiler entered into the construction of this building, and the evidence is sufficient to support a finding of a jury that it did, then Layne & Krone and their sureties are liable for it. This is the letter as well as the spirit of their bond. (*Sample v. Hale*, 34 Neb., 220; *Abbott v. Morrissette*, 48 N. W. Rep. [Minn.], 416; *Sepp v. McCann*, 50 N. W. Rep. [Minn.], 246; *Lyman v. City of Lincoln*, 38 Neb., 794.)

It appears that this suit was first brought in the county court of Lancaster county, and that plaintiffs in error obtained a judgment there against Layne, and he appealed to the district court. In the latter court plaintiffs in error again obtained judgment against Layne, and on motion and notice to the sureties on the appeal bond of Layne, from the county court, took judgment against such sureties. Counsel for defendants in error say that plaintiffs in error, by reason of having taken judgment against the sureties on the appeal bond from the county court, are now estopped from prosecuting this proceeding in error. We do not think any one can complain of the judgment against Layne or the sureties on his appeal bond except themselves. These defendants in error could not plead such judgments in the

absence of their satisfaction as a defense to this action. Plaintiffs in error are entitled to judgment against as many of the parties sued as the evidence and the law will give them; and the fact that they have judgment against one or more of the parties sued does not prevent plaintiffs in error from prosecuting this suit against others liable on the same cause of action. *Buchanan v. Dorsey*, 11 Neb., 373, cited by counsel, does not sustain their contention. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

ALPHONSO S. GODFREY V. JOHN R. MEGAHAN ET UX.

FILED JANUARY 4, 1894. No. 5630.

1. **Married Women:** CONTRACTS. The disability of a married woman to make a valid contract remains the same as at common law, except in so far as such disability has been removed by our statutes.

2. ———: ———: SEPARATE ESTATE. The statute has removed the common law disability of a married woman to make contracts only in cases where the contract made has reference to her separate property, trade, or business, or was made upon the faith and credit thereof, and with intent on her part to thereby bind her separate property.

3. ———: ———: QUESTION FOR JURY. Whether a contract of a married woman was made with reference to her separate property, trade, or business, or upon the faith and credit thereof, and with intent on her part to thereby bind her separate property, is always a question of fact.

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

Leese & Stewart, for plaintiff in error:

A married woman can bind her separate property by

general engagements. (*Davis v. First Nat. Bank of Cheyenne*, 5 Neb., 246; *Savings Bank v. Scott*, 10 Neb., 87.)

Where a married woman having a separate estate executes a promissory note, the presumption arises that she intends to charge her separate estate with its payment. (*Williams v. Urmston*, 35 O. St., 296; *Hershizer v. Florence*, 39 O. St., 516; *Wicks v. Mitchell*, 9 Kan., 80; *Webb v. Hoselton*, 4 Neb., 314.)

Webster, Rose & Fisherdick, contra:

At common law the wife was under the power and authority of her husband. Her legal identity was merged into his. She had of herself no separate legal existence in the eye of the law. Therefore all her contracts were absolutely void. The common law in respect to the rights of husband and wife is in force in this state except so far as it has been changed by statute. (*Aultman v. Obermeyer*, 6 Neb., 264; Comp. Stats. Neb., ch. 53, secs. 2, 4; 2 Kent, Com., 129*; 1 Bishop, Married Women, sec. 35; *Martin v. Dwelly*, 6 Wend. [N. Y.], 9; *Patterson v. Lawrence*, 90 Ill., 174.)

The rule of the Nebraska cases is that it is for the trial court to determine whether the contract sought to be enforced against a married woman was made with reference to, and upon the faith and credit of, her separate estate. (*Davis v. First Nat. Bank of Cheyenne*, 3 Neb., 246; *Hale v. Christy*, 8 Neb., 264; *Gillespie v. Smith*, 20 Neb., 456.)

RAGAN, C.

Alphonso S. Godfrey sued John R. Megahan and his wife, Maggie E. Megahan, in the district court of Lancaster county on a promissory note in words and figures as follows:

"$1,004.92. LINCOLN, NEB., December 15, 1890.

"Six months after date, for value received, I promise to pay to the order of A. S. Godfrey one thousand and four

and .92 dollars, with interest at the rate of ten per cent per annum from maturity until paid. Negotiable and payable at the First National Bank, Lincoln, Nebraska.

"JOHN R. MEGAHAN.
"MAGGIE E. MEGAHAN."

Mrs. Megahan answered as follows: "Defendant Maggie E. Megahan, for her separate answer to the petition of the plaintiff, says that she is, and at the date of the execution of the note mentioned in said petition, and for a number of years last past, has been, a married woman, the wife of the defendant John R. Megahan, and living with him as his wife; that the defendant signed the note mentioned in the petition at the request of her husband only, and as surety for him, but wholly without consideration, there then being no existing indebtedness or prior obligation on her part to plaintiff or her said husband, and nothing of value having at the time of the signing of the same passed from said plaintiff or her husband to this defendant. Defendant did not, and did not intend thereby to, bind or obligate her separate estate or herself personally for the payment of said note. She received no part of the consideration for which said note was given; no benefits accrued therefrom to her separate estate, property, trade or business, and the said note was not made or given for the benefit of, and did not concern, her separate estate, property, trade or business; and she incurred no personal or other liability by the signing thereof, and was without legal capacity so to do." Godfrey replied, denying the allegations of this answer, except the coverture of the respondent. The case was tried to the presiding judge alone, who found in favor of Mrs. Megahan and dismissed Godfrey's suit as to her, and he brings the case here for review. The error assigned is that the judgment is contrary to the evidence and law applicable to the case.

There is some conflict in the evidence, but it supports the following conclusions: That the note in suit was given in

payment of a note of $500 and an open account owing at the time by Mr. Megahan to Godfrey; that this note and account were for lumber and building material purchased by Mr. Megahan of Godfrey, no part of which was purchased for or on behalf of Mrs. Megahan; that she never had any dealings whatever with Godfrey; that the only property owned by her at the time of suit was the homestead where she resided; that she owned no separate estate or property, and was engaged in no trade or business when she signed the note sued on; that she signed it at her husband's request; that he did not tell her for what purpose he desired her to sign it; that she received nothing for signing it; that she expected her husband to take care of it; that she executed papers when her husband requested her; that she never executed any other note to Godfrey; that she had no conversation with Godfrey about the execution of this note, and that she never purchased any materials or lumber of Godfrey at any time. In other words, that the note in suit was given for a pre-existing debt of Mr. Megahan to Godfrey and that Mrs. Megahan signed the same as surety for her husband, and that her execution of this note was not with reference to, or upon the faith and credit of, her separate property, trade, or business; nor did she intend by signing this note to bind her separate estate for its payment. Under these facts Mrs. Megahan is not liable on this note. At common law the contracts of a married woman were void, and her disability to contract still remains, except in so far as it has been removed by our statutes. (*Aultman v. Obermeyer*, 6 Neb., 260.)

The statute has removed the common law disabilities of a married woman to make contracts only so far as the contracts made have reference to her separate property, trade, or business, or are made upon the faith and credit thereof, and with the intent on her part thereby to bind her separate property. (*Webb v. Hoselton*, 4 Neb., 308; *Davis v. First Nat. Bank of Cheyenne*, 5 Neb., 242; *Hale v. Christy*,

8 Neb., 264; *Barnum v. Young*, 10 Neb., 309; *State Savings Bank, St. Joseph, Mo., v. Scott*, 10 Neb., 83.) This is the construction given to our statutes for the last fifteen years. It has become a rule affecting the rights and liabilities of individuals, and if unsatisfactory, appeal should be made to the legislature for its modification, and not to the courts. Whether a contract of a married woman sued on was made with reference to her separate property, trade, or business, or upon the faith and credit thereof, and with the intention on her part to thereby bind her separate property, is always a question of fact. The judgment of the district court is

AFFIRMED.

GEORGE S. ARNOLD V. STATE OF NEBRASKA.

FILED JANUARY 4, 1894. No. 4433.

1. **Criminal Law:** PLEA IN BAR: FORMER JEOPARDY: DEMURRER: JURY TRIAL. The prosecuting attorney may interpose a demurrer to a plea in bar offered under section 449 of the Criminal Code by a prisoner indicted for a felony, and have the judgment of the court, whether the facts stated in such plea are sufcient, if true, to prevent the trial of the prisoner for the crime for which he stands indicted and arraigned; but where the plea in bar is good, then the issues raised by it, and the state's reply thereto, must, and can only, be tried by a jury.
2. **Power to Waive Jury Trial of Issues Raised by a Plea in Bar.** In such a case it is beyond the power of the state's attorney and prisoner, by agreement, to substitute another tribunal than the one prescribed by statute for the trial of such issues. The law is designed for the protection of the state as well as the prisoner, and its mandates cannot be evaded by contract, nor can a prisoner charged with a felony waive the right to a jury trial of such issues.
3. ———. The language, "in the absence of a valid agreement to proceed otherwise," found in the second paragraph of the syllabus in *State v. Priebnow*, 16 Neb., 131, disapproved.

ERROR to the district court for Scott's Bluff county. Tried below before CHURCH, J.

George W. Heist and *Henry St. Rayner*, for plaintiff in error:

When a plea in bar is interposed to a prosecution upon indictment, and it states facts which, if true, would constitute a bar to further prosecution, the truth of the plea must be ascertained by a jury. (*State v. Priebnow*, 16 Neb., 131.)

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

RAGAN, C.

George S. Arnold was tried in the district court of Scott's Bluff county for the crime of murder, found guilty, and sentenced to imprisonment in the penitentiary. From this judgment he prosecutes error to this court.

Arnold, at the time of his arraignment, August 26, 1889, offered to the indictment against him a plea in bar as follows: "Now comes George S. Arnold, defendant, in his own proper person, into court here, and having heard the indictment read in the above entitled cause, says that the state of Nebraska ought not further to prosecute said indictment against him, because at the December, 1888, term of the district court of Cheyenne county, Nebraska, held at Sidney, in said county, he, the said George S. Arnold, was indicted by the grand jury of said county on said charge; that he was duly arraigned in said court on said indictment and pleaded 'not guilty' thereto; that after having pleaded 'not guilty,' and being placed upon his trial, was lawfully acquitted by being discharged of the offense charged in said indictment." To this plea the prosecuting attorney filed the following reply: "Now comes W. J. Richardson, prosecuting attorney of Scott's Bluff county, state of Nebraska, and replying to the plea in bar of said

defendant, says that he denies each and every fact stated therein." The record before us sets out: "On the 29th day of August, 1889, the said plea in bar was tried to said court; and after hearing the evidence and arguments of counsel, the court did overrule the same, to which defendant excepted." It appears that the court, and not a jury, tried the issues of fact made by the plea in bar and reply thereto, and this is assigned as error.

Section 449 of the Criminal Code provides: "The accused may then offer a plea in bar to the indictment that he has before had judgment of acquittal, or been convicted, or been pardoned for the same offense; and to this plea the prosecuting attorney may reply that there is no record of such acquittal or conviction, or that there has been no pardon; and on the trial of such issue to a jury," etc. The record does not disclose that Arnold demanded a jury to try the truth of the facts alleged in his plea in bar, nor does it disclose that he waived his right to a jury to try the issues joined by such facts. But he did not need to demand a jury for that purpose, as the law required the matter in issue to be tried, not by a judge, but by a jury; and, if the prisoner had waived the jury, and the record so showed, he would not be estopped from alleging the failure to try this matter to a jury as error. The statute was designed for the protection of the state as well as the prisoner. His consent could not change the law. The rights given him by statute he could not waive; and, even by agreement with the state's prosecutor, the tribunal which the law provided for the trial of this issue could not be set aside and some other tribunal substituted. (*State v. Lockwood*, 43 Wis., 403; *State v. Davis*, 66 Mo., 684; *Williams v. State*, 12 O. St., 622; *State v. Mansfield*, 41 Mo., 470; *Allen v. State*, 54 Ind., 461; *Ward v. People*, 30 Mich., 116.) We have no doubt the prosecuting attorney may interpose a demurrer to a plea in bar offered by a prisoner indicted for a felony and have the rul-

ing of the court whether the facts stated in the plea, if true, are sufficient to prevent a trial of the prisoner under the indictment under which he has been arraigned. (*State v. Priebnow*, 16 Neb., 131.) But where the allegations of the plea in bar, liberally and fairly construed, substantially state that the prisoner has before, by a court having jurisdiction, had judgment of acquittal, or in such court been convicted, or has been pardoned for the same offense for which he stands charged in the indictment to which the plea in bar is offered, then the truth of the facts averred in said plea must, and can only, be tried by a jury. This is laid down in *State v. Priebnow, supra*, in the second paragraph of the syllabus, in these words: "When a plea in bar is interposed to the prosecution upon indictment which is clearly insufficient, a demurrer may be filed thereto without resorting to the formality of impaneling a jury to try the issue presented by the plea; but if the plea states facts which, if true, would constitute a bar to further prosecution, the truth of the plea must, in the absence of a valid agreement to proceed otherwise, be ascertained by a jury." But the words, "in the absence of a valid agreement to proceed otherwise," import that a prisoner indicted for felony can, by agreement, waive his right to a jury trial of the issues made by the averments of his plea in bar, and the state's reply thereto. We do not think he can, and the language quoted above must be overruled. The error assigned is sustained, the judgment of the district court reversed, and the cause remanded with instructions to set aside the verdict and judgment and grant the plaintiff in error a new trial.

REVERSED AND REMANDED.

LIZZIE C. SKINNER V. GEORGE B. SKINNER.

FILED JANUARY 4, 1894. No. 5608.

1. **To sustain an action for use and occupation** of real estate the relation of landlord and tenant must exist between the parties by agreement, either expressed or implied.
2. **One in exclusive possession of the real estate** of another with the latter's knowledge, in the absence of all evidence on the subject, will be presumed in possession by the owner's permission.
3. **Landlord and Tenant.** The law, in the absence of all evidence to the contrary, will imply the existence of the relation of landlord and tenant between two parties, where one owns land, and with his knowledge and permission, such land is used and occupied by another.
4. **If the tenant's use and occupation** has been beneficial to him, that is sufficient from which to imply a promise on his part to pay a reasonable compensation for such use and occupation, in the absence of any evidence negativing such promise.
5. **Witnesses:** HUSBAND AND WIFE. In a suit by a married woman against her husband for the use and occupation by him of her real estate the wife is not a competent witness.
6. **Pleading Under Code.** It is not material by what name, or whether by any, an action under the Code is designated. The pleader should state the facts, and if they constitute a cause of action, the law affords the remedy without reference to the form of the action.

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

The opinion contains a statement of the case.

Charles O. Whedon, for plaintiff in error:

The married woman's act of 1871 wholly removed the common law disability of a married woman and repealed section 331 of the Code so far as it prevents a married

woman from testifying in a suit brought by her against her husband. (*May v. May*, 9 Neb., 16; *Pope v. Hooper*, 6 Neb., 187; *Omaha Horse Railway Co. v. Doolittle*, 7 Neb., 486.)

G. M. Lambertson and *Abbott, Selleck & Lane, contra:*

The petition does not state a cause of action. Such a suit cannot be maintained by a wife against her husband. (*Barber v. Root*, 10 Mass., 260; *Aultman v. Obermeyer*, 6 Neb., 264; *Fowler v. Trebein*, 16 O. St., 498; *White v. Wager*, 25 N. Y., 328; *Winans v. Peebles*, 32 N. Y., 423; *Lord v. Parker*, 3 Allen [Mass.], 127; *Smith v. Gorman*, 41 Me., 405; *McKeen v. Frost*, 46 Me., 239; *Dwelly v. Dwelly*, 46 Me., 377; *Farrell v. Patterson*, 43 Ill., 52; *Reeves v. Webster*, 71 Ill., 307; *Aiken v. Davis*, 17 Cal., 119.)

In order to maintain an action for use and occupation the relation of landlord and tenant must exist. Occupancy under some contract, express or implied, must be shown. (*Thompson v. Bower*, 60 Barb. [N. Y.], 463; *Smith v. Stewart*, 6 Johns. [N. Y.], 46; *Sylvester v. Ralston*, 31 Barb. [N. Y.], 287; *Marquette, H. & O. R. Co. v. Harlow*, 37 Mich., 555; *Dalton v. Laudahn*, 30 Mich., 349; *Hogsett v. Ellis*, 17 Mich., 351; *Long v. Bonner*, 11 Ired. [N. Car.], 27; 2 Wood, Landlord & Tenant, sec. 546; *Moore v. Harvey*, 50 Vt., 297; *Brewer v. Craig*, 18 N. J. Law, 214; *Stewart v. Fitch*, 31 N. J. Law, 17; *Mitchell v. Pendleton*, 21 O. St., 664; *Nance v. Alexander*, 47 Ind., 516; *Espy v. Fenton*, 5 Ore., 423.)

The wife cannot testify in this case against her husband. (Sec. 331, Code; *Lord v. State*, 17 Neb., 526; *Karney v. Paisley*, 13 Ia., 89; *Russ v. Steamboat War Eagle*, 14 Ia., 363; *Blake v. Graves*, 18 Ia., 312; *Stephenson v. Cook*, 64 Ia., 265; *Bartlett v. Bartlett*, 15 Neb., 595; *Shoeffler v. State*, 3 Wis., 717; *Farrell v. Ledwell*, 21 Wis., 184.)

RAGAN, C.

Lizzie C. Skinner sued George B. Skinner in the district court of Lancaster county, alleging, as her cause of action, that she was the owner of certain real estate; that George B. Skinner, by her permission and as her tenant, had occupied and used said real estate for about four years, and though often requested, had never paid anything whatever for his use and occupancy thereof; that the reasonable rental value of said property during the time said George B. Skinner had occupied it was $1,200 per year. George B. Skinner's answer, so far as it is material here, admitted his use and occupation of the property; averred that the property was his, Mrs. Skinner holding the legal title as his trustee; that he and Mrs. Skinner were husband and wife; that the relation of lessor and lessee had never existed between him and Mrs. Skinner; that she had never made demand on him for rent; that he had never paid any rent; and he further denied that he used and occupied said premises by her permission or as her tenant, but averred that he occupied them with her knowledge. Mrs. Skinner's reply admitted that she and Mr. Skinner were husband and wife, and denied the other allegations of the answer recited above. Mrs. Skinner proved her title to the property and the rental value, and then offered herself as a witness to prove that Mr. Skinner occupied said real estate as her tenant; that she had paid $800 taxes on said real estate during said time; that Mr. Skinner took possession of and erected some buildings on said property by her permission; and that she had paid $400 insurance on said buildings. Counsel for Mr. Skinner objected to Mrs. Skinner's testifying, on the ground that she being the wife of the defendant could not testify against him. The court sustained the objection. Mrs. Skinner excepted. No evidence was offered by George B. Skinner. The court dismissed Mrs. Skinner's case, and she brings the cause here for review.

The first error alleged is the refusal of the court to permit Mrs. Skinner to testify against her husband. By section 331, title 10, Code of Civil Procedure, it is provided: "The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other; but they may in all criminal prosecutions be witnesses for each other." If this statute is still the law, it is decisive of the question presented. This statute was passed in 1855, and counsel for Mrs. Skinner argues that it is no longer in force. He bases this conclusion on chapter 53, Compiled Statutes, 1893, entitled "Married Women," sections 2, 3, and 4 of which act provide:

"Sec. 2. A married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same, in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property.

"Sec. 3. A woman may, while married, sue and be sued, in the same manner as if she were unmarried.

"Sec. 4. Any married woman may carry on trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman from her trade, business, labor, or services shall be her sole separate property, and may be used and invested by her in her own name."

Counsel says: "By this act the legislature removed the common law disabilities of a married woman." But this act has no reference to the right of married women to testify. It does not define, nor attempt to define, what shall be evidence, nor who shall be competent witnesses in any case. It does not deal with the subject of either witnesses or evidence. At common law the contracts of a married woman were void, and the object, and the only object, of this statute (chapter 53) was to remove her disa-

bility to contract, and permit her to contract with reference to her separate property, trade, or business. (*Godfrey v. Megahan*, 38 Neb., 748, and cases there cited; *Niland v. Kalish*, 37 Neb., 47.) In *Lawson v. Gibson*, 18 Neb., 137, the rule as to the repeal of statutes by implication is thus stated: "A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable."

Now there is no repugnancy whatever between section 331 of the Code of Civil Procedure, defining the cases and circumstances in which a husband or wife becomes a competent witness against the other, and the so-called "married woman's act," removing the common law disabilities of a married woman to make contracts and sue and be sued. At common law neither husband nor wife could testify one against the other in any case. The rule still remains, except in so far as it has been changed by our statutes. The changes made by the statutes now in force permit a husband or wife to testify one against the other only in proceedings for divorce, and in criminal proceedings for a crime committed by the one against the other. If the statutes, as they exist, are unjust and oppressive, appeal should be made to the legislature to modify them. The court is but a humble interpreter, whose duty it is to give effect to the mandates of the sovereign people as found in the laws enacted by the legislative department of the state. The court did not err in refusing to permit Mrs. Skinner to testify.

The pleadings and evidence in the case establish that Mrs. Skinner owned the real estate described in the petition; that George B. Skinner had used and occupied it for four years, and that its reasonable and fair rental value for that time was $——; that plaintiff and defendant were husband and wife, and that the property used and occupied by the defendant was not the homestead of the parties. It was not proved that George B. Skinner occupied said premises under an express agreement to pay rent; nor that he

went into possession by Mrs. Skinner's express permission; nor that his taking possession of said property was wrongful; nor was it proved that he had ever paid any rent or been requested to pay any. Section 1, chapter 53, Compiled Statutes, 1893, provides: "The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits or proceeds thereof, and any real, personal, or mixed property which shall come to her by descent, devise, or the gift of any person except her husband, or which she shall acquire by purchase or otherwise, shall remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband." The design of this statute was to protect the wife's separate property from the control and disposition of her husband; to make them, so far as her separate estate is concerned, strangers. To give effect to this policy requires that in such cases as the one at bar the same presumptions should be indulged as in an action between strangers; any other course would permit the husband to gain the usufruct of his wife's property, and undo the policy of the law. A married woman would thus be restored to her common law status. With the question as to whether this is a wise law we have nothing to do. It is the law, and that is sufficient for us. The evidence further showed that Mrs. Skinner acquired this real estate by purchase after her marriage to Mr. Skinner; that the title has remained of record in her name since 1878, and this raises the presumption that it is her separate property.

Counsel for appellee George B. Skinner say: "The statute which says 'a woman may, while married, sue and be sued, in the same manner as if she were unmarried,' does not authorize a married woman to sue her husband at all, because if she were unmarried she could not sue her husband, since she would have none to sue." The answer to this proposition is, "that if this woman was unmarried,

she could at common law sue this man; being a married woman, she could not at common law sue her husband, or any one else; but the statute having removed her common law disability in that respect, she may now sue any person whom she could sue, either at common law or under the statute, if she were unmarried. Her legal ability to sue and be sued is not limited to matters having reference to her separate property, trade, or business, as is her legal ability to make contracts."

The rights, then, of the parties to this suit are to be determined as though the parties were strangers, and the question is, does the law imply a promise on the part of George B. Skinner to pay his wife what the use and occupation of her real estate by him was reasonably worth during his occupancy and use thereof? The form of action in this case seems to be given much prominence by counsel for appellee in his brief and in the authorities cited by him. It is true that the action is designated as one for use and occupation. It is not material by what name, or whether by any, an action under the Code is designated. The pleader should state the facts, and if they constitute a cause of action the law affords the remedy.

We have examined all the authorities cited by counsel for the appellee George B. Skinner to the point that an action for use and occupation for land will not lie in this case, and of those cited we notice the following:

In *Nance v. Alexander*, 49 Ind., 516, Alexander owned a house standing on a lot for which he held a lease. This house was levied on and sold under an execution and purchased by Nance, who went into possession and occupied the same for some time. The sale under the execution having been set aside, Alexander sued Nance for use and occupation, and the court said: "The finding and judgment cannot be sustained on the evidence. A suit for use and occupation can only be sustained where the relation of landlord and tenant exists expressly or by implication."

In *Mitchell v. Pendleton*, 21 O. St., 664, the facts were: Pendleton owned a lot in the city of Cincinnati extending from Vine to Walnut street. Mitchell & Co. had a lease of a part of this lot and used it for a lumber yard, and had verbal permission to use the other part without paying rent therefor. In November, 1865, Pendleton notified Mitchell that if he continued to use the unleased portion of the lot after a certain date, he would be expected to pay rent. Thereupon Mitchell notified Pendleton that he did not wish to use the unleased portion of the lot any longer, and offered to remove the fence which he had put across it; but Pendleton requested him to let the fence remain, as the lot, if unfenced, might become a nuisance. Shortly after this Mitchell moved all his lumber from that part of the lot not embraced in the lease. Such part of the lot, however, remained unoccupied and vacant, and Mitchell drove his teams across it and threw lumber off his wagons on it, and let the lumber lie there, but made no piles of boards on the land. After the expiration of the lease for that part of the lot occupied for a lumber yard by Mitchell, Pendleton sued Mitchell for the use made by him as above stated, of the portion of the lot not covered by his lease, and the court said: "There was no express contract to pay rent for the land not embraced in the lease; and we think none can be implied from the facts of the case, but rather that such implication is negatived by the conduct of both parties."

In *Stewart v. Fitch*, 31 N. J. Law, 17, the facts were thus stated by the judge delivering the opinion of the court: "The plaintiff is the owner of land in the county of Burlington, bounding on the Delaware river. The defendants, who are lumber merchants, were in the habit of occupying the mud flats adjacent to and in front of plaintiff's lands with their rafts and floats of lumber, and the action in this case was brought for such use and occupation of the flats;" and the court decided: "The action for use and occupation

can only be maintained upon a contract, express or implied. A shore owner cannot maintain an action against a party using lands in front of him between high and low water mark unless he has reclaimed or improved the land so used."

In *Brewer v. Administrators*, 18 N. J. Law, 214, the decision was: "No action can be maintained for use and occupation where the relation of landlord and tenant does not exist; and that relation does not exist where the defendant enters upon land under a contract of purchase and sale or for a deed. If, under such contract, the purchaser enter upon land and cut and sell the timber thereon, the law will not raise an implied contract on which he is liable for goods and timber sold and delivered."

In *Smith v. Stewart*, 6 Johns. [N. Y.], 46*, I quote the opinion of the court in full: "At common law no action of assumpsit for rent would lie except upon an express promise made at the time of the demise. The present action is given by the statute of 11 George 2d, chapter 19, section 14, which we have adopted. But this statute, from the terms of it, seems to apply only to the case of a demise and where there exists the relation of landlord and tenant founded on some agreement creating that relation. * * Here the defendant did not enter under such a relation, but under a contract for a deed. He therefore entered under a color of title which might have been enforced in equity. He finally refused to perform the contract and changed himself into a trespasser, and the better opinion is, notwithstanding the case of *Hearn v. Tomlin*, Peake's N. P., 192, that he never was strictly a tenant and never entitled to notice to quit, nor liable to distress or to an action of assumpsit for rent. He is liable in another way to be turned out as a trespasser, and is responsible in that character for the mesne profits."

In section 19, Taylor's Landlord and Tenant, it is said: "The relation of landlord and tenant may be created by

implication or by express contract. The law will, in general, imply the existence of a tenancy wherever there is an ownership of land on the one hand and an occupation by permission on the other, for in such cases it will be presumed that the occupant intended to pay for the use of the premises. It will be implied in many cases where there has been no distinct agreement between the parties, or where, from various causes, the agreement may have ceased to be operative." In section 655 the same author says: "Almost any evidence which shows the relation of landlord and tenant to exist between the parties, will support this action (use and occupation). It is not necessary for the plaintiff to prove an express contract with the tenant when he took possession; or any particular reservation of rent; nor that the tenant has once paid rent; for an understanding to that effect will be implied in all cases where a permissive holding is established."

In *Dwight v. Cutler*, 3 Mich., 566, it was held: "Where the occupancy of premises by a tenant at will has been beneficial to him, that is a sufficient ground to imply a promise to pay a reasonable sum as compensation for such occupancy, unless there is something in the circumstances inconsistent with the notion of such a promise or of an obligation to pay."

In *Hogsett v. Ellis*, 17 Mich., 351, Christiancy, J., speaking for the court, said: "It is very clear that assumpsit for use and occupation cannot be maintained where the relation of landlord and tenant did not exist during the occupancy, or when the holding has been adverse to the owner, because, among other reasons, a disputed title cannot be tried in an action of assumpsit; but when the relation exists and the occupancy has been beneficial to the defendant, we think, upon principle and the weight of American authority, the law implies a promise to pay a reasonable compensation, unless there be an express contract or other circumstance inconsistent with the notion of such

promise, or with the duty or obligation to pay. * * * And we think the mere fact of the occupancy by A of the land of B is *prima facie* evidence that A is the tenant of B, which can only be rebutted by showing some fact or circumstance tending to rebut this inference. * * * But this inference would not tend to establish one kind of tenancy more than another, but simply the relation of landlord and tenant. * * * But it has been said that at common law a tenant at sufferance was not liable for rent; and this must be so beyond question, as to 'rent,' strictly so called, which always grows out of express contract and is fixed and definite in amount.

"The contract being terminated before the tenancy commences, there is nothing from which rent as such can arise; but the reason generally given for the rule is broad enough to cover the reasonable compensation for use and occupation, or, rather, it applies to this as well as to rent."

In *Dalton v. Laudahn*, 30 Mich., 349, the real point decided in the case was that one could not sue a railroad company for rent when he had never consented that the railroad company might use his land and had warned it that it had no right in the soil and that it went upon the land at its peril, the court saying that the action for use and occupation of lands was based on the contract relation of landlord and tenant and rested upon an express or implied agreement to pay rent during the tenancy.

From the foregoing authorities we deduce the following principles:

1. To sustain an action for use and occupation of real estate the relation of landlord and tenant must exist between the parties, based on an agreement, expressed or implied.

2. One in the exclusive possession of real estate of another with the latter's knowledge, in the absence of all evidence on the subject, will be presumed in possession by the owner's permission.

3. That the law, in the absence of all evidence to the

contrary, will imply the existence of the relation of landlord and tenant between two parties where one owns land, and by his permission it is used and occupied by the other.

4. That if the tenant's use and occupation has been beneficial to him, that is sufficient ground from which to imply a promise on his part to pay a reasonable compensation for such use and occupation, in the absence of any evidence negativing such promise.

We are therefore of the opinion that Mrs. Skinner is entitled to recover in this action, from her husband, a fair and reasonable compensation for his use and occupation of her real estate, and that the decree of the court dismissing her petition was error. The judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

ALBERT WELTON, APPELLEE, V. THOMAS J. DICKSON ET AL., APPELLANTS.

FILED JANUARY 4, 1894. No. 5488.

1. **Eminent Domain:** PRIVATE PROPERTY FOR PRIVATE USE. The constitutional provision, "The property of no person shall be taken or damaged for public use without just compensation," prohibits, by implication, the taking of private property for any private use whatever without the consent of the owner.

2. **Such constitutional provision** forbids private property from being compulsorily taken or damaged for any but public use, and then only upon just compensation being made, the amount of which is to be assessed by a jury.

3. **The want of power in a legislature to transfer to one man the property of another** without his consent, either with or without compensation, does not depend upon constitutional restriction, but upon the fact that it is not the exercise of the power of making laws or rules of civil conduct, which is the branch of the sovereign power committed to the legislature.

4. **Eminent Domain.** When the public exigencies demand, the exercise of the power of taking private property for the public use is solely a question for the legislature, upon whose determination the courts cannot sit in judgment.

5. **But what is such a public use** as will justify the exercise of the power of eminent domain is a question for the courts to decide. But if the public use be declared by the legislature, the courts will hold the use public, unless it manifestly appears from the provisions of the act that they can have no tendency to advance and promote such public use. *Bankhead v. Brown*, 25 Ia., 540, and *Coster v. Tide Water Co.*, 18 N. J. Eq., 54, followed.

6. **Private Roads:** CONSTITUTIONAL LAW. Sections 47, 48, 49, 50, 51, and 52 of chapter 78, Compiled Statutes, 1893, authorize the taking of private property for private use, the roads therein mentioned being essentially private and beyond the public control, and said sections are therefore unconstitutional and void.

7. **Equitable Jurisdiction:** INJUNCTION. The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction; and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed in the proceedings. It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Watson v. Sutherland*, 72 U. S., 74, followed.

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

The opinion contains a statement of the case.

N. Z. Snell and *Beeson & Root*, for appellants:

The county commissioners have exclusive original jurisdiction in laying out and establishing roads. In this class of cases the board acts judicially. It is discretionary with it to grant or refuse the relief asked. The only way its final orders in such cases can be attacked is by review. (*State v. Clary*, 25 Neb., 403; *State v. Palmer*, 18 Neb., 644.)

There being an adequate remedy at law, chancery will not

interfere. (*Brown v. Otoe County*, 6 Neb., 111; *Clark v. Dayton*, 6 Neb., 193; *Ellis v. Karl*, 7 Neb., 381.)

The proper place to raise questions as to the propriety or impropriety of establishing the proposed road is before the commissioners themselves. The remedy of the party aggrieved by the decision is by a direct proceeding to review in the district court. (*Poyer v. Village of Des Plaines*, 123 Ill., 111; *Wallack v. Society*, 67 N. Y., 23; 1 High, Injunctions [2d ed.], secs. 29, 88; 2 High, Injunctions [2d ed.], secs. 1242, 1244, 1257, 1258; *West v. Mayor of New York*, 10 Paige [N. Y.], 539.)

The sections of chapter 78, Compiled Statutes, providing for the establishment of roads, are not unconstitutional as allowing private property to be taken for private use. The law is valid. (*Sherman v. Buick*, 32 Cal., 241; *Allen v. Stevens*, 5 Dutch. [N. J.], 509; *In re Hickman*, 4 Harring. [Del.], 580; *Harvey v. Thomas*, 10 Watts [Pa.], 65; *Pocopson Road*, 16 Pa. St., 15; *Killbuck Private Road*, 77 Pa. St., 39; *Waddell's Appeal*, 84 Pa. St., 90; *Metcalf v. Bingham*, 3 N. H., 461; *Proctor v. Andover*, 42 N. H., 351; *Brewer v. Bowman*, 9 Ga., 37; *Robinson v. Swope*, 12 Bush [Ky.], 21; *McCauley v. Dunlap*, 4 B. Mon. [Ky.], 57; *Denham v. County Commissioners of Bristol*, 108 Mass., 202; *Jones v. Andover*, 6 Pick. [Mass.], 59; *Commonwealth v. Hubbard*, 24 Pick. [Mass.], 98; *Ferris v. Bramble*, 5 O. St., 109; *Shaver v. Starrett*, 4 O. St., 494; *Bankhead v. Brown*, 25 Ia., 540.)

Pound & Burr, contra:

Commissioners acting under color of law and proceeding without any legal authority to permanently appropriate the land of a private citizen may be enjoined from proceeding with such appropriation. (2 High, Injunctions, secs. 1308, 1309, 1318; *Beatty v. Beethe*, 23 Neb., 210; *Follmer v. Nuckolls County*, 6 Neb., 204; *McArthur v. Kelly*, 5 O., 110; *Anderson v. Hamilton County*, 12 O. St., 635; *Mo-*

hawk H. R. Co. v. Artcher, 6 Paige [N. Y.], 83; *Wild v. Deig*, 43 Ind., 455; *Witham v. Osburn*, 4 Ore., 318; *Green v. Green*, 34 Ill., 320; *Green v. Oakes*, 17 Ill., 249; *Lumsden v. City of Milwaukee*, 8 Wis., 239; *Waddell's Appeal*, 84 Pa. St., 90; *Coster v. Tide Water Co.*, 18 N. J. Eq., 55.)

It is well established that when county commissioners or other public officers are proceeding in excess of their powers, or in the absence of power or jurisdiction, and their acts are likely to result in irreparable injury to property owners, an injunction is the appropriate relief. (*Armstrong v. City of St. Louis*, 3 Mo. App., 151; *Town of Covington v. Nelson*, 35 Ind., 532; *Conrad v. Smith*, 32 Mich., 429; *Carter v. City of Chicago*, 57 Ill., 283; *Dinwiddie v. President and Trustees of Rushville*, 37 Ind., 66; *Mayor and City Council of Baltimore v. Gill*, 31 Md., 375; *Lumsden v. City of Milwaukee*, 8 Wis., 239; *Follmer v. Nuckolls County*, 6 Neb., 204; *Vanderlip v. City of Grand Rapids*, 41 N. W. Rep. [Mich.], 677; *Board of Commissioners of Benton County v. Templeton*, 51 Ind., 266.)

When there is some legal remedy, but it is clearly inadequate to give the relief to which the plaintiff is entitled, he may have an injunction. (*Watson v. Sutherland*, 5 Wall. [U. S.], 74; *Bishop v. Moorman*, 98 Ind., 1; *Keene v. Bristol*, 26 Pa. St., 46; 3 Pomeroy, Equity, sec. 1399; *Roy v. Atchison & N. R. Co.*, 4 Neb., 439; *Omaha & N. W. R. Co. v. Menk*, 4 Neb., 21.)

A constitutional provision that "the property of no person shall be taken or damaged for public use without just compensation" should be construed as equivalent to a declaration that private property, without the consent of the owner, shall be taken only for public use, and this only upon a just compensation. Such a provision prohibits private property from being taken for private use. (Sedgwick, Stats. & Const. Law [2d ed.], pp. 447–450; *In re Albany Street, New York*, 11 Wend. [N. Y.], 149; *Bloodgood v. Mohawk & H. R. Co.*, 18 Wend. [N. Y.], 9; *Reeves v.*

Treasurer of Wood County, 8 O. St., 346; *McQuillen v. Hatton*, 42 O. St., 204; *Jenal v. Green Island Draining Co.*, 12 Neb., 166; *Forney v. Fremont, E. & M. V. R. Co.*, 23 Neb., 468; *Osborn v. Hart*, 24 Wis., 90; *In re Application of Eureka Basin Warehouse & Mfg. Co.*, 96 N. Y., 49; *Anderson v. Kerns Draining Co.*, 14 Ind., 199; *Tyler v. Beacher*, 44 Vt., 648; *Consolidated Channel Co. v. Central P. R. Co.*, 51 Cal., 269; *Beekman v. Saratoga S. R. Co.*, 3 Paige Ch. [N. Y.], 73.)

Statutes authorizing private roads or right of way to be laid out across the lands of unwilling persons by the exercise of the right of eminent domain are held, in states having a constitutional provision like our own, unconstitutional and void. (*Bankhead v. Brown*, 25 Ia., 540; *Nesbitt v. Trumbo*, 39 Ill., 110; *Wild v. Deig*, 43 Ind., 455; *Taylor v. Porter*, 4 Hill [N. Y.], 140; *In re Albany Street, New York*, 11 Wend. [N. Y.], 149; *Dickey v. Tennison*, 27 Mo., 373; *Osborn v. Hart*, 24 Wis., 89; *Clack v. White*, 2 Swan [Tenn.], 540; *Varner v. Martin*, 21 W. Va., 534; *Roberts v. Williams*, 15 Ark., 43; *Witham v. Osburn*, 4 Ore., 318; *Sadler v. Langham*, 34 Ala., 311; *Crear v. Crossly*, 40 Ill., 175; *Stewart v. Hartman*, 46 Ind., 331; *Sholl v. German Coal Co.*, 118 Ill., 427; *Ross v. Davis*, 97 Ind., 79; Elliott, Roads & Streets, p. 146; Lewis, Eminent Domain, sec. 167.)

As to what is a public use is a question of law to be decided by the courts. (*McQuillen v. Hatton*, 42 O. St., 202; *Tyler v. Beacher*, 44 Vt., 648; *In re Application of Eureka Basin Warehouse & Mfg. Co.*, 96 N. Y., 42; *City of Savannah v. Hancock*, 91 Mo., 54; *Coster v. Tide Water Co.*, 18 N. J. Eq., 55.)

RAGAN, C.

Chapter 78, Compiled Statutes of 1893, provides:

"Sec. 47. When the lands of any person shall be surrounded or enclosed, or be shut out and cut off from a

public highway by the lands of any other person or persons, who refuse to allow such person a private road to pass to or from his or her said land, it shall be the duty of the county board, on petition of any person whose land is so surrounded or shut out, to appoint three disinterested freeholders of the precinct or township, in counties under township organization, in which the land lies, as commissioners to view and mark out a road from land of the petitioner to the nearest public highway, and assess the damages the person will sustain through whose land the road will pass.

"Sec. 48. The person desiring to secure the right of way shall give the person or persons through whose lands the road will run at least two days' notice of such intended application, by leaving or causing to be left a written notice at his usual place of abode; and satisfactory evidence that such notice has been given shall be presented to the board before commissioners shall be appointed.

"Sec. 49. The commissioners shall, before entering upon the discharge of their duties, take and subscribe an oath before some judge or justice of the peace, that they are not interested nor of kin to either of the parties interested in the proposed road, and that they will faithfully and impartially view and mark out said road to the greatest ease and convenience of the parties, and as little as may be to the injury of either, and assess the damages which will be sustained by the party through whose land it will run.

"Sec. 50. Said commissioners shall make out a report of their proceedings, stating particularly the course and distance of said road, and the amount of damages assessed, which report, together with a certificate of the oath, shall be returned to the county commissioners and filed by the county clerk.

"Sec. 51. If the report be approved by the county board, and the petitioner shall produce satisfactory evidence that he has paid the damages assessed (or tendered payment, if

the party refuse to receive it), and all costs attending the proceedings, the county board shall grant an order to said petitioner to open a road not exceeding fifteen feet in width; and if any person or persons obstruct said road, such person or persons shall be liable to all the penalties for obstructing a public road; *Provided, however*, If such road shall pass through any inclosure, and it shall be required by the owner thereof, the person applying for such road shall put up and keep at each entrance into such inclosure a good and substantial swinging gate; *Provided further*, That either party may appeal from the decision of the county board in like manner as prescribed in case of public roads.

"Sec. 52. Upon the establishment of the right of way, as in this chapter provided, the same shall vest and descend as an easement in the party and his or her heirs or assigns forever."

The board of county commissioners of Lancaster county, on the petition of Owen Marshall and Aaron C. Loder, appointed three commissioners, who viewed and marked out a private road through the land of one Albert Welton, and made report of their proceedings to said board of county commissioners. Thereupon, Welton brought this suit in the district court of Lancaster county to enjoin Marshall and Loder, and the board of county commissioners, from laying out and establishing on his land the private road petitioned for. The suit is based on the grounds that the statute quoted above is unconstitutional, and that the threatened action of the defendants, if permitted, will work an irreparable injury to Welton, for which he has no adequate remedy at law. The appellants demurred to the petition on the ground that it did not state a cause of action. The court overruled the demurrer and entered a decree perpetually enjoining the board of county commissioners from establishing such private road on the lands of Welton. The case comes here on appeal.

The principal question in the case is the constitutionality

of the sections of the statute recited above. If B's land shall be shut off from public highways by the land of A, and he shall refuse to allow B a private road across his, A's land, then this statute, against A's consent, takes a part of his land and transfers it to B, to be used as a private road by him, his heirs and assigns, forever. Section 21, article 1, of the constitution of the state provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." The uniform holding of the courts is that such a constitutional provision as this is an implied prohibition on the power of the legislature to take the private property of A without his consent, even when compensation is made, and transfer it to B for his private use.

The supreme court of the state of New Jersey, in *Coster v. Tide Water Co.*, 18 N. J. Eq., 54, declares: "This want of power in the legislature does not depend upon any constitutional restriction, but upon the fact that it is not the exercise of the power of making laws or rules of civil conduct, which is the branch of the sovereign power committed to the legislature. To justify the taking of the citizen's property by the legislature, the use for which it is appropriated must be a public use."

Speaking to this subject the eminent jurist, Cooley, says: "The right of eminent domain implies that the purpose for which it may be exercised must not be a mere private purpose; and it is conceded on all hands that the legislature has no power in any case to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit. The right of eminent domain does not imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer." (Cooley, Const. Lim. [6th ed.], p. 651.)

Now, is the use for which this statute authorizes the tak-

ing of appellee's land a public or private one? Is the purpose of this law to take A's property and transfer it to B for the use of the public, or for B's private use? If the private road contemplated by this law is for the use of the public, the law is good; if, on the other hand, the road authorized is for the private use and benefit of an individual, the law is void; and, whether one or the other, is a question of law. To make the use public, it need not be for the benefit of the whole public or state, or any large portion of it. It may be for the inhabitants of a small or restricted locality, but the use and benefit must be in common, not to a particular individual or estate. (*Coster v. Tide Water Co.*, 18 N. J. Eq., 54.)

Section 4511, Revised Statutes of Ohio, provides: "The trustees of any township may, whenever in their opinion the same will be conducive to the public health, convenience, or welfare, cause to be established, located, and constructed, as hereinafter provided, any ditch within such township." Certain parties petitioned for the construction of a ditch across the lands of others under said statute. On the trial the court was requested to charge the jury as follows: "If you find that the petitioners * * * are the only persons in any way interested in the location of the ditch, and that it would not be conducive to public health, convenience, or welfare to locate the ditch in question, then, and in that case, you should return your verdict against the proposed ditch." The court refused to give this instruction, and the case was taken to the supreme court for review, and that tribunal say: "The facts being ascertained, the question whether or not a ditch will conduce to the public health, convenience, or welfare, within the meaning of Rev. Stat., sec. 4511, so that it will be of public use, is a question of law." (*McQuillen v. Hatton*, 42 O. St., 202.)

In *Jenal v. Green Island Draining Co.*, 12 Neb., 163, was considered a statute of this state, authorizing the con-

struction of levees, dikes, and drains, and the reclamation of wet and overflowed lands by incorporated companies. The act provided, among other things, that the company might appropriate any land, stones, timber, gravel, or other materials necessary for the right of way or construction, maintenance, or improvement of the proposed work by first paying into the county treasury of the county where the land is situate, for the use of the owner of the land, the amount of damage assessed by the appraisers who were appointed therefor. Chief Justice MAXWELL, speaking for this court, said: "The statute in question authorizes the entry upon lands, and construction of drains whenever the private interest of the corporation requires it, and without reference to the public welfare. Any number of persons, not less than three, being the owners of wet and overflowed lands, whenever it is for their interest, may locate a ditch across the lands of others. * * * This is an infringement of the right of private property and is unauthorized and void."

The general road law of this state, chapter 78, Compiled Statutes, 1893, confers on county boards of the several counties of the state general supervision over the public roads of the state, with power to maintain them; requires a petition for a public road to be signed by ten freeholders; fixes their width at sixty-six feet; makes the cost of their construction and maintenance a public charge; provides that when persons traveling with carriages shall meet on such roads, each shall turn to the right of the center thereof; prohibits all persons addicted to the excessive use of intoxicating liquors from being employed as drivers on said roads; prohibits the running of horses on such roads; the leaving in such roads, unhitched or unguarded, any horses or teams; and that the overseer of each road district shall annually cause furrows to be plowed on either side of all such roads, as fire guards. None of these provisions are found in this act in reference to private roads, and none

of these provisions apply to private roads. Had the legislature intended that these private roads should be for the public use, then, indeed, the entire private road act would be superfluous; but the law we have under consideration expressly provides: "Upon the establishment of the right of way, as in this chapter provided, the same shall vest and descend as an easement in the party and his or her heirs or assigns forever." (Sec. 52, ch. 78, Comp. Stats.) The fact that the legal title is not taken, but an easement created, does not render this law less objectionable; for what value is one's legal title if another have the possession and use forever? Marshall and Loder would acquire no greater estate to the land in question if Welton gave them an absolute warranty deed. The public have an easement in all public roads, while the legal title remains in the adjoining owner, but by this law no right in or to the private road is conferred on the public. This law is, and was intended to be, and act for the transfer of A's property against his consent, compensation being made to him, to B, his heirs and assigns, for their private use and convenience, and is, therefore, in conflict with the implied prohibitions of the constitution, and void.

In *Bankhead v. Brown*, 25 Ia., 540, the question of the constitutionality of a private road law was decided. By the statute considered in that case it was provided:

Section 1. Private roads may be laid out in the same manner as county roads, and the general road laws of the state as to the establishment of county roads are applicable, except that it is not necessary that any person but the applicant shall sign the petition.

Sec. 2. That the board of supervisors may appoint a commissioner to report upon the application, and requires a bond from the applicant to pay all costs and damages.

Sec. 3. That no such road shall be ordered to be opened until the costs and damages have been paid and the conditions on which it is established shall have been complied with by the applicant.

Sec. 4. That on the final hearing the board may receive petitions for and against the proposed road, hear testimony, and establish the road upon the payment of costs and damages, and upon such condition as to fences as to the board may seem just to all parties concerned.

It will be observed that the Iowa law is substantially the same as the one under consideration here, with the exceptions that the Nebraska statute contains no provisions allowing the board of county commissioners to receive petitions for and against the proposed road; and the Iowa statute has no provisions vesting the perpetual easement in the private road established in the party petitioning therefor.

Bankhead v. Brown, supra, arose out of an effort of Bankhead to have established a private road under the provisions of the Iowa law just quoted, across the land of Brown, in order to reach Bankhead's coal mine. The establishment of the private road was resisted by Brown on the ground that the law authorizing it was unconstitutional, in that it proposed the taking of private property for private uses. Dillon, C. J., delivering the opinion of the court, said: "With respect to the act, * * * we are of opinion that roads thereunder established are essentially private, that is, are the private property of the applicant therefor, because, first, the statute denominates them 'private roads.' * * * If the roads established thereunder were not intended to be private and different from ordinary public roads, there was no necessity for the act. Second. Such road may be established upon the petition of the applicant alone, and he must pay the costs and damages occasioned thereby and perform such other conditions as to fences, etc., as the board may prescribe. Third. The public are not bound to work or keep such roads in repair, and that is a very satisfactory test as to whether the road is public or private. Fourth. We see no reason, when such a road is established, why the person at whose instance this was done

might not lock the gates opening into it or fence it up, or otherwise debar the public of any right thereto. Could not the plaintiffs in this case, after having procured the road in question, abandon it at their pleasure? Could they not relinquish it to the defendants without consulting the board of supervisors? If this is so, does it not incontestably establish that it is essentially private? For it must be private if it is of such a nature that the plaintiffs can at their pleasure use or forbid its use, abandon or refuse to abandon it, relinquish or refuse to relinquish it. If the act * * * is valid, might not the plaintiffs, having procured the road, use it for laying down a tram or horse railway and forbid everybody from using the road, and even exclude all persons therefrom? Who could prevent it? These considerations mark the great difference between such a road and a public highway and demonstrate the essential private character of the road."

In the following cases acts substantially like the Iowa act providing for the establishment of private roads, have been declared unconstitutional: *Nesbitt v. Trumbo*, 39 Ill., 110; *Dickey v. Tennison*, 27 Mo., 373; *Clack v. White*, 2 Swan [Tenn.], 540; *Taylor v. Porter*, 4 Hill [N. Y.], 140; *Sadler v. Langham*, 34 Ala., 311; *Newell v. Smith*, 15 Wis., 111.

The language quoted above from the learned judge in reference to the Iowa law is applicable to the statute under investigation. The eminent jurist, commenting on the constitutional provision of the state of Iowa, "that private property shall not be taken for public use without just compensation," continues: "The limitation * * upon the right of eminent domain, or the power of the legislature to take private property for public use, is found in all, or nearly all of the state constitutions. Many of the questions growing out of this limitation upon the otherwise practically if not theoretically absolute power of the legislature to take the property of one for the benefit of the

many, have been settled by adjudication." And he deduces from the numerous authorities cited by him in the opinion the following propositions:

"1. The constitutional limitation above quoted prohibits by implication the taking of private property for any private use whatever without the consent of the owner.

"2. It forbids private property from being compulsorily taken for any but public use, and then only upon just compensation being made, the amount of which is to be assessed by a jury.

"3. When the public exigencies demand the exercise of the power of taking private property for the public use is solely a question for the legislature, upon whose determination the courts cannot sit in judgment.

"4. That what is such a public use as will justify the exercise of the power of eminent domain, is a question for the courts. But 'if a public use be declared by the legislature, the courts will hold the use public, unless it manifestly appears by the provisions of the act that they can have no tendency to advance and promote such public use.'"

We are entirely satisfied with the reasoning and conclusions of this opinion and follow it without hesitation. Statutes similar to the Nebraska law have been held invalid in the following cases: *Stewart v. Hartman*, 46 Ind., 331; *In re Albany Street, New York*, 11 Wend. [N. Y.], 149; *Osborn v. Hart*, 24 Wis., 89; *Crear v. Crossly*, 40 Ill., 175; *Sholl v. German Coal Co.*, 118 Ill., 427.

Counsel for appellants in their brief cite us to many authorities to sustain the validity of the law assailed as invalid in this case. In some of the cases cited the statutes were held good on the ground that the general public had a right to use the private roads provided for by the statutes. Such was the ground of the decision in *Shaver v. Starrett*, 4 O. St., 495, and *Denham v. County Commissioners*, 108 Mass., 202.

In *Sherman v. Buick*, 32 Cal., 242, the court sustained

the constitutionality of a law very similar to our own, but did so by holding that although the statute denominated the road a 'private road,' it was in fact and in law a public road, under the control of the government, and open to every one who might have occasion to use it; and the court declared that "the phrase, 'private road,' is unknown to the common law; all roads are public." The opinion, as counsel say, is ably reasoned; but we do not think this court can say that all roads are public roads in this state. The legislature has said that all public roads shall be sixty-six feet wide, and by the law we are considering it is provided that private roads shall be fifteen feet wide. Evidently, then, the legislature has attempted to recognize two classes of roads. If Marshall and Loder had opened the private road they sought to across Welton's farm, and had been indicted under the criminal statutes for running their horses on a public road of the state, and the proof had shown that the running of their horses was on a private road established under this private road law, can any one doubt that the jury would have been rightly instructed to acquit them?

Counsel for appellants also insist that appellee has an adequate remedy at law by appeal from the order of the board of county commissioners, should it make an order establishing the road, and that therefore this case must be dismissed. The law being invalid, the case of the appellee resolves itself into an appeal, on his part, to a court of equity to enjoin the appellants from committing a threatened trespass. The supreme court of Illinois in *Poyer v. Village of Des Plaines*, 123 Ill., 117, lay down the rule in such case thus: "There are, however, two exceptions, clearly recognized, to the rule that courts of equity will not interfere to restrain trespasses, whether committed under the forms of law or otherwise, which are, first, to prevent irreparable injury; and, second, to prevent a multiplicity of suits. * * * Before a court of equity will interfere to prevent a trespass upon this ground, 'the facts and circumstances

must be alleged from which it may be seen that irreparable mischief will be the result of the act complained of, and that the law can afford the party no adequate remedy.'" In *Watson v. Sutherland*, 5 Wall., 74, the supreme court of the United States say: "The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed in the proceedings." It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. The facts averred in the appellee's petition show that the trespass threatened by the appellants, if committed, would cause appellee an injury, to the redress of which his legal remedy would be inadequate. The decree of the district court is

AFFIRMED.

MARY H. SWARTZ, APPELLEE, V. SAMUEL C. DUNCAN ET AL., APPELLANTS.

FILED JANUARY 4, 1894. No. 5392.

1. **Review:** APPEAL. 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. (*Gadsen v. Phelps*, 37 Neb., 590.)

2. **Principal and Agent:** RATIFICATION. A principal must repudiate the acts of his agent within a reasonable time after such acts come to his knowledge, or his silence and inaction will be deemed a ratification of the agent's conduct. Accordingly, where S., in 1881, conveyed his farm and delivered possession of the same to C. in trust for S.'s use, and C., in February, 1883, sold and conveyed the farm to D., taking his notes

secured by a mortgage on the farm for purchase price, and on February 20, 1883, C. sent the notes to S. and advised him of the sale and conveyance to D., and S. retained the notes and made no objection to the sale, either to C. or D., until October, 1888, when he brought suit to annul the contract of sale, *held*, that S. had ratified the sale and conveyance through C. to D.

3. The evidence relied on in this case to sustain the defense that the compromise or settlement pleaded herein had been procured by unfair means examined, and *held*, not to establish either fraud, duress, or undue influence.

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

W. P. Freeman, for appellants.

Alfred Hazlett, Shelley L. Webb, and *John Saxon, contra.*

RAGAN, C.

In the year 1881 Henry R. Swartz and wife conveyed eighty acres of land owned by them, and on which they resided, in Jefferson county, Nebraska, to Martha J. Carpenter, and in 1883 she and her husband, Solon B. Carpenter, conveyed this land to Samuel C. Duncan for an express consideration of $700. Henry B. Swartz instituted this suit in the district court of Jefferson county in October, 1888, against Martha J. Carpenter, Solon B. Carpenter, her husband, Samuel C. Duncan, and Harriet A. Duncan, his wife, alleging, in substance, that defendants, in 1881, conspired together to obtain said land from plaintiff without consideration, and to carry out their fraudulent intention, informed plaintiff that a complaint had been sworn out for him, and that a warrant for his arrest for a criminal offense was then in the hands of the sheriff, and that plaintiff would be arrested and imprisoned if he remained in the country, and advised him to leave the state; that they greatly frightened plaintiff thereby, he being a timid man, and caused him to turn over to Martha J. Carpenter and her

husband all plaintiff's personal property, and to deed to said Martha J. Carpenter the land mentioned above without consideration, transported plaintiff to a railroad station outside of Jefferson county, and shipped him to the state of Illinois, and in a few days thereafter shipped plaintiff's wife and children to him; that plaintiff and his family have since resided in Illinois, and on account of their extreme poverty have been unable to return to Nebraska; that the Carpenters converted to their own use all of plaintiff's personal property; that the conveyance of the land to Duncan by the Carpenters was a part of the fraudulent scheme to defraud plaintiff. The prayer of the petition was for a decree that Duncan be decreed to reconvey the land to plaintiff and for an accounting of rents. Henry R. Swartz and his wife, Mary H., were, after this suit was brought, divorced, and Henry R.'s interest in the land and all his other property transferred to his wife, and she was substituted as the sole plaintiff in this case. The district court found the issues in favor of Mrs. Swartz and entered a decree canceling the conveyance from Swartz and his wife to Mrs. Carpenter, and from Mrs. Carpenter and husband to Duncan, and quieted and confirmed the title to said real estate in Mrs. Swartz. From this decree Carpenter and his wife and Duncan and his wife appeal.

There are three grounds relied upon by the appellants to reverse the decree.

1. That Duncan was an innocent purchaser of the land from Mrs. Carpenter without notice of the fact that Mrs. Carpenter held it in trust. Whether Duncan was an innocent purchaser,—that is, whether he bought this land without knowledge of the fact that Carpenter held it in trust for Swartz,—was a question of fact. The trial court found that Duncan purchased the land with knowledge of the fact that Carpenter held the land in trust for Swartz. After a careful study of the evidence, we are unable to say that this finding is wholly unsupported by competent testimony.

It would subserve no useful purpose to quote the evidence. The testimony does not impress us very strongly with the conviction that Duncan was actuated with a fraudulent purpose in these transactions, but we have only the lifeless record for a guide. We have not heard the living witnesses speak, nor observed them nor their conduct while testifying. The trial judge had all these opportunities. The conduct of Duncan in the premises,—that is, what he did and the part he took in sending Swartz out of the country,—was a circumstance susceptible of an innocent or guilty interpretation, and whether one or the other should have been, and doubtless was, determined from the extent of credibility given to the statements of the witnesses, who testified to the facts intended to establish the intent of the actor. "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." (*Gadsen v. Phelps*, 37 Neb., 590.) The first exception of appellants to the decree must therefore be overruled.

2. The second point made by the appellants is that Henry R. Swartz, before being divorced from his wife, ratified the sale and conveyance made by the Carpenters to Duncan. It appears from the record that Carpenter and his wife conveyed this land to Duncan on the 7th of February, 1883, the consideration paid by Duncan being $700, and paid as follows: A prior mortgage on the premises amounting, principal and interest, to some $412, and for the remainder of the purchase money Duncan executed to Mrs. Carpenter his note of $300, secured by a mortgage on the real estate. On February 20, 1883, Carpenter wrote a letter to Swartz advising him of the sale and conveyance of this land to Duncan; advised him of the price for which he had sold it to Duncan, and how the consideration was paid, and inclosed the purchase-money notes, unindorsed, to Swartz, and these notes were retained by Swartz. The mortgage secur-

ing these notes was never assigned or delivered to Swartz. In September, 1883, Duncan paid these notes to the Carpenters, and Mrs. Carpenter thereupon released the mortgage. There is no evidence that Swartz did or said anything towards repudiating this sale and conveyance until he brought this suit in 1888, at which time he brought the notes into court. After his receipt of the notes he sent them, in 1883 or 1884, to Messrs. Norval Bros., attorneys at law, Seward, Nebraska, for collection; and this firm sent them some time afterwards to one Claussen, a banker, at Alexandria, Nebraska, for collection. The letter, with the notes, came into the hands of one Gowdy, then an attorney at law at Alexandria. He kept them for some time, and finally, on the 15th of January, 1887, Messrs. Norval Bros., having regained possession of the notes, returned them to Swartz. During all this time Swartz made no effort to repudiate this sale and conveyance; he was personally acquainted with Duncan; had been Duncan's neighbor; knew that Duncan had bought the land of Carpenter; yet he did not, as a prudent man would have done had he been dissatisfied with the sale, return these notes to Carpenter and notify Duncan that he disapproved of the sale and conveyance of the land to him. All these years Duncan remained in possession, paying taxes, and making improvements on the land. Do these facts establish a ratification by Swartz of the sale and conveyance of this land by Carpenter to Duncan? We think they do. Swartz knew the land had been sold by his trustee or agent, Carpenter; knew to whom sold; knew the price paid, and had in his possession the evidences of it. Under these circumstances, if he was dissatisfied, it was his duty to speak, at least, if not to act, within a reasonable time. He remained silent; he remained inactive, so far as repudiating the acts of Carpenter; indeed, his only acts were directed to a confirmation of what Carpenter had done. Whether Duncan was an innocent purchaser,—that is, whether he purchased this land

from Carpenter knowing that he held it in trust for Swartz, —has nothing to do with the point under consideration. Duncan may have purchased with notice of Swartz's rights, —and the finding of the trial court compels us to assume that he did,—but Swartz, knowing this, could not remain silent all these years, until Duncan had changed his status, and then repudiate the sale. The second exception of appellants to the decree is sustained.

3. The third exception of the appellants to the decree is that Mrs. Swartz, after her divorce, settled and compromised the dispute in this case. The record shows that after Norval Bros. had returned the notes to Swartz they were put into the hands of one Gowdy, an attorney at Fairbury, Nebraska, and he instituted this suit in the name, as has before been stated, of Henry R. Swartz. While the action was pending in April, 1890, and after Swartz and wife had been divorced, Duncan and Gowdy effected a settlement of the matters in controversy in this suit, the terms of which were Swartz and wife were to quitclaim the land to Duncan in consideration of his paying $300 and the costs of suit. A deed was accordingly made out and sent to the Swartzes in Illinois, with a statement of the terms and purposes of settlement. Mr. Swartz executed this deed, but Mrs. Swartz declined to execute the deed and make the settlement, and at once came to Fairbury. Here, in the office and presence of her attorney, after an interview with Duncan, and a consultation with some of her friends, who, she says, advised her to compromise the case, she, on April 28, 1890, executed the deed already signed by Mr. Swartz. Duncan thereupon paid over the $300 and paid the costs of suit and received his quitclaim deed. Of the money paid for this settlement, Mrs. Swartz received only about $112 from her attorney. After this had been done, about May 20, 1890, Mrs. Swartz filed a petition of intervention in this case, and some time afterwards the court set aside the dismissal of the case that had been entered in pursu-

ance of the settlement and allowed Mrs. Swartz to prosecute the action as plaintiff. From anything we have been able to find in the record this compromise or settlement made between Mrs. Swartz and Duncan was fairly made. Mrs. Swartz knew in Illinois of the terms of the proposed settlement and was dissatisfied with it. She comes to Nebraska. She knows at this time all that Carpenter and Duncan had both done. The suit to annul their action is pending. She meets Duncan and charges him, she says, with having purchased the land from Carpenter, knowing it was her husband's. She at first declines to accept the terms of settlement; leaves her attorney's office, remarking that she will, on her return, decide what she will do. She consults her friends. They advise her, she says, to make the settlement. She returns, signs the deed and accepts the money paid in settlement. The record does not show any fraud or deception practiced on her to procure this settlement. She was laboring under no mistake as to the facts. She was not old, infirm, weak-minded, or ignorant. Her evidence to parry this defense is that she was intimidated by her attorney, Gowdy, into agreeing to this settlement; that he betrayed her; that he was in a conspiracy with Duncan; that Gowdy threatened that if she did not execute the deed and carry out the terms of the proposed settlement, he had authority, as her attorney, to do so for her, and bind her, and would do so, and then she would get nothing; that, believing Gowdy had such authority, and that he would do as he threatened, she signed the deed, made the settlement, and accepted the money. There is no evidence in this record sustaining her theory that Duncan and Gowdy conspired together, nor does the evidence sustain her contention that Gowdy betrayed her. Assuming the other evidence of hers to be true, it does not establish that this settlement or compromise was brought about by duress or undue influence. The third exception of the appellants must therefore be sustained.

The evidence in this record establishes beyond all controversy that Martha J. Carpenter did not buy or own this land, but held the same in trust for Swartz, and had his authority to sell and convey it to Duncan as stated above; and the evidence also conclusively shows that about October 1, 1883, Duncan paid to the Carpenters $300 for the balance of the purchase price of said land. This money belonged to Swartz. The Carpenters, however, converted it to their own use and have never paid it, or any part of it, over. They cannot be allowed to retain this money. It is true that they did not receive in cash quite the full amount of $300 and accrued interest of $16, as some $80 were deducted by Duncan for the purpose of clearing up a cloud on the title; but the rents and profits of the land for the length of time it was held and used by the Carpenters were of as great value as the deduction made by Duncan, and, under the evidence, the Carpenters must be held to account for the full $300, with seven per cent interest thereon from October 1, 1883.

The decree appealed from is reversed and the cause remanded with instructions to the district court to dismiss the case as to Samuel C. Duncan and Harriet A. Duncan, his wife, and to enter a personal judgment in this case in favor of Mary H. Swartz against Martha J. Carpenter and her husband for $300, with interest thereon at the rate of seven per cent per annum from October 1, 1883, and to award immediate execution therefor, and tax the entire cost of this proceeding to the said Martha J. Carpenter and Solon B. Carpenter, her husband.

JUDGMENT ACCORDINGLY.

JENNIE T. VOUGHT V. J. H. FOXWORTHY, APPELLANT, AND H. B. STRAUT, APPELLEE, ET AL.

FILED JANUARY 4, 1894. No. 5275.

1. **Judicial Sales:** APPRAISEMENT: MOTION TO VACATE. Appraisers of property for sale under execution act judicially, and on motion to vacate such sale, the value fixed by them on the property appraised can only be assailed for fraud. Objection that the appraised value of the property is too high or too low should be made and filed in the case with a motion to vacate the appraisement before a sale occurs thereunder.

2. **To justify the setting aside of a sale** on the ground that the property was appraised too low, the actual value of the property must so greatly exceed its appraised value as of itself to raise a presumption of fraud in the making of the appraisement.

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

Adams & Scott, for appellant, cited: *Demaray v. Little*, 19 Mich., 244; *Capital Bank of Topeka v. Huntoon*, 35 Kan., 577; *Morris v. Robey*, 73 Ill., 462; *Sinnett v. Cralle*, 4 W. Va., 600; *Gould v. Gager*, 18 Abb. Pr. [N. Y.], 32; *Griffith v. Hadley*, 10 Bosw. [N. Y.], 587; *King v. Morris*, 2 Abb. Pr. [N. Y.], 296; *Seller v. Lingerman*, 24 Ind., 264; *Davis v. McGee*, 28 Fed. Rep., 867; *Carden v. Lane*, 2 S. W. Rep. [Ark.], 709; *Bean v. Hoffendorfer*, 2 S. W. Rep. [Ky.], 556; *In re Palmer*, 13 Fed. Rep., 870.

B. F. Johnson, contra, cited: *Neligh v. Keene*, 16 Neb., 407; *Crowell v. Johnson*, 2 Neb., 146; *Day v. Thompson*, 11 Neb., 123; *Wilcox v. Raben*, 24 Neb., 368.

RAGAN, C.

On the 9th day of October, 1890, the district court of Lancaster county, sitting in equity, rendered a decree of

foreclosure of a mortgage against lots 5 and 6, in block 230, in the city of Lincoln. The amount of the decree was $1,200, and was to draw interest at the rate of ten per cent per annum from the date of its rendition. It was in favor of Jennie T. Vought and against Jefferson H. Foxworthy *et al.* September 28, 1891, an order of sale was issued, and on November 17, 1891, the land was sold at public auction by the sheriff to one H. B. Straut for $350. The land was appraised at $500. November 25, 1891, a motion to confirm the sale was filed by the purchaser and the complainant in the decree; and the court made an order requiring the defendants to the foreclosure proceedings to show cause on Monday, November, 30, 1891, why the sale should not be confirmed. On Tuesday, December 1, 1891, no objections to the confirmation of such sale having been made, the court duly confirmed it, ordered the sheriff to execute a deed to the purchaser of the property, and rendered a deficiency judgment against Jefferson H. Foxworthy and Alice Foxworthy for $1,042.07, to draw interest at the rate of ten per cent per annum. December 2, 1891, Jefferson H. Foxworthy filed a motion to set aside the confirmation of said sale and said deficiency judgment on the grounds (1) that the confirmation and deficiency judgment were procured by the fraudulent practices of counsel for Mrs. Vought; (2) that the property was not appraised at anything near its actual value. The court overruled this motion and Mr. Foxworthy brings the case here.

In support of the first ground of his motion Foxworthy filed the affidavit of himself and one Wade, stating that prior and subsequent to the sale he had an agreement with Mrs. Vought and her counsel that Foxworthy should pay a certain sum of money in compromise of the decree. If Foxworthy did not make this payment prior to the close of the term of court then sitting, Vought's counsel should file his motion to confirm in time to procure a confirmation during the term then in session; that on Saturday, No-

vember 28, 1891, Foxworthy sent by Wade a note to Vought's counsel. The note is as follows: "Dear Sir: What have you done as yet, if anything, about the confirmation of the sale in the Vought case? I am going out to my farm tomorrow and will not be in until Tuesday noon. Answer." That the counsel to whom this was addressed "told me (Wade) to tell Mr. Foxworthy that he had done nothing as yet except file a motion for confirmation, but that he would go up to the court house Monday and look after it;" that counsel for Vought had promised Foxworthy to keep him posted on what he (Vought's counsel) was doing and going to do in the case; that he relied on counsel's promise and understood from the message sent by Wade that counsel would take his order to show cause on Monday, if he (Foxworthy) did not make the compromise payment agreed on; that he was absent from the city when the sale was confirmed.

To support the second ground of his motion, that the property was appraised very much below its value, his affidavit fixed the value of the property as high as $3,000 in trade; but no facts are offered showing, or tending to show, that the appraisers acted in bad faith, or that there was any fraud or deceit practiced by any one in regard to the appraisement.

The affidavits filed in opposition to this motion show that Mrs. Vought and her counsel, about the time the order of sale was issued, agreed with Foxworthy to take a certain sum in compromise of the decree if the same was paid before the sale of the land under the decree; that Foxworthy made no payment before the sale and did not appear thereat; that after the sale Foxworthy informed Vought's counsel that he (Foxworthy) was about to procure a loan of $500 on the property from Zeigler & Ward for the purpose of making the compromise settlement; that Vought's counsel immediately called on Zeigler & Ward in regard to this and was by them informed that they would not make

a loan on this property; that counsel for Vought sent word on Saturday, November 28, to Foxworthy by Wade that the motion to confirm the sale was on file and would be called up on Monday, December 1, 1891, and that Mr. Foxworthy had better be present. The record does not disclose any offer or tender by Mr. Foxworthy to pay the amount agreed on in compromise at any time. We cannot say the court erred in overruling this motion. More than a year elapsed between the date of the decree and the sale. The entire proceedings were regular. Foxworthy knew on Saturday afternoon there was a motion on file to confirm the sale, and Wade told him that Vought's counsel said he would go to the court house Monday and see about it. Mr. Foxworthy ought not to have been misled by this. It was not intended to lull him into a feeling of security. The confirmation of this sale was not procured through sharp practice or unprofessional or discourteous conduct on the part of Vought's counsel. The record does not disclose when the term of court closed, but the sale was confirmed on the fifty-seventh day of the term; and no showing was made on the hearing of the motion to set the sale aside, that Mr. Foxworthy was then ready to carry out the compromise.

Appraisers of property about to be sold under execution act judicially, and the value fixed by them on property appraised can only be assailed for fraud. Inadequacy of the appraised value alone is not sufficient cause for setting aside a sale in the absence of fraud. To justify the vacation of a sale on the ground that the appraisement was too low, the actual value of the property must so greatly exceed its appraised value as to raise a presumption of fraud. All the affidavits filed in this case on the question of the value of the property were immaterial. There was no averment in the motion to set the sale aside of any fraudulent conduct on the part of the appraisers in making this appraisement; nor averment of any fraud or unfair means resorted

to by the appraisers at the sale, or other party to the suit, conducing to the making of this appraisement. No facts were stated in the affidavits showing any fraudulent conduct on the part of any one in the making of the appraisement, nor can any such inference be drawn from the facts stated. The appraisement is assailed for error of judgment upon the part of the appraisers, and this furnishes no ground for setting the sale aside. (*Harris v. Gunnell*, 9 S. W. Rep. [Ky.], 376.) It remains to be said that the value of the property, as shown by the affidavits filed in support of the motion to set the sale aside, does not so greatly exceed its appraised value as to raise a presumption of fraud. Parties desiring to make objections to the value fixed on property appraised for sale under execution, whether on the ground that such valuation is too high or too low, should make and file such objections in the court where the case is pending, together with a motion to set aside such appraisement before the sale occurs. The party seeking the sale of the appraised property would thus have notice of the objections to its appraised value, and he could either proceed to sale and take his chances of the appraisement being finally set aside, or could stay the sale until such time as the court should decide the question as to the correctness of the appraisal made. The judgment of the district court is right and is

AFFIRMED.

CHARLES W. LYMAN V. CITY OF LINCOLN ET AL.

FILED JANUARY 4, 1894. No. 5230.

1. **Building Contracts with City:** CONSTRUCTION: BUILDERS' BONDS. L. & S. contracted with the city of Lincoln to furnish the material and labor to erect for said city two engine

houses. They gave a bond to the city to faithfully perform all the terms of the contract, which provided: "The contractors shall file with the board of public works receipts of claims from all parties furnishing them with material and labor in the construction of such engine houses." One L. sued the contractors and their sureties for lumber used in the construction of the buildings. The sureties demurred to the petition on the ground that it did not state a cause of action against them. *Held*, (1) That the clause quoted above from the contract was a promise on the part of L. & S. to pay for all labor and material furnished them in constructing said engine houses; (2) that the statement of L. in his petition, that L. & S. owed him for lumber furnished to and used by them in said buildings, was a sufficient averment of a breach of said bond; (3) that the awarding of the contract by the city to L. & S. was a sufficient consideration to support their promise to pay for the labor and material furnished them in the performance of said contract; (4) that the promise they made to the city of Lincoln was for the benefit of all persons who furnished labor and material used in said contract, and such persons could sue on said bond; (5) that the existence of an express statute or ordinance of the city of Lincoln was not necessary to the authority of the city to require of L. & S. a bond to pay their material-men and laborers; (6) that the demurrer should be overruled.

2. ———: PART PERFORMANCE: ACTION ON BOND: DAMAGES. A contractor who furnishes labor and material to a city under a contract which reserves to the city the right of cancellation is entitled, after a termination of such contract by the city, to recover from it the actual benefits the city has received from the contractor's partial performance, and this is found by ascertaining the reasonable worth to the city of such partial performance appropriated or received by the city at the time of such receipt or appropriation, and deducting therefrom all payments made to the contractor and all actual damages the city has sustained by his defaults.

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

The facts are stated in the opinion.

Leese & Stewart, for plaintiff in error:

The petition states a cause of action against McMurtry

and McBride. (*Sample v. Hale*, 34 Neb., 220; *Sepp v. McCann*, 50 N. W. Rep. [Minn.], 246.)

The evidence shows a strict compliance with the contract on the part of Layne & Sweet, except when the city waived performance. The finding of the court that the city rightfully terminated the contract is contrary to law. (*Mercer v. Harris*, 4 Neb., 82; *Fitzgerald v. Allen*, 128 Mass., 232; *Adams v. Hill*, 16 Me., 215; *Boettler v. Tendick*, 11 S. W. Rep. [Tex.], 499; *Linch v. Paris Lumber & Grain Elevator Co.*, 15 S. W. Rep. [Tex.], 213; *Barr v. Van Duyn*, 45 Ia., 228; *Lawson v. Hogan*, 93 N. Y., 39; *Snow v. Inhabitants of Ware*, 13 Met. [Mass.], 50; *Henderson Bridge Co. v. O'Connor*, 11 S. W. Rep. [Ky.], 18, 957; *Elizabethtown & P. R. Co. v. Geoghegan*, 9 Bush [Ky.], 56; *Foster v. Woodward*, 6 N. E. Rep. [Mass.], 853; *South Fork Canal Co. v. Gordon*, 6 Wall. [U. S.], 561; *Grand Rapids & B. C. R. Co. v. Van Dusen*, 29 Mich., 431; *Smith v. Cedar Rapids & M. R. R. Co.*, 43 Ia., 239; *Taylor v. Renn*, 79 Ill., 181.)

The contract was wrongfully annulled by the city. The plaintiff, as assignee of the contractors, is entitled to recover the full value of the work done, for extras and for damages for not being permitted to complete. (*Sanger v. Chicago*, 65 Ill., 506; *Guerdon v. Corbett*, 87 Ill., 272; 2 Sutherland, Damages, 519, 520.) Assuming the city rightfully put an end to the contract, the finding of the court was wrong. (*Graves v. White*, 87 N. Y., 463; *Martin v. Boyce*, 49 Mich., 122; 2 Jones, Liens, sec. 1513.)

John P. Maule, for defendants in error McMurtry and McBride, cited: *Brennan v. Clark*, 29 Neb., 385.

N. C. Abbott, City Attorney, and *Abbott, Selleck & Lane*, for defendant in error City of Lincoln:

Where a contract is silent as to the time of performance, the law implies that it was to be performed within a rea-

sonable time. The contract was properly annulled. (*Tiljengren Furniture & Lumber Co. v. Mead*, 44 N. W. Rep. [Minn.], 306; *Driver v. Ford*, 90 Ill., 595; *Stone v. Harmon*, 19 N. W. Rep. [Minn.], 88; *Hart v. Barnes*, 24 Neb., 782.)

RAGAN, C.

Charles W. Lyman brought suit in the district court of Lancaster county against the city of Lincoln, Layne & Sweet, copartners, Joseph C. McBride, and J. H. McMurtry, and in his petition alleged: That on June 5, 1889, the city of Lincoln entered into a contract with Layne & Sweet, by the terms of which they agreed to furnish material and labor and construct for said city two buildings for the use of its fire department. The buildings were to be according to certain plans and specifications, made part of the contract; to be completed, one July 15 and the other August 1, 1889; the city was to pay for them $5,968; payments to be made on monthly estimates of completed work furnished by the city's engineer; such payments to be eighty per cent of the estimate, and the remainder of the contract price to be paid when the buildings were completed and accepted by the city; that it was also provided in said contract as follows: "The contractors shall file with the board of public works receipts of claims from all parties furnishing materials and labor in the construction of such engine houses before the final estimate is paid and the work accepted from the hands of the contractors." That on the date of the execution of said contract said Layne & Sweet, as principals, and McBride and McMurtry, as sureties, in consideration of said contract between said city and said Layne & Sweet, made and delivered to said city a bond in words and figures as follows: "That the above mentioned John Layne and Charles A. Sweet shall well and truly execute all and singular the foregoing stipulations by them to be executed, or on default thereof we, jointly and severally,

bind ourselves * * to pay the city of Lincoln all damages which may result from such default," etc. That the plaintiff furnished Layne & Sweet lumber and material used by them in the construction of said buildings for said city of the value of $2,155.58, $500 of which had been paid, leaving a balance due him on said account of $1,655.58; that Layne & Sweet entered upon the construction of said buildings, the city afterwards waiving their completion at the time fixed therefor in said contract, and were prosecuting their construction with reasonable diligence and in all respects according to the contract, when the city of Lincoln, on September 6, 1889, wrongfully refused to permit Layne & Sweet to further prosecute the work, canceled said contract, took possession of the unfinished buildings, completed them, and appropriated to its (the city's) use the labor and materials performed and furnished by Layne & Sweet in the partial construction of said buildings, which labor and materials were of the value of $4,000; that the city had previously paid Layne & Sweet on said contract $2,400, and no more; that plaintiff was the owner by assignment from Layne & Sweet of their cause of action against the city of Lincoln arising out of this contract. Layne & Sweet made no appearance. McBride and McMurtry submitted to the petition a demurrer, on the grounds that the petition did not state facts sufficient to constitute a cause of action against them. The answer of the city, outside of the admission of the execution of the contract and bond, and the cancellation by the city of the contract, consisted of a general denial and an affirmative averment that the city had expended a larger sum in the building of said buildings, according to Layne & Sweet's contract, than they were to receive for their construction, and that Layne & Sweet were indebted to the city. The court sustained the demurrer of McBride and McMurtry and dismissed Lyman's suit as to them. Judgment was rendered by default against Layne & Sweet in favor of Lyman, and on the final hearing the court, sitting

without a jury, found the issues for and rendered a judgment in favor of the city of Lincoln, and Lyman brings the case here on error.

There are three points which we notice:

1. Did the court err in sustaining the demurrer of McBride and McMurtry? It is to be observed that there are in this petition three causes of action, though not separately stated: (*a*) Lyman sues Layne & Sweet on an account for lumber sold and delivered to them; (*b*) Lyman sues Layne & Sweet, as principals, and McBride and McMurtry, as sureties, on the bond they gave to the city of Lincoln for the faithful performance by Layne & Sweet of their contract with the city; and (*c*) Lyman, as assignee of Layne & Sweet, sues the city for the reasonable worth of the labor performed and material furnished and used by them in the partial construction of the buildings they undertook to build for the city under the contract, and which contract, it is alleged, the city wrongfully canceled. The clause, "The contractors shall file with the board of public works receipts of claims from all parties furnishing them with material and labor in the construction of such engine houses," found in the contract between the city and Layne & Sweet, liberally and fairly construed, means that Layne & Sweet promised the city that they would make payment to those who furnished them material or labor on said buildings; and the sureties in their bond guarantied that Layne & Sweet would perform this promise. The averment of Lyman in his petition, that Layne & Sweet still owed him a balance of $1,655.58 for lumber which he had furnished them to use in said buildings, under their contract with the city, was a sufficient allegation of a breach by Layne & Sweet of their contract and bond. Counsel for the sureties contend that the waiver by the city of the time for the completion of said buildings by Layne & Sweet released the sureties. That might be correct were this a suit by the city against the sureties for a failure on the part of Layne

& Sweet to complete their work in the time fixed by the contract; but this waiver cannot be urged here against Lyman. A second contention of counsel for the sureties is: "The sum total of obligation of the sureties here is to pay the city of Lincoln the damages it may sustain by reason of Layne & Sweet's not filing receipts," etc. If this contention is correct, the clause referred to in the contract is meaningless. The city of Lincoln could suffer no damages by the failure of Layne & Sweet to pay for the labor or material used in the construction of these buildings; and no lien for such labor or materials could be asserted against such buildings. (*Ripley v. Gage County*, 3 Neb., 397.) But, the nature of the contract and bond considered, counsel's contention is too narrow a construction. Obviously, the city of Lincoln intended by this bond to protect from defaults of its contractors all those who might labor on or furnish material for its buildings. The petition assailed sets out no statute or ordinance authorizing the city of Lincoln to do this, but we do not deem such a statute or ordinance indispensable. The awarding of the contract to Layne & Sweet was a sufficient consideration to them and their sureties to support their promise to pay for this labor and material. The promise they made to the city of Lincoln was for the benefit of all who labored on these buildings and all who furnished material that was used in their construction; and since Lyman had furnished material to these contractors which was used in these buildings for the city, the bond inured to his benefit and he can maintain a suit thereon. (*Shamp v. Meyer*, 20 Neb., 223; *Cooper v. Foss*, 15 Neb., 515; *Stewart v. Snelling*, 15 Neb., 502; *Sample v. Hale*, 34 Neb., 220.) The court erred in sustaining the demurrer.

2. The second point made by counsel for Lyman is that the court erred in finding as a conclusion of fact that the city of Lincoln rightfully terminated its contract with Layne & Sweet. On July 30, 1889, the city engineer gave Layne

& Sweet an estimate for $2,200. This estimate was approved by the board of public works and city council, and eighty per cent thereof paid. One of the buildings, known as the "F Street Building," was not finished at this time though by the contract it was to be completed July 15. When August 1st arrived, the other building was not finished as it should have been by the terms of the contract. The city did not at either of said dates exercise its right to terminate the contract by reason of such defaults on the part of Layne & Sweet; on the contrary it gave them the estimate of July 30 and paid it, and after August 1st permitted Layne & Sweet to continue the work. This conduct of the city waived on its part the time fixed by the contract for the completion of the work. August 1st having passed, the buildings remaining unfinished, the city not having annulled the contract by reason thereof, but having permitted Layne & Sweet to continue the work without any new agreement as to when it should be completed, the law then presumes a contract on the part of Layne & Sweet to build these buildings within a reasonable time. (*Driver v. Ford*, 90 Ill., 595; *Stone v. Harmon*, 19 N. W. Rep. [Minn.], 88.) Section 13 of the contract provided that if the contractors should neglect or refuse to comply with the instructions of the board of public works, then the city should have the right to annul and cancel the contract. Now there is evidence in this record that this work was not at any time prosecuted with due diligence; that the city constantly urged Layne & Sweet to push the completion of the buildings, which urging they disregarded; that when September arrived, neither of the buildings was ready, the work not progressing rapidly, and the engines, horses, and men of the fire department were housed in tents. Under these circumstances, the city, by the resolution of its mayor and council, annulled and canceled the contract and took possession of the partially completed buildings. The evidence supports the court's conclusions of fact, that Layne & Sweet

did not comply with the reasonable instructions of the city to prosecute diligently the work; that the month of August was ample time in which to complete the buildings had the contractors done their duty; and that the city was justified in canceling the contract.

3. The third assignment of error is that the decree of the court, in that it found that the city of Lincoln is not indebted in any sum to Layne & Sweet, is contrary to the law of the case. It must be borne in mind that we are now considering the suit of Layne & Sweet in the name of their assignee, Lyman, against the city to recover the value of the labor and material done and furnished by Layne & Sweet under the contract. Counsel for the city contend, and the court below, it seems, held, that Layne and Sweet's measure of damages was the contract price for the buildings less the amount paid them on the contract, and less, also, the amount it cost the city to complete the work according to Layne & Sweet's contract. This rule is based on the mistaken assumption that this is a suit against the city on the contract, which it is not. This rule wrongfully assumes that the contract is in force; but the city canceled it. It cannot annul a contract for one purpose and keep it in force for another. Counsel for the city say: "The city then having the right to take the work out of the contractors' hands, and having done so, it had the right, both in law and under the special agreement of clause seven of the contract, to go on and finish the work and charge whatever it should fairly and honestly cost the contractors." The substance of this clause seven of the contract is that, if the contractors shall not furnish sufficient workmen or material for the rapid construction of the buildings, the city may purchase material and employ workmen on the buildings and charge the cost thereof to Layne & Sweet. The city did not avail itself of this clause of the contract. If Layne & Sweet did not prosecute the work on said buildings as speedily as they should, the city

(1) could have purchased material and employed men on the work and charged the same to Layne & Sweet, and (2) sue them and their sureties on their bond for a breach of contract, or (3) cancel the contract. It chose the latter course, and took what Layne & Sweet had done under it, and they sue for its value. What is the measure of their damages? In *Fitzgerald v. Allen*, 128 Mass., 232, it is said: "The result of the cases is that if the special contract is terminated by any means other than the voluntary refusal of the plaintiff to perform the same upon his part, and the defendant has actually received benefit from the labor performed and materials furnished by the plaintiff, the value of such labor and materials may be recovered upon account upon a *quantum meruit*, in which case the actual benefit which the defendant receives from plaintiff is to be paid for, independently of the terms of the contract. The contract itself is at an end. Its stipulations are as if they had not existed. But this does not imply that the contract may not be put in evidence and its terms referred to upon the question of the real value to the defendant of the plaintiff's labor and materials. If the time of performance is extended very far beyond the time fixed by the contract, if the materials furnished are of a very different quality from that provided for by the contract, these facts have necessarily a bearing upon the real value of the services and labor. The original contract price, too, is an important element in determining the value of the labor and materials, and the proportion in value which the work done bears to the whole value of the contract labor and materials is also important in determining the *quantum meruit.*" We think this case states the law correctly. Layne & Sweet did not voluntarily abandon or refuse to perform the contract, and they are entitled to recover from the city the actual benefits it has received from their partial performance. This actual benefit is found by ascertaining the reasonable worth to the city of the labor and materials fur-

nished by Layne & Sweet and received and appropriated by the city, such value to be determined at the date of such receipt or appropriation, and deducting therefrom all payments made to Layne & Sweet and any actual damages sustained by the city by reason of any defaults of Layne & Sweet. Tried by this rule, the judgment of the court, that the city of Lincoln was not indebted in any sum to Layne & Sweet, is erroneous. The decree of the district court must therefore be reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

GEORGE C. WASHBURN, APPELLANT, V. MARY K. OSGOOD, APPELLEE.

FILED JANUARY 4, 1894. No. 4654.

Judgments: EXECUTIONS: ATTORNEY AND CLIENT: SUBROGATION. A. M. & Co. held a judgment against W. and instructed their attorney to collect the same by a levy upon and sale of W.'s land, if the attorney could thereby realize the money due on the judgment without A. M. & Co.'s having to become the purchasers of the land. The attorney had execution issued and levied upon W.'s land, and at the sale he purchased the land in the name of his wife at the full amount of the judgment, interest, and costs, paid the costs, and receipted the sheriff as A. M. & Co.'s attorney, for the amount of the bid. The sheriff reported the sale, and the same was confirmed and deed executed to the wife of the attorney. The attorney notified the general agent of A. M. & Co. of these proceedings and was given permission by the agent, because of threats made on the part of W. to set the sale aside, to hold the remittance a reasonable time. The attorney finally remitted to A. M. & Co. the amount of the W. judgment less some fees which he claimed they owed him in other cases. A. M. & Co. refused to allow the attorney these fees in the settlement and returned his remittance for that reason. Thereupon W., with actual knowledge of the levy upon and sale of the land, the confirmation of the sale and its

conveyance by the sheriff to the attorney's wife, paid A. M. & Co. the amount of the judgment to satisfy which his land had been already sold, and brought suit to set aside the sale and quiet the title in himself. *Held*, (1) That the attorney acted in good faith and according to the instructions of his clients; (2) that neither the attorney nor his wife held the land as trustee for A. M. & Co.; (3) that the rights of A. M. & Co., against the attorney were those of a creditor against his debtor; (4) that the judgment held by A. M. & Co. against W. was satisfied and extinguished by the levy upon and sale of his land; (5) that the payment made by W. to A. M. & Co. was a voluntary one, and that W. was not thereby subrogated to the rights of A. M. & Co. against the attorney, nor did he, by such payment, acquire any right as against the attorney, his wife, or the land bought by her at such sale.

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

S. P. Davidson, for appellant:

An attorney having control of a judgment for his client cannot, without the consent of his client, expressed or implied, become a purchaser of lands at a sale under execution issued thereon; and if he does so purchase, he becomes, like any other agent, a trustee for his client. Such a trust arises by operation of law and continues until barred by lapse of time, or until terminated by an election to ratify the purchase, thus giving it validity. (*Pearce v. Gamble*, 72 Ala., 341; *Baker v. Humphrey*, 101 U. S., 494; *Henry v. Raiman*, 25 Pa. St., 354; *Zeigler v. Hughes*, 55 Ill., 288; *Harper v. Perry*, 28 Ia., 57; *Wheeler v. Willard*, 44 Vt., 640; *Case v. Carroll*, 35 N. Y., 385; Weeks, Attorneys, secs. 268–277; *Yerkes v. Crum*, 49 N. W. Rep. [N. Dak.], 423; *Cunningham v. Jones*, 37 Kan., 477.)

Cobb & Harvey and *Daniel F. Osgood, contra.*

RAGAN, C.

George C. Washburn brought this suit in the district court of Johnson county against Mary K. Osgood, and

alleged in his petition that he was the owner and in possession of a certain piece of land in Johnson county, and that on the 18th day of March, 1889, one D. F. Osgood, an attorney of this court, without authority of or from Aultman, Miller & Co., caused an execution to issue to satisfy a judgment in favor of Aultman, Miller & Co. against the plaintiff, a transcript of which judgment was filed in the district court of said Johnson county; that Osgood caused said execution to be placed in the hands of the sheriff of said Johnson county, who levied the same upon the land of plaintiff; that a sale of said land was made by the sheriff under such execution, and that he struck off and sold said lands to the defendant, she being then the wife of said Daniel F. Osgood, for $125, which sum was bid at said sale by the said Daniel F. Osgood for his wife; that prior to said sale the lands were appraised at $1,200; that prior incumbrances on the land at the time did not exceed $960; that the value of plaintiff's interest in the lands was at the time not less than $240; that said Daniel F. Osgood caused the sale to be confirmed and the sheriff to execute to his wife, the defendant, a deed for said lands; that neither the said defendant nor her said husband paid the amount bid for said land at the sale thereof; that all the proceedings, from the issuing of said execution to the confirmation of said sale, were done without the knowledge, consent, or authority of Aultman, Miller & Co., who owned the judgment; that plaintiff had since paid said judgment and the same had been released; that plaintiff had offered to pay the defendant and her husband all their legitimate expenses and costs paid out by them, and requested them to convey the land to plaintiff, which the defendant had refused to do; that plaintiff never discovered that the issuance of said execution and the making of said sale were without the authority of Aultman, Miller & Co. until after the sale was confirmed. The prayer of the petition was that the sale might be set

aside and the title of the lands quieted and confirmed in the plaintiff. The answer averred that the execution under which the land was sold was issued under the direction of Aultman, Miller & Co. and the sale duly confirmed in open court; that plaintiff was actually notified of the time and place of the sale; that defendant offered Washburn, after the sale, to reconvey the land to him. The court rendered a decree dismissing Washburn's case, and he comes here on appeal.

The material issue in the case is whether D. F. Osgood, husband of the appellee, in having the execution issued and levied upon this land, and the same sold to satisfy the judgment of Aultman, Miller & Co. against Washburn, was an intruder, or was acting by authority of Aultman, Miller & Co. To this point the record contains the following evidence: That on August 21, 1888, Aultman, Miller & Co., in the county court of Pawnee county, obtained a judgment against Washburn for $80.90 and costs; that on October 26, 1888, a duly certified transcript of this judgment was filed in the office of the clerk of the district court of Johnson county; that in February, 1889, D. F. Osgood had in his hands some business in the nature of collections or claims for Aultman, Miller & Co. On the 2d day of February, 1889, he wrote Aultman, Miller & Co. in reference to these claims, and in said letter said to them: "There is a transcript on file here, from Pawnee county, of yours against G. C. Washburn. Would you like me to attend to that for you? If so, please answer soon." On February 21, 1889, Aultman, Miller & Co. wrote Osgood in reply and said: "Yours of the 2d received in regard to sundry claims in your hands. You say there is a transcript on file there from Pawnee county, judgment taken against G. C. Washburn. We would be very glad to have you take charge of this matter for us; and if so, please advise us in your correspondence in reference to this judgment." March 19, 1889, D. F. Osgood wrote the following letter to Aultman, Miller & Co.:

"TECUMSEH, NEB., March 19, 1889.

"*Aultman, Miller & Co., Akron, Ohio*—DEAR SIR: We have to-day had an execution issued against G. C. Washburn. He has land in this county, and there is no doubt but the collection can be made with some trouble and expense. Perhaps it would be well for you to notify Story & Story, of Pawnee City, that the matter is in my hands, and am proceeding to collect.

"Yours truly, D. F. OSGOOD."

April 3, 1889, Aultman, Miller & Co. wrote to Osgood another letter as follows:

"AKRON, OHIO, April 3, 1889.

"*D. F. Osgood, Esq., Tecumseh, Neb.*—DEAR SIR: We are just in receipt of a letter from Story & Story, attorneys at Pawnee City, in answer to ours of March 27, in reference to your action in the issuing of an execution on the judgment transcripted to your county by them against G. C. Washburn. They have rendered us a bill for services rendered up to date, and leave it for us to say whether they shall go ahead with the case or drop out and let you finish it for us. We have decided upon the latter, and this day pay them for their services they have rendered us in this case. You will now proceed to get the money for us out of this land. We are sorry, however, that you have advertised this land for sale, because we were in hopes that the expense of this could be avoided and Mr. Washburn induced to pay this judgment without going to that expense. If it is not too late yet to do this, we want you to do so and save this extra expense. Are there any other incumbrances upon this land? If there are, we don't want you to sell this land unless you are sure you can get the money and take up prior claims. Let us hear from you by return mail and oblige.

"Yours truly, R. H. WRIGHT,

"*Tr. Leohner.*"

April 9, 1889, Osgood wrote Aultman, Miller & Co. that the land in controversy had mortgages on it for $886, and that he, Osgood, would see that they, Aultman, Miller & Co., did not have to buy the land and that they got their money on their judgment. The land was sold at public auction by the sheriff April 24, 1889, and bid in by the appellee. Sale was confirmed and deed made to her May 8, 1889. D. F. Osgood paid the costs of the sale and receipted to the sheriff in full for Mrs. Osgood's bid, which was more than the execution called for; that is, more than the amount of Aultman, Miller & Co.'s judgment and interest and the costs of the sale. We have quoted this evidence somewhat at length and contrary to our usual custom, and we do this because the correctness of the conduct of an attorney is challenged in this suit. Not only does the evidence not sustain appellant's allegations in his petition, but it affirmatively shows, and that without contradiction, that D. F. Osgood had authority from Aultman, Miller & Co., as their attorney, to collect this judgment against Washburn by a levy upon and sale of the land in suit herein. This is sufficient to dispose of this appeal; but it is alleged in his petition by Washburn that neither the appellee nor her husband paid the amount bid for the land at the sheriff's sale. This is not a matter to the prejudice of or of which Washburn can complain. The sheriff could only sell the land for cash. D. F. Osgood receipted in full to the sheriff for the amount of the judgment and interest, and he did this as Aultman, Miller & Co.'s counsel, and at once became their debtor for the amount. His receipt estops him from saying the sheriff did not pay him the amount of his client's debt made by the levy and sale under this execution. The report of the sale by the sheriff estops him, as against Aultman, Miller & Co., from alleging he was not paid the bid; and while he and the sureties on his official bond might be liable to Aultman, Miller & Co. for the amount realized by the sale of the

land, nevertheless the proceedings operated to satisfy the judgment of Aultman, Miller & Co. against Washburn.

The learned counsel for appellant contends "that an attorney having control of a judgment for his client cannot, without his client's consent, become a purchaser of land at a sale under execution issued thereon, and if he does so, will hold the land so purchased as trustee for his client." We think the rule as stated by counsel has many, very many, exceptions, and is too broadly stated. But suppose it entirely correct. How does that help appellant? Aultman, Miller & Co. are not seeking to have Mrs. Osgood declared their trustee in her holding of this land, and their own evidence is that they did not wish their attorney to sell the land under the execution, if such sale would result in their having to become purchasers of the land. Washburn, because he paid the amount of the judgment and interest to Aultman, Miller & Co., is not therefore entitled to have this sale set aside nor to be subrogated to their rights. Washburn made this payment voluntarily, with full knowledge that the land had been sold, the sale confirmed, and a deed made to the appellee; that is, he paid to Aultman, Miller & Co. a debt that he knew, or was bound to know, had already been paid by the sale of his land. If Washburn supposed he was still indebted on this judgment to Aultman, Miller & Co., he has never pleaded nor proved such supposition, and it would not enable him to invoke successfully, in this case, the doctrine of subrogation had he done both. In *Ætna Life Ins. Co. v. Middleport*, 124 U. S., 534, the supreme court of the United States say: "The doctrine of subrogation in equity requires, first, that the person seeking its benefit must have paid a debt due to a third party before he can be substituted to that party's rights; and second, that in doing this he must not act as a mere volunteer, but on compulsion to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the

debt. * * * The right is never accorded in equity to one who is a mere volunteer in the paying of a debt of one person to another." It is evident that Washburn has not brought himself within this rule, and on no other theory than that of subrogation can his case be maintained. But if he were entitled to be subrogated to the rights of Aultman, Miller & Co. against D. F. Osgood, the only right Aultman, Miller & Co. have against D. F. Osgood is, not the right to regard him or his wife as holding this land as their trustee, but the ordinary right of a creditor against a debtor.

There is evidence in the record showing that D. F. Osgood did not account to and pay over to Aultman, Miller & Co. the amount realized on the Washburn judgment; but there is also evidence that appellee authorized her husband to use a sum of money belonging to her and in his hands to purchase this land; that D. F. Osgood did so; that he advised Aultman, Miller & Co.'s agent that he, Osgood, had the money on the Washburn judgment and was, by the agent, given permission to hold it a reasonable time, as Washburn was threatening to institute proceedings to set aside the sale; that Osgood finally remitted the amount of the judgment and interest to Aultman, Miller & Co., deducting therefrom the amount of certain fees owing him by Aultman, Miller & Co. in other matters; that Aultman, Miller & Co. refused to accept the amount remitted by Osgood, but not on the ground that he had not their authority to collect the Washburn judgment, by sale of the land, but on the ground of fees deducted in other cases; that they returned Osgood's remittance to him; and that they did not return it to him. But whatever may be the materiality of this evidence, after a finding that D. F. Osgood acted in the premises by authority of Aultman, Miller & Co., and as their attorney, it, and the credibility and weight thereof, and the inferences and conclusions to be drawn therefrom, were for the trial court. The decree of the district court is right and is

AFFIRMED.

ART E. ALEXANDER V. WILLIAM H. SHAFFER.

FILED JANUARY 4, 1894. No. 5389.

1. **Tax Liens:** FORECLOSURE: PLEADING. A brought suit against B and others to foreclose tax liens. B, in 1891, answered averring that she had purchased portions of the premises in controversy in 1870 and in 1871 for taxes, the last payment being made in 1874, and asking that her title, interest, and claim be decreed superior to A's. *Held*, first, that treating the answer as setting up title in B under the tax sales and deeds issued thereunder, it failed to state any defense against A's petition to foreclose liens for subsequent taxes; and, second, viewed as an assertion of tax liens, they appeared on the face of the answer to be barred by the statute of limitations.

2. **An action to foreclose tax liens** must be brought within five years after the expiration of the time to redeem. *Helphrey v. Redick*, 21 Neb., 80; *D'Gette v. Sheldon*, 27 Neb., 829; *Warren v. Demary*, 33 Neb., 327, followed.

3. **Statute of Limitations:** TAX LIENS. When land has been sold for taxes and a suit to foreclose the lien therefor is not instituted within five years from the expiration of the time to redeem, the lien is extinguished and ceases to be a charge upon the land. The statute in that respect does not merely operate to defeat the remedy, but limits the duration of the lien itself.

4. ———: ———: PRIORITY. The holder of tax certificates, whose lien is barred by the statute of limitations, has no equity as against the holder of subsequent tax liens whereby he can require such subsequent lienor to discharge the barred liens or admit their priority as a condition for foreclosing his own.

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

S. P. Vanatta, for plaintiff in error.

Beeson & Root, contra.

IRVINE, C.

Shaffer, the defendant in error, brought a suit in the district court of Cass county against the unknown heirs of Joseph Throckmorton, the plaintiff in error Art E. Alex-

ander, and others, the object of which was to foreclose tax liens upon certain property in that county. The petition alleged as to a portion of the property covered by plaintiff's lien that Art E. Alexander claimed to have some lien on or title to the same, but averred that such title or lien was junior to that of the plaintiff. Alexander made default and a decree was rendered in accordance with the prayer of the petition, fixing the plaintiff's lien and finding that the plaintiff in error had no lien upon the premises. The taxes for which the plaintiff below claimed a lien were taxes for 1885 and subsequent years, and were paid at different periods between 1886 and 1890. The suit was begun September, 1890. Upon the 9th of February, 1891, the plaintiff in error filed a petition to set aside the decree and for leave to answer. A demurrer was filed to this petition, which was overruled, and the decree vacated so far as to allow the plaintiff in error to answer, setting forth her claim. An answer was then filed by the plaintiff in error, alleging that she claimed an interest in certain of the property described in the original petition; that a portion of such property she purchased September 4, 1871, at tax sale for the taxes of 1870, and that a portion she purchased at tax sale September 6, 1870, for the taxes of 1869, and that she had paid subsequent taxes on this property, the last payment being made May 1, 1874. The different taxes and dates of payment are set out at large in the answer. The answer further alleged that August 5, 1873, a tax deed was made for the lot sold in 1871, and that on May 8, 1874, a deed was made for the lot sold in 1870. The answer then averred that her title and claim was superior to that of Shaffer, and that Shaffer bought with notice of her interest. There was a prayer that her "title, interest, and claim" be decreed superior to that of Shaffer, and for general relief. A demurrer was filed to this answer, which was sustained and judgment entered accordingly. From this judgment error is prosecuted.

The answer lacks much in certainty, but however it may be construed the judgment of the district court is right. If it is to be taken as pleading title in the plaintiff in error under her tax deeds issued in 1873 and 1874, it failed entirely to present a defense to plaintiff's petition, for the reason that it made no denial of the facts set out in the petition establishing a subsequent lien for taxes, and notwithstanding the answer, the plaintiff on his petition would still be entitled to the relief granted him in the original decree. If, on the other hand, the answer be construed as setting up a tax lien superior to that of Shaffer, it is still fatally defective. The answer shows on its face that the last payment of taxes was made in 1874, more than five years before the original action was begun, to say nothing of the time of filing the answer. The time of redemption expired as to part of the property in 1872, and as to the rest in 1873. An action to foreclose tax liens must be brought within five years after the expiration of the time to redeem. (*Helphrey v. Redick*, 21 Neb., 80; *Parker v. Matheson*, 21 Neb., 546; *D'Gette v. Sheldon*, 27 Neb., 829; *Warren v. Demary*, 33 Neb., 327.)

Plaintiff in error says, however, that she is not in court prosecuting an action to foreclose a lien, but merely in defense of Shaffer's action, and that the maxim that "He who seeks equity must do equity," is to be applied; that Shaffer must be required either to admit the seniority of her lien, or else to pay it, as a condition of his obtaining relief. This claim raises two questions: First—Does the subsequent tax sale cut out a former one for prior taxes? Second—If it do not, should the subsequent tax lienor, after the expiration of the period of limitations upon the former tax sale, be required to admit or discharge the prior lien? The conclusion reached upon the second question renders a decision of the first unnecessary. It was held in *Wygant v. Dahl*, 26 Neb , 562, that where the owner of property institutes an action *quia timet* to remove the cloud cast by a

tax title upon his property, he must, as a condition of relief, do equity by paying the holder of the tax title the taxes paid by him, with interest. Two observations are to be made upon this case. The first is that the decision was based partly at least upon the duty of the owner to pay the taxes when they became due. This is evident from the following language from the opinion: "He comes into a court of equity asking relief from consequences fairly traceable to his own failure to discharge a common duty which the state requires of all lot owners." Second—The opinion also laid stress upon the fact that the statute provides that "taxes upon real property are hereby made a perpetual lien thereupon," and the opinion further states that "this right and lien is recognized as unaffected by the lapse of time." But in the subsequent case of *D'Gette v. Sheldon* the following language is used: "But it may be said that the statute declares taxes upon real estate to be a 'perpetual lien,' and therefore they can be enforced at any time. This provision of the statute, however, is to be construed in connection with that providing for a sale of the land at a specified time for the taxes due, and if not redeemed after notice to that effect within two years thereafter, then the tax purchaser may either take a tax deed or foreclose his tax lien. In either case, if he seeks the aid of a court of equity to enforce his lien, he must do so in five years. The word 'perpetual,' therefore, was not intended to continue the delinquent taxes in force against real estate after the statute had barred a right of action thereon. The lien conferred by the statute is fixed upon the land itself, and is primary, overriding all other liens, since a sale thereunder, if duly made, would extinguish all other claims, and the word 'perpetual' seems to be used in that sense;" and in the syllabus it is said that "it was not intended to continue a tax lien in force after the remedies to enforce it had ceased." Section 180 of the revenue law provides that "if the owner of any such certificate shall fail or neglect either to demand a deed

thereon or to commence an action for the foreclosure of the same, as provided in the preceding sections, within five years from the date thereof, the same shall cease to be valid or of any force whatever, either as against the person holding or owning the title adverse thereto and all other persons, and as against the state, county, and other municipal subdivisions thereof." It seems, therefore, established by the statute and by the later decisions of this court that the limitation fixed in the revenue law is not merely a limitation as to the right of action, but it is a limitation upon the duration of the lien itself, and that upon the expiration of the period it is not merely the remedy to enforce the lien which expired, but the lien itself is extinguished absolutely.

The maxim that "He who seeks equity must do equity" has never been so applied as to justify a court in imposing arbitrary conditions in order to carry out what, in the individual opinion of the chancellor, would amount to substantial justice between the parties. The rule only requires the plaintiff to do "equity;" that is, to do what upon established legal principles he should be required to do. It has sometimes been applied in cases where the defendant was not in a position to affirmatively seek relief himself, but the vast preponderance of authority is that the maxim should never be applied so as to require that the plaintiff should perform an act not devolved upon him by established legal or equitable principles. (See 1 Pomeroy, Equity Jurisprudence, sec. 385 *et seq.*, and cases there cited.) In this case the plaintiff in error has not only lost her remedy to enforce her lien, but has lost the lien itself, so that there is no charge upon the land which a court can require to be paid. Moreover, there never was any duty devolving upon Shaffer to pay the taxes which were paid by plaintiff in error. He was not the owner of the land and not chargeable with those taxes, and if she had a claim upon the land, it was her duty to pay them and not to per-

mit the land to be subsequently sold and subsequent taxes to be paid by Shaffer.

AFFIRMED.

STATE OF NEBRASKA v. NERIAH B. KENDALL ET AL.

FILED JANUARY 4, 1894. No. 5435.

1. **Obstruction of Water-Courses:** INFORMATION. An information sufficiently charges an offense under section 228 of the Criminal Code, where it charges the erection and keeping up of a dam in a stream whereby an artificial pond is raised and stagnant water is produced, whereby the air was, and now is, corrupted, offensive, and unwholesome, and manifestly injurious to public health and safety.

2. **It is not a fatal defect in an information** that it charges an offense with unnecessary particularity.

3. **Where words appear in an information which might be stricken out,** leaving an offense sufficiently charged, and such words do not tend to negative any of the essential averments, the state should, upon motion, be permitted to strike out such words.

4. **When an information proves upon trial to be defective,** the trial judge should inquire as to whether probable cause exists for holding the defendant, and in the exercise of a sound legal discretion may then either discharge him from custody or recognize him to answer at the next term of court.

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

N. Z. Snell, County Attorney, and *Thomas Ryan,* for the state.

Charles O. Whedon, for defendants.

IRVINE, C.

The defendants were informed against for that they, "on the 18th day of November, 1889, and continuously from that time until the 15th day of May, 1891, did and now do unlawfully and injuriously keep up a mill-dam across a stream of water known as 'Salt creek,' in said county and state, and thereby raised and now raise by means of the keeping up of said mill-dam an artificial pond which is situated near and adjacent to a common highway and the dwelling houses of divers persons who occupy the same with their families; and that the said artificial pond so raised by said mill-dam as aforesaid produced, and now produces, stagnant, corrupted, and impure waters, whereby the air in and around said dwelling houses and highway, and over and for a long distance around said artificial mill pond and stream known as 'Salt creek,' became, was, and now is corrupted, infected, offensive, and unwholesome, and manifestly injurious to the public health and safety, to the common nuisance of all the people." To this information a plea of not guilty was entered, and upon the trial the defendants objected to the introduction of any testimony for the reason that the information did not state facts sufficient to constitute any offense punishable by the laws of the state. This objection was sustained. Thereupon the state asked leave to strike from the information the words "whereby the air in and around said dwelling houses and highway over and for a long distance around said artificial mill pond and stream known as 'Salt creek' became, was, and now is corrupted, infected, offensive, and unwholesome." This motion was overruled. Thereupon the state asked leave to file an amended information, which would in substance be the same as the original, with the last words quoted stricken out. This motion was overruled. Finally, the state asked that the defendants be required to enter into a recognizance to appear on the first day of the

next term of court, and not to depart without leave, and to abide the further order and judgment of the court. This motion was also overruled. The court then instructed the jury to find for the defendants, which was done. The state brings the case here upon exceptions according to the statute.

The first question presented is as to the sufficiency of the information. Section 228 of the Criminal Code is as follows: "If any person shall build, erect, continue, or keep any dam or other obstruction in any river or stream of water in this state and thereby raise an artificial pond or produce stagnant waters which shall be manifestly injurious to the public health and safety, every person so offending shall be fined," etc. We think that the information stated an offense against this statute. The argument is first made that the information did not state that the pond was manifestly injurious to public health and safety, but that because of the pond the air became so. This is a clinging to the bark. By section 251 of the Criminal Code it is provided that every law upon the subject of crime shall be construed according to the plain import of the language without regard to the distinction usually made between the construction of penal laws and laws upon other subjects. The gist of the offense created by section 228 is the creation or maintenance of an artificial pond or stagnant waters to the manifest injury of the public health and safety. The means by which such waters may become so manifestly injurious may be varied. Usually in charging a statutory offense it is sufficient to follow the terms of the statute. The information would have been sufficient had it charged the erection of the dam whereby an artificial pond and stagnant waters were created to the manifest injury of the public health and safety, without charging the manner in which public health and safety were affected. It would be a narrow and indefensible construction of the statute to say that in order to constitute the offense, the waters themselves must be directly injurious to public health

or safety. If such injury results directly or indirectly from the acts complained of, the offense is complete, and the averment in the information of the means by which the waters became so injurious, while it might require proof according to the averment, did not vitiate the information, and was to the advantage of the accused rather than to his prejudice. Section 412 of the Criminal Code provides that no indictment shall be deemed invalid for any surplusage or repugnant allegation where there is sufficient matter alleged to indicate the crime or person charged nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits. It is next argued that the information was defective because charging the erection of a mill-dam. Chapter 57 of the Compiled Statutes provides for the erection of mill-dams, whence it is said that the erection of a mill-dam being a lawful act, section 228 of the Criminal Code cannot refer to mill-dams. Chapter 57 of the Compiled Statutes, referred to, provides for an inquest by a jury. The jury is required to inquire, among other things, whether the health of the neighborhood will be injured by the stagnation of water, and whether such injury can be prevented; and by section 12 of that chapter the court is required to refuse permission to build such mill-dam if it appears that the health of the neighborhood will be affected. It is not therefore every mill-dam which is lawful, but the right to construct a mill-dam is subject to this qualification, among others, that it must not amount to a public nuisance injurious to health. The provision of the Criminal Code, already referred to, requiring a reasonable, and forbidding a strict, construction of penal statutes, requires that we should apply section 228 of the Criminal Code to mill-dams as well as to other dams, provided they are manifestly injurious to public health and safety. We therefore think that the information charged an offense and that the court should have overruled the objection to the evidence. What we

have already said disposes of the two exceptions. which go to the overruling by the court of the state's motion for leave to strike out the words already referred to, and to amend the information. We have already said that an information omitting those words would have been sufficient. Had they been of such a nature as to negative the other averments, it is probable that the state ought not to have been permitted to strike them out, but inasmuch as they were entirely surplusage, the state should have had such leave.

The only other question of importance is the refusal of the court to require that the defendants should be held to bail after their objections to the evidence were sustained. Section 480 of the Criminal Code provides that when it shall appear at any time before the verdict that a mistake has been made in charging the proper offense, the accused shall not be discharged if there appear to be good cause to detain him in custody, but the court must recognize him to answer to the offense on the first day of the next term of said court; and section 481 provides that when a jury has been impaneled in a case contemplated by the preceding section, such jury may be discharged without prejudice to the prosecution. The latter section shows that the former is intended to apply, not only where the defect is taken advantage of before trial, but that it also applies to defects objected to upon the trial and before verdict. The words of section 480, limiting the right to recognize the defendants to cases where there appears to be good cause to detain him, show that something is left to the discretion of the trial court. There is no reason why a defendant held to answer for a criminal offense should be forever discharged because of a formal defect in the indictment or information; and for this reason the trial judge is permitted, in the exercise of a sound legal discretion, either to discharge the defendant or to recognize him to appear at the next term of court. He becomes in such a case a *quasi*-examining

magistrate. In this case no evidence at all affecting the merits of the case had been received. It would seem that the court should have proceeded, even had the information been defective, far enough to ascertain whether there was probable cause for a prosecution under a proper information. In a case where it appeared that a defective information could not be remedied in conformity with evidence it would undoubtedly be proper for the court to absolutely discharge the defendant. As there was no evidence received in this case we cannot say that the court abused its discretion. The error lay farther back, to-wit, in excluding the evidence offered. All that we can do in passing upon this exception is to say that it becomes the duty of the trial judge, when an information is found defective, to make inquiry as to the probable guilt of the accused of an offense which might properly be charged against him, and after such inquiry, to exercise his discretion as to discharging the person or holding him to answer at the next term of court.

EXCEPTIONS SUSTAINED.

BADGER LUMBER COMPANY, APPELLEE, V. WILLMER MAYES AND NEW HAMPSHIRE FIRE INSURANCE COMPANY, APPELLANTS, ET AL., APPELLEES.

FILED JANUARY 4, 1894. No. 5056.

1. **Bill of Exceptions:** REVIEW. Where, upon an inspection of the bill of exceptions, palpable omissions appear, and the bill is so illegible and so unsystematically arranged that an intelligent examination is impracticable, the supreme court will upon review assume that there was evidence sufficient to sustain the findings of the trial court upon questions of fact.

2. **Mechanics' Liens.** Where one supplies lumber to a contractor for the erection of a building upon land of a third person with

the understanding between the vendor and vendee that it shall be used in the construction of such building, and delivers it to the vendee at a place other than the premises where the building is constructed, and the vendee there manufactures such material into another form and so uses it in constructing such building, the vendor is in such case entitled to a mechanic's lien upon the premises.

3. **Time Lien Attaches.** As to whether a lien so acquired could antedate the actual delivery of the manufactured articles upon the premises where the building is constructed, *quære.*

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

Lamb, Ricketts & Wilson, for appellants Mayes Bros.:

Persons who furnish lumber and materials to manufacturers, to be made up into articles used in the construction of buildings, cannot obtain liens against the buildings in which such articles are used. (*Great Western Mfg. Co. v. Hunter,* 15 Neb., 32; *Pitts v. Bomar,* 33 Ga., 96; *Foster v. Dohle,* 17 Neb., 631.)

Harwood, Ames & Kelly, for appellant New Hampshire Fire Insurance Company:

The materials mentioned in the second cause of action are not the proper subject of a lien. (*Horton v. Carlisle,* 2 Disney [O.], 184; *Arnold v. Budlong,* 11 R. I., 561; *Bennett v. Shackford,* 11 Allen [Mass.], 444; *Choteau v. Thompson,* 2 O. St., 114.)

Charles E. Magoon, for appellee Badger Lumber Company:

A lien may sometimes be established for work done away from the premises if it is done upon articles which are intended for use in the building and are actually used in its construction. (2 Jones, Liens, sec. 1324; *Hinchman v. Graham,* 2 S. & R. [Pa.], 170; *Wilson v. Sleeper,* 131 Mass., 177; *Dewing v. Congregational Society of the North Par-*

ish of Wilbraham, 13 Gray [Mass.], 414; *Sweet v. James*, 2 R. I., 270; *Singerly v. Doerr*, 62 Pa. St., 9; *Bennett v. Schackford*, 11 Allen [Mass.], 444.)

Lumber furnished for a building with the understanding that it is to be used in the erection of the building may be delivered at a carpenter's shop at a distance from it, and a lien will attach to the premises for the price of it, although it is never actually used in the building. (2 Jones, Liens, sec. 1329; *White v. Miller*, 18 Pa. St., 52; *Singerly v. Doerr*, 62 Pa. St., 9; *Presbyterian Church v. Allison*, 10 Pa. St., 413; *Odd Fellows' Hall v. Masser*, 24 Pa. St., 507; *Hinchman v. Graham*, 2 S. & R. [Pa.], 170; *Harker v. Conrad*, 12 S. & R. [Pa.], 301; *Wallace v. Melchoir*, 2 Browne [Pa.], 104.)

Abbott, Selleck & Lane and *M. L. Easterday*, for other appellees.

IRVINE, C.

This was an action brought by the Badger Lumber Company against Willmer Mayes, George D. Mayes, and a number of other defendants for the purpose of foreclosing a mechanic's lien upon a lot in the city of Lincoln. The petition states two causes of action. The first alleges the sale and delivery by plaintiff to the two Mayeses between November 16, 1888, and December 13, 1888, of material for the construction of a building upon the premises. The second cause of action alleges the sale and delivery between August 10 and November 15, 1888, of lumber and building material to one D. R. McCurdy for the construction of the same building; this count alleging that the Mayeses were the owners of the land, and that McCurdy was a contractor with them for the inside finish of the building, for which it was alleged that the lumber was furnished. The New Hampshire Fire Insurance Company, by answer, sets up a mortgage upon the premises,

executed by the Mayeses September 11, 1888, and recorded October 2, 1888; and Henry E. Lewis, by answer, sets up another mortgage dated and recorded upon the same days. One Korsmeyer and one Noll seem also to have set up mechanics' liens upon the premises, although their pleadings do not appear in the transcript. L. B. Treman and F. A. Cropsey seem also to have set up mortgages upon the premises, but their pleadings do not appear in the transcript. The decree established the lien of the plaintiff upon its second cause of action, and the lien of Korsmeyer, as mechanics' liens of equal priority and senior to all others. It establishes the liens of the New Hampshire Fire Insurance Company and Lewis, under their mortgages, as of equal priority, and next junior to the mechanics' liens of plaintiff and Korsmeyer; the lien of the plaintiff upon its first cause of action, and that of Noll, as mechanics' liens of equal priority and next in order; and the liens of Treman and Cropsey as junior to the others; and ordered foreclosure accordingly. The Mayeses appeal, and the New Hampshire Fire Insurance Company also asks that the decree be modified in so far as it establishes a lien on behalf of the plaintiff, superior to that of its mortgage.

It appears by inference from the pleadings, and seems to be conceded in the briefs, that such material as was furnished by the plaintiff to McCurdy, and which forms the basis of the second cause of action alleged by plaintiff, consisted of lumber delivered not at the premises, but at the planing mill of McCurdy, where it is claimed it was worked up into finishing material for the building. Mayes Brothers, in support of their pleadings, urge first, that the claim or lien of plaintiff upon its second cause of action was not filed within time, and this because the evidence fails to show any delivery of material within sixty days of the filing; it being claimed that the single item of the account bringing the furnishing within that time is unsupported by the

evidence. It is next claimed that the law does not provide for any lien for materials furnished at a place other than where the building is constructed, or for the purpose of being worked over into other articles in which the original material is not distinguishable; and, finally, that there was failure of proof as to the amount and value of the lumber bought by McCurdy and actually used by him in the construction of this building. We think only the second of these points is properly presented to us for review. The bill of exceptions is in such a condition that it is exceedingly difficult, if not absolutely impossible, to ascertain just what the evidence was, and give it its due force; and we frankly state that after a conscientious and laborious effort to study the case upon this bill, that effort was abandoned as fruitless. The bill opens with an intelligible and intelligent stipulation as to certain material facts, and thereupon follows a record of certain objections and rulings upon questions and answers appearing in depositions at the end of the record; then follows the testimony of certain witnesses, which, from certain objections made, seems to be testimony in rebuttal. Next comes a group of original instruments offered in evidence, with no intelligible marks of identification. Then follows a great mass of testimony, type written, in all parts trying to the eyes, for the most part appearing to be a "carbon copy," in some parts illegible, and, in one place at least, showing that a portion has been omitted. Under the rule established in *Dawson v. Williams*, 37 Neb., 1, this palpable omission will be in itself sufficient reason for not considering any exceptions based upon the insufficiency of the evidence. But we think, in addition to this, that some consideration is due to the court, and that appellants should at least be required to present to this court a record written in a legible manner and arranged in such a way that the court may ascertain upon whose part the different portions of the evidence were offered, if not the order in which they were received,

and also without the difficulty of solving an enigma determine what evidence was before the trial court, and what excluded. If the appellants fail to do this, this court should presume, in matters not clearly appearing, that there was evidence justifying the trial court in its findings. We shall, therefore, presume, for the reasons just stated, that there was evidence before the trial court justifying its findings upon the controverted issues. It does appear from the pleadings, and is admitted in the briefs, that the material furnished by plaintiff, which forms the basis of its second cause of action, was not delivered where the building was erected, but at the planing mill of McCurdy, and we are by this brought to a consideration of the contention that no lien can be claimed on account of such delivery.

In *Great Western Mfg. Co. v. Hunter*, 15 Neb., 32, the court, speaking through COBB, J., said: "I have no doubt that under the provisions of our statute then in force, lumber or other building material, sold on general book account without regard to any particular building, if used by the purchaser in the erection or reparation of a building upon land of which he is the owner, the vendor of such lumber or other building material may have his lien." And in *Foster v. Dohle*, 17 Neb., 631, it was said by MAXWELL, J.: "This liability of the owner of a building which is being erected or repaired is not placed on the ground of a contract made with the owner by the person performing the labor or furnishing the material; because usually there is no such contract between them, and when there is, the right of the party to a lien is unquestioned; but upon the ground that as the labor or material contributed to the erection or reparation of the building of which the owner receives the benefit, the law imposes upon him the responsibility, for sixty days at least, of seeing that the claims are paid. * * * So far as it may be necessary to carry this purpose into effect, the law should be liberally construed." In *Marrener v. Paxton*, 17 Neb., 634, it is

said: "We have no doubt that in a proper case one furnishing materials in good faith for the erection of a building under an agreement with a contractor for that purpose, may file a mechanic's lien upon the structure and the lots on which it stands. The lien is given, however, not upon the ground that a contract was made by the owner with such subcontractor, but because the material so furnished was used in the erection of the building." In *Irish v. Pheby*, 28 Neb., 231, the court, commenting upon *Foster v. Dohle, supra,* say that the doctrine is "that the builder would be liable for such material as was actually put into the building, and might be held liable for material not actually put into the building if those furnishing it to the contractor acted in entire good faith, and the material was delivered to the material-man at the site of the building."

In a number of cases the court has stated that the mechanic's lien law of this state should receive a liberal, and not a strict, construction; and the foregoing authorities, taking the portions cited along with the questions there under consideration, lead to the conclusion that the doctrine of a subcontractor's lien is not based upon any implied agency authorizing the contractor to obligate the owner, but upon an equity raised by the statute from the use of materials in the construction of a building on behalf of the person furnishing such material. In some cases it is not required that the subcontractor should show, at least to make out a *prima facie* case, that the materials were actually used in the construction, delivery upon the premises being deemed *prima facie* evidence, and held to be notice to the owner of the furnishing of the material for that purpose. But in view of the policy of our law upon the subject, we see no reason why one furnishing lumber at a planing mill, to be there worked into shape to put into a building, where it was intended by the vendor and purchaser that it should be so used, and where it has been in fact so used, should not be entitled to a lien as much as if

he had furnished it upon the premises, and had it there worked into proper form, the only difference arising upon the question of notice, which will be hereafter referred to.

We think the law is well stated in 2 Jones, Liens, sec. 1324, as follows: "A lien may sometimes be established for work done away from the premises if it be done upon articles which are intended for use in the building, and are actually used in its construction or repair. In such case the labor is to all intents and purposes performed in the erection, alteration, or repair of a building within the terms of the statute. Where, for instance, the inside finish for a house is sawed, planed, or moulded at a a mill, or the doors or windows are made at a carpenter shop, or the iron work is prepared at a blacksmith shop away from the premises, but really as a part of the work of construction, and the material upon which such work is done actually becomes a part of the building, a lien arises for such labor equally with the labor performed upon the land on which the house is erected. But it is essential that such labor be performed under an agreement that the articles upon which the work is done are to be used in the construction of the building against which it is sought to enforce the lien. Thus, if the owner of a planing mill saws lumber for a builder without any agreement for its use in any particular building, though the lumber is in fact used in the construction of a building which the builder was erecting at the time under a contract for another person, the mill-owner is not entitled to a lien on such building." This reasoning applies to subcontractors as well as principal contractors. While the authorities are not in harmony in different states upon many questions arising under mechanic's lien laws, this doctrine seems to receive substantial and reasonable support from the adjudications. Assuming, therefore, that the evidence justified the trial court in finding that the complainant furnished this lumber to McCurdy with the understanding that it should be

used in the construction of this building, and that it was in fact so used, we think the lien was correctly allowed.

There remains only the question of priorities. It is probable that in such a case, in a contest between a lienor and mortgagee, the time when the material in its manufactured form was delivered upon the premises should be considered the time when the lien attached. So if in this case the evidence showed that the mortgage of the New Hampshire Fire Insurance Company was executed before any delivery of the manufactured material upon the premises, it would appear unjust to give the plaintiff priority of lien, although lumber may have been delivered for the purpose of manufacturing at the planing mill before the mortgage was made. The notice to subsequent lienors is derived from the condition of the premises (*Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207; *Holmes v. Hutchins*, 38 Neb., 601), and it would seem too much to require of a mortgagee that he should not only take notice of what was actually going on upon the premises, but should also investigate as to whether or not materials had been purchased for an improvement and had been delivered elsewhere. But in this case the presumption is that the evidence showed delivery upon the premises before the mortgages were made, and we can find no evidence to the contrary. The judgment of the district court is

AFFIRMED.

SOPHIA W. DAVIS V. JOHN G. BALLARD ET AL.

FILED JANUARY 4, 1894. No. 5431.

1. A district court obtains jurisdiction of a transitory action and of the person of the defendant when the defendant was within the county when the petition was filed and summons issued,—the defendant leaving the county, however, before serv-

ice, and service having been obtained upon an alias summons issued after his return to the county.

2. **Alias Summons.** For the purpose of determining the jurisdiction of the court in such a case the issuance of the alias summons is to be treated as a recommencement of the action.

3. *Coffman v. Brandhoeffer*, 33 Neb., 279, distinguished.

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

Talbot & Bryan, for plaintiff in error:

All civil actions in Nebraska other than proceedings in attachment are commenced with the issuance of the writ of summons which is served on the defendant. The filing of the petition is not the commencement of the action, and although a petition may remain on file before the time of the issuance of an alias summons, yet in law the action must be considered as commenced at the issuance of the summons which is actually served upon the defendant. (*Cropsey v. Wiggenhorn*, 3 Neb., 116; *Baker v. Sloss*, 13 Neb., 231; *Gage County v. Fulton*, 16 Neb., 5.)

It is immaterial when the petition was filed. If it is said that the petition must be refiled at the time of the issuance of each summons, then the court must conclude that the issuance of an alias summons is in law equivalent to the formal matter of refiling the petition. The jurisdiction of the court over the person is obtained by the service of process. (Wells, Jurisdiction, sec. 83; *Johnson v. Jones*, 2 Neb., 136; *Smelt v. Knapp*, 16 Neb., 54; *Frazier v. Miles*, 10 Neb., 113; *Aultman v. Cole*, 16 Neb., 5.)

Leese & Stewart, contra, cited: *Coffman v. Brandhoeffer*, 33 Neb., 279; *Carlisle v. Corran*, 2 S. W. Rep. [Tenn.], 26.

IRVINE, C.

On the 10th day of September, 1891, Sophia W. Davis filed her petition in the district court of Lancaster county

against John G. Ballard, Caleb Strickler, the First State Bank of Bertrand, and James A. Ruby, sheriff, to recover damages for a wrongful attachment of property alleged to belong to plaintiff, but to have been seized upon a writ directed against a third person, it being alleged that Ruby, as sheriff, levied the attachment; that Ballard, as plaintiff, directed the levy, and that the other defendants rendered aid and assistance in the act. Upon the same day a summons was issued, which, upon September 23, was returned *non est inventus*. Upon the 1st day of March, 1892, an alias summons was issued which, upon March 3, was returned as having been served upon Ballard March 2; the other defendants not found. Ballard entered a special appearance and objected to the jurisdiction of the court, first, because none of the defendants was present in Lancaster county at the time of the commencement of the action; second, because the petition was filed September 10, 1891, and permitted to remain on file until March 1, 1892, when the alias summons was issued; third, because the action was not commenced in the county in which any of the defendants reside or could be summoned. These objections were sustained and the action dismissed for want of jurisdiction.

The evidence was in the form of affidavits, which are preserved in the bill of exceptions. The affidavit of John G. Davis is to the effect that Ballard was in Lancaster county on the 10th of September, when the petition was filed and the original summons issued, and that he remained in that county a few days thereafter, but evaded service; also, that upon March 1, 1892, Ballard was in the county before the alias summons was issued and at the time of its issuance. Ballard's affidavit is that upon September 10, 1891, and for several years prior thereto, he was a resident of Phelps county, and has ever since resided in that county; that the other defendants are all residents of Phelps county; "that none of the defendants have ever been in Lancaster

county since the 10th day of September, 1891, and for a a long time prior thereto, except this affiant, who was temporarily present in Lancaster county on March 1, 1892." There was no evidence outside of these two affidavits.

Davis' affidavit is positive in its averment that Ballard was in Lancaster county upon September 10, when the petition was filed and original summons issued. Ballard's affidavit is equivocal and does not deny this. It is true that he says that none of the defendants have been in Lancaster county since the 10th day of September and for a long time prior thereto, but his language seems to be carefully studied so as not to assert that none were in the county upon the 10th day of September, and the words "except this affiant" seem also to be inserted in the place they occupy for the purpose of still further guarding this point. It must, therefore, be taken as established that when the petition was filed and the original summons issued, Ballard was within the county and might there at that time have been summoned. Again, it is admitted that Ballard was in the county on the 1st of March, the day the summons was issued, which was served upon him on the 2d, and it is averred and not denied that he was there on that day at and prior to the time when the alias summons was issued. These facts take the case out of the rule in *Coffman v. Brandhoeffer*, 33 Neb., 279. In that case suit was begun in attachment by the filing of a petition and the issuance of summons, writ of attachment, and garnishment process April 3. Upon April 25 the summons was returned not served. Prior thereto a motion to quash was filed. It appeared that the defendant was not in the county when the summons was issued, but the plaintiff relied upon proof that it was issued upon information that the defendant was then *en route* to Douglas county, and that plaintiff expected and intended that the summons would be served before the return day. It was held that upon these facts the court had no jurisdiction. Section 60 of the Code, providing that such actions "must

be brought in the county in which the defendant, or some of the defendants, reside or may be summoned," was construed as meaning that the suit, if not instituted in the county where the defendant resides, must be brought in a county where the defendant was at the time the suit was begun, and that the summons must be served upon him while in that county. In other words, it cannot be said that an action is properly begun when a petition is filed and summons issued without the present ability to proceed and serve the summons. To permit a contrary course would allow the plaintiff to select his forum, issue summons after summons, and lie in wait for a chance coming of the defendant. It would open a door to fraud upon the jurisdiction of the court. No such state of affairs exists here and the reasons do not apply. When the petition was filed and the original summons issued, Ballard was in Lancaster county and legally liable to service there. The action was rightfully commenced in Lancaster county, at that time; but aside from that consideration the proceedings of March 1, 1892, amounted to a new commencement of the action at a time when Ballard was in the county, when an action could rightfully be commenced and when as a matter of fact it was proceeded with and service obtained. The mere fact that the petition had remained on file presents no reason for denying the jurisdiction of the court. It is clear that had the same petition been taken and refiled upon March 1, when the alias summons was issued, no question could be raised. The commencement of an action depends not only upon filing a petition, but the issuance of summons. For some purposes it is not deemed commenced until the summons is served, although after service the commencement of a suit may relate back to the date of the summons. In no case is an action, where jurisdiction depends upon actual service, deemed commenced by the mere filing of a petition unaccompanied by the issuance of summons. In order that an action should be com-

menced there must in every case be a petition on file and a summons issued based upon that petition. Both these essentials existed upon March 1, as soon as the alias summons was issued. The first summons having proved abortive, the issuance of the alias summons for the purposes of this case must be deemed the commencement of the action, and for the reasons stated we think the learned judge erred in sustaining defendant's objections. It must be remembered that the only service had was upon Ballard, the plaintiff in the attachment suit. The acts complained of were tortious in their nature, and Ballard might be sued without joining other tort-feasors. We are not, therefore to be understood as determining any questions which might arise in consequence of any action taken for the purpose of bringing the sheriff into the case by summons issued to another county and there served upon him.

REVERSED AND REMANDED.

EDWARD ROSEWATER V. FRIEDRIEKA PINZENSCHAM.

FILED JANUARY 16, 1894. No. 6103.

1. **Notice of an application for a license to sell intoxicating liquors** must be published at least two weeks in a newspaper published in the county having the largest circulation therein, before any action can be taken on the application. When the notice is inserted in a daily paper, it must be published daily for the statutory period.

2. **The affidavit of the publisher of a newspaper,** accompanying and annexed to such a notice, stating, after giving the name of the paper, "that said newspaper has the largest circulation in Douglas county, and that the printed notice hereto attached was, to his personal knowledge, published daily in the said daily newspaper from the 15th day of December, 1892, to the 28th day of December, 1892," is *prima facie* evidence of the publica-

tion of the notice, and that the same was inserted in the proper newspaper. The affidavit may be impeached by competent evidence.

3. **A license board** has no authority to designate the newspaper in which the publication of such notices shall be made.

4. **The statute relating to the publication of notices** of applications for liquor licenses contemplates that the newspaper in which such notices are to be published must be one having *bona fide* subscribers. The circulation of the paper is not to be determined alone from the number of subscribers in the county, but from such subscription list and the *bona fide* average sales of the publication combined.

5. **Whether or not several editions of a daily paper** are separate and distinct publications is a question of fact to be determined, from the evidence, by the license board.

6. **Notice of application for liquor license.** Where the matter published in each of several editions of a daily paper is not substantially the same, and each edition has a different heading or name, and is sent to a different set of subscribers, liquor notices should be inserted in but one edition thereof, and the circulation of which alone will determine whether the notice was inserted in the proper paper.

7. **Powers of License Board.** A license board, on the hearing of a remonstrance against granting a liquor license, has power to compel the attendance of witnesses, the production of books and papers, and to commit for contempt a witness if he persists in refusing to answer questions, or if he willfully refuses to produce books and papers before the board.

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

The opinion contains a statement of the case.

Edward W. Simeral, for plaintiff in error:

The law regards each daily edition as a separate newspaper. (*State v. City of South Omaha*, 33 Neb., 876; *Russell v. St. Paul, M. & M. R. Co.*, 31 N. W. Rep. [Minn.], 692; *Scammon v. City of Chicago*, 40 Ill., 146; *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb., 371.)

Hall & McCulloch, contra, cited: *Fairchild v. City of St. Paul,* 49 N. W. Rep. [Minn.], 325; *Lambert v. Stephen,* 29 Neb., 283.

NORVAL, C. J.

This is a proceeding in error to reverse the judgment of the district court of Douglas county affirming an order of the board of fire and police commissioners of the city of Omaha granting a saloon license to defendant in error. In December, 1892, Friedrieka Pinzenscham filed with the secretary of the board of fire and police commissioners of the city of Omaha a petition, signed by the requisite number of qualified petitioners, praying a license to sell intoxicating liquors in said city during the year 1893. Notice of the application in due form was published in all of the daily editions of the Omaha *Daily World-Herald,* from the 15th day of December, 1892, to the 28th day of the same month. Edward Rosewater filed with said board a remonstrance against the issuing of a licence to defendant in error, on two grounds: First, that the notice of said application was not published in the newspaper having the largest circulation in Douglas county; second, that at the time said notice was published in the *World-Herald* the applicant knew said paper did not have the largest circulation in said county. On the 12th day of January, 1893, a hearing was had upon the remonstrance, before the board of fire and police commissioners, and upon consideration of the testimony adduced it was ordered by said board that the remonstrance be overruled, that the applicant's bond be approved, and that a license be granted. The remonstrator prosecuted error to the district court, where the decision of the board was sustained.

Section 2174 of the Consolidated Statutes (sec. 2, ch. 50, Comp. Stats.), relating to notice of applications for liquor licenses, 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, having the largest circulation therein, or if no newspaper is published in said county, by posting written or printed notices of said application in five of the most public places in the town, precinct, village, or city in which the business is to be conducted," etc. The foregoing provision is mandatory and imperative. Unless the statutory notice has been given, the license board has no jurisdiction or power to issue a license. Manifestly it was the intention of the legislature that the notice should be published in the newspaper, in case one is published in the county where the liquors are to be sold, having the largest *bona fide* circulation therein. (*Lambert v. Stevens*, 29 Neb., 283.) In the case cited it was held, in effect, that, even though the notice is published in a newspaper not having the largest circulation, the publication is sufficient, provided the applicant acted in good faith in the making of the choice of the paper; and upon a re-examination of the question, we are satisfied that the rule announced in the decision alluded to is correct, and should be followed.

In *State v. South Omaha*, 33 Neb., 876, it was decided that a notice of an application for a license to sell intoxicating liquors must be published for two weeks, in each issue of the paper. Where the paper containing the notice is a daily, the notice must be published daily; but in case the paper having the largest circulation in the county is published weekly, the notice must be published therein in every issue of such paper for two weeks. In the case at bar, no question is made as to the form of the notice, nor is it claimed that the notice was not inserted for the requisite length of time, but it is insisted by the remonstrator that the newspaper selected was not a proper one, for the reason that the *World-Herald* does not have as large a circulation in Douglas county as the Omaha *Bee*. This is the main

ground, and the only one which we deem necessary to notice, upon which a reversal is asked. It might be observed that the notice given by the defendant in error of her application for a license, with proof of publication thereof, was filed with the license bond before any action was taken upon this application. A copy of this notice is contained in the record before us. Accompanying and annexed to the notice is the affidavit of Guy N. Stephens, the advertising clerk of the Omaha *Daily World-Herald*, which states "that said newspaper has the largest circulation in Douglas county, and that the printed notice hereto attached was, to his personal knowledge, published daily in the said daily newspapers from the 15th day of December, 1892, to the 28th day of December, 1892." This affidavit is *prima facie* evidence, not only of the publication of the notice, but that the same was inserted in the newspaper having the largest circulation in Douglas county. The affidavit, however, is not conclusive, but may be impeached by competent proof. (Code, sec. 370.)

Does the evidence in the case disclose that the notice in question was not published in compliance with the provisions of the statute above quoted, relating to such notices? Upon the hearing before the board of fire and police commissioners there were introduced in evidence, over the objection of the applicant, the record of a resolution adopted by said board on the 30th day of October, 1892, requesting the publishers of the several newspapers in Douglas county to furnish the board with a sworn statement of the number of subscribers each had in the county, to the various editions, during the period beginning August 1, 1892, and ending October 31, 1892; also the record of the following proceedings of the board at their meeting held on November 14, 1892:

"The secretary presented affidavits of circulation from the Omaha *World-Herald* and from the Omaha *Bee* as follows, to-wit: From William H. Dox, city circulator of the

World-Herald, dated November 7, 1892, showing the average daily circulation during the period beginning August 1, 1892 and ending October 1, 1892, to be 10,112 copies. From N. P. Feil, of the Omaha *Bee*, dated November 7, 1892, showing the average daily circulation of the *Bee* for three months ending October 31, 1892, to be, *Morning Bee*, 2,374 copies, and *Evening Bee*, 8,144 copies (total 10,518). From G. M. Hitchcock, of the *World-Herald*, dated November 14, 1892, showing the circulation of the *World-Herald* for the month of October, 1892, as being 10,694. From N. P. Feil, of the *Bee*, dated November 14, 1892, showing the average daily circulation of the *Evening Bee* during October as 8,214 copies, and the *Morning Bee*, 2,522 copies (10,736).

"Thereupon, upon motion, the following resolution was adopted, to-wit:

"*Resolved*, That the board finds from the affidavits filed by the *World-Herald* and from the affidavits filed by the *Bee*, that the *Bee* is the newspaper having the largest circulation in the county of Douglas, the two papers above mentioned being the only two newspapers which have filed any evidence of circulation."

The foregoing action of the board was had prior to the time Pinzenscham filed her petition for a license. We are unable to find any provision of statute, and our attention has not been called to any such by counsel, which makes it the duty of a license board to take testimony and determine in advance of the filing of an application for a license, which paper published in the county has the largest circulation therein. The action of the board, therefore, was not binding upon the applicant, nor was the same admissible for the purpose of showing which paper, the Omaha *Bee* or the *World-Herald*, had the larger circulation. We do not understand that counsel for plaintiff in error claims that the foregoing record of the proceedings of the board was competent evidence on the question of circulation, or that the

same was admitted for that purpose; but rather, since a copy of the record was served upon defendant in error, it was admissible as bearing upon the question whether or not she acted in good faith in the selection of the paper in which the notice was published. In our view, the validity of the notice in this case does not depend upon the good faith, or want thereof, of the defendant in error in the designation of the paper. Therefore, said record of the proceedings of the board of fire and police commissioners will not be further considered.

The determination of the question of fact, namely, which of the two papers had the larger circulation, involves the consideration of the evidence. Upon the hearing of the remonstrance, testimony was introduced for the purpose of establishing that the notice was not published in the newspaper contemplated by the statute.

W. H. Dox, being called as a witness for the remonstrator, testified that he was an employe of the publisher of the *World-Herald;* that the average daily circulation of the *World-Herald* in Douglas county, for the months of August and September, 1892, was 10,112; that during the month of October of that year it was between ten and eleven thousand; that during a portion of the months named there were three editions of the paper, viz., morning, noon, and evening, and for the remainder of the time there were but two; that the figures given by the witness covered all the editions, including the paper issued on Sunday.

G. M. Hitchcock, business manager of the *World-Herald,* testified that generally four editions of his paper are published daily, namely, "*Early Mail*" edition, so called for the Burlington flyer, *Morning World-Herald, Noon World-Herald,* and *Evening World-Herald;* that subscribers of the morning and evening editions are rarely the same, probably twenty-five duplicates; that the noon edition is not sent to subscribers, but is sold by news-boys. Witness

declined to state the number of subscribers for the different editions separately, or the number sold by news-dealers, but insisted on treating all the editions as one newspaper. Witness was asked to produce the book containing a list of subscribers, but he failed to comply with the request.

N. P. Feil, business manager of the Omaha *Bee*, testified that during the months of August, September, October, November, and December, 1892, there were three editions daily, except Sunday, known as *Morning World-Herald*, *Noon World-Herald*, and *Evening World-Herald;* that the average daily circulation of the Omaha *Evening Bee*, for August, September, and October, 1892, six days in the week, excepting Sunday, on which no evening edition is published, was 8,144, which is exclusive of returned papers from news-stands, or railroad papers delivered in Omaha; that the average circulation of the *Evening Bee* for December of the same year was 8,151, and for November, 8,308. Witness further stated that in giving these figures he relied upon a memorandum made from the books of the *Bee*, and that he could not remember the circulation without refreshing his recollection from the books or a memorandum. The board also ruled that witness should not state the circulation of the *Morning Bee*.

F. M. Youngs, foreman of the press-room of the Omaha *Bee*, testified that the number of *Evening Bees* printed daily during December, 1892, was between ten and eleven thousand, of which number about seventy-six or seventy-eight hundred were delivered daily to Mr. Williams, the lessee of the city circulation of the paper; that from 250 to 350 *Evening Bees* are delivered by witness daily to the news-boys; that the usual speed of a Potter press is 9,000 per hour; that the publishers of the *World-Herald* have a Potter press, and also a Hoe press.

William Nichol, helper in the press-room of the *Bee*, testified that he was familiar with the speed newspapers are printed on a Potter or web perfecting press, the same

being the kind used in the printing of the *Evening World-Herald;* that such a press will ordinarily print 150 papers per minute; that on December 22d, 23d, 24th, and 31st, 1892, and on January 2, 1893, witness timed the running of the press on these dates, during the period the *Evening World-Herald* was being printed, and that the length of time consumed was from forty-seven to fifty minutes, exclusive of stops.

James Ryan testified that it requires about an hour to print the evening edition of the *World-Herald.*

Edward Rosewater, president of the Bee Publishing Company, testified that he had examined the books and found that the circulation of the *Bee* was larger in November than in October; that the circulation of the *Evening Bee* was greater by one hundred in December than it was in October. Witness declined to give the circulation of the *Morning Bee,* but stated that "whenever Mr. Hitchcock will come and tell how many papers they print in the morning, I will tell ours."

There is considerable more testimony in the record, but the foregoing is believed to be a fair synopsis of that portion relating to the circulation of the two papers. It will be noticed that the evidence in the case is not of the most conclusive or satisfactory character. Instead of the books, which show the circulation of the *Bee* and *World-Herald* respectively, being produced on the trial and introduced in evidence, witnesses were permitted to state what it is claimed appears on the face of the books. On the one side the witnesses refused to divulge the circulation of each edition of the *World-Herald,* while those for the remonstrator declined to give the circulation of the *Morning Bee.* The books themselves were the best evidence of their contents, yet they were not required to be produced, nor was any attempt made to compel the witnesses on either side to answer many pertinent and proper questions put to them. Doubtless, this arose from the belief that the license board

had no authority either to enforce the production of the books, or to punish witnesses as for contempt for their refusal to testify. This court is, however, unanimously of the opinion that the board possessed such power. The proposition is too plain to require discussion or the citation of authorities in support thereof.

It appears from the proofs in the case that defendant in error's notice was inserted in all of the editions of the *World-Herald*, and that the aggregate daily circulation in Douglas county of all of said editions at the time was between 10,000 and 11,000. The *Evening Bee* likewise had at the time of the publication a circulation in the county of 8,150. The contention of the remonstrator is, and we are asked to so decide, that each edition of the *World-Herald* is a separate and distinct newspaper. A newspaper, in the usual popular acceptation of the word, is a publication issued at regular stated intervals, containing, among other things, the current news, or the news of the day. (16 Am. & Eng. Ency. of Law, 490.) In contemplation of the statute relating to the publication of notices of applications for liquor licenses, the newspaper in which such notices are to be published must not only be one having *bona fide* subscribers, but the publication must have the largest circulation in the county. By this we do not mean that the circulation is to be determined alone by the number of subscribers residing in the county, but from the subscription list and average *bona fide* sales of the paper in the county, combined. A paper which is not distributed to subscribers, but is merely sold to news-boys and news-dealers for distribution, is not such a publication as the law requires notices like the one in question shall be inserted in. (*Scammon v. City of Chicago*, 40 Ill., 146.)

Counsel for plaintiff in error cites the case of *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb., 371, as sustaining his contention that the several daily editions of the *World-Herald* do not constitute one newspaper. In that case, no-

tice of proceedings to condemn real estate taken for right of way of a railroad was published in the *Daily State Journal* a portion of the time, and the remainder of the time in the *Weekly State Journal.* It was held that the publication was invalid, for the reason that it was made in two distinct newspapers, instead of one; in other words, that the *Weekly State Journal* was a separate and distinct paper from the *Daily State Journal.* There the evidence conclusively established, and the trial court so found, that although such papers were published at the same office by the same proprietors, they were sent to different subscribers in different localities, and were in fact separate and different papers. There is nothing in the record before us from which we can say as a matter of fact that each daily edition of the *World-Herald* is a separate and distinct publication.

It is said in the brief of remonstrator "that the *Morning World-Herald* and *Evening World-Herald* contain different articles and news items." This may be true as a matter of fact, but there is absolutely no proof in the record to show whether the matter contained in the various editions is the same or unlike. If there is such evidence, we have failed to discover it. True, each edition was issued by the same publisher and each was sent to a different set of subscribers, from which we might conjecture, perhaps, that the several editions did not constitute one newspaper; yet these facts alone are not sufficient to justify us in so holding. Whether or not the several editions of a daily paper are separate and distinct publications is a question of fact to be determined from the proof, in the first instance, by the license board. If the matter published in each edition of a daily paper is not substantially the same, and each edition has a different heading or name, and is sent to different subscribers, it would be quite clear that the combined circulation of all cannot be counted, for the purpose of ascertaining the newspaper in which notices like the one in question should be published.

Counsel for defendant in error calls attention to the case of *State v. South Omaha, supra*, and to the following language used by the author of that opinion, viz.: "This notice is to have as wide publicity as possible." Again, "The object of the publication is to give the widest possible publicity to the application, in order that those who consider the applicant an unfit person to conduct a saloon, may have an opportunity to remonstrate against the issuing of license." The foregoing must be construed with reference to the case that was there before the court. The question there involved was whether a notice of application for a license to sell liquors, which is published in a daily paper, must be published therein continuously each day for two weeks. The question now under consideration was not before the court. To give the language above quoted the meaning contended for by defendant in error would not only require that the publication be made in each edition of a newspaper, daily, weekly, and tri-weekly, as well as in all the newspapers published in the county. Such was not within the contemplation of the statute. All that the law requires is that the notice shall be published in the newspaper having the largest circulation in the county. If several editions of a daily paper in fact constitute but one paper, then the notice must be published in each of said editions. If each edition is a separate and distinct publication, a publication in one, if the same has the largest circulation in the county, will be sufficient. But if we regard each edition of the daily *World-Herald* as a distinct publication, still the judgment below is right, since the evidence fails to disclose that any one of such editions, in which the notice was published, had a smaller circulation than the *Evening Bee*. The latter publication may have a larger circulation in Douglas county than any single edition of the *World-Herald*, but if so, the evidence does not show it, owing to the fact that the record shows the aggregate circulation of the several editions of the paper merely, and not the circulation of

each edition separately. For the reasons stated the judgment will be

AFFIRMED.

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY v. JOHN N. RICKARDS.

FILED JANUARY 16, 1894. No. 5187.

1. **Adverse Possession.** AN EASEMENT in real estate may be acquired by open, notorious, peaceable, uninterrupted, adverse possession for the statutory period of ten years.

2. ———. Where a party enters upon and occupies land under color of title, such possession is regarded as co-extensive with the entire tract described in the instrument under which such possession is claimed.

3. **Easements:** ADVERSE POSSESSION. Although color of title is not indispensable to adverse possession, yet where a railroad company enters upon and takes possesssion of the real estate of another for a right of way without color of title, such possession is limited to the land actually occupied; and in such case the corporation will acquire a right of way of the width, and no more, which it has so used and occupied for the full period of limitations.

4. **Eminent Domain:** PLEADING: DESCRIPTION. In proceedings to condemn land of an individual for the use of a railroad, the petition must accurately describe the tract affected by the proceedings. Where the petition describes the land by government subdivision, the description is insufficient to authorize the condemnation of real estate within the limits of an incorporated city, which real estate has been laid out and platted into lots and blocks.

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

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

Rickards & Prout, contra.

NORVAL, C. J.

This is an action of ejectment by John N. Rickards against the Omaha & Republican Valley Railway Company to recover possession of a portion of lot 103, in South Beatrice, an addition to the city of Beatrice. The petition is in the ordinary form. The defendant answered by a general denial, and also pleaded the statute of limitations of ten years. Plaintiff replied, denying each allegation of new matter contained in the answer. There was a trial to the court, without the intervention of a jury, which resulted in a finding and judgment for the defendant company that it has an easement in, and is entitled to the possession of, that part of said lot 103 embraced in the following description, to-wit: Commencing at the northeast corner of said lot 103, running thence south 27 feet; thence northwesterly to a point 56 feet west of the northeast corner of said lot; thence east 56 feet to the place of beginning. The court further found for the plaintiff for so much of said lot 103 as is described as follows: Beginning at a point 56 feet west of the northeast corner of said lot, running thence west 43 feet; thence southeasterly to a point in the south line of said lot, 37 feet west of the southeast corner of said lot; thence east 37 feet; thence north 17 feet; thence northeasterly to the point of beginning. The defendant prosecutes error, alleging that the finding in favor of the plaintiff is not sustained by sufficient evidence, and is contrary to law. The cause was tried upon the following agreed statement of facts:

"First—The property in controvery is situated within the limits of the east half northeast quarter of section 4, town 3, range 6 east of the sixth P. M.

"Second—The legal title to said tract, and the disposition thereof is shown, so far as the same appears thereon, by the abstract of the title thereto, hereto annexed, marked Exhibit 'A' and made a part hereof; other proceedings

and conveyances claimed to affect said property are as below stated.

"Third—The abstract annexed, and its memoranda of conveyances, and also the statements and memoranda of other proceedings below written, are to be taken with the same effect as though the original instruments and proceedings were themselves hereto annexed.

"Fourth—The track of the defendant and its road-bed in fact occupied, when constructed, and still occupies, the following described ground, viz.: Commencing at the northeast corner of lot No. 103 in South Beatrice, running thence south 27 feet; thence in a northeasterly direction to a point 56 feet west of the northeast corner of said lot; thence east 66 feet to the place of beginning.

"Fifth—The Omaha and Republican Valley Railroad Company was, about the month of September, 1879, a railroad corporation of this state, and at said time located its line of railroad over and across the east half northeast quarter section 4, town 3 north, range 6 east, and by its line across said land in fact intersected and crossed lots 104, 103, 102, 110, 111, 112, 113, 114, 99, 100, 101, in South Beatrice, as shown by the plat thereof, referred to in the abstract of title hereto annexed, marked Exhibit 'A.'

"Sixth—That the Omaha & Republican Valley Railroad Company finished and completed its line of railroad, as in this agreement mentioned, on or about January 1, 1880, and has from thence hitherto, it and its successors, maintained, occupied and operated the same on the line of its original location.

"Seventh—That about the month of September, 1879, the Omaha & Republican Valley Railroad Company commenced and instituted certain proceedings in the county court of Gage county, Nebraska, to obtain a right of way for its railroad, and for such purpose duly filed its petition in said court, and that said court duly appointed a commission for such purpose as provided by law; that on or

about November 13, 1879, proof of service of notice on the South Platte Land Company in said proceeding was filed in said court, a copy of which is hereto annexed, marked Exhibit 'B'; that afterwards on the 14th day of November, 1879, said commission filed in said proceedings a report of its doings in the premises, a copy of which is hereto annexed, marked Exhibit 'C'; that on November 18, 1879, the said Omaha & Republican Valley Railroad Company deposited in said county court the amount of money awarded by said commission in said proceeding as stated and awarded in and by said Exhibit 'C'; that afterwards, on December 29, 1879, there was filed in said county court, by said South Platte Land Company, a certain order for the payment of money, a copy of which, with its indorsements, is hereto annexed, marked Exhibit 'D,' and made a part hereof; that on January 9, 1880, the said county court paid out said money on said order and took a receipt therefor in writing, a copy of which is hereto annexed, marked Exhibit 'E,' and the same is made a part hereof. The said commissioners so appointed by said county court were, before the making of the said appraisement and report set forth in said Exhibit 'C,' qualified by taking the oath prescribed by law, a copy of which is hereto annexed, marked Exhibit 'C C,' and the same is made a part hereof. The said report and condemnation proceedings above referred to were all of them recorded in the office of the county clerk of Gage county, Nebraska, on the 7th day of January, 1880, at 2 o'clock P. M. of said day, and entered in the numerical index and recorded in book 'D' of Miscellaneous Records, page 125, and following.

"Eighth—That on the 26th day of December, 1879, the said South Platte Land Company made, executed, and delivered to the said Omaha & Republican Valley Railroad Company its certain deed, a copy of which is hereto annexed, marked Exhibit 'F,' and the same is made a part hereof.

"Ninth—The map or plat hereto annexed, marked Exhibit 'G,' made a part hereof, shows the location of the east half northeast quarter and of South Beatrice as laid out thereon, and the line of the original location and construction of said railroad over and through the same, the track shown thereon crossing near the northeast corner of lot 103 being the line of original location.

"Tenth—The heavy white line on said map shows the line which defendant and its predecessor claims and has claimed as its exterior boundary lines under said condemnation proceedings and the said deed to the Omaha & Republican Valley Railroad Company, the particular premises within lot 103 so claimed by it being described as follows: Commencing at the northeast corner of lot 103, running thence west on north line of said lot 99 feet; thence southeasterly to a point in the south line of said lot, 37 feet west of the southeast corner thereof; thence east 37 feet; thence north 44 feet to the place of beginning.

"Eleventh—The Omaha & Republican Valley Railway Company is a railroad corporation of the state of Nebraska, and is the successor to the Omaha & Republican Valley Railroad Company, and as such successor is vested with all the property, rights, and franchises of the said Omaha & Republican Valley Railroad Company.

"Twelfth—The said Omaha & Republican Valley Railroad Company and its successor, this defendant, have been in the open, notorious, exclusive, and adverse actual possession of its said track and road-bed as a railroad, as constructed on its said line of original location, for more than ten years before the commencement of this suit.

"Thirteenth—The premises in the vicinity of the said railroad in the years 1879 and 1880, when said railroad was built over and across the said east half northeast quarter, were vacant and uninclosed lands or lots. The plat of South Beatrice had before that time been made and recorded, but the ground was vacant, uninclosed, and unoccupied.

"Fourteenth—It is agreed that on August 24, 1877, the following streets and parts of streets, as shown on Exhibit 'G,' were duly vacated, to-wit: Fifth, Sixth, Seventh, and Eighth, from the south line of South Beatrice to the south line of Perkins street, Ames street west of the center of Fourth street, also Fourth street, all except the east half of said street, lying north of the south line of Perkins street; and afterwards, on April 26, 1879, a strip extending from the south line of Perkins street southwards was dedicated to the public, which strip was located on what was once the east half of Fifth street, before its vacation."

The abstract of title, which is attached to the foregoing stipulation as an exhibit, shows a complete and perfect chain of title to the entire premises in controversy, by patent from the United States government to one John L. Carson, and from Carson, through other parties, to plaintiff. The railroad company claims title to the real estate mentioned in the petition by reason of adverse possession. The portion of said lot 103 described in the fourth paragraph of the stipulation is occupied by the road-bed and track of plaintiff in error, and it having been in the open, notorious, exclusive, adverse, actual possession thereof for more than ten years prior to the bringing of this suit, the corporation thereby acquired an easement therein, and was entitled to said strip of ground. The trial court having given the defendant below judgment for that portion of the lot, it is no longer involved in the case.

The controlling, and we may say the only, question presented for our consideration and decision is this: Did the railroad company acquire title to any portion of said lot which the trial court found belonged to Rickards, and which adjoins on the south the strip actually used and occupied by the road-bed and track of the corporation? As we have said, plaintiff in error claims the land in dispute by adverse possession. While the railroad company has been in the exclusive occupancy, for the statutory period, of the

strip used for the road-bed and track, there is nothing in the agreed statement of facts to show that it has been in possession of, or exercised any acts of ownership over, any other portion of said lot 103. The premises, when the road was constructed, were vacant, uninclosed, and unoccupied. There is no claim that the Omaha & Republican Valley Railroad Company, or its successor, plaintiff in error, has ever inclosed the land in dispute with a fence, or that when the road was located, or at any other time, it staked out the width of its right of way across lot 103. So far as this record discloses, the company has never used any portion of the lot for its right of way, except the strip which was awarded it by the district court. The presumption of law is always in favor of the owner of the record title, and the burden of proving adverse possession rests upon the party relying thereon. It did not devolve upon plaintiff below to establish that he and his grantors have been in the actual occupancy of the premises during the statutory period.

Counsel for the railroad company call attention to the tenth paragraph of the stipulation of the parties above mentioned, which reads: "The heavy white line on said map shows the line which defendant and its predecessor claims and has claimed as its exterior boundary lines," etc. There can be no doubt that it is established that the company has ever claimed its right of way, where the road crosses lot 103, consisted of a strip of land 100 feet in width, being 50 feet on each side of the center line of its road-bed, and the land here demanded is within such limits; but it does not necessarily follow that the plaintiff in error, or its predecessor, has held adverse possession of the ground next south of the twenty-seven feet which has been occupied by its track and road-bed. Whether the adverse possession of the twenty-seven feet constituted a similar possession of the whole fifty feet south of the center of its track depends upon whether its occupancy has been under color of title.

There is a marked distinction between a possession acquired under a claim of right or color of title, and where possession of land is taken and held by a mere usurper or intruder. Where a party's occupancy is under a color of title, his possession is regarded as being co-extensive with the entire tract described in the instrument under which possession is claimed. On the other hand, where one enters without color of title, his possession is confined to the land actually occupied. It is firmly settled in this state that while color of title is not indispensable to adverse possession, yet, when the occupancy is without color of title, possession is limited to the land actually occupied. (*Gatling v. Lane*, 17 Neb., 80; *Haywood v. Thomas*, 17 Neb., 237.) The rule stated applies to corporations and individuals alike.

Did the railroad company take possession of any part of lot 103, and hold and occupy the same under and by virtue of a color of title? Neither the condemnation proceedings mentioned in the seventh paragraph of the stipulation, nor the deed referred to in the eighth paragraph, conferred any authority upon the company to take possession of, and construct its road over, lot 103, as we shall proceed to show. In the condemnation proceedings, no reference is made to lot 103, in South Beatrice, or any other lot. The real estate in the notice of condemnation of right of way, and in the report of the commissioners appointed by the county judge of Gage county to appraise and assess the damages caused by the location of the railroad, is described as the east half of the northeast quarter of section 4, township 3 north, range 6 east. It appears from the abstract of title that the northeast quarter of the northeast quarter of said section 4, in June, 1872, was platted by the owner thereof as South Beatrice, which plat was duly recorded on the 12th day of the same month. The condemnation proceedings were not commenced until more than seven years thereafter, and, at the time they were instituted and the railroad was located and constructed, the real estate in controversy

was within the limits of an addition to the city of Beatrice. The description of the property in the condemnation papers was insufficient to include lands which had theretofore been laid out and platted into lots and streets; therefore, by the proceedings to condemn, the railroad company acquired no right of way over lots in South Beatrice. And this is the construction placed upon the condemnation proceedings by the railroad company, for on the 26th day of December, 1879, in consideration of $750, it procured a deed from the South Platte Land Company, the owner of the lots in South Beatrice, for right of way, a strip fifty feet wide on each side of the center of its railroad track as then located through lots 99, 100, 101, 102, 110, 111, 112, 113, and 114, in South Beatrice. If the railroad company acquired a right to pass over the foregoing mentioned lots under the law of eminent domain, there was no necessity of its afterwards obtaining the deed alluded to. This deed was insufficient to create a color of title to the premises in litigation, for the obvious reason that lot 103, of which they form a part, is not mentioned in the conveyance. For some cause or other, not disclosed by the record, this lot was not included in the description therein. From the fact that in the notice of condemnation, as well as in the report of the commissioners appointed to assess the damages, the land sought to be acquired for right of way is described as being "a strip of ground 100 feet in width upon the line as located," it cannot be inferred that the railroad company claimed or occupied a strip that wide where its track passes over lot 103. A right of way of a railroad is generally 100 feet wide, and probably, where real estate is sought to be appropriated for that purpose by the power of eminent domain, and the width required for right of way is not specified in the proceedings, or where a deed conveys to a railroad company a right of way over a particular tract of land, and no mention is made in the conveyance of the width of the land conveyed, it might be held that the customary or

usual right of way was acquired. Some of the authorities cited by plaintiff in error go to that extent; but it requires no argument to show that such decisions have no application here, since the railroad company entered upon and constructed its road across the lot in question without authority so to do from the owner, and without complying with the statute which confers upon a railroad company the power to appropriate lands for right of way against the consent of the owner. Where a railroad company enters upon land without any pretense of title, in the absence of a designation of boundaries, there is no presumption that the corporation has appropriated for its right of way a strip of the usual width, or all that the statute allows it to take for that purpose.

Attention has been called to the statute of this state relating to eminent domain. We cannot conceive that it has any bearing upon the subject under discussion. As we have already shown, the railroad company acquired no right to cross lot 103 by the condemnation proceedings. Again, the statute does not fix the exact width of a railroad right of way, but, on the other hand, it expressly provides that "the lands held, taken, and appropriated, otherwise than by the consent of the owner, shall not exceed 200 feet in width, except for wood and water stations and depot grounds, unless where greater width is necessary for excavations, embankments, or depositing waste earth." The legislature has specified the maximum width, merely, where land is appropriated for a right of way against the consent of the owner, and this court has held that the right is restricted to so much real estate as is essential for the location, construction, and convenient use of the road. (*Forney v. Fremont, E. & M. V. R. Co.*, 23 Neb., 465.) It must be presumed, in the absence of a showing to the contrary, that the portion of lot 103, which has been actually used and occupied by the railroad company for the past ten years, was all that was reasonably necessary to the convenient and proper use and maintenance of the railway.

The principal authority on which counsel for plaintiff in error rely is *Hargis v. Kansas City, C. & S. R. Co.*, 100 Mo., 210. That was a case where a land owner verbally agreed to donate and convey to the railroad company the usual right of way across his land, and in pursuance thereof the company entered upon the land and staked off a right of way of the customary width of 100 feet, and constructed its road thereon, but exercised actual and exclusive possession of only 25 feet along the center of the strip, under a claim and color of title to the whole 100 feet. It was held that such possession for the necessary length of time gave the company a title, under the statute of limitations, for the strip of 100 feet in width. We find no fault with that decision, but it is clearly inapplicable to the facts of the case at bar. There the corporation entered upon and occupied the land under a license given by the owner, and the boundary of the right of way was marked by stakes. The parol agreement to convey was sufficient to constitute a good color of title (*Niles v. Davis*, 60 Miss., 750; *McClellan v. Kellogg*, 17 Ill., 498; *Teabout v. Daniels*, 38 Ia., 158; *Rannels v. Rannels*, 52 Mo., 108); and the actual possession of a portion of the strip under a claim and color of title to the whole was constructive possession of the entire 100 feet. In the case we are considering, there was no designation of the boundaries of the 100 feet now claimed as a right of way, nor did the railroad company enter under a license, parol or otherwise, from the owner of the lot. It took possession without a shadow or claim of right, therefore such possession is limited to that portion of the lot actually occupied by the company. It is not deemed necessary to refer to the other cases cited in the brief of counsel for plaintiff in error. We are of the opinion that, for the reasons already stated, the judgment of the district court is right, and it is

AFFIRMED.

HARTWIG CARSTENS v. W. G. MCDONALD.

FILED JANUARY 16, 1894. No. 5474.

1. **Breach of Contract:** CHECK AS EVIDENCE. Defendant contracted to sell and deliver to plaintiff in a reasonable time a quantity of corn, $50 of the purchase price being paid at the time by the check of the purchaser. A memorandum of the transaction between the parties, stating the number of bushels and price per bushel, was made by plaintiff at the time, on the face of the check, in the presence of the defendant. In an action against the seller for a breach of the contract, it was *held* that the check was competent evidence.

2. **Action for Damages for Breach of Contract:** WHEN ACCRUES. A mere declaration by a party to a contract, before performance is due, that he does not intend to comply with the terms of his agreement, will not constitute a breach so as to authorize the other party to maintain an action for damages before the time fixed for performance has elapsed.

3. **Instructions:** HARMLESS ERROR: REVIEW. The giving of an erroneous instruction, where it does not have the tendency to confuse and mislead the jury, is not sufficient cause for reversing the judgment.

4. ——: ——: ——. Where a jury has been fully instructed on a given point, it is wholly unnecessary to give another instruction covering the subject, and to do so may be sufficient cause for reversal; but it will not have that effect where it is clear that the jury were not thereby misled.

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

J. B. Smith, for plaintiff in error.

Douglas Cones, contra.

NORVAL, C. J.

This action was brought in the court below by W. G. McDonald against Hartwig Carstens, to recover damages for an alleged breach of an executory contract for the sale

of corn. There was a verdict and judgment in plaintiff's favor for $6.25, and defendant prosecutes error to this court.

Defendant in error is in the stock business in Pierce county, and plaintiff in error is engaged in farming in said county. The proof shows that on the 7th day of November, 1890, McDonald went to Carstens' farm for the purpose of buying the latter's crop of corn, and, after some negotiations between the parties upon the subject, Carstens finally agreed to sell, and deliver in a reasonable time a quantity of corn at the agreed price of thirty-five cents per bushel. Fifty dollars of the purchase price was paid at the time by McDonald giving his check on the bank for that sum, and the purchaser agreed to pay the balance upon the delivery of the corn. One hundred and forty-one bushels and a half of corn, and no more, were delivered upon the contract early in December, 1890. Carstens informed defendant he would deliver enough more to make 600 bushels, to which McDonald replied that he would not receive the same, unless he would deliver 1,000 bushels. The dispute on the trial was as to the quantity of corn sold. Plaintiff below claims that he purchased 1,000 bushels, while Carstens insists that no definite number of bushels was mentioned at the time the contract was made, but that the agreement covered merely his yellow corn,—that which had been gathered and piled on the ground, as well as the portion then in the field ungathered. The total amount of the yellow corn was afterwards ascertained to be about 600 bushels.

The first assignment in the petition in error is based upon the admission in evidence of the check above mentioned, of which the following is a copy:

"PIERCE, NEB., Nov. 7, 1890. No. ——.

"The Farmers & Merchants State Bank, pay to Hartwig Carstens, or order, ($50) fifty dollars.

"35c. per bushel for 1,000 bus. corn.

"W. G. MCDONALD."

The ground of objection to the introduction of the instrument, as stated in the record, is "that it is admitted by the defendant, Mr. Carstens, that he received the $50 as part payment, and that is all this check can be used for." Had this check been offered for the purpose of proving payment, the error in the introduction thereof, if any, would have been without prejudice, since the payment of the $50 is admitted by the defendant's answer; but the writing was not put in evidence for such purpose, but to corroborate the testimony of the plaintiff below as to the quantity of corn purchased. It will be noticed that on the face of the check appear the words "35c. per bushel for 1,000 bus. corn." They were made by the drawer of the check. True, there is a dispute in the testimony as to the precise time they were written, but according to the testimony of plaintiff in error, which is not contradicted by any other witness, they were, at least, on the instrument when plaintiff received the money thereon from the bank, and he knew they were there at that time. According to the testimony of defendant in error, they were written by himself in the presence of Mr. Carstens at the time the contract was entered into, and prior to the delivery of the check, as a memorandum of the agreement. We think it competent evidence of the transaction as against plaintiff in error.

Another ground urged for a reversal is that the verdict is not sustained by sufficient evidence. There is a sharp conflict in the testimony relating to the number of bushels of corn sold. As to the other matter there is little dispute. We do not think the weight of the evidence is so clear and decided against the contention of the plaintiff below as to call for a reversal of the judgment. If the agreement was that Carstens should deliver 1,000 bushels of corn, as there is abundant evidence in the record to show, and which the jury found to be true, then the contract was broken by plaintiff in error.

The court charged the jury, in the seventh paragraph of the instructions given on its own motion, that "a breach of a contract occurs when one of the parties to it refuses and declines to carry out its terms, and the other party to such contract may then treat it as broken; and in this case, if the defendant, after making the contract, and before the time of furnishing all of the corn expired, refused to deliver more, or placed himself in a condition that he could not perform the contract, the plaintiff was then justified in treating the contract as broken by the defendant, and proceeding to enforce a recovery of its breach." As a legal proposition, the foregoing is inaccurate. A mere declaration by a party to a contract that he does not intend to carry out the terms thereof before performance is due, will not constitute a breach, so as to authorize the other to at once maintain an action; for the party, at any time before the period fixed for performance, has the right to recant and comply with his agreement; but if he fails to withdraw his declaration before the time comes for performance, it will excuse the default of the other party. (*Daniels v. Newton*, 114 Mass., 530.) Plaintiff in error could not have been prejudiced by the giving of the instruction complained of, inasmuch as the suit was not instituted until after the time for performance had elapsed, and there is no claim that plaintiff in error ever offered to comply with the agreement set up in the petition. On the contrary, the defendant below, both in his answer and in his evidence, denies the making of said contract, and he contested the cause in the court below through the entire trial, upon that theory. The jury therefore could not have been misled by the charge. The giving of an erroneous instruction, when it does not have the tendency to confuse and mislead the jury, is not sufficient reason for vacating the judgment and granting a new trial.

Exception is taken to instruction No. 10, which reads as follows: "If you find for the plaintiff, you will then de-

termine the damage he has sustained, which will be the difference between the agreed price of corn and its market price at the time it should have been delivered under the contract for the number of bushels offered, viz., 600, and render your verdict accordingly." The objection urged against the instruction is that, as the substance of it had already been given in the fifth paragraph of the charge, undue prominence was thereby called to the subject. It is useless to give an instruction where the substance of it has once been given, and to do so may be sufficient ground for reversal; but it will not have that effect where it appears that the jury were not thereby misled or confused. (*Seabrock v. Fedawa*, 30 Neb., 424.) In the case at bar plaintiff in error has no just cause to complain of the amount of damages. In no view of the testimony would the jury have been warranted in returning a verdict for the plaintiff below for a smaller sum.

The defendant requested the court to charge the jury not to take into consideration the memorandum on the check, which request was refused. What has been said by us on the introduction of the check disposes of the request to charge. There is no reversible error in the record, and the judgment is

AFFIRMED.

JAMES P. PALIN V. STATE OF NEBRASKA.

FILED JANUARY 16, 1894. No. 5995.

1. **Rape**: EVIDENCE. On a trial of an information for an assault with intent to commit a rape, it is not necessary to prove the commission of the offense on the particular day named in the information, provided the same be within the time limited by statute for the prosecution of the offense.

2. ——: ——. As a general rule, it is incompetent for the state in a criminal prosecution to prove that the prisoner at some other time committed an offense similar to the one with which he stands charged. This rule has its exceptions; but whether the crime of rape, or an assault with intent to commit that offense, falls within the rule or its exceptions, is not decided.

3. **Criminal Law:** PROOF OF DISTINCT CRIMES: PRACTICE. Where a single crime is charged in an information, and the state on the trial, for the purpose of proving the offense alleged, introduces testimony tending to prove similar, but distinct crimes, the proper practice is for the accused to move the court to require the prosecutor to elect on which transaction he will rely for a conviction.

4. **The word "abuse,"** in the sense it is used in section 12 of the Criminal Code, is synonymous with "ravish."

5. **Criminal Law:** PRESUMPTION OF INNOCENCE: REASONABLE DOUBT. In a criminal prosecution the court instructed the jury, in substance, that the law presumed the accused innocent of the crime charged, and that such presumption continued until his guilt should be established by competent evidence beyond a reasonable doubt. *Held*, Sufficient to apprise the jury that their verdict must be based upon the evidence in the case alone, and that it was not error to refuse an instruction that "the information in this case is of itself a mere accusation or charge against the defendant, and is not, of itself, any evidence of the defendant's guilt; and no juror in this case should permit himself to be, to any extent, influenced against the defendant because or on account of the information in this case; that your personal opinion as to facts not proven cannot properly be considered as the basis of your verdict. You may believe as men that certain facts exist, but as jurors you can only act upon evidence introduced upon the trial, and from that alone you must form your verdict, unaided, unassisted, and uninfluenced by any opinion or presumption not formed upon the testimony."

6. **Argument in Absence of Court:** MISCONDUCT OF ATTORNEY. On the trial of a criminal cause the county attorney made a portion of his closing address to the jury while the trial judge was absent from the court room, and in said address said prosecutor, over the objection of the accused, misquoted the testimony in a material matter, to which counsel for the prisoner at the time objected, but, owing to the said absence of the judge, no ruling was had thereon. *Held*, Such error as demanded a reversal.

ERROR to the district court for Lancaster county. Tried below before TIBBETS, J.

W. B. Comstock and *Reese & Gilkeson*, for plaintiff in error.

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

NORVAL, C. J.

At the September term, 1892, of the district court of Lancaster county, an information was filed by the county attorney, charging the plaintiff in error, on the 11th day of July, 1892, with assaulting one Maud Shaffer, a female child of the age of six years, with the felonious intent to carnally know and abuse her with her consent. Upon the trial the jury returned a verdict of guilty against the plaintiff in error, whereupon his counsel filed a motion for a new trial, which was overruled by the court, and an exception taken. Thereupon plaintiff in error was sentenced to confinement in the penitentiary for the term of four years.

The first assignment of error is based upon the ruling of the trial court on the admission of testimony. It appears that the prosecution was permitted to prove by the witness McGrew, over the objection of the defendant, that the accused, on the Friday preceding the 11th day of July, 1892, committed an assault upon the child Maud Shaffer with the intent to ravish her. It is insisted that said testimony tended to prove a similar, but a separate and distinct offense from the one with which the accused was charged in the information, and was therefore reversible error. This court in numerous cases has held that in criminal prosecutions, except in cases where it is necessary to show guilty knowledge, it is incompetent for the state to prove that the prisoner, at another time and place, committed an offense similar to the one with which he stands charged. (*Smith v.*

State, 17 Neb., 358; *Cowan v. State*, 22 Neb., 519; *Berghoff v. State*, 25 Neb., 213.) Such, undoubtedly, is the general rule, but whether the principle should be applied in a prosecution for rape, or an assault with intent to commit that crime, is not so clear. In the case of *Parkinson v. People*, 25 N. E. Rep. [Ill.], 764, it was ruled that, on a trial for rape, proof of two acts of rape committed by the prisoner on the prosecuting witness on different days is inadmissible. The following authorities hold that the admission of such evidence, in prosecutions like the one at bar, is not reversible error, but is competent for the purpose of showing the intent with which the assault charged was committed: *Sharp v. State*, 15 Tex. App., 171; *Williams v. State*, 8 Humph. [Tenn.], 585; *Commonwealth v. Lahey*, 14 Gray [Mass.], 91; *Commonwealth v. Nichols*, 114 Mass., 285; *State v. Wallace*, 9 N. H., 515; *State v. Marvin*, 35 N. H., 22; *State v. Knapp*, 45 N. H., 156; *Lawson v. State*, 20 Ala., 65; *People v. Jenness*, 5 Mich., 305. As we view the record, it is not necessary for us to now decide between the conflicting authorities. The testimony of the witness McGrew was objected to on the ground "that they have charged this man with an offense committed on a certain day, and now they are attempting to prove a different crime." The acts proved by the witness tended to establish the identical crime laid in the information, although they occurred prior to July 11, 1892, which is the day the information alleges that the offense was committed. The allegation in the information as to the time the crime was committed is not material. The state was not required to prove that the transaction occurred on the day alleged, but it was sufficient, if proven to have been committed within the time limited by statute for the prosecution of the offense. (*Yeoman v. State*, 21 Neb., 171.) True, the state introduced evidence of two distinct attempts of improper familiarities on the part of the plaintiff in error with the child, one on the date named in the information, and the

other on the Friday preceding. The testimony of the acts committed on July 11th was the last introduced on the trial and was received without any objection being interposed thereto by the plaintiff in error. Had the acts occurring on July 11th been first proved, possibly the state would have been required to confine its evidence to the transaction occurring on that day; at least the defendant would then have been in a position to raise the question in this court whether or not the evidence of what took place on Friday was admissible. Where an information charges a single crime, and on the trial the state, for the purpose of proving the act charged, introduces evidence tending to establish similar, but separate and distinct offenses, the proper practice is for the defendant to move the court to require the prosecutor to elect on which transaction he will claim a verdict. (Maxwell, Crim. Proc., 517; *State v. Crimmins*, 31 Kan., 376; *State v. Chicago, M. & St. P. R. Co.*, 77 Ia., 442.) No motion to elect was made in the case at bar.

It is further contended that the court erred in giving instruction No. 5, which reads as follows: "The information charges the defendant with an assault with an intent to commit rape. You are instructed that the attempt contemplated in this charge must be manifested by acts which would end in the consummation of the particular offense but for the intervention of circumstances independent of the will of the accused; and although you find from the evidence that the defendant did, at the time charged in the information, take hold of the said Maud Shaffer, expose her private parts, and make an indecent exposure of his own person, yet if he desisted in his attempts to have sexual intercourse or abuse her, upon his own volition, without the intervention of circumstances independent of his own will, the law would presume that he did not intend to carnally know or abuse said Maud Shaffer; but, on the other hand, if you should find from the evidence, and beyond a reasonable doubt, that the defendant proceeded in efforts to car-

nally know or abuse the said Maud Shaffer, and desisted therefrom by reason of some intervening circumstance not dependent upon his own will, or by the intervention of some third party, then the law would presume that he did intend to carnally know or abuse the child in question; and this would be true even though you should believe from the evidence that sexual intercourse between the defendant and the said Maud Shaffer would be impossible, and that the only physical possibility in the attempt at sexual intercourse was to place the genital organs of the defendant in contact with the genital organs of the said child." The contention of plaintiff in error is, that the use of the word "abuse" in the instruction renders it erroneous and misleading. Section 12 of the Criminal Code provides that "If any person shall have carnal knowledge of any other woman, or female child, than his daughter or sister, as aforesaid, forcibly and against her will; or if any male person, of the age of eighteen years or upwards, shall carnally know or abuse any female child under the age of fifteen years, with her consent, every such person so offending shall be deemed guilty of a rape, and shall be imprisoned in the penitentiary not more than twenty nor less than three years." It will be noted that the section quoted above uses the words "carnally know or abuse," and the instruction follows the language of the statute in that particular. The jury could not have inferred from the language of the court that they might find the prisoner guilty of the offense charged, even though they believed he did not intend to have sexual intercourse with Maud Shaffer. Webster defines the verb "abuse" thus: "to violate; to ravish;" and the noun "abuse" the same authority defines as "Violation; rape; as abuse of a female child." The jury doubtless understood that, unless the defendant attempted to have illicit intercourse or connection with the prosecutrix, there could be no conviction of an assault with intent to commit a rape.

Error is assigned because the court refused the following instruction requested by counsel for the prisoner:

"1. The mere verbal solicitation of a female child under the age of consent to permit sexual intercourse is not an attempt to commit rape, as the evil purpose, so long as it exists in contemplation only, is not within these provisions of the law. The attempt contemplated by the statute must be manifested by acts which would end in the consummation of the particular offense but for the intervention of circumstances independent of the will of the accused; and although you find from the evidence that the defendant did, at the time charged in the information, take hold of the said Maud Shaffer, and expose her private parts, and make an indecent exposure of his own person, yet if he desisted without having sexual intercourse with the said Maud Shaffer, and such desistance was caused by the defendant's own volition, and without the intervention of circumstances independent of the will of the defendant, the law presumes that the defendant did not intend to have sexual intercourse with the said Maud Shaffer, and your verdict should be an acquittal of the crime as charged in the information, but the defendant might be guilty of an assault, or assault and battery."

The above request to charge was fully covered by the fifth instruction given by the court on its own motion; therefore, it was not error to refuse said request. (*Olive v. State*, 11 Neb., 1.)

Complaint is also made of the refusal of the court to give to the jury the defendant's instructions 2 and 3, which read:

"2. The jury are further instructed that the information in this case is of itself a mere accusation or charge against the defendant, and is not, of itself, any evidence of the defendant's guilt; and no juror in this case should permit himself to be to any extent influenced against the defendant because or on account of the information in this case.

"3. Your personal opinions as to facts not proven cannot properly be considered as the basis of your verdict. You may believe as men that certain facts exist, but as jurors you can only act upon evidence introduced upon the trial, and from that, and that alone, you must form your verdict, unaided, unassisted, and uninfluenced by any opinion or presumption not formed upon the testimony."

It is true that a criminal information is no evidence of the guilt of the accused; but it was not necessary to so charge the jury in this case, nor was it error to refuse defendant's third request to charge, since the court in its instructions told the jury repeatedly, in substance, that the law presumes the defendant is not guilty of the crime charged in the information, and that this presumption of innocence continues until his guilt is established by competent evidence beyond a reasonable doubt. The jury knew from the charge of the court that their verdict must be based upon the evidence alone, and that if they entertained a reasonable doubt of his guilt, it was their duty to acquit. Plaintiff in error has no just cause for complaint on account of the instructions to the jury, or the court's refusal to charge as requested.

We are asked to reverse the case on the ground that the verdict is not sustained by sufficient evidence. Since there must be a new trial, for the reasons hereinafter stated, we refrain from expressing an opinion upon this branch of the case.

On the hearing of the motion for a new trial it was shown by the affidavit of W. B. Comstock, one of the prisoner's counsel, that the presiding judge, during the final argument of the cause, left the bench and retired from the court room in which the trial was being held, and allowed the argument of the cause to proceed in the absence of said judge, and that while the trial judge was thus absent, and after the argument for the defendant had closed, the county attorney, during his closing argument to the jury, stated

that he had noted carefully the evidence as it was given by the witnesses on the stand, and the evidence showed that the front door of the building in which the crime charged is alleged to have been committed was shut; that, when said statement was made, counsel for the prisoner objected thereto, and that on account of the judge being absent from the court room no ruling upon the objection could be made; that the county attorney continued his argument and insisted that the evidence did show that the said door was shut. The county attorney filed an affidavit in which he admits the facts substantially as stated above, except he denies that he insisted the door was shut, after his attention was challenged to the same by opposing counsel, but avers that as soon as objection was made to the statement he ceased addressing the jury until the judge returned to the court room, when the judge admonished the prosecutor to keep within the record, and the county attorney then said: "You jurors have heard the testimony. If I am wrong in my statement, I ask you not to consider it, but to be guided solely by the testimony. It may be that I have confused the testimony of the witnesses concerning the outer door with the inner door, or rather applied it to the inner door when it was given in reference to the outer." The undisputed evidence shows that the building in which it is alleged the offense was committed is situated on P street in the city of Lincoln; that the windows in the building were unobstructed, and that the front door facing on P street was not closed, but was standing wide open. It is claimed that the act charged in the information occurred in broad daylight in a building situated on one of the principal streets of the capital city. The accused took the witness stand in his own behalf and positively denied that he attempted any improper familiarities with the little girl. Owing to the conflicting character of the testimony, the fact of the door of the building being open at the time of the alleged occurrence was an important fact to be considered

by the jury in arriving at a conclusion. Considerable latitude should always be allowed counsel in the discussion of facts before the jury; but an attorney, and especially a prosecutor in a criminal trial, has no right in arguing a cause to state as a fact any matter not borne out by the testimony. The argument in this case was clearly beyond legitimate bounds and was highly prejudicial to the accused. The trial judge likewise erred in permitting the argument to be made while he was absent from the court room. (*Thompson v. People*, 32 N. E. Rep. [Ill.], 968.) For the errors mentioned, the judgment is reversed and the case remanded for further proceedings according to law.

REVERSED.

GREEN S. GRAVELY V. STATE OF NEBRASKA.

FILED JANUARY 16, 1894. NO. 6143.

1. **Criminal Law:** BURDEN OF PROOF. In criminal prosecutions the burden of proof never shifts, but, as to all defenses which the evidence tends to establish, rests upon the state throughout; hence a conviction can be had only when the jury are satisfied, from a consideration of all the evidence, of the defendant's guilt beyond a reasonable doubt.

2. ———: ———. That rule applies not alone to the case as made by the state, but to any distinct, substantive defense which may be interposed by the accused to justify or excuse the act charged.

3. **Homicide:** SELF-DEFENSE. Where, in a prosecution for murder, there is evidence tending to prove that the killing was justifiable on the ground of self-defense, the jury, in order to convict, must be satisfied beyond a reasonable doubt that the killing was not done in self-defense.

4. **Instructions:** SELF-DEFENSE. It is error to instruct that the accused is required to justify the act charged in the indictment, on the ground of self-defense, by a preponderance of the evidence.

ERROR to the district court for Lancaster county. Tried below before TIBBETS, J.

William B. Price and *Cobb & Harvey*, for plaintiff in error:

It was error for the court to instruct the jury that it devolves upon the defendant to justify his act, on the ground of self-defense, by a preponderance of the evidence. (*People v. Coughlin*, 32 N. W. Rep. [Mich.], 905; *State v. Cross*, 26 N. W. Rep. [Ia.], 62; *State v. Coleman*, 6 S. Car., 185; *Preuit v. People*, 5 Neb., 378; *Vollmer v. State*, 24 Neb., 838; *Farris v. Commonwealth*, 14 Bush [Ky.], 363; *Buckner v. Commonwealth*, 14 Bush [Ky.], 601; *Commonwealth v. York*, 9 Met. [Mass.], 93; *Bush v. Commonwealth*, 78 Ky., 268; *State v. Coleman*, 3 Am. Crim. Rep. [S. Car.], 180; *Erwin v. State*, 29 O. St., 186.)

George H. Hastings, Attorney General, for the state, to sustain the instruction, cited: *United States v. Kan-Gi-Shun-Ca*, 14 N. W. Rep. [Dak.], 437; *People v. Milgate*, 5 Cal., 127; *State v. Neely*, 20 Ia., 108; *Commonwealth v. York*, 9 Met. [Mass.], 93; *People v. Schryver*, 42 N. Y., 1; *People v. McCann*, 16 N. Y., 58; *Patterson v. People*, 46 Barb. [N. Y.], 625; *People v. Arnold*, 15 Cal., 476; *People v. Stonecifer*, 6 Cal., 405; *State v. Knight*, 43 Me., 11; *Commonwealth v. Knapp*, 10 Pick. [Mass.], 484; *Fife v. Commonwealth*, 29 Pa. St., 429; *Silvus v. State*, 22 O. St., 90; *State v. Turner*, Wright [O.], 20; *Commonwealth v. Webster*, 5 Cush. [Mass.], 305.

POST, J.

This was a prosecution in the district court of Lancaster county on the charge of murder in the first degree. A trial was had at the September, 1892, term, at which the accused was convicted of murder in the second degree, and

which he now seeks to reverse by means of a petition in error addressed to this court. The only question which calls for notice is that presented by the following instruction given by the court on its own motion:

"It is incumbent upon the state to show by proof, beyond any reasonable doubt, that on the 28th day of May, 1892, the defendant Green S. Gravely fired a pistol shot at Charles Thomas, and said shot took effect upon the person of said Charles Thomas, and from the effects of said shot, so fired, the said Charles Thomas died; that said act took place in Lancaster county, state of Nebraska; that said act of the defendant was done purposely, with deliberation and premeditation and malice. After the state has established its case, as above, it then devolves upon the defendant to justify his act, on the ground of self-defense, and this he is required to do only by a preponderance of the evidence."

The particular objection to this instruction is the direction contained in the last sentence thereof, requiring the prisoner to justify the killing of the deceased, on the ground of self-fense, by a preponderance of the evidence. It is true there are many cases which sustain the rule as given by the trial court, but the decided weight of recent authority, including commentaries as well as decisions, is to the contrary. The rule seems to be that in criminal prosecutions the burden of proof never shifts, but rests upon the state throughout; and before a conviction can be had the jury must be satisfied, upon all the evidence, beyond a reasonable doubt, of the affirmative of the issue presented, viz., that the prisoner is guilty in manner and form as charged. This rule applies, not alone to the case as made by the state, but to any distinct, substantive defense which may be interposed in order to justify or excuse the act charged. (See 1 Greenleaf Ev. [15th ed.], 81, notes; 3 Greenleaf, Ev., 28, and note *a*; *People v. Riordan*, 117 N. Y., 71; *People v. Downs*, 123 N. Y., 558; *Tiffany v. Commonwealth*, 121 Pa. St., 165; *Rudy v. Commonwealth*, 128 Pa. St., 500; *Commonwealth v. McKie*,

67 Mass., 61; *People v. Coughlin*, 65 Mich., 704; *Lilienthal's Tobacco v. United States*, 97 U. S., 237; *Howard v. State*, 50 Ind., 190; 1 Bish., Crim. Proced., 1048, 1051, 1066; 2 Bish., Crim. Proced., 669, 673.) Even in those jurisdictions in which the burden of proving a distinct defense rests upon the prisoner, the rule is generally held not applicable where it is sought to justify the act charged on the ground of self-defense. (See *Tweedy v. State*, 5 Ia., 434; *State v. Donahoe*, 78 Ia., 486; *State v. Wingo*, 66 Mo., 181; *People v. Rodrigo*, 69 Cal., 601.) This case is clearly within the principle stated in *Wright v. People*, 4 Neb., 407, although the defense interposed therein was insanity. In the opinion of the court in that case LAKE, C. J., after conceding the rule to be different in England, concludes: "By this rule the burden of this defense is shifted from the prosecution to the defendant, which we think ought never to be done."

If a distinction can be said to exist on principle between self-defense and insanity in the application of the rule which imposes upon the state the burden in criminal cases, it is in favor of the first named defense. This is obvious from the rules applicable to homicides. For instance, to constitute the crime of murder the prisoner on trial must have killed the deceased purposely and with malice. If the killing was justifiable, it was not malicious within any definition of the term; hence, it was not murder, nor even manslaughter. Thus it is apparent that the prisoner is not required to establish the facts relied upon as a justification by a preponderance of the evidence. If, upon a consideration of all of the evidence, the jury entertain a reasonable doubt of any fact essential to establish guilt, such doubt should be resolved in his favor. But this rule does not affect the presumption of sanity, or of malice, where the killing is wholly unexplained. Hence, the state is not required in the first instance to prove that the prisoner was sane at the time of the commission of the act charged; and

where, on the case as made out against him, there is no evidence tending to rebut the presumption of sanity, evidence to the contrary must be produced by him; and where the evidence of the state discloses no circumstances tending to establish a justification of the act charged, the prisoner is required to produce evidence sufficient to create a reasonable doubt of his guilt in order to entitle him to an acquittal on that ground. In that sense the burden may be said to be upon the prisoner, but as to all defenses which the evidence tends to establish, the burden rests upon the state. As indicated by the instruction given, there was in this case evidence which tended to prove that the killing of the deceased was justifiable on the ground that the fatal shot was fired by the prisoner in defense of his person. The burden was, therefore, upon the state, and it was not entitled to a conviction unless the jury were satisfied beyond a reasonable doubt that the shooting was not justifiable. It follows that the giving of the instruction complained of is error, for which the judgment must be reversed and the case remanded for a new trial.

REVERSED.

A. H. WEIR & COMPANY, APPELLANTS, v. W. B. BARNES ET AL., APPELLEES.

FILED JANUARY 16, 1894. No. 4920.

1. **Mechanics' Liens:** MATERIALS FURNISHED. The lien of a material-man for materials furnished for the erection of a building by virtue of an agreement with the contractor extends to such materials only as are used in, or delivered at, the building for use therein.

2. **Evidence** examined, and *held* not sufficient to entitle the plaintiff, a material-man, to a lien for materials furnished by virtue of an agreement with the contractor.

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

Marquett, Deweese & Hall and *A. G. Greenlee*, for appellants, cited: *Stewart-Chute Lumber Co. v. Missouri P. R. Co.*, 28 Neb., 44; *White v. Miller*, 18 Pa. St., 52.

N. Rummons, contra.

POST, J.

This is an action to enforce a mechanic's lien against certain property in the city of Lincoln and comes into this court by appeal from the decree of the district court of Lancaster county in favor of the answering defendant, McNeill, the owner of the property described in the petition, upon which in the summer of 1890 was erected a dwelling house, his co-defendant Barnes being the contractor. Plaintiffs, it is admitted, furnished material to Barnes which was used in the erection of said building. The lien is resisted, however, on the ground that it was not filed within the statutory time after the furnishing of said material. It is not necessary to set out the pleadings, which are in the usual form, or to make an extended reference to the issues, since the controversy in this court is confined to a single charge in the itemized account filed with the petition, viz., 100 feet of No. 4234 moulding, under date of June 17, 1890. The last item charged previous to the date above named was under date of June 2, and the account was filed with the county clerk on the 14th day of August following. It is apparent, therefore, that unless the 100 feet of moulding is chargeable to defendant under the provisions of the mechanics' lien law, plaintiffs cannot recover, for the reason that they were required to file a sworn statement of the amount due them from the contractor within sixty days from the furnishing of the material. (Sec. 2, ch. 54, Comp. Stats.) As said by the late

chief justice in *Foster v. Dohle*, 17 Neb., 633: "The contractor, however, unless expressly constituted such, is not the agent of the builder, and cannot bind him by contracts for materials not put into the building or delivered at the same for use therein."

The evidence upon the question at issue is as follows: Plaintiffs were in the habit of delivering material at the place it was required for use, and most of the lumber charged in their account was so delivered. On the day in question Burton Barnes, son of the contractor, with his father's team, procured from plaintiffs at their lumber yard 100 feet of moulding. At the time said moulding was delivered a ticket was made out and signed as follows:

"LINCOLN, NEB., June 17, 1890.

"A. H. Weir & Co.

"For McNeill, job No. 2, 100 ft. Ml'd. 4324. Del. at yd.

"Received above items. BURTON BARNES."

There is no evidence that the party above named was acting for W. B. Barnes, the contractor, or that he claimed such authority, or that he even represented that the moulding was for use in this particular building. A dealer who delivers material in good faith on the premises where a building is in process of erection, or reparation, is entitled to his lien, although it may have been wasted or destroyed. In other words, after delivery it is at the risk of the owner. But one who entrusts material to a third party, thereby assumes the risk of its delivery upon the premises sought to be charged. (*Foster v. Dohle, supra; Irish v. Pheby*, 28 Neb., 231.) In this case there is no evidence whatever of a delivery of the moulding in controversy. Had moulding of the character and quality charged been used in the finishing of defendant's house, that fact was susceptible of proof and would, at least, have been a circumstance tending to sustain the plaintiffs' claim; but no such proof was offered. It is true that defendant testifies on cross-examination that there is moulding in his house, but plaintiffs' counsel did

not pursue the subject to the extent of inquiring the kind or quality thereof, or when it was placed therein. It also appears that defendant was engaged in the erection of more than one building, for the charges in plaintiffs' books, introduced in evidence, are all against Barnes on account of "McNeill job No. 2." Assuming that we are warranted, from the circumstances of the case, in presuming that the moulding was ordered for the contractor, there is still no proof that it was used in or delivered upon "job No. 2." Experience has demonstrated the wisdom of the mechanics' lien law. It is likewise settled by abundant authority that it should be liberally construed in favor of the mechanic or material-man, by means of whose labor or capital the property has been enhanced in value. But by no liberal or reasonable construction can the owner of property be charged in a case like this. The filing of the lien within the statutory time is just as essential as the furnishing of the material. Having failed to take the steps necessary to charge the property of the defendant for the material furnished to the contractor, plaintiffs must look to the latter for their satisfaction. The judgment of the district court is

AFFIRMED.

AULTMAN, MILLER & COMPANY V. WILLIAM GRIMES.

FILED JANUARY 16, 1894. No. 4772.

1. **Liability of Sheriffs for Failure of Duty in Serving Writs.** A sheriff who has received for service an order of attachment, and garnishee notices for alleged debtors of the defendant, will not be held liable in an action by the plaintiff in the attachment suit on the sole ground that he procured like notices to be served on the same parties as garnishees in a suit by attachment, in which he is plaintiff against the same defendant, after the receipt of the notices first mentioned and before service thereof.

2. **Pleading.** Petition examined, and *held* not to state a cause of action.

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

Daniel F. Osgood, for plaintiff in error.

S. P. Davidson and *J. Hall Hitchcock*, *contra.*

POST, J.

This was an action by the plaintiff in error in the district court of Johnson county against the defendant in error, William Grimes, on his official bond as sheriff of said county. The allegations of the petition are substantially as follows: On the 20th day of October, 1888, the plaintiff in error commenced an action in the district court of Johnson county against one George H. Dennett to recover the sum of $1,417, and caused an order of attachment to be issued in said action, and also garnishee notices for Charles M. Chamberlain and the Chamberlain Banking Company, as supposed debtors of the defendant therein, which writs were, on the day above named, delivered to defendant in error as sheriff for service; that the latter intentionally neglected and refused to serve said writs until the 22d day of October; that in the meantime defendant in error had commenced an action in the county court of said county against said Dennett, to recover the sum of $———, and caused an order of attachment to be issued in said action, and also garnishee notices for the said Charles M. Chamberlain and the Chamberlain Banking Company, which last named notices defendant in error, as sheriff, served on the aforesaid garnishees previous to the service of the notices issued in the action of plaintiff in error; that on the 14th day of December, 1888, said garnishees answered in the action of the defendant in error, admitting that they had in their possession property and money of the defend-

ant Dennett amounting in the aggregate to $2,900, as security for a debt of $2,700 due and owing by the latter to them, whereupon they were ordered to pay into court a sum sufficient to satisfy the judgment of defendant in error, with costs, to-wit, $162.85; that the last named sum was paid into court by the garnishees, in obedience to the order of the county court, on the 5th day of February, 1889, and turned over to the defendant in error; that subsequently the action against Dennett came on for trial in the district court and judgment was rendered therein for plaintiff in error in the sum of $1,417, which remains wholly unsatisfied; that had defendant in error served said notices in the order in which they were received by him, the said sum of $162.85 would have been due and payable on the claim of the plaintiff; wherefore it is damaged, etc. The answer is in the nature of a demurrer to the petition. A second cause of action set out in the petition need not be noticed, since it is not referred to in the brief of counsel. A trial in the district court resulted in a verdict and judgment for the defendant in error.

Practically the only question argued in this court is that of the sufficiency of the petition. It will be observed that the wrong complained of is not a failure to serve the notices upon the garnishees, but the previous service of like notices in his own case by the defendant in error. It does not appear from the petition that the garnishees have ever answered or been discharged in the action of plaintiff, or that they have not in their possession sufficient property to satisfy the judgment in the district court. The only allegation on the subject is that the garnishees in the action, by defendant in error, in the county court answered that they had in their possession property and money of Dennett of the value of $2,900, to secure an indebtedness of the latter to them of $2,700. It is not insisted that there exists any special provision of statute making a sheriff liable for procuring a writ of attachment to be served in an action to

which he is a party, although the effect thereof may be to defeat the claims of other creditors; nor is there any claim that the garnishee notices were not served and returned within the statutory time. If defendant in error is to respond in damages for the acts complained of, it must be on the ground that plaintiff in error has suffered damage in consequence thereof; but on that question the petition is silent. In order to state a cause of action for the wrong complained of, it should have been alleged either that the amount paid into court to satisfy the judgment of defendant in error exhausted the funds of Dennett in the hands of the garnishees, or that the latter had answered and been discharged in the action against Dennett in the district court; nor is it alleged that Dennett is insolvent, or that the amount of the judgment could not be made on execution against him. There is a further question presented by the record, viz., the validity of the service by defendant in error of the garnishee notices in his own action, which will not be noticed, as the judgment must be affirmed for reasons already stated.

AFFIRMED.

MARGUERITE ALTSCHULER V. WILLIAM COBURN, SHERIFF.

FILED JANUARY 16, 1894. No. 4670.

1. **Trial:** CROSS-EXAMINATION: FRAUD. A wide latitude will generally be allowed in the cross-examination of witnesses where the issue is fraud, especially of witnesses who are parties to the alleged fraudulent transaction.

2. **Replevin:** EVIDENCE. Where property in the possession of M. is taken to satisfy an execution against F., declarations of the former in disparagement of his title *held* admissible in an action by A. to recover the property from the sheriff, there being evidence tending to prove a conspiracy between A., F., and M. to

defraud the creditors of F. by investing M. with the apparent title thereof.

3. **Instructions**: BURDEN OF PROOF. It is not error to instruct that the party on whom the burden rests is required to establish his cause of action or defense by a fair preponderance of the evidence.

4. **Review**: HARMLESS ERROR. A judgment will not be reversed on account of errors which are not prejudicial to the complaining party.

5. **Evidence** examined, and *held* to sustain the judgment of the trial court.

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

B. G. Burbank, for plaintiff in error:

The court erred in giving the following instruction: "The burden of proof in this case is on the plaintiff to show by a preponderance of the testimony her right to the possession of the property in controversy at the commencement of this suit; and unless she has satisfied you, by a fair preponderance of the testimony, of her right to such possession, she cannot recover in this action." It requires the plaintiff to produce before the jury a greater degree of evidence than required by law. (*Search v. Miller*, 9 Neb., 26; *Marx v. Kilpatrick*, 25 Neb., 118.)

Hall & McCulloch, contra:

The use of the words "fair preponderance" in the instruction was not error. (*Dunbar v. Briggs*, 18 Neb., 97.)

Transactions between relatives by which creditors are deprived of their just dues should be scrutinized strictly, and the *bona fides* of such transactions clearly established. (*Fisher v. Herron*, 26 Neb., 130; *Bartlett v. Cheesbrough*, 23 Neb., 767; *Plummer v. Rummel*, 26 Neb., 142.)

Transactions between a failing debtor and his relatives are always suspicious. They are to be regarded with strict

scrutiny. They are badges of fraud unless clearly explained. (*First Nat. Bank of Omaha v. Bartlett*, 8 Neb., 319; *Aultman v. Obermeyer*, 6 Neb., 260; *Thompson v. Loenig*, 13 Neb., 386; *Stevens v. Carson*, 30 Neb., 544; *Lipscomb v. Lyon*, 19 Neb., 511; *Hill v. Fouse*, 32 Neb., 638.)

POST, J.

This was an action of replevin in the district court of Douglas county in which the plaintiff in error, Marguerite Altschuler, sought to recover certain personal property, which is thus described: "All the goods and chattels now being contained in the two-story building known as 'No. 623 North Sixteenth Street,' in the city of Omaha, and all the fixtures and other personal property connected with the saloon in said building contained, of the value of $5,000." A trial resulted in a verdict and judgment for the defendant below, whereupon the case was removed to this court by petition in error.

The plaintiff claims to be the owner in her own right of the property in controversy, while the defendant claims, as sheriff of Douglas county, by virtue of a levy to satisfy certain executions against one John A. Freyhan. From the bill of exceptions it appears that for some time prior to September, 1886, Freyhan had been engaged in the saloon business in Omaha. Some time in said month he failed, and is still owing more than $10,000 of debts contracted previous to his failure. In the month of April following, according to the contention of the plaintiff, she opened a saloon in Omaha, with one McGrath as manager, and that the property seized to satisfy the executions against Freyhan consists of the fixtures and a part of the stock of liquors owned by her, while the theory of the defendant is that the saloon in question and the liquors and fixtures therein were, at the time they were taken by him, the property of Freyhan, and that the plaintiff's alleged ownership is a

mere pretense for the purpose of assisting him, Freyhan, to defraud his creditors. The plaintiff, who is Freyhan's sister, resides with her husband at Missouri Valley, Iowa, and does not appear to have visited Omaha at the time she claims to have embarked in the business of saloon-keeping in that city, and if she ever took an active part in the management of the business, that fact is not apparent from the record. On the 16th day of May, 1887, which was about a month subsequent to the opening of the saloon, Freyhan and McGrath entered into an agreement in writing which, so far as material in the controversy, is as follows:

"This agreement, made at Omaha this 16th day of May, 1887, by and between John A. Freyhan, as agent, of Omaha, party of the first part, and S. M. McGrath, of the same place, party of the second part, witnesseth:

"That said party of the second part shall open and conduct in his own name a wholesale and retail liquor and cigar business in said city of Omaha, under the direction of said party of the first part.

"That all of the assets and property used in and about said business, consisting of fixtures, wines, liquors, cigars, etc., and all the moneys, accounts, and other assets arising out of or accruing from or furnished to be used in said business shall belong to, and be and remain the property of, the party of the first part, as agent, as aforesaid, the intention being by this agreement to cover all property now held by said McGrath for said purpose, and all which may hereafter be purchased for or furnished for use in said business and the receipts, issues and profits thereof.

* * * * * * *

"Said party of the second part shall, if directed by said party of the first part, execute to all parties who may have furnished, or may hereafter furnish, property, or stock, or cash for use in said business a note or notes, or obligations therefor, and secure the same by mortgage on the fixtures, stock, and property aforesaid, or any part thereof. And

said party of the second part shall carry on said business at all times as directed by said party of the first part as agent aforesaid.

* * * * * * *

"Nothing herein contained shall be ever construed so as to allow the party of the second part to call in question the agency of the party of the first part or the party whom he represents.

"In the event that said party of the second part shall fail to comply with any of the agreements herein contained on his part to be performed, then said party of the first part shall, at his option, be entitled to immediate possession of all the property, fixtures, and assets used in and about said business, and all moneys arising in any manner out of the same, and to the immediate possession of the buildings and premises whereon said business is being conducted, and the business there being carried on and being conducted within or in any manner thereunto appertaining, the possession of this agreement being sufficient authority upon which the party of the first part, his agents or assigns, may demand, enforce, and receive the immediate possession of said premises, property, and business aforesaid.

"This agreement is made by said party of the first part with said party of the second part as a personal agreement, which said party of the second part shall have no right to assign, transfer, or in any manner dispose of, and an attempt so to do will terminate this contract at the option of the party of the first part.

"Witness our hands the day and year first above written.

"JOHN A. FREYHAN.
"S. M. MCGRATH.

"Witness to signatures:
"W. J. MARTIN.
"GEO. F. WITTUM."

It will be observed that the name of Freyhan's alleged principal is not mentioned in the above agreement, nor does

it appear that the identity of the party represented by him was ever disclosed to McGrath. The latter, it is admitted, applied for and received the license in his own name, and by a sign over the door announced that he was proprietor of the saloon. The business continued under his management until some time during the fall of 1887, from which time, until it was closed out by the sheriff in January following, it was conducted by a bartender employed by Freyhan. A fact which should be noted in this connection is that McGrath was not produced as a witness; nor did the plaintiff testify in her own behalf. A written power of attorney was introduced in evidence which appears to have been executed by the plaintiff on the 2d day of April, 1887, in which it is recited that "John A. Freyhan is appointed her lawful attorney with power to sell and convey by good and sufficient deed, with full covenants and warranty, any and all of the real estate now owned by me or may hereafter be purchased by me, hereby giving and granting to my said attorney full power to do and perform every act necessary to be done in the premises as fully as I could do myself if personally present, also giving and granting unto my said attorney, John A. Freyhan, full power and control over every species of personal property which I may now be in possession of, or may hereafter become possessed of, allowing and delegating to him authority to draw checks, make, sign, deliver and execute notes, contracts, and each and every kind of business which I myself could do relative to my own individual property, and that he is hereby empowered to do the same as fully as I myself could do were I personally thereat, hereby ratifying and confirming all that my said attorney shall do by virtue hereof."

It appears that the original stock of liquors, as well as additions thereto, were purchased on credit from Samuel Westheimer, of St. Joseph, Missouri. Referring to the first order Freyhan testifies:

Q. Did Mrs. Altschuler order the goods, or did you?

A. No, sir; Mr. McGrath placed the orders with Mr. New, the agent of Mr. Westheimer, in my presence, and I acted for Mrs. Altschuler.

Q. In guarantying and confirming the payments of accounts, Mr. McGrath did so under your instruction?

A. Yes, sir.

Q. Mrs. Altschuler wasn't present?

A. No, sir.

It does not appear, except from statements rendered September 14 and October 27, that the plaintiff was known to Westheimer, the business with him having been transacted in the name of McGrath. It is admitted that she advanced no money to pay for the liquors previous to the commencement of this action, and that all payments prior thereto were made from receipts of the saloon, but that the sum of $1,100 was paid October 25 from the proceeds of the property taken under the writ of replevin. The testimony of Freyhan is in some respects unsatisfactory and apparently evasive. For instance, he cannot tell positively whether the surety on the replevin bond was procured by the plaintiff or himself. We are not disposed to comment upon the facts above stated. The jury found Freyhan, and not the plaintiff, to be the owner of the property in controversy, and that finding we must accept as conclusive.

2. Exception was taken to the ruling of the court in permitting the defendant to cross-examine Freyhan with respect to the disposition of certain property by him. Counsel for the plaintiff overlooks the fact that the witness named had testified on his direct examination that plaintiff was the owner of the property, and in effect that his transactions with her were in good faith and not fraudulent as to his creditors. But assuming that he did not expressly or by implication assert that such transactions were free from the taint of fraud, we think the facts disclosed by him, giving them the most favorable construction, are of so

suspicious a character as to fully warrant the examination allowed. A wide latitude will generally be allowed in cross-examinations, where the issue is fraud, especially of witnesses who are parties to the alleged fraudulent transaction. (See *Anderson v. Walter*, 34 Mich., 113.)

3. The next assignment is the admission in evidence over the objection of the plaintiff of certain records of the county court, to-wit, the petition, affidavit for attachment, motion to discharge attachment, affidavit for garnishment, and prior execution and return thereof, all in the case of *Groff v. Freyhan.* It should be mentioned that a second execution to satisfy the judgment above named is one of the writs upon which the defendant relies in the action, and the petition therein was properly received in evidence. The other records were received as tending to establish the insolvency of Freyhan, a fact which the jury were authorized to consider in determining the issue of fraud. Whether or not the records were admissible for that purpose we need not now determine, since if the ruling complained of was erroneous, it was error without prejudice, for the reason that Freyhan's insolvency had been conclusively established by his own testimony.

4. Exception was taken to the admission in evidence of the numerical index of deeds to show the record title of the south 20 feet of lot 12, block 80, in South Omaha. That evidence was material upon one proposition only, and which was collateral to the main controversy. The defendant attempted to show by the cross-examination of Freyhan that he (the witness) had indemnified the surety on the replevin bond, Moritz Meyer. The testimony of the witness, while not satisfactory, is to the effect that Meyer was secured by property in South Omaha, which the plaintiff "had given to Westheimer as security." The record introduced shows a conveyance of the property described by the plaintiff to Rachel Robinson by the latter to Samuel Westheimer, and by the last named to Moritz Meyer.

Its admission, if error, was harmless, since it tends to sustain rather than contradict the claim of the plaintiff.

5. The defendant was permitted to prove declarations of McGrath while the latter was acting as manager of the saloon, in substance, that although it was conducted in his name it was owned by Freyhan, who could not carry on the business in his own name for the reason that he was still owing debts contracted previous to his failure. The ground of the objection is that such statements do not relate to any matter within the scope of the authority of McGrath as the representative either of the plaintiff or Freyhan and are not therefore a part of the *res gestæ*. It does not follow, however, that the question presented by this ruling is to be determined by an application of the principles which govern the law of agency. The contention of the defendant has been throughout that Freyhan was engaged with McGrath in a conspiracy to defraud the creditors of the former, in which he was aided and abetted by the plaintiff. It is sufficient to say that there was, in our judgment, evidence tending to sustain that contention, and sufficient as a foundation for the admission of the declaration offered.

6. Exception was taken to the following instruction: "The burden of proof in this case is on the plaintiff to show by a preponderance of the testimony her right to the possession of the property in controversy at the commencement of this suit, and unless she has satisfied you by a fair preponderance of the testimony of her right to such possession, she cannot recover in this action." The criticism of the instruction is directed to the expression "fair preponderance" of the evidence used therein. In support of this exception we are referred by counsel to *Search v. Miller*, 9 Neb., 26, and *Marx v. Kilpatrick*, 25 Neb., 118, in which the expression "clear preponderance of the evidence" is condemned. But in *Dunbar v. Briggs*, 18 Neb., 94, an instruction was approved which required a counter-claim to

be established by a fair preponderance of the evidence. The last case is in point and decisive of the question presented by this exception. In the opinion of the writer, any attempt to qualify that term by subtle distinctions between *a clear preponderance* and a *fair preponderance* of the evidence is to be deprecated as an unnecessary refinement and tending to confuse rather than enlighten the average mind. "Preponderance" is defined by Webster thus: "An outweighing; superiority of weight." There can be no preponderance while the evidence is evenly balanced, but when the scale inclines toward one side, we know the weight or superiority of evidence is with that party. Manifestly there can be no such outweighing unless there is both a clear preponderance and a fair preponderance. As well might we attempt to apply degrees of comparison to the term "equilibrium" by holding the evidence in one case more evenly balanced than in another. Applicable in this connection is the language used in Stephen's General View of the Criminal Law, p. 262, with reference to the term "reasonable doubt," where it is said that an attempt to give a specific meaning to the word "reasonable" is "trying to count what is not number, and measure what is not space."

7. Lastly, it is argued that the court erred in the giving of the following instruction: "The jury are instructed that conveyances by and transactions between a failing debtor and his relatives are always suspicious and to be regarded with strict scrutiny, and such transactions are badges of fraud, unless clearly explained." It is not claimed that the instruction does not correctly state the law as an abstract proposition, but it is contended that it is not applicable to the facts disclosed by the evidence. To that proposition we cannot give our assent. Transactions like those shown between the plaintiff and Freyhan are regarded with suspicion and are universally held to be evidence of fraud. We find no prejudicial error in the record and the judgment is accordingly

AFFIRMED.

OMAHA LOAN & TRUST COMPANY, APPELLEE, V. JARED B. AYER ET AL., IMPLEADED WITH ALEXANDER LILIENCRON ET UX., APPELLANTS.

FILED JANUARY 16, 1894. No. 5926.

1. **Appeal:** LACHES OF APPELLANT: JURISDICTION. The provision of section 675 of the Code, for the taking of appeals within six months after the date of the decree or final order appealed from, is mandatory, and a compliance therewith essential in order to confer jurisdiction upon this court, unless the failure is in nowise attributable to the laches of the appellant.

2. **Failure to File Transcript for Review:** BILL OF EXCEPTIONS. The fact that the appellant, through no fault or negligence of his own, is unable to procure the allowance of a bill of exceptions within the time allowed for taking an appeal, will not excuse the filing of the transcript required by law within six months after the date of the decree or order appealed from.

3. **Permission to File Petition in Error Upon Dismissal of Appeal:** TIME. The appellant will be permitted to file a petition in error in this court upon the dismissal of his appeal in order to secure a review of the decree appealed from upon exception, provided such proceeding be commenced within one year from the date of such order or decree.

4. The case of *Bazzo v. Wallace*, 16 Neb., 290, distinguished.

MOTION by appellee to dismiss appeal from the district court of Douglas county, and motion by appellants for leave to file a petition in error. *Appeal dismissed. Motion for leave to file petition in error overruled.*

John P. Breen and *E. R. Duffie*, for appellants.

Lake, Hamilton & Maxwell, contra.

POST, J.

This was an action by the appellee, the Omaha Loan & Trust Company, in the district court of Douglas county

for the foreclosure of a mortgage executed by J. B. Ayer on lots 1, 2, and 3, in block 10, in Rodgers' addition to the city of Omaha. The appellants Alexander Liliencron and wife were made parties defendant, and answered, alleging title to the mortgaged property. They allege further that their co-defendant Ayer, by means of fraud and falsehood, induced them to execute in his name a deed by which they conveyed to him the legal title to said property, and that while holding such legal title he executed the mortgage described in the petition in fraud of their rights. They also charge that the plaintiff accepted said mortgage and made the loan represented thereby with full knowledge of their rights. The reply puts in issue all of the above allegations. On the 6th day of January, 1892, a final decree was rendered in favor of the plaintiff in accordance with the prayer of the petition.

On the 5th day of January, 1893, appellants filed in this court their bill of exceptions and a transcript of the proceedings in the district court, accompanied by a motion in the following language: "And now on this 5th day of January, 1893, the defendant cross-petitioners herein, Alexander Liliencron and Franciska Liliencron, file in this court their transcript of the record and bill of exceptions in this case and reserving the right to make application hereafter to this court to have this whole case reviewed on petition in error, if this court shall deem and decide that this appeal has not been taken in time, they ask that this case may be heard and considered as upon appeal, and shall be heard and determined as though filed in this court within six months from the rendition and filing of the decree herein. In asking this, and as a reason therefor, they refer to the showing on file with their bill of exceptions as to the diligence used in endeavoring to settle their bill of exceptions in the lower court, and the unavoidable delay in having their appeal perfected within the time provided by statute." No action was taken on the above motion, nor

was it called to our attention until the 28th day of June, 1893, on which day a motion was made by appellee to dismiss the appeal on the ground that it was not taken within the time allowed therefor by law. Appellants, it is conceded, show by the affidavits referred to in their motion that they were unable, through no fault or negligence of their own, to procure the allowance of a bill of exceptions until about the time of the filing of the case in this court. That fact will not, however, excuse the failure to file the transcript required by section 675 of the Code, within six months after the date of the decree appealed from.

In *Schuyler v. Hanna*, 28 Neb., 604, it was held that the filing of a transcript of the pleadings and final decree will confer upon this court jurisdiction in cases brought here by appeal; and in *Fitzgerald v. Brandt*, 36 Neb., 683, it was held that the provision of the Code for the taking of appeals in equity causes within six months is mandatory, and a compliance therewith essential to give this court jurisdiction, unless the failure is in nowise attributable to the laches of the appellant. It is not deemed necessary to examine the earlier cases in this court, for whatever authority may be therein found for a different rule the law must be regarded as settled by the cases above cited. The motion to dismiss was accordingly sustained, whereupon the appellants moved for leave to file a petition in error in order to secure a reversal of the decree, on account of errors to be alleged therein. It is provided by section 592 of the Code that "no proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced unless within one year after the rendition of the judgment or the making of the final order complained of," etc. By section 584 it is provided that the proceeding to secure a reversal, vacation or modification of a judgment or decree by this court shall be by a pleading entitled "a petition in error," and that "thereupon a summons shall be issued and served, or publication made, as in the commencement of an action." The

Code further provides, section 19, that "an action shall be deemed commenced within the meaning of this title as to the defendant at the date of the summons which is served on him." A summons issued within the time authorized by statute will give the court jurisdiction, although served after the expiration of such period. But in all cases the summons must be issued before the bar of the statute is complete. (*Rogers v. Redick*, 10 Neb., 332; *Baker v. Sloss*, 13 Neb., 230; *Republican Valley R. Co. v. Sayer*, 13 Neb., 280.) The foregoing, like other provisions limiting the time within which appellate proceedings may be instituted, are jurisdictional, and cannot be enlarged by the court. This case is clearly distinguishable from *Bazzo v. Wallace*, 16 Neb., 290. The facts of that case do not clearly appear from the opinion of the court, but it is said therein that "there was a general appearance of the defendant within the year by his attorney entering into an agreement in writing to continue the case." The inference from the above language is that the petition in error, which was essential in order to confer jurisdiction, was on file at the time of the appearance. We do not understand that case to be authority for the proposition that the filing of the transcript and evidence in this court within one year from the date of a final order or decree, will operate to enlarge the time allowed for proceeding by petition in error, and as authority it should be restricted to cases within the facts stated therein. Motion to dismiss appeal sustained. Motion for leave to file petition in error overruled.

JUDGMENT ACCORDINGLY.

NEW ENGLAND LOAN & TRUST COMPANY, APPELLEE, v. JAMES KENNEALLY ET AL., APPELLANTS.

FILED JANUARY 16, 1894. No. 5582.

1. **Fire Insurance:** ASSIGNMENT OF POLICY. The general rule is that a fire insurance policy is a personal contract with the party insured, and does not run with the land or pass to the purchaser by a sale of the property insured, and any assignment of the policy, to be valid and operative, must be with the knowledge and consent of the insurer, especially where the policy, by its terms, requires the assignment, if any, to be assented to by the company.

2. **Foreclosure of Mortgage:** INSURANCE: SET-OFF AND COUNTER-CLAIM. G., by purchase of property from K., who, prior to the sale to G., had mortgaged the property to N., and had obtained insurance on the property in his own name, the policy of insurance having a clause attached by which the loss, if any, was made payable to N., the mortgagee, there being no assignment of the policy to G., does not acquire any right, in the event of the destruction of the buildings on said property by fire after the sale to him, to set-off or counter-claim the amount of said policy, or any part thereof, against the amount of the mortgage, in a suit by N. to foreclose the same, because of the neglect of N. to perform any of the conditions of the mortgage clause, and in which action a deficiency judgment is asked against G. as a part of the relief prayed for, G. having, in the sale of the property to him, assumed and agreed to pay the mortgage to N.

3. **Vendor and Vendee:** LIABILITY OF PURCHASER FOR PAYMENT OF MORTGAGES. Where a party, purchaser of property, buys the property subject to a certain mortgage of $1,200, and the interest thereon, which he assumes and agrees to pay, he does not become personally liable for the payment of a second mortgage on the premises which is not shown by the pleadings or evidence to be any part of the first mortgage, or any part of the interest thereon.

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

Wooley & Gibson, for appellants.

Balliet & Points, contra.

HARRISON, J.

The New England Loan & Trust Company commenced an action in the district court of Lancaster county to foreclose two mortgages, one in the sum of $1,200, and one in the sum of $——, executed and delivered to it December 26, 1887, by James Kenneally and Eliza Kenneally, and covering the following property, situated in the county of Lancaster and state of Nebraska, to-wit: "Lot twelve (12), in block five (5), 'Pleasant Hill' subdivision of lots three (3), four (4), five (5), and six (6) of the northeast quarter of section thirty-six (36), township ten (10) north, of range six (6) east, of the sixth principal meridian, with all the appurtenances thereto belonging." The petition contained the usual allegations of a petition in such actions and also a copy of the conditions of the mortgages, one of which provided that the Kenneallys should keep the buildings on said premises insured in some responsible and approved company or companies for the benefit of the mortgagee, in a sum not less than $2,000, and deliver the policies and renewal receipts to mortgagee. The petition also contained the following allegation: That Benjamin A. Gibson and Francis N. Gibson each agreed and assumed to pay this plaintiff the said mortgages made and executed by James Kenneally and wife to this plaintiff, and that said agreement was a part of the purchase price of said land from Kenneally to Gibson, and from Gibson to Gibson. There was a deed executed, as appears from the evidence, from the Kenneallys to Benjamin A. Gibson, and one from Benjamin A. Gibson to Francis N. Gibson, in each of which there was a clause whereby the grantee assumed and agreed to pay the $1,200 mortgage and the interest thereon. The prayer of the petition was for foreclosure of the mortgages and de-

ficiency judgments against the Kenneallys and the Gibsons. The Kenneallys did not appear, made no defense, and were defaulted. The Gibsons filed separate answers, but as the defenses were the same, and the pleadings in substance very similar, they may be considered together, and one statement here of the issues raised will suffice. These answers, after admitting the execution and delivery of the notes and mortgages, and the purchase of the property from the Kenneallys, alleged that such purchase was made January 10, 1888. The deed to Benjamin A. Gibson is of date January 25, 1888. This deed, it is shown by the testimony, should have been made to both the Gibsons, defendants herein, and was by mistake made to Benjamin A. Gibson alone. The deed from Benjamin A. Gibson to Francis N. Gibson is of date June 18, 1888. The answers further alleged that on the 10th day of January, 1888, in pursuance of the covenants in the mortgage contained, insurance policy No. 978 was procured by James Kenneally to be issued to him by the Insurance Company of North America, insuring the buildings on said premises against loss or damage by fire in the sum of $2,000. That the sum proven to be due on said policy in case of loss or damage by fire was, by the terms of the mortgage clause attached to said policy, made payable to the plaintiff, the New England Loan & Trust Company, mortgagee, or beneficiary, or its assigns, subject to the following stipulations, to-wit:

"It is agreed that this insurance, as to the interests of the mortgagee, or beneficiary, or its assigns only, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupancy of the premises for purposes more hazardous than are permitted by the terms of this policy, nor by any change in title or possession, whether by legal process, voluntary transfer or conveyance of the premises, provided the mortgagee or beneficiary shall notify this company of any change of

ownership or increase of hazard which shall come to the knowledge of such mortgagee or beneficiary, and shall have permission for such change of ownership or increase of hazard duly indorsed on the policy."

There is a further averment that the policy was immediately forwarded by Kenneally to the plaintiff, and by plaintiff kept and retained; that defendants were not permitted to see and examine it, and were ignorant of its conditions until March, 1889. It is further alleged in the answers that the buildings on said premises, covered by the policy, were, on the 14th day of December, 1888, entirely destroyed by fire, and that due proofs of loss were made. The answers further alleged that the plaintiff was notified immediately of the transfer and conveyance of the property by the Kenneallys to the Gibsons, and that plaintiff willfully, negligently, and carelessly omitted and refused to give notice to the Insurance Company of North America of such transfer, by reason of which negligence and failure on the part of plaintiff to so notify the insurance company, the said company refuses to pay the amount of the loss under the policy to the damage of defendants in the sum of $2,000. Defendants pray for a finding in their favor in the sum of $2,000, for a cancellation of the notes and mortgages, and a judgment against plaintiff for the balance, if any, of the $2,000, after deducting therefrom the amount of the notes and mortgages. The plaintiff filed replies to the answers, which were in effect general denials. A trial of the issues was had February 26, 1892, in the lower court, and findings made by the court that there was due on the first mortgage the sum of $1,589.85; that the defendants Benjamin A. Gibson and Francis N. Gibson had assumed and agreed to pay the same, and that there was due the plaintiff upon said note and mortgage from the defendants James and Eliza Kenneally and Benjamin A. and Francis N. Gibson the sum of $1,589.85. There was a further finding that there was due plaintiff

from James and Eliza Kenneally on the note secured by the second mortgage the sum of $174.58. There was also a finding against the answer and counter-claim of Francis N. Gibson, and that he was not entitled to the relief prayed for in said answer. There was a decree of foreclosure for said sums and interest at seven per centum per annum from date of decree, the date of the decree being June 17, 1892.

The evidence shows: The execution and delivery of the notes and mortgages by James and Eliza Kenneally to plaintiff; the issuance of the policy of insurance to James Kenneally with mortgage clause attached, as set forth in the answers, and that the same was sent to plaintiff and retained by it until sent to defendants Benjamin A. and Francis N. Gibson at their request, during February or March, 1889; that plaintiff was notified or informed of the transfer or conveyance of the property to the Gibsons on or about July 31, 1888; that plaintiff did not notify the insurance company of the transfer of the property to the Gibsons; that on December 14, 1888, the buildings on the premises and covered by the policy of insurance were totally destroyed by fire; that the policy of insurance was never assigned to the Gibsons or either of them; that the insurance had been obtained on the buildings by James Kenneally prior to the sale of the premises to Benjamin A. Gibson, but he had not paid the premium and same was paid by the Gibsons, but the evidence does not show to whom they paid it, or whether they paid it for Kenneally, as his indebtedness to the company, or its agent, or on their own account; that the policy contained the following condition as to change of ownership of the property insured, and assignment of the policy: "If the assured shall, by voluntary transfer or conveyance, dispose of the property covered by this policy, or of an undivided interest therein, or a change shall take place in the membership of the firm or copartnership for whose benefit the insurance

hereunder was effected, this policy may be assigned to the party or parties succeeding to the ownership of the property, provided the company shall first consent thereto by indorsement hereon; otherwise this insurance shall cease from the date of such change in ownership."

The controlling fact in this case as to the rights of the defendants Gibson in the proceeds of the policy of insurance, or its proper enforcement, or its being kept alive and in force by the plaintiff, if any such rights could in any event be or accrue to Kenneally or to defendants as assignees of Kenneally, must clearly, it seems to me, depend upon whether or not the policy was ever assigned to the Gibsons, and it is unquestionably shown by the evidence that it never was. In this case the question is not left an open one, but by a condition of the policy it is made obligatory upon the party or parties receiving a conveyance or transfer of the property, to have the policy assigned and consent of the company to such assignment indorsed on the policy; if not, the insurance to cease. The general rule of law is, that a policy of fire insurance is a personal contract with the party insured and does not run with the land or pass to the purchasers by a sale of the premises or property insured, and any assignment of the policy must be with the knowledge and consent of the insurer. (*Ayres v. Hartford Fire Ins. Co.*, 17 Ia., 183, and cases cited; *Simeral v. Dubuque Mutual Fire Ins. Co.*, 18 Ia., 319; *Ætna Fire Ins. Co. v. Tyler*, 30 Am. Dec. [N. Y.], 90; May, Insurance, sec. 6.) The defendants not having received any assignment of the policy, acquired no rights to the proceeds thereof, and clearly were in no position to require an enforcement of the policy at the hands of the mortgagee, and were not damaged by his failure to give notice of the transfer to the insurance company and had no right to the relief prayed for in their answers.

It may be claimed that as they paid the premiums, they thereby acquired a right to the proceeds of the policy

and to its enforcement by the mortgagee; but on this point, if it would avail them anything, the evidence does not go far enough to show that the insurance company knew that the premium was paid by them. The evidence is conclusive that they paid the premium, but the nearest we can come to any knowledge of how it was paid, or to whom, is in the evidence of one Epperson, who was a clerk in the real estate office where the sale from the Kenneallys to the Gibsons was effected and closed, and who was the active party in said office in closing the sale and making the transfer. Said Epperson states on page 46, in answer to question No. 170, "Who paid the premium on the policy?" "Mr. Gibson; his money paid it. He sent the money by mail." The letter, if any, is not introduced, and there is no evidence as to whether the company was informed that Gibson paid it, or, if he did, whether he paid it for Kenneally or not, and whether it was paid as a part of the purchase price or not. As to these matters, we are left entirely in the dark and to conjecture, while on the other hand it is conceded that prior to this time the insurance was ordered by Kenneally and the policy issued to him, the mortgage clause attached, and the policy forwarded to the plaintiff; and it is not shown that the defendants, the Gibsons, ever made any effort in any manner to obtain possession of it, or have it assigned until after the property was destroyed by fire. There is nothing in the mere furnishing of the money to pay the premium upon which to found a claim to the proceeds, or the enforcement of the policy, or to obviate the necessity of an assignment of the policy.

The appellee has asked in its petition in the lower court that the deficiency judgment be accorded it against the defendants Gibson as to both mortgages, and in its brief in this court it asks that the decree of the lower court be so modified as to give it such relief, the lower court not having allowed it as against the defendants Gibson

any judgment as to the second mortgage. The agreement of the Gibsons was that they assumed and agreed to pay the mortgage of $1,200 and the interest thereon. In the absence of any testimony that the amount of the second mortgage was to cover any part of the $1,200 note and mortgage, or any interest thereon, the finding and decree of the lower court was right and will not be modified or changed.

As the conclusion which we have reached as to the rights of the appellants fully disposes of them, the decision of the questions of what would have been their rights under the policy had they acquired any by proper assignment thereof, to have the notice of the transfer given by the mortgagee, and to recover damages if such notice was not given, is not necessary to a determination of the case as to them, and will not be discussed or decided. After thorough investigation of the record in the case, we are fully satisfied that the decree of the lower court was right, and it is

AFFIRMED.

FANNIE C. STEVENSON, EXECUTRIX, V. E. K. VALENTINE, ADMINISTRATOR.

FILED JANUARY 16, 1894. No. 4809.

1. **Administration:** FILING AND ALLOWANCE OF CLAIMS: LIMITATIONS. An order of this court, which in the district court permitted the ascertainment of the amount of provable claims against the estate of a deceased person, did not excuse the filing and allowance of such claims in the county court of the proper county, wherein, by the provisions of the constitution and statutes of this state, the settlement of such estate was required to be made.

2. ———: PAYMENT OF UNALLOWED CLAIMS: STATUTE OF LIMITATIONS: PROVABLE CLAIMS. At the date of first pleading

his alleged right to reimbursement more than four years had elapsed since the claimant, as *administrator de son tort*, had voluntarily paid unallowed claims against a deceased person's estate. Whatever right to reimbursement he may have had was therefore fully barred by the statute of limitations when pleaded, and was not a provable claim against said estate.

3. A provable claim is one not barred by the statute of limitations, and to establish which there is competent evidence available.

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

A former opinion in this case is reported in 27 Neb., 338.

Uriah Bruner and *M. McLaughlin*, for plaintiff in error.

E. K. Valentine and *J. C. Crawford, contra.*

RYAN, C.

The opinion of this court delivered by REESE, C. J., on the former hearing of this cause will be found on pages 338 *et seq.* of the 27th Nebraska.

Preliminary to a discussion of the matters involved in the present proceedings in error, the facts will probably be sufficiently presented by a quotation of the findings recited in the opinion of Chief Justice REESE. The material part of said findings is as follows:

"First. That the said B. M. Gay died intestate in Cuming county, Nebraska, on or about the 20th day of June, 1883, leaving an estate therein consisting of real and personal property, and also left surviving him a widow and three children living in the state of Connecticut, who are entitled to said property as the heirs of said Gay.

"Second. That in about the month of July, 1883, the said R. F. Stevenson was the attorney for one Angeline Bromley, who claimed the property as her own, took pos-

session of, sold, and converted certain of the property of said estate of the value of $4,055.

"Third. That said Stevenson was an attorney at law, and the only relation he sustained to said property was that of attorney for said Bromley, to whom he accounted for the same.

"Fourth. That the time he so acted for said Bromley the said Stevenson was advised of the fact that said Gay left surviving him the widow and children as aforesaid, and that they were entitled to the property of said estate.

"Fifth. That the said Valentine is the duly appointed and acting administrator of the estate of said Gay, and that Fannie C. Stevenson is the executrix of the estate of said Stevenson.

"And as a conclusion of law, that the acts of said Stevenson in taking possession of and selling said property made him a wrong-doer, and liable for the conversion of said property to the estate of Gay; and that the plaintiff is entitled to recover from the defendant the sum of $4,055, together with interest from August, 1883, at the rate of seven per cent per annum.

* * * * * * *

"It is therefore considered, ordered, and adjudged that the plaintiff have and recover of the defendant the said sum of $5,316.53 damages so as aforesaid found due, to draw interest from this date. And plaintiff recover his costs."

The judgment above referred to was affirmed, but upon motion of the defendant, Mrs. Stevenson, executrix, the following order was made in this court:

"This cause came on to be heard upon the motion by the defendant to modify the order entered herein December 3, 1889, and was submitted to the court, on consideration whereof it is considered by the court that the cause be, and it hereby is, remanded to the district court with directions to permit plaintiff in error to amend her answer so as to set

out the actual debts of the estate of B. M. Gay, deceased, and which were provable against said estate and paid by R. F. Stevenson, if she so desires, and the question of the amount of such provable debts paid by him be ascertained by evidence, and any such amount so found due will be deducted from the amount heretofore ascertained as having been received by said Stevenson; the judgment of the district court as to the amount so received being hereby affirmed, and a proper judgment be entered for the amount due the defendant in error, and that the same be allowed against the estate of plaintiff in error and so certified to the county court."

One effect of this order was to recognize as a fixed quantity the amount due from the estate of R. F. Stevenson, by reason of the conversion by Mr. Stevenson of the assets of the estate of Dr. Gay. In the first trial no counterclaim or set-off had been pleaded on behalf of Mr. Stevenson's estate on account of the debts of the estate of Dr. Gay properly paid by him. Another effect of this order was to permit of the filing of said claim by way of a set-off, as though such filing had occurred previous to the original trial in the district court. On the 6th of March, 1890, there was accordingly filed on behalf of the defendant in this action, in the district court, an amended answer, in which there were pleaded by way of set-off forty-three different items in favor of the estate of R. F. Stevenson as against the estate of B. M. Gay. The aggregate amount of these set-offs, as given by the defendant in said answer, was $2,625. None of these items was of date later than August 9, 1883, as stated in the defendant's answer filed March 6, 1890. There was, therefore, between the accruing of the last cause of action set out in defendant's answer by way of set-off, and its being first pleaded, a period of over six years. As there was no attempt to plead these matters of set-off until the date of the filing of the answer as authorized by this court, the commencement of suit in

respect to these items, as contemplated by the statute of limitations, must be construed as March 6, 1890,—a fact to be borne in mind in connection with such reference as shall hereafter be made to the statute of limitations.

The court instructed the jury to allow the defendant as set-off but the sum of $255.90, which was accordingly done, as to which no complaint is made by defendant in error. The claims, by the instructions of the court withdrawn from the consideration of the jury, were without the support of any evidence under the rulings of the court, and this proceeding must be determined by the correctness of such rulings. In effect, the court held, as we understand the record, first, that it was necessary that the claims pleaded and offered to be proved should have been filed and passed upon in the county court; and, second, that whatever claim might otherwise have existed was barred by the statute of limitations. With such variations as the name of the holders of the claims, the amounts and dates of payment respectively rendered imperative, each of the forty-three counts of the defendant's answer was stated in the following language, used in setting out the first count, to-wit: "Said B. M. Gay, deceased, at the time of his death was justly indebted to the Consolidated Tank Line Company in the sum of $40.74, which said sum the said R. F. Stevenson, deceased, paid said Tank Line Company on or about June 29, 1883." There was, of course, a general recitation in the answer of the indebtedness of Gay at the time of his death to a large number of persons, which the detailed statement above referred to immediately followed; the whole closing with the prayer that the amount of said claims, of the total of $2,625, with interest from August 1, 1883, should be deducted from the amount of the value of said Gay's property which had been received by said R. F. Stevenson, and that said last named amount should be reduced accordingly. Parenthetically, it may be remarked that each of the allegations made in the answer

was denied; the plea of the statute of limitations was interposed, and the necessity for, as well as the lack of, filing the said several claims in the county court and the allowance of each as claims was set up; following which pleas the reply set forth that under the order of the county court the proof of claims against Gay's estate was required to be made within six months from March 6, 1886, and that none of the aforesaid claims had ever been filed or allowed in said county court. In proof of the respective items set forth in the answer of the defendant by way of set-off there was produced evidence simply of payments made by Mr. Stevenson to the holders of alleged claims against Dr. Gay's estate. It will scarcely escape notice that there was no proof, as there had been no pleading of the filing of any such claim or of action in respect thereto in the county court of Cuming county. By timely and proper objections these prerequisites were insisted upon, as well as was the lapse of time for presenting and proving claims.

The plaintiff in error appeals to the order of this court above recited as sufficient to avoid these objections. We do not so understand the scope and effect of the order invoked. Section 16, article 6, of the constitution of Nebraska provides that "county courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians and settlement of their accounts, in all matters relating to apprentices, and such other jurisdiction as may be given by general law." These constitutional provisions are supplemented by section 3, chapter 20, Compiled Statutes, by which it is provided that "the courts of probate in their respective counties shall have exclusive jurisdiction of the probate of wills, the administration of estates of deceased persons," etc. This court could never have intended by its order to nullify these provisions of the constitution and statute of the state, as would the construction contended for by the plaintiff in

error. The order provided for the allowance by the district court of all "provable" claims. In the district court no claim against the estate of a deceased person is provable, originally, except upon appeal as to the same from the county court. The district court, by the statute and constitutional provisions cited, has no jurisdiction to administer the estate of a deceased person; that jurisdiction, by restrictive terms, is confined to the county court. No order of this court could operate to remove this restriction. Hence, as the construction which we now place upon this order in question is the only one which does no violence to the statute and constitution, it must be accepted as the only admissible construction. The ruling of the district court, whereby a claim was not deemed provable unless it had been duly filed in the county court and there properly allowed, was correct.

Equally effective was the statute of limitations to exclude from consideration the several claims urged, for more than four years had elapsed since the alleged payment of such claims by Mr. Stevenson before it was pleaded in the district court. In the trial of the cause, from the result of which the former error proceedings were taken, there was introduced in evidence a letter written by Mr. Stevenson to the pseudo Mrs. B. M. Gay (whose true name was Angeline Bromley). This letter was dated January 18, 1884, and recited the separate items for which Mr. Stevenson was debtor to the estate of B. M. Gay (known in Nebraska as "Gray"). Following this admission, Mr. Stevenson claimed credit in this letter for payment made by him to general creditors of Gay (*alias* Gray) in the sum of $2,211.24, and for taxes paid of the amount of $54.70; in all, $2,265.94. The admission against his own interest was competent testimony as against Mr. Stevenson, or his estate, without doubt. We have been cited to no authority to sustain the present contention that the admission in his own favor is equally competent. If Mr. Stevenson him-

self was seeking the allowance of these credits, neither statute nor adjudication could be found to aid him; but how much more inadmissible becomes the proposed admission in his own favor as proof, ignoring as it does the existence and jurisdiction of the county court.

It is quite possible that the result reached may work great hardship to the estate of Mr. Stevenson. Doubtless, to avoid such a result, this court allowed the representative of said estate to plead and establish all "provable" claims against the estate of Dr. Gay, notwithstanding Mr. Stevenson had acted without authority in selling the property of Dr. Gay and with the proceeds of said sale discharging debts claimed to be due from Dr. Gay's estate. This was the extreme limit of the power of this court. Mr. Stevenson, when in his own wrong he assumed to dispose of the estate of Dr. Gay, rendered himself liable for the value thereof and all incidental damages, no matter what his motives may have been. Section 185 of chapter 23, Compiled Statutes, was then, as now, in force, and its provisions were as follows: "If any person or persons, before the granting of letters testamentary or of administration, shall convert to his or their own use, or shall embezzle, alienate, or destroy any of the moneys, goods, chattels, or effects of any deceased person, such person or persons shall stand chargeable and be liable to the executor or administrator of the estate of such deceased person for the value of the moneys, goods, chattels, or effects so converted, embezzled, alienated, or destroyed, and for all damages sustained, to be recovered by such executor or administrator, for the benefit of such estate, by a civil action in any court of competent jurisdiction," etc.

On the former hearing in this court, justice was so far tempered with mercy that the representative of the estate of Mr. Stevenson was permitted to plead matters of set-off omitted on the first hearing in the district court. Its own rules of practice and procedure it was competent for this

court to modify, hold in abeyance, or wholly abrogate. It could not set aside constitutional or statutory provisions affecting and guarantying substantial rights. The trial had upon these new issues enabled the representative of the estate of Mr. Stevenson to establish as against the estate of Dr. Gay but $255.70. As no error is apparent in the record of the trial leading to this result, it follows that the judgment of the district court is

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3. Rulings and instructions in attachment and replevin *held* to have restricted too much province of jury. *Karll v. Kuhn*..... 539

Garnishment. See SHERIFFS, 4.

1. Stipulation that garnishee should be discharged upon "showing fully" the amount in his hands, is no defense to an action under Code, sec. 225, for unsatisfactory disclosure and conversion. *Lau v. Grimes Dry Goods Co*..... 224
2. Rulings of trial court in such action *held* to be harmless error, and evidence of value of goods sufficient to sustain judgment. *Id*.....223, 224
3. Garnishee must answer unequivocally, and if he fail to obey orders of court he acts at his peril. *Work v. Brown*... 498

General Denial. See PLEADING, 5.

Good-Will.

One who sells his business and good-will to another, agreeing not to do business at the same point, and afterwards violates such agreement, is liable in damages. *Nelson v. Hiatt*..... 478

Government Land. See TAXATION, 1, 4.

Holder of receiver's certificate cannot, when entry has been canceled (though without authority) and no patent has been issued, maintain ejectment. *Headley v. Coffman*, 68, 74, 75

Guaranty. See NEGOTIABLE INSTRUMENTS, 6.

Habeas Corpus. See BAIL, 5.

Harmless Error. See INSTRUCTIONS, 2, 3, 6.

1. *Altschuler v. Coburn*..... 888
2. *Lau v. Grimes Dry Goods Co*..... 223

Highways.

1. *Animus dedicendi* must be clearly proved before highway may be claimed by dedication. *Brown v. Stein*..... 599
2. Evidence *held* insufficient to establish dedication. *Id.*
3. Secs. 47–52, ch. 78, Comp. Stats., providing for the establishment of private roads, are unconstitutional. *Welton v. Dickson*..... 767

Homesteads. See EXEMPTIONS.

Under sec. 17, ch. 36, Comp. Stats., surviving husband or wife may mortgage life estate in, and the same will pass to purchaser at foreclosure sale. *Nebraska Loan & Trust Co. v. Smassall* 519

Homicide. See CRIMINAL LAW, 7.

Horses. See EXEMPTIONS. MASTER AND SERVANT.

Husband and Wife. See HOMESTEADS. MARRIED WOMEN.

1. Husband not impliedly responsible to a third party for board and lodging of a wife living apart from him without justification or permission. *Belknap v. Stewart* 310
2. Record of divorce proceedings not admissible in action by such third party against husband, to show wife's justification. *Id* 307-309
3. Wife may recover from husband for his use and occupation of her premises, though without an express contract, but she cannot testify in such action. *Skinner v. Skinner*, 756

Identity of Issues. See APPEAL, 4.

Illegitimate Children. See BASTARDY.

Impeachment.

Furbush v. Barker 27, 28

Improvements. See TAXATION, 1, 2.

Indictments. See INFORMATIONS AND INDICTMENTS.

Indorsements. See NEGOTIABLE INSTRUMENTS, 1, 4, 6.

Informations and Indictments. See CRIMINAL LAW, 10.

1. When charging unlawful transfer of mortgaged personalty, must allege name of transferee and that transfer was without written consent of owner and holder of debt. *State v. Hughes* 368, 369
2. Not a fatal defect that offense is charged with unnecessary particularity; surplusage may be stricken out. *State v. Kendall* 817, 819, 820
3. Sufficiency of, in prosecution for maintaining dam injurious to public health. *Id* 818, 819
4. When apparently defective, court should inquire whether there is probable cause for prosecution and hold or discharge accused accordingly. *Id* 821, 822

Injunctions.

1. Remedies at law must be plain and adequate, which will prevent resort to. *Welton v. Dickson* 781, 782

Injunctions—*concluded.*

2. Petition for, to prevent enforcement of judgment rendered by default must aver facts from which it appears that plaintiff had a meritorious defense, and that his failure to plead it and to avail himself of appellate and other remedies was not due to neglect. *Langley v. Ashe*.....55, 56

Instructions.

1. Erroneous, if they assume existence of a material fact concerning which evidence is conflicting. *Chicago, B. & Q. R. Co. v. Anderson*.....116, 117
2. Error in, is not cured by the fact that the general tenor of the charge is more favorable to the defeated party. *Id*... 117
3. Conflicting charges, one of which misstates the law to the prejudice of the successful party, cannot be availed of as error by the defeated one. *Farwell v. Cramer*.....62, 67
4. Need not be given upon uncontroverted points or in the exact language asked. *Lau v. Grimes Dry Goods Co*...216, 222
5. Refusal of, when applicable to the issues and not otherwise supplied, is reversible error. *Powder River Live Stock Co. v. Lamb*..... 354
6. Giving an erroneous instruction, or a second instruction on the same point, is not reversible error unless the jury is misled thereby. *Carstens v. McDonald*.....861, 862

Insurance. See MORTGAGES, 1.

1. Oral agreements of attorneys to arbitrate loss will not be enforced against objections of one even though policy provide for arbitration. *German-American Ins. Co. v. Buckstaff*.....140–143
2. Vacancy and non-occupancy of a building are questions for the jury under proper instructions. *Id*..... 144
3. A building whose tenant has removed, leaving a portion of his effects therein, is not "vacant or unoccupied." *Liverpool & London & Globe Ins. Co. v. Buckstaff*.....148, 149
4. A clause requiring actions to be "commenced six months after the occurrence of the fire," construed with another providing for payment sixty days after receipt of proofs of loss, and *held* to authorize commencement of suit within six months after the sixty days. *Fireman's Fund Ins. Co. v. Buckstaff*.....151, 152
5. Against fire is a personal contract, and does not run with the land. *New England Loan & Trust Co. v. Kenneally*.... 900
6. Written contract of, conclusively presumed to contain all

Insurance—*concluded.*

agreements of the parties. *McLaughlin v. Equitable Life Assurance Society* 733

7. In a life policy providing for issue of paid-up insurance upon surrender of old policy within six months after default, time is of the essence, and where there is no surrender for more than eleven months beneficiary cannot compel specific performance though three annual premiums had been paid. *Id* 734, 735

Interstate Commerce. See CARRIERS.

Intoxicating Liquors. See LIQUORS.

Inventory. See EXEMPTIONS.

Jailers. See SHERIFFS, 2.

Joint Tenancies.

Are not favored, and conveyance to more than one will be presumed to create a tenancy in common. *Maxwell v. Higgins* 676

Journal Entries.

By clerk of district court are conclusive on review; if incorrect, should be remedied by order of district court. *Chicago, B. & Q. R. Co. v. Anderson* 112

Judgments. See JUSTICE OF THE PEACE, 2. REPLEVIN. SUBROGATION. VOLUNTARY PAYMENT.

1. Order vacating judgment by default and permitting answer at same term not a final order. *Roh v. Vitera* 338
2. Motion to vacate, should assign grounds, but if these are set forth in a separate paper, and acted upon by the trial court without objection as to form, supreme court will not consider it. *Id* 337
3. When rendered against surety on appeal bond, only the surety can complain, and such judgment does not bar error proceedings against principal defendant. *Habig v. Layne* 747, 748
4. Cannot be vacated by district court after term except for grounds enumerated in Code, sec. 602. *McBrien v. Riley*, 563, 564
5. Hence the fact that one against whom judgment was rendered by default was not notified of appeal of the case from justice's court is not sufficient ground for vacating it. *Id* 564
6. A motion to vacate judgment by default must be accompanied by answer setting up meritorious defense. *Id.*

Judicial Sales. See ATTORNEYS.

Fraud alone in appraisement, and not mere error of judgment, will authorize vacation of; objections to appraisement and motion to vacate should be made and filed before sale. *Vought v. Foxworthy*.....793, 794

Jurisdiction. See ACTIONS, 1–4, 7, 8. ADMINISTRATION OF ESTATES, 3. CARRIERS. MANDAMUS, 1.

Jury. See FRAUDULENT CONVEYANCES, 3. NEGLIGENCE, 3. QUESTIONS OF FACT.

Justice of the Peace. See ERROR PROCEEDINGS, 3. MALICIOUS PROSECUTION.

1. Notice of appeal from, by appellant to appellee, is not necessary. *McBrien v. Riley*..... 564
2. Order of continuance by, two days before summons is returnable, with the consent of one defendant but without the knowledge of the other, is, as to the latter, voidable only; and where judgment is rendered against him by default at the adjourned date, a petition to enjoin its execution, which merely states that he had a good defense without setting it forth, and which does not state why he failed to appear or appeal, is insufficient. *Langley v. Ashe*..... 54

Land Contracts.

1. May be shown by parol to be securities in the nature of mortgages, even though formally and absolutely assigned in writing, upon payment of debt, or lien of assignee ceases. *Scharman v. Scharman*..... 39, 45
2. In action by vendor to foreclose contract of purchase or bond for deed on account of vendee's default, plaintiff need not prove a tender of deed; at most this could only affect the matter of costs. *Harrington v. Birdsall*.....182–184
3. Strict foreclosure decreed where vendee had paid but one-tenth of the purchase price and was in default more than fifteen months without showing excuse, or that the land had increased in value; or was worth more than purchase price. *Id.*..... 187
4. Stay of execution not allowed in strict foreclosure. *Id.*, 187, 188

Landlord and Tenant. See AGENCY, 1. JOINT TENANCIES. MECHANICS' LIENS, 9.

1. In absence of contract to repair, tenant takes premises as they are, and cannot recover for repairs made. *Powell v. Beckley*.....157, 161
2. Relation of, implied between parties, by the beneficial use

Landlord and Tenant—*concluded.*

and occupation on the part of one of the other's land with owner's knowledge. *Skinner v. Skinner*..... 756

3. In an action between lessor and lessee's assignee, where description in lease is uncertain, parol evidence is admissible to show that at the time it was made the parties to the lease went upon the land and agreed upon certain boundaries. *Schneider v. Patterson*.....684, 685

4. It is no defense to an action by such assignee for damages for exclusion from the land that he knew of his assignor's exclusion and the lease to another. *Id*.....685, 686

5. Measure of damages for exclusion from land leased for mining sand is value of occupancy for that purpose, and evidence thereof is admissible. *Id*..... 686

Larceny. See CRIMINAL LAW, 4.

Leading Questions. See EVIDENCE, 9.

Leases. See LANDLORD AND TENANT. TAXATION, 2.

License. See LIQUORS, 4-9.

Life Estates. See HOMESTEADS.

Life Insurance. See INSURANCE, 6, 7.

Limitation of Actions. See ADMINISTRATION OF ESTATES, 5. INSURANCE, 4. TAX LIENS.

Action for damage to land by construction of railroad near it, is barred in four years from such construction. *Omaha & R. V. R. Co. v. Moschel*.....287, 288

Morrissey v. Chicago, B. & Q. R. Co..... 415

Liquors.

1. It is not a fact mitigating damages in action against saloon-keeper for death of a father caused by, that deceased had accumulated property which plaintiffs acquired. *Houston v. Gran*.....690, 691

2. Nor is a child precluded from recovering in such action to the extent that he has supported himself in the past. *Id.*

3. Evidence that the saloon-keeper had instructed his servants not to sell to the deceased is inadmissible. *Id*..... 691

4. Publication of statutory notice is a jurisdictional prerequisite to issue of license. *Rosewater v. Pinzenscham*..... 838

5. Affidavit of publisher that notice was published in newspaper having largest circulation in county, is *prima facie* evidence thereof, but may be impeached. *Id*..... 839

6. Considerations in determining proper newspaper. *Id*..... 844

Liquors—*concluded.*

7. Whether separate editions of a daily paper are distinct publications, is a question of fact for the license board. *Id.*, 845
8. Where such editions are not substantially the same, insertion in but one is sufficient if its circulation is the largest in the county. *Id.*, 846
9. License board has no power to designate newspaper, but on hearing remonstrance may compel production of instruments and commit for contempt those refusing to testify. *Id.* 836, 843, 844

Locus. See ACTIONS, 1–4, 7, 8.

Malicious Prosecution.

1. Action for, against justice of the peace, constable, and prosecuting witness, is properly brought in the county where plaintiff was arrested, though subsequent proceedings were all in another county. *Vennum v. Huston* 299, 300
2. Justice of the peace is not liable for issuing a warrant, if he acts in good faith, has jurisdiction, and the complaint, though informal, is not void. *Id.* 302
3. Prosecuting witness not liable unless inspired by malice and without probable cause. *Id.* 303

Mandamus.

1. Application for, to enforce private rights, should be made first to the district court, not the supreme court. *State v. Lincoln Gas Co.* 33
   State v. School District 237
   State v. Merrill 511
2. Not the proper remedy to correct error of justice of the peace in granting new trial more than four days after judgment. *State v. Holmes* 357, 358

Manslaughter. See CRIMINAL LAW, 7.

Married Women. See HUSBAND AND WIFE.

1. Property rights, same as *feme sole.* *Farwell v. Cramer* 61
2. No presumption that personalty in possession of wife living with her husband belongs to latter. *Id.* 66, 67
3. Common law disability remains except as removed by statute. *Godfrey v. Megahan* 751
4. Whether contracts of, are made with reference to separate estate is a question of fact. *Id.* 752

Master and Servant. See LIQUORS, 3. PLEADING, 6.

1. Master's duty to provide for use by servant is the same in respect to animals as in case of machinery. *Hammond v. Johnson* 248, 249

Master and Servant—*concluded.*

2. Master, even though a corporation, is liable for injuries to servants from instruments which it might have known were unsafe. *Id.*.....249, 250
3. Evidence *held* to show that party directing the use of a vicious horse by servant was a vice-principal and not a fellow-servant. *Id.*..... 251

Maxims.

"He who seeks equity must do equity" discussed. *Alexander v. Shaffer*..... 816

Measure of Damages. See LANDLORD AND TENANT, 5.

Lyman v. City of Lincoln..... 803

Mechanics' Liens.

1. Cannot ordinarily take precedence over prior recorded mortgage. *Holmes v. Hutchins*.....610–612
2. No lien attaches against purchasers where sworn statement contains a misdescription of premises. *Id.*.....617, 618
3. Mere knowledge by the vendor of a lot, of proposed building thereon by the vendee, will not subject the former's mortgage lien for purchase money to the material-man's lien. *Id.*.....602, 619
4. Vendor's lien is subject to, where, by agreement with vendee, latter is constituted agent of vendor in erecting a building on the premises; and such agreement may be established by parol. *Sheehy v. Fulton*.....693–696
5. Lien of material-men and laborers contributing to the construction of a railroad *held* superior to a mortgage on the railroad executed before such construction was begun. *Kilpatrick v. Kansas City & B. R. Co.*..... 620
6. Such lien is not waived by merely taking collateral security from another, in a manner not inconsistent with retention of lien. *Id.*.....640, 641
7. Do not attach merely by virtue of delivering material to son of contractor not shown to be acting or claiming to act for him. *Weir v. Barnes*.....877, 878
8. Filing of lien within statutory limit is imperative. *Id.*... 878
9. Cannot attach by virtue of contract with mere tenant of premises. *Waterman v. Stout*..... 396
10. Material-man is charged with notice of interest held by party with whom he deals. *Id.*
11. Attach for lumber delivered at another place than where building is being erected but used in its construction as was intended; and such lien dates probably from final delivery at building. *Badger Lumber Co. v. Mayes*.....827–830

Mill-Dams.

Are unlawful if they render a stream stagnant and it becomes injurious to public health and safety. *State v. Kendall*.... 820

Misconduct. See TRIAL, 4.

Misdemeanors. See CRIMINAL LAW, 8.

Mortgages. See CHATTEL MORTGAGES. ESCROW, 2. HOMESTEADS. INFORMATIONS AND INDICTMENTS, 1. LAND CONTRACTS, 1. MECHANICS' LIENS, 1, 5, 6.

1. Where a fire insurance policy on mortgaged premises, payable to the mortgagee, is forfeited through his fault, a purchaser subject to the mortgage to whom the policy was not assigned cannot set off its amount against foreclosure. *New England Loan & Trust Co. v. Kenneally*..... 895
2. Purchaser assuming first mortgage does not thereby become liable for a second. *Id*.....901, 902

Motions. See JUDICIAL SALES. PLEADING, 4.

Municipal Corporations.

1. Charter provision requiring statement of claims against city for unliquidated damages to be filed with city clerk within three months after cause of action accrues, is constitutional and a condition precedent to suit. *City of Lincoln v. Grant*.....372-374
2. Evidence *held* to show that damages to property from change of street grade exceeded special benefits. *Stanson v. City of Omaha*..... 550
3. In cities of first class over 10,000 in counties under township organization, town board equalizes taxes and may employ a clerk. *Rittenhouse v. Bigelow*..... 543
4. Award of damages to property from construction of viaduct *held* insufficient. *Stanwood v. City of Omaha*..... 552

Murder. See CRIMINAL LAW, 7.

Names. See ACTIONS, 6. AMENDMENT, 3.

Negligence. See DAMAGES. MASTER AND SERVANT. PLEADING, 6.

1. *Chicago, B. & Q. R. Co. v. Anderson*..... 112
2. In an action against a railroad company for killing a boy on its track, evidence of the engineer's neglect to keep a lookout ahead is inadmissible where petition does not allege the same, and a verdict founded on such evidence will be reversed. *Chicago, B. & Q. R. Co. v. Grablin*.....96-99
3. Failure of company to fence its tracks as required by statute is. *Id*..... 99

Negligence—*concluded.*

4. In determining whether the deceased was guilty of contributory negligence in trespassing on the track, it was proper for the jury to consider his age and discretion. *Id.*, 99, 100
5. The fact that a train is not on schedule time is not. *Id.*... 98
6. Outside of cities, speed of train is not, *per se.* *Id.*, 91, 98, 99
7. Failure to use air-brake on trains may be. *Id.*..... 98
8. Failure of engineer to keep a lookout ahead is, though deceased was a trespasser. *Id.*.....101, 102
9. Action against employer for death from defective appliances; rulings and instructions approved; judgment for plaintiff affirmed. *Union Stock Yards Co. v. Conoyer*..... 488
   Union Stock Yards Co. v. Larson..... 492
10. Is a question of fact. *Union P. R. Co. v. Porter*..... 233
11. Instructions in actions by passenger against railroad company, for personal injuries, approved. *Id.*.....235, 237

Negotiable Instruments.

1. Assignee after maturity takes subject to all defenses between the parties. *Roberson v. Reiter*..... 204
2. Instruction that giving of note at settlement is *prima facie* evidence that all matters then pending between the parties were settled, approved. *Wagner v. Ladd*..... 163
3. Action on note; defense, failure of consideration; finding and instructions approved. *Richardson v. Winter*..... 288
4. The guarantor of a note who has paid part of it, may recover such payment from the sureties thereon, though the latter were also stay sureties on a judgment against the maker, to the discharge of which such guarantor, at the maker's request, had applied the amount loaned on the note, and thus made paramount a lien of his own. *Lichty v. Moore*.....274, 275
5. Nor is it a defense to such an action that the original payee, as assignee of the maker, has wasted the latter's estate so that he cannot pay. *Id.*..... 273
6. Blank indorsement may, as between original parties, be modified by parol. *Holmes v. First Nat. Bank of Lincoln*, 330–332

New Trial. See MANDAMUS, 2.

Newly discovered evidence to authorize, must be such as was not, with diligence, procurable at first trial, and would change the result thereof. *Smith v. Hitchcock*..... 110

Notes and Bills. See NEGOTIABLE INSTRUMENTS.

Notice. See ADVERSE POSSESSION, 2, 3. CHATTEL MORTGAGES, 2. DISMISSAL, 1, 2. JUSTICE OF THE PEACE, 1. LIQUORS, 4-9. MECHANICS' LIENS, 3, 10. VENDOR AND VENDEE.

Nuisances. See MILL-DAMS.
Omaha & R. V. R. Co. v. Moschel 281

Oath. See ARBITRATION AND AWARD, 3.

Occupancy. See ADVERSE POSSESSION. INSURANCE, 2, 3.

Officers. See COUNTY CLERK. COUNTY TREASURER. MUNICIPAL CORPORATIONS, 3. REGISTER OF DEEDS. SHERIFFS.

Official Bonds. See ACTIONS, 3, 4.

Onus Probandi. See CRIMINAL LAW, 14. PLEADING, 3.
Not error to instruct that plaintiff must make out his case by "a fair preponderance of the evidence." *Altschuler v. Coburn* 889, 890

Overruled Cases. See TABLE, *ante*, xxiii.

Paid-Up Insurance. See INSURANCE, 6, 7.

Parol Evidence. See LANDLORD AND TENANT, 3. PARTNERSHIP, 2. STATUTE OF FRAUDS, 5.

Parties. See AMENDMENT, 3. BUILDING CONTRACTS, 2.
Roman Catholic bishop the proper plaintiff in action on a church subscription. *Egan v. Bonacum* 577

Partnership.
1. Purchase of material by one member of a firm of contractors, under a written contract in his own name, though with no understanding that it was on his individual account, binds the firm. *Habig v. Layne* 743
2. Secs. 27-29, ch. 65, Comp. Stats., requiring certificate of, to be recorded, do not prohibit conduct of partnerships without such certificate, nor exclude parol evidence of their existence. *Schneider v. Patterson* 680

Patents. See TAXATION, 4. GOVERNMENT LAND.

Personal Injuries. See MASTER AND SERVANT. NEGLIGENCE.

Pleading. See ACTIONS, 6. APPEAL, 4. ARBITRATION AND AWARD, 5. BUILDING CONTRACTS, 3. INFORMATIONS AND INDICTMENTS, 1, 2. INJUNCTION, 2. NEGLIGENCE, 1.
1. Facts, and not conclusions in, will be considered. *Spargur v. Romine* 736, 741

Pleading—*concluded.*

2. Allegations of petition, not specifically denied in answer, will be taken as admitted. *Maxwell v. Higgins* 676
3. In submissions on pleadings moving party must make out his case from pleadings alone; question is not as to burden of proof, but who, from the disclosed facts, is entitled to judgment. *State v. Lincoln Gas Co*.....38, 39
4. Sustaining a motion to strike from an answer a portion of the defense which consisted of a series of acts constituting one transaction is reversible error. *Hovland v. Burrows* 130, 131
5. In an action on a contract governed by that section of the statute of frauds which requires acceptance, a petition which merely alleges delivery is demurrable, and the defect is not waived by answering to the merits but is raised by a general denial. *Powder River Live Stock Co. v. Lamb* 348–351
6. In action against employer for death of servants from defective appliances, latter's want of knowledge of the defect need not be averred in the petition. *Union Stock Yards Co. v. Conoyer*.....490, 491

Possession. See ADVERSE POSSESSION.

Practice. See APPEAL. DISMISSAL. ERROR PROCEEDINGS. MANDAMUS, 1. PLEADING. REPLEVIN. REVIEW. TRIAL.

Prescription. See ADVERSE POSSESSION.

Presumption. See BAIL, 4. INSURANCE, 6. JOINT TENANCIES. MARRIED WOMEN, 2. REVIEW, 16. WATERS, 4.

Skinner v. Skinner 756

Principal and Agent. See AGENCY. CORPORATIONS. LIQUORS, 3. MECHANICS' LIENS, 7.

Principal and Surety. See NEGOTIABLE INSTRUMENTS, 4. SURETYSHIP.

Production of Instruments. See LIQUORS, 9.

Public Health. See MILL-DAMS.

Public Lands. See GOVERNMENT LAND.

Publication. See LIQUORS, 4–9.

Quantum Meruit. See BUILDING CONTRACTS, 4.

There can be no recovery on, by one who pleads and relies on a special contract. *Powder River Live Stock Co. v. Lamb*... 354

Questions of Fact.

1. Whether speed of train constitutes negligence is. *Chicago, B. & Q. R. Co. v. Grablin*.....91, 98, 99
2. And in general negligence is. *Union P. R. Co. v. Porter*... 233
3. Whether building is "vacant or unoccupied" is. *German-American Ins. Co. v. Buckstaff*..... 144
4. Fraudulent intent in conveyances is. *Shrider v. Tighe*..... 394
   Farwell v. Wright..... 445
5. Whether contract of married woman is made with reference to separate estate is. *Godfrey v. Megahan*..... 751
6. Whether separate editions of a daily paper are distinct publications is. *Rosewater v. Pinzenscham*..... 845
7. Need not be decided by the jury upon a mere count of witnesses; they are judges of the weight of each witness' testimony, and unless clearly wrong their estimate will not be disturbed on review. *Howell Lumber Co. v. Campbell*..... 567
   Habig v. Layne..... 743

Questions of Law.

Interpretation of insurance policy is. *German-American Ins. Co. v. Buckstaff*..... 144

Quorum. See COUNTY TREASURER, 4.

Quo Warranto.

Information in, against railroad corporation for illegal use of franchise, dismissed upon approval of adverse report of referee upon the facts. *State v. Atchison & N. R. Co*..... 437

Railroads. See CARRIERS. DAMAGES, 1. MECHANICS' LIENS, 5, 6. NEGLIGENCE, 2–8, 10, 11. QUO WARRANTO. WATERS, 3.

Rape.

The word "abuse" in sec. 12 of Crim. Code is synonymous with "ravish." *Palin v. State*..... 867

Ratification. See AGENCY, 2.

Real Estate. See ADVERSE POSSESSION. BOUNDARIES. GOVERNMENT LAND. JOINT TENANCIES. LAND CONTRACTS. VENDOR AND VENDEE.

Real Estate Agents.

Action for commissions; judgment for plaintiff affirmed. *Mills v. Leavitt*..... 580

Reasonable Doubt. See CRIMINAL LAW, 6–8, 14.

Recognizance. See BAIL, 6, 7.

Record. See CHATTEL MORTGAGES, 2. REVIEW, 8, 12.

Register of Deeds.

Counties having less than 18,003 inhabitants by last national census cannot elect, though prior state census shows that number. *State v. Lewis*.....193, 194

Religious Societies. See PARTIES.

Remedies. See ACTIONS, 5. INJUNCTION, 1.

Removal of Officers. See COUNTY TREASURER, 2-5.

Replevin. See EVIDENCE, 7.

1. Will not lie against one not in possession or control of property unless he has concealed, removed, or disposed of the same in order to avoid the writ; but such a defendant is not entitled to judgment for return of property. *Depriest v. McKinstry*.....196, 197
2. Judgment in, should be in alternative, for property or its value; but if not so, case will simply be remanded to trial court for proper judgment. *Roberson v. Reiter*.....205, 206

Reputation.

Furbush v. Barker.....27, 28

Res Adjudicata.

1. Party asserting, must show that former judgment was conclusive in his favor. *Spargur v. Romine*..... 742
2. A former adjudication in the federal court will not be noticed in the state court unless properly presented by pleadings and evidence. *Kilpatrick v. Kansas City & B. R. Co.*, 620, 647

Rescission.

Decree setting aside conveyance of land for notes proving to be worthless, affirmed. *Wagner v. Lewis*..... 325

Review. See ADMINISTRATION OF ESTATES, 2. APPEAL. ERROR PROCEEDINGS. BAIL, 2. CERTIORARI. DISMISSAL, 1, 2. NEGLIGENCE, 2, 11. QUESTIONS OF FACT, 7. REPLEVIN, 2.

1. *Richardson v. Winter*..... 288
2. Findings foreign to the issues will be disregarded by the appellate court, and if essential to the decree the latter will be set aside. *Furbush v. Barker*..... 1
3. Decree upon findings unsustained by the evidence will be set aside and one directed entered which the facts will justify. *Id.*
4. Conflicting evidence. . *Cunningham v. Katz*..... 29
5. Alleged errors will not be considered unless argued specifically in briefs. *Brown v. Dunn*..... 52.

Review—*concluded.*

6. Assignment in petition in error that the court erred in excluding evidence sought to be introduced "according to the offer made by defendants in the record" is too general. *Farwell v. Cramer* 67
7. A decree granting appellant the relief sought by him below will be affirmed regardless of its merits. *Hoops v. McNichols* 76
8. Supreme court will not substitute, for the certified copy of the journal entry in the transcript, another paper certified to be a memorandum of such journal entry prepared by the trial judge. *Chicago, B. & Q. R. Co. v. Anderson* 112
9. Admission of incompetent testimony in trial to court not ground for reversal. *Liverpool & London & Globe Ins. Co. v. Buckstaff* 147
10. An order entered by consent of parties will not be reviewed by supreme court. *Omaha Fire Ins. Co. v. Maxwell* 360, 361
11. Special finding requested by one party but made in favor of the other; evidence conflicting; finding sustained. *McConnell v. First Nat. Bank of Lincoln* 261-263
12. Where the copy of an affidavit appearing in the transcript differs from that in the bill of exceptions, only the latter will be considered. *Lundgren v. Erik* 365
13. Unless exceptions were taken to amendments and objections made to allowance of amendments, rulings of trial court on neither point will be reviewed. *Levi v. Fred*, 566, 567
14. Judgment found to conform to pleadings and evidence; affirmed as of course, no brief having been filed. *Damon v. City of Omaha* 583
15. Decree on appeal will be affirmed unless it and the findings are irreconcilable with any view of the testimony. *Swartz v. Duncan* 785
16. Evidence will be presumed to sustain findings where bill of exceptions is so poorly prepared as to prevent an intelligent examination. *Badger Lumber Co. v. Mayes* 826, 827

Roads. See HIGHWAYS.

Sales. See INFORMATIONS AND INDICTMENTS, 1. JUDICIAL SALES.

School Lands. See TAXATION, 2.

Scienter. See LIQUORS, 3.

Self-Defense. See CRIMINAL LAW, 14.

Settlement. See NEGOTIABLE INSTRUMENTS, 2.
Evidence *held* not to show unfair means in obtaining. *Swartz v. Duncan*.....787, 788

Sheriffs.
1. Not entitled to salaries from county for themselves or deputies as jailer, but only to compensation for board and care of prisoners. *Kyd v. Gage County*..... 134
2. But are entitled to fees as jail guard. *Gage County v. Kyd*, 164
3. Deputy of, cannot collect salary from county. *Gage County v. Wilson*..... 169
4. Not a sufficient cause of action on bond of, that sheriff served notices of garnishment in his own case before serving those previously left with him by plaintiff. *Aultman v. Grimes*.....880, 881
5. Wrongful seizure of property. *Russell v. Gillespie*.....459, 461

Special Findings. See REVIEW, 11.

Specific Performance. See INSURANCE, 7.

State Treasurer. See ACTIONS, 3, 4. CONVERSION.

Statute of Frauds.
1. Evidence found to show an original verbal promise to pay for materials furnished another. *Barras v. Pomeroy Coal Co.*..... 314
Sheehy v. Fulton..... 697
2. A contract is not within sec. 8 of ch. 32, Comp. Stats., where performance within one year is possible. *Powder River Live Stock Co. v. Lamb*.....347, 348
3. Under sec. 9 of the same chapter, actual acceptance by the vendee is necessary; mere delivery by vendor is insufficient. *Id*.....348–350
4. Memorandum executed after sale, in pursuance of verbal promise before sale, is sufficient and requires no new consideration. *Sheehy v. Fulton*.....692, 697
5. While separate parts of a correspondence are sufficient to constitute the memorandum required by, the connection of these parts must be apparent and cannot be established by parol. *Fowler Elevator Co. v. Cottrell*.....514–16

Statute of Limitations. See LIMITATION OF ACTIONS.

Statutes. See CONSTITUTIONAL LAW. TABLE, *ante*, p. xlv.
1. Ch. 50, Laws of 1891, is constitutional, and did not repeal art. 2, ch. 18, Comp. Stats. *Hopkins v. Scott*.....667–669
2. Nor is the latter repealed by act of 1879, specifying powers of county boards. *Id.*

Stay. See LAND CONTRACTS, 4. SUBROGATION.

Stipulations. See ATTORNEYS, 1.

Orders entered by, are not available as ground of error or reviewable in supreme court. *Omaha Fire Ins. Co. v. Maxwell*.....360, 361

Streets. See MUNICIPAL CORPORATIONS, 2.

Strict Foreclosure. See LAND CONTRACTS, 3, 4.

Subrogation. See ATTORNEYS.

A stay surety, who is also surety with the judgment debtor on a note for money with which the stayed judgment has been discharged, is not thereby subrogated to the rights of the judgment creditor. *Lichty v. Moore*.....269, 275

Subscription. See PARTIES.

Summons. See ACTIONS, 2, 7, 8. JUSTICE OF THE PEACE, 2.

Sunday. See ARBITRATION AND AWARD, 4.

Supervisors. See COUNTY TREASURER. 2-5.

Supreme Court. See DISMISSAL, 1, 2. REVIEW.

Suretyship. See JUDGMENTS, 3. NEGOTIABLE INSTRUMENTS, 4. SUBROGATION.

Sureties on a bond for the faithful performance of a building contract, which requires the payment of laborers and material-men, are not released from liability to the latter by an extension of time granted the principal by the obligee. *Lyman v. City of Lincoln*.....799, 800

Surface Water.

Morrissey v. Chicago, B. & Q. R. Co.....415–421

Survey. See BOUNDARIES.

Tacking Possession.

Maxwell v. Higgins..... 679

Taxation. See MUNICIPAL CORPORATIONS, 3.

1. Improvements on government land, whose owners have not made final, are subject to. *State v. Tucker*..... 59
2. So are the interests, as determined by improvements, of lessees of school land and purchasers thereof who have not made full payment. *Id*..... 60
3. A payment of taxes upon a demand known to be illegal, and without urgent necessity, such as threatened sale or seizure, is voluntary and cannot be recovered back. *Dixon County v. Beardshear*.....391, 392
4. Land in which federal government has such a beneficial

Taxation—*concluded.*

interest as to warrant witholding a patent, is not taxable by the state. *Graff v. Ackerman*.....722, 723

5. Petition to enjoin collection of tax must allege facts, not conclusions, which clearly entitle plaintiff to relief; petition under consideration *held* insufficient. *Spargur v. Romine*.....737–744

Tax Liens.

Not merely the right to foreclose, but also the lien itself expires in five years, and it cannot then be set up against the valid claims of a subsequent tax lien holder. *Alexander v. Shaffer*.....814–816

Tender. See LAND CONTRACTS, 2.

Tenancies in Common. See JOINT TENANCIES.

Trade. See GOOD-WILL.

Transcript. See APPEAL, 2. REVIEW, 8, 12.

Trespass. See NEGLIGENCE, 4, 8.

Trial. See CRIMINAL LAW, 12. CROSS-EXAMINATION. EVIDENCE. INSTRUCTIONS. NEW TRIAL. PRACTICE. REVIEW.

1. Where defenses are not sustained by the evidence, court should not direct verdict for defendants. *Lichty v. Moore*, 269

2. Upon a motion to direct a verdict for defendant, every allegation, in support of which there is testimony, should be considered as proved. *Union Stock Yards Co. v. Conoyer*.....488, 491
Habig v. Layne..... 743

3. Admission of evidence, in itself immaterial, upon promise to connect it with material matters, is not erroneous if objections are waived. *Farwell v. Cramer* 64

4. Oral motion, not shown to have been sustained, to send certain documentary evidence into the jury room, is not misconduct. *Id*.....64, 65

Trover. See CONVERSION.

Trusts. See ATTORNEYS, 2.

Undisclosed Principal. See AGENCY, 1.

Use and Occupation. See HUSBAND AND WIFE, 3. LANDLORD AND TENANT, 3.

Vacancy. See INSURANCE, 2, 3.

Vendor and Vendee. See LAND CONTRACTS. MECHANICS' LIENS, 4. RESCISSION.

Continued possession of vendor after conveyance, which he claims to be fraudulent, is notice of his rights to purchasers from vendee. *Kahre v. Rundle*.....319, 320

Vendor's Lien. See MECHANICS' LIENS, 4.

Venue. See ACTIONS, 1-7, 7, 8.

Vice-Principal. See MASTER AND SERVANT, 3.

Vicious Animals.

Hammond v. Johnson..... 244

Voluntary Payment. See TAXATION, 3.

Payment by judgment debtor, of a judgment by virtue of which debtor's land has already been sold, with his knowledge, is voluntary, and gives no right of subrogation against plaintiff's attorney who retains the proceeds of the sale, and no rights in the land. *Washburn v. Osgood*...810, 811

Waiver. See CRIMINAL LAW, 5. DISMISSAL, 2. MECHANICS' LIENS, 6.

Warrant.

For arrest by justice of the peace, set out and *held* valid though informal. *Vennum v. Huston*.....301, 302

Waters.

1. Water-courses defined. *Morrissey v. Chicago, B. & Q. R. Co.*, 406, 420
2. Surface water distinguished from water-courses. *Id*...415-421
3. A railroad company is not liable for the deflection of surface water from its normal course by the construction of an embankment proper for railroad purposes. *Id*.....430, 431
4. In the absence of proof to the contrary such embankment will be presumed to have been properly constructed. *Id*, 414, 415
5. Information for unlawfully obstructing a stream by maintaining a mill-dam; sufficiency. *State v. Kendall*.....818-820

Wills. See ADMINISTRATION OF ESTATES, 6.

Witnesses. See COUNTY TREASURER, 3. CROSS-EXAMINATION. EVIDENCE, 9. HUSBAND AND WIFE, 3. LIQUORS, 9.

Words and Phrases. See MAXIMS.

1. "Abuse." *Palin v. State*..... 867
2. "Newspaper." *Rosewater v. Pinzenscham*..... 844
3. "Provable claims." *Stevenson v. Valentine*..... 903
4. "Ravish." *Palin v. State*..... 867