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# SOPHIA F. LARSON, APPELLANT, V. J. B. DICKEY ET AL., APPELLEES.

FILED FEBRUARY 20, 1894. No. 5196.

1. **Constitutional Law**: TAX DEEDS. The legislature has the power to make a tax deed *prima facie* evidence that every requirement of the law necessary to its validity has been complied with.
2. ———: ———. The legislature has the power to make a tax deed conclusive evidence of compliance with all the requirements of the law which are merely directory, and which pertain to the regulation or manner of the exercise of the taxing power, and which requirements it might, in the exercise of its discretion, dispense with entirely.
3. ———: ———. The legislature has no power to make a tax deed conclusive evidence of any jurisdictional fact, or fact vital to the exercise of the power of taxation or sale, divesting the title of the citizen's property, for non-payment of taxes.
4. ———: TAXATION: TAX SALES: EVIDENCE. The constitution of this state has not committed to the legislature the power of conclusively determining what facts are jurisdictional or vital to the exercise of the power of taxation or sale, divesting the title of the citizen's property for non-payment of taxes. Such determination belongs to the judiciary.
5. **Tax Deeds**: EXECUTION: TREASURER'S SEAL. There is no such thing as a county treasurer's official seal of office provided for or recognized by the laws of this state, and until the legislature shall provide for an official seal for county treasurers, no tax deed of any validity can be executed under the present revenue law.
6. **Constitutional Law**: TAX DEEDS: EVIDENCE. The legislature has no power to make a tax deed conclusive evidence that the grantee named therein was the purchaser or assignee of the purchaser at the sale for taxes on which said deed is predicated.

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

The opinion contains a statement of the case.

*James B. Meikle* and *George W. Covell*, for appellant:

The appellant contends that she has a right to show by the tax list that the delinquent taxes for the year 1885 were not carried forward upon the tax list of 1886, and in consequence thereof that the appellant had no notice the taxes for the year 1885 were delinquent. The provision of section 130, chapter 77, Compiled Statutes, which provides that a tax deed shall be conclusive evidence of the following facts is unconstitutional and void for the reason that it is in conflict with the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law: That the manner in which the listing, assessment, levy, and sale were conducted was in all respects as the law directed; that the grantee named in the deed was the purchaser or his assignee; that all the prerequisites of the law were complied with by all the officers who had, or whose duty it was to have had, any transaction relating to or affecting the title conveyed or purporting to be conveyed by the deed, from the listing or valuation of the property up to the execution of the deed inclusive, and that all things whatsoever required by law to make a good and valid sale and to vest the title in the purchaser were done, except in regard to the points named in said section, wherein the deed should be presumptive evidence only. (*McCready v. Sexton*, 29 Ia., 359; *Groesbech v. Seeley*, 13 Mich., 329; *Case v. Dean*, 16 Mich., 13; *White v. Flynn*, 23 Ind., 46; *Smith v. Cleveland*, 17 Wis., 556*; *Allen v. Armstrong*, 16 Ia., 508; *People v. Mitchell*, 45 Barb. [N. Y.], 212; Blackwell, Tax Titles, p. 98; *Abbott v. Lindenbower*, 42 Mo., 162, 46 Mo., 291; *Wantlan v. White*, 19 Ind., 470; *Huntington v. Brantley*, 33 Miss., 451.)

The tax deed is void because it does not contain a recital showing where the tax sale was had. (*Haller v. Blaco*, 10 Neb., 36; *Shelley v. Towle*, 16 Neb., 194; *Baldwin v.*

*Merriam*, 16 Neb., 199; *Taylor v. Courtnay*, 15 Neb., 198; *Towle v. Holt*, 14 Neb., 227.)

"If a tax deed fails to show that it was made at the place required by law, it is void." (*Howard v. Lamaster*, 11 Neb., 582.)

*Saunders & Macfarland, contra:*

In conformity with the well known principle that those matters over which the legislature has exclusive authority may be required or omitted at its pleasure, it must follow that if the legislature has power to require taxes for the previous year to be entered on the book of subsequent years or not at its discretion, then it has the right to make deeds conclusive evidence of that fact. (Black, Tax Titles, sec. 253.)

The mode of levying, assessing, and collecting taxes is entirely subject to the discretion of the legislature. (*Smith v. Cleveland*, 17 Wis., 556*.)

The manner of the listing and assessing, failure to make entries on proper book, or the failure to list or assess the property within the time provided by law are not jurisdictional matters, and are mere irregularities. (Sec. 142, ch. 77, Comp. Stats.)

A tax deed may be made conclusive evidence of the regularity of all proceedings, and of all matters except the facts of a levy, an assessment, or sale; and it may be conclusive evidence of the regularity of such levy, assessment, or sale. (2 Blackwell, Tax Titles, secs. 850, 851, 852, 853; *Gould v. Thompson*, 45 Ia., 450; *Callanan v. Hurley*, 93 U. S., 387; *Shawler v. Johnson*, 52 Ia., 472; *Phelps v. Meade*, 41 Ia., 473; *Easton v. Perry*, 37 Ia., 681; *Madson v. Sexton*, 37 Ia., 562; *Clark v. Thompson*, 37 Ia., 536; *Hurley v. Powell*, 31 Ia., 64; *Leavitt v. Watson*, 37 Ia., 93; *Martin v. Cole*, 38 Ia., 141; *Robinson v. First Nat. Bank*, 48 Ia., 354; *Jenkins v. McTigue*, 22 Fed. Rep., 148; *Smith v. Cleveland*, 17 Wis., 556*.)

It is competent for the legislature to make tax deeds *prima facie* evidence of title in the holder, and to place the burden of proof upon the party attacking such title. (*Delaplaine v. Cook*, 7 Wis., 44; *Genther v. Fuller*, 36 Ia., 604; *Turnny v. Yeoman*, 14 O., 207; *Stanbery v. Sillon*, 13 O. St., 571; *Hoffman v. Bell*, 61 Pa. St., 444; *Hand v. Ballou*, 12 N. Y., 541; *Pillow v. Roberts*, 13 How. [U. S.], 472; *Keely v. Sanders*, 99 U. S., 441; *De Treville v. Smalls*, 98 U. S., 517; *Falkner v. Guild*, 10 Wis., 506; *Stewart v. McSweeney*, 14 Wis., 507; *Whitney v. Marshall*, 17 Wis., 181; *Smith v. Cleveland*, 17 Wis., 556*.)

A person must be in the actual possession of the premises in order to entitle him to a notice to redeem; constructive possession is not sufficient. (*Parker v. Cochran*, 64 Ia., 757; *Tuttle v. Griffin*, 64 Ia., 455; *Burdick v. Connell*, 69 Ia., 458.)

A comparison of the deed with the statute will show that the deed is in strict conformity with section 127, chapter 77, Compiled Statutes, and has been executed in the manner and form provided by law. The appellant contends that the county treasurer had no authority to provide himself with a seal; but under the statute the county treasurer had authority by implication to provide himself with one. (*Hendrix v. Boggs*, 15 Neb., 472.)

If a form is given by statute and is followed, it must be held sufficient. (Cooley, Taxation [2d ed.], p. 515; *Hubbell v. Campbell*, 56 Cal., 527; *Grimm v. O'Connell*, 54 Cal., 522; *Geekie v. Kirby Carpenter Co.*, 106 U. S., 379; *Martin v. Garrett*, 30 Pac. Rep. [Kan.], 168; *Bell v. Gordon*, 55 Miss., 45.)

Proceedings for the collection of delinquent taxes, and sale of the property by summary process, are not obnoxious to the constitutional provisions as to due process of law. (*Pritchard v. Madren*, 4 Kan., 486; *Murray v. Hoboken Land & Improvement Co.*, 18 How. [U. S.], 272; *McMillen v. Anderson*, 95 U. S., 37; *Davidson v. City of New Or-*

*leans*, 96 U. S., 97; *Springer v. United States*, 102 U. S., 586; *Bennett v. Hunter*, 9 Wall. [U. S.], 326; 2 Desty, Taxation, pp. 749–753; Cooley, Taxation, p. 464; 1 Blackwell, Tax Titles, sec. 75.)

RAGAN, C.

During the year 1885, and until October 14, 1886, one Marcus P. Mason owned lots 11 and 12 in block 4, Kilby Place, in the city of Omaha, Nebraska. On said last date Mason sold, and by warranty deed conveyed, said premises to Sophia F. Larson. These lots were assessed for taxes in the name of Mason for the year 1885, and on the 6th day of November, 1886, were sold at the county treasurer's public tax sale for the taxes of 1885, to one Dickey, who afterwards, on the 20th day of November, 1888, obtained a treasurer's tax deed for the property, based on the sale made thereof in 1886, for the delinquent taxes for the year 1885. This suit was brought in the district court of Douglas county, by Mrs. Sophia F. Larson against J. B. Dickey, the holder of the tax deed, and James M. Taylor, his lessee, for the purpose of canceling said tax deed. In her petition Mrs. Larson tendered Dickey the amount which he had paid for the tax title, together with interest and costs. Both parties submitted their title to the court. The court found and decreed that the tax deed was valid and divested Mrs. Larson of her title to the property. From this decree Mrs. Larson appeals to this court.

Section 86 of the revenue act of 1879, chapter 77, Compiled Statutes, 1893, provides: "In all cases where taxes are delinquent on any real property, for any preceding year, or years, it shall be the duty of the county clerk in making up the list for the current year, to enter the amount of the delinquent tax opposite the tract or parcel of real property against which it was charged, in a suitable column or columns, with the year or years in which the same was due, and the amount thereof shall be collected in like

manner as tax for other real property of that year may be collected."

On the trial in the district court Mrs. Larson offered to prove by competent evidence that when the 1886 tax was extended against this property by the county clerk the delinquent taxes against the same for the year 1885, and for which it had been sold, were not carried forward on the tax list and entered as delinquent against the property with the taxes assessed thereon for the year 1886. The district court excluded this evidence on the theory, as appears from a copy of the court's opinion found in the brief of counsel for the appellant, that section 130 of this revenue law made the tax deed conclusive evidence that the requirement of said section 86 had been complied with. Said section 130 is in words and figures as follows:

"Sec. 130. Deeds made by the county treasurer as aforesaid shall be presumptive evidence in all the courts of this state, in all controversies and suits in relation to the rights of the purchaser, his heirs or assigns, to the land thereby conveyed, of the following facts: 1. That the real property conveyed was subject to taxation for the year or years stated in the deed; 2. That the taxes were not paid at any time before the sale; 3. That the real property conveyed had not been redeemed from the sale at the date of the deed; 4. That the property had been listed and assessed; 5. That the taxes were levied according to law; 6. That the property was sold for taxes as stated in the deed; 7. That notice had been served and due publication had, as required in section 123 of this chapter, before the time of redemption had expired. And it shall be conclusive evidence of the following facts: 1. That the manner in which the listing, assessment, levy, and sale were conducted was in all respects as the law directed; 2. That the grantee named in the deed was the purchaser or his assignee; 3. That all the prerequisites of the law were complied with by all the officers who had, or whose duty it was to have had, any part or

action in any transaction relating to or affecting the title conveyed, or purporting to be conveyed by the deed, from the listing and valuation of the property up to the execution of the deed, both inclusive, and that all things whatsoever required by law to make a good and valid sale, and to vest the title in the purchaser, were done, except in regard to the points named in this section, wherein the deed shall be presumptive evidence only. And in all controversies and suits involving the title to real property claimed and held under and by virtue of a deed made substantially as aforesaid by the treasurer, the person claiming the title adverse to the title conveyed by such deed, shall be required to prove, in order to defeat the said title, either that the said real property was not subject to taxation for the year or years named in the deed, that the taxes had been paid before the sale, that the property had been redeemed from the sale according to the provisions of this chapter, and that such redemption was had or made for the use and benefit of persons having the right of redemption under the laws of this state, or that there had been an entire omission to list or assess the property, or to levy the taxes, or to sell the property; but no person shall be permitted to question the title acquired by a treasurer's deed without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale, and that all taxes due upon the property have been paid by such person or the person under whom he claims title as aforesaid; *Provided*, That in any case where a person had paid his taxes, and through mistake in the entry made in the treasurer's books or in the receipt, the land upon which the taxes were paid was afterwards sold, the treasurer's deed shall not convey the title; *Provided further*, That in all cases where the owner of lands sold for taxes shall resist the validity of such tax title, such owner may prove fraud committed by the officer selling the same or in the purchaser to defeat the

same, and if fraud is so established such sale and title shall be void."

The learned judge of the district court was right in holding that this section made the tax deed conclusive evidence that the requirements of said section 86 had been complied with; but is this section 130 constitutional in so far as it makes the tax deed conclusive evidence that the thing was done which it is here sought to prove, and, as a matter of fact, was not done?

At common law, it was necessary that one who claimed to have obtained title to property of another under proceedings based upon a neglect of public duty, should take upon himself the burden of showing that the law had been complied with by those who had had the proceedings in charge; especially if the proceedings would operate with severity and be in their effects something in the nature of a forfeiture. The law was strict in its requirements that his evidence should exhibit the proceedings, from step to step, and show that each of the safeguards with which the statute had surrounded the delinquent for his protection in this very emergency had been duly observed. This rule of the common law has not been modified by the decisions and is still recognized and enforced where statutes have not changed it. (Cooley, Taxation, p. 326.) It will be observed that this section 130 of our revenue law makes the tax deed *prima facie* evidence that certain requirements of the revenue law, leading up to the sale of property for taxes, have been complied with, thus casting the burden on the one assailing the validity of a tax deed of showing that such requirements had not been complied with; and said section 130 also makes the tax deed conclusive evidence that every fact existed; that everything had been done and every requirement of the law complied with necessary to the validity of the deed, except those requirements whose performance are made *prima facie* evidence.

It is said by counsel for appellant that section 130 is

repugnant to the constitution, in that in making the tax deed conclusive evidence of certain matters, it deprives the citizen of his property without due process of law. The question is an intensely interesting one, and we have tried to give it such time and attention as its importance deserves, but it would extend this opinion to an unreasonable length to quote and comment upon all the cases examined in its investigation. I have no doubt, however, that the following propositions are established by the weight of authority in this country.

1. That the legislature has power to make tax deeds *prima facie* evidence that every requirement of the law necessary to their validity has been complied with. (Black, Tax Titles, sec. 449, and cases there cited; Cooley, Constitutional Limitations, p. 458; *Raley v. Guinn*, 76 Mo., 263; *Abbott v. Lindenbower*, 42 Mo., 162; *Callanan v. Hurley*, 93 U. S., 387.)

2. That the legislature has the power to make a tax deed conclusive evidence of compliance with all the requirements of the law which are merely directory and which pertain to the regulation or the manner of the exercise of the taxing power, and which requirements it might, in the exercise of its discretion, dispense with entirely. (Black, Tax Titles, sec. 452, and cases there cited; *Allen v. Armstrong*, 16 Ia., 508.)

3. That the legislature has no power to make a tax deed conclusive evidence of any jurisdictional fact, or fact vital to the exercise of the power of taxation or sale, divesting the title of the citizen's property for the non-payment of taxes. (*Bannon v. Burnes*, 39 Fed. Rep., 892; *Marx v. Hanthorn*, 30 Fed. Rep., 579; *Abbott v. Lindenbower*, 42 Mo., 162; *Wantlan v. White*, 19 Ind., 470; *White v. Flynn*, 23 Ind., 46; *McCready v. Sexton*, 29 Ia., 356; *Allen v. Armstrong*, 16 Ia., 508; *Groesbeck v. Seeley*, 13 Mich., 330; *In re Douglass*, 41 La. Ann., 765.)

4. The constitution of this state has not committed to

the legislature the power of conclusively determining what facts are jurisdictional or vital to the exercise of the power of taxation or sale divesting the title of the citizen's property for the non-payment of taxes. Such determination belongs to the judiciary.

The authorities establishing the foregoing propositions lead us to the conclusion that the requirement found in said section 86, that the county clerk should enter the delinquent tax of 1885 against these lots on the tax list of 1886, is one not jurisdictional or vital to the exercise of the powers of taxation or sale, and one that the legislature might have dispensed with altogether, and of the performance of which the legislature could make the tax deed conclusive evidence, and that, therefore, the court did not err in refusing to permit Mrs. Larson to prove that the county clerk did not in fact comply with said section 86.

The next error assigned by the appellant is that the district court erred in admitting in evidence the tax deed sought to be canceled by this suit. The objections made to this deed are as follows: (1) That it does not show where the tax sale was held; (2) that it does not show for the taxes of what year the property was sold; (3) that it does not show for what amount the property was sold; (4) that it is not witnessed; (5) that there is no seal of any court attached thereto; (6) that the deed is not acknowledged; (7) that it does not purport on its face to have been executed by the county treasurer of Douglas county, Nebraska; (8) that it does not show to whom the property was sold; (9) that it is not attested by the seal of any person authorized by law to use a seal. The deed was as follows:

"STATE OF NEBRASKA, }
DOUGLAS COUNTY. }

"Whereas, at a public sale of real estate for the non-payment of taxes, made in the county aforesaid, on the fourth (4th) day of November, A. D. 1886, the following

described real estate was sold, to-wit: Lots eleven (11) and twelve (12), in block four (4), in Kilby Place addition to the city of Omaha, as surveyed, platted, and recorded;

"And whereas, the same not having been redeemed from such sale, and it appearing that the holder of the certificate of purchase of said real estate has complied with the laws of the state of Nebraska necessary to entitle J. B. Dickey to a deed of said real estate:

"Now, therefore, know ye, that I, Henry Bollin, county treasurer of said county of Douglas, in consideration of the premises, and by virtue of the statutes of the state of Nebraska in such cases provided, do hereby grant and convey unto J. B. Dickey, his heirs and assigns forever, the said real estate hereinbefore described, subject, however, to any redemption provided by law.

"Given under my hand and the seal of our court, this 20th day of November, A. D. 1888.

"[SEAL.] HENRY BOLLIN,
"*County Treasurer.*"

In support of the first objection made by the appellant, we are cited to the following cases: *Haller v. Blaco*, 10 Neb., 36, *Howard v. Lamaster*, 11 Neb., 582, *Thompson v. Merriam*, 15 Neb., 498, and *Shelley v. Towle*, 16 Neb., 194. These authorities do say that if a tax deed fails to show that the tax sale was made at the place required by law, that the deed is void; but it must be borne in mind that these decisions were rendered under the revenue law of 1869. Section 56 of that law, as section 109 of the revenue law of 1879, required the county treasurer to hold the sales of lands made by him for unpaid taxes "at the court house, or the place of holding court in his county, or at the treasurer's office." But the form of the tax deed prescribed by section 68 of the revenue act of 1869 required a recital in such deed of the place where the tax sale was held. This requirement is not in the form of tax deed prescribed by section 127 of the revenue act of 1879,

the section on which the tax deed in suit is based. The cases cited above from this court are, therefore, not applicable to the case at bar.

Again, the subject-matter of objections Nos. 1, 2, and 3 as well, embraces facts of the performance of which, according to law, we have seen it was competent for the legislature to make the tax deed conclusive evidence. As these objections assail the deed only on that ground, they are untenable.

We will consider objections Nos. 4 and 6 together. The revenue law of 1866 required that a tax deed should be executed by the county treasurer under his hand, and the execution thereof attested by the county clerk with the county seal, and that such tax deed should be acknowledged. By this law not only was the tax deed required to be witnessed, but the law specified the witness. Section 68 of the revenue law of 1869 contained precisely the same provision. The revenue law of 1879, the one under consideration, is substantially a re-enactment in most respects of the acts of 1866 and 1869, but in the act of 1879 section 68 of the act of 1869 was left out, and in its place was put section 221 of the revenue act of 1873 of the state of Illinois, which is our section 127, chapter 77, Compiled Statutes of 1893, and is as follows:

"Sec. 127. The deed so made by the county treasurer under the official seal of his office shall be recorded in the same manner as other conveyances of real estate, and shall vest in the grantee, his heirs and assigns, the title of the property therein described, without further acknowledgment or evidence of such conveyance, and said conveyance shall be substantially in the following form:

"STATE OF NEBRASKA, —— COUNTY. Whereas, at a public sale of real estate for the non-payment of taxes made in the county aforesaid, on the —— day of ——, A. D. 18—, the following described real estate was sold, to-wit: (here place description of real estate conveyed); and whereas,

the same not having been redeemed from such sale, and it appearing that the holder of the certificate of purchase of said real estate has complied with the laws of the state of Nebraska necessary to entitle (insert him, her, or them) to a deed of said real estate: Now, therefore, know ye, that I, ——, county treasurer of said county of ——, in consideration of the premises, and by virtue of the statutes of the state of Nebraska in such cases provided, do hereby grant and convey unto ——, his heirs and assigns forever, the said real estate hereinbefore described, subject, however, to any redemption provided by law.

"Given under my hand and the seal of our court this —— day of ——, A. D. 18—.

"—— ——, *County Treasurer.*"

The only difference in this section and said section 221 of the Illinois statute is this: The word "Nebraska" has been substituted for the word "Illinois," and the word "treasurer" for the word "clerk." The law of Illinois in force at the date of the enactment of the statute of which said section 127 of our revenue act is a copy, required the execution of all conveyances of real estate to be acknowledged or proved, in order to entitle such conveyance to be recorded, and thus become of themselves evidence, but did not require the signature of the grantor to a real estate conveyance to be witnessed. The conveyance was entitled to record if acknowledged by the grantor or his signature proved; hence the language of this section 221, our 127: "That the deed so made by the county treasurer * * * shall vest in the grantee * * * the title of the property * * * without further acknowledgment or evidence of such conveyance." Now, the object of statutes requiring conveyances of real estate to be acknowledged is to make them evidence without extraneous proof of their execution, and to entitle them to be recorded, thus perpetuating them as evidence. The acknowledgment, however, is not part of a deed. (*Burbank v. Ellis*, 7 Neb., 157.)

But to entitle a deed to be acknowledged, and thus made of itself evidence, it must first be executed (and this execution proved) as the statute provides. Our statute on the subject of the execution of real estate conveyances, section 1, chapter 73, Compiled Statutes, 1893, provides: "Deeds of real estate or any interest therein in this state, except leases for one year or for a less time, if executed in this state, must be signed by the grantor or grantors, being of lawful age, in the presence of at least one competent witness, who shall subscribe his or her name as a witness thereto, and be acknowledged or proved and recorded as directed in this chapter." With this statute before us, and bearing in mind that the revenue acts of this state prior to the act of 1879 required the execution of tax deeds to be witnessed and acknowledged in order to entitle them to record, and thus make them evidence, can it be said our legislature intended to do away with these requirements because of the interpolation of this section 221 of the Illinois statute into our revenue act? Had the revenue acts of 1866 and 1869 been silent on the subject of witnessing and acknowledging of tax deeds, it seems that the general statute on the subject of the execution, witnessing, and acknowledging of conveyances of real estate would have been applicable to tax deeds made under said acts. (*Heelan v. Hoagland*, 10 Neb., 511; *Stierlin v. Daley*, 37 Mo., 483; *Tilson v. Thompson*, 27 Mass., 359.)

The language of section 127 should be strictly construed in favor of the citizen, the title to whose property is sought to be divested by a tax deed. It is said in said section that "the deed so made by the county treasurer * * * shall vest in the grantee * * * the title of the property * * * without further acknowledgment or evidence of such conveyance." Now, every conveyance of real estate can only be recorded when acknowledged, and can only be acknowledged when the signature of the grantor is witnessed or proved. The words "without further ac-

knowledgment or evidence," it would seem, ought not in this case to be construed to read: "Without any acknowledgment or evidence of such conveyance;" especially in view of our statutes, by which the holder of a void tax deed is subrogated to the lien of the public for taxes on real estate, and by which the holder is allowed to foreclose his lien in equity against the property, and thus acquire, if the same be redeemed, a large return on his investment, and if not redeemed, an indefeasible title to the property. Since the decree must be reversed on another ground, we do not decide whether the failure to witness or acknowledge the deed renders it void.

Objection No. 7, made to this tax deed, is untenable. True, the words "of Douglas county, Nebraska" do not follow the signature "Henry Bollin, county treasurer," but the deed is headed "State of Nebraska, Douglas county," and in it is the statement "I, Henry Bollin, county treasurer of said Douglas county," etc. This is sufficient, so far as the objection made is concerned.

We next direct our attention to objections Nos. 5 and 9. The substance of these objections is that the deed of the treasurer shows that it was not executed under the official seal of his office. The copy of the deed in the bill of exceptions recites: "Given under my hand and the seal of our court, this 20th day of November, A. D. 1888. [Seal.] Henry Bollin, County Treasurer." It will be observed that this is the exact language of the form of tax deeds provided for by section 127 quoted above from our revenue act, and which is, as already stated, a copy of section 221 of the Illinois revenue act of 1873. By the statute of Illinois in force when this section 221 was enacted, the collector of taxes brought a proceeding or suit in the county court against all the property and the parties in whose name the same was listed on which taxes were delinquent, and gave notice by publication in a newspaper that at a certain term of the county court he would apply for judgment against

such property and persons for the unpaid taxes and for an order of the court for a sale of the property. At the term fixed by the notice, the taxes against any piece of property remaining unpaid, and no defense being interposed to the collector's proceeding, the county court rendered judgment against the property for the unpaid taxes and an order that the collector sell. The statutes also made the county court a court of record, and the county clerk the clerk thereof, and required all tax deeds to be executed by the county clerk under the official seal of his office, which seal of the county clerk became and was, by virtue of the statute, the seal of the county court. This explains the words "under the official seal of his office," and the words "the seal of our court," found in section 127 of our law. It is our duty to give effect to this section 127 if possible, but by any construction it makes it the duty of the county treasurer to execute tax deeds under the official seal of his office. But there is no such thing as the county treasurer's official seal of office provided for or recognized by our statutes, and until the legislature shall provide for an official seal for county treasurers, they cannot execute tax deeds of any validity under the present law. If the legislature had so provided for an official seal for county treasurers, and if this tax deed had been attested by such seal, the court might regard the words "of our court" as surplusage, and thus give effect to the law; but under the name of "construction," we cannot read out of this section the words "under the official seal of his office," for this would be, in effect, legislation. From the copy of the tax deed in the record we do not know what seal or kind of seal was used by the treasurer, but it is wholly immaterial, as he could not lawfully use any. It follows that objections Nos. 5 and 9 were well taken and should have been sustained.

It remains to consider objection No. 8. It will be observed that said section 130, quoted above, makes the tax deed conclusive evidence of the fact that the grantee named

in the deed was the purchaser, or his assignee, of the property at the tax sale. Is it within the power of the legislature to make this tax deed conclusive evidence of such fact? We do not think it is. Suppose this property had been sold to John Doe and a certificate of sale issued to him, and the same had been lost or stolen, and an indorsement of his name forged thereon under a false assignment of the certificate to Richard Roe, and he had presented the certificate and obtained the tax deed. In a suit by Doe to recover this land no lawyer would contend that the tax deed would be conclusive evidence for Roe of his rightful ownership, nor that the legislature could make it such. We apprehend that it is beyond the power of the legislature to restrain a defendant in any suit from setting up a defense to an action against him. Due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity, when in court, to establish any fact, which, according to the usages of common law or provisions of the constitution, would be a protection to his property. (*Wright v. Cradlebaugh*, 3 Nev., 341.) There are fixed bounds to the power of the legislature over the subject of evidence, which must not be exceeded. As to what shall be evidence and who shall assume the burden of proof, its power is unrestricted so long as its rules are impartial and uniform; but it has no power to establish rules which, under pretense of regulating evidence, altogether prohibit a party from exhibiting his rights. (Cooley, Constitutional Limitations [4th ed.], 457.) While the courts should treat with great respect the enactments of the legislative department of the government, yet the courts, which stand as the last resort of the citizen and the sworn guardian of his property rights, cannot fail to recognize that there are some things which even a legislature cannot do. Due process of law is not any process which legislative power may devise. (*Bannon v. Burnes*, 39 Fed. Rep., 892; *Wantlan v. White*,

19 Ind., 470.) Does it alter the case that the suit is by the owner whose title is sought to be divested by tax deed? This deed is, as we have already seen, void for several reasons, but, under our statute, the lawful owner of it is entitled to a lien on this property for taxes paid at the sale and since. Is this deed conclusive evidence that this holder is the one entitled to such lien? Had Dickey brought this suit to foreclose his lien, alleging his tax deed to be void, and Mrs. Larson had answered denying, as she might lawfully have done, Dickey's ownership of the lien, would this tax deed have been conclusive evidence that Dickey was the lawful owner? We think not. It follows that the decree of the district court must be reversed and the cause remanded with instructions to that court on payment by Mrs. Larson of the taxes and expenses, the tender of which was made in her petition, to enter a decree canceling the said tax deed and lease of the appellees, and quiet and confirm the title to said real estate in appellant.

REVERSED AND REMANDED.

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## OMAHA STREET RAILWAY COMPANY V. SAMUEL ELKINS.

FILED FEBRUARY 20, 1894. No. 5576.

**Admissibility of Testimony Given at Former Trial.** Where a witness is shown to be absent from the state, his testimony given at a former trial of the cause is admissible in evidence, if otherwise unobjectionable. RAGAN, C., dissenting.

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

*John L. Webster*, for plaintiff in error:

Where a witness is beyond the jurisdiction of the court, his testimony given at a former trial between the same parties, with reference to the same subject-matter, is admissible in evidence. (*City of Omaha v. Jensen*, 35 Neb., 68; *McGill v. Kauffman*, 4 S. & R. [Pa.], 316; *Carpenter v. Groff*, 5 S. & R. [Pa.], 162; *People v. Devine*, 46 Cal., 45; *Lowe v. State*, 86 Ala., 47; *Sneed v. State*, 47 Ark., 180; *Parker v. State*, 24 Tex. App., 61.)

*E. T. Farnsworth, contra.*

IRVINE, C.

On the trial of this case in the district court the defendant called to the stand the stenographic reporter, produced a transcript of the testimony of a witness given at a former trial of the same action, and offered to prove and introduce in evidence such testimony. The offer was objected to, as incompetent, irrelevant, and immaterial, because the witness might now testify differently, and because there was no authority for introducing the testimony of the witness given at a former trial. The objection was sustained and the evidence excluded. The defendant had asked for a continuance of the case upon a showing properly made that the witness had removed to another state and was out of the jurisdiction of the court. The motion had been overruled, and we think properly so, for want of sufficient showing of diligence on the part of the defendant. The exclusion of the witness' former testimony is assigned as error, and the question presented is, whether the testimony of a witness given upon a former trial of the same case is admissible in evidence simply upon a showing that the witness is out of the jurisdiction and beyond reach of the court's process. Since the trial of the case in the district court the question has been decided by this court, and such

testimony held to be admissible. (*City of Omaha v. Jensen*, 35 Neb., 68.) The question in that case was complicated with collateral features to which the arguments chiefly directed the attention of the court. All that is there said upon the point is as follows: "Christensen is shown to have been absent from the state, and his testimony on a former trial, if otherwise unobjectionable, is admissible." While we think that decision is correct and adhere to it, the manner in which the question was there treated justifies us in now making a more thorough examination than was there demanded.

The authorities are all agreed that in the case of a deceased witness his testimony upon similar issues between the same parties is admissible, the test seeming to be whether the party against whom such testimony is offered had, at the former hearing, an opportunity to cross-examine upon the subject-matter in relation to which his testimony is sought to be proved. Greenleaf (1 Greenleaf, Evidence, sec. 163) and many other text-writers state that the rule is the same where the witness is out of the jurisdiction. The cases, however, are in conflict. The following cases are directly in favor of the admission of the evidence: *Magill v. Kauffman*, 4 S. & R. [Pa.], 317; *Howard v. Patrick*, 38 Mich., 795; *Sneed v. State*, 47 Ark., 180; *Lowe v. State*, 86 Ala., 47; *People v. Devine*, 46 Cal., 46.

The other side of the case is not without considerable support. *Gerhauser v. North British & Mercantile Ins. Co.*, 7 Nev., 174, is a well-reasoned case, holding that such testimony is not admissible, chiefly upon the ground that as a matter of policy any rule admitting testimony partaking of the nature of hearsay should not be extended further than necessity requires; but in that case the court gives other reasons sufficient in themselves to justify the exclusion of the evidence there offered. *Berney v. Mitchell*, 34 N. J. Law, 337, is also a case containing a careful discussion of the question, and practically the same conclusion is reached as by the Nevada court.

In *Wilder v. City of St. Paul*, 12 Minn., 116, such evidence was excluded, not because it was in its nature inadmissible, but because it should not be received until the party offering it has shown that he could not with due diligence have procured the attendance of the witness in person. In that case the showing was that the witness had departed from the state during the trial.

In *Hobson v. Doe*, 2 Blackf. [Ind.], 308, frequently cited in favor of excluding such evidence, the following is the whole report of the case: "A party is not permitted to prove what one of his witnesses swore to on a former trial of the cause until he has proved that the witness is dead." Such a report is of no value as a precedent, as it recites none of the facts, and the statement made does not even purport to be an opinion of the court.

Most of the cases excluding such evidence cite the case of *Wilbur v. Selden*, 6 Cow. [N. Y.], 162. But that case is also authority for holding that in no case can a witness' former testimony be admitted unless the witness by whom it is sought to make the proof is able to state the exact words of the absent witness. Such a rule would practically exclude such testimony in all cases. It was, indeed, once the doctrine of the English courts, but has since been everywhere overruled. Only two authorities are cited. Of these, *Lightner v. Wike*, 4 S. & R. [Pa.], 203, is not at all in point. It simply holds that the witness in that case had not shown himself competent to relate the testimony of the absent witness, and the New York court in citing that case was apparently oblivious of the fact that in *Magill v. Kauffman*, *supra*, in the same volume, the same eminent Chief Justice Tilghman had distinctly held that such testimony was admissible. The other case cited by the New York court is *Le Baron v. Crombie*, 14 Mass., 234, where the point decided was that the testimony of a witness upon a former trial could not be admitted where he had meantime become incompetent by a conviction of an

infamous crime, and even upon that point a careful and discriminating editor has added the note: "This decision is supported by no authority and is inconsistent with general principles."

In *Crary v. Sprague*, 12 Wend. [N. Y.], 41, the evidence upon a former trial had been produced by the defendant. Upon the second trial the plaintiff sought to prove that testimony, but the witness had such an interest in the event of the cause on the side of the plaintiff that under the law then in force he was incompetent.

In *Brogy v. Commonwealth*, 10 Gratt. [Va.], 722, the court recognized the admissibility of such evidence in a civil case, but it held it inadmissible in a criminal proceeding when offered by the defendant, upon the authority of *Finn v. Commonwealth*, 5 Rand. [Va.], 701, apparently overlooking the fact that the distinction between criminal and civil cases enforced in Finn's case grows out of the constitutional guaranty that a person accused of crime shall be confronted by the witnesses and that such distinction should not, therefore, be drawn where the testimony was offered by the defendant.

*Collins v. Commonwealth*, 12 Bush [Ky.], 271, was similar to the Virginia case. It recognized the admissibility of the evidence in civil cases, but held that it was not admissible in criminal.

In *Bergen v. People*, 17 Ill., 426, the evidence of an absent witness was excluded, the court citing a number of criminal cases, and also the New York, Massachusetts, and Indiana cases above referred to. No reference is made in the opinion to any distinction between civil and criminal cases. The evidence was offered by the state, and it was shown that the witness was beyond the jurisdiction by the procurement of the defendant. This case is out of line with all the authorities, for it seems elsewhere always conceded that whatever the rule may be under other circumstances, if the absence of the witness is due to the procurement of

the party against whom it is offered, his former testimony is admissible.

Upon a careful consideration we are convinced that the rule stated in *Omaha v. Jensen, supra,* is in accordance with the weight and the reason of the authorities. Only two of the cases cited as opposing the rule are entitled to weight. The others are based either upon distinctions not here presented, or are based upon untenable grounds.

The testimony sought to be introduced in this case appears in the bill of exceptions. It is unquestionably material and its exclusion was prejudicial. There are other assignments of error, but as the questions to which they relate are of such a character that they will probably not recur, it will be unnecessary to consider them.

REVERSED AND REMANDED.

RAGAN, C., dissenting.

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EXETER NATIONAL BANK, APPELLANT, V. WILLIAM J. ORCHARD ET AL., APPELLEES.

FILED FEBRUARY 20, 1894. No. 5605.

1. **Usury**: MORTGAGE FORECLOSURE: NOTES: CONSIDERATION. W. & Co., a private bank, lent money to O. upon an agreement for the payment of usury. The business was conducted between O. and W., one of the partners in the firm of W. & Co. A note was made to the order of W., and a conveyance of land, absolute in form, made to W. to secure the loan. The note was renewed at frequent intervals, usurious interest being paid upon each renewal. Some months after the loan was made the E. National Bank was incorporated and succeeded to the business and assets of W. & Co., W. becoming its cashier. The note continued to be renewed to the order of W. for some years, but finally was renewed to the order of the E. National Bank. O., at the inception of the transaction, did no know that the money lent to him was that of W. & Co., and there was no evidence to show that

at any particular time he learned of that fact or of the fact that renewal notes belonged to the national bank until the first note was made directly to that bank. *Held*, That in an action by the national bank to foreclose the mortgage, O. was entitled to have all the payments of interest applied as payments upon the principal, and that as these payments, at the time when the first note was made directly to the bank, amounted to more than the original debt, those notes were without consideration and the bank, not being a *bona fide* holder, could not recover.

2. **National Banks**: USURY. It seems that the remedies given by the federal statutes for usury exacted by national banks are exclusive; but that principle does not prevent a debtor, under the circumstances stated in the foregoing paragraph, from availing himself of any defenses to which he is entitled under the state law, and which accrued before he was aware that the debt was owing to the bank.

3. **Usury**: RENEWALS OF LOAN: DEFENSE. Where a loan is originally usurious, the defense of usury applies to all renewals, and when action is brought upon any note, no matter how remote, the court will apply all payments of interest upon such usurious loan as payments *pro tanto* of the principal.

4. ———: ———: STATUTE OF LIMITATIONS. Such application is made not by way of set-off or counter-claim, but by way of payment, and the statute of limitations does not bar such a defense.

5. ———: JUDGMENT UNDER FEDERAL STATUTES: PAYMENTS OF USURY: APPLICATION UPON PRINCIPAL: ESTOPPEL. After the notes came to be made directly to the bank, O. brought suit against the bank and recovered judgment under the federal statutes for payments of usury made after the bank became the ostensible creditor. *Held*, That that action did not estop O. from pleading usury in the earlier transactions with W. and having those payments applied as payments upon the principal.

6. **Estoppel.** Nor was the making of renewal notes directly to the bank and the payment of interest thereon such a recognition of the existence of an indebtedness as would estop O. from pleading the prior usury and payment by reason thereof.

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

*Charles H. Sloan*, for appellant.

*Sedgwick & Power, contra.*

IRVINE, C.

The plaintiff, a national bank, instituted this action for the purpose of foreclosing an instrument which was in form of an absolute conveyance from Orchard and wife to William H. Wallace, dated October 10, 1883, and followed by a quitclaim deed from Wallace and wife to plaintiff, dated September 21, 1887. The petition contained proper averments to constitute this a mortgage, which it was alleged was given to secure the payment of a note made by Orchard to plaintiff for $500, and dated April 16, 1891. The defense pleaded was usury, and that the full amount of the principal had been paid. The pleadings aver many facts with great particularity, but there is little conflict in the evidence, and the nature of the case can best be stated by a narrative of the facts without regard to whether they are disclosed by the pleadings or evidence. In October, 1883, William H. Wallace and another were engaged in the banking business at Exeter under the name of Wallace & Co. On the day named Orchard borrowed $400 and gave his note therefor to Wallace, Orchard and wife executing the deed to secure the same. The money advanced is shown to have been that of Wallace & Co., but Orchard avers and testifies that he did not know that fact; that all his transactions were with Wallace, and that he believed Wallace to be the principal. This note was renewed from time to time; sometimes for thirty days; sometimes for sixty; once or oftener for ninety days, the renewal notes always being made to Wallace until April 10, 1889. In February, 1885, the plaintiff bank was organized and succeeded to the business and assets of Wallace & Co. April 10, 1889, upon the maturity of one of the Orchard notes, a renewal note was made to the plaintiff, and from that time on the notes were drawn to plaintiff's order. Neither the deed to Wallace, nor the quitclaim deed from Wallace to the bank, was recorded until March 12, 1892, the day this suit was

begun. November 30, 1891, Orchard began suit against the bank to recover the penalty under the federal statutes for usury exacted by the bank on several loans. In his petition he sought to recover, among other things, for payment of usurious interest made upon this loan from June, 1889, to the time he brought his action. It seems from the pleadings and from parol testimony that he did recover judgment thereon, but the judgment itself was not offered in evidence. Orchard testifies that when the $400 loan was first made, in October, 1883, the agreement was that he should pay thereon interest at the rate of two and one-fourth per cent per month; that he paid this interest for fifteen months, when another $100 was lent to him and a note made for $500, under an agreement whereby he was to pay upon that sum interest at the rate of two per cent per month. This interest he continued to pay for three years, when an agreement was made reducing the rate of interest to one and one-half per cent per month. This he paid until the first note was drawn to the order of the bank, in April, 1889. According to this testimony he must have paid upon notes drawn to the order of Wallace something over $600; so that the entire debt was discharged before the first note was made to the bank, provided Orchard's testimony is to be believed and unless some reason is shown for not applying the payments of interest made by him in discharge of the note. The trial court found for the defendants.

Much of the argument on behalf of appellant is taken up with the propositions that although a national bank has no right to lend upon real estate security, nevertheless, when it is organized to succeed a private bank, it has the right to take that bank's securities as it finds them, and enforce them against the borrowers, and further, that, as against a national bank, the remedies given for usury by the federal statutes are exclusive; that, therefore, as to usurious interest contracted for but not paid; the bank simply forfeits the

interest, and that as to usurious payments of interest an action may be maintained to recover back double the amount paid; but it must be a separate action for that purpose, and payments already made cannot be pleaded as payments upon the principal in a suit by the bank to collect the principal. In the view we take of the case all this may be assumed as true, and yet the judgment of the trial court was correct. It will be remembered that, according to Orchard's testimony, before any note had been made to the bank, enough had been paid by way of interest to discharge the debt. There is a special finding that for a considerable time before the notes were first made to the bank Orchard was aware that they, in fact, belonged to the bank and not to Wallace. There is no finding, however, as to the time when that fact was brought to Orchard's notice. Wallace was the cashier of the bank. The finding seems to be based upon evidence that Orchard frequently paid the interest by checks drawn to bearer or to the order of the bank, and that the business was all transacted in the banking house, sometimes with other officers of the bank than Wallace himself. The matured notes upon their renewal were stamped paid with the bank's stamp, but it is shown that this stamp was used to receipt payment of instruments held for collection only. The notes bore numbers by which the bank designated its own paper, but Orchard did not know the meaning of these numbers. It is questionable whether this evidence was sufficient to sustain the court's finding as to Orchard's knowledge of the ownership of the notes. It is certainly insufficient to enable us to supply a fact not found by the court—the time when Orchard learned of the bank's ownership. If this point is material, the burden of proof would be upon the bank, and it certainly has not satisfied the burden. In reviewing the case we cannot find that at any particular time before the first note was drawn to the bank's order, Orchard knew that Wallace was merely the agent of the bank. Certainly,

until that fact became known to Orchard, he had a right to treat Wallace as the principal. Suppose, by reason of the transaction, any liability had arisen in favor of Orchard. Upon the most familiar principles Orchard might have maintained his action against Wallace, and even after the discovery of the principal he might elect either to sue the principal or the agent. Probably, on ascertaining the facts, he might have elected to treat the bank as the principal and recover from it the penalty under the federal statutes, but he was not required to so elect. Wallace and the bank had voluntarily given the transaction the form of a loan by Wallace individually, and having given it that form the bank could not be heard to say that, as against any right which Orchard might have, the real transaction was different in its nature. This certainly must be true as long as Orchard remained ignorant of the facts. Down to the time, then, when Orchard contracted directly with the bank he was entitled to all the rights which he would have had had the loan been in fact, as it was in form, a loan by Wallace. The bank, upon its organization, and in all subsequent transactions, must be presumed to have known the facts. (*Colby v. Parker*, 34 Neb., 510, and prior cases there cited.) There was no effort made to show the contrary, and it is clear that no effort to do so could have been successful. The bank, therefore, took the first note made directly to it subject to all equities. The indebtedness which it represented had been fully discharged and the note was without consideration.

The plaintiff in reply pleads that certain of the payments alleged in the answer were made more than four years prior to the commencement of the action, and that the defendant is barred by the statute of limitations from setting them up. This plea is not sound. The payments are not pleaded by way of counter-claim or set-off, but by way of payment and discharge. Where a loan is originally usurious, the defense of usury applies to all renewals thereof and

all subsequent securities, and when action is brought upon any, no matter how remote, it is subject to the plea and proof of usury, and when the proof is sufficient, the court will apply all payments of interest upon such usurious loan as payments *pro tanto* of the principal. (*Nelson v. Hurford*, 11 Neb., 465; *Knox v. Williams*, 24 Neb., 630; *Blackwell v. Wright*, 27 Neb., 269.)

The suit brought by Orchard to recover the penalty for usurious payments made subsequently to April, 1889, is pleaded as estopping the defendants from maintaining their present defense. This suit undoubtedly recognized the bank as the lender during the period of the payments for which Orchard sought to recover the penalty, and would probably estop him from pleading that the bank is not now, or has not during that period been, the owner of the notes. But Orchard did not in that action seek to recover the penalty for any period earlier than the time when he first made his note directly to the bank, and that action does not estop him from setting up any matters which he might, in an appropriate action, have set up before the period to which that suit relates. There might be some plausible reason advanced for holding, not that the suit for the penalty was a recognition of the validity of the note upon which the payments were made, but that the giving of the renewal notes to the bank, and the payments of interest thereon, were a recognition of the existence of the debt at the time these transactions began. But in usury cases no such consequences follow. The usury laws are founded upon public policy. A man may deliberately contract to pay usurious interest, may make payments as interest, giving on each occasion a new note for the full amount of the principal, and yet, under the authorities we have cited, when he is sued for the principal, the court will treat all the payments made as credits upon the principal, in spite of his deliberate contract to the contrary. Indeed, in most cases, in order to establish a defense of usury the defendant must plead and

prove that he was a party to the unlawful contract. The general principles of estoppel, for reasons of public policy and for other reasons growing out of the nature of the transactions, do not apply to usury cases.

It is, as usual, asserted that the findings of the trial court are not supported by the evidence. We have stated the purport of Orchard's testimony. It is true he does not produce checks, receipts, or books of account. He does not give with exactness dates of payments, but he avers, and it appears, that Wallace or the plaintiff kept account of the transactions. The plaintiff produces nothing to contradict Orchard's evidence. Wallace himself was upon the stand, and the only evidence in the record tending in any way to contradict Orchard comes from Wallace, and is as follows:

Q. Do you remember the rate of interest which the bank charged on this loan at any time?

A. Yes, sir.

Q. State whether or not at any time it amounted to two and one-half per cent or two and one-fourth per cent.

A. No.

It will be remembered that Orchard's testimony was that two and one-fourth per cent was only charged for a period of fifteen months after the loan was first made, and that this was during a period when everything except Wallace's testimony indicates that it was Wallace himself and not either Wallace & Co. or the bank which charged that rate. This testimony in nowise contradicts Orchard. It is less ingenuous, but discloses no greater regard for the law than Wallace's testimony at another point, where he says that because it was against the law for a national bank to loan on real estate he had made a good many loans in the way this was made, so that in case there was any trouble he could take them up. The record discloses no error, and the judgment of the trial court was as much in accordance with good law as it was with good morals.

JUDGMENT AFFIRMED.

# WALTON E. BURLINGIM, APPELLANT, V. CHARLES E. WARNER ET AL., IMPLEADED WITH NORMAN A. KUHN ET AL., APPELLEES, AND BRENNAN & BAGLEY ET AL., APPELLANTS.

FILED FEBRUARY 20, 1894. No. 5245.

1. **Review**: FINDINGS OF TRIAL COURT. In cases tried to the court without a jury the finding on questions of fact is entitled to the same weight and the same presumption of correctness as a verdict of a jury. The rule is the same whether the case is brought to this court on error or appeal, and applies to all classes of actions.

2. **Mechanics' Liens**: VENDOR AND VENDEE. Where the owner of land completes negotiations for the sale thereof and the vendee takes possession without the consent of the owner and commences the erection of a building, but fails to make the payment of the purchase money, which by the terms of the sale was to be made upon the delivery of the conveyance, and the vendor refuses to make a conveyance or complete the contract without such payment, no agreement in writing having been executed, the vendor is not charged with liens for labor and material used in constructing the building.

3. ———: ———: ESTOPPEL. The vendor, in such a case, when he learned that the building was in progress, warned those engaged in its erection that they were trespassers and that the person with whom they had contracted had no rights in the property, but subsequently visited the premises and complained of the manner in which some of the work was being performed. The circumstances did not justify an inference that the mechanics had relied upon his later acts or undertaken or continued their work on the faith thereof. *Held*, That he was not thereby estopped from asserting his title as against the mechanics' liens.

4. **Mortgages**: CANCELLATION OF RELEASE: MECHANICS' LIENS. A loan and trust company had contracted to lend the vendee money secured by mortgage upon the premises. The mortgage had been delivered and by the trust company recorded, but no money advanced. The agreement was that the money should not be advanced until the vendee procured title and had expended a certain sum in constructing the buildings, and that the vendee should furnish the trust company a bond conditioned

that the buildings should cost a stipulated sum. The vendor refused to convey because of the vendee's failure to pay the purchase money, and the vendee did not furnish to the trust company such a bond as its agreement required. The trust company then executed releases of its mortgage. *Held*, That persons claiming liens growing out of the construction of the buildings had no equity by which they could require a conveyance to be made, the releases of the mortgage canceled and the money advanced thereon and applied to the payment of their claims.

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

*Winfield S. Strawn* and *Charles H. Breck*, for appellants.

*Isaac E. Congdon* and *George F. Gilmore*, *contra*.

IRVINE, C.

Walter E. Burlingim began this suit to foreclose a mechanic's lien upon certain lots in the city of Omaha. Charles E. Warner, Egbert E. French, Norman A. Kuhn, the Central Loan & Trust Company, and a number of other parties were made defendants. The defendants not named claim mechanics' liens upon the property.

The plaintiff in his petition alleged a contract between the defendants Goddard and Seivert and the defendant Warner to erect for Warner two brick dwellings upon the lots in controversy, and the purchase by Goddard and Seivert from the plaintiff of materials which were delivered and used for the purpose of erecting such buildings; that Warner was then the owner of the property "by some contract of purchase from Norman A. Kuhn, in whom was the fee title," and that under said contract Warner had entered into possession of the premises; that under the contract Warner was required to erect the buildings upon the lots; that plaintiff furnished the material and filed a claim of lien as required by law; that while the contract for the erection of the buildings and purchase

of the lots was made with Warner, yet Warner was insolvent and was acting in the whole matter for the defendant French; that Kuhn took from French and Warner a bond conditioned to relieve such realty from mechanics' liens, and to secure the erection of such buildings clear and free of such liens. The petition further avers that the defendant the Central Loan & Trust Company had two certain mortgages from Warner and wife upon said lots in the sum of $7,500, duly recorded, but that no part of the sum secured by said mortgages had ever been paid, but the whole was yet in the hands of the trust company, which company the plaintiff avers has always been ready to pay over the same upon the execution and delivery by Kuhn of a deed to Warner, but that Kuhn refuses unlawfully to deliver such deed. The prayer is for the establishment of the mechanic's lien prior to any claims of Kuhn, Warner, and French; that Kuhn be decreed to deliver a deed to the property, and that the trust company be required to bring the proceeds of the loan into court, and out of that the plaintiff's lien paid, and in any event the property be sold to satisfy the same. There were other prayers incident to the above which need not be specifically stated.

Some of the defendants claiming liens filed cross-petitions in substance similar to the original petition. Other defendants filed cross-petitions alleging, in terms, that Warner acted in the premises as agent for Kuhn. Still others averred ownership generally in Warner without averring any facts which could possibly charge any interest which Kuhn might have with their liens. These differences in the pleadings become unimportant in the view we take of the case.

Warner, by his answer, denied everything except his contract with Goddard and Seivert, and that he was in possession of the property under a contract of purchase from Kuhn.

Kuhn, by answer, averred that he agreed with Warner

upon the terms of a sale, and that the proposed contract was put in writing; that the purchase price of the property was to be $5,000, $1,200 of which was to be paid in cash, but that the contract was never executed; that Warner never paid any of the purchase price; that Kuhn never gave Warner the right to enter into possession, never authorized the construction of improvements upon the property, and expressly told plaintiff while he was delivering material that Warner had no right or interest in the premises.

To this answer the plaintiff replied, denying each material affirmative allegation, and averring that when plaintiff found the title to be in Kuhn he applied to Kuhn and was by Kuhn informed that the premises had been sold to Warner and that French was taken as surety on the contract for the sale of the land and building of the houses, and that Kuhn would consider the sale by Burlingim a good sale, and that thereupon the plaintiff delivered the material; that Kuhn was present at the buildings, gave instructions in regard to the contract, and assumed a superintendency thereof.

The Central Loan & Trust Company answered that it had two mortgages "on file" upon the property and that no part of the sum described by said mortgages had been paid, but denied that it had ever been ready to pay over the same, and averred that it was one of the express conditions of the contract of loan that no money was to be paid until Warner had acquired title in fee-simple to the premises, and had fully constructed the buildings; that Warner had not finished the buildings and had not acquired title to the premises, and that the trust company had declared its agreement at an end and entered of record releases of the mortgages.

The different pleadings, based upon the original petition and the cross-petitions, are numerous and voluminous, but their nature is fairly summarized by saying that they re-

sulted in forming issues upon all the claims substantially similar to those above stated.

A trial was had and a decree rendered finding that neither the plaintiff nor any defendant had any claim or lien upon the interest of Kuhn; that the different mechanic's lien claimants had liens in amounts specified upon such interest as Warner might have in the premises; that Kuhn did not enter into any contract by virtue of which Warner was under obligation to or had a right to erect any building upon the premises, but that the verbal negotiations for such contract were never completed by the performance of the conditions precedent upon which Kuhn was to enter into such contract, and that no written contract had ever been executed. The court declined to adjudicate the question of Warner's equitable rights.

The plaintiff and the defendants claiming mechanics' liens appeal from the decree, claiming that the evidence brings the case within the rule stated in *Bohn Mfg. Co. v. Kountze*, 30 Neb., 719.

On behalf of the appellants the argument is based chiefly upon the state of affairs which the testimony on their behalf tended to establish, and it is urged that the testimony on behalf of Kuhn should not prevail against the contradicting evidence. It is said that upon appeal the case should be tried *de novo*, and that the findings of the trial court are a nullity in an equity case brought here upon appeal. It would seem that this question is so well settled that it should not be again raised. In cases tried to the court without a jury the finding on questions of fact is entitled to the same weight and the same presumptions of correctness as would be accredited to the verdict of a jury. (*Cheney v. Eberhardt*, 8 Neb., 423; *Hartley v. Dorr*, 15 Neb., 451; *McLaughlin v. Sandusky*, 17 Neb., 110; *Roggencamp v. Seeley*, 19 Neb., 170; *Cass County Bank v. Morrison*, 17 Neb., 341; *Bond v. Dolby*, 17 Neb., 491.) A large number of cases might be cited. In this respect the rule is the same

upon appeal as in proceedings in error. (*Newman v. Mueller*, 16 Neb., 523; *Armstrong v. Freeman*, 9 Neb., 11.) Indeed, many of the cases cited were appeals.

The appellants urge a reason, which is at least unique, for departing from the established rule in this case. It is as follows: "If it is urged that any presumptions of correctness attach to the decision of the court below, we cannot only urge that the trial here is *de novo*, but remind this court—and do it in the utmost courtesy to the lower court—that upon the most important principles in mechanic's lien cases, and in almost everything that goes to sustain the law, or to make it what it was intended to be, *remedial*, in short, to give it any efficacy whatever, this court has had to reverse the district court, and do it in no uncertain terms, nor to any limited extent. In justice to these mechanics who earn their living in this way, and to whom, therefore, the legislative power has given this additional remedy for the enforcement of their claims for payment of their labor and material," etc. We should think mechanics and material-men should be satisfied with the privileges granted them by the terms of the mechanics' lien law and the liberal construction this court has always placed upon it, and not seek to arrogate to themselves, because the legislature has granted them so many favors, the benefits of a course of procedure not granted to any other class of litigants, and contrary to principles firmly established in the jurisprudence of the state. The findings of the trial court must, therefore, prevail as to questions of fact, if they have for their support such evidence as would sustain the verdict of a jury, or the findings of a court in a case not relating to mechanics' liens. The search, therefore, must be for evidence which will sustain the findings of the trial court, and not for evidence which might have sustained contrary findings. When so examined, the testimony of Kuhn tends to show that in the winter of 1889 and 1890 he and Warner had

negotiations looking towards the sale of the lots to Warner. Kuhn proposed to sell for $5,000, $1,500 to be paid in cash and the deferred payments to be secured by mortgage. Later, Kuhn agreed to accept $1,200 in cash, and finally agreed that if Warner would build two houses upon the lots of a character agreed upon, Kuhn would accept as security for the deferred payment a mortgage which would be subject to two mortgages, each for $3,500, which would be made for the purpose of procuring money for building. In addition to this a satisfactory bond was to be furnished and given to Kuhn. Contracts embodying the agreement were drawn up but never signed by either party. Warner never paid the $1,200, or any part thereof; on the contrary, he sought, at a later period, to induce Kuhn to accept notes secured by second mortgage on other property in lieu of cash, and that failing, he endeavored to have Kuhn accept the $1,200 out of the loan which was to have been made by the Central Loan & Trust Company, and which the contracts contemplated should be used in constructing the buildings. The latter course Kuhn finally agreed to, but when they went to the agent of the trust company they were met with a refusal to complete the loan because Warner did not tender to the trust company a satisfactory bond. Other reasons were assigned by the trust company; but upon this branch of the case the only important fact is that the trust company did refuse to complete the loan; Kuhn did not receive the $1,200, or any part thereof, and neither contract nor deed was ever delivered. In the meantime, the evidence tends to show Warner had taken possession of the property and begun the construction of the houses. When Kuhn ascertained this, he notified the people at work thereon that they were trespassers, and that Warner had acquired no rights. Kuhn is corroborated in very many particulars, and the trial court was justified in believing him. There is nothing showing any such part performance as would take the case out of the statute of

frauds. According to the testimony on behalf of appellees, Kuhn did not put Warner in possession. Warner simply took possession, and Kuhn persistently denied and controverted his rights, insisting at all times that the payment of $1,200 should be made before any conveyances should be delivered.

There is evidence tending to show that when Kuhn informed the mechanics that they were trespassers, work was stopped, and the following morning Goddard and Seivert came to Kuhn's place of business inquiring if Warner had been there. Before they left, Warner entered. Warner and Kuhn had a conversation which it seems neither Goddard nor Seivert heard. In this conversation Kuhn swears that he told Warner that he would not permit the men to go to work until Warner paid the money, signed the contract, and "got the whole thing in shape." After this it appears that Warner told Goddard and Seivert it was "all right" and directed them to proceed, but there is evidence that Kuhn did not hear that statement. Accepting this evidence as establishing the facts, it is clear that not only was there no privity between Kuhn and the contractors, but there was none between Kuhn and Warner, and that Kuhn was no more responsible than he would be for the acts of a total stranger trespassing upon his property. Goddard and Seivert proceeded with the work, and it is undisputed that Kuhn several times thereafter visited the premises and was aware the work was in progress. The number of times he was present and his acts while at the premises are matters upon which the evidence is conflicting. It is certain, however, that he, on two occasions at least, after the work had progressed to a very considerable extent, made complaint as to the manner in which some of the work had been done and asked that the defects be remedied, explaining that he expected to have a second mortgage on the property and was therefore interested in having the building properly constructed. Kuhn says this state-

ment was made because he was still being led to believe that Warner would eventually perform his bargain. All this, it must be remembered, was after Kuhn had informed the contractors that they were trespassers and that Warner had no rights in the premises. It was after they had undertaken the work and after they had expended a great deal of labor thereon. It is plain that they could not have entered into their contracts with Warner relying upon Kuhn's acts; that they did not begin the work or begin to furnish material in reliance thereon; and there is nothing whatever to show that they continued the work after Kuhn's visits, relying upon his conduct. On the contrary, the inference rather is that they resented his conduct as an officious interference on his part. Were it shown that he by his language or conduct had led them to make the contract, to begin the work, or even to continue beyond a point where they would otherwise have ceased, an entirely different question would be presented. But under the facts as they appear, it cannot be claimed that Kuhn was estopped from setting up his title as against the mechanics' lienors.

So far we have discussed the case solely with reference to the relations between Kuhn and the mechanics' lienors. As against the Central Loan & Trust Company, the lienors claim that the contract for a loan was completed; that the trust company accepted the mortgages and placed them upon record, and is bound, irrespective of other facts, to furnish the money thereon, which should equitably be applied to the discharge of the liens. The applications for the loans are dated the "—— day of April, 1890." They said, among other things: "Title is in the name of Charles E. Warner." "Describe the buildings fully. Nine rooms, two-story and basement brick residences, size 25 by 40 feet, have slate roof, gas, city water, bath, furnace, mantel. Frame barn, size 14 by 16 feet, 12-foot posts." "When were they built? April, 1890." "In what repair at present? Good repair." The title was not in Warner, the

buildings were not then completed, nor had they approached completion. If we are confined to the written contract, these were material misrepresentations which would relieve the trust company from the obligation of advancing the money and entitled it to cancel the contracts. If we can go outside of the writing, there is evidence that there was a verbal agreement that the money should not be advanced until Warner had title, and not then until a certain amount had been expended upon the buildings, and that Warner agreed to furnish a bond conditioned, among other things, that the houses should cost not less than $4,500. As already seen, Warner did not procure title, and there is evidence tending to show that while he tendered a bond it was not one in conformity to the agreement. The loan company was under no obligations then to advance the money and was justified in executing releases of the mortgages and annulling its contract. We have discussed the question solely in view of the evidence tending to sustain the findings of the trial court. There was a great deal of testimony of a different nature. Whether if such other testimony had been believed by the trial court, and whether if the negotiations between Kuhn and Warner had been perfected and reached the status of an enforceable contract a different decree would have been required, are questions not before us for determination.

There was ample evidence to sustain the findings of the trial court. Upon a consideration of that evidence it requires no argument to show that the lienors have no equity either as against Kuhn or the trust company.

JUDGMENT AFFIRMED.

# JOHN L. CARSON, ADMINISTRATOR, ET AL. V. JOHN H. DUNDAS, ADMINISTRATOR.

FILED FEBRUARY 20, 1894. No. 5302.

1. **Ejectment:** PLEADING: POSSESSION. In an action of ejectment an answer denying plaintiff's title, averring title in the answering defendant, and alleging that defendant's title had been divested by legal proceedings and a judicial sale, and that the purchaser had been put in possession and defendant ousted, amounts to a disclaimer of title and a denial of possession.

2. ———: ADVERSE POSSESSION: PURCHASER AT JUDICIAL SALE. Where, in an action of ejectment, title has been adjudicated in the plaintiff, but the defendant in possession decreed to have a lien upon the land and the land ordered sold to satisfy it, the purchaser at a sale under such decree cannot, in a subsequent action of ejectment against him, tack the prior possession of the lienors to his own possession, subsequent to the sale, for the purpose of establishing a title by adverse possession against another who claims under the same source of title as the plaintiff in the action where the sale was had.

3. ———: PURCHASER AT JUDICIAL SALE: LIENS. The purchaser at such a sale takes the title of the plaintiff in the action, in whom title was decreed, freed, however, from the lien to satisfy which the sale was made.

4. **Effect of Tax Sales.** A sale to satisfy tax liens, when the action was brought *in personam* and not against the land itself, passes only the title of the parties to the action and their privies in estate. It does not divest the title of strangers.

5. **Ejectment:** ADMINISTRATORS. An administrator may, during the period of administration, maintain ejectment against the grantees of his decedent's heirs. His possessory interest under chapter 23, section 202, Compiled Statutes, is sufficient to sustain such action.

6. ———: EVIDENCE. When both plaintiff and defendant claim title from a common source, evidence of the derivation of title antecedent to that common source is immaterial.

7. ———: PROOF OF PLAINTIFF'S TITLE. The plaintiff in ejectment need not prove title as against the whole world. It is sufficient if he prove a title good as against the defendant.

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

*George W. Covell* and *Robert W. Patrick*, for plaintiffs in error.

*E. W. Thomas* and *W. H. Kelligar*, *contra.*

IRVINE, C.

Dundas brought this action in ejectment to recover the northwest quarter and the northeast quarter of section 4, township 4, range 14, in Nemaha county. The original defendants were John L. Carson, administrator of the estate of Matthew A. Handley, deceased, McFarland Campbell, and Albert Gillen. In his petition Dundas alleged that Peter B. Borst died intestate in the state of Virginia, April 24, 1882, and that he, Dundas, had been appointed administrator of Borst's estate by the county court of Nemaha county, and had qualified as such, and he claimed the land described as such administrator. Afterwards the heirs of Handley, upon their own motion, were made parties defendant. The cause was removed to the United States circuit court, and subsequently remanded to the district court for Nemaha county. After it was remanded the district court sustained a demurrer to the petition, which went to the jurisdiction of the court and the capacity of the plaintiff to maintain the action. A judgment of dismissal was entered and the case brought to this court, where the judgment of the district court was reversed, this court holding (*Dundas v. Carson*, 27 Neb., 634) that an administrator may maintain ejectment for the recovery of real property for the necessary purposes of administration. That rule thus became the law of the case. After the case was remanded, the administrator and heirs of Handley filed an answer denying plaintiff's title, averring title in themselves by adverse possession, and further averring that

since the commencement of the action all of the premises in controversy had been sold under a decree of the United States circuit court to Henry Harmon, the sale confirmed, a deed made, and the answering defendants evicted by the marshal under an order of the court.

At this point the case may be briefly disposed of so far as it concerns Handley's administrator and heirs who are among the plaintiffs in error. Their answer amounted to a disclaimer of title. It was, in substance, a denial of plaintiff's title and an averment of title in themselves by adverse possession, and then an averment that that title had been divested by judicial sale and vested in Harmon thereby; in other words, they pleaded that they no longer had title and that they were no longer in possession, and this removed all issues in the case except those based upon plaintiff's count for rents and profits. Upon these issues there was no finding or judgment against Handley's heirs or administrator. They have nothing whatever to complain of here.

Immediately after the cause was remanded Henry Harmon and John N. H. Patrick applied to be made parties defendant, and their application being sustained, filed separate answers.

Harmon, after specific denials, amounting, in effect, to a general denial of the allegations of the petition, averred title by adverse possession in himself of the northwest quarter. Then he averred conveyances of all the land in controversy from the widow and heirs of Peter Borst to John W. Borst, one of those heirs. The widow was also Borst's administratrix in Virginia, the place of his domicile. Harmon's answer then alleged that in 1885 John W. Borst brought an action in ejectment in the circuit court of the United States against Handley's administrator and heirs to recover said land; that all the defendants answered, and that it was in that action determined that John W. Borst was entitled to possession, and that the defend-

ants had a lien upon the land for $2,700, for taxes paid, and because of the ownership of a judgment which was a lien upon the land, and that if said lien should not be paid within twenty days the land was ordered sold to satisfy it; that John W. Borst did not pay the lien; that the land was sold under order of the court to Harmon, the sale confirmed, and a deed made and delivered to Harmon, who was put in possession on January 18, 1888.

The answer of Patrick was similar to that of Harmon, except that it averred a conveyance of the northeast quarter by Harmon to Patrick, and asserted title in Patrick to that quarter.

A jury was waived and the cause tried to the court, which found title to be in the estate of Peter B. Borst, subject to the amount of the judgment of the United States circuit court. It subrogated Harmon and Patrick to the lien of Handley's estate, and ordered possession to be given to Borst's administrator, upon the condition precedent, however, that he should first pay to Harmon on account of the northwest quarter one-half of the lien decreed by the federal court, together with interest, and less "the rents and profits of said land for four years, amounting to $894; and to Patrick, one-half of said lien, with interest, less the rents and profits of the northeast quarter for four years, amounting to $620." Both Harmon and Patrick prosecute error.

Both Harmon and Patrick claim title under the proceedings in the federal court, which was proved substantially as alleged in their answer. They have no other paper title. The action in the federal court was by John W. Borst, who had the title of Peter Borst's widow and heirs. The administrator and heirs of Handley were all parties to that action and were bound by the decree. The decree in that case awarded possession to John W. Borst, and, in effect, though not in express terms, found the title to be in him as against Handley's estate. The sale made under the decree, in pursuance of that portion of it establishing a lien in

favor of the Handley estate, vested in Harmon, and subsequently by his conveyance of a portion of the land to Patrick, in the latter, all the title and interest of the parties to the federal case, and no more; that is, it vested in Harmon and Patrick the title of Peter Borst's heirs and the interest of Handley's heirs and administrator; but Borst's administrator was not a party to that action, and such interest as he may have had in the land was not bound by that decree nor divested by that sale.

Harmon and Patrick pleaded adverse possession and endeavored to tack to their own possession, subsequent to the judicial sale, the possession of Handley and his heirs prior thereto. They cannot so unite these possessions. Their title is derived through the judicial sale in pursuance of the decree of the federal court. That decree adjudicated title in Borst's heirs, or in their grantee, and against Handley's representatives and heirs. What they took was the Borst title so adjudicated, with the Handley lien discharged and satisfied by the sale. Claiming under those proceedings, they cannot be heard to say that they claim under the Handley title. They claim no conveyances from the Handleys, and there is no privity between them and the Handleys.

It is contended that the Handley lien being for the most part for taxes, it was superior to all other liens or claims, and that a sale therefor passed the absolute title to the land regardless of the parties to the action. This is not true. The proceedings were not *in rem*, but *in personam*. The decree bound the parties to the action and their privies, but no others, and the sale and deed thereunder vested in the purchasers only such estate as John W. Borst had (Code of Civil Procedure, secs. 499, 500), with the additional features that the decree had, as against Borst, conclusively terminated the Handley claim, and the sale satisfied the Handley lien. Regarded as a proceeding by the Handleys to foreclose a tax lien, the sale only vested in the pur-

chasers the title of the adverse party to the action, the proceeding being against the owner and not against the land itself. (Comp. Stats., ch. 77, art. 5, sec. 6.)

The case, then, resolves itself to this: Harmon and Patrick are the privies in estate of John W. Borst, and are entitled to the benefit of the adjudication of title in favor of Borst against the Handleys. But such rights as Peter Borst's administrator had against his heirs have not been adjudicated, and the case, by the proceedings subsequent to the former judgment of this court therein, became substantially an action in ejectment by Peter Borst's administrator against the representatives of his heirs. It is true that Peter Borst's administratrix, appointed in the state of his domicile, was a party to the action in the federal court, but such rights as the personal representative had in the land were possessed by the administrator appointed by the courts of this state and not by one appointed in the state of the decedent's domicile. It is not probable that that proposition would be controverted, and no argument is required for its support.

We are thus brought to the consideration of a single question: May an administrator maintain ejectment against the heirs of the decedent in possession? The former opinion in this case, 27 Neb., 634, decides that an administrator may maintain ejectment against strangers. Compiled Statutes, chapter 23, section 202, provide: "The executor or administrator shall have a right to the possession of all the real as well as personal estate of the deceased, and may receive the rents, issues, and profits of the real estate, until the estate shall have been settled, or until delivered over, by order of the probate court, to the heirs or devisees, and shall keep in good, tenantable repair, all houses, buildings, and fences thereon which are under his control." There is no special procedure provided for an administrator's enforcing the right so given. The supreme court of California, construing a statute substantially similar to our own,

has held, in a case cited by Judge COBB in the former opinion in this case, that during administration an administrator may recover possession from the grantee of the heirs in an action of ejectment. The case is in all material aspects in point and we are entirely satisfied with the reasoning and conclusions of that court, which are as follows:

"It is contended on the part of the appellant that plaintiff, as administratrix, is entitled to the possession of the premises of the deceased during and for the purposes of administration. On the other hand, the respondents insist that the defendants, claiming under the devisee in the will, are entitled to the possession; that before the administratrix can recover, she must allege and show that the possession is required by her for the purposes of administration, viz., to pay debts, etc.

"We are of opinion that the court below erred in granting the new trial. During the administration, and until distribution, partial or final, the executor or administrator is entitled to have the possession of the property left by the deceased. The statute authorizes an heir to recover possession as against third persons, but not as against the executor or administrator. The district court, in an action of ejectment, could not try and determine whether there will be debts to be paid, or expenses of administration, or past sickness, or funeral charges. The consideration of those matters is exclusively within the jurisdiction of the probate court. The executor or administrator cannot be kept out of the property until the probate court shall have settled his accounts, and the debts and expenses have been ascertained, and then, and not till then, have his action to recover possession; but immediately upon the issuance of his letters, he is entitled to have the possession of the estate of deceased, to the end that the rents and profits, and, if need be, the proceeds of the property itself, be applied to the payment of debts and charges, and the balance, if any, distributed, and by him delivered to the parties entitled.

The grant of letters by the probate court is conclusive upon other courts as to the necessity for administration." (*Page v. Tucker*, 54 Cal., 122.)

Errors are assigned upon the admission in evidence of certain records and instruments through which title was traced to Peter Borst. This evidence was all immaterial, and, the trial being without a jury, error cannot be predicated upon its admission. The pleadings, as well as the evidence, show that both sides claimed under Peter Borst, the plaintiff, as his administrator; Harmon and Patrick, through the judicial sale. Claiming title from a common source, it was not necessary for the plaintiff to prove title antecedent to that common source. A party is estopped from denying a title under which he claims to derive his own right to the premises. (*Barton v. Erickson*, 14 Neb., 164; *Gaines v. New Orleans*, 6 Wall. [U. S.], 715; *Merchants Bank of St. Louis v. Harrison*, 39 Mo., 433.) This rule holds good where the defendant traces title through a sheriff's sale. (*Feimster v. McRorie*, 1 Jones' Law [N. Car.], 547.) The rule requiring the plaintiff in ejectment to recover on the strength of his own title does not mean that he must show a good title against all the world. It is sufficient if he shows a right to recover against the defendant. (*Gaines v. New Orleans, supra; Garrett v. Lyle*, 27 Ala., 589.) The title is shown to be in Harmon and Patrick, subject, however, to the possessory interest of the administrator, which is sufficient to sustain the action.

JUDGMENT AFFIRMED.

## EUGENE MOORE, AUDITOR, V. JOSEPH GARNEAU, JR., COMMISSIONER GENERAL, ET AL.

FILED MARCH 6, 1894. No. 6752.

1. **Vouchers.** The term "voucher," when used in connection with the disbursement of money, means a written or printed instrument in the nature of a bill of particulars, account, etc., which shows on what account and by what authority a particular payment has been made. (*State v. Moore*, 36 Neb., 579.)
2. ———. *Held*, That the voucher finally presented to the state auditor in this case for audit and allowance conforms to the above definition, and is in legal form.
3. **World's Columbian Exposition:** COMMISSIONER GENERAL: POWER TO MAKE CONTRACTS. By virtue of chapter 41, Session Laws, 1893, the commissioner general for this state at the World's Columbian Exposition, appointed under and in pursuance of said act, possessed the power or authority to contract for and purchase all property, as well as employ all labor, necessary for the successful presentation of the products, resources, and possibilities of this state at said exposition, and the state, in the absence of a showing of collusion or fraud, is liable to the person performing such labor, or furnishing said property, at the price stipulated therefor in the express contract entered into with the commissioner general.

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

*George H. Hastings, Attorney General,* and *C. A. Atkinson*, for plaintiff in error.

*Frank T. Ransom, contra.*

NORVAL, C. J.

This was an appeal to the district court of Lancaster county from the decision of the auditor of public accounts in rejecting, in part, a claim upon the state treasury in favor of the Henry Dibblee Company. Upon the trial the district court reversed the decision of the auditor, and en-

tered a finding in favor of the claimant for the sum of $3,280, and directed the auditor to issue a warrant upon the treasury for said sum in payment of said claim of the Henry Dibblee Company. The auditor has brought the cause into this court for review by petition in error.

The record before us discloses that Joseph Garneau, Jr., the commissioner general for this state at the Columbian Exposition, entered into a contract with the Henry Dibblee Company of Chicago, whereby the latter agreed to furnish certain furniture, fixtures, and decorations required for the Nebraska state building and the exhibits of this state in the various exposition buildings, for the stipulated sum of $4,000. In pursuance of said contract all of said furniture, fixtures and decorations were furnished and delivered. Subsequently, under other contracts with the commissioner general, the Henry Dibblee Company furnished and delivered on the exposition grounds for the use of the state in making its exhibits certain other furniture and property for the stipulated price of $2,856. The aggregate of the several purchases is $6,856, on which there has been paid $3,628, and no more. The claim for the balance of the account was filed with the auditor, who allowed thereon $872, and rejected the remainder of the claim. A warrant was drawn for said last named sum, which the claimant declined to accept, but prosecuted an appeal to the district court.

The answer filed by the auditor in the district court alleges, in substance:

First—That all the goods and furniture described in the petition, and for which voucher was presented to the auditor, were not purchased of the Henry Dibblee Company.

Second—That the voucher filed with the auditor was not in proper form.

Third—That the prices agreed upon by and between the claimant and the commissioner general "are extravagant, unjust, illegal, and unwarranted, and greatly in excess of the value of the goods, furniture, and property."

Upon the trial in the court below the auditor did not offer any proof to establish the first defense interposed. On the contrary, the evidence introduced by the other side conclusively established that each and every item specified in the claim presented to the auditor was actually furnished and delivered by the claimant to Mr. Garneau on the exposition grounds, and was used by the latter in furnishing and decorating the Nebraska state building and in arranging and making the display of the several exhibits of this state at the fair. The property and decorations so furnished were necessary for the proper carrying into effect the act of the legislature. Nothing further under this branch of the case need be said.

As to the form of the voucher submitted for audit and allowance, we do not understand that the auditor now seriously urges any objection. As first filed in the auditor's office the voucher was not in proper shape, in that there was no itemization of the articles furnished and the prices charged for each article. The following is a copy of the account:

"THE STATE OF NEBRASKA,

"To HENRY DIBBLEE CO., Dr.

"To itemized account and receipted bill hereto attached for merchandise furnished as therein stated:

| | |
|---|---|
| To item for educational exhibit (A) | $1,978 |
| To item for state building, including painting of all the walls and wood work (B) | 4,000 |
| Item of extras for furniture for dairy, forestry, educational, and agricultural exhibits, and extra furniture for state building (C) | 878 |
| | $6,856 |
| Less cash paid | 3,628 |
| | $3,228 |

"To be charged to appropriation for Nebraska exhibit at World's Columbian Exposition, approved April 8, 1893.

"I hereby approve and allow the above claim in the sum of $3,228, and certify the same to be in all things just and correct, and that it is due the party named herein, and is wholly unpaid. JOS. GARNEAU, JR.,

"*Commissioner General Nebraska Exhibit, World's Columbian Exposition.*"

For the $1,978 and $4,000 charges no list of the goods furnished making up the same with the prices charged accompanied the voucher, hence the auditor would not have been justified in allowing the claim as first presented. In *State v. Moore*, 36 Neb., 579, this court held that an original voucher, when used in connection with the disbursement of money, means a written or printed instrument in the nature of a bill of particulars, account, etc., which shows on what account and by what authority a particular payment has been made. (*People v. Swigert*, 107 Ill., 495.) Subsequently, at the request of the auditor, the claimant brought itself within the above decision, for a detailed itemized bill was furnished the auditor, which was attached to the original voucher presented for allowance. The voucher, with the exhibits thereto attached, when finally acted upon, was sufficient.

There was evidence before the trial court, given by credible witnesses, which fully justified the contention of the auditor, that many of the prices charged by the claimant greatly exceeded the fair and reasonable market value of the goods and property furnished, and that under ordinary circumstances they ought to, and could, have been purchased at a sum which would have resulted in a saving to the state of several hundred dollars. There is also evidence which tends to show that goods of the character and class furnished the commissioner general by the claimant, as well as most other kinds of goods, were held and sold in Chicago during the exposition at extravagant prices.

Mr. Garneau in his testimony states, with reference to the purchase of the property, that he submitted plans and specifications for estimates and bids to five persons in Chicago and two in Omaha; that the Omaha firms stated they could not offer a bid, from the fact they could not do so on the details without sending a man to Chicago to look it up; that three of the Chicago parties absolutely declined to bid, stating that they had more work than they could get done; that bids were received from two firms, that of the Henry Dibblee Company being $80 lower; that he purchased the property described in the voucher at the lowest possible figure for which the goods could be procured at the time the same were bought; and that the bill as rendered the state was the contract price agreed upon between the witness and the claimant. Upon the conflicting testimony the trial court decided against the state. As already stated, all the articles charged in the voucher were furnished under express contracts, the prices being at the time agreed upon. There is no charge of fraud or collusion between Mr. Garneau and the claimant in the transaction, nor is there a particle of evidence in the record upon which such a charge could be predicated. Mr. Garneau was the representative or agent of the state, and as such, by virtue of the act under which he was appointed, possessed the power or authority to purchase the goods in question, as well as appoint assistants and employ such clerical and other help deemed necessary for the presentation of the work. The state, in the absence of fraud, is bound by the contracts under which the property was furnished. It is an elementary rule that a principal is bound by the acts and contracts of his agent within the scope of the agent's authority; and we do not know of any reason why the same rule should not apply to the state as well as an individual. Had no prices been agreed upon, then the state would have been liable for the fair market value of the goods, and no more. The decision of the district court is

AFFIRMED.

## PATRICK S. REAL V. PETER HONEY.

FILED MARCH 6, 1894. No. 5201.

1. **Names of Parties:** AMENDMENT OF PLEADINGS. Where a plaintiff to an action is designated in the pleading and process by the initials of his Christian name, it is not error for the court to allow him to amend by inserting his full Christian name.
2. **Dismissal:** NAMES: PLEADING: AMENDMENT. An action should not be dismissed because the plaintiff's full first name is omitted from the title of the cause, until an opportunity has been given the party to correct the defect by amendment.
3. **Bill of Exceptions:** AUTHORITY OF JUSTICE OF PEACE TO SIGN: APPEAL: REVIEW. The statute confers no authority upon a justice of the peace to sign a bill of exceptions in an action tried before him without a jury, nor can the evidence adduced in such a case be reviewed in the district court on petition in error, for the purpose of determining whether it is sufficient to sustain the judgment.
4. **Taxation of Costs:** REVIEW: MOTION. In order to review the question of taxation of costs, a motion to retax the costs must be made in the trial court, and a ruling obtained thereon by that court.

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

The facts are stated in the opinion.

*Charles H. Sloan*, for plaintiff in error:

The motion of defendant to dismiss the case for want of a proper party plaintiff was properly overruled by the justice. (*Burlington & M. R. R. Co. v. Dick*, 7 Neb., 246.)

The taxation of costs is not a judicial action, in the proper sense of the term, but is ministerial; and without a motion to retax, which would call into action the judicial power, the taxation cannot be reviewed upon error. (*Ross v. Harper*, 99 Mass., 175; *Barnes v. Smith*, 104 Mass.,

363; *Abbott v. Matthews*, 26 Mich., 176; *Stricker v. Holtz*, 50 Ia., 291; *Woods v. Colfax County*, 10 Neb., 556; *Cozine v. Hatch*, 17 Neb., 606; *Whittall v. Cressman*, 18 Neb., 511; *Wilkinson v. Carter*, 22 Neb., 189; *Jacobs v. Morrow*, 21 Neb., 239; *Linton v. Housh*, 4 Kan., 541; *Hoagland v. Van Etten*, 31 Neb., 292.)

*E. E. Hairgrove* and *Ong & Jensen, contra.*

NORVAL, C. J.

This was an action brought by the plaintiff in error in the name of P. S. Real against the defendant in error before a justice of the peace, claiming in his bill of particulars a judgment for $15. On the return day of the summons, by consent of parties, the trial was postponed until a subsequent date, it, at the time, being agreed that the defendant should not thereby waive any right which he might have to object to the jurisdiction of the court. On the day to which the action was adjourned, the defendant filed a motion objecting to the jurisdiction of the justice, for the reason "that there is no proper plaintiff to said cause, in that said Real, alleged plaintiff herein, has not commenced this action in his proper name as provided by section 23 of the Code of Civil Procedure," and praying that the suit be dismissed. The motion was denied, and thereupon plaintiff asked permission to amend the title of the cause by inserting his Christian name in full, which request was granted by the justice, and the title was accordingly amended to read "Patrick S. Real v. Peter Honey." The defendant then filed a bill of particulars denying that he was indebted to the plaintiff in any sum, and pleading a set-off in the sum of $32.50, for which amount he prayed judgment against the plaintiff. A trial was had to the justice, a jury being waived, who found that there was due the plaintiff from the defendant the sum of $2.50, and that there was due the defendant on his set-

off a like sum of $2.50. A judgment of dismissal was entered, and one-half the costs were taxed to each party.

The defendant prosecuted error to the district court, alleging in his petition the following grounds for reversal of the judgment:

1. The overruling of the motion to dismiss for want of proper party plaintiff.

2. In finding that the defendant was indebted to the plaintiff in the sum of $2.50.

3. In taxing one-half of the costs to the defendant.

Upon the hearing the district court sustained each of the assignments of error, reversed the judgment, and ordered that the case be retained in that court for trial. Plaintiff in error excepted, and brings the case here on error.

The first question is, whether the justice erred in refusing to dismiss the case because the plaintiff sued by the initial letters of his Christian name. We think not. Ordinarily, the full Christian names of the parties to a suit must be given. An exception to the rule is where the action is brought upon a promissory note or other written instrument, and the party thereto is designated by the initials or some contraction of his Christian name. In which case, under section 23 of the Code of Civil Procedure, it is sufficient to use the initials or contraction of the Christian or first name of the party. But this is not an action upon a written instrument, therefore plaintiff's first name should have been given in full in the summons and the papers in the case. This defect, however, was cured by the justice permitting an amendment to be made by inserting the full Christian name of the plaintiff.

Section 144 of the Code provides that "the court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name, or a mistake in any other respect, or by inserting other allega-

tions material to the case, or, when the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the facts proved." Under the foregoing section the justice had ample power to allow the amendment in question. The statute authorizes a pleading, process, or proceeding to be amended at any time by correcting a mistake in the name of a party.

In *Martin v. Coppock*, 4 Neb., 173, the summons was issued in the name of Isaac Coppock and served upon Martin. Afterwards the summons was amended by changing the name "Isaac" to "Isaiah," to conform to the pleading. It was held that the amendment related back to the time of service of the writ.

In *Reed v. Beardsley*, 6 Neb., 493, the action was brought against the members of a partnership, and on the trial it was discovered that the transaction was with one member of the firm in his individual capacity. The court allowed the filing of an amended petition, changing the title of the action. On error to this court the ruling was sustained.

*Haskins v. Citizens Bank*, 12 Neb., 39, was an action brought by a partnership before a justice of the peace. There was a variance in the title between the summons and bill of particulars. It was held that the justice was authorized to allow the bill of particulars to be amended so as to conform to the summons.

It is plain that every court has the power to permit any pleading, process, or proceeding to be amended, whenever justice will be thereby promoted; and in every case, before a court makes an order dismissing an action because the full Christian name of the plaintiff has not been written in the pleading or process, opportunity should first be given the party to correct the omission by amendment. As the defect in the case at bar was cured by amendment immediately upon the objection being made, the justice did not err in overruling the defendant's motion to dismiss.

Whether the justice erred in finding that the defendant

was indebted to the plaintiff in the sum of $2.50 could only be determined upon an examination of the evidence upon which the finding was based, and there is no bill of exceptions preserving the testimony. Besides, it is well settled in this state that a justice of the peace has no power to settle a bill of exceptions in a case tried before him without a jury. Therefore, in the case at bar, had the evidence been incorporated in a bill of exceptions, neither this court, nor the court below, could have reviewed the same for the purpose of ascertaining whether it supported the finding and judgment of the justice. (*Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520, and cases there cited.) It will be presumed that there was ample testimony before the justice to sustain the judgment. Error is never presumed, but must appear affirmatively from an inspection of the record.

Lastly, it is claimed that the taxing of a portion of the costs against the defendant was error. Whether this is true or not we are unable to determine, since no motion to retax the costs was made before the justice. It has been often decided that before a judgment for costs will be reviewed by an appellate court, a motion to retax must be made in the trial court and a ruling obtained thereon by that court. (*Cozine v. Hatch*, 17 Neb., 694; *Whitall v. Cressman*, 18 Neb., 508; *Wilkinson v. Carter*, 22 Neb., 186.)

There being no reversible error in the proceedings in the justice court, the judgment of the district court is therefore reversed, and that of the justice of the peace is affirmed.

REVERSED.

## JAMES BARRY V. PATRICK BARRY.

FILED MARCH 6, 1894. No. 5328.

1. **Appeal from County Court: FAILURE TO FILE TRANSCRIPT: DISMISSAL.** In case an appeal is taken from the county court to the district court, except in matters of probate jurisdiction, the appellant must file, or cause to be filed, with the clerk of the district court of the proper county a transcript of the proceedings on or before the thirtieth day after the rendition of the judgment, and in case such transcript is not so filed within the thirty days, the district court, upon motion of the appellee, may dismiss the appeal and remand the cause to the county court, to be there proceeded in as if no appeal had been taken.
2. **Review: AFFIDAVITS: MOTIONS: BILL OF EXCEPTIONS.** Affidavits used on the hearing of a motion in the district court, to be available in this court, must be incorporated in a bill of exceptions.

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

*Jay & Beck*, for plaintiff in error.

*John T. Spencer, contra.*

NORVAL, C. J.

On the 9th day of December, 1891, defendant in error obtained a judgment in the county court of Dakota county against plaintiff in error for the sum of $193.18, with costs. On the 14th day of December, plaintiff in error filed with said court an appeal undertaking, and the same was duly approved. On the 12th day of January following, a transcript of the proceedings was filed in the district court. The defendant in error filed in said court a motion to dismiss the appeal on the ground that the transcript was not filed within thirty days after the rendition of the judgment. The court sustained the motion, dismissed the ap-

peal, and remanded the cause to the county court for proceedings therein as though no appeal had been taken. This ruling is before us for review.

This court has more than once held that in order to perfect an appeal taken from the judgment of a justice, the appellant must file a transcript of the proceedings in the office of the clerk of the district court of the proper county within thirty days after the rendition of the judgment, and in case the same is not so filed, the district court is authorized, on motion of the appellee, to dismiss the appeal and remand the cause to the justice court, to be there proceeded with as if no appeal had been taken. (*Slaven v. Hellman*, 24 Neb., 646; *Converse Cattle Co. v. Campbell*, 25 Neb., 37; *Lincoln Brick & Tile Works v. Hall*, 27 Neb., 874.)

Section 26, chapter 20, Compiled Statutes, relating to appeals from county courts, provides that "either party may appeal from the judgment of the probate [county] court, or prosecute a petition in error, in the same manner as provided by law in cases tried and determined by justices of the peace," etc. Under the foregoing provision an appeal from a judgment of the county court must be taken and perfected in the same time as allowed by law for appeals from judgments of justice courts; that is to say, the appeal undertaking must be filed within ten days after judgment is entered and the transcript of the proceedings must be delivered to the clerk of the district court on or before the thirtieth day after the rendition of the judgment. In this case the appeal was not perfected in time, since plaintiff in error did not file his transcript in the district court until the thirty-fourth day. (*Maggard v. Van Duyn*, 36 Neb., 862.)

Plaintiff in error contends that the affidavit of Mell C. Jay, copied into the transcript prepared for this court, contains sufficient facts to excuse the failure to file the transcript in the statutory period. The affidavit referred to cannot be considered by us, for the reason that the same

is not made a part of the record of the case by a bill of exceptions. We have no means of knowing whether the affidavit was called to the attention of the district court on the hearing of the motion, or whether any evidence was produced on such hearing. Often this court has decided that affidavits used in support of a motion in the trial court will not be considered in the reviewing court, unless the same are embodied in a bill of exceptions. This rule cannot be departed from. (*Tessier v. Crowley*, 16 Neb., 369; *Bradshaw v. State*, 17 Neb., 147; *Graves v. Scoville*, 17 Neb., 593; *Olds Wagon Co. v. Benedict*, 25 Neb., 372; *Maggard v. Van Duyn, supra; Aldrich v. Bruss*, 39 Neb., 569.)

The district court did not err in dismissing the appeal, and the decision is

AFFIRMED.

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## CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. J. N. SHEPHERD.

FILED MARCH 6, 1894. No. 5194.

1. **Vendor and Vendee:** EASEMENT: RIGHT OF GRANTEE TO DAMAGES. A grantee of land which is incumbered by a right of way or other easement takes it burdened with such incumbrance, and will not, as a rule, be entitled to recover damage therefor.
2. **Trespass:** PLEADING. In order to maintain an action for trespass to land it must appear either that the plaintiff was the owner of the premises or in possession thereof at the time of the commission of the acts charged.
3. **Pleading:** MOTION FOR SPECIFIC STATEMENT. The office of a motion for a more specific statement is not to cure fatal defects in pleadings, but to secure definite statements in pleadings which are sufficient in substance but not in form.
4. **The failure to allege a material fact** raises a presumption that it does not exist.

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

*M. A. Low* and *W. F. Evans*, for plaintiff in error.

*D. D. Davis* and *Daniel F. Osgood, contra.*

POST, J.

This was an action in the district court of Pawnee county against the Chicago, Kansas & Nebraska Railway Company to recover for damage to lots 10, 11, and 12 in block 8, in Hazel's addition to Pawnee City. Afterwards an amended petition was filed against said defendant and the plaintiff in error, the Chicago, Rock Island & Pacific Railway Company.

Plaintiff, in his amended petition, states that during the year 1886 the Chicago, Kansas & Nebraska Railway Company built and constructed a railroad in Pawnee City, and in the building, operation, and construction of said railroad a large portion of Third street is occupied and used; that blocks 10, 11, and 12, in said city, are owned by the said company, and that said railroad is constructed upon the same; that said railway company has built, constructed, and operated its railroad and stock yards upon, over, and across said block 11; that Walnut street in said city extends north and south along the east side of blocks 8 and 11, and in the building and construction of its railroad said company threw up and built a large embankment, entirely obstructing said street at a point about 200 feet south of the southeast corner of lot 12 in said block. It is further alleged "that the plaintiff is the owner in fee-simple of lots Nos. 10, 11, and 12 in said block 8, his dwelling house being situated on the south end of lot 12 in said block, which he occupies for his residence," and that ever since the construction of said railroad and stock yards said yards have been used almost continuously day and

night, and have been occupied by large numbers of cattle and hogs, and have been permitted to become noisome, unclean, and unhealthy, and have given out a strong and unhealthy stench, contaminating the air and rendering his said residence almost uninhabitable by reason thereof, and that "by reason of the bellowing of the cattle and the noise of the hogs inclosed in said yards during the night the rest of this plaintiff and his family is disturbed, as is the peace and comfort of his home by the same noises during the day, as well as by the shouts and noise of the loading and unloading of said stock into defendant's cars," and that "by reason of the smoke and soot from the defendant's engines, the noise of the bell and whistle, and of the passing of defendant's cars on said railroad at all hours of the day and night said premises have been made unfit for residence purposes; also, by reason of the closing of said Walnut street, as aforesaid, traffic has been entirely cut off from said street and diverted therefrom. By reason of which the plaintiff has suffered pecuniary loss, and his said property has been diminished in value, and he has been otherwise injured, to his great damage, in the sum of $500." It is further alleged that the Chicago, Rock Island & Pacific Railway Company claims to have purchased and become the owner of said railroad and claims to be operating the same.

The Chicago, Kansas & Nebraska Railway Company was not notified of said action, and did not enter its appearance therein.

The answer of the Chicago, Rock Island & Pacific Railway Company, in addition to a general denial, contains an allegation that the railroad referred to in the amended petition was constructed by the Chicago, Kansas & Nebraska Railroad Company, a corporation of the state of Nebraska, and that afterwards said railroad company sold and conveyed the same to the Chicago, Kansas & Nebraska Railway Company, a corporation of Kansas and Nebraska, and

that during all of the times mentioned in plaintiff's amended petition the railroad and stock yards were in possession of, and were being operated by, the St. Joseph & Iowa Railroad Company, under a lease executed by the Chicago, Kansas & Nebraska Railway Company. It also alleges the adoption of an ordinance by the city, which is set out at length, and which authorizes the use of the streets described in the petition by the Chicago, Kansas & Nebraska Railroad Company, its successors and assigns.

On the trial of the action in the district court, a verdict was returned for the plaintiff below, upon which judgment was rendered. The plaintiff in error, after moving unsuccessfully for a new trial, has removed the case into this court by petition in error.

The plaintiff below was permitted, over the objection of the defendant therein, to prove that the lots in controversy were worth $1,000 immediately prior to the construction of the said road, and that immediately after the completion of the tracks and the stock yards they did not exceed $500 in value. The ground of the objection to this evidence is that the right of action, where land is taken or permanently injured in the construction of railroads, or by other agencies of the state, is personal and does not run with the land.

From an inspection of the petition it will be observed that it is not alleged therein that the plaintiff owned the lots described when the road was constructed in 1886. The only allegation is that "he is [at the date of the filing the petition, in March, 1890] the owner of said lots and occupies them as a residence." A grantee of land which is subject to a right of way or other easement takes it burdened with such incumbrance, and is not, as a rule, entitled to recover damage therefor. (*Wadhams v. Lackawanna & B. R. Co.*, 42 Pa. St., 303; *Beale v. Pennsylvania R. Co.*, 86 Pa. St., 509; *Davis v. Titusville & O. C. R. Co.*, 6 Atl. Rep. [Pa.], 736; *Chicago & A. R. Co. v. Maher*, 91 Ill., 312;

*Chicago & E. I. R. Co. v. Loeb*, 118 Ill., 203; *Piper v. Union P. R. Co.*, 14 Kan., 568; *Dunlap v. Toledo, A. A. & G. T. R. Co.*, 50 Mich., 470; *Milwaukee N. R. Co. v. Strange*, 63 Wis., 178; *Indiana, B. & W. R. Co. v. Allen*, 100 Ind., 409.)

It is conceded that had the Chicago, Kansas & Nebraska Railroad Company been a trespasser in the first instance, and continued to occupy the streets without authority from the city, a different question might have been presented; but the use of the street by the railroad company for its tracks was fully authorized by the ordinance, hence the right of action for injury to the property described accrued to the owner when the road was constructed, in the year 1886. A recognized rule of pleading is that the complaint in an action for trespass must allege that the plaintiff was the owner or in possession when the trespass was committed. (*Winkler v. Meister*, 40 Ill., 349; *Edwards v. Noyes*, 65 N. Y., 125; 2 Boone, Pleading, p. 442.) Counsel who appear for the defendant in error in this court frankly admit that the petition would have been held insufficient had it been assailed by a motion for a more specific statement. Where a pleading is sufficient in substance but wanting in form, the remedy is by motion (*Farrar v. Triplett*, 7 Neb., 237); but where the petition lacks an essential allegation, without which it fails to state a cause of action, objection on that ground may be raised by demurrer, or by motion for new trial. Another rule is that where the pleader has failed to state a material fact, the presumption is that it does not exist. (*Burlington & M. R. R. Co. v. York County*, 7 Neb., 487; *McClure v. Warner*, 16 Neb., 447.)

Our conclusion is that under the allegations of the petition the plaintiff was not entitled to recover damages for the appropriation of the street by the defendant company for its tracks, and that the submission of that question to the jury, over the objection of the defendant, was error. There are other errors assigned, but the record of the case

is of so confusing a character as to leave us in doubt as to what questions were submitted. We are therefore unable to say whether the rulings complained of, if erroneous, are prejudicial to the plaintiff in error. For reasons above stated the judgment will be reversed and the cause remanded for further proceedings in the district court.

REVERSED AND REMANDED.

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CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. JOSEPH BACHMAN.

FILED MARCH 6, 1894. No. 5193.

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

*M. A. Low* and *W. F. Evans*, for plaintiff in error.

*D. D. Davis* and *Daniel F. Osgood, contra.*

POST, J.

The issues and essential facts of this case are identical with the case of *Chicago, R. I. & P. R. Co. v. Shepherd*, 39 Neb., 523, decided at this session, and for reasons stated therein the judgment of the district court is

REVERSED.

## RUPERT W. BRADY V. STATE OF NEBRASKA.

FILED MARCH 6, 1894. NO. 6646.

**Witnesses:** ATTORNEY AND CLIENT: CONFIDENTIAL COMMUNICATIONS. An attorney will not be permitted to disclose confidential communications made to him by a client while the relation of attorney and client continues; but communications voluntarily made to him after the confidential relation has terminated may be proved, although they are the same in substance as given while the relation existed.

ERROR to the district court for Lancaster county. Tried below before TIBBETS, J.

*Stearns & Strode*, for plaintiff in error:

A communication is not privileged unless the person to whom it is made is acting for the time being in the character of a legal adviser of the person who makes it. The communication must also be made for the purpose of obtaining professional advice or aid in the matter to which the communication relates. (*Alderman v. People*, 4 Mich., 414; *Milan v. State*, 24 Ark., 346; *Beeson v. Beeson*, 9 Pa., 279; *Flack v. Neill*, 26 Tex., 273; *Allen v. Harrison*, 30 Vt., 219.)

Communications which an attorney is precluded from disclosing, the client cannot be compelled to disclose. (Wharton, Cr. Ev., sec. 583; *Hemenway v. Smith*, 28 Vt., 701; *Bigler v. Reyher*, 43 Ind., 112.)

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

Communications to which privilege once attaches are always privileged, whether made with reference to the existing action, or to a previous one if the same question is in dispute. (*In re Cowdery*, 69 Cal., 32; *Sleeper v. Abbott*, 60 N. H., 162; *Bank of Utica v. Mersereau*, 3 Barb. Ch. [N.

Y.], 592; *Foster v. Hall*, 12 Pick. [Mass.], 89; *People v. Atkinson*, 40 Cal., 284; *Bacon v. Frisbie*, 80 N. Y., 394.)

Whenever the communication made relates to a matter so connected with the employment of attorney as to afford presumption that it was the ground of making the same by the client, then it is privileged. (*Turquand v. Knight*, 2 M. & W. [Eng.], 98.)

POST, J.

This is a petition in error to review a judgment of the district court of Lancaster county whereby the plaintiff in error was convicted of the crime of burglary. He is charged in the information with feloniously breaking and entering a stable, the property of Charles O. Davis, with intent to steal six chickens of the value of $3. The only direct evidence of the guilt of the accused is the testimony of Charles Smith, an alleged accomplice, who had been convicted of the same offense and was at the time serving a term in the penitentiary. Said witness having testified that the accused was present and participated in the burglary, it was sought to impeach him by showing that he had previously made statements fully exonerating the accused from complicity in the crime charged. For that purpose the following affidavit was offered in evidence, its execution having been admitted by said witness:

"STATE OF NEBRASKA, }
LANCASTER COUNTY. }

"Charles Smith, being duly sworn, on oath says he is one of the defendants in the above entitled case; that his co-defendant, Rupert W. Brady, was occupying a room in the house affiant was stopping at at the time of the alleged burglary and larceny for which affiant and his said co-defendant were tried at the May, 1893, term of the district court, but that at the time affiant and his said co-defendant, Rupert W. Brady, had no business relations at all. Affiant further says that said Rupert W. Brady had no con-

nection with the alleged burglary and larceny of Chas. O. Davis' hen house on the night of March 31, 1893, wherein it is charged that the barn and stable of said Chas. O. Davis was forcibly broken into and entered and six Plymouth Rock chickens stolen, taken, and carried away; that said breaking and entering, whatever was done on that night in the way of entering into the structure that said Chas. O. Davis' chickens were in, and the taking of said chickens was done by affiant alone without the assistance or advice or the knowledge, so far as affiant knows, of said Rupert W. Brady; and affiant says said Rupert W. Brady had no financial interest in, or benefit from, said burglary and larceny upon the premises of said Charles O. Davis on said night of March 31, 1893, and that whatever has heretofore been said by affiant in any way implicating said Rupert W. Brady in said burglary and larceny was done at a time when there was a misunderstanding and ill-feeling between this affiant and said Rupert W. Brady, and said charges were made by this affiant to get revenge, and for mere spite work, upon the part of this affiant, and was wholly without foundation in fact, and this affiant is now ready to make amends, as far as affiant now can, for the wrong done an innocent person.

"CHARLES SMITH.

"Subscribed in my presence and sworn to before me, this 29th day of June, A. D. 1893. R. D. STEARNS,

"*Notary Public.*"

The above affidavit was excluded on the objection of the state, as was also a verbal admission to the same effect made to Mr. Stearns, attorney for the accused. The ground upon which this evidence was excluded is that the admissions offered were made at a time when the relation of attorney and client existed between Mr. Stearns and the witness Smith, and are therefore privileged communications. The only evidence which it is claimed sustains that conclusion is the testimony of Mr. Stearns, from which it appears

that at a former term the plaintiff in error and Smith were tried together for the same offense, which resulted in a verdict of guilty as to both defendants, but which was subsequently set aside on their motion. At that trial Smith was represented by Mr. Oppenheimer and the plaintiff in error by Mr. Strode, who was assisted by Mr. Stearns. Smith soon afterward withdrew his plea of not guilty and entered a plea of guilty. After judgment on his plea of guilty he sent for Mr. Stearns, to whom he volunteered the statement that the plaintiff in error had nothing to do with the burglary, and offered to make an affidavit to that effect. The affidavit set out above was then prepared by Mr. Stearns and signed and sworn to by said witness after it had been read over in his presence and fully explained to him. We may assume that the relation of Mr. Stearns to the defense of Smith was such as to impress the information received from the latter during the trial with the character of a privileged communication. There is, however, no evidence that the relation of client and attorney existed between them at the time the affidavit was made. On the other hand, it appears that the prosecution had terminated in the conviction of the party whose statements were offered in evidence. By section 328 of the Code an attorney is declared incompetent to testify concerning any communication made to him by a client; and by section 333 it is provided that no practicing attorney, in giving testimony, shall disclose any confidential communication properly intrusted to him in his professional capacity. These provisions, it seems, are but declaratory, and add nothing to the general rule. It is not necessary to the application of the rule that any judicial proceeding should have been commenced or even contemplated. It is sufficient if the matter in hand may become the subject of judicial inquiry. (1 Greenleaf, Evidence, 240.) But all authorities recognize one essential to a privileged communication, viz., the attorney, solicitor, or counsel must have been acting for the

time being in the capacity of a legal adviser. (1 Greenleaf, Evidence, 239, 244; Taylor, Evidence, 930; *Romberg v. Hughes*, 18 Neb., 579.) The fact that the same or similar statements may have been made to the attorney while the confidential relation existed is immaterial, provided such statements are voluntarily repeated after the termination of such relation. It is said in *Yordon v. Hess*, 13 Johns. [N. Y.], 492, that "while an attorney cannot disclose what has been communicated to him in that capacity, if the client chose after that relation has ceased to volunteer any communication, he is not protected, although they may be in substance the same as given while the relation existed." It follows that in excluding the evidence offered the district court erred. This conclusion renders an examination of other questions presented unnecessary. The judgment of the district court is

REVERSED.

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OTTO COURCAMP ET AL. V. GEORGE P. WEBER.

FILED MARCH 6, 1894. NO. 5500.

O. 49 Neb. 44
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1. **Alteration of Instruments:** EVIDENCE: NOTES: JUDGMENTS. Where a note was introduced in evidence which disclosed upon its face that it had been altered from a note to bear interest at "10" per cent per annum from "maturity" to one to draw "7" per cent per annum from date, the number "10" and word "maturity" in the original having been crossed out by a line or lines drawn over each with pen and ink, and the number "7" and word "date" interlined or written above the number and word crossed out, *held*, that it was error to render judgment or grant decree upon such note, as testimony of the amount due, without some evidence explaining such alteration.

2. ———: TIME OF ALTERATION: EVIDENCE. When an altered note has been received in evidence either with or without testimony explanatory of such change, it then becomes the province

of the court or jury, if tried by jury, to decide from the evidence, as a question of fact, whether such alteration was made before or after the execution of the note, and it is error for the trial court to exclude testimony offered which is competent upon such question.

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

The facts are stated in the opinion.

*Holmes, Cornish & Lamb*, for plaintiffs in error:

An alteration of a promissory note in any material part renders it invalid as against the party not consenting thereto, even in the hands of an innocent purchaser. (*Brown v. Straw*, 6 Neb., 536; *State Savings Bank of St. Joseph v. Shaffer*, 9 Neb., 1.)

The alteration of the note was a material alteration. (*Palmer v. Largent*, 5 Neb., 225; *Wait v. Pomeroy*, 20 Mich., 425; *Benedict v. Cowden*, 49 N. Y., 396; *Nazro v. Fuller*, 24 Wend. [N. Y.], 374; *Woodworth v. President and Directors of the Bank of America*, 19 Johns. [N. Y.], 391.)

A material alteration of a written instrument will be presumed to have been done with a fraudulent intent, in the absence of evidence to the contrary. In such cases no action can be maintained on the instrument. (*Walton Plow Co. v. Campbell*, 35 Neb., 173, and cases cited.)

*Clark & Allen, contra:*

The proof offered by the defendants shows that Weber did not make the alteration, and had no knowledge of it until a year after it was made. Having been guilty of no fraud himself, he is not precluded from recovering the debt. (*State Savings Bank of St. Joseph v. Shaffer*, 9 Neb., 1.)

This is not an action upon the note, but to foreclose a mortgage and subject the security to the payment of the debt. A mortgage secures the debt and not the note or

bond or other evidence of it. No change in the form of the evidence, or the mode or time of payment—nothing short of actual payment of the debt, or express release, will operate to discharge the mortgage. The mortgage is not affected by a change of the note. (2 Jones, Mortgages [3d ed.], sec. 924.)

HARRISON, J.

September 29, 1891, George P. Weber filed a petition in the district court of Saunders county, alleging the execution and delivery of two notes, each for $1,000, by the Courcamps and others to one Martin Tighe, and of a mortgage on certain property in Valparaiso, Nebraska, to secure the notes; that the notes were purchased before maturity by Weber (defendant in error) and notes and mortgage duly assigned to him by Tighe. The petition contained the further allegation of default in payment of amount due on the mortgage, etc., and prayed for foreclosure. The answer of the principal defendants pleaded fraudulent alteration of the note in suit, in that it had been changed since executed and delivered, and without the knowledge or consent of defendants, so as to bear interest from date, the note when executed having been made to draw interest from maturity. This answer also contained a general denial of all allegations in the petition. Weber, in reply to this answer, states that the note was in the same condition when purchased by him as it is now, and if any alteration has been made in it, the same was without the knowledge of plaintiff and before he bought it. Tighe, the original payee of the note, filed answer and reply, and in his reply to the answer of the principal defendants states that this note in suit and another which was secured by the same mortgage were given to him by the Courcamps for a portion of the purchase price of the property covered by the mortgage in suit; that the alteration, if any, in the note would conform it in the interest stating portion to the original agree-

ment regarding interest, and to be as it should have been originally written. There was a trial to the court, finding against defendants, and decree of foreclosure. The case is brought here by the principal defendants for review.

The first question which presents itself in an examination of the case and the proceedings had at the trial thereof is, did the court below err in allowing the note to be introduced in evidence over the objection of defendants?

George P. Weber was called in his own behalf, and as a part of his examination the following appears:

Q. You may look at this note, Exhibit "A," and state who is the owner, if you know?

The defendant Martin Tighe objects to the introduction or any testimony in this case against him, under the petition in this case, for the reason that the petition does not state facts sufficient to constitute a cause of action in favor of plaintiff and against the defendant Martin Tighe. Objection overruled, and the defendant Martin Tighe excepts.

Plaintiff asks leave to amend petition as follows: "And on the day said note became due it was then presented to Lizzie Courcamp, Otto Courcamp, Jacob Reyher, and Jacob Hoover, and payment thereon demanded, which was refused, and it was thereupon protested for non-payment, of all which said Martin Tighe had due notice." Leave to amend is granted by the court, to which the defendant Martin Tighe excepts.

A. I am.

Q. You may look at this mortgage, Exhibit "B," and state who is the owner of that, if you know?

A. I am.

Plaintiff now offers in evidence Exhibits "A" and "B." Defendants Courcamp, Reyher, and Hofee object, for the reason that the instrument does not purport to be the instrument declared on in the petition. Objection overruled, defendants except, and the same were read to the court and are hereto attached.

The last objection was undoubtedly made to raise the question of the admissibility of the note in its altered condition, without first explaining such alteration, and was, we think, sufficient as an objection to raise the question.

The defense to the action was that a material alteration of the note had been made subsequent to its execution and delivery, without the knowledge and consent of the defendants who signed it. The note was a printed form, with blank spaces for date, amount, name of payee, etc., which were filled in in writing at the time of execution. As printed, it drew interest at "10 per cent" from "maturity," the figures making up the "10" and the word "maturity" being printed. The "10" and the word "maturity" in the note introduced at the time of trial had been erased with ink by drawing the pen across or through them, and just above the "10" was interlined the figure "7," and above the word "maturity" the word "date" was written. The note had a coupon attached, which coupon was for the sum of $70, or interest at 7 per cent for one year, the time the note was to run, on the amount of the note, $1,000. The petition and action were founded upon the note as evidence of the debt, and the decree is predicated upon it as evidence of the amount of indebtedness. The description of the debt, as set forth in the mortgage, was as follows: The consideration was stated at "two thousand dollars," and in the condition the sum of "two thousand dollars, $1,000 dollars on the 13th day of May, 1891; $1,000 on the 13th day of May, 1893, with interest thereon at 7 per cent per annum, according to the tenor and effect of the two promissory notes of said Otto Courcamp, Jacob Reyher, and Jacob Hofee, bearing even date with these presents." The first note of $1,000, above described, is the one in suit.

From the foregoing it will be gathered that the note, or some competent evidence, was necessary in the case, other than the mortgage, from which to determine the amount due, as the same was not definitely ascertainable from the

terms of the mortgage, and, moreover, no other or further testimony was offered of the amount due than the note. Hence, the note became or was a material portion of the plaintiff's testimony, and unless entitled to be admitted in its altered condition, upon objection by defendant should have been excluded, or not admitted without testimony being first introduced explaining such changes. We are satisfied that under the condition of the issues as raised by the pleadings in the case, as between the plaintiff and principal defendants, and the alterations by erasure and interlineation as shown by the face of the note, the objection of defendants to its introduction was well taken and that the court below erred in overruling the same. We are aware that the rule is well settled in this court that the decision of a trial judge, when the trial is to the court, admitting evidence, the objection to the testimony being in reference to its relevancy or competency, will not be considered here; and such a ruling, if erroneous, is not error which will reverse the judgment or decree of the lower court; but where the evidence so admitted is objectionable, being incompetent, and is the testimony upon which the judgment in the case is based, as was the note in this case, and the objection to its introduction might be removed by explanatory evidence, without which it was invalid and no recovery would be allowed upon it, the action of the court in basing its decree thereon will be reviewed, and, if erroneous, will be sufficient to warrant a reversal. This case falls within the rule just stated, since the finding of the amount due plaintiff was from the note alone. The trial court should have required testimony explaining the alteration or alterations in the note before receiving it in evidence. (*Johnson v. First Nat. Bank*, 28 Neb., 792.) We have no doubt that the alteration in the instrument, changing it from a note bearing interest at 10 per cent per annum from maturity to one bearing 7 per cent per annum from date, was a material alteration, and even if the note had been competent

evidence, admissible in its altered condition without any explanatory testimony, or admitted without objection, the defendants were entitled to introduce evidence showing such alteration, and that it was made after the note was executed without their consent or knowledge on their part; but when they offered such evidence, it was excluded. This was error. Such evidence was admissible. (*Walton Plow Co. v. Campbell*, 35 Neb., 173.)

It is contended that the alterations in the note were not made with any fraudulent intent, but honestly and under the supposition that the party making them had a right to do so, and that such alterations were to make it conform with what was originally to be done and not with a view to obtain any undue advantage. If this be true, then, although the validity of the note may have been destroyed, and it would not have been competent evidence of the indebtedness, and no recovery could have been had upon it, this court has mapped out the proper course to be pursued under such circumstances or state of facts in *State Savings Bank of St. Joseph v. Shaffer*, 9 Neb., 1, in which case an altered note was excluded as evidence on the trial and no recovery allowed thereon. It was held: "Where an alteration is made under an honest mistake of right, and not fraudulently and with a view to obtain improper advantage, a recovery may be had upon the original consideration of the note. And it is the duty of the court, upon payment of the costs, to permit the plaintiff to amend his petition, setting up the original consideration."

It follows from the above considerations and conclusions that the decree of the court below must be reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

## WILLIAM ROGGENKAMP ET AL. V. ALFRED E. HARGREAVES ET AL.

FILED MARCH 6, 1894. No. 4521.

1. **Partnership.** The evidence in the case examined, and *held* sufficient to sustain the verdict.
2. **Instructions:** HARMLESS ERROR. Objection to an instruction given by the court on its own motion considered, and *held*, when taken in connection with an instruction given at request of defendant, to so present the issues in the case that although such instruction may have been defective and indefinite its giving was not prejudicial to the rights of defendant.
3. **Form of Verdict:** JUDGMENT: TRIAL. Objections to the verdict of the jury in this case considered, and *held*, that the verdict was not so deficient or erroneous, in either form or substance, as to call for a reversal of the case, and that it was proper and correct for the jury in the case, it being one against the individual members of a partnership on an account for articles of merchandise furnished to the firm, to return a verdict against one defendant or member of the firm alone, and that the court did not err in rendering judgment on such verdict.
4. **Verdict:** OBJECTIONS: REVIEW. Objections to the form and terms of a verdict should be made in the court below at the time of rendition, in order to be available on error to this court.
5. **Partnership:** ACTION ON ACCOUNT: JUDGMENT AGAINST ONE MEMBER. In an action against the individual members of a partnership on an account for merchandise purporting to have been furnished to the firm, if the testimony shows that the articles were furnished to one of the persons composing such firm, that the debt sued for was the individual debt of such member or person, a verdict may be returned against such member, and judgment rendered thereon against him alone.

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

*Abbott, Selleck & Lane*, for plaintiffs in error.

*Cornish & Tibbets, contra.*

HARRISON, J.

January 12, 1888, the plaintiffs in the court below (defendants in error here) filed a petition in the district court of Lancaster county, in an action against William Roggenkamp and Charles Scott, partners, doing business as Scott & Roggenkamp, as defendants. The petition is short and we will give a copy of it:

"The above-named plaintiffs, a firm doing business at Lincoln, Nebraska, complain of the above-named defendants, a firm doing business at Bennett, Nebraska, for that on the 10th day of August, 1886, plaintiffs sold and delivered to William Roggenkamp certain merchandise, consisting of smoked meats and hams, in the reasonable value of $33.40, which amount said Roggenkamp agreed to pay; that the same has not been paid, nor any part thereof; that there is now due from defendants to the plaintiffs thereon the sum of $33.40 and interest.

"Second—Plaintiffs further say that the said merchandise was purchased by the said Scott in the name of William Roggenkamp, and the same was shipped and delivered by plaintiffs to said Roggenkamp.

"Third—Plaintiffs further say that the said Scott, at the time of the said purchase, was in business in Bennett, Nebraska, as partner of the said Roggenkamp and that the said merchandise, as plaintiffs verily believe, was purchased for the use and benefit of said firm, and that said firm is liable for payment of the same.

"Plaintiffs pray judgment for the sum of $33.40 and interest, and costs of suit."

To this petition Scott did not answer. Roggenkamp, as answer for himself, filed a general denial. A trial was had to the court and a jury, and the jury rendered a verdict, which was as follows:

"HARGREAVES BROS., PLAINTIFFS,
v.
WILLIAM ROGGENKAMP.

"We, the jury, duly impaneled and sworn in the above entitled cause, do find for the plaintiff and assess the amount of their recovery at the sum of thirty-three and $\frac{40}{100}$ dollars principal, and seven $\frac{79}{100}$ dollars interest."

A motion for a new trial was filed, argued, and overruled, and judgment rendered on the verdict against William Roggenkamp, and the case is brought here on error for our consideration.

The first assignment of error argued by plaintiff in error in his brief is that the verdict is not supported by sufficient evidence. We have read and considered the whole of the testimony carefully, and are satisfied that there was sufficient evidence to warrant the jury in believing that Roggenkamp furnished the capital and Scott contributed his services and they engaged in the business of running a butcher or meat shop, the profits of such business to be shared equally. This would constitute them partners within the rule or definition announced by this court in the case of *Strader v. White*, 2 Neb., 348, where it was said: "If a person contract with a partnership to contribute his services to the enterprise, for which he is to be compensated by a proportion of the profits, he becomes a member of the firm and liable for its debts, although he do not stipulate to bear any part of the losses." In the body of the opinion written by LAKE, J., we find the following statement: "It is argued, however, that there is no agreement on the part of the Whites to share in the losses which might occur, and therefore they cannot be held to be partners. This proposition is altogether untenable. In the first place they could receive no compensation for their skill and labor except out of the net profits. If these failed, they must necessarily share in the losses, at least to the extent of the value of the skill and labor contributed by them. It has been held

that where one person advanced funds for carrying on a particular trade, and another furnished his personal services only in carrying on the trade, for which he was to receive a portion of the net profits, they were partners between themselves as well as to third persons." We are fully of the opinion that the evidence on the question of partnership was ample and strong enough to sustain the verdict and bring it within the rule of this court, so often expressed, that "when not clearly against the weight of the evidence, the verdict will not be disturbed." The same rule will apply to the contention made by plaintiff in error in regard to the facts that the claim in suit was for "smoked meats and hams." There was sufficient evidence to sustain the finding of the jury, that the smoked meats and hams were bought for sale in the business and with the knowledge of Roggenkamp, and the jury must necessarily have made such a finding as to this fact, as one of the component elements or facts of their whole verdict, as returned in the case.

The next assignment of error is that the court erred in giving to the jury instruction No. 4, which was as follows: "If you find from the evidence that the defendant Roggenkamp entered into an arrangement with Charles Scott, his co-defendant herein, whereby he became a partner of said Scott, in the business engaged in, and was to receive half the profits of said business, in pursuance of such agreement, such arrangement would make said Roggenkamp a partner of said Scott in their business, and he would be liable for debts contracted by the firm as partners in and about the carrying and management of said partnership business." It is contended that by this the jury were told that if they found that there was to be a division of the profits, this would constitute the defendants partners. This is not strictly correct, as it will be seen the jury were further told that they must find from the evidence that Roggenkamp and Scott had entered into an arrangement

whereby they became partners. The instruction is not very clear and does not define a partnership, and under some circumstances we think it might be misleading and prejudicial; but immediately following this instruction the court, in its charge to the jury, gave instruction marked "First," as asked by defendants, as follows: "The jury are instructed that if you find that the agreement between Scott and Roggenkamp consisted only in Mr. Roggenkamp's furnishing three beeves to Scott for slaughter, and that Scott was to pay Roggenkamp the value thereof, and that Roggenkamp was to have one-half of the profits thereof, for the rent of the shop, tools, and slaughter house, that alone would not constitute a partnership or make the defendant Roggenkamp liable for the goods in controversy." By this instruction certain of the facts in evidence in the case were grouped together and the jury informed that if they concluded that such was the agreement, it did not constitute a partnership between defendants or make Roggenkamp liable for the goods. The only other possible grouping of the facts in the case on the question of partnership would so arrange them that the conclusion to be drawn from them must be that the defendants were partners in the meat business. In view of the fact that the court gave the further instruction above quoted, although instruction No. 4 was imperfect and not as clear and explicit as it should have been, we do not think it could have misled the jury or prejudiced the rights of defendants, and we do not think its giving was sufficient ground for a new trial. "The giving of an instruction which is imperfect or erroneous is not grounds for a new trial, where it could not have prejudiced the complaining parties." (*Converse v. Meyer*, 14 Neb., 190.)

Plaintiff in error objects to the verdict, that it is, both in form and substance, against Roggenkamp alone. We have reproduced the verdict in another part of this opinion, and by referring to the copy it will be ascertained that it was entitled "Hargreaves Bros. v. William Roggenkamp."

That this is not such a defect in form as will affect its validity as a verdict has been decided by this court in a case very similar to this, *Parrish v. McNeal*, 36 Neb., 727, in which the court says: "The only criticism upon the verdict, urged by counsel, relates to the title of the cause. No such objection was called to the attention of the court at the time the verdict was returned into court. Had it been, the defect, if any, doubtless would have been corrected before the jury were discharged. The title of the cause was not changed by permitting the administrator to appear and defend. The verdict was returned and filed in the proper action, and the title was sufficient to identify the verdict with the case. The omission of the name of the administrator as a defendant from the title was not such a defect as to prevent the entry of a judgment on the verdict."

The further and main objection to the verdict is its being against Roggenkamp, of defendants, alone and omitting the other defendant Scott. It must be borne in mind that this is an action on account, from all the information we can get from an examination of the record, against the individual members of the partnership, and it was competent and proper in such a case for the jury to return a verdict against one of the members of the firm, and such a verdict warranted the court in rendering judgment thereon against the party therein named. Section 429 of the Code of Civil Procedure provides as follows: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; it may determine the ultimate rights of the parties on either side, as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants, the court may in its discretion render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper. The court may also dismiss the petition with costs in favor of

one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served." (See also *Nebraska R. Co. v. Lett*, 8 Neb., 251; *Rowland v. Shephard*, 27 Neb., 494; *Anderson v. Fort Worth Base Ball Ass'n*, 14 S. W. Rep. [Tex.], 1016.)

There is the further thought here which has a bearing upon this branch of the case: Under the evidence, the jury, viewing it in the light of one set of facts, might well have determined that the meats were bought for Roggenkamp on his own account by Scott as his agent. The evidence to support a finding that this was the individual debt of Roggenkamp was strong and amply sufficient to sustain a verdict founded upon such a conclusion, and we are almost led to believe, from a careful perusal of the testimony, and the verdict as rendered by the jury, that this was the conclusion which they did reach; and if so, we think it would not be reversible error, under the pleadings in the case and evidence introduced. "In an action against two jointly, as partners, a recovery may be had against one alone, on proof that the debt sued for was his individual debt. Following *Maynard v. Ponder*, 75 Ga., 664." (*Ledbetter v. Dean*, 9 S. E. Rep. [Ga.], 720.) But if arrived at by the jury on either of the above theories of the case as presented in the evidence,—it is immaterial which,—the verdict was sustained by the testimony and there was no error in either its form or substance which calls for a reversal of the judgment. The judgment of the lower court is

AFFIRMED.

JOHN T. MOLLYNEAUX V. MARCUS WITTENBERG ET AL.

FILED MARCH 6, 1894. NO. 5598.

1. **Contracts:** RESTRAINT OF TRADE. Where real estate, consisting of certain lots and the buildings thereon, is sold, and in the granting portion of the deed conveying the same a clause is inserted stating that the property is not to be used for hotel purposes for two years, *held*, that such restriction as to use of the property, being a limited one, was valid and not an unreasonable restraint of trade in view of the facts developed by the pleadings (the case having been decided upon the pleadings alone), and that such agreement was not within or covered by the prohibitions or provisions of chapter 91*a*, entitled "Trusts," Compiled Statutes, 1893.

2. **Pleading:** ALLEGATIONS OF REPLY. A plaintiff, in replying to new matter set up in an answer, may allege new matter, not inconsistent with the petition, constituting a defense to such allegations contained in the answer. (*Cobbey v. Knapp*, 23 Neb., 579.)

3. **Damages for Breach of Contract.** Where a breach, by defendant, of an actually existing contract between plaintiff and defendant is proven, plaintiff is entitled to at least nominal damages.

4. **Judgment Upon Pleadings:** REVIEW. The pleadings in the case examined, and *held*, that the court erred in sustaining the motion of defendants for judgment upon the pleadings and in rendering judgment for defendants thereon.

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

*E. E. McGintie* and *Robert Ryan*, for plaintiff in error.

*G. W. Bemis, contra.*

HARRISON, J.

March 24, 1891, the plaintiff in the lower court, plaintiff in error here, filed a petition in the district court of Clay county, Nebraska, as follows:

"1. Comes now the said plaintiff, and for a cause of action against the said defendants, says that heretofore, to-wit, on the 11th day of June, A. D. 1889, said plaintiff was the owner of certain real estate in Sutton, in Clay county, in the state of Nebraska, which said real estate is fully described in a deed executed by this plaintiff and Margaret A. Mollyneaux, his wife, on the 11th day of June, A. D. 1889, whereby the said property, to-wit:

"2. Lots 13, 14, and 15, in block 9, of the first addition to the town of Sutton, Clay county, Nebraska, were conveyed by the said plaintiff and his said wife to the said defendants, and his property was so conveyed by said plaintiff and his wife to said defendants in part consideration for the purchase by the said Margaret A. Mollyneaux of the following described property, to-wit:

"3. Lots 17, 18, 19, 20, 21, and 22, in block 20, in the original town of Sutton, in said Clay county, and as a part of consideration of said transfers it was then and there agreed by the said defendants, to and with this plaintiff, that the said real estate embraced in the said deed given by this plaintiff and his said wife as aforesaid should not be used for hotel purposes for the space of two years from said date of June 11, A. D. 1889. Copies of both said deeds are hereto attached and marked, respectively, Exhibits 'A' and 'B.'

"4. Plaintiff further says that immediately after said 11th day of June, A. D. 1889, relying upon his said agreement with the said defendants, he engaged in the business of keeping and managing a hotel upon the premises so conveyed to the said Margaret A. Mollyneaux, as shown in the said Exhibit 'B,' and has been ever since, and is now, engaged in the conducting of said business, and the purpose and object of the purchase of the said premises as shown in said Exhibit 'B' was the opening of plaintiff's said hotel, as defendants then and there well knew.

"5. Plaintiff further says that the said premises so conveyed to the said defendants constituted and constitute the only suitable place in said Sutton, Clay county, Nebraska, besides that now occupied by the said plaintiff, wherein the said business could be successfully carried on. Plaintiff further says, on or about the 17th day of September, A. D. 1889, the said defendants, wholly disregarding their agreement in that behalf, sold said premises described in Exhibit 'A,' for use as a hotel, and during all the time since, on or about September 17, 1889, have caused and permitted said premises so conveyed to said defendants, as aforesaid, to be used for hotel purposes, whereby the custom of the traveling public has been diverted away from the said hotel of the said plaintiff, and the custom and profits of the said plaintiff's hotel have been greatly diminished and reduced, and said plaintiff has been injured in his business thereby and has suffered great loss and damage in the sum of $5,000.

"6. Wherefore plaintiff prays judgment against the said defendants for his damages in the said sum of $5,000 and costs.

Exhibit "A," immediately after the description of the property in the conveying clause, contains these words: "With all the buildings thereon, the same not to be used for hotel purposes for two years from this date."

The defendants answered the petition as follows:

"Come now the defendants in the above entitled cause, and for answer to the plaintiff's petition herein filed respectfully show the court:

"1. The plaintiff, immediately after making the deed mentioned by him to defendants, began the business of keeping a hotel as stated by him in the fourth paragraph of his petition, but having a monopoly of the business for the time being, he conducted said business in such an unsatisfactory way, and gave such meager and poor accomodations to the traveling public, that the people generally,

who had been theretofore accustomed to patronize the hotels in the said town of Sutton, became greatly dissatisfied, and justly complained that the said plaintiff gave very little value for the price charged to his guests, and many of them became prejudiced against said hotel and against the plaintiff herein, and against the said town of Sutton, and threatened to cease making business visits to said town. The defendants further show that by reason of the facts as above set forth, a large number of the principal capitalists and public-spirited citizens of the town of Sutton began the project of building and opening a new and distinct hotel from either of those mentioned in the petition of plaintiff, and for that purpose and with the intent began to pledge, and secure pledges for, large sums of money to carry out such project. None of the defendants herein aided in any way the said project of building a new hotel, nor sympathized with said movement, nor gave to the same any encouragement whatever.

"2. Of the facts above set forth the plaintiff had then full knowledge, and in consideration of the danger to his said business to be expected from the permanent competition of said proposed new hotel, and in consideration of the prospect that the building of said new hotel would be much more injurious to his private business interests than the opening of the hotel of these defendants, said plaintiff voluntarily requested the defendant to open their said hotel to the public, and requested them to lease the same to any party to be found that would open a hotel and run the same, in order to discourage and prevent the building and opening of the new hotel, as aforesaid, about to be built.

"3. The defendants, being then considering the plan of remodeling the said hotel deeded to them by said plaintiff and wife, so as to rent the same for store purposes, or for some business other than a hotel, refused to rent the same for a hotel, although the plaintiff was anxious to have the same done for his benefit.

"4. After repeated solicitations on the part of plaintiff herein, and at his special instance and request, defendants sold said hotel, which was known as the 'Occidental Hotel,' and the purchaser opened business about October 1, 1889, and not before.

"5. Before the opening of said Occidental Hotel, in consideration of all the foregoing facts, and in consideration that the same was beneficial to plaintiff, and in consideration of the prevention of the building and opening of the third hotel, as aforesaid, and in consideration of the removal of prejudice from among the traveling public, the said plaintiff, on the 17th day of September, 1889, waived in writing the clause in the deed made by him to defendants, and thereby consented to have said hotel opened, and by said instrument of writing waived all rights which he had to a monopoly of the said business in said town of Sutton, which town has above 1,600 inhabitants. A true copy of said written waiver and consent is attached hereto and made a part hereof by reference as Exhibit 'A,' as fully as though the same were fully set forth in this answer.

"6. The sale of the said Occidental Hotel and the opening of the same to the public accomplished the object intended by the said plaintiff and prevented the establishment of a new rival in business, and was of benefit to him, and to the value of the said property which he got in exchange for the Occidental Hotel. The plaintiff has, therefore, sustained no damage whatever by reason of the yielding of defendants to his desire in the premises.

"7. The falling off in business of the plaintiff, if any, is not because of any action of the defendants herein, but because of the fault of the plaintiff in forfeiting the goodwill of the public by furnishing poor entertainment when he had the only hotel in the town of Sutton, and partly by reason of the general stringency in all business in the west by reason of financial depression and distress common to all branches of business during the time mentioned in the petition, and especially the hotel business.

"Wherefore the plaintiff ought not to maintain his said action, and these defendants ask to go hence without day and recover their costs."

Exhibit "A," as attached to the answer:

"SUTTON, NEB., Sept. 17, 1889.

"To whom it may concern: Be it known that we, John T. Mollyneaux and Margaret A. Mollyneaux, hereby waive all rights we may have by virtue of a clause in a certain deed dated June 11, 1889, to M. Wittenberg and others, to lots 13, 14, and 15, in block 9, first addition to Sutton, Nebraska, whereby the Occidental Hotel, situated on said lots, was not to be used for hotel purposes, and we do now, by these presents, consent that said property be opened as a hotel, provided the maximum rate of said hotel shall be $1 per day, and provided a greater sum is charged, this agreement shall be null and void, and the clause in said deed shall be binding on the owners of said above described property. MARGARET A. MOLLYNEAUX.

"J. T. MOLLYNEAUX."

The following reply to the answer was filed by plaintiff:

"Comes now the said plaintiff and for reply to defendants' answer herein admits the making of the agreement of said Margaret A. Mollyneaux and this plaintiff, as shown in Exhibit 'A' attached to defendants' answer, but plaintiff alleges that the conditions of said agreement have not been fulfilled, and that ever since, very shortly after the 17th day of September, A. D. 1889, the said hotel, so agreed to be allowed to be opened on lots 13, 14, and 15, in block 9, first addition to Sutton, Nebraska, has charged for the accommodation of guests therein a greater sum than $1 per day for the boarding and lodging of such guests, and the maximum rate of said hotel has not been $1 per day, but has been a greater sum, and said agreement of September 17, 1889, has thereby become null and void and the original contract, as shown by the deed referred to in said Exhibit 'A,' has become again in full force and effect.

"2. Plaintiff, further replying, denies each and every allegation of new matter in said defendants' answer contained which is not hereinbefore specifically admitted."

To the reply a demurrer was filed and on hearing overruled. Defendants then filed the following motion:

"Now, to-wit, this 17th day of November, 1891, a day of the November term of above court, and before the calling of a jury in this case, come defendants and move the court to render a judgment of dismissal of said cause, and allow defendants to go hence without day, for the following reasons, to-wit:

"First—The petition filed in said cause does not state sufficient facts to constitute a cause of action, because—

"(*a.*) The said clause in said deed from plaintiff to defendants, whereby it is provided that the property therein described shall not be used for 'hotel purposes' for two years, is void and of no force, because said clause is inconsistent with the grant made by said deed; and further, because said restriction in said deed is against public policy; further, because,

"(*b.*) Said clause of said deed restricting the use of said premises is void, because it is in contravention of the laws of Nebraska, page 516 of the Session Laws of 1889.

"(*c.*) Further, said clause in said deed is void, because the same interferes with the fundamental right of dominion over one's property by the absolute owner thereof.

"(*d.*) The said deed, set forth and exhibited by said plaintiff in his petition herein, grants the premises in said petition and deed described forever, and warrants and guaranties the quiet enjoyment thereof forever to the defendants and assigns forever, and said grant and warranty cannot be affected by a naked recital of restriction inconsistent with the grant forever in said deed made.

"(*e.*) The said clause in said deed and petition referred to, whereby it is attempted to be provided that the real estate described in said deed, petition, and exhibit attached

thereto shall not be used for 'hotel purposes for two years,' is void, because no consideration therefor appears in said deed, nor is any alleged in said petition; therefore, said condition is a nullity.

"(*f.*) The bare recital in said deed, 'not to be used for hotel purposes for two years,' does not possess the element of a contract, and is an unreasonable restraint upon trade, and, therefore, void.

"Second—The plaintiff in his reply admits that the restriction in said deed was waived, annulled, and abrogated by a new contract made months subsequent to the giving of said deed, and in said new contract, set out for the first time in the answer of defendants, it is provided that said clause in said deed, set forth in said petition, is annulled on condition that said hotel may be opened at $1 per day, therefore said new contract was and is a merger of the former clause in said deed, and said former clause has no standing nor effect, except as an inducement to the new contract; said old contract, being void, furnished no consideration for the new agreement. The measure of damages, as charged by the new contract and the pleadings, show a merger of the contract declared upon, and no testimony is required.

"Wherefore the defendants pray for judgment of dismissal."

The motion was sustained, to which action of the court plaintiff excepted, and judgment was rendered in favor of defendants and against plaintiff and for costs of the action. The plaintiff complains of the decision of the court, sustaining the motion and rendering judgment for defendants, and brings the case here for review.

The case in this court is argued upon three propositions, —one being that the agreement not to use the building for hotel purposes was in restraint of trade and void, because contrary to the rule of common law governing such contracts; a second being that the agreement was objection-

able and void under the provisions of chapter 91*a*, Compiled Statutes of 1893, entitled "Trusts;" and a third, that the petition set up as a cause of action one contract, the one contained in the clause in the deed, and the reply set up a different one, to-wit, the agreement contained in Exhibit "A," attached to answer, known in the case as the "Waiver," and was a departure from the cause of action stated in the petition. The petition states that the agreement to not run a hotel on the premises entered into the consideration moving between the parties to the transfer of property and was a material part of such consideration. This is not denied in the answer, and, as we have only the pleadings to consider in arriving at a conclusion here, must be taken as admitted. The contract not to use the premises for hotel purposes was a limitation in itself, necessarily confining it, as to place, to the particular lots and building, and the time was limited to "two years." These limitations clearly relieve the agreement of any objection made to it on the ground that it is obnoxious to the common law rule governing contracts in restraint of trade, if, coupled with the above limitations, the contract was reasonable. A contract made upon a valuable consideration, and which does not impose an unreasonable restraint upon engaging in business, is valid. This may be said to be an almost universal rule, so often has it been passed upon and, with some modifications, which do not exist in this case, sustained. (See *Angier v. Webber*, 92 Am. Dec. [Mass.], 748; and for a discussion of the subject see note to the above case on page 751 of same report, which contains a full citation of authorities.)

In reaching a conclusion as to whether or not the agreement in this case was a reasonable one we must not lose sight of the fact that we are confined to the pleadings in the case for enlightenment upon this as well as all other points raised for our decision. The allegations of the answer are confined mainly, as to this part of the case, to

statements setting forth the manner in which plaintiff conducted his hotel business, stating that it was unsatisfactory and did not please the traveling public or the citizens; but these allegations are all denied in the reply of plaintiff, hence we are left with no, or not sufficient, information upon which to base an opinion regarding the reasonableness or unreasonableness of the restraint upon the business so far as it affected the public. The act cited by defendant in error, chapter 69, Session Laws of 1889, chapter 91*a*, entitled "Trusts," Compiled Statutes, 1893, page 838, provides in section 1 thereof, among other things, as follows: "It shall be unlawful for any person or persons, partnership, company, association, or corporation organized for any purpose whatever, or engaged in the manufacture or sale of articles of commerce or consumption, or for any such person or persons, * * * dealing in any natural product, to enter into any contract, agreement, or combination with any other person or persons, * * * doing business in this state, * * * engaged in the manufacturing, selling, or dealing in the same, or any like manufactured or natural product whereby a common price shall be fixed for any such article or product, or whereby the manufacture or sale thereof shall be limited or the amount, extent, or number of such product to be sold or manufactured shall be determined, or whereby any one or more of the combining or contracting parties shall suspend or cease the sale or manufacture of such products, or whereby the products or profits of such manufacture or sale shall be made a common fund to be divided among the respective persons, partnerships, companies, association, or corporation so entering into such contract, agreement, or combination." This section is followed by one prohibiting trusts and pools of all kinds for any purpose whatever, and by further sections in regard to penalties and forfeitures, etc. The defendants in error strenuously argue that the case at bar is within the provisions of the act above cited, but we do

not think so. The act applies to persons "engaged in the manufacture or sale of any article of commerce or consumption," "or dealers in any natural product," and prohibits them from entering into certain contracts, agreements, etc. The contract in this case, to not use the premises for hotel purposes, clearly is not covered by the terms or meaning of section 1 of the above act. A pool is defined to be "a combination of persons contributing money to be used for the purpose of increasing or depressing the market price of stocks, grain, or other commodities; also the aggregate of sums so contributed. Webster. See 103 U. S., 168." (Black's Law Dictionary, p. 910.) Black in his Law Dictionary, p. 1192, defines trusts as follows: "In mercantile law. An organization of persons or corporations, formed mainly for the purpose of regulating the supply and price of commodities, etc." The agreement under consideration cannot be said to come within the definition of either a "pool" or "trust," as these designations are now commonly understood, and the parties were not prohibited from entering into the agreement they did make by this act of the legislature.

Having concluded that the agreement was valid, then it follows that the petition declaring upon it stated a cause of action, there being alleged, first, a valid contract; second, a breach of it; and third, the damage arising from such breach. The answer admits almost everything pleaded in the petition, possibly denying that plaintiff suffered any damage, alleges matter in avoidance, and sets up affirmatively the "waiver." The reply meets the portion of the answer founded upon the waiver, by affirmatively stating that the defendants have failed to comply with the provisions of the waiver, and it is of this allegation in the reply that complaint is made by defendants, they contending that it was an attempt by plaintiff to introduce a new cause of action by his reply different from that stated in the petition. If the recovery, if any, by plaintiff on a trial of

the case would be founded upon the waiver, and for a breach of its conditions alone, then this position is a true one. On the other hand, if the matter alleged in the reply relating to the waiver set up in the answer, and constituting a defense to it was not inconsistent with the petition, then it is not a true position. After a careful examination of the pleadings we are satisfied that the action of the plaintiff was necessarily founded upon the original agreement of defendants not to use the property for hotel purposes, and its breach, the waiver being merely collateral to the original contract and incident to it and purely a matter of defense; that the cause of action set up in the petition was complete without alleging the waiver and negativing its force or effect; that when the waiver was alleged in defendants' answer as matter of defense it was proper and good pleading to deny it, or affirmatively show by the reply that defendants had, by their failure to comply with some of its requirements, or rather by their violation of such requirements or conditions, rendered it of no value or force, and destroyed any effect it might otherwise have had in releasing the defendants from the original agreement, and if evidence had been introduced which established the plaintiff's contention as pleaded in the reply, the waiver would have been fully avoided and the plaintiff entitled to damages, not under the waiver, but from the breach of the original contract or agreement, to which waiver, by its terms, refers the parties. "A plaintiff, in replying to new matter set up in an answer, may allege any new matter, not inconsistent with the petition, constituting a defense to such allegations contained in the answer." (*Cobbey v. Knapp*, 23 Neb., 579.)

It may be well before leaving the case to touch upon that branch of it regarding damages. If plaintiff was entitled to no damages, then the court was right in its judgment; but let us examine. The allegation of the petition in respect to damages reads as follows: "Whereby the

custom of the traveling public has been diverted away from said hotel of said plaintiff, and the custom and profits of said plaintiff's hotel have been greatly diminished and reduced, and said plaintiff has been injured in his business thereby, and has suffered great loss and damage in the sum of $5,000." We think it very doubtful under this statement whether any evidence could be received on the question of damages, as just how it could be shown that persons went to the other hotel who would or might have patronized plaintiff's place of business if the other had not been opened or it had been running at $1 per day, and how much profit plaintiff might have realized from their entertainment if they had stopped at his hotel, we are not able to discern; but however this may be, when the case was passed upon by the court below it was as the issues then stood, established by the pleadings in the case, that there was a contract between plaintiff and defendants and a breach of the same by defendants. If plaintiff, on a trial of the cause, had been able to sustain the case in its same condition as made by the pleadings, he would have been entitled to nominal damages at least. Where a contract between parties is proved, and a breach of it by defendant, the plaintiff is always entitled to at least nominal damages. (3 Parsons, Contracts, pp. 217–219; 1 Wood's Mayne, Damages, pp. 9–16, and notes.) This rule is supported by numerous authorities and seems not to be doubted or questioned. The action of the court below was wrong and is reversed and the case remanded.

REVERSED AND REMANDED.

ALLEN RATHBUN, APPELLEE, V. THOMAS DOOLEY ET AL., APPELLANTS.

FILED MARCH 6, 1894. NO. 5085.

**Review:** CREDITOR'S BILL: SUFFICIENCY OF EVIDENCE. The evidence in support of a creditor's bill being sufficient to sustain the finding of the trial court, its judgment must be affirmed when no other question than such sufficiency is presented by the record.

APPEAL from the district court of Dodge county. Heard below before POST, J.

*Howard B. Smith* and *C. Hollenbeck*, for appellants.

*Frick & Dolezal, contra.*

RYAN, C.

The appellee on March 20, 1889, filed his petition in the district court of Dodge county, Nebraska, wherein he alleged that on May 9, 1888, he had obtained a judgment in the county court of said county against Thomas Dooley for the sum of $748.21 and costs; that thereafter execution had been issued for the collection of said judgment, but that the same had been returned wholly unsatisfied; that the recovery of judgment in the said county court was upon a judgment rendered in the supreme court of the state of New York in and for Washington county, October 30, 1885; that while the suit was pending which resulted in the above judgment in the aforesaid supreme court, Thomas Dooley resided in said Washington county, and was there possessed of real and personal property of the value of $4,500; that said Thomas Dooley and his wife, Ellen Dooley, conspired together to defeat the collection of the judgment last mentioned, and to accomplish that purpose disposed of and converted into money the property held in

New York and with the proceeds thereof came to Nebraska; that to further the said design the said money was deposited in a bank at Omaha, of which John L. McCague, William L. McCague, Thomas H. McCague, and Alex. C. Charlton were proprietors, and that the certificate evidencing said deposit of $4,142.10 was, at the time of filing the petition, held by the defendant Richards and John W. Goff. The plaintiff in his petition charged that unless restrained, the two defendants last named would place said certificate of deposit beyond the reach of the process of the court, and that the proprietors of the bank which issued said certificate would cause the said certificate to be taken up by paying the same, whereby irreparable injury would result to plaintiff. There were the ordinary averments to justify relief upon a creditor's bill presented for subjecting said certificate of deposit to the payment of the judgment rendered in the county court of Dodge county aforesaid, followed by a prayer for equitable relief of the nature above indicated.

The answers of Thomas Dooley and Ellen Dooley were filed separately, but were alike in their terms, for each of said defendants admitted the recovery of the alleged judgment in the county court of Dodge county and the issue of execution thereon. All other averments of the petition were met by a general denial. It is unnecessary to summarize the answers of the other defendants, for neither presented any averment or denial pertinent to the main issue in the case; that is, whether or not the certificate of deposit above referred to was taken in the name of, and held by, Ellen Dooley for the purpose of preventing the application of the amount thereby evidenced as due to the payment of the judgment against Thomas Dooley, as of right it should be applied.

There was evidence amply sufficient to sustain the findings in favor of plaintiff upon the several questions in controversy. They must therefore be accepted as established

facts, which the court will not disturb. (*Worthington v. Worthington*, 32 Neb., 334.) The record presents no question save that of the sufficiency of the evidence to sustain the judgment of the district court, and a review of it could subserve no useful purpose in this or for any other case. The judgment of the district court is

AFFIRMED.

POST, J., having tried the case in the court below, took no part in the above decision.

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LUCY T. ST. CLAIR, APPELLANT, V. SAMUEL H. SEDGWICK ET AL., APPELLEES.

FILED MARCH 6, 1894. No. 5115.

1. **Estrepement:** EVIDENCE: INJUNCTION. An action against one in possession of real estate to restrain alleged commissions of waste thereon was properly dismissed when the court found from the proofs that no waste had been contemplated or committed by either of the defendants.
2. **Action to Restrain Commission of Waste:** LIEN ON NURSERY STOCK: DECREE. Where one has instituted proceedings to prevent the commission of waste upon real property and for general equitable relief, and the defendant in such suit has pleaded and proved his rightful possession of certain nursery stock growing on the premises to secure part of the purchase price of said stock remaining unpaid, *held*, that the court, in conformity with the prayer of said defendant's answer, properly decreed that such nursery stock should be sold on execution to pay the amount found remaining due.

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

*George B. France* and *Merton Meeker*, for appellant.

*Sedgwick & Power* and *George W. Bemis*, *contra*.

RYAN, C.

In her petition the plaintiff Lucy T. St. Clair alleged that on September 27, 1890, she purchased of the defendant S. H. Sedgwick 150 acres of land in York county, Nebraska, which land was fully described in the petition; that by virtue of said purchase the said Sedgwick agreed to deliver the possession of said real estate to plaintiff on or before March 1, 1891, as evidenced by a deed of conveyance on that date executed by Samuel H. Sedgwick and his wife to the plaintiff; that at the last mentioned date the co-defendants of Samuel H. Sedgwick were in possession of the real property so conveyed as lessees of said Sedgwick, their rights as lessees being limited in duration to the 1st of March aforesaid, and that at the time of the aforesaid purchase it was agreed by the said Samuel H. Sedgwick that he would commit no waste upon said premises, and that he would not cut down or destroy any fruit, shade, or ornamental trees standing upon said premises. Plaintiff further alleged that she became the owner of certain nursery stock on the premises aforesaid before the date of the conveyance above referred to, and that since said conveyance, and before the commencement of this action, she had paid the full purchase price for said nursery stock and had paid in full for the said real estate; that defendants, having unlawfully combined for that purpose, had cut down and removed many valuable growing trees from the premises aforesaid, and had threatened to, and if not restrained would still continue to cut down, destroy, and remove trees and vines from said premises, to the great and irreparable injury of the plaintiff. It was further alleged by the plaintiff that the co-defendants of said Samuel H. Sedgwick having refused to give up to plaintiff the possession of the buildings on said premises on March 1, 1891, plaintiff served notice upon them to quit said premises, and upon their continued refusal thereafter to yield possession to her the plaintiff

begun an action of forcible entry and detainer before the county judge of York county aforesaid for such possession, and that the trial of said cause for the forcible entry and detainer of said property was, upon the application of said defendants, procured to be continued thirty days from March 16, 1891, the date set for the trial thereof, and that the prolongation of the litigation of said forcible entry and detainer case was with the view to further the common unlawful designs of the defendants as against the rights of plaintiff. This petition closed with a prayer for a temporary injunction restraining the defendants from cutting down trees upon said premises; from burning up or hauling away any of the timber or wood, or fuel already cut; from selling or disposing of any of said timber, and from intermeddling in any way with any of the trees, timber, wood, or personal property of the plaintiff; and from preventing the plaintiff or her agents from cultivating the nursery stock on the premises, and from handling the same, and from preventing plaintiff from going on said premises for the purpose of such cultivation and the removing of said nursery stock and wood, and that upon a final hearing the injunction should be made perpetual, and that the plaintiff should be decreed such further relief as might be just and equitable.

The answers filed need no notice except that to which attention is now directed.

With varying degrees of directness as to each averment of the petition the several allegations thereof were denied by defendant Sedgwick's answer, by whom it was also denied that the nursery stock had been fully paid for; that there was a combination between defendants for any purpose; that defendant Sedgwick had instigated any one to commit waste or damage on the premises in dispute; and that said Sedgwick proposed or intended any unlawful act. The answer further alleged that no trees had been cut down by defendants of more than the value of $8 or $10 in the ag-

gregate, and that the removal of such as had been cut was not a damage, but a benefit, and necessary to the use of the premises in question; that defendant Sedgwick, on July 3, 1890, was the owner of the nursery stock on the premises in question, and on that date, by a written memorandum of agreement between himself and Emmet L. St. Clair, husband of the plaintiff, sold to Emmet L. St. Clair the nursery stock on the premises for the sum of $1,300, of which $910 had been paid at the time this action was brought, and that by the terms of said memorandum defendant Sedgwick was entitled to the possession of said nursery stock until the purchase price thereof should be fully paid. The answer further admitted the commencement by plaintiff of the forcible entry and detainer action as alleged in plaintiff's petition, and that the trial of the same had been postponed upon such a showing by the defendants therein, as said defendants had a right to make; and the answer alleged that subsequently judgment was rendered against said defendants in said forcible entry and detainer case, which judgment had been superseded by the defendants, pending error proceedings which they had begun in the district court of York county, which proceedings had not at the time of the filing of defendants' answer been yet determined. This answer closed with the following prayer: "Wherefore this answering defendant prays that the injunction heretofore granted in this case may be dissolved, and that he may have a decree of this court finding, ascertaining, and stating the amount of his lien upon the aforesaid nursery stock, and decreeing that the said nursery stock may be sold as the law provides, and out of the proceeds thereof that this answering defendant may be paid the amount found due him thereon and his costs herein expended, and for a temporary order of injunction restraining the plaintiff, her agents or attorneys, from taking, disposing of, or interfering with the said nursery stock, or any part thereof, without paying to this defendant the

amount of his aforesaid lien thereon and the costs herein, and that upon a trial of this action the said injunction may be made perpetual, and that the said plaintiff, her agents and attorneys, may be restrained from trespassing on the aforesaid premises, or any part thereof, during the pendency of this action, and that upon the final trial said injunction may be made perpetual, and for such further relief as may be just and equitable." The allegations of the answer upon which was predicated the right of the defendant Sedgwick to affirmative relief were denied in a reply filed by the plaintiff.

Upon final hearing the court found the facts and decreed the relief following: "The court, being fully advised in the premises, doth find for the defendants on the issues joined between the parties. The court further finds that the defendants, nor any of them, have not heretofore nor is there danger that they will commit any waste upon the premises or property mentioned in plaintiff's petition. It is therefore considered by the court that the plaintiff's petition be dismissed and the said injunction be dissolved and that the defendants as to said petition go hence without day; * * * and upon consideration of the answer and cross-petition of the defendant Samuel H. Sedgwick, and the answer thereto, and the reply, and the evidence introduced by the parties, the court finds the issues thereon in favor of the defendant Samuel H. Sedgwick, and that there is due from the defendant Emmet L. St. Clair to the defendant Samuel H. Sedgwick on the cause of action set forth in said answer and cross-petition, after allowing upon said cause of action the value of the colt described in the pleadings herein, and the value of that part of the nursery stock taken and appropriated by the defendant Samuel H. Sedgwick, and all just credits, the sum of $260, and that the defendant has a lien in the said sum of $260 upon the nursery stock described in said cross-petition, in the nature of a chattel mortgage, and is by virtue of said lien entitled

to the possession of the same, and has remained in possession, and is now in possession of said nursery stock and entitled to have said property sold to satisfy the same; and that prior to the commencement of this action the defendant Emmet L. St. Clair transferred said nursery stock to the plaintiff in this action, and the plaintiff took the same with full knowledge of said interest and lien of said defendant Samuel H. Sedgwick. The court further finds that the said property is of such nature as to make removal of the same detrimental to the value thereof. It is therefore considered by the court that the defendant Samuel H. Sedgwick recover from the defendant Emmet L. St. Clair the sum of $260 and his costs, and that the same bear interest at eight per cent per annum; and in case said sum is not paid for forty days, then an order of sale will be issued to the sheriff of said county commanding him to sell said property as upon execution, and the said sheriff is authorized in his discretion to sell the said property where the same now is." * * *

A careful examination of all the evidence shows that the principal matters in controversy were, first, the right and intention to cut trees from the premises; and, second, the right to hold possession of the nursery stock for payment of the amount due Mr. Sedgwick as part of the purchase price thereof. There was, of course, evidence that Mr. Sedgwick permitted, and that his co-defendants removed valuable ash and other trees from the premises, some of which trees were two or three feet in diameter at the butt, and that such as were removed were thrifty trees of great present, and of still greater prospective, value. On the other hand, the testimony was that the trees cut were not such as were thrifty or growing trees, but were in the highway or such as the Blue river was very likely to cut under and carry away, and that these latter trees were removed at the particular time at which they were because the ice then gave an unusual opportunity so to do by reason of its great

thickness and strength, and that when there was no ice there was no way by which said trees could be cut and removed because of their overhanging the river. It was testified that the cutting and removal of most of such trees as were cut and removed rather increased the value of the premises in controversy than lessened it. It was not even claimed that the chief defendant, Samuel H. Sedgwick, was insolvent, nor was there any reason shown why full compensation could not be collected in a suit against Sedgwick for such damages as the petition alleged, provided the proofs had sustained such allegations. The trial court found the facts in favor of the defendant upon the conflicting evidence above referred to, and there exists no reason for setting aside such finding as to the facts contested.

As to the nursery stock, the written memorandum introduced in evidence showed that Mr. Sedgwick was entitled to the possession of it until the purchase price thereof had been fully paid. While it was testified by Mr. and Mrs. St. Clair that the balance due for the nursery stock was included in the mortgage given by them for the premises, yet upon this point they were squarely contradicted by Mr. Sedgwick, whose statements were corroborated by a written memorandum signed by Mr. and Mrs. St. Clair and himself, in which the several amounts making up the mortgage referred to were set forth in detail. This finding of the district court was, therefore, fully justified by the evidence upon the proposition last discussed.

These considerations dispose of all questions arising upon the record, and the judgment of the district court is

AFFIRMED.

## HENRY ALDRICH V. WILLIAM H. BRUSS.

FILED MARCH 6, 1894. NO. 5533.

1. **Appeal:** FAILURE TO FILE TRANSCRIPT IN TIME: DISMISSAL. An appeal from the county court to the district court should be dismissed upon proper motion when the transcript was not filed within thirty days from the date of the judgment and no reason is shown for the delay. Following *Maggard v. Van Duyn*, 36 Neb., 862, and *Barry v. Barry*, 39 Neb., 521.
2. **Review:** AFFIDAVITS ON MOTIONS: BILL OF EXCEPTIONS. Affidavits used on the hearing of a motion in the district court cannot be considered in the supreme court unless embodied in a bill of exceptions. Following *Maggard v. Van Duyn*, 36 Neb., 862, and *Barry v. Barry*, 39 Neb., 521.

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

*Reid & Morgan*, for plaintiff in error.

*Martin I. Brower, contra.*

RYAN, C.

Plaintiff in error complains that his appeal from the county court of Nance county was dismissed in the district court because the transcript was not filed within thirty days from the date of the judgment. There was probably an attempt to excuse the above failure by a showing of facts made by affidavit not incorporated in a bill of exceptions. Following the rules laid down in *Maggard v. Van Duyn*, 36 Neb., 862, and *Barry v. Barry*, 39 Neb., 521, the judgment of the district court is

AFFIRMED.

## STATE OF NEBRASKA, EX REL. POMERENE & COOPER, v. D. G. SABIN, TREASURER.

FILED MARCH 6, 1894. No. 4811.

**Mandamus**: SCHOOL DISTRICT WARRANTS: PAYMENT BY TREASURER. A writ of *mandamus* cannot issue to the treasurer of a school district requiring payment by him of an order payable by its terms at a fixed time in the future and in the meantime drawing interest at a rate per centum defined by the terms of the order itself.

ORIGINAL application for *mandamus*.

*Lamb, Ricketts & Wilson*, for relators, cited: *State v. Gandy*, 12 Neb., 232; *State v. Scott*, 15 Neb., 147; *State v. Leidtke*, 12 Neb., 171; *State v. Roderick*, 23 Neb., 505; *Everts District Township of Rose Grove*, 77 Ia., 37; *Capital Bank of St. Paul v. School District No. 85*, 42 N. W. Rep. [Dak.], 774; *Robbins v. School District*, 10 Minn., 268; *Maher v. State*, 32 Neb., 369.

*Steele Bros., contra*, cited: *School District v. Stough*, 4 Neb., 357; *Nevil v. Clifford*, 24 N. W. Rep. [Wis.], 65; *Gehling v. School District*, 10 Neb., 239.

*A. J. Evans*, also for respondent.

RYAN, C.

This proceeding was instituted June 30, 1891, to compel payment by the defendant of an order, of which the following is a copy:

"$500. DAVID CITY, NEB., September 2, 1889.

"State of Nebraska, Butler county: Treasurer of School District No. 56 of Butler County: On the first day of March, 1891, pay to the order of Pomerene & Percival the sum of five hundred and $\frac{00}{100}$ dollars out of any money in

your hands belonging to the fund for general purposes. Interest, seven per cent per annum from date until paid.

"GEO. P. SHEESLEY, *Director.*

"Countersigned:

"H. W. KELLER, *Moderator.*

"No. 14138."

The relators in their petition averred that by the terms of the instrument aforesaid it matured on the 1st day of March, 1891, and that the said order, at the time of the commencement of this proceeding, was the property of the relators, whose demand of payment had been refused by the defendant, though the said defendant had in his hands sufficient funds with which to make full payment of the same and could properly have done so. There was, soon after this action was begun, a reference thereof and quite a large amount of evidence was taken by the referee in support of the contentions of each party, for which reason it is deemed but fair to decide this controversy, notwithstanding it is one which should not have been brought in this court in the first instance. The order copied above was of date September 2; 1889, due March 1, 1891, for $500, and, by the terms of the instrument itself, this sum drew interest at the rate of seven per cent per annum. This was, therefore, not a mere order drawn against some fund specified and in existence; it was rather an order payable out of a fund entirely to be provided for in the future.

In *School District No. 2, Dixon County, v. Stough*, 4 Neb., 357, LAKE, J., delivering the opinion of this court, said: "Contracts for the erection of a school house should be made with reference to the funds in the treasury for that purpose. The district board have no authority to draw orders in payment thereof on a fund which has been proposed but not raised by taxation." The rule stated is as applicable to orders of the class under consideration as to those referred to in the above opinion; *i. e.*, those for the erection of a school house. The contract for supplying the school building at David

City with steam heating apparatus was dated July 4, 1889, and required that the work stipulated should be completed by September 2 immediately following. In payment three so-called orders were to be issued for the sum of $500 each, due respectively May 1, September 1, 1890, and March 1, 1891. This was directly issuing evidence of indebtedness against the school district due respectively in six, twelve, and eighteen months from date. Notwithstanding the above quoted language of Judge LAKE, the relators insist that the following quotation from *Maher v. State*, 32 Neb., 369, justifies the issuance of the order sought to be collected in this proceeding. The language was used by Judge COBB in the opinion referred to, and is as follows: "In the case of *Robbins v. School District No. 1, Anoka County*, 10 Minn., 268, it was held that 'instruments in the form of promissory notes payable at a future date with interest beyond the statute rate, executed for the district by the trustees for an indebtedness incurred by the district, are valid between the parties as a contract for forbearance and a promise to pay the amount specified, but a judgment on them can be enforced only against the fund raised by levying the amount of tax authorized.'" The case in which the above quotation was made was a *mandamus* proceeding to compel the treasurer therein named to pay an order, in the following language:

"$125. STATE OF NEBRASKA, DAKOTA COUNTY,

"July 14, 1890.

"Treasurer of School District No. 11, Dakota County: Pay to the order of Allen & Jenkins the sum of one hundred and twenty-five dollars out of any money in your hands belonging to the fund for building.

"JNO. A. WILLIAMS, *Director.*

"Countersigned:

"W. B. AMMERMAN, *Moderator.*

"No. 60."

Immediately preceding the quotation just made from the case of *Maher v. State* there was a discussion of the power of the electors of a district to ratify an action not authorized. Just following the quotation were statements that the school board issued the warrant copied in payment for labor and material used in the construction of a school house pursuant to a contract with the relators, etc. The quotation from *Robbins v. School District* seems to have been made without any reference to the facts under discussion, and, hence, is mere dictum, not necessary to the determination of the case of *Maher v. State*. The Minnesota case cited proceeded upon the ground that there was no inhibition in the law of that state against incurring an indebtedness in excess of what could be met with the taxes of one year. The notes given by the directors as individuals for the rent of premises to be used from year to year for school purposes were therefore held valid as between the parties as a contract for forbearance until the requisite taxes could be levied, assessed, collected, and paid to the trustees, and as binding the trustees and their successors in office to make such payments as had been agreed in said notes. This case, cited in the manner in which it was cited in *Maher v. State, supra*, has no controlling weight or application in this state, and should, therefore, be accorded no consideration as against the rule laid down in *School District v. Stough, supra*. If evidences of indebtedness of the nature of that sought to be enforced in this action are to be held valid and binding, it will render wholly inoperative and useless the provisions of the statute regulating and restricting the issuance of bonds by school districts.

To warrant the granting of a *mandamus* it must appear that the relator has a clear legal right to the performance by the respondent of the particular duty sought to be enforced. (*State v. City of Omaha*, 14 Neb., 265; *Anderson v. Colson*, 1 Neb., 172; *State v. School District No. 9, York County*, 8 Neb., 94; High, Legal Rem., sec. 10.) What,

if any, may be the proper remedy available to the relators upon the facts in this case, we are not called upon to determine. Certainly it is not by *mandamus*, and the writ is therefore denied.

WRIT DENIED.

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## HARVEY W. MASTERS v. HENRY J. LEE.

FILED MARCH 6, 1894. No. 4903.

**Commercial Agencies:** DAMAGES: LIABILITY OF MEMBERS: LIBEL: CONSPIRACY. The constitution of an association of retail dealers provided: "Whenever an account against any person shall have been listed in the abstract of unsettled accounts issued by our general association, or certified to the secretary of this branch by said association as unsettled, no member shall in any case open an account without security with such delinquent, and the opening of such account by any member with such person shall be considered a misdemeanor, and subject such member to an investigation by the executive board, and if found guilty he shall pay to said board a fine of twenty dollars for the sole use and benefit of this branch, and his neglect or refusal to comply with this demand shall make him liable to expulsion from said association." In an action for damages against one of the members of said association by an alleged delinquent against whom a claim had been, by the defendant, procured to be listed, *held*, that the defendant thereby rendered himself liable for all damages sustained by the plaintiff by reason of said listing and the publication of his alleged delinquency, whether such damage was owing to a technical libel or to the refusal of members of said association to extend credit to plaintiff because of the provision above quoted in relation to listing and publication.

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

*C. Hollenbeck* and *Frick & Dolezal*, for plaintiff in error, contending that upon the ground of conspiracy the right of

plaintiff to recover is complete and unavoidable, cited: *Muetze v. Tuteur*, 46 N. W. Rep. [Wis.], 124; Cooley, Torts, 421; *Albrecht v. Treitschke*, 17 Neb., 205; *Carew v. Rutherford*, 106 Mass., 1; *Gregory v. Brunswick*, 6 Man. & Gr. [Eng.], 205; *Mapstrick v. Ramge*, 9 Neb., 393; *Swan v. Saddlemire*, 8 Wend. [N. Y.], 676.

*Munger & Courtright, contra*, contending that the publication is not libelous *per se*, cited: Townshend, Slander & Libel, secs. 146-148, 132, 191, 345, 200, 181; *Newbold v. Bradstreet*, 57 Md., 38; *Woodruff v. Bradstreet*, 116 N. Y., 217; *Geisler v. Brown*, 6 Neb., 254; 3 Sutherland, Damages, p. 664; *Pittsburgh, A. & M. R. Co. v. McCurdy*, 8 Atl. Rep. [Pa.], 231; *Strader v. Snyder*, 67 Ill., 404; *Johnston v. Morrison*, 21 Pac. Rep. [Ariz.], 465; *Riddle v. State*, 17 S. W. Rep. [Tex.], 1073.

RYAN, C.

On the 17th day of February, 1890, plaintiff filed his amended petition in the district court of Dodge county, in which he alleged that the defendant, unlawfully, maliciously, and wickedly, intending, designing, and contriving how to injure the plaintiff and ruin the plaintiff in his credit and make it impossible for the plaintiff to obtain the necessaries of life, and goods, wares, and merchandise on credit from and among the merchants of the city of Fremont and throughout the states of Nebraska, Iowa, and Kansas, did falsely publish and cause it to be believed that the plaintiff, dishonestly and designedly, would not pay obligations legally entered into by him and legally enforceable in the said city of Fremont and throughout said states, with the intent and purpose to coerce and force plaintiff against his will, and in violation, subversion, and in disregard of the laws of the state of Nebraska with respect to the collection and enforcement of money demands claimed by one person against another, to give up and deliver to the defend-

ant $13.40 of the property of the plaintiff, did theretofore, to-wit, on or about the 1st day of September, 1889, unlawfully, maliciously, wickedly, and secretly combine, confederate, and conspire with divers and numerous persons of the city of Fremont, and also in and through said states, and with them together did maliciously, unlawfully, and wickedly imagine, design, and construct, and did unlawfully, maliciously, and wickedly aid, abet, counsel, and assist in the imagining, designing, and constructing of a certain wicked contrivance known and called "State Abstract of Unsettled Accounts of the Merchants' Retail Commercial Agency of Chicago, and the Retail Merchants' Association of Iowa, Nebraska, and Kansas (Consolidated)," the same being a pamphlet book containing and having therein printed, among other things, the names of sundry and different persons, and secret signs understood and known by the defendant and said persons with said defendant combined as aforesaid, which said secret signs are unknown to plaintiff and plaintiff cannot allege nor describe the same. This amended petition alleged that the known intent, meaning, and signification of said contrivance and book is, that any person whose name is placed, printed, or published therein is unworthy of credit, and does dishonestly and designedly refuse and neglect to pay his debts legally enforceable against him, and it is agreed and made by preconcert among said persons with whom said defendant combined, confederated, and conspired, as aforesaid, a great number of whom are vendors of necessaries of life, goods, wares, and merchandise in said city of Fremont, that none of said persons shall sell to any person whose name is placed in said contrivance and pamphlet book any necessaries of life, goods, wares, or merchandise of any nature whatsoever on credit, under severe penalty to said persons so combined, conspiring, and confederated, as aforesaid among themselves agreed. The amended petition further alleged that on the first day of September, 1889,

the defendant, intending falsely to cause it to be believed that plaintiff was unworthy of credit and dishonestly and designedly refused to pay his debts and obligations, and to prevent the plaintiff from procuring the necessaries of life and goods, wares, and merchandise on credit, for the purpose and with the intent in so doing to unlawfully coerce and compel plaintiff, against his will, and in evasion, subversion, and disregard of the laws of the state of Nebraska relative to the enforcement of debts and obligations, to give up and deliver to said defendant $13.40 of the property of plaintiff, did unlawfully, maliciously, and wickedly print and publish, and did cause to be printed and published, in the said wicked contrivance and pamphlet book the following wicked, malicious, false, and defamatory libel of and concerning the plaintiff in the words, signs, and figures following, to-wit: "H. W. Masters, Fremont, (note) $13.40," and did unlawfully, maliciously, and wickedly send, distribute, and circulate said wicked contrivance and pamphlet book with the said words, signs, and figures aforesaid therein printed and placed, and did cause the same to be sent, distributed, and circulated, and did procure, aid, assist, counsel, and encourage the sending, distribution, and circulating of said wicked contrivance and pamphlet book to, among, and between the vendors of the necessaries of life, goods, wares, and merchandise, and among other divers good citizens of the city of Fremont and throughout the states of Nebraska, Iowa and Kansas, whereby the said defendant unlawfully, maliciously, and wickedly did publish of and concerning the plaintiff to and among the said vendors and citizens of the city of Fremont and throughout the states aforesaid, that the plaintiff was unworthy of credit, and did and would dishonestly and designedly refuse and neglect to pay his obligations legally enforceable against him, all of which, as published, was understood as aforesaid by said vendors and citizens. The amended petition thereupon averred that by the aforesaid publication

plaintiff had been injured in his credit and good name and brought into scandal and discredit among the vendors of the necessaries of life, goods, wares, and merchandise, and many divers good citizens in the said city of Fremont and throughout the said states, and that the credit of plaintiff had been greatly injured, and that plaintiff was thereby prevented from procuring any of the necessaries of life, goods, wares, and merchandise from the vendors thereof on credit in said city of Fremont and elsewhere throughout said states, to his great scandal and disgrace, and that he had suffered thereby great anxiety and pain of mind to such an extent that plaintiff was thereby incapacitated from properly performing the duties of his vocation, by all of which the plaintiff had been damaged in the sum of $2,000, for which he prayed judgment.

In the answer there was a general denial of all the allegations of the petition, except that both the parties, plaintiff and defendant, were citizens of the state of Nebraska, and residents of the city of Fremont. For a second defense it was alleged that on September 1, 1889, plaintiff was and still is indebted to defendant upon a promissory note executed by plaintiff to defendant in the sum of $13.78, and that the defendant, being desirous of collecting said note (plaintiff having refused to pay the same), on or about the month of June, 1889, sent said note to the Retail Merchants' Agency of Iowa, Nebraska, and Kansas for collection, and said association tried to persuade said plaintiff to pay the amount he was honestly owing to said defendant on said note, but plaintiff refused to pay the same; that on said 1st day of September, 1889, plaintiff was and is owing many and divers other persons various sums which he has and does refuse to pay, and that the general reputation of plaintiff was that he was a person who would fail and refuse to pay his honest debts.

By reply the plaintiff denied each averment of the defendant's answer.

Upon a trial had of the issues joined, there was a verdict for the defendant, upon which judgment was rendered. From this judgment the plaintiff brings the case to this court for review upon his petition in error.

Upon the trial of this case there was evidence—indeed, it was unquestioned—that defendant held plaintiff's note for something over $13, which was long past due; that plaintiff had leased property of the wife of the defendant and thereon had made repairs and improvements for which he claimed he should be reimbursed to such an amount as would offset the note which he owed to the defendant. This offset was denied, and thereupon the defendant sent to plaintiff a letter, of which the following are the material parts:

"This association is established to afford protection in giving credit, and is a safeguard against those who contract debts and do not pay or adjust the same. Our members are furnished a list of parties who contract debts and fail to pay or make settlement, each member of the association agreeing to refuse credit to any one whose unsettled account appears on said list until settlement of said claim against him has been made and noted by this association.

"LOCAL BRANCH AT FREMONT, NEB., July 20, 1889.

"*Mr. H. W. Masters, Fremont, Nebraska*—DEAR SIR: We are members of the above association, which, as you will observe, is organized for the purpose of affording protection to retail merchants against that class of persons who have no regard for their promise to pay. Your unsettled account due us now amounts to 13.40 dollars. We shall regret being forced by your neglect to place the account in the hands of the above association for adjustment. Unless you call upon us within ten days from the date hereof and pay the amount due, or pay part of it and arrange for payment of the balance, or give us some reason why you cannot settle it in whole or in part, we shall certainly place the account in the general office of the Retail

Merchants' Association at Des Moines, Ia., for collection, and after doing so you must not blame us if your credit is stopped in your town, county, and state.

"Hoping to hear from you within the time specified,

"Yours respectfully, H. J. LEE."

About a month after the receipt by plaintiff of the above letter he received another, having the same letter-heading as that just set out. This last letter was in the following language:

"DES MOINES, IOWA, 8-22, 1889.

"*Mr. H. W. Masters, Fremont, Neb.*—DEAR SIR: We have in our hands for adjustment a claim against you in favor of H. J. Lee of Fremont, amounting to $13.40. Said firm has several times requested that you in some way make settlement. Can and will you give us a plausible reason why you neglect to do so? Is there anything wrong with the account as presented, and if so, in what particular? We represent an organization of the retail merchants of your town, county, and state, whose sole object is to protect themselves from giving credit to any person who, being indebted to a member of this organization, will not in some way make an effort to honorably adjust such indebtedness. Can you afford to have credit denied you? Will it not be a source of satisfaction for you to have this claim settled? We shall expect a satisfactory adjustment within the next ten days. Notify this office by postal card if you settle the claim. Trusting you will give this your immediate attention and save us the unpleasant duty of proceeding further, we remain

"Yours truly,

"THE RETAIL MERCHANTS' ASSOCIATION,

"Per J. W. MARTIN, *Gen. Secy.*"

In the brief for plaintiff in error there are indications that the letter last referred to was sent to the plaintiff in an envelope upon which was a return card requiring the return of the letter, if not called for in a specified time, to the agency,

which was described as one for the collection of bad debts. We can give no more definite description than this of the said envelope, for it is not to be found in the bill of exceptions and the case must be determined without reference to the alleged envelope. There seems to have been no other correspondence than the above carried on in relation to this claim as between the plaintiff and the defendant or the Merchants' Retail Commercial Association. In the state abstract of unsettled accounts of the agency last named, issued for the month of September and December, respectively, of the year 1889, there appears under the head of Dodge county the following entry: "Masters, H. W., Fremont, (note) $13.40." It is proper to explain that the note referred to was originally for $13.78, upon which some interest had accrued, but which by reason of a credit on the note of date May 13, 1885, was reduced to $13.40. This accounts for the apparent discrepancy in the amounts of the note referred to. The headings of the letters, to which reference has been made, indicate to some extent the object of the organization known as the "Retail Merchants' Association of Nebraska (Iowa and Kansas)." The constitution and by-laws of the organization just referred to were introduced in evidence, and under the head of "membership" the 3d and 4th sections thereof read as follows:

"Sec. 3. It shall be obligatory upon each member promptly to report to the Retail Merchants' Association of Iowa, Nebraska, and Kansas at its general compiling office in Des Moines, Iowa, the name of every person who shall settle his account after being placed in the hands of the association for adjustment.

"Sec. 4. Whenever an account against any person shall have been listed in the abstract of unsettled accounts issued by our general association, or certified to the secretary of this branch by said association as unsettled, no member shall in any case open an account without security with such delinquent, and the opening of such an account by

any member with such person shall be considered a misdemeanor and subject such member to an investigation by the executive board, and if found guilty he shall pay to such board a fine of $20.00 for the sole use and benefit of this branch, and his neglect or refusal to comply with this demand shall make him liable to expulsion from said association."

There was introduced in evidence a notice, of which the name of the association, the word "penalty" just preceding a copy of section 4, just referred to, which was printed on said notice, and the character and figures "$20.00" in said section 4 were in very large display type. It was shown by the testimony that this notice, which was of the dimensions of about 14 by 20 inches, was publicly posted in the place of business of some of the members of the Retail Merchants' Association at Fremont, Nebraska. A membership certificate in the Retail Merchants' Association of Iowa, Nebraska, and Kansas was introduced in evidence, from which it appears that a membership fee of $8 was required as a condition for joining the association, and there was also required the payment of $1 from each member for each quarterly abstract of unsettled accounts upon deliveries which were to be made in March, June, September, and December of each year respectively. The quarterly abstract for the month of December, 1889, covered 123 pages, either in whole or in part, and on each full page were printed 47 names with notice of the same sort of complimentary character as that which followed the name of the plaintiff in this suit. Following the names printed under the above heading, there were 58 pages devoted to requests for the addresses of the several parties named whose letters had been returned to the Retail Commercial Agency as uncalled for. On the outside of the last page or cover of each quarterly abstract of unsettled accounts of the Retail Merchants' Commercial Agency is given what is probably a correct statement of its main purpose.

It is in the language of section 4 above quoted. If this was not its only object, it certainly was conspicuous as its main object, for it appears in the notices posted in the places of business of the respective members of the association, and upon each quarterly abstract, in such a way as to preclude all possibility of being ignored. This object was to deprive any person whose name should appear as a delinquent in any of the quarterly reports from obtaining credit from a member of the association without his giving security, under a penalty to such member, in case of non-compliance with this condition, of the payment of $20 and the possibility of his being expelled from the association. To attain this unenviable distinction it was only necessary that any person who claimed to have an account against another should have it listed in the abstract of unsettled accounts issued by the general association, or certified to the secretary of the branch to which he belonged, as unsettled. There was no method provided by which it might be ascertained whether or not the account was just or unjust, whether paid or unpaid, the person reporting the account not even being required to pay any extra expense for the purpose of publishing the name and failure to pay of the alleged delinquent. As indicated in the letter of August 22, 1889, to Mr. Masters, the only way open to him whereby might be avoided the unpleasant publicity given by the quarterly reports was that he should pay or settle the demand made.

The instructions of the court, aside from a mere summary of the issues and the duty of the jury in construing the evidence given, were all devoted to a consideration of the law of libel and the rules with reference to publications which were claimed to be libelous. Of the class last described there were nine instructions given by the court upon its own motion, and four given at the request of the defendant with respect to the same branch of inquiry. It is no part of our purpose to criticise these instructions

so far as they apply to the alleged libelous nature of the transactions complained of, for as to that branch of the case they were probably correct. The court, however, refused an instruction asked by the plaintiff which was in the following language: "If you find from the evidence that the defendant caused the name of plaintiff to be placed in the book to be circulated among the merchants of the city of Fremont and elsewhere in the states of Nebraska, Iowa, and Kansas, to stop the credit of plaintiff and to thereby compel plaintiff to pay to said defendant the sum of $13.40, and that thereby the credit of plaintiff was injured, then the defendant is liable, and you will find for the plaintiff and assess such damages as the plaintiff has sustained as shown by the testimony." To the refusal to give this instruction a proper exception was taken. In one view of the case, it is perhaps correct to assume that the inquiry was proper as to the alleged libelous nature of the printing and publication, as to which there is no contradiction in the evidence. The petition, however, was not for the recovery of damages arising from the libel alone, it was for the recovery of such damages as should compensate plaintiff for the refusal of dealers in the necessaries of life, goods, wares, and merchandise to extend to him such credit as, but for the publications referred to, he would have been accorded.

The case of *Muetz v. Tutuer*, 77 Wis., 236, was one wherein was involved transactions of the same nature in which was concerned as the principal party an agency of the same character and with the same purposes as those of the Retail Merchants' Commercial Agency under consideration in this case. It was there held that the sending of letters with a return card upon the envelope containing the words "for collecting bad debts," was an imputation of dishonesty, and that the distribution of a book among the members with the plaintiff named in the black list of bad creditors constituted a sufficient publication of a libel. That

element, however, is not presented to us for consideration in this case, for the reason that upon that phase there were full and proper instructions to the jury. No qualification seems to have been required as a condition precedent to the right of any one to become a member of the association. For that purpose the only prerequisite was the payment of $8 or $10 in advance and the further payment of $1 for each quarterly abstract as it was issued. This gave to each member the right to report the name of any person against whom such member justly or unjustly claimed to have a demand. The party against whom the claim was made had no right to be heard. His name must be published or he must pay whatever was claimed against him. If his name appeared in the "black list," which is but a proper designation for the so-called "quarterly abstract," his credit was destroyed with every member of the association. The evidence in this case showed that in the city of Fremont, where the plaintiff and defendant both lived, there were from thirty to thirty-two members of the association in question. From the publication of the plaintiff's name in the black list, it resulted that at from thirty to thirty-two different places of business in the city of which he was a resident the proprietors were bound under a penalty to extend no credit to him, no matter what explanation he might give, what defense he might have, or what the real facts of the case might be. As to this there was allowed no opportunity for investigation or adjudication. The law, from considerations of public policy, allows each defendant, the head of a family, certain exemptions. These exemptions are not for the purpose of enabling him to defy his creditors, but are rather deemed proper for the protection of his family. The association in question ruthlessly ignored both the policy and the letter of this law. By it there was allowed to the defendant neither the opportunity to allege and prove a defense nor the right of an impartial trial by jury, and the exemptions as to which the holder of the claim had no right, either equitable

or legal, were absolutely denied the so-called "defendant." The holder of the claim, by the payment of $10 in advance and thereafter $4 annually, became a privileged member of the self-constituted society, which was at once the plaintiff, the judge, the jury, and the executive officer, before which the alleged defendant had not even the poor privilege of being heard. His only recourse was to pay the claim, whatever its nature and whatever might be his just defense. It seems to us that when an individual becomes a member of such an association as this, he should be held as a co-conspirator and not merely as the author of a libel. Counsel for defendant in error insist that the plaintiff in this case has no right to complain, because every man should pay his just debts. Probably this is true, and yet, in a case like that at bar, who is to determine what just debts are due? Manifestly there is no determination of this fact except by the holder of the claim himself. If he shall set in motion such a contrivance as this which we have under consideration, and a damage results to the party whose name he has handed in to be dealt with, he should respond in damages, irrespective of the rules of law governing mere libelous publications. The court erred in refusing to give the instruction asked by the plaintiff in error, and its judgment is therefore

REVERSED.

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THOMAS SWOBE, APPELLEE, V. NEW OMAHA THOMSON-HOUSTON ELECTRIC LIGHT COMPANY, APPELLANT.

FILED MARCH 6, 1894. No. 5546.

1. **Partnership**: RETIREMENT OF MEMBER OF FIRM: EFFECT ON CONTRACTS. The mere fact that a member of a copartnership firm retires therefrom does not release from the obligations of its contract a corporation which had theretofore engaged to furnish

electric lights for the use of a hotel of which, first, the aforesaid firm, and later its successor, a member of said firm, was proprietor, there being no showing of a release of either member of said firm from its contract liabilities, nor that, under said contract, duties were incumbent on said firm implying a special personal confidence in the member retiring therefrom.

2. **Contracts:** RESCISSION. A party who has required payment of sums of money which by a rescission of the contract will be rendered useless to the other contracting party cannot rescind such contract for the mere non-performance of some condition thereof, unless such right of rescission is reserved by the express terms of the contract itself.

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

*Charles Offutt*, for appellant:

The contract was not assignable so as to enable the assignee to require the continuation of the service without the consent of the defendant, and the attempted assignment authorized the defendant to treat the contract as at an end. (*Robson v. Drummond*, 2 Barn. & Ad. [Eng.], 303; Pomeroy, Remedies & Remedial Rights, secs. 146, 152; *Humble v. Hunter*, 12 Q. B. [Eng.], 310*; *Winchester v. Howard*, 97 Mass., 303; *Boston Ice Co. v. Potter*, 123 Mass., 28; *Lansden v. McCarthy*, 45 Mo., 106; Pollock, Contracts [4th ed.], 425; *Arkansas Smelting Co. v. Belden*, 127 U. S., 387; *Dickinson v. Calahan*, 19 Pa. St., 233; *Rapplye v. Racine Seeder Co.*, 44 N. W. Rep. [Ia.], 363; *Tasker v. Shepherd*, 6 Hurl. & N. [Eng.], 575; *Leahy v. Dugdale*, 27 Mo., 439.)

The contract between the electric light company and the firm of Markel & Swobe was terminated absolutely at the dissolution of the latter. Neither the electric light company nor the retiring partner is longer bound thereby. The service to be rendered was the performance of all work of a certain class. It was, moreover, such as could be discontinued at any time without impairing the value of that

already rendered. (2 Bates, Partnership, sec. 708; *Caldwell v. Stileman*, 1 Rawle [Pa.] 212.)

The general nature of the contract is such as to make it unenforceable after dissolution. (*McCord v. West Feliciana R. Co.*, 3 La. Ann., 285; *Oliver v. Forrester*, 96 Ill., 315; *National Bank v. Hall*, 101 U. S., 43; *Tasker v. Shepherd*, 6 Hurl. & N. [Eng.], 575; *Johnson v. Wilcox*, 25 Ind., 182; *Schlater v. Winpenny*, 75 Pa. St., 321; *Johnson v. Hartshorne*, 52 N. Y., 173; *Doe v. Miles*, 1 Starkie [Eng.], 181; *Doe v. Bluck*, 8 C. & P. [Eng.], 464; *In re Beck's Estate*, 24 Pac. Rep. [Ore.], 1038; *Griffiths v. Griffiths*, 2 Hare [Eng.], 588.)

The specific terms of the contract clearly import that it was contingent, and that the parties had in mind its possible, if not probable, discontinuance before the end of the five years. (*Lochrane v. Stewart*, 2 S. W. Rep. [Ky.], 903.)

The defendant had a right to cancel the contract for non-payment of the monthly rentals. (*Withers v. Reynolds*, 2 Barn. & Ad. [Eng.], 882; *State v. Davis*, 20 Atl. Rep. [N. J.], 1080; *Hoare v. Rennie*, 5 Hurl. & N. [Eng.], 19; *Reybold v. Voorhees*, 30 Pa. St., 120.)

In no event did the plaintiff, or, indeed, either one of the partners, have the right to enforce the contract after the dissolution of the firm. (*Thomson v. McDonald*, 10 S. E. Rep. [Ga.], 448; *Tasker v. Shepherd*, 6 Hurl. & N. [Eng.], 575.)

*Edward W. Simeral, contra:*

The action was properly brought by Swobe alone. (*West v. Citizens Ins. Co.*, 27 O. St., 1; *Viles v. Bangs*, 36 Wis., 131.)

The contract was assignable. (*La Rue v. Groezinger*, 84 Cal., 281; *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U. S., 379; *West v. Citizens Ins. Co.*, 27 O. St., 1; *British Waggon Co. v. Lea*, 5 L. R., Q. B. D. [Eng.], 149.)

Swobe succeeded to all the rights of the firm, because he

was one of the parties with whom the contract was made, and by the assignment no new party or stranger was brought in. (*Ayres v. Chicago, R. I. & P. R. Co.*, 52 Ia., 478; *Dickson v. Indianapolis Cotton Mfg. Co.*, 63 Ind., 9; *Davis v. Lowell*, 77 Ala., 262.)

RYAN, C.

The appellee filed his petition in the district court of Douglas county, alleging that he was the successor of the firm of Markel & Swobe, and that he had become such successor by virtue of his partner, Markel, having on April 4, 1891, sold and transferred to him his interest in the firm of Markel & Swobe, including his rights and interest in the contract with the appellant; that the appellant was a corporation whose business consisted in furnishing electric lights; that said appellant contracted to furnish the firm of Markel & Swobe with electric lights for the Millard Hotel in pursuance of a written contract between said parties, for which payments were to be made as therein stipulated; that said hotel had been doing a large business as such and was constantly using the lights furnished by the appellant under the contract aforesaid in lighting its rooms, and had no other means of sufficiently lighting the same; that notwithstanding the requirements of said written contract the appellant had failed to furnish with good and sufficient light the said hotel, and in the connection last referred to, the appellee attached an itemized statement showing at what times and for how long at each time there had been a failure to furnish light as required by the contract, whereby, as the appellee alleged, he had been compelled to use gas during the several aforesaid failures of the appellant to furnish electric light, and that the gas so used had cost appellee $1,624.72, as shown by the said itemized statement; that appellee had repeatedly notified appellant of the unsatisfactory supply and quality of the light furnished. The appellee in his petition alleged that he was ready and willing,

and had been at all times, to comply with each of the terms of the contract referred to, but excused his literal compliance with all of its terms by alleging the above matters and others which are fully stated in the finding of the court hereinafter referred to, and which need not be set out at this time. The appellee tendered the amount which he conceded to be justly due when the aforesaid matters were given proper consideration. He further stated that on April 23, 1891, the appellant had caused to be served upon him a notice, of which a copy will hereinafter be set out at length, and the appellee averred that the appellant, unless restrained, will shut off the light in the aforesaid hotel, to the great and irreparable injury of the appellee, for which the appellee has no just and adequate remedy at law. The prayer of the petition was that the appellant, its servants, employes, and agents, should be enjoined from shutting off said light from said hotel, or from in any way interfering with the same, and for general equitable relief.

The answer alleged the dissolution of the firm of Markel & Swobe and its non-existence since April 1, 1891; that said firm during its existence had operated and run the Millard Hotel, but that since the dissolution of said firm the appellee had been running and operating said hotel, and that in said respects, and no other, the appellee was the successor of the firm of Markel & Swobe, the said Markel, a member of said firm, having on April 1, 1891, sold and transferred all his right and interest in said firm to appellee Swobe. The appellant in its answer admitted that notice had been, on its behalf, served upon the appellee; admitted that appellee had refused to pay what was due from him to appellant, but denied that such refusal was because of the failure by appellant to furnish light as required by the terms of its contract. The appellant, further answering, admitted that unless enjoined or restrained by the court it would shut off said electric light from said hotel, as it had a clear right to do, but denied that the shutting off of said

light would be a great and irreparable injury to appellee for which there would be no remedy at law. The allegations of the petition not admitted as above noted were denied by the answer separately and with great particularity. The answer alleged affirmatively that Markel, who had been a member of the firm of Markel & Swobe, was a man of large wealth and financial credit which was one of the considerations influencing appellant to make the written contract which he did with Markel & Swobe; that from the time the said lighting began, the firm of Markel & Swobe had been unreasonable and unfair in their demands as to light, and had refused to make payments therefor as agreed; that on March 1, 1891, there was due appellant from said firm the sum of $2,625; that on account of the captious and unreasonable complaints of said firm it was agreed between said firm and appellant that the amount to be paid up to March 1, 1891, should be $2,073.50, of which there was then paid $573.50, leaving due appellant the sum of $1,500, which sum the aforesaid firm had failed and refused to pay, and that afterwards appellant presented its bill for furnishing light for March, 1891, of $375, which also, as well as said $1,500, the said firm refused to pay; that thereupon appellant served the notice, referred to in the petition and answer, upon the appellee for the sufficient reasons, as advised by counsel, that appellant was not under obligations longer to furnish light under the aforesaid contract, and could not look to said firm for pay in the future, and because of the failure to pay what was already due appellant at the time of filing its said answer, which payment it was thereby insisted should be made and was an indispensable condition precedent necessary to be complied with before appellee was or could be entitled to any relief whatever.

The contract referred to in the answer and petition was in the following language:

"This agreement, made in duplicate and entered into this

first day of January, 1890, by and between the New Omaha Thomson-Houston Electric Light Company and J. E. Markel and Thomas Swobe, proprietors of the Millard Hotel, witnesseth: That the said electric light company agrees to sufficiently light said hotel for said Markel & Swobe with five (5) arc and five hundred and thirty-seven (537) sixteen (16) candle power lamps, in a complete and satisfactory manner, for which lighting said Markel & Swobe agree to pay said electric light company the sum of three hundred and seventy-five (375) dollars per month as rent therefor, the same to be paid at the end of each and every month; and the said electric light company hereby guaranties that said five (5) arc and five hundred and thirty-seven (537) lamps will sufficiently light said hotel, but in case said hotel is not sufficiently lighted with said number of lights, then and in that case said electric light company shall furnish additional lights of sixteen (16) candle power, without additional cost to said Markel & Swobe.

"Said Markel & Swobe also agree to the following additional terms: Said electric light company is to furnish and provide all fixtures, work, etc., insulating joints, shell and casing, also concealed work in rooms with decorated ceilings which will not admit of cleated work, for which said Markel & Swobe are to pay in cash, when completed, the sum of three hundred and fifty (350) dollars, and also the sum of five hundred eighty-five (585) dollars for plain work and labor, to be paid as follows, to-wit: If the lights are discontinued at the end of the first year, the sum of $468, or $\frac{1}{5}$ off; at the end of the second year, $351, or $\frac{2}{5}$ off; at the end of the third year, $234, or $\frac{3}{5}$ off; at the end of the fourth year, $117, or $\frac{4}{5}$ off; and at the end of the fifth year said Markel & Swobe shall pay nothing. Said Markel & Swobe agree that they will use the lights only when required, the same as gas has been used heretofore in same premises, said lights to be ready for use at all times, day and night.

"In witness whereof, we have hereunto set our names this first day of February, 1890, at Omaha, Nebraska.

"MARKEL & SWOBE.

"THE NEW OMAHA THOMSON-HOUSTON ELECTRIC LIGHT CO.,

"By S. L. WILEY, *Pres't.*

"In presence of

"J. W. SNOWDEN.

"Attest:

"FRANK WARREN, *Secretary.*"

The notice served by appellant upon appellee was in the following terms:

"OMAHA, NEBRASKA, April 22, 1891.

"*Messrs. Markel & Swobe, Omaha, Nebraska*—DEAR SIRS: That there may be no misunderstanding as to the import of my interview with Mr. Thomas Swobe in my office this P. M., I beg to express herein again the position of the New Omaha Thomson-Houston Electric Light Company, relative to the contract between you and that company for lighting the Millard Hotel in Omaha, Neb., of date February 1, 1890. The New Omaha Thomson-Houston Electric Light Company hereby notifies you that it declares said contract at an end and cancels the same, to take effect on and after May 1, 1891, for the reasons as follows, to-wit: 1. By the terms of said contract it continues only from month to month at the option of either party, and the electric light company now asserts the right to, and does hereby, exercise that option. 2. The firm of Markel & Swobe has been dissolved and is no longer in existence. This contract was made with that firm on the faith of its joint personal credit and financial responsibility. By the dissolution of the firm the contract was assigned, and this without the consent or acquiescence of the electric light company. It hereby, as it has before by word of mouth, refuses to continue the contract with one member of the former firm, or with any assignee of or purchaser

from said firm. 3. The monthly rental stipulated in the contract, to-wit, $375, and the price agreed to be paid, to-wit, $350, for the concealed wiring, has long been in default and remained unpaid, contrary to the express obligation of Markel & Swobe in said contract. The electric light company will continue to furnish the light to and including the 30th of April, 1891, solely for the purpose of completing a full month and to enable you to make such other arrangements as you may deem proper to meet your needs. In compliance with the obligation which the company owes to supply lights to all the public on like terms and for the same price, it hereby notifies you that on and after the first day of May, 1891, it will furnish you with all the lights you may require at its regular list and schedule prices to all other customers, payable at the end of each and every month, and it will be pleased to furnish you at once with a tariff rate on application at its offices in this city. Yours truly,

"NEW OMAHA THOMSON-HOUSTON ELECTRIC LIGHT CO.,
"By CHAS. OFFUTT, *Its Attorney.*"

The findings of the court, its conclusions of law, and the relief granted by the final decree, were as follows:

"1. On the 1st day of February, 1890, the defendant entered into a contract with the firm of Markel & Swobe, a copartnership, as set forth in plaintiff's petition.

"2. Said contract was for a term of five years from February 1, 1890, with the option of Markel & Swobe to stop its operation at their election at the end of any year before the end of said term.

"3. Jacob Markel, being the Markel of said Markel & Swobe, before the commencement of this suit, and in April, 1891, assigned to the plaintiff herein all his rights in said firm and the contract with said defendant.

"4. By the terms of said contract, the defendant agreed to sufficiently light said hotel for said Markel & Swobe

with five arc and five hundred and thirty-seven sixteen candle power lamps in a complete and satisfactory manner, or not to exceed six hundred and twelve such lights, and that for said light said Markel & Swobe agreed to pay said electric light company the sum of $375 per month as rent therefor, payable at the end of each and every month.

"5. That at the commencement of this suit and for a long time prior thereto the defendant had furnished five arc and five hundred and thirty-four incandescent lights; that the plaintiff claims said lights were not sufficient and did not light said hotel in a complete and satisfactory manner, and that the plaintiff, before the commencement of this suit, had repeatedly demanded that the said defendant furnish additional incandescent lights as specified in the contract, and that defendant refused to do so.

"6. That prior to the institution of this action, to-wit, March 17, 1891, the firm of Markel & Swobe had a settlement with the defendant of the defendant's account and the statement thereof, when it was agreed by and between the defendant and Markel & Swobe that the amount due and unpaid by the said Markel & Swobe under said contract up to March 1, 1891, was $2,073.50; that of this amount $573.50 was paid at or about the time of said settlement; that the defendant on or about the first day of April, 1891, presented a bill to the plaintiff for $2,225, $350 thereof being for concealed wiring and $375 for lights for the month of March, 1891, $1,500 being the balance due on said settlement; that at the time said bill was presented the plaintiff refused the same, assigning as a reason that the $350 was included in the settlement had on the 17th day of March, 1891.

"7. That no part of the remainder due on said settlement of March 17, 1891, to-wit, $1,500, and no part of the rent for March, 1891, was paid before the institution of this suit.

"8. That at the time of the final hearing herein all bills

for monthly lighting had been paid by the plaintiff, and that on the date of the hearing of the application for the injunction herein the said plaintiff paid the sum of $1,799.16 thereof to defendant in open court.

"9. That just prior to April 22, 1891, said Markel, of the firm of Markel & Swobe, declined to pay the bill of the defendant when the same was presented, on the ground that he had sold out to the plaintiff Swobe and had nothing more to do with the contract of February 1, 1890.

"10. Said Markel & Swobe, in said contract of February 1, 1890, agreed that they would use the lights only when required, the same as gas had been used theretofore in said premises.

"And thereupon the court concludes, as a matter of law, that the interest of said Jacob E. Markel in said contract of February 1, 1890, was assignable to this plaintiff, and that the plaintiff is now entitled to prosecute this action in his own name and to have the lights furnished by the said defendant under said contract until the expiration of said five years, at his election, in like manner as the said defendant contracted to furnish them to said Markel & Swobe; and it is thereupon ordered and adjudged that the temporary injunction granted herein be, and the same is hereby, made perpetual, and that the said defendant, its servants, officers, agents, and employes be, and they are hereby, enjoined from in any way interfering with the electric lights, wires, and machinery now in said Millard Hotel, in the city of Omaha, Douglas county, Nebraska; provided, however, and this injunction is granted upon the express condition, that the said plaintiff shall pay to said defendant, until the end of said contract, the sum of $375 on the first day of each and every month as rent for said lights, on the presentation by the defendant of its bill therefor at the Millard Hotel office in the city of Omaha.

"In entering this decree the court does not determine or consider the character or sufficiency of the lights furnished

by defendant, nor undertake to prejudice or estop the plaintiff from prosecuting an action at law for the recovery of the damages, if any, which he may sustain by reason of the failure of the defendant to furnish the lights as contracted for."

Each of the findings of fact is sustained by sufficient evidence to render unnecessary any review thereof with the view of determining the contentions in that direction.

The appellant insists that the contract between appellant and the firm of Markel & Swobe was not assignable. This might be conceded, and yet it would advance but little the inquiry properly arising upon said contract in respect of the relations, rights, and remedies of appellee. The firm of Markel & Swobe was originally one of the parties to the contract under consideration; and the question is not whether or not by virtue of the assignment another party might be substituted, but one member of said firm having retired therefrom and assigned his interest and rights thereunder to his partner, whether or not such partner's entire rights under the contract are extinguished by virtue of said assignment. If the assignment had been by Markel & Swobe to a stranger, it might be insisted, with some degree of plausibility, that a credit was extorted from appellant in favor of a person to whom the appellant might not wish to extend such credit. In the case under consideration, this element has no place. The credit was voluntarily extended to Markel & Swobe. No assignment as between the parties composing said firm could release or even modify the liability of each of the partners of that firm for the indebtedness of the firm, unless assent was given thereto by appellant. It is urged, however, that the contract provided that the firm of Markel & Swobe should use the electric lights only when required, the same as gas had been used on the same premises before the contract was entered into. What was the remedy which the appellant could resort to if more lights were used than required?

Obviously, it was not in contemplation by either party that upon the use of an unnecessary amount of electric light the company should have the right to deny the hotel the use of any electric light whatsoever. Its remedy, then, was an action on account of such unnecessary use of light as against Markel & Swobe, a right of action in no way abridged by the retirement from that firm of one of its individual members. But it is said that by the terms of the contract it continued from month to month, determinable at the option of either party. The contract, by its terms, required the electric light company to furnish the money for plain work and labor, for which the firm of Markel & Swobe were to make payments as follows: "If the lights were discontinued at the end of the first year, the sum of $468, or $\frac{1}{5}$ off; at the end of the second year, $351, or $\frac{2}{5}$ off; at the end of the third year, $234, or $\frac{3}{5}$ off; at the end of the fourth year, $117, or $\frac{4}{5}$ off; at the end of the fifth year said Markel & Swobe shall pay nothing." The oral evidence as to why these terms were fixed upon tends to show that the difficulty of coming to a common understanding was found in this item of $585, for the appellant declined to wait for this amount, while the firm of Markel & Swobe insisted that if by that firm it was paid in advance the amount would be a total loss in case it was found that the lights were unsatisfactory. It is shown that at the time the contract was entered into the appellant was desirous that the Millard Hotel management should adopt the use of the company's electric lights, and a compromise was agreed upon, its terms being expressed in the language above quoted. The evidence, including the terms of the contract itself, fully justified the court's second finding of fact, that the contract contemplated the term of five years, the firm of Markel & Swobe having the sole option to terminate it within that time. Appellant insists, however, that this option was exercised when Markel retired from the firm of Markel & Swobe, for, says appellant's counsel in his

brief, "there could be no better evidence of the exercise of this option to discontinue than Markel's withdrawal from the firm and his refusal to pay the rents, saying that he had nothing further to do with the hotel business." The language thus attributed to Markel is paraphrased by appellant's counsel as follows: "Here, in words not to be mistaken, he [Markel] gave the defendant [the appellant] notice that, so far as he was concerned, the lights were not needed and were not to be furnished." If the statement of Markel was fairly susceptible of the construction given it in the use of the words, "and were not to be furnished," there would be force in appellant's argument, for it might amount to a rescission of the contract and the repudiation of all rights and liabilities under it; but it is in just this respect that appellant's contention fails, for Markel never was released from liability for the performance of the terms agreed to by Markel & Swobe, either by his refusal to perform or otherwise, so far as the evidence discloses. The proposition to enter into a new contract with appellee, which is found at the close of appellant's notice, though addressed to Markel & Swobe, clearly indicates that there is, in reality, no objection to Mr. Swobe himself, nor to his ability to perform the undertakings in the existing contract. A notice of rescission by one party because of an objection to the financial ability of the other to pay what has already been undertaken, is, to say the least, somewhat inconsistent with a contemporaneous proposition to renew such undertakings upon terms which require still greater financial ability of the party notified. The judgment of the district court is right and is

AFFIRMED.

JOHN D. SLADE, APPELLANT, V. SWEDEBURG ELEVATOR COMPANY, APPELLEE.

FILED MARCH 6, 1894. No. 5695.

1. **Accord and Satisfaction.** A compromise of honest differences, whereby a less sum than that claimed has been paid and accepted in full of plaintiff's claim, bars the right of plaintiff to insist upon a recovery of the amount originally claimed by him.
2. **Review:** EVIDENCE OF COMPROMISE. Where there is sufficient evidence to justify a finding that there has been an executed compromise of all differences between the parties to the action, the judgment of the trial court will not be reversed.

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

*Abbott, Selleck & Lane*, for appellant:

In cases of contract for the payment of a sum of money the payment of a less sum will not be a good satisfaction unless it was paid before due, or upon some other new and valid consideration. (2 Greenleaf, Evidence, sec. 28; Bishop, Contracts, sec. 50; *Price v. Treat*, 29 Neb., 544; *Abbott v. Royce*, 3 N. Y. Supp., 503; *Duluth Chamber of Commerce v. Knowlton*, 42 Minn., 229.)

*Simpson & Sornborger, contra*, cited: *Pulliam v. Taylor*, 50 Miss., 257; *Bull v. Bull*, 43 Conn., 465; *Preston v. Grant*, 34 Vt., 203.

RYAN, C.

This action was brought by the appellant in the district court of Saunders county, Nebraska, to enforce a claim for a balance alleged to be due from appellee to appellant for constructing its elevator. The contract for the erection was oral, and, as would naturally be expected, there exists a conflict of evidence as to its terms and conditions. The

answer alleged that the elevator was very defectively constructed, and that it was not completed as agreed, and that, therefore, the elevator company refused to pay the amount to which appellant would have been entitled upon full compliance with the terms of the aforesaid contract; that to settle the differences it was agreed finally that appellant should be paid the sum of $350 in full of his claim against appellee, which proposition was assented to by appellant, whereupon that sum was paid by appellee to appellant, and that there was nothing due when this action was begun. This was denied by a reply duly filed.

The evidence was not at all satisfactory as to anything connected with the building of the elevator, and as to the alleged final settlement it is but little better. There was, however, sufficient relevant evidence from which the court might conclude that there had been made a compromise of honest differences between these contracting parties, and that pursuant to the terms of such compromise all matters of difference had been fully settled. The judgment of the district court is therefore

AFFIRMED.

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## OMAHA STREET RAILWAY COMPANY V. MARGARET CRAIG.

FILED MARCH 6, 1894. No. 5519.

1. **Negligence:** QUESTION OF LAW. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury; but where the facts are such that all reasonable men must draw the same conclusion from them, the question of negligence is one of law for the court. *Grand Trunk R. Co. v. Ives*, 144 U. S., 408, and authorities in support of this rule, collated in opinion, followed.

2. **Carriers**: NEGLIGENCE. Whether alighting from a moving train constitutes negligence or not is a fact to be determined by the jury, taking into consideration all the circumstances in evidence in the case.

3. **Negligence** is a failure to do what reasonable and prudent persons would ordinarily have done under the circumstances and situation, or doing what reasonable and prudent persons under the existing circumstances would not have done.

4. **Street Railways**: PERSONAL INJURIES: NEGLIGENCE: CONTRIBUTORY NEGLIGENCE: REVIEW OF EVIDENCE. Plaintiff sued the defendant, a street railway company, for damages for injuries she alleged she sustained through the negligence of defendant's servants while a passenger on its cars. The car on which plaintiff rode was an open one, having seats crosswise, and on either side a platform on which persons stepped in entering or leaving the car. At the end of each seat was an upright provided with a hand-hold. Plaintiff testified that on entering the car she informed the conductor that she wished to alight at Cass street, to which he answered, "Yes, ma'am;" that when the car reached Cass street crossing she rang the bell, the gripman applied the brake and brought the car almost to a standstill; that thinking it would stop every instant, without using the hand-hold, she stepped onto the platform preparatory to stepping onto the street when the car came to a full stop, and while in that position and seen by the gripman, he released the brake and suddenly accelerated the car's speed with a jerk, which threw plaintiff onto the street. *Held*, (1) Whether plaintiff was guilty of contributory negligence in stepping onto the platform of the car while in motion, and in not using the hand-holds on the uprights, were questions of fact for the jury; (2) that the jury's finding that plaintiff was thrown from the platform by the cause and in the manner she testified, would not be set aside as not supported by the evidence because two witnesses testified that she stepped from the platform onto the street, nor because two witnesses swore there was no sudden acceleration of the speed of the car, and three witnesses swore that they did not observe any.

5. **Conflicting Evidence**: REVIEW. This court will not weigh conflicting evidence nor pass judgment upon the credibility of witnesses.

6. **Instructions.** Certain instructions given by the trial court to the jury set out in the opinion and approved.

7. **Negligence**: INSTRUCTIONS. Such expressions as "slight neg-

ligence" and "slight want of ordinary care" should never be used in instructions to juries, as such expressions tend to obscure and confuse what should be stated in plain and concise language.

8. **Jurors:** QUALIFICATIONS. To qualify a person to act as a juror he should not only be unbiased and unprejudiced against all parties to the suit, but he should stand indifferent as to the success of either party thereto; and a person called as a juror who testifies that his acquaintance with one of the parties will interfere with his judgment and finding in the case should be excused.

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

The facts appear in the opinion.

*John L. Webster*, for plaintiff in error:

It is negligence to leap from a moving street car. (*Hagan v. Philadelphia & G. F. R. Co.*, 15 Phila. [Pa.], 278.)

If passenger signaled the car to stop and the car immediately began to slow down speed, and the passenger, without waiting for the car to stop, did step from the car while in motion and was injured, he cannot recover. (*Harmon v. Washington & G. R. Co.*, 6 Mackey [D. C.], 64.)

A passenger in the act of stepping down from the front platform of a street car, and when his foot was nearly on the ground the driver let go the brake and the car started, and he was thrown down and injured, cannot recover. (*Brown v. Congress & Baker Street R. Co.*, 49 Mich., 153.)

The boarding or alighting from a moving train is presumably and generally a negligent act *per se*. It is not sufficient to rebut the presumption of negligence that the trainmen acquiesced in the action of the passenger, or that the company failed to stop at the appointed place. (*Solomon v. Manhattan R. Co.*, 103 N. Y., 437.)

Where one is injured by attempting to get off a moving street car, unless some act of negligence on the part of the

company or its servants producing the injury is shown, it is not error to enter a nonsuit. (*Stager v. Ridge Avenue P. R. Co.*, 119 Pa. St., 70.)

In a case where it appeared a person attempted to board a street car while in motion, and that his foot slipped from the step caused by a jolt of the car, nonsuit was properly entered. (*Reddington v. Philadelphia Traction Co.*, 132 Pa. St., 154.)

To alight from a moving street car without notice to the person in charge forbids recovery, though the injury resulted from the sudden starting of the car. (*Nickols v. Middlesex R. Co.*, 106 Mass., 465.)

To alight after ringing bell to stop, and failure of car to stop, but only slackened speed, is not justified. (*West End & Atlantic Street R. Co. v. Mozely*, 79 Ga., 463.)

The fact that the train is about to pass the place of the passenger's destination without stopping will not justify him in jumping from the train. (*Reibel v. Cincinnati, I., St. L. & C. R. Co.*, 114 Ind., 476.)

In alighting from a moving train, it is not sufficient to prove that a prudent person would have done the same thing under the same circumstances, but it must always be made to appear that the company did some act or was guilty of some negligence which contributed to the injury. (*Gulf, C. & S. F. R. Co. v. Wallen*, 65 Tex., 568.)

It is contributory negligence to jump from a moving train just before it has stopped, but while train is being brought to a stop. (*Savannah, F. & W. R. Co. v. Watts*, 82 Ga., 229.)

Where conductor promised to let passenger off, not at a station but at a street crossing, and then neglected to stop at the street crossing, and passenger got off while train was in motion, no recovery can be had in suit for damages for injury sustained. (*Watson v. Georgia Pacific R. Co.*, 81 Ga., 476.)

It is negligence for a passenger to jump from a railroad

train moving from six to twelve miles an hour, although the conductor advised him that it was safe. (*Bardwell v. Mobile & O. R. Co.*, 63 Miss., 574; *Chicago & A. R. Co. v. Randolph*, 53 Ill., 510; *Baltimore & P. R. Co. v. Jones*, 95 U. S., 439; *Dowell v. Vicksburg*, 61 Miss., 579; *Lake Shore & M. S. R. Co. v. Bangs*, 47 Mich., 470; *Burrows v. Erie R. Co.*, 63 N. Y., 556; *Morrison v. Erie R. Co.*, 56 N. Y., 302; *Vimont v. Chicago & N. R. Co.*, 71 Ia., 58; *Missouri P. R. Co. v. Texas & P. R. Co.*, 36 Fed. Rep., 879.)

Attempting to board a train running six miles an hour is negligence *per se*, even though conductor told man to jump on. (*Hunter v. Cooperstown & S. V. R. Co.*, 2 L. R. A. [N. Y.], 832.)

The residents of a municipality must be held to know the rule as to the place of stopping of trains of street cars prescribed by the ordinances of the city. (*North Birmingham Street R. Co. v. Calderwood*, 7 So. Rep. [Ala.], 360.)

The ninth instruction was erroneous. The rule is that if the plaintiff was guilty of contributory negligence, or, in other words, guilty of negligence contributing to the injury, then the plaintiff cannot recover. (*Philadelphia & R. R. Co. v. Boyer*, 97 Pa. St., 91; *New Jersey Express Co. v. Nichols*, 33 N. J. Law, 434; *Wilds v. Hudson River R. Co.*, 24 N. Y., 430; *Toledo & W. R. Co. v. Goddard*, 25 Ind., 185; *Baltimore & O. R. Co. v. State*, 60 Md., 449.) In Illinois an exception to this rule exists to the extent and with the limitation that if the plaintiff's negligence is slight and the defendant's negligence in comparison should be gross, then such slight negligence of plaintiff will not prevent recovery. (*Chicago, B. & Q. R. Co. v. Lee*, 60 Ill., 501; *Illinois C. R. Co. v. Hammer*, 85 Ill., 526; *Chicago, B. & Q. R. Co. v. Harwood*, 90 Ill., 425; *Chicago & A. R. Co. v. Langley*, 2 Ill. App., 505; *North Chicago Rolling Mills Co. v. Monka*, 4 Ill. App., 664; *City of Winchester v. Case*, 5 Ill. App., 486; *Pittsburgh, C. & St. L. R. Co.*

*v. Shannon*, 11 Ill. App., 222; *Peoria, D. & E. R. Co. v. Miller*, 11 Ill. App., 375; *Moody v. Peterson*, 11 Ill. App., 180; *Union Railway & T. Co. v. Kallaher*, 12 Ill. App., 400.) The supreme court of Nebraska has decided the question to the effect that if plaintiff's slight negligence, if any, contributed directly to the alleged injury, the verdict should be for the defendant. (*City of Lincoln v. Gillilan*, 18 Neb., 114.)

*Cowin & McHugh, contra:*

We maintain that the following propositions cannot be successfully controverted: (1.) The same degree of care and caution is not required of a person in getting on or off a street railway car as is required in getting on or off a steam railway car. (2.) The plaintiff, Miss Craig, was not guilty of negligence, when she found the car nearly at a dead still, in rising from her seat and putting one foot upon the side board step, ready to step off when the car should completely stop. (3.) If Miss Craig was guilty of negligence in rising from her seat, under the circumstances, and putting one foot upon the side board, ready to step off when the car should cease to move, yet, if the gripman saw her in that position and, instead of entirely stopping the car, propelled it forward, which caused more or less of a jerk, by reason of which she was thrown and injured, she is entitled to recover. (4.) If the conductor and gripman, one or both, knew that a passenger was to alight at Cass street and, in addition to that, the bell was rung for a stop, and that when the car nearly came to a stop, barely moving, Miss Craig arose from her seat, took a step with one foot upon the side board, ready to step with the other immediately after the car should cease moving, and the car suddenly started forward, before entirely stopping and giving her an opportunity to get off, and that such forward movement caused her to be thrown to the ground and injured, then she is entitled to recover, whether the gripman and

conductor, or either, saw her in her standing position or not, for the reason that it was their, or one of their duties to see that the car came to a full stop, and that the passenger had alighted before accelerating the speed of or propelling forward the car. (5.) It is not *prima facie* evidence of negligence to get on or off even a steam passenger train, much less a street car, while the train is moving at a speed of four or five miles an hour. (*Louisville & N. R. Co. v. Crunk*, 21 N. E. Rep. [Ind.], 31; *Birmingham U. R. Co. v. Smith*, 8 So. Rep. [Ala.], 86; *Evansville & C. R. Co. v. Duncan*, 28 Ind., 441; *Jeffersonville, M. & I. R. Co. v. Hendricks*, 41 Ind., 48; *Montgomery & E. R. Co. v. Stewart*, 8 So. Rep. [Ala.], 708; *Union P. R. Co. v. Mertes*, 35 Neb., 204; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S., 551; *New York, P. & N. R. Co. v. Coulbourn*, 16 Atl. Rep. [Md.], 208; *Lacas v. Detroit City R. Co.*, 52 N. W. Rep. [Mich.], 745; *Britton v. Grand Rapids Street R. Co.*, 51 N. W. Rep. [Mich.], 277; *Beems v. Chicago, R. I. & P. R. Co.*, 12 N. W. Rep. [Ia.], 223; *Bowie v. Greenville Street R. Co.*, 10 So. Rep. [Miss.], 574; *Central Railroad & Banking Co. v. Miles*, 6 So. Rep. [Ala.], 696; *Ridenhour v. Kansas City Cable R. Co.*, 13 S. W. Rep. [Mo.], 889; *Houston v. Gate City Street R. Co.*, 15 S. E. Rep. [Ga.], 323; *Gallagher v. West End Street R. Co.*, 30 N. E. Rep. [Mass.], 480; *Buck v. People's Street R. & E. L. & P. Co.*, 18 S. W. Rep. [Mo.], 1090; *Lent v. New York C. & H. R. R. Co.*, 24 N. E. Rep. [N. Y.], 653; *Hays v. Gainesville Street R. Co.*, 8 S. W. Rep. [Tex.], 491; *Strand v. Chicago & W. M. R. Co.*, 31 N. W. Rep. [Mich.], 184.)

The following cases are cited in support of the ninth instruction: *Orleans Village v. Perry*, 24 Neb., 831; *Lake Shore & M. S. R. Co. v. Johnson*, 26 N. E. Rep. [Ill.], 510; *Terre Haute & I. R. Co. v. Voelker*, 22 N. E. Rep. [Ill.], 20.

RAGAN, C.

Miss Margaret Craig brought this suit in the district court of Douglas county against the Omaha Street Railway Company (hereinafter called the "company") to recover damages for a personal injury which she alleges she sustained by reason of the company's negligence while she was a passenger on its cars on September 22, 1889. The defenses of the company were a general denial, and contributory negligence on the part of Miss Craig. There was a finding and judgment for Miss Craig, and the company prosecutes error.

The car on which Miss Craig was a passenger was the last of a train of two cars moved by an endless cable. The rear car was an open or summer car, having seats across the same, and on either side a foot-board upon which passengers stepped on entering or leaving the car. At the end of each seat there were uprights with hand-holds attached. The train was in charge of a conductor and gripman. Miss Craig boarded the train at the intersection of Dodge and Twentieth streets in the city of Omaha, and occupied the rear seat. The train was moving north on said Twentieth street, and Miss Craig was to alight at the intersection of Twentieth and Cass streets and on the north side of the latter. It was the rule or custom of the company to stop its Twentieth street cable cars just on the north side of said Cass street. Miss Craig's evidence of the casualty was substantially as follows:

A. Well, when he came to collect the fare at Davenport street I told him to stop at Cass street; he answered, "Yes, ma'am," and when the car was crossing Cass street I noticed they wasn't going to stop and I rang the bell and sat back in the seat and waited for quite a little while; and finally they slowed up the car and it didn't—and they slowed up the car and it was going very slow, and I looked at the gripman to see if he was going to bring the car to a stand-

still, and he looked back at me—it was moving very slow—and then I took the step to step off.

Q. Where did you take the step? Onto what? This rail?

A. On that side rail; yes, sir.

Q. When you took the step—when you put your foot out and took that step onto the east rail for the purpose of stepping off, what was the motion of that car then?

A. O, you could tell it was just slowly moving. You would think it would stop in a second. Instead, when I went to take my last step, why he let the brake off, and the car started forward with a sudden jerk, and that jerk threw me.

Q. When you arose up to step on the rail, how near had the car stopped?

A. Well, it was just moving along very slowly. It was not—it hadn't come to a standstill—stopped altogether, but it was moving. You would think it would stop at any time, and I waited quite a little after I raised from the seat to give him plenty of time to bring the car to a stop.

Q. When you were on this rail, ready to step off one step, was the gripman looking at you?

A. Yes, sir.

Q. Did you see him?

A. Yes, sir. He looked around to see, I had an idea, if I got off or was going to get off.

Q. But when you were there, and it was going slow, was he looking at you when you were there on the rail ready to step off?

A. Yes, sir. He turned and looked at me the second, time before I got off.

Q. And then the car jerked ahead?

A. Yes, sir.

Cross-examination:

Q. But the train had not got quite to a full stop when you did step off?

A. Well, I had not yet stepped.

Q. So from the seat that you were sitting in, if you wanted to alight from that car, the first thing you would do would be to put your foot out on this foot-board that ran along the side of the car?

A. Well, I didn't do that.

Q. Well, I am not asking you how you did it. Isn't that the first thing you would step onto? Would it be the platform?

A. Well, I would raise out of the seat. I would stand in a straight standing position first, before I would attempt to step down.

Q. Now, why did you not wait till the car had come to a full stop?

A. Why, the car was moving so slow that you would think it would stop every instant, and it was merely moving, and I had stepped down onto the side rail or foot-board, and thought all the time I would step, and I took that step onto the foot-board, thinking that the car would be stopped; and in place of coming to a real standstill, stopping perfectly still, it gave a sudden jerk forward, and that jerk had thrown me off of that foot-board.

Q. Why didn't you wait until the car had come to a full stop before you stepped out on that foot-board?

A. Well, the car was moving so slow and the gripman looked. I noticed the gripman twice to see if he was going to bring it to a stop, and he looked back twice to see if I had got off; and it was moving so slow that I thought it would be stopped all the time, and I would step onto that foot-board; and it didn't; it went on; and if it had moved at the rate it was going then, I could have stepped off in perfect safety; but that sudden jerk threw me.

Q. So you assumed, or thought you could step down with safety off the car, if the car maintained simply the motion it then had?

A. Well, I wasn't going to try it.

Q. Well, but if you had grabbed hold of that [the post] you would not have fallen, would you?

A. Well, I would with the jerk the car had taken.

Q. You think you would anyhow?

A. Yes, sir; it jerked forward very suddenly.

Q. Now, you say after you had got onto that foot-board that the car made a jerk?

A. Yes, sir.

Q. That is the way you think it was?

A. Yes, sir.

Q. When you got onto that foot-board, which way were you looking?

A. Well, I glanced at the gripman just as soon as I took the step down on the foot-board, for I thought every second the car would come to a standstill.

Q. And you didn't know at the time of this accident any more about it than you know?

A. Well, I know that he let the car go forward when he hadn't ought to——

Q. You think that you didn't step from that foot-board onto the ground? Is that correct?

A. That I didn't step?

Q. Yes.

A. Why, no; I didn't. I didn't step. The car jerked forward and threw me before I had time to step.

Q. Then you didn't step from the platform onto the ground?

A. No, sir.

This testimony is contradicted by the witnesses for the company. One Thompson, a passenger on the train, testified that as near as he could see from where he was standing, Miss Craig arose and turned and stepped right out on the foot-board (platform) and after that right out on the street; that at that time the car was not moving much faster than a person could walk and came to a stop within a car's length of the point where Miss Craig stepped off, and that

he did not notice any sudden jerking of the car. One Benton testified that Miss Craig stepped onto the platform and then onto the street before the car stopped, and that there was no sudden jerking of the car. The gripman and conductor testified that there was no sudden jerking of the car. This evidence on the part of the company was somewhat weakened and contradicted by cross-examination and certain facts and circumstances proved on the trial. This evidence tended to establish the following conclusions: That Miss Craig notified the conductor where she was to alight; that as the car was on the Cass street crossing Miss Craig rang the bell for the train to stop; that the gripman applied the brakes and brought the train nearly to a standstill just beyond the crossing; that when the car was nearly stopped Miss Craig stepped out on the platform intending to step to the street when the train should become motionless; that the gripman saw her in that position, and instead of bringing the train to a standstill he took off the brakes, which caused the speed of the train to be accelerated, and that this sudden jerk threw Miss Craig from the platform onto the street; and that she did not step from the platform onto the street.

Counsel for the company says that this evidence discloses no negligence on the part of his client. The negligence charged to the company was releasing the brake and gripping the car to the cable, and thus accelerating the speed of the car, instead of stopping it while Miss Craig, to the knowledge of the company's servants in charge of the train, was standing on the platform, the car having been slowed down, expecting the train to come to a full stop and intending to alight when it should do so. Whether the company's servants were guilty of the negligence charged was a question properly submitted to the jury. We cannot set aside the jury's finding because the evidence on which it was based was contradictory. The credibility of witnesses and weight to be given their state-

ments were for the jury, not for us. This court has many times said that it would not weigh conflicting evidence nor pass judgment on the credibility of witnesses.

At the request of the company the trial court instructed the jury as follows:

"The burden rests upon the plaintiff to prove that there was a sudden starting of the car. Upon this point you have the testimony of five witnesses for the defendant; two of them the train men, and three not employes of the company. If these witnesses had an equal opportunity to know whether there was or was not a sudden jerking of the car, and if entitled to equal credit, then the plaintiff has failed to produce a preponderance of testimony on this point." The giving of such an instruction as this is of doubtful propriety; and it does not follow that because five persons had an equal opportunity to observe an occurrence which one person says happened, and the other five say they did not observe, that therefore the occurrence did not happen. The jury may have been of the opinion that it was more probable that Miss Craig fell from the platform of the car, as she says she did, and that the other witnesses, by reason of their situation at the time, did not notice the accelerated speed of the car, than that Miss Craig deliberately committed perjury. At all events the company has had the benefit of having its theory of the casualty not only submitted to the jury, but had their attention specifically directed by the instruction of the court in such manner as to leave no doubt but that the jury's finding must be taken to mean that Miss Craig's version of the accident was the correct one.

Counsel for the company next contends that because Miss Craig did not wait for the car to come to a full stop before she stepped onto the platform, and because, when she stepped onto the platform, she did not avail herself of the hand-holds on the uprights at the end of the seats, that she was, therefore, guilty of contributory negligence, and

asks us to say as a matter of law that this act and omission of Miss Craig raise against her a conclusive presumption of negligence. But we think that Miss Craig's stepping out onto the platform of the car before it came to a full stop, at the time and under the circumstances, and her failure to avail herself of the hand-holds on the uprights of the seats were, at most, facts to be submitted to the jury as evidence tending to show negligence on her part. Reasonable men might honestly draw different conclusions as to whether this act and omission of Miss Craig were, under the circumstances, negligence, and therefore it was for the jury to say whether the evidence of what she did and what she omitted to do warranted the conclusion of negligence on her part. It is for the court to say what act or omission is evidence of negligence, but it is for the jury to say whether the evidence establishes negligence. This is the settled rule and doctrine of this court, and has been many times announced, as will be seen from the following cases: *Huff v. Ames*, 16 Neb., 139; *Johnson v. Missouri P. R. Co.*, 18 Neb., 690; *City of Lincoln v. Gillilan*, 18 Neb., 114; *City of Plattsmouth v. Mitchell*, 20 Neb., 228; *Powers v. Craig*, 22 Neb., 621; *Orleans Village v. Perry*, 24 Neb., 831; *Union P. R. Co. v. Lee Sue*, 25 Neb., 772; *Stevens v. Howe*, 28 Neb., 547; *Omaha & R. V. R. Co. v. Clark*, 35 Neb., 867; *Chicago, B. & Q. R. Co. Landauer*, 36 Neb., 642; *Omaha & R. V. R. Co. v. Brady*, 39 Neb., 27; *Missouri P. R. Co. v. Baier*, 37 Neb., 235; *American Water-Works Co. v. Dougherty*, 37 Neb., 373; *Union P. R. Co. v. Porter*, 38 Neb., 226.) The rule is, we think, just and reasonable, and in harmony with the genius of our institutions and the weight of modern judicial authority. (*Louisville & N. R. Co. v. Crunk*, 21 N. E. Rep. [Ind.], 31; *New York, P. & N. R. Co. v. Coulbourn*, 16 Atl. Rep. [Md.], 208; *Cumberland Valley R. Co. v. Maugans*, 61 Md., 53; *Britton v. Street R. Co., Grand Rapids*, 51 N. W. Rep. [Mich.], 276; *Lacas v. Detroit*

*City R.*, 52 N. W. Rep. [Mich.], 745; *Strand v. Chicago & W. M. R. Co.*, 31 N. W. Rep. [Mich.], 184; *Beems v. Chicago, R. I. & P. R. Co.*, 58 Ia., 150; *Bowie v. Greenville Street R. Co.*, 10 So. Rep. [Miss.], 574; *Ridenhour v. Kansas City Cable R. Co.*, 13 S. W. Rep. [Mo.], 889; *Buck v. People's Street R.*, 8 S. W. Rep. [Mo.], 1090; *Lent v. New York C. & H. R. R. Co.*, 24 N. E. Rep. [N. Y.], 653; *Central Passenger R. Co. v. Stevens*, 22 S. W. Rep. [Ky.], 312; *Connolly v. City of Waltham*, 31 N. E. Rep. [Mass.], 302; *Finnegan v. Fall River Gas Works Co.*, 34 N. E. Rep. [Mass.], 523; *Washington & G. R. Co. v. Harmon*, 147 U. S., 571; *Hobbol v. Chicago Sugar Refining Co.*, 44 Ill. App., 418; *Arkansas Telephone Co. v. Ratteree*, 21 S. W. Rep. [Ark.], 1050; *Brown v. Brooks*, 55 N. W. Rep. [Wis.], 395; *Thompson v. Flint & P. M. R. Co.* 57 Mich., 300; *Gaynor v. Old Colony & N. R. Co.*, 100 Mass., 208; *Marietta & C. R. Co. v. Picksley*, 24 O. St., 654; *Jamison v. San Jose & St. C. R. Co.*, 55 Cal., 593.) This rule has received the sanction of the supreme court of the United States. The *Grand Trunk R. Co. v. Ives*, 144 U. S., 408, was a suit brought by the administrator of one Smith for damages for his death alleged to have been caused by the negligence of the railway company. Smith was traveling on the highway which crossed the Grand Trunk Railway Company's road at grade. At the place of the crossing a view of the track was obstructed until a person approaching the same was within fifteen or twenty feet of it. Smith and his wife were driving down the highway in a buggy with the top raised, and just as they reached the point where the railway crossed the highway they were struck by an engine and Smith was killed. It appears that the defense relied upon was that Smith was guilty of contributory negligence, in that he drove onto this railway track, the view of which was obstructed, without stopping and first ascertaining if there was a train approaching. The circuit court of the United States for the district of

Michigan instructed the jury as follows: "You fix the standard for reasonable, prudent, and cautious men under the circumstances of the case as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved and try it by that standard, and neither the judge who tries the case nor any other person can supply you with the criterion of judgment by any opinion he may have on that subject." This instruction was excepted to, and on appeal to the United States supreme court it was declared to be correct law and applicable to the facts brought out at the trial of the case. The court said: "Negligence is the failure to do what reasonable and prudent persons would ordinarily have done under the circumstances of the situation; or, doing what reasonable and prudent persons under the existing circumstances would not have done." The court further say in this connection: "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care under any and all circumstances. * * What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury under proper instructions from the court. It is their province to know the special circumstances and surroundings of each particular case and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs." And the court declared the rule to be: "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever

considered as one of law for the court." This rule has been again examined and approved by the supreme court of the United States as late as November, 1893, in the case of *Gardner v. Michigan Central R. Co.*, 150 U. S., 349.

Counsel for the company cites us to authorities holding that as a matter of law it is negligence for one to step on or off a street car in motion. Such are *Hagan v. Philadelphia & G. F. R. Co.*, 15 Phila. [Pa.], 278; *Harmon v. Washington & G. R. Co.*, 6 Mackey [D. C.], 64; *Stager v. Ridge A. P. R. Co.*, 119 Pa. St., 70; *Reddington v. Philadelphia Traction Co.*, 132 Pa. St., 154. The cases cited hold as counsel contends, but it must suffice to say that they do not hold the rule of this court.

The next error alleged by the company is the giving by the trial court to the jury instructions Nos. 6 and 9. They are as follows:

"No. 6. The plaintiff, in order to recover in this action, must not only satisfy you by the evidence that she received the injuries complained of, but that the same were occasioned by the negligent act of the defendant, or its agents, on the occasion set forth in the petition. Negligence has been defined to be 'the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do;' it is 'want of due diligence, whether the party at fault is an individual, a private corporation, or a municipality.'

"No. 9. You are instructed that if you find from the evidence that plaintiff, at the time of the injury complained of, was guilty of slight negligence in attempting to leave the car while in motion, at the speed above mentioned, and that such slight negligence contributed to the injury, still such fact, if you find it to be a fact, would not of itself prevent a recovery in this action, and the plaintiff is barred from recovering damages only when the injury

could have been avoided by the exercise of ordinary or reasonable care upon her part. Such negligence on the part of the plaintiff, if you find any to have existed, must be found to have contributed to bring about the injury complained of in order to defeat a recovery in this case."

The complaint made of the sixth instruction is that it omits the element of contributory negligence on the part of the plaintiff; and that the ninth instruction is bad because it asserts that if the jury should find Miss Craig was guilty of slight negligence contributing to her injury it would not prevent her recovery; but we do not think that the company was prejudiced by the giving of either of these instructions. The court had just told the jury in the eighth instruction that if they should find from the evidence that Miss Craig attempted to step from the train while the same was in motion, and that such act was a dangerous one and one liable to result in injury, and that she was heedless, careless, and negligent in stepping from the train, and that her injuries were occasioned by such act and not by the negligence of the company, then she could not recover; and that if the jury found Miss Craig had been guilty of contributory negligence, it would bar her right to recover, unless they found that the company had been grossly and wilfully negligent. In drafting the ninth instruction the learned judge probably had in mind certain instructions given by the trial court and commented on by this court in *City of Lincoln v. Gillilan*, 18 Neb., 114, and *Orleans Village v. Perry*, 24 Neb., 831, where such terms as "slight negligence" and "slight want of ordinary care" were used. It is unfortunate that such expressions have ever been used in instructions to juries, as they tend to obscure and confuse what should be stated in plain and concise language. Negligence does not cease to be negligence because qualified as "slight," nor because denominated "slight want of ordinary care." While instruction No. 9 was erroneous as above stated, we are constrained to say that when all the

instructions of the court are considered together, the company was not prejudiced by the error in said instruction.

The next complaint of the company is that the court erred in giving instruction No. 12 on its own motion, and instruction No. 1 at the request of Miss Craig. The instructions are as follows:

"12. If you find from the evidence that before the injuries complained of were received, plaintiff notified the conductor of the train that she desired to leave the same at Cass street, that the conductor notified the gripman of this fact, and you find that while crossing Cass street, the defendant let go the cable and put on the wheel brake, and slowed down so that after arriving on the straight track, north of the north line of Cass street, said train was then moving at a rate of from two to three miles per hour; and if you find from the evidence that plaintiff then arose and stepped on the platform as if to descend from the car, that the gripman turned once or twice to observe her; and if you further find that about this time, or before plaintiff left her position, the gripman suddenly let off the brake and permitted the car to start with a sudden jerk, by reason whereof plaintiff was violently thrown to the ground and received the injuries complained of; and if you find that at the time the plaintiff arose to get off the car she had reasonable ground to believe that the car was about to stop, and that her position did not contribute to her fall and injuries, that the defendant would be liable to plaintiff in such sum as the evidence shows you she sustained, not exceeding the amount claimed in the petition, unless you further find from the evidence that plaintiff could not by the exercise of due care have avoided the consequence of the negligent act of the defendant, if you find it was so negligent, and if you find such to be the facts."

"1. If you, gentlemen of the jury, find from the testimony in this case that the plaintiff Margaret Craig was a passenger on the defendant's cars at the time alleged in the

petition, that the servants of the company in charge of those cars knew at what point she desired to alight, she was entitled to be carried by the defendant company with proper and reasonable care to the place where she desired to alight, and to have the cars stop at that point a sufficient length of time to permit her to alight with reasonable care and diligence; and if you further find from the testimony that when the defendant's cars reached that point they had commenced slowing up but did not stop, but passed beyond such point and then continued to slow up, and while going very slow, as if to immediately stop, the plaintiff, Miss Craig, arose from her seat and stepped upon the platform or guard on the side of the car, which platform or guard was used for alighting from the car, and that as she stepped on that platform or guard for the purpose of alighting when the car should stop, the gripman propelling the car saw her and moved the cars suddenly forward with a jerk before stopping them and giving Miss Craig, the plaintiff, an opportunity to alight, and that by such sudden movement forward she was thrown to the ground and injured, and that she herself was free from blame under all the circumstances of the case, then your verdict should be in favor of the plaintiff."

The complaint made of these instructions is that they fail to state what would have constituted contributory negligence on Miss Craig's part; but we are of the opinion that the instructions were correct in every particular. As has been stated above, it was not for the court to say what acts or omissions of Miss Craig rendered her guilty of contributory negligence. That was for the jury. Another error assigned by the company is the refusal of the trial court to give instructions Nos. 9, 12, and 16, requested by the company. They are as follows:

"16. The jury are instructed that, under the evidence of this case, there is not sufficient proof of any act on the part of the defendant company, or its agents or servants, to jus-

tify a recovery herein, and you are instructed to return a verdict for the defendant."

"9. The jury are instructed that it is presumably a negligent act for a passenger to attempt to alight from a cable train while the same is in motion and that it is not sufficient, to rebut this presumption of negligence on the part of the plaintiff, that the men in charge of the car violated their duty in not stopping at the exact place where the train had been accustomed to stop."

"12. The jury are further instructed that if they find that the plaintiff, after ringing the bell to stop the car, attempted to alight from the car before the train came to a full stop, but while its speed was being slackened, that she was guilty of contributory negligence, and that such facts do not make out a case which should entitle the plaintiff to recover."

We think the court was right in not giving these instructions. By them it was sought to have the trial court say what act or omission of Miss Craig was or was not negligence.

Again, a review of the entire record and of all the instructions given to the jury in this case convinces us that the plaintiff in error has no just ground to complain because the jury was not properly instructed, or sufficiently instructed.

At the request of the company the trial court charged the jury as follows:

"1. The jury are instructed that if the plaintiff attempted to get off from a moving cable car while the speed of the train was being slackened, but before the train had been brought to a full stop, she was guilty of contributory negligence, which bars her right of recovery if this be true, although the men in charge of the train did not immediately comply with her request to stop the train.

"2. The jury are further instructed that if the plaintiff signaled the car to stop and the car immediately began to

slacken speed, and the plaintiff, without waiting for the car to stop, did step from the car while it was in motion, and was thereby injured, she cannot recover.

"3. The jury are further instructed that if the gripman in charge of the car had applied the brakes, and was bringing the train to a stop for the purpose of allowing the plaintiff to alight from the car, and the gripman, by applying the brakes and slackening the speed of the train for the purpose of stopping the train, was doing his duty, and that the only duty which the men in charge of the train owed to the plaintiff was to stop the train as soon as the same could be reasonably done, and if the men in charge of the train performed their duty in this respect, and were not guilty of any other wrongful or negligent act in connection with the stopping of the train, the plaintiff cannot recover, and your verdict should be for the defendant.

"4. The jury are further instructed that if you find from the evidence that the plaintiff, without waiting for the men in charge to bring the same to a stop, attempted to get off of the train while the same was in motion, and that injury resulted to her by reason of her own act in attempting to get off of the train while the same was in motion, and while the same was being brought to a stop, then the plaintiff cannot recover.

"5. The jury are further instructed that if they believe from the evidence that the plaintiff, in attempting to step off from the car while still in motion, stepped directly out from the car at right angles from the car, and that by reason of the momentum of the car, and her own body, she was caused to fall over northwards, the direction in which the car was moving, she was guilty of contributory negligence and cannot recover.

"6. The jury are further instructed that any failure of the defendant company, if such there was, to stop at the exact point where the company is accustomed to stop its cars, is not of itself negligence on the part of the company.

"7. The jury are further instructed that if they believe from the evidence that the plaintiff thought she could step from the car with safety to herself, even while the car was in motion, the fact that she so believed she could step from the car is not of itself proof that she was not guilty of contributory negligence.

"8. The jury are further instructed that the plaintiff assumed the responsibility of danger in attempting to step from the car while in motion, and if they find from the evidence that she did so, the fact that she misjudged her ability to get from the car with safety, if she did so misjudge her ability to alight with safety, does not show negligence on the part of the defendant company, and does not create any liability on the part of the defendant company.

"10. The jury are further instructed that if the plaintiff was injured by the accident caused by her attempting to jump off of a moving cable car, the defendant company is not liable unless the proof satisfies them that some negligent act on the part of the company's servants in charge of the train produced the injury shown by the evidence.

"11. The jury are instructed that if they believe from the evidence that there was a sudden movement of the car at the instant of time when the plaintiff was attempting to get off from the car, that such fact does not show negligence on the part of the railway company; for in order to show negligence on the part of the railway company, there must be some evidence of a sudden movement of the car attributable to some act or action of the men in charge of the train; and that such act of negligence on the part of the men in charge of the train cannot be determined by the jury from mere conjecture.

"13. The jury are further instructed that if the plaintiff believed that the train was about to pass the place of her destination without stopping, that such fact did not justify her in attempting to get off of the car while it was still in motion.

"14. The jury are further instructed that under no circumstances can the plaintiff recover unless the defendant, by its agents and servants in charge of the train, did some act or was guilty of some negligence which contributed to the injury.

"15. If the jury should be satisfied from the evidence that when the plaintiff signaled the car to stop by the ringing of the bell for that purpose, the car immediately began to slacken its speed, and that the plaintiff, without waiting for the car to stop, undertook to and did step from the car while it was still in motion, and was thereby injured, she cannot recover, and the defendant is entitled to the verdict."

Some of these instructions should not have been given. The first, second, fifth, seventh, and fifteenth, in effect, told the jury that if Miss Craig stepped from the car while in motion, she was guilty of contributory negligence. The sixth instruction told the jury that it was not negligence in the company not to stop its car at the point where the company was accustomed to stop its cars. It was not for the court to say; it was for the jury. By the eleventh instruction the court told the jury that if the company started its car with a sudden jerk at the instant when Miss Craig was attempting to step from the platform onto the street, that such act on its part was not negligence, and the instruction further proceeds to tell the jury why it was not negligence.

The final error assigned here is that the trial court erred in sustaining a challenge for cause submitted to one Woodworth, called as a juror. This man's examination was as follows:

Q. Mr. Woodworth, you have no bias or prejudice against the plaintiff in this suit?

A. I do not know the party at all.

Q. You have no bias or prejudice either for or against the street railway company?

A. No, sir.

Q. You know nothing about the facts in this case?

A. I do not think I ever heard of it until I heard Mr. Cowin state it. I may have read a notice of it in the papers; that is all.

Q. Then could you, or could you not, in your opinion, render a fair and impartial verdict, according to the law and the evidence, as you shall be instructed by this court.

A. Yes, sir.

Q. And your acquaintance with the officers of the railway company would not prevent you from rendering a fair and impartial verdict on the evidence as you shall be instructed by the court?

A. That would not interfere with my duties as a juror at all. The point I made, you know, was that other things being equal, then I would be more especially in favor of the street railway company, simply because of my acquaintance with them.

Q. You did not mean to say that would have any greater weight in this case where you happened to be acquainted with one of the parties to the lawsuit?

A. O, no. No sir.

Cross-examination:

Q. As I understood you before when I asked you the question whether your acquaintance with the stockholders and officers of the street railway company would interfere with your judgment or finding in the case, you stated, that other things being equal, you thought it would?

A. Yes, sir.

Q. That is right?

A. Yes, sir.

We think that a juror should not only be unbiased and unprejudiced against both the parties to a suit, but that he should be indifferent as to which party succeeds; and that a juror who admits that an acquaintance with a party litigant would interfere with his judgment or finding in the case, is an incompetent juror; and that the court did not

abuse its discretion in sustaining a challenge submitted to Mr. Woodworth for cause.

The judgment of the district court is

AFFIRMED.

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PETER A. ANDERSON v. HENRY W. VALLERY.

FILED MARCH 6, 1894. No. 5637.

1. **Usury: RENEWAL OF NOTE: BONUS: QUESTION OF FACT.** An agent had for collection a promissory note belonging to his principal. The maker of the note paid such agent sufficient money to discharge said note, except the sum of $165. Said agent, instead of applying on said note all the payments made, retained the sum of $10 by way of a bonus, attorney or collection fee, and took a note from the debtor, payable to the agent's principal, for $175, due six months afterwards, drawing interest at ten per cent, and secured by a chattel mortgage. *Held*, In a suit of replevin brought by the payee of said note for the possession of the mortgaged property, that whether said agent retained said sum of $10 by way of a bonus, attorney or collection fee in consideration of a forbearance extended by him to the debtor for the payment of the $165 remaining due on the note which the agent held for collection, was a question of fact properly submitted to the jury.

2. ———: ———: ———. In such case if the agent retained said $10 as a bonus for forbearing present payment of the balance due on the note which he held for collection and for which the $175 note was given, then taking such bonus rendered such last named note usurious.

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

*Clark & Allen*, for plaintiff in error.

*J. K. Vandemark* and *Simpson & Sornborger, contra.*

RAGAN, C.

1. This is an action of replevin brought in the district court of Saunders county by Peter A. Anderson against

Henry W. Vallery. Anderson claims that at the commencement of this suit he had a special ownership in, and was entitled to the immediate possession of, the property replevied. He bases his claim to the possession of this property under a chattel mortgage made thereon April 18, 1889, by Vallery, the owner of the property, which mortgage was given to secure the payment of a note of said date for $175, due six months after date, drawing interest at ten per cent per annum from date, and payable to the order of Anderson. Anderson having been unsuccessful in the court below brings the case here on error.

The evidence in the record conclusively shows that one Bays was the agent for Anderson in all the transactions out of which this lawsuit arose; that on April 4, 1888, Vallery executed his note to Anderson for $350, drawing interest at the rate of ten per cent per annum, and due one year after that date, and to secure the payment of the same he gave Anderson a chattel mortgage on certain personal property; that this latter note with mortgage, about the time of its maturity, was in the hands of Bays, as Anderson's agent, for collection. The evidence tends to show that Vallery paid to Anderson on this $350 note sufficient money to discharge the same, both principal and interest, except $165; that Bays, instead of applying all said money to the discharge of said $350 note, retained $10 as a bonus, attorney or collection fee, and took the note in suit from Vallery for the balance due on the note of $350 and the $10 retained by him. The evidence is undisputed that on the $175 note Vallery made payments, before this suit was brought, as follows: October 29, 1889, $55; November 16, 1889, $57; and the evidence is undisputed that on the 17th day of February, 1889, the day the suit was brought, Vallery made a further payment on said note of $70. Whether this $70 was paid before or after the service of the summons in this case on Vallery is disputed, but there is no doubt but that Bays, who brought the suit for

Anderson, was advised by Vallery before such suit was brought that the $70 was on its way to him by express from Plattsmouth, where it seems Vallery had borrowed the money about the 15th of February. It appears that the action was originally commenced before a justice of the peace. One of the errors assigned here is that the verdict of the jury is not supported by the evidence. If the note for $175 should have been for only $165, as the evidence tends to show and the jury found, then the payments made by Vallery on this note were sufficient to pay it in full, both principal and interest, and there was nothing due on it when this suit was brought, provided the $70 payment was made before the bringing of the suit. As before stated, the evidence tended very strongly to show that this $70 payment was made before the suit was brought, and the jury, by its finding, has said that the payment was made before the bringing of the suit. The evidence in the record abundantly supports the finding of the jury, then, that at the time the suit was brought no sum of money whatever was due upon the note made the basis of the replevin action.

2. On the trial the court instructed the jury as follows: "You are instructed that if the plaintiff, by himself or his agent, contracted for, received, or reserved $10 or other sum in excess of ten per cent per annum upon the pretense that the same was a commission or collection or attorney's fee, then the promissory note for $175 would be usurious, and the plaintiff would not be entitled to recover or receive any sum greater than the sum shown to be due at the time of the execution of the said $175 note." The giving of this instruction is now assigned as error. The contention is that there was no evidence of usury in the case to which the instruction was applicable. The action being one of replevin, and the pleadings being a petition and a general denial, the only issue of course was whether the plaintiff was entitled to the possession of the property replevied.

To defeat this claim the defendant below was entitled to introduce any evidence which tended to disprove the right of the plaintiff to the possession of the property. The evidence introduced tending to show that Bays retained $10 of the money paid him by Vallery for Anderson, as a bonus, collection or attorney fee, was competent, as it tended to show that this $10 was reserved in consideration of a forbearance by Anderson, through his agent, Bays, extended to Vallery for the $165 remaining unpaid of the old note. We think the jury would have been justified, under the evidence, in inferring that the $10 retained by Bays—if it was so retained by him—was in consideration that he would extend the time to Vallery for the payment of the amount remaining due on the old note. It follows, therefore, that the court did not err in the instruction to the jury complained of. It was for the jury to say not only whether this $10 was retained by Bays, but, if retained, for what purpose and on what account. It is said by counsel that if it be admitted that Bays retained the $10, that that did not make the transaction usurious. We are unable to agree to this contention. It might, or it might not, make the transaction usurious. That would depend upon the intention and purpose with which the money was retained. Had Vallery paid the entire sum due on the note to Anderson or his agent, Bays, and Anderson or Bays had then loaned Vallery $165 of the money, reserving $10 by way of a bonus, commission, or collection fee, we do not think that counsel would question but that the transaction would have been usurious. Is there any difference in principle in the case supposed and the one which the testimony tends to establish? The rule of this court is that where one is entrusted with the business of lending money of another and exacts for its use, either directly or indirectly, by whatsoever shift or device, interest in excess of the rate permitted by the statute, the transaction will be adjudged usurious. (*Cheney v. Eberhardt*, 8 Neb., 423.)

3. The next error assigned is in giving an instruction by the court to the jury as follows: "You are instructed that if at the time of the commencement of this action the defendant had tendered to the plaintiff, or his agent, Bays, $20, or any other sum, which, added to any sums which had before that time been paid, aggregated an amount equal to, or greater than, the amount actually due to the plaintiff at that time, then the jury should not take into consideration any amount thereafter paid by the plaintiff in his efforts to collect or enforce his claim." Counsel say that this instruction was erroneous because there was no evidence of a tender, and because the instruction lays down the rule that if the sum due on a debt is tendered at any time before trial, all costs thereafter made must fall on the creditor; but counsel misunderstands this instruction. It tells the jury that if they find, at the time suit was brought, Vallery had already paid or tendered to Anderson all the money due on the note, then the jury could not take into consideration any money paid out by Anderson after such payment and tender in his efforts to collect his debt. The jury had no right to take into consideration in this case any money paid out by Anderson in his efforts to collect this debt, whether paid before or after the tender. Anderson had to succeed by establishing a lien upon the mortgaged property, and that lien could only be established by showing that some sum remained due on the debt which the mortgage secured; and there is no dispute in the record but that Vallery had paid on the note the sums of $55, $57, and $70. The only dispute as to these payments was the exact time at which this $70 was paid. The instruction certainly did not prejudice the plaintiff in error.

As to the other reason assigned by counsel as to why this instruction was erroneous, viz., that the record contained no evidence of a tender, this is to be said: It appears that Vallery's first answer to the petition of replevin, among other defenses, set out that on the 16th day of February,

the day before the suit was brought, he had paid Bays for Anderson $70, and tendered him $20 in full satisfaction of the note. The case was not tried on this answer, but, by permission of the court, Vallery filed an amended answer, consisting of a general denial. On the trial Vallery introduced no evidence on the subject of a tender, but Anderson's counsel, for some reason not disclosed by the record, over the objection of Vallery, put this first answer of Vallery in evidence; and at the request of the plaintiff in error the court instructed the jury: "The jury are instructed that if they find from the evidence that the tender shown on the trial was insufficient in amount to cover the amount due the plaintiff at the time the tender was made, then the jury will find that such tender was no defense." The plaintiff in error is in no position now to say that there was no evidence of a tender in the record. He proved that fact by putting in evidence Vallery's answer; and not only that, but at his request the court instructed the jury as to the effect of this tender. The rule laid down in *Tompkins v. Batie*, 11 Neb., 147, cited by counsel, is not applicable to this case. The court did not tell the jury, in the instruction on the subject of tender, that if they found Vallery tendered as much or more money to Bays than was due on the $175 note, such tender amounted to a payment of the note and released the mortgage lien. Had he done so the instruction would have been bad. What the court did tell the jury was, in effect, that they should not take into consideration any costs made by Anderson in attempting to collect his debt after the tender made. This was correct. The judgment of the district court is

AFFIRMED.

# FREMONT BUTTER & EGG COMPANY V. F. J. SNYDER & COMPANY.

FILED MARCH 6, 1894. No. 5281.

1. **Actions Against Corporations: VENUE.** The Fremont Butter & Egg Company was a corporation organized under the laws of the state for the purpose of buying and selling butter and eggs. Its principal place of business, as fixed by its charter, was in Dodge county, and its chief officer resided there. It had and maintained in Saunders county a place of business, there exercised its corporate functions, and had there employes conducting the business for which it was organized. *Held*, That, within the meaning of section 55 of the Code of Civil Procedure, the corporation was situated in Saunders county and suable there.

2. ———: ———. Section 55 of the Code of Civil Procedure provides: "An action * * * against a corporation created by the laws of this state may be brought in the county in which it is situated or has its principal office or place of business." * * *Held*, That the meaning of this statute is that a domestic corporation may be sued (*a*) in the county where its principal place of business is fixed by its charter, although its actual business is carried on and its officers reside in some other county; (*b*) that a domestic corporation, except those governed by sections 56, 57, and 58 of the Code of Civil Procedure, may be sued in any county where it is situated, and that it is situated in any county where it has and maintains a place of business, and servants, employes, or agents engaged in conducting and carrying on the business for which it exists.

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

*G. W. Simpson* and *Frick & Dolezal*, for plaintiff in error.

*George I. Wright* and *J. R. Gilkeson, contra.*

RAGAN, C.

F. J. Snyder & Co. sued the Fremont Butter & Egg Company (hereinafter called the "corporation") in the dis-

trict court of Saunders county for the price of some butter and eggs alleged to have been sold and delivered by the former to the latter. The answer of the corporation alleged two defenses: (1.) A general denial. (2.) That it was a domestic corporation, having its principal place of business at the city of Fremont, in Dodge county; that it was served with summons in Saunders county, and therefore the district court of that county had no jurisdiction over it. The corporation, having been unsuccessful in the district court brings the case here, alleging:

1. That the verdict of the jury, on which is based the judgment here sought to be reversed, is contrary to the evidence. The record shows that the corporation was organized under the general incorporation laws of the state, its principal place of business, as fixed by its charter, being in the city of Fremont, in Dodge county, where its general manager resided. It is a trading corporation, engaged in the buying, packing, shipping, and sale of butter, and the buying, assorting, candling, boxing, shipping, and sale of eggs. It had "branch houses" at Red Oak, Iowa, and in Beatrice and Wahoo, Nebraska. In the latter city, at the time and for some years prior to the time of the transaction out of which this suit arose, it had a place of business—business house—on which it kept its sign, viz.: "Fremont Butter & Egg Co., Buyers of Butter and Eggs." The corporation had in its employ there one or more persons. Butter and eggs were bought by these employes or persons operating for the corporation and in its name. The eggs were assorted, candled, and boxed at this place of business by these employes of the corporation, and then shipped to the Fremont house, or to such other point as the corporation's general manager directed. The general manager of the corporation was frequently in Wahoo looking after the business there. Among others who bought butter and eggs at this point for the corporation was one Darrah. It is claimed by the corporation that he

was operating on his own account and not as the corporation's agent, and that Darrah bought the goods sued for of the producers and the corporation bought them of Darrah. This contention, however, is disputed, and the evidence supports the jury's finding that Darrah, in buying the property sued for, was acting for, and on behalf of the corporation. It appears from the record that the corporation clothed this man Darrah for years with the authority of an agent. He was, to the corporation's knowledge, buying butter and eggs for the corporation at Wahoo, turning over the property bought to the corporation at its place of business in Wahoo, and drawing drafts on the corporation through the banks of Wahoo to pay for the goods bought. The corporation cannot now escape payment for goods thus purchased by Darrah and received by it by denying Darrah's agency. The corporation's conduct and course of business and dealing through this man was of itself sufficient to lull the inquiry of all reasonable men and induce them to believe that Darrah was, in fact, what he appeared to be, the corporation's agent. The evidence abundantly justifies the finding of the jury that Darrah was the purchasing agent of the corporation, and that in all that he did he was acting for and on its behalf.

2. The next error assigned is that the district court of Saunders county had no jurisdiction of the corporation, as it could be sued only in Dodge county, that being the location of its principal place of business. Section 55 of the Code of Civil Procedure provides: "An action * * * against a corporation created by the laws of this state, may be brought in the county in which it is situated, or has its principal office or place of business." * * * It is argued that the word "may" in this section means "must," and that the word "situated" is synonymous with "principal place of business." But the able counsel are mistaken in their construction. The meaning of this statute is that a domestic corporation may be sued (1) in the county where

its principal place of business is fixed by its charter, and this though its actual business is carried on and its officers reside in some other county; (2) that a domestic corporation may be sued in any county where it is situated, and it is situated where it has and maintains a place of business and servants, employes, or agents engaged in conducting and carrying on the business for which it exists. This statute was not intended to limit the county in which a domestic corporation, except those mentioned in sections 56, 57, and 58 of the Code of Civil Procedure, could be sued to the one in which it has its principal place of business, but rather was enacted for the benefit of creditors and persons having claims against a domestic corporation. There are a number of lumber companies, corporations, whose principal places of business are in the cities of Omaha and Lincoln, having places of business and employes exercising their corporate functions in the various counties of the state. It was not intended by this statute that such corporations could only be sued in Douglas and Lancaster counties. If counsels' contention is correct, the corporation at bar, if it refused to pay the rent of, or vacate, the building it occupies in Wahoo, could only be sued for rent or in forcible detainer in Dodge county. The mere statement of the proposition refutes it. The corporation sued in this case had, in Saunders county, a place of business, agents, and employes, and was exercising its corporate functions in that county, and, hence, was situated and suable there.

3. We have not been unmindful of the complaints made by counsel for the corporation that the court erred in certain instructions given to the jury, and in the admission and rejection of certain testimony at the trial. We have carefully examined the instructions and the evidence complained of and have reached the conclusion that the court was not in error in the matters complained of. It follows that the judgment of the district court must be, and the same is

AFFIRMED.

## FREMONT BUTTER & EGG COMPANY V. THOMAS KILLIAN & COMPANY.

FILED MARCH 6, 1894. NO. 5280.

**Actions Against Corporations: VENUE.** Following *Fremont Butter & Egg Co. v. Snyder*, 39 Neb., 632, the judgment in this case is affirmed.

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

*G. W. Simpson* and *Frick & Dolezal*, for plaintiff in error.

*S. H. Sornborger, contra*, on the question of jurisdiction, cited: *Bristol v. Chicago & A. R. Co.*, 15 Ill., 436; *Baldwin v. Mississippi & M. R. Co.*, 5 Ia., 518.

RAGAN, C.

The facts in this case and the law applicable thereto are substantially the same as in the *Fremont Butter & Egg Co. v. Snyder*, decided at this term and reported in 39 Neb., 632, and on the authority of that case the judgment in this is

AFFIRMED.

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## GEORGE P. LEWIS ET AL. V. CARRIE R. BAKER.

FILED MARCH 6, 1894. NO. 5121.

**Adverse Possession.** When a person has been in the actual, visible, exclusive, and uninterrupted possession of a portion of a street in a city, under a claim of right, for ten years, the title thereto vests absolutely in such occupant. *Meyer v. City of Lincoln*, 33 Neb., 566, followed.

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

*F. S. Howell*, for plaintiffs in error.

*J. A. Price, contra.*

RAGAN, C.

This is an injunction proceeding brought in the district court of Boone county by Carrie R. Baker against the village of Albion and one George P. Lewis, the overseer of streets of said village. The substantial allegations of the petition are that in the year 1879 one Mansfield owned lots 14 and 15, in block 2, of Mansfield's addition to the village of Albion, and on the first day of March of said year he conveyed said lots to one Diffenderfer who took possession of said lots, and inclosed them, together with a strip of ground nine feet and five inches in width, on the south side thereof, by erecting around said lots and said ground a post and board fence; that on the 1st day of November, 1880, Diffenderfer conveyed said premises to one Letson; that on said last date said Letson conveyed said real estate to one Matilda Diffenderfer, who took possession of the same as inclosed; that on the 2d day of July, 1887, said Matilda Diffenderfer and husband conveyed said premises to the plaintiff, and that she, in the year 1887, removed the fence which Diffenderfer had built around said lots and strip of ground, and on the same day erected in its place and on the same line a new and costly fence of posts and boards, which fence she caused to be painted, as well to make it ornamental as to preserve it, and that said fence remained as built at the time of the institution of this suit; that the plaintiff and those under whom she derived title had been in the open, notorious, exclusive, continuous, adverse possession as owners of said premises and every part thereof as inclosed by said fence for more than

ten years immediately before the commencement of this suit; that plaintiff's dwelling house and barn were on said lots so inclosed; that the said strip of ground of nine feet and five inches in width, adjoining said lots on the south and inclosed with them, had for more than ten years formed a part of the lawn of the plaintiff's dwelling house; that she had spent much time, labor, and money in having said lawn improved and cared for; that on said strip of ground were a number of shade and ornamental trees upon which she had bestowed much time, labor, and care; that said strip of ground had received the same care and had been improved and occupied in the same manner as other parts of said premises inclosed by said fence; that the defendants claimed that said strip of ground was a part of one of the public streets of said defendant village, and were threatening to cut down, remove, and destroy said fence and appropriate said strip of ground to the public use as a street. To this petition the parties made defendant filed a general demurrer on the ground that the petition did not state facts sufficient to constitute a cause of action. The trial court overruled this demurrer, to which ruling the defendants took an exception, and, refusing to plead further, the court granted a perpetual injunction as prayed for, and the parties made defendant below bring the case here.

There are two points relied upon for a reversal of this decree:

1. That although the petition shows that Baker had been for more than ten years immediately before the bringing of the suit in the open, notorious, exclusive, and adverse possession of the premises, yet it does not appear from the petition that she and her grantors held such possession under a claim of title thereto. We do not think this contention can be maintained. True, the precise expression, "under claim of title," is not found in the petition, nor is it essential to the validity of the petition that it should be. It appears from the allegations of the com-

plaint that the use and possession of said premises by Baker and her grantors had been and were that of absolute owners. In other words, the facts stated in the petition sufficiently show that Baker and her grantors had been and were occupying the premises, claiming title to the same.

2. The second point relied upon to reverse this judgment is that adverse possession, though for the statutory time, did not vest Baker with the title to the strip of ground, because it was a part of a public street. This point has been, by this court, decided adversely to the contention of the plaintiffs in error. See *Meyer v. City of Lincoln*, 33 Neb., 566, where it is held, "When a person has been in the actual, visible, exclusive, and uninterrupted possession of a portion of a street in a city, under a claim of right, for ten years, the title thereto vests absolutely in such occupant." In that case the question at bar was very thoroughly considered, and the authorities on both sides of the question examined and collated. We are satisfied with both the reasoning and the conclusion reached in that case and adhere to the same. Upon the authority of that case the judgment of the district court, assailed here, is

AFFIRMED.

HARRISON, J., having presided in the trial of the case below, took no part in the consideration here.

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HENRY HORNBERGER ET AL. V. SAMUEL A. ORCHARD.

FILED MARCH 6, 1894. No. 4941.

**Unincorporated Associations:** LIABILITY OF MEMBERS. One is not liable for the debts of a voluntary unincorporated association incurred by it at a time when he was not a member thereof, unless by express contract, based on a good consideration, which must be alleged and proved.

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

*Schomp & Corson*, for plaintiffs in error.

*Brome, Andrews & Sheean*, *contra*.

RAGAN, C.

Samuel A. Orchard sued the plaintiffs in error and forty-five others in the district court of Douglas county, and in his petition alleged that on the 17th of September, 1887, the parties made defendants were members of an unincorporated association known as the Junior Order of United American Mechanics, organized for social and recreative purposes only, and not for the holding of any property or the carrying on of any trade or business; that prior to the 17th day of September, 1887, the defendants, at a meeting of said association, ordered that carpets, matting, and shades be procured and placed in a hall for the use of the association; and that Orchard did, on the 17th day of September, 1887, furnish said hall for the defendants' use, with certain carpets, matting, and shades, and performed the necessary work and labor of placing the same in said hall; that said defendants then and there accepted the said carpets, matting, and shades in said hall, and for a long time thereafter used the same therein, and repeatedly promised to pay therefor; and that the bill was past due and wholly unpaid. The plaintiffs in error filed separate answers, each consisting of a general denial. There was a verdict and judgment against the plaintiffs in error, who bring the case here for review.

In the petition in error on file there are thirty-one errors assigned, only two of which we shall notice.

1. The plaintiffs in error complain because of the refusal of the court to give the sixth instruction asked for by them. That instruction was as follows: "If you find that

the goods were sold either to a committee for the use of the society known as the Junior Order of United American Mechanics, and the credit was given either to said committee or even to the Junior Order of United American Mechanics, no person who was not liable, either as principal or agent, at the time of sale or when credit was given can be made so by any promise or words of his that was not in writing, and although if each of these said defendants not so primarily liable had promised and agreed to pay this bill, or any part thereof, he cannot be held thereto unless such promise was in writing; the statute of frauds in our state being that no person can become liable for the debt of another person or persons unless the same shall be in writing and subscribed to by the party sought to be charged therewith." This society was an unincorporated voluntary association, supported by the initiation fees and dues charged its members, and the liability of its members to its creditors are governed by the law of agency. (*Gorman v. Russell*, 14 Cal., 532; *Moore v. Brink*, 4 Hun [N. Y.], 402; *Butterfield v. Beardsley*, 28 Mich., 412; *Tyrrell v. Washburn*, 88 Mass., 466; *Bullard v. Kinney*, 10 Cal., 60; *Taft v. Ward*, 106 Mass., 518; *Bodwell v. Eastman*, 106 Mass., 525; *Davison v. Holden*, 55 Conn., 103; *Tappan v. Bailey*, 45 Mass., 529; *Park v. Spaulding*, 10 Hun [N. Y.], 128.) It will be observed that Orchard based his right to recover of plaintiffs in error on the ground that they were members of the society and present at the meeting when the goods were ordered, or afterwards learned of the purchase; that the bill was unpaid; attended meetings at which the payment was discussed, acknowledged to be correct, and promised to be paid, and thereby ratified the contract of the society in purchasing the goods, even if they, the plaintiffs in error, were not present at the meeting at which the purchase was ordered. Under the pleadings, oral testimony that plaintiffs in error promised to pay this bill would not have been

competent, except upon the theory that they were members of the society when the debt was contracted. But there was testimony which tended to show that the plaintiffs in error were members of the society and present at the meeting at which the goods were ordered; and there was also testimony which tended to show that after the goods were purchased and in the hall, plaintiffs in error were present at meetings of the society at which the payment of the bill for the goods was discussed, its correctness acknowledged, and payment promised. This testimony was competent under the issues. The question then at which this instruction was aimed was not one of the statute of frauds, but of agency; the plaintiff's theory being that even if the plaintiffs in error were not present at the meeting when the goods were bought, yet being members at that time, and afterwards learning of the purchase and promising to pay it, they had ratified what the society did. There was no error then in refusing to give this instruction. Again, if the pleadings of the plaintiff had sought to hold the plaintiffs in error liable for this bill by an allegation that they were not members of the society when it was contracted, but joined the society afterwards and then promised to pay it, the plaintiffs in error, to have availed themselves of the statute of frauds as a defense, must have pleaded it.

2. The plaintiffs in error also complain because of the refusal of the court to give the thirteenth instruction asked for by them. It was as follows: "None of these defendants, by becoming members of the Junior Order of United American Mechanics, became liable for any of the past indebtedness that had been incurred, or was owing by said association, or by any member or committee thereof, prior to the time he associated himself therewith." Were the plaintiffs in error entitled to have this instruction given to the jury, and was the refusal of the court to give it error? This instruction presented the question squarely as to whether these plaintiffs in error were liable for the debts

of the association contracted prior to the time they became members of it. Nowhere in the trial of this case, nor in the instructions given by the learned court, was the distinction drawn as to the liability of these plaintiffs in error, as asked for by this instruction. Indeed, the court, by its instructions, told the jury substantially that any defendant who was a member of the order (without reference to the time when he became such) and attended its meeting, and knew of the purchase of the goods in question, and used said goods after they were placed in the hall, knowing that they had not been paid for, became liable. The testimony as to whether the plaintiffs in error were members of the society when the goods were purchased was very contradictory. It is not denied that the plaintiffs in error were members of the society, but there was much testimony tending to show that they did not become members until after the purchase of the goods. The plaintiffs in error were entitled to an instruction to the effect that their liability did not attach for any debts of the society prior to the date of their becoming members of it; and nowhere in the record was there any such instruction given; and, as before observed, Orchard based his right to hold the plaintiffs in error liable on the theory that they were members of the society when the goods were purchased. The charges of the court and the instructions given by him at the request of the plaintiff left room for the jury to infer that if the plaintiffs in error became members after the debt was contracted, and then attended meetings of the society at which the debt was spoken of, acknowledged to be unpaid, and promises made to pay it, the plaintiffs in error thereby ratified and became liable to pay for what the society had done before they joined it. No member of a voluntary unincorporated association is liable for any debt contracted by such society, unless at the time the debt was incurred he was a member thereof, except by an express contract, based on a good consideration, all which must be alleged

and proved. There is sufficient testimony in the record for the jury to have found that the plaintiffs in error were members of the society when the debt was contracted. On the other hand, there was abundant evidence to support a finding that they were not members at the time the debt was contracted, and the instructions of the court left ample room for them to infer that the plaintiffs in error had become liable, even if they joined the society after the debt was contracted, by attending its meetings after that time at which the debt was discussed and promised to be paid. It is impossible for us to say whether the jury's finding is predicated upon the evidence that the plaintiffs in error were members at the time the debt was contracted, or whether it is predicated upon the evidence that they attended meetings after it was contracted at which the debt was discussed and promises made to pay it.

The authorities cited by the defendant in error, none of them, reach the point raised by this instruction. In all the cases cited by him the parties sued were members of the association at the time the debt was contracted, and, so far as appears from the reported cases, that was not a disputed question on the trial. We are constrained to say, after much reflection and research, that the plaintiffs in error were entitled to have the instruction asked for given to the jury, and its refusal was error to their prejudice. The judgment of the court below is therefore reversed and the cause remanded to that court to grant the plaintiffs in error a new trial.

REVERSED AND REMANDED.

# WILLIAM H. EDWARDS ET AL., APPELLEES, V. SARAH A. REID ET AL., APPELLANTS,

AND

# OLOF BERGGREN, APPELLEE, V. SARAH A. REID ET AL., APPELLANTS.

FILED MARCH 6, 1894. No. 5553.

1. **Homestead:** ABANDONMENT. Two things must concur to show an abandonment of a homestead, viz., an intention to abandon and actual abandonment. *Eckman v. Scott*, 34 Neb., 817, adhered to.

2. ———: ———. The rule is, that to establish abandonment of a homestead the evidence must show, not only that the party removed from the homestead, but that he did so with the intention of not returning, or after such removal he formed the intention of remaining away.

3. ———: ———: CREDITOR'S BILL: FRAUDULENT CONVEYANCES. A man and wife removed from their farm, owned by the wife, to a neighboring town, where they lived for some years in a rented house and in which the man pursued the business of shoemaking. They left a son in charge of the farm and the greater part of their household goods, and all their stock and farming implements also remained on the farm. The wife divided her time between her place of abode in town and the farm, keeping general supervision of the latter and doing there the laundry work and part of the cooking for herself and husband. The man died and the widow sold the farm. In a suit by her creditors to set aside her conveyance as fraudulent, *held* that, as the evidence did not show that the man and wife left the farm with the intention of not returning, their removal to and residence in town did not work an abandonment of the homestead.

4. ———: ———: INTENTION. Removing from a homestead and residing temporarily elsewhere for the purpose of business, pleasure, or health, will not work an abandonment of a homestead, unless coupled with such removal is the intention not to return, or after removal the intention is formed of remaining away.

5. **Fraudulent Conveyances:** NOTICE TO PURCHASER. To avoid a sale upon the ground that it is fraudulent as to creditors, the purchaser must have notice of such facts tending to show

such fraudulent purpose as would put a person of ordinary prudence on inquiry. (*Temple v. Smith*, 13 Neb., 513, adhered to.)

6. ———: CANCELLATION OF CONVEYANCE: VALIDITY OF DECREE WITHOUT FINDINGS. In a suit by a creditor to set aside a conveyance of real estate on the ground that the same was made to defraud him, to the knowledge of the defendant, the court, without either a general or a special finding against such defendant, entered a decree annulling the conveyance, as prayed. *Held*, That it was erroneous to pronounce a decree annulling the defendant's title without either a general or a special finding against him. (Sec. 297, Code Civil Procedure.) *Foster v. Devinney*, 28 Neb., 416, adhered to.

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

*N. H. Bell* and *M. B. Reese*, for appellants, contending that the homestead was originally acquired and never abandoned, cited: *Dorrington v. Myers*, 11 Neb., 388; *Dennis v. Omaha Nat. Bank*, 19 Neb., 677; *McFarland v. Washington*, 14 S. W. Rep. [Ky.], 354; *Reilly v. Reilly*, 26 N. E. Rep. [Ill.], 604; *Moore v. Flynn*, 25 N. E. Rep. [Ill.], 844; *Duffey v. Willis*, 12 S. W. Rep. [Mo.], 520; *Rollins v. O'Farrell*, 13 S. W. Rep. [Tex.], 102; Freeman, Executions, sec. 248, and cases cited; *Eckman v. Scott*, 34 Neb., 817; Thompson, Homesteads & Exemptions, sec .285; *Rix v. Capitol Bank of Topeka*, 2 Dill. [U. S.], 370; *Bloedorn v. Jewell*, 34 Neb., 649.

*Simpson & Sornborger*, *contra*, on the question of homestead, cited: Thompson, Homesteads & Exemptions, secs. 265, 266; *Fyffe v. Beers*, 18 Ia., 7; *Kimball v. Wilson*, 59 Ia., 638; *Cotton v. Hamil*, 58 Ia., 594.

RAGAN, C.

The evidence before us shows that in the year 1881 one Alfred Reid purchased the west half of the southeast quarter of section 25, in township 15 north and range 7 west, in Saunders county, Nebraska, and about the year

1884 moved upon, improved, and began farming and occupying said land as the homestead of himself and family. Some time after this he conveyed the land to his wife, Sarah A. Reid. That he was a shoemaker by occupation, and being unable, on account of poor health, to do the work on the farm, about the year 1886 he rented a building in Wahoo, to which he and his wife removed a part of their household goods, and used this building as their temporary home and Mr. Reid's shoe shop. At the time Mr. and Mrs. Reid came to Wahoo they left their farm in charge of a son, and left also on the farm all their stock and farming utensils, and the greater part of their household goods. Mrs. Reid divided her time between the farm and her abode in Wahoo, a few miles distant. She did the laundry work and some of the cooking for herself and husband on the farm. Thus matters stood until August, 1887, when Mr. Reid died. On November 1, 1887, Mrs. Reid sold and conveyed the farm to her daughter, Mrs. Starks, the consideration being $600, evidenced by two notes of Mrs. Starks of $300 each; the assumption by her of mortgages on the land amounting to $1,200, and the promise to provide her mother with a home, she being then about fifty-two years of age. In February, 1889, Mrs. Reid sold her property on the farm, and the daughter rented the land for that year for cash rent. On January 30, 1890, Mrs. Starks and her husband sold and conveyed the land to one Krailick. On July 27, 1889, one Olof Berggren recovered a judgment against Mrs. Reid and one C. M. Frey, her son by a former husband, for $90.95. A transcript of this judgment was filed and docketed in the office of the clerk of the district court of Saunders county on January 13, 1890. November 1, 1887, Edwards & Castle recovered a judgment in the county court of Saunders county against Mrs. Reid for $80.80, and on February 14, 1888, a transcript of this judgment was filed and docketed in the office of the clerk of the district court of Saunders county.

Executions having been issued and returned unsatisfied, Edwards & Castle and Berggren, in March, 1890, each brought suit in equity against Sarah A. Reid, Abbie A. Starks, and Joseph Krailick, alleging that the conveyance from Mrs. Reid to Mrs. Starks was made and received without consideration and for the fraudulent purpose of hindering and delaying Mrs Reid's creditors in the collection of their debts; and alleging that Krailick's interest in the land was acquired with knowledge of Mrs. Reid's interest in the land and the existence of plaintiff's judgment.

The answer of the parties made defendants and the replies thereto made the following issues: (1.) Whether the conveyance from Mrs. Reid to Mrs. Starks was made and accepted in good faith and for a valuable consideration. (2.) Whether Krailick was an innocent purchaser. (3.) Whether the land at the time it was conveyed to Mrs. Starks by Mrs. Reid was the latter's homestead. The court found and decreed the issues for the complainants, the cases having been consolidated and tried together, and the defendants below bring the case here on appeal.

1. Was the conveyance from Mrs. Reid to Mrs. Starks made and accepted without consideration and with a fraudulent purpose? As to the consideration, the evidence is that Mrs. Starks assumed $1,200 of incumbrances on the land, gave her notes for $600, and promised to provide the grantor a home. The land was worth at the time about $2,600. This was, as between the parties, a good consideration; or, to express it differently, it was not a conveyance wholly without consideration. As to the intent with which this conveyance was made and accepted, for the purposes of this opinion we may disregard Mrs. Reid and her intentions in making the conveyance. If her purpose was fraudulent, and we do not wish to be understood as saying that this record discloses that it was, still, to invalidate the conveyance, Mrs. Reid's fraudulent purpose and intent must have been known to and participated in by

Mrs. Starks. (*Hedman v. Anderson*, 6 Neb., 393; *Smith v. Schmitz*, 10 Neb., 600; *Keith v. Heffelfinger*, 12 Neb., 497; *Burley v. Millard*, 11 Neb., 286; *Crab v. Morrissey*, 31 Neb., 161; *Spring Lake Iron Co. v. Waters*, 50 Mich., 13.) Or, Mrs. Starks must have had notice of such facts, tending to show fraudulent purposes on the part of Mrs. Reid, as would put a person of ordinary prudence on inquiry. (*Temple v. Smith*, 13 Neb., 513; *Bollman v. Lucas*, 22 Neb., 796.) There is no evidence in this record which shows, or tends to show, that Mrs. Starks, at the time she took the deed, knew, or had any reason to suspect, that Mrs. Reid was indebted to any one; nor can such an inference be reasonably drawn from any or all the testimony. The evidence, and all the evidence, on the subject is that Mrs. Starks knew nothing of her mother's indebtedness until after the sale and conveyance of the land to Krailick, nor was any attempt made to show the contrary. Indeed, it would seem from the record, although not expressly so stated, that Berggren's debt was not contracted until 1889. His judgment before the justice of the peace was rendered one year and nine months after, and his transcript thereof filed two years and two months after the date of the conveyance from Mrs. Reid to Mrs. Starks was recorded. We think, therefore, the decree, in so far at least as it finds that Mrs. Starks accepted this conveyance with intent to defraud her mother's creditors, or with knowledge or notice that her mother intended by the conveyance to defraud her creditors, is without any evidence to support it.

2. We come now to the consideration of that part of the decree of the district court in and by which the conveyance from Mrs. Starks to Joseph Krailick was set aside. There is no general finding in favor of appellees or against appellants; nor is there any special finding as to whether Krailick was or was not a *bona fide* purchaser of this land, nor even that he knew of appellees' claims before paying the purchase money to Mrs. Starks, as appellees allege in

their petition. The court found specially that the conveyance from Mrs. Reid to Mrs. Starks was made and accepted without consideration and with the intent to defraud Mrs. Reid's creditors; and, without more ado, proceeded to decree that not only that conveyance but the one by Mrs. Starks to Krailick be set aside. The only issue in the case so far as Krailick was concerned was whether he was a *bona fide* purchaser of the property, and it was error for the court to pronounce a decree annulling his title without either a special or a general finding against him. (Sec. 297, Code of Civil Procedure; *Sprick v. Washington County*, 3 Neb., 253; *Smith v. Silvis*, 8 Neb., 164; *Foster v. Devinney*, 28 Neb., 416.) This decree, then, against Krailick cannot stand, but in view of the disposition we have decided to make of the entire case, we shall not send it back for a retrial. In view of the evidence, or rather the absence of evidence, in the record, a finding of the court against Krailick would not avail to support the decree. There is no pretense that Krailick had any knowledge or notice of Mrs. Reid's debts or the alleged fraudulent intent or purpose of Mrs. Reid and Mrs. Starks in the matter of the conveyance of the land at the time he bought of Mrs. Starks; nor that he did not pay full consideration for the land. The only claim made against him is that before he paid over the purchase money he learned of appellees' debts and claims in the premises. It appears from the evidence that Krailick bought the land prior to 1890, and took a bond for a deed; that Mrs. Starks' conveyance to him is dated January 3, 1890; that Krailick borrowed the money of or through a loan company to pay Mrs. Starks and left the money in the bank for her, and so advised her, and that when she called for the money the bank refused to pay it over unless appellees' claims were paid. In short, there is no evidence before us from which the court would have been justified in finding that Krailick was anything other than a *bona fide* purchaser of this land, with all that that term implies.

3. The controlling factor in this case, however, is that at the date Mrs. Reid conveyed this land to Mrs. Starks it was Mrs. Reid's homestead, and therefore not susceptible of fraudulent alienation. The contention of appellees is that because Mrs. Reid and her husband left the farm and resided in Wahoo, they thereby abandoned the homestead. All the evidence is that they left it temporarily, and the evidence does not support the court's conclusion, if it made such, that they abandoned the homestead; *i. e.*, that they left it with the intention of not returning. The rule is, that to establish abandonment of a homestead the evidence must show not only that the party removed from the homestead, but that he did so with the intention of not returning, or that after such removal he formed the intention of remaining away. (*Eckman v. Scott*, 34 Neb., 817; *Gouhenant v. Cockrell*, 20 Tex., 98.) In *Duffey v. Willis*, 12 S. W. Rep. [Mo.], 520, defendant left his homestead for several years, doing business in other places part of the time. The homestead property was rented from month to month, and was at one time vacated by the tenant; and defendant then intended to return to it, but was prevented by his business. There was evidence that defendant's residence elsewhere was temporary, and that he intended to return. He acquired no new home elsewhere. The supreme court of Missouri held that these facts did not work an abandonment of the homestead. (See also *McFarland v. Washington*, 14 S. W. Rep. [Ky.], 354.) A case very like the one at bar is found in *Kenley v. Hudelson*, 99 Ill., 493. It is said in the opinion in that case: "It appears from the evidence that complainant resided on the premises about six years until February, 1876, when she rented to a tenant and moved to Louisville, a town about three miles distant, for the purpose of educating an invalid child. At the time she moved she expressed an intention to return. When the lease was made she reserved the right to move back at the end of the year. She did not move all her personal property away. She left farming

implements, a loom, spinning-wheel, bedsteads, etc. From the testimony, it is apparent complainant did not abandon the homestead. * * * Where a person leaves a place which is occupied as a homestead, for a temporary purpose, intending to return, * * * it cannot be held that the homestead has been abandoned." The cases agree in holding that removing from a homestead and residing elsewhere for the purpose of business, health, or pleasure does not work an abandonment of the homestead, unless coupled with such removal is the intention not to return. We reach the conclusion then, and so decide, that the removal of Mrs. Reid and her husband from the farm to Wahoo and their residence there did not work an abandonment of their homestead. The unbending rule of this court is that a finding of fact made by a jury or trial judge will not be disturbed by this court if supported by competent evidence; that this court will not weigh conflicting evidence, nor pass judgment upon the credibility of witnesses; but we place the decision in this case not on the ground that the district court's decree is not supported by sufficient evidence, nor that it is contrary to the evidence, nor that it is contrary to the weight of the evidence, but we predicate our conclusion expressly on the ground that there is no evidence in the record from which the trial court could find that Mrs. Reid and her husband left their home with the intention of not returning. The decree appealed from is reversed and a decree will be entered in this court dismissing the cases of the appellees at their costs.

JUDGMENT ACCORDINGLY.

## FRED HUNZINGER V. STATE OF NEBRASKA.

FILED MARCH 6, 1894. No. 5352.

1. **Intoxicating Liquors:** LICENSE: CONSTITUTIONAL LAW. The proviso in section 1, chapter 50, Compiled Statutes, 1893, that "*Provided*, Such [county] board shall not have power to issue any license for the sale of any liquors in any city or incorporated village, or within two miles of the same," is not obnoxious to any provision of the constitution, because the inhabitants living within two miles of the corporate limits of the cities and villages of the state, situated in counties not having 150,000 inhabitants, are, by such proviso, deprived of the privilege of having the sale of the liquors licensed within their territory. *Pleuler v. State*, 11 Neb., 547, reaffirmed.
2. ———: LICENSE LAW. THE LEGISLATURE, in the exercise of the police power of the state, may not only control the license and sale of intoxicating liquor therein, but may entirely prohibit such license and sale.
3. ———: ———: SPECIAL LEGISLATION. The proviso in said section 1 in said chapter 50, that "*Provided*, In counties having 150,000 inhabitants the county commissioners may also issue licenses within two miles of any city in said county," is not obnoxious to section 15 of article 3 of the constitution as assuming to "regulate county and township offices;" nor is said proviso obnoxious to said constitutional provision as class or special legislation.
4. **Special Legislation:** CONSTITUTIONAL LAW. An act of the legislature will not be declared special legislation, within the meaning of the constitution, solely because at the time of its enactment there was only one county in the state to which its provisions were applicable. If the law is general in its terms, and restricted by its terms to no particular locality, and operates equally upon all of a group of objects, it is not a special law. *McClay v. City of Lincoln*, 32 Neb., 412, followed.
5. **Violation of License Law:** DEFENSE. To an indictment for selling liquors in this state without a license, it is no defense that such sale was made at a time or place or under circumstances which rendered the procurement of a license impossible.

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

*M. V. Gannon*, for plaintiff in error.

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

RAGAN, C.

Fred Hunzinger was indicted in the district court of Douglas county for selling intoxicating liquors without having first procured a license therefor. Hunzinger pleaded guilty to the indictment, and the state put on record an admission that the sale was made within two miles of the corporate limits of the city of Omaha, in said county, but not within the limits of any incorporated city or village. Hunzinger then filed a motion in arrest of judgment, alleging that the statute on which the indictment was predicated was unconstitutional. The court overruled this motion and sentenced Hunzinger to pay a fine of $300 and costs, from which judgment Hunzinger comes here on error.

Section 1, chapter 50, Compiled Statutes, 1893, provides: "The county board of each county may grant license for the sale of malt, spirituous and vinous liquors, if deemed expedient; * * * *Provided*, Such board shall not have power to issue any license for the sale of any liquors in any city or incorporated village, or within two miles of the same; *Provided*, In counties having 150,000 inhabitants the county commissioners may also issue licenses within two miles of any city in said county." The provisions in the section just quoted are the ones said to be obnoxious to the constitution. The contention is that the second proviso is obnoxious to article 3, section 15, which provides that the legislature shall not pass special or local laws in certain named cases. It is argued that the second proviso of the section is special legislation, within the meaning of the constitution quoted above, as it assumes to regulate county and township offices. We are cited to no authority to support this contention, nor do we think any could be found. It must suffice to say, that, in our opinion, the proviso of

the statute is not obnoxious to the constitutional provision above quoted on that ground. Another objection to this second proviso is that by its terms it applies and can only apply to Douglas county and for that reason is special or class legislation. In *McClay v. City of Lincoln*, 32 Neb., 412, a law which exempted cities of the state from giving an appeal bond in actions appealed by them from the courts was held not to be obnoxious to the constitutional provision above, as being special legislation, the court holding that a law framed in general terms, restricted to no locality and operating equally upon all of a group of objects, was not a special law. In *State v. Graham*, 16 Neb., 34, this court held that classification of the cities of the state into classes and sub-classes, and the conferring upon them of powers of a general nature by act of the legislature, the provisions of which act were applicable to but one of such classes or sub-classes of cities, was not repugnant to any provision of the constitution. It is not thought that the decision of the court would have been different had the law, considered in the case last cited, been made applicable to cities having certain populations without designating them as of any class.

Section 12, chapter 2, Compiled Statutes, 1893, provides: "Whenever twenty or more persons, residents of any county in this state, shall organize themselves into a society for the improvement of agriculture within said county, and shall have adopted a constitution and by-laws agreeable to the rules and regulations furnished by the state board of agriculture, and shall have appointed the usual and proper officers, and when the said society shall have raised and paid into the treasury, by voluntary subscription or by fees imposed upon its members, any sum of money, in each year not less than $50, and whenever the president of such society shall certify to the county clerk the amount thus paid, it shall be the duty of the county board of said county to order a warrant drawn on

the general fund of said county in favor of the president of said society for a sum equal to three cents on each inhabitant of said county, upon a basis of the last vote for member of congress, allowing five inhabitants for each vote thus cast, and it shall be the duty of the county board of said county to include this three cents per capita in their annual estimate, and it shall be the duty of the treasurer of the county to pay the same out of the general fund." * * * An agricultural society in Custer county, having complied with this statute, requested the board of supervisors of said county to include the three cents per capita in their annual estimate of expenses for the year 1892. The supervisors refused to do this, and the agricultural society applied to this court for a *mandamus* to compel them to perform the request. Mr. Justice POST, delivering the opinion of this court in the case (*State v. Robinson*, 35 Neb., 401), said: "It is urged as an objection to the law that it contravenes section 15, article 3 of the constitution, which provides: 'The legislature shall not pass local or special laws * * * granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever.' We are unable to perceive wherein the law is susceptible of such a construction. The limitation contained in the above section of the constitution was evidently intended as a remedy for the evil of special legislation, and cannot, by any reasonable or natural construction, be held to apply to the act under consideration. It has been frequently held by this court that a law which is general and uniform throughout the state, and operates alike upon all persons or localities which come within the relations and circumstances provided for, is not objectionable to the constitution or wanting in uniformity." The proviso of the statute assailed in this case as unconstitutional is uniform in its application to all counties of the state having 150,000 inhabitants, and is not special or class legislation, because at the time the

act went into effect there was but one county in the state to which it applied.

It is also argued that the first proviso in said section 1 is unconstitutional because it arbitrarily prohibits the sale of intoxicating liquors within the radius of two miles of all the cities and villages in the state situated in counties not having 150,000 inhabitants. This proviso was passed upon by this court in *Pleuler v. State*, 11 Neb., 547, and declared to be constitutional. With the reasoning and the conclusion in that case we are entirely satisfied. We are urged by the counsel for plaintiff in error to declare this first proviso unconstitutional, because counsel says that the residents and citizens within two miles of the cities and villages of the state, in counties not having 150,000 inhabitants, by reason of this law are deprived of the rights and privileges of other citizens of the state. This is a political argument which should be addressed to the legislature; and, if so addressed by those citizens of the state whose rights and privileges, it is said, are denied, would doubtless be heeded. This argument, to say the least, is remarkable; and, so far as we know, is the first record of a willingness intimated by the traffickers without license in intoxicating drinks to immolate themselves upon the altar of liberty to protect the rights and privileges of the citizen from the encroachments of a tyrannical legislature. But this argument—if it is not undignified to say so—reminds us of the complaint made by the wolf to the farmer because the shepherd refused the lambs the right and the privilege of grazing in the woods instead of in the pastures.

Section 11 of said chapter 50 provides: "All persons who shall sell or give away upon any pretense, malt, spirituous, or vinous liquors, or any intoxicating drinks, without having first complied with the provisions of this act and obtained a license as herein set forth, shall for each offense be deemed guilty of a misdemeanor." And we agree with the honorable the attorney general that this

proceeding in error is entirely without merit. If the act assailed as unconstitutional were so, the judgment would still have to be affirmed. It would be no defense to the plaintiff in error for selling liquor in this state without a license that he made such sale at a time or place or under circumstances which rendered it impossible for him to procure a license to make such sale. (*Kadghin v. City of Bloomington*, 58 Ill., 229; *State v. McNeary*, 88 Mo., 143.)

Under any view of the case that may be taken, the judgment of the district court was right and the same is

AFFIRMED.

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FRANK SHANNON V. STATE OF NEBRASKA.

FILED MARCH 6, 1894. No. 5353.

**Intoxicating Liquors**: LICENSE: CONSTITUTIONAL LAW. On the authority of *Hunzinger v. State*, 39 Neb., 653, the judgment in this case is affirmed.

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

*M. V. Gannon*, for plaintiff in error.

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

RAGAN, C.

The facts in this case and the law applicable thereto are the same as in *Hunzinger v. State*, 39 Neb., 653, and on the authority of that case the judgment of the district court is

AFFIRMED.

## ERNEST SOEHL V. STATE OF NEBRASKA.

FILED MARCH 6, 1894. No. 5354.

**Intoxicating Liquors: LICENSE: CONSTITUTIONAL LAW.** On the authority of *Hunzinger v. State*, 39 Neb., 653, this case is affirmed.

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

*M. V. Gannon*, for plaintiff in error.

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

RAGAN, C.

The facts in this case and the law applicable thereto are the same as in *Hunzinger v. State*, 39 Neb., 653, decided at this term, and on the authority of that case the judgment of the district court is

AFFIRMED.

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## JOSEPH ROWELS V. STATE OF NEBRASKA.

FILED MARCH 6, 1894. No. 5355.

**Intoxicating Liquors: LICENSE: CONSTITUTIONAL LAW.** On the authority of *Hunzinger v. State*, decided at this term, and reported in 39 Neb., 653, the judgment in this case is affirmed.

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

*M. V. Gannon*, for plaintiff in error.

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

RAGAN, C.

The facts in this case and the law applicable thereto are the same as in *Hunzinger v. State*, decided at this term, and reported in 39 Neb., 653, and on the authority of that case the judgment of the district court is

AFFIRMED.

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## JOHN M. VIOLET V. H. F. ROSE.

FILED MARCH 6, 1894. No. 5513.

1. **Negotiable Instruments:** BONA FIDE HOLDER: DEFENSES: BURDEN OF PROOF. It seems that in an action by an indorsee of a promissory note against the holder, where the defendant pleads fraud in the inception of the note, the burden is upon the plaintiff to show that he is a *bona fide* holder for value, but that, where the defense pleaded is failure of consideration, the burden is upon the defendant to show that the plaintiff did not pay value for the note, or that he took it with notice.

2. ———: ———: ———: ———. Accordingly, where a defendant in such a case pleads both fraud and failure of consideration, it is not error for the trial court to permit the introduction of evidence as to the transactions between the original parties before the defendant has by evidence attacked plaintiff's *bona fides*, especially in view of the rule that the order in which proof shall be introduced rests within the discretion of the trial court.

3. **Trial:** SURPRISE: WITHDRAWAL OF JUROR. Where, upon a trial, a party is taken by surprise by the admission or exclusion of evidence, the trial court may permit the withdrawal of a juror and continue the case; but the propriety of such action rests within the sound legal discretion of the trial judge.

4. ———: ———: ———. Where the pleadings notify the party seeking the continuance of the character of the evidence which his adversary will offer, and where no reason is shown for his not being prepared to meet such evidence, except his reliance upon an issue of law arising upon the trial, which is determined against him, it is not error for the trial court to refuse permission to withdraw a juror and continue the case.

5. **Instructions**: HARMLESS ERROR. The submission incidentally to the jury in the course of an instruction of a fact admitted by the pleadings is not prejudicially erroneous, where the instructions, taken as a whole, do not place the existence of that fact before the jury as a controverted issue, and where, upon a review of the instructions and the evidence, it appears that the jury could not have been misled. *Dayton v. City of Lincoln*, 39 Neb., 74, distinguished.

6. **Conveyance of Homestead.** In order to convey a homestead, the instrument of conveyance must be signed and acknowledged by both husband and wife.

7. **Review**: VOLUNTARY STATEMENT BY WITNESS. Consideration will not be given in this court to an assignment of error based upon the admission in evidence of a statement by a witness not responsive to the question he was answering, although such question was objected to, unless by a motion to strike out that portion of his answer, or otherwise, the trial judge was given an opportunity to rule upon the particular testimony, the admission of which is assigned as error.

8. **Handwriting**: HOW PROVED: COMPETENCY OF EXPERT WITNESS. Where the genuineness of a signature is in controversy, a witness may testify as to his opinion upon the subject, where his knowledge of the disputed handwriting is not derived from ever having seen the person write, but where he has addressed that person a letter, received a letter in answer thereto coming from another post-office than the one to which his letter was addressed, and where further correspondence has ensued because of such letter, and acts have been performed showing that the person whose handwriting is in controversy has acted upon the letters as genuine.

9. **Transfer of Vendee's Interest in Contract for Sale of Real Estate.** In order to transfer the interest of a vendee in an executory contract for the purchase of land it is only necessary that there should be a memorandum in writing signed by the person to be charged; neither attesting witness nor acknowledgment is necessary as between the parties.

10. **Damages**: BREACH OF CONTRACT TO CONVEY REAL ESTATE. The measure of damages in favor of a vendee of real estate against a vendor who delays performance, but who ultimately conveys, the vendee accepting the conveyance, is the difference between the value at the time the conveyance should have been made and the value when it was made; but where the vendor has in the meantime kept the vendee out of possession, to the

damage thus ascertained should be added the rental value of the property during the period of delay.

11. ——: ——: LOSS OF PROFITS ON RESALE. The profit which would have been made through a bargain for the resale of the property pending a delay is not an element of damages, at least where at the time of the contract the vendor did not know that the vendee was purchasing for the purpose of a resale.

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

The facts are stated by the commissioner.

*Abbott, Selleck & Lane*, for plaintiff in error:

Denial of plaintiff's request to withdraw a juror was such an abuse of discretion as entitles plaintiff to a new trial. (Maxwell, Pleading & Practice, 429; *People v. Judges*, 8 Cow. [N. Y.], 126.)

Defendant was not qualified as an expert to testify to the handwriting of Mrs. McCurday. (*Rogers v. Ritter*, 12 Wall. [U. S.], 321.)

The admission in evidence of a letter purporting to be written by Mrs. McCurday, without proof of signature, was error. (*Gartrell v. Stafford*, 12 Neb., 545.)

The measure of damages for breach of a contract to convey real estate is the difference between what defendant agreed to pay for the land and its real market value at the time the breach was made. (*Wasson v. Palmer*, 13 Neb., 378.)

Profits that could have been made on a resale of the land by the vendee are not proper elements of damage, and it was prejudicial error to admit proof thereof. (1 Sutherland, Damages, 114, 116; *Markel v. Moudy*, 11 Neb., 218.)

Under the evidence the McCurdays had no homestead right in the lots in question, and defendant cannot set up such claim to defeat the contract of conveyance. A home-

stead right is a personal privilege. It may be claimed or it may be waived. If claimed, it could only extend to two lots. (Sec. 1, ch. 36, Comp. Stats.; *Rector v. Rotton*, 3 Neb., 171; *Gallagher v. Smiley*, 28 Neb., 194.)

Proof as to the consideration for the note was not admissible till after the holder was shown to have taken with notice of defense. (*Smith v. Columbus State Bank*, 9 Neb., 31.)

*J. R. Webster, M. B. Reese* and *Halleck F. Rose, contra:*

The denial of plaintiff's request to withdraw a juror was right, because there was no proof or showing of surprise; defendant's answer apprised plaintiff of the character of evidence he would be required to meet; plaintiff had opportunity, on motion for new trial, to make showing of surprise and existence of newly-discovered evidence, and failed to do so; and it would have been improper to have permitted the exercise of this right as a mere pretext for a continuance. (Secs. 314, 317, Code; Maxwell, Pleading & Practice, 429, 430.)

The order in which proof may be admitted is discretionary with the trial court. At what stage in the trial any material fact is proved is immaterial if all the other necessary facts are afterwards proved. (*Goodman v. Kennedy*, 10 Neb., 270; *Ponca v. Crawford*, 18 Neb., 551.)

The indorsement in this case was by a contract *in extenso* in the form of an assignment written on the back of the note. The contract was not the implied contract of indorsement, and the holder was not entitled to be protected under the law merchant as a *bona fide* indorsee. (*Aniba v. Yeomans*, 39 Mich., 171; *Lyons v. Divelbis*, 22 Pa. St., 185; *Hailey v. Falconer*, 32 Ala., 536.)

The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife. (Sec. 4, ch. 36, Comp. Stats.; *Cobbey v. Knapp*, 23 Neb., 579; *Phillips v. Bishop*, 31 Neb., 853.)

The profit which vendee could have made on a resale is a proper element of damage. (1 Sutherland, Damages, 130; *Drake v. Baker*, 34 N. J. Law, 358; *Engell v. Fitch*, 3 L. R., Q. B. [Eng.], 314.)

IRVINE, C.

The plaintiff in error sued the defendant in error upon a promissory note dated April 9, 1889, and alleged to have been made and delivered by the defendant to Hiram M. McCurday, and payable to his order one year after date. Plaintiff alleged that on October 22, 1889, McCurday indorsed the note as follows: "I hereby assign the within note to John M. Violet and authorize him to collect the same. H. M. McCurday," and delivered the note to plaintiff. Rose answered substantially as follows:

First—Denying the indorsement and alleging that McCurday was the owner and the real party in interest.

Second—That whatever interest plaintiff had in the note he acquired with full notice of all the facts, and not in the usual course of business, for value before maturity.

Third—That upon April 9, 1889, defendant executed the note for delivery, upon receipt from McCurday, of a deed of assignment, executed and acknowledged by himself and Catherine McCurday, his wife, conveying to defendant all their interest in certain land in the city of Lincoln, being then their homestead, and that on said day McCurday fraudulently, and without consideration, presented to the defendant a deed of assignment with the names Hiram McCurday and Catherine J. McCurday signed thereunto as apparent grantors, and fraudulently represented to plaintiff that Catherine McCurday had executed the same, that it was her own signature thereunto written, and that she would personally appear next morning before a notary public and make formal acknowledgment of such instrument; and that, relying upon such representations, defendant delivered the note to McCurday; whereas, in fact,

said signature of Catherine McCurday was a forgery, and Catherine McCurday never did acknowledge the instrument, and that defendant took nothing by said instrument, and plaintiff retained possession of the premises until December 1, 1889; that upon December 1, 1889, the said McCurday transmitted to the defendant a quitclaim deed to said premises, but without attesting witnesses, and that during the delay, and while the conveyance was wrongfully withheld, the incumbrance, because of accruing interest, delinquent taxes, and cost of a foreclosure action brought against the McCurdays, so increased that the defendant was compelled to pay by reason of such increase $950, being the whole amount for which the note was given. The answer further averred that the contract of sale was made with a view to a present conveyance, and, as McCurday knew, in order that defendant might resell at a profit; that defendant afterwards secured purchasers for said land at a profit to himself of $1,000, but was unable to convey because of the delay of the McCurdays in conveying title, and that since receiving the quitclaim deed the premises have not been salable at all by reason of the pending foreclosure suit.

The averments of the answer were met by a general denial.

A verdict was returned for defendant and judgment entered thereon from which plaintiff prosecutes error.

1. The defendant claimed and was conceded the right to open and close, whereupon the defendant himself was sworn and was almost immediately asked what was the consideration of the note. This was objected to for the reason that such evidence was inadmissible until it should be first established that the plaintiff was not a *bona fide* holder. This objection was overruled and the defendant permitted to go into the transaction between himself and the McCurdays. Several assignments of error relate to this class of testimony.

It is a universal principle that in the absence of any attack upon the validity of a negotiable instrument, as between its original parties, the holder bringing the action upon it is presumed to be a *bona fide* holder for value. When, however, the holder or acceptor in an action against him upon the instrument sets up matter in defense which would constitute a valid defense were the action brought by the original payee, it is frequently a question of difficulty as to where the burden of proof lies upon the issue of *bona fides*. The writer is unable to perceive why, upon different defenses, there should be any distinction as to the burden of proof upon that issue, whatever the defense pleaded. It may be urged upon one side that the policy of the law merchant, in favoring the free negotiation of bills and notes, demands that the maker, in order to defend against an indorsee, should prove affirmatively that such indorsee is not a *bona fide* holder for value, and to this argument there may be added that the plaintiff in such a case has already in his favor a presumption of *bona fides*, and that no evidence of a defense growing out of transactions between the original parties has a natural tendency to rebut such presumption; but, upon the other hand, whatever may be the fundamental defense, it would seem that the proof of a *bona fide* purchase for value before maturity lies peculiarly within the possession of the plaintiff; that such facts are always easily susceptible of proof by him, whereas proof of *mala fides*, or want of consideration, even where the facts exist, is frequently beyond the knowledge or reach of the defendant. These arguments upon either side apply with equal force, whatever may be the fundamental defense, but unfortunately the courts have drawn distinctions between defenses. The numerous decisions disclose a general tendency to cast the burden of *bona fides* upon the plaintiff where illegality of consideration or fraud is alleged, and in other cases, to cast the burden of showing notice or want of consideration upon the defendant. But

even the test suggested by this general tendency of authorities is not trustworthy, for the classification thus resorted to has not been strictly recognized, and possibly it has not been absolutely observed by the courts of any state. While this confusion of authorities is to be regretted, the distinctions referred to, whether well or ill-founded, have been recognized everywhere, and our own decisions probably approach the general classification referred to as nearly as those of any state. Thus, it has been held that where usury is established, the burden is upon the plaintiff to show *bona fides*. (*Wortendyke v. Meehan*, 9 Neb., 221; *Olmsted v. New England Mortgage Security Co.*, 11 Neb., 487; *Darst v. Backus*, 18 Neb., 231; *Sedgwick v. Dixon*, 18 Neb., 545; *Cheney v. Janssen*, 20 Neb., 128; *Knox v. Williams*, 24 Neb., 630; *Lincoln Nat. Bank v. Davis*, 25 Neb., 376; *Blackwell v. Wright*, 27 Neb., 269; *Richardson v. Stone*, 28 Neb., 137; *First Nat. Bank of North Bend v. Miltonberger*, 33 Neb., 847; *Colby v. Parker*, 34 Neb., 510.) So also where the evidence established the theft of a note payable to bearer. (*Hooper v. Browning*, 19 Neb., 420.) So, too, where fraud in the inception of the note is proved. (*Haggland v. Stuart*, 29 Neb., 69.) On the other hand, where the defense was in the nature of failure of consideration, and the plaintiff, as a part of his case in chief, had introduced evidence tending to show a *bona fide* purchase, it was held that no testimony in support of the fundamental defense was proper, unless the defendant introduced evidence tending to show that the plaintiff was not a *bona fide* purchaser. (*Western Cottage Organ Co. v. Boyle*, 10 Neb., 409.) In *Cannon v. Canfield*, 11 Neb., 506, the inference is that where want of consideration is shown the burden is also upon the maker to prove notice to the indorsee. The same inference is to be drawn in case of failure of consideration, from *Citizens Bank v. Ryman*, 12 Neb., 541. But a contrary inference might be drawn from a closing paragraph of the opinion in *Fifth Nat. Bank of New York City*

*v. Edholm*, 25 Neb., 741. In *Coakley v. Christie*, 20 Neb., 509, it was distinctly decided that in the case of a note given in payment of a piano sold with a warranty, evidence of the fundamental defense was properly excluded, for the reason that there was no tender made of proof that the plaintiff was not an innocent purchaser.

It would seem from this review of the authorities that the defendant, where fraud is pleaded, makes out his case simply by proof of the fraud, and that the plaintiff must affirmatively establish *bona fides;* but that where the defense is failure of consideration the defendant must establish both failure of consideration and *mala fides* on the part of the plaintiff, or the fact that he was not a purchaser for value. Now, in the case before us, the defendant pleaded both fraud and failure of consideration. When he opened his case the situation was this: Should he succeed in showing that the instrument of assignment brought to him by McCurday, purporting to be signed by both McCurday and wife, did not in fact bear Mrs. McCurday's genuine signature, and that the note was procured through the representation that such signature was genuine, then fraud would be established, and it would lie with the plaintiff to show his *bona fides* in the purchase of the note. If, on the contrary, the proof of this defense should fail, but the defendant should succeed in showing that he failed to obtain the property in question because Mrs. McCurday refused or failed thereafter to acknowledge the instrument, then there would be merely a failure of consideration, and the defendant, to prevail, would be required to attack plaintiff's *bona fides*. The burden of proof, therefore, depended upon the evidence introduced upon these issues. The order of proof rests within the discretion of the trial court. (*Consaul v. Sheldon*, 35 Neb., 247.) The court, therefore, did not err in allowing evidence of the fundamental defense to be introduced before evidence was offered as to the good faith of the purchaser. The court instructed

the jury that the burden of proof was upon the defendant upon this issue, so there was nothing in this procedure of which the plaintiff can complain.

2. When the court ruled that the defendant might introduce evidence going to the consideration without first attacking plaintiff's *bona fides* the plaintiff asked leave to withdraw a juror and continue the case. This motion was overruled. The granting or refusing leave to withdraw a juror rests largely within the discretion of the trial court. The object of that procedure is to prevent a failure of justice where a party has been taken by surprise by his opponent's evidence or the exclusion of his own. In *People v. Judges of New York City*, 8 Cow. [N. Y.], 126, it was held that such leave should be given where a party was prevented by accident or mistake from making out his case or establishing his defense; but in *Chandler v. Bicknell*, 5 Cow. [N. Y.], 30, it was held that such practice was improper where there was merely a failure of proof. The surprise which justifies a trial court in permitting the withdrawing of a juror must not be due to the negligence of the party in preparing his case. Here by the answer the plaintiff was distinctly and specifically notified of the defense sought to be introduced. If he had evidence to meet that defense he should have been prepared with it at the trial, and had no right to rely upon the theory that the court would hold that the defendant must first attack plaintiff's *bona fides* and that defendant would be unable to successfully do so, and then, finding himself mistaken in this theory, ask for a continuance. The specific reason given for the motion was that it became necessary for him to take the depositions of the McCurdays. The deposition of the plaintiff was offered in evidence, and from that it appears that he and the McCurdays were then living in the same town. No reason is advanced for not taking their depositions as well as the plaintiff's.

3. By the first instruction the court instructed the jury

as follows: "If the jury believe from the evidence that the defendant made the note in question, then, under the issues joined in this case, the defendant assumes the burden of proving by a preponderance of the evidence not only that the consideration of the note had failed in whole or in part as alleged in his answer, and that he is entitled to the offsets therein pleaded, but also that the plaintiff took the said note after it became due, or if before due, without paying any consideration therefor, or that he had notice of the alleged defenses at the time said note was assigned to plaintiff, if the evidence shows that it was assigned to plaintiff." The execution of the note was admitted, and it was therefore erroneous to submit the question of its execution to the jury. Was the error prejudicial? In *Dayton v. City of Lincoln*, 39 Neb., 74, decided at the present term, it was held to be prejudicially erroneous to submit to the jury issues arising from the pleadings in support of which there stands uncontradicted sufficient competent evidence, where the effect of submitting such issues may be to mislead the jury and withdraw its attention from the controverted issues. In this case we do not think the instruction quoted could have had any such effect. The statement was not the principal object of the instruction, but was merely incidental to other propositions. The other instructions, instead of emphasizing the false issue, as was the case in *Dayton v. City of Lincoln*, 39 Neb., 74, rather assumed the facts according to the pleadings. Under the circumstances we do not think the error was prejudicial.

4. Error is assigned upon the court's permitting the witness Stewart to testify in general terms that the property was the homestead of the McCurdays. This testimony appeared in a long answer given by him in response to an inquiry as to what negotiation he had entered into with defendant for the purchase of the property. A general objection was introduced to this question, which will be hereafter noticed. The statement that the property was a

homestead was interjected in the course of this answer. It was not pertinent to the question asked, no special objection was interposed to it, there was no motion to strike it out, and the trial court was given no opportunity to rule upon this special testimony. The assignment cannot, therefore, be considered. There is ample proof elsewhere in the record, uncontradicted, that the property was the homestead of the McCurdays and was by them occupied as such until long after the note was given.

5. Objections are made to the giving and refusal of instructions relating to the indorsement of the note to plaintiff. The form of the indorsement has been already stated. The plaintiff contends that the instructions given by the court left to the jury to determine whether the language upon the note amounted to an indorsement, and that the instructions asked by plaintiff and refused correctly charged the jury that such language constituted an indorsement. The instructions bearing upon this question are too long to quote. That asked by plaintiff and refused is objectionable because it added to the statement that the language constituted an indorsement the further statement that it vested the title and ownership of the note in the assignee. To have given it would have misled the jury, because it would be inferred therefrom that the defendant could not attack the transfer by showing that it was made without consideration and for the purpose only of maintaining an action as an indorsee. The instructions given upon the subject we do not think bear the construction that the plaintiff puts upon them. The instructions distinctly told the jury what constituted a *bona fide* holder for value of negotiable paper and what are his rights, and submitted to it the question as to whether or not the plaintiff was such a *bona fide* holder under the evidence in the case. All assumed, although not in so many words stating, that the assignment upon the note was sufficient in form to enable the plaintiff to claim under it as a *bona fide* holder for

value. The instructions related, not to the form of the indorsement, which was assumed to be sufficient, but to the evidence in regard to Violet's ownership. Upon this subject the only evidence was of Violet himself, who says in direct examination, referring to McCurday: "I had a trade with him; gave him money; traded stock and merchandise and chattels." Upon cross-examination he says: "I got possession of said note in a legal, *bona fide* way, in the usual way of business." He also says that he paid McCurday no money, that he let him have property at a fair cash value, but the property, to-wit, "stock and merchandise," had not yet been delivered to McCurday and was only to be delivered when the note should be collected. It is doubtful whether upon this evidence a finding that plaintiff was a *bona fide* holder for value could have been sustained. He was not a holder for value as he had yet parted with nothing, and unless the note should ultimately be collected he was never to give anything for it. He does not say what the stock and merchandise, which he had agreed to give in case of the collection of the note, is, or how much of it he was to give. When the court upon this evidence left to the jury the question of *bona fides* it certainly did all that plaintiff could ask.

6. The defendant was allowed to testify that in his opinion the signature of Mrs. McCurday to the assignment of the contract was not genuine. The admission of this evidence is assigned as error. The proof shows that defendant had never seen Mrs. McCurday write, but he had sent her a letter which he says he thinks was addressed to Scotia, Ohio, and had received a letter in answer thereto which is in evidence. This letter is dated and postmarked "Otsego, Ohio, October 25." It contains a proposition by Mrs. McCurday to sign a relinquishment in consideration of the prompt payment of the $950 note. On November 20 the defendant addressed both the McCurdays, this time to Scioto, Ohio, enclosing for execution a quitclaim deed for the prop-

erty, which, on November 24, was returned with an indorsement apparently written by McCurday stating that the deed was enclosed, and there was enclosed therein a deed of quitclaim signed and acknowledged by both Mr. and Mrs. McCurday. The plaintiff in his deposition testifies that subsequently Mrs. McCurday stated to him that she had conducted such a correspondence with the defendant. It will be observed that while the letter from Mrs. McCurday did not come from the post-office to which defendant's letter was sent, nevertheless it was followed by other correspondence and was acted upon by her. This was sufficient proof of genuineness to support the defendant's testimony. The rule is thus stated by Patteson, J., in *Doe v. Suckermore*, 5 Ad. & E. [Eng.], 703: "The knowledge [rendering a witness competent to give his opinion as to the genuineness of a writing] may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the parties upon the contents of those letters or documents, or, having otherwise acted upon them by written answers, producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party." The proof in the case before us brings it directly within this rule, which is adopted by Greenleaf *in totidem verbis* (1 Greenleaf, Evidence, 577), and which has been frequently recognized in this country. (*Commonwealth v. Carey*, 19 Mass., 47; *Johnson v. Daverne*, 19 Johns. [N. Y.], 134; *Pinkham v. Cockell*, 77 Mich., 265.) The weight of such evidence must be very slight, but it is competent, and the credit to be given it is for the jury.

7. Another group of assignments of error relates to the evidence and instructions in regard to the attempted conveyances of the land and the measure of damages on behalf of the defendant. Recurring to the evidence upon these subjects, we find it clearly established that McCurday's interest was under a contract of sale assigned to him by the original vendee; that he was in possession and was occupying the premises as a homestead. In order to convey a homestead the instrument of conveyance must be executed and acknowledged by both husband and wife (Comp. Stats., ch. 36, sec. 4; and a court of equity will not decree the specific performance of a contract for the sale of a homestead unless the contract be executed and acknowledged by both husband and wife. (*Larson v. Butts*, 22 Neb., 370; *Clarke v. Koenig*, 36 Neb., 572.) It is undisputed that Mrs. McCurday did not acknowledge the instrument whereby McCurday undertook to assign his interest in the premises and contract to the defendant. No rights in the premises were, therefore, vested in the defendant under that assignment, and there was really no delivery of the assignment, such as it was. It was merely left with the defendant until Mrs. McCurday should come and acknowledge it, and the defendant gave plaintiff the note, relying upon his promise that such acknowledgment would be made. It was not made, and the defendant seems to have persistently endeavored to procure a proper conveyance for many months, finally receiving an instrument in form of a quitclaim deed. This was executed in Ohio and has no attesting witness. The certificate of acknowledgment has no county named in the venue, and it is at least doubtful whether that defect is supplied elsewhere in the certificate. It is probable, therefore, that no presumption attaches that the deed was executed in accordance with the laws of Ohio. But McCurday had no legal estate in the premises. What he undertook to convey was his rights under the executory contract for the purchase of the land. The property had by that time been

abandoned as a homestead, the McCurdays having permanently removed to Ohio, and a formal deed would not be necessary to transfer their interest as executory vendees. It is not necessary to here decide whether a deed having no attesting witness is sufficient to pass the legal title as between the parties thereto. The quitclaim deed, signed by the parties without witness or acknowledgment, was a sufficient memorandum to satisfy the requirements of the statute of frauds, and operated to transfer to the defendant in December what the plaintiff had undertaken to transfer in April. (*Missouri Valley Land Co. v. Bushnell*, 11 Neb., 196; *Blazier v. Johnson*, 11 Neb., 404.) The defendant seems to have objected at the time to the form of this conveyance, but he retained it; and while it does not appear clearly whether he ever was in possession of the premises, he acted upon the conveyance and subsequently sold his interest to a third person.

The defendant upon the trial proceeded upon the theory that he was entitled to set off against the note for the purchase money losses he sustained by reason of inability to carry out arrangements made for the resale of the land at a profit. He also undertook to set off expenses incurred in the way of interest upon incumbrances and taxes. Evidence was introduced tending to show that between April and December he had completed arrangements for selling the land at a considerable profit; that these arrangements fell through because of his inability to make title, and that in December, when he procured the quitclaim deed, persons holding the incumbrance had instituted an action to foreclose, and that because of the pendency of that proceeding he was unable then to sell; that he subsequently did dispose of the land, but the condition of the incumbrances was such that he obtained nothing out of the proceeds.

The instructions given by the court upon the measure of damages are couched in general terms, and, so far as they go, are free from objection; but the evidence referred to

was all objected to and its admission is assigned as error. The instructions of the court left the jury free to consider it. We do not think it was directed to the proper measure of damages in such a case. There is no evidence that, at the time the sale was made and the note delivered, McCurday knew that Rose was buying for the purpose of a resale. There is only evidence that McCurday suggested that the property might shortly afterwards be sold at a profit. There is no evidence that Rose then had a purchaser secured. It is shown that McCurday was afterwards informed that a portion of the land had been contracted to be sold, but applying the rule in *Hadley v. Baxendale*, we do not think that the loss of a prospective sale of the premises pending the delay was such a loss as can be considered as arising naturally from the breach of contract or such as might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of its breach.

It has been held that in the case of the breach of an executory contract to convey real estate, where the vendor having title refuses or puts it beyond his power to convey and no part of the consideration has been paid, the measure of damages is the value of the land at the time the contract should have been performed less the contract price. (*Wasson v. Palmer*, 13 Neb., 376; *Carver v. Taylor*, 35 Neb., 429. See, also, *Dunshee v. Geoghegan*, 7 Utah, 113; *Muenchow v. Roberts*, 77 Wis., 520; *Pumpelly v. Phelps*, 40 N. Y., 59; *Allen v. Atkinson*, 21 Mich., 351; *Hopkins v. Lee*, 6 Wheat. [U. S.], 109.) The general principle of all these cases is that which controls the whole subject of damages in this state, to-wit, that actual fair compensation should be made. In *Sweem v. Steele*, 5 Ia., 352, it was held that the vendee should recover any increased value to the land to the time when the contract should have been performed. Applying the rule to this case, if there had been an enforceable executory contract made providing for a convey-

ance immediately thereafter and McCurday had refused to convey, Rose could have recovered only the difference between the value of the land at that time and the purchase price agreed upon. If his contract had been to convey in December and he had then refused to do so, the measure of damages would have been the difference between the value in December and the contract price. He accepted the conveyance in December, and following the analogy of the cases where there has been a refusal to convey, and applying the rule there laid down to this case, which amounts simply to a delay in the conveyance, the measure of damages would be the difference between the value of the land in April when it should have been conveyed, and its value in December when it was conveyed. If the defendant was kept out of possession during these months, it would seem that the rental value of the land in the meantime should be added to the damages thus ascertained. There was no foundation in the evidence admitted for ascertaining the damages according to this rule, and the evidence which was admitted was directed to a false measure of damages.

In support of the rule of damages contended for by defendant we are cited to 1 Sutherland, Damages, 130; *Drake v. Baker*, 34 N. J. Law, 358; *Engel v. Fitch*, L. R. 3 Q. B. [Eng.], 314; s. c., L. R. 4 Q. B. [Eng.], 659. Sutherland, at the place cited, lays down the proposition that a party injured by total breach is entitled to recover the profit of a particular contract which he shows with sufficient certainty would have accrued if the other party had performed. Here there was no total breach, merely delay. Sutherland cites a vast array of cases, but all of them, so far as we have been able to examine them, simply state the general rule of damages; *Hadley v. Baxendale*, 9 Exch. [Eng.], 341, being among the number and affording a fair illustration of the general principles from which Mr. Sutherland has sought to deduce this particular rule. *Drake v. Baker, supra*, simply holds that the case of *Flureau v.*

*Thornhill*, 2 Wm. Bl. [Eng.], 1078, does not apply to the case of a failure to make title because of the wife's refusing to join in the deed, and that substantial damages may be in such case recovered, but no rule is laid down for determining those damages. In *Engel v. Fitch*, *supra*, it was certainly held that a vendee was entitled to recover the profits which he would have made upon a particular sale negotiated by him, and this was allowed upon the principle that the possibility of a resale is not beyond the contemplation of the parties, and that such damages came within the rule of *Hadley v. Baxendale*, *supra*. But upon appeal in exchequer chamber (L. R. 4 Q. B. [Eng.], 659) this judgment was affirmed, not upon this ground, but upon the ground that the measure of damages was the difference between the purchase price and the value at the time of the breach. This is clear from the following language: "If the contract had been carried out he would have been possessed of property of the increased value of 105 pounds. It follows that he is entitled to damages to that amount. Not, I repeat, because he happens to have made such a good bargain of resale, but because, as the case is put before us, we must take this bargain as evidence of the market value, no contrary evidence having been given." This case supports the view we have taken, but the portion of it making the purchase price at the resale evidence of market value is not applicable to the case before us, for here the defendant's bargain of resale was made during the period of delay and afforded no criterion as to the market value at the time title was made. It may then have been much greater, in which case defendant would suffer no damage; and the mere fact that a foreclosure suit, in which defendant then obtained a right to redeem, was pending, and that fact prevented a resale at that time, does not go to the market value.

REVERSED AND REMANDED.

## SINGER MANUFACTURING COMPANY V. CHARLES R. FLEMING.

FILED MARCH 6, 1894. No. 5662.

1. **Constitutional Law:** WAGES OF LABORERS. The act to provide for the better protection of the earnings of laborers, servants, and other employes of corporations, firms, or individuals engaged in interstate business, Laws of 1889, chapter 25, is not in conflict with the constitution of Nebraska, either as being broader than its title or as being prohibited class legislation.

2. ———: ———: DAMAGES. Nor does the act seek to impose a penalty for the benefit of an individual. The recovery provided for in the act, of the debt, costs, expenses, and attorney's fee, is simply a recovery of compensatory damages and not a penalty.

3. ———. Whether the act is valid, in so far as it makes its violation a crime, is not decided; that portion of the act not being so connected with the rest as to affect the validity of the whole act.

4. ——— Nor is the act in conflict with section 1 of article 4 of the constitution of the United States, requiring that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.

5. **Garnishment of Wages in Other States:** FOREIGN CORPORATIONS. A foreign corporation, having a place of business in Nebraska, which institutes, in another state, attachment proceedings and seizes the earnings of a citizen of Nebraska, exempt under the laws of Nebraska, is subject to the operation of the act; the contract out of which the proceedings arose having been made in Nebraska and being here performable.

6. ———: ———: EXEMPTIONS: CONFLICT OF LAWS. While under the laws and decisions of Iowa a judgment in a proceeding by foreign attachment, whereby earnings of the defendant, a resident of Nebraska, earned in Nebraska and payable there, are seized and applied to the payment of the defendant's debt, must be treated as within the jurisdiction of the Iowa courts, still the *situs* of said earnings, for the purpose of determining the right to exemption, is Nebraska. *Mason v. Beebee*, 44 Fed. Rep., 556, followed.

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

The opinion contains a statement of the facts.

*Breckenridge, Breckenridge & Crofoot*, for plaintiff in error:

The law upon which the judgment is based is unconstitutional because the act is broader than its title. The penalties provided in section 4 of the act are clearly beyond the scope of, and not indicated by the scope of, the title of the act. (Sec. 11, art. 3, Constitution; *White v. City of Lincoln*, 5 Neb., 505; *Ex parte Thomason*, 16 Neb., 238; *Messenger v. State*, 25 Neb., 674; *Touzalin v. City of Omaha*, 25 Neb., 817.)

The law is unconstitutional also because it imposes a penalty which is not contributed to the school fund. (Sec. 5, art. 8, Constitution; *Atchison & N. R. Co. v. Baty*, 6 Neb., 37, 45.)

The act is unconstitutional, as a vicious example of class legislation. (Sec. 15, art. 3, Constitution; *Atchison & N. R. Co. v. Baty*, 6 Neb., 37.)

The act, if valid, can have no application to persons or corporations not domiciled in Nebraska. Corporations are citizens and residents of the state, under the laws of which they were created, and cannot by engaging in business in another state acquire a residence there. (*Fales v. Chicago, M. & St. P. R. Co.*, 32 Fed. Rep., 673; *Insurance Co. v. Francis*, 11 Wall. [U. S.], 210; *Ex parte Schollenberger*, 96 U. S., 377; *Railroad Co. v. Koontz*, 104 U. S., 5; *Booth v. St. Louis Fire Engine Mfg. Co.*, 40 Fed. Rep., 1; *Bensinger Register Co. v. National Register Co.*, 42 Fed. Rep., 81.)

The judgment infringes upon the "full faith and credit" clause of the federal constitution. (Secs. 1, 2, art. 4, Constitution, United States; *Mooney v. Union P. R. Co., Garnishee*, 60 Ia., 346; *Harwell v. Sharp*, 85 Ga., 124; *Jenks v. Ludden*, 27 N. W. Rep. [Minn.], 188; *Warner v. Jaf-*

*fray*, 96 N. Y., 248; *Green v. Van Buskirk*, 7 Wall. [U. S.], 139; *Cole v. Cunningham*, 133 U. S., 107; *Hervey v. Rhode Island Locomotive Works*, 93 U. S., 664; *Walworth v. Harris*, 129 U. S., 355; *Scudder v. Union Nat. Bank*, 91 U. S., 406.)

*Kennedy, Gilbert & Anderson, contra:*

Chapter 25 of Laws, 1889, is constitutional, the subject of the bill is fairly expressed in the title, and there is a compliance with the constitutional requirements. (*White v. City of Lincoln*, 5 Neb., 516; *People v. McCallum*, 1 Neb., 194; *State v. Ream*, 16 Neb., 683; *State v. Bush*, 45 Kan., 138; *State v. Barrett*, 27 Kan., 213.)

The law does not undertake to divert any fine from the school fund. The recoverable items, "costs, expenses, and attorney's fees," all fall properly within legitimate costs and damages when the statute allows their recovery. (*Winkler v. Roeder*, 23 Neb., 709; *Rich v. Stretch*, 4 Neb., 189; *Seidentopf v. Annabil*, 6 Neb., 524; *Heard v. Dubuque County Bank*, 8 Neb., 13; *Hand v. Phillips*, 18 Neb., 595.)

The judgment of the district court does not infringe on the "full faith and credit" clause of the federal constitution. The exemption existing where a debt is contracted is a vested right *in rem*, which follows the debt into any jurisdiction in which an action may be brought. The *situs* of the debt will be deemed to be at the domicile of the wage-earner by whose labor the debt due him was created. (*Mason v. Beebee*, 44 Fed. Rep., 556; *Turner v. Sioux City & P. R. Co.*, 19 Neb., 246; *Wright v. Chicago, B. & Q. R. Co.*, 19 Neb., 175; Freeman, Judgments, sec. 580.)

IRVINE, C.

The plaintiff in error is a corporation organized under the laws of the state of New Jersey. It has a place of doing business, styled a "general agency," at Denver, Colorado.

It has also agencies in Iowa and Nebraska, and does business in both of these states. The agents there report to the general agent at Denver. The defendant in error is a resident of Nebraska, the head of a family, and an employe of the Union Pacific Railway Company, whose lines extend into both Iowa and Nebraska. Fleming bought from the Singer Company a sewing machine upon credit. The agent of the Singer company in Omaha, after some efforts to collect the bill, returned it to the general agent at Denver, who in turn sent it to the agent in Council Bluffs, Iowa. The agent at Council Bluffs brought an action in Pottawattamie county, Iowa, against Fleming on behalf of the Singer Company, proceeding by process of foreign attachment and garnished the Union Pacific Railway Company. The result of this proceeding was that wages of Fleming to the amount of $38.05, due him from the railroad company, were seized by the Iowa court and appropriated to the payment of the judgment there rendered against Fleming. Fleming then instituted this action in Douglas county, Nebraska, under sections 531*c*, 531*d*, 531*e*, and 531*f* of the Code of Civil Procedure to recover from the Singer Company the debt so garnished, with costs, expenses, and attorney's fees. The wages reached by garnishment were earned within sixty days prior to the commencement of the action in Iowa. Judgment was rendered in favor of Fleming in the district court of Douglas county in the sum of $95.55 and costs, from which the Singer Company prosecutes error. No question is raised as to the sufficiency of evidence to support a judgment for that amount, but the judgment is sought to be reversed upon three grounds:

First—That the statute under which the action was brought is contrary to the constitution of Nebraska.

Second—That it conflicts with section 1 of article 4 of the constitution of the United States, requiring that full faith and credit shall be given in each state to the pub-

lic acts, records, and judicial proceedings of every other state.

Third—That if the law be constitutional, it does not apply to foreign corporations.

The statute referred to is as follows:

"Sec. 531*c*. That it be, and is hereby declared, unlawful for any creditor of, or other holder of any evidence of debt, book account, or claim of any name or nature against any laborer, servant, clerk, or other employe of any corporation, firm, or individual, in this state, for the purpose below stated, to sell, assign, transfer, or by any means dispose of any such claim, book account, bill, or debt of any name or nature whatever, to any person or persons, firm, corporation, or institution, or to institute in this state or elsewhere, or prosecute any suit or action for any such claim or debt against any such laborer, servant, clerk, or employe by any process seeking to seize, attach, or garnish the wages of such person or persons earned within sixty days prior to the commencement of such proceeding for the purpose of avoiding the effect of the laws of the state of Nebraska concerning exemptions.

"Sec. 531*d*. That it is hereby declared unlawful for any person or persons to aid, assist, abet, or counsel a violation of section one of this act for any purpose whatever.

"Sec. 531*e*. In any proceeding, civil or criminal, growing out of a breach of sections one or two of this act, proof of the institution of a suit or service of garnishment summons by any persons, firm, or individual, in any court of any state or territory other than this state or in this state to seize by process of garnishment, or otherwise, any of the wages of such persons as defined in section one of this act, shall be deemed *prima facie* evidence of an evasion of the laws of the state of Nebraska and a breach of the provisions of this act on the part of the creditor or resident in Nebraska causing the same to be done.

"Sec. 531*f*. Any persons, firm, company, corporation, or

business institution guilty of a violation of sections one or two of this act shall be liable to the party injured through such violation of this act, for the amount of the debt sold, assigned, transferred, garnished, or sued upon, with all costs and expenses and a reasonable attorney's fee, to be recovered in any court of competent jurisdiction in this state, and shall further be liable by prosecution to punishment by a fine not exceeding the sum of two hundred dollars and costs of prosecution."

1. Three arguments are made upon the proposition that the statute is in conflict with the constitution of Nebraska. In the first place it is said that the act is broader than its title. The title is as follows: "An act to provide better protection for the earnings of laborers, servants, and other employes of corporations, firms, or individuals engaged in interstate business." We are somewhat at a loss to appreciate the argument based on this proposition. It seems to be the theory of counsel that that portion of the act which provides for the recovery of the debt, costs, expenses, and attorney's fee, and which enacts a penalty for the violation of the law, is not expressed in the title. These features are not distinctly expressed, but the title to the act need not amount to an analysis or complete abstract of its text. It is sufficient if the title, by general language, fairly expresses its subject-matter. Where a bill has but one general object, it will be sufficient if the subject is fairly expressed in the title. (*People v. McCallum*, 1 Neb., 182; *State v. Ream*, 16 Neb., 681.) The title of this act is comprehensive. Merely to declare the doing of certain acts unlawful would be nugatory unless the act itself or other provisions of the law provided a redress for injuries inflicted by reason of its violation. Without the section providing a remedy the act would not provide "for the better protection of the earnings" of the persons sought to be protected. Both a substantial enactment of law and a remedy for its violation are fairly included in the title, and

the act would not be complete in the absence of either provision.

It is next urged that the act is unconstitutional because imposing a penalty which does not go to the school fund. The last section of the act undertakes to provide two remedies. One is that the person violating it shall be liable by prosecution to punishment by fine. It is not necessary to here consider whether that portion of the act is valid. If it is, the fine imposed is like all other fines in criminal cases, and is not subject to the objections urged. If it be not valid, the whole act is not therefore unconstitutional. Where a part of an act is void and a part in its nature valid, the whole act is not void, unless it appears from an examination of the act itself that the invalid portion was designed as an inducement to pass the valid, so that the whole taken together will warrant the belief that the legislature would not have passed the valid portion alone. (*State v. Lancaster County*, 6 Neb., 474; *State v. Lancaster County*, 17 Neb., 85; *Trumble v. Trumble*, 37 Neb., 340.) But counsel say the provision permitting the recovery not only of the debt, but of costs, expenses, and attorney's fees is in the nature of a penalty; and we are cited upon that subject to *Atchison & N. R. Co. v. Baty*, 6 Neb., 37. In that case an act was held void because it sought to give to the owner of live stock injured upon a railroad double the value of his property. This double recovery was clearly in the nature of a penalty. It had no element of compensation, but in the statute we are considering the damages awarded are purely compensatory. Nothing is allowed by way of vindictive damages or as a penalty, but the injured party is made whole by being permitted to recover the amount of money wrongfully taken from him, together with the exact costs and expenses by him incurred, and a reasonable attorney's fee, which is also an item of expense for which he should be compensated, and which, probably, would have been included as costs and

expenses even though not otherwise expressed. The law is for none of the reasons urged in conflict with the constitution of Nebraska.

2. Is the act in conflict with the constitution of the United States? It is said in support of this proposition that the courts of Iowa have held that a non-resident of Iowa or a foreign corporation may have an attachment in that state against a non-resident upon precisely the same grounds and upon the same conditions as a resident. The case of *Mooney v. Union P. R. Co.*, 60 Ia., 346, is cited as sustaining that contention. The case cited certainly goes that far; and that case and later cases which might have been cited carry the doctrine further and go to the extent of holding that a citizen of Nebraska may sue another citizen of Nebraska in the courts of Iowa, obtain jurisdiction by attaching and garnishing the wages earned by defendant in Nebraska, and there payable to him by a railroad company which happens to operate in both states; and that in such case the defendant, being a non-resident of Iowa, is not entitled to the benefits of the Iowa exemption laws, and that the Iowa courts will not, even upon principles of comity, give effect to the Nebraska exemption laws, and that by such a device the defendant is absolutely deprived of his exemptions under the law of either state. The question presented is whether the courts and the legislature of this state are required, in order to give full faith and credit to the judicial proceedings of Iowa, to sanction such a proceeding. We think not. The section of the federal constitution referred to requires not only that full faith and credit shall be given to the judicial proceedings of another state, but also that full faith and credit shall be given to the public acts of such state. The laws of Nebraska make sixty days' wages of laborers, mechanics, and clerks, who are heads of families, exempt from attachment, execution, and garnishment proceedings. Where the wages are earned in Nebraska and are there payable to the laborer residing

there, Nebraska is the *situs* of the debt. (*Wright v. Chicago, B. & Q. R. Co.*, 19 Neb., 175; *Mason v. Beebee*, 44 Fed. Rep. 556.) As pointed out in the case of *Mason v. Beebee*, last cited, there is a marked distinction between the *situs* of a chose in action for the purpose of jurisdiction and its *situs* for determining the rights of the parties thereto. The case of *Mason v. Beebee* contains a well-reasoned discussion of the whole subject by Judge Shiras. The opinion is too long to quote entire, and the whole of it is so closely applicable to the case at bar that we could not select one portion as more proper for quotation than the rest. Suffice it to say that the case of *Mooney v. Union P. R. Co., supra*, is there discussed *in extenso*, its fallacies laid bare, and the monstrous injustice and disregard of the laws of other states which would result from following the *Mooney Case* are there demonstrated. If the *situs* of the debt was Nebraska and not Iowa, then it follows that no legislative or judicial interposition in Iowa could rightfully sustain the jurisdiction of Iowa courts in such a case. If the courts of Iowa should seek to prosecute a citizen of Nebraska who does not come within their jurisdiction, and to reach over into Nebraska and take from this state the property of that citizen here located, can any one for a moment urge or seriously consider that our legislature and courts, in order to give full faith and credit to the judicial proceedings of Iowa, must stand idly by and countenance such a proceeding? Must we permit our laws to be nullified and evaded in order to sustain the courts of another state in overreaching their jurisdiction, in refusing to exercise the comity elsewhere accorded sister states and in seizing the property in Nebraska of citizens of Nebraska who have not brought themselves within the lawful reach of Iowa courts? To quote from the brief of the plaintiff in error a citation from Black on Constitutional Prohibitions: "The moment a state attempts to lay its hands upon the rights of those whose domiciles and affairs are beyond its

boundaries, its acts are null." And to quote again from that brief, "Where at the place of commission the act is legally innocent, it cannot be elsewhere made a delict,"—a principle which, if correct, must give rise to another principle that where at the place of commission the act is legally wrong, it cannot be elsewhere made right. The decisions of the supreme court of the United States in nowise militate against this view. In *Green v. Van Buskirk*, 5 Wall. [U. S.], 310, and 7 Wall. [U. S.], 139, the decision, so far as it is applicable to this case, we think directly tends to support our view. In that case one Bates, a citizen of New York, owned certain iron safes in Chicago upon which he gave a mortgage to Van Buskirk and others which was executed and delivered in New York. The laws of Illinois required for the validity of a chattel mortgage as against third persons that it should be recorded and the property delivered to the mortgagee. These conditions were not complied with. The laws of Illinois further permitted attachments against a non-resident debtor. A creditor of Bates sued by attachment in Illinois and levied upon and sold the safes. Van Buskirk then sued this creditor in New York state, and the creditor pleaded in bar the attachment proceedings in Illinois. The New York courts held that the transaction was governed by the laws of New York, and the case was then taken by writ of error to the supreme court of the United States, which held that the attaching creditor had been denied a privilege accorded him by the constitution of the United States, that the property, to-wit, the safes, were situated in Illinois, and that the Illinois law must govern them. That is precisely the position of the defendant in error here. His property which was seized was in Nebraska and subject to the jurisdiction of our courts and not those of Iowa.

In *Cole v. Cunningham*, 133 U. S., 107, it was held that it was not in violation of the constitution of the United States for a court in one state, in which proceedings have

been begun to distribute the estate of an insolvent debtor among his creditors, to enjoin a creditor of the insolvent, a citizen of the same state, from proceeding to judgment and execution in a suit against the insolvent in another state by an attachment of his property, which property the insolvent law of the state of the domicile of the parties required the debtor to convey to his assignee. It is true that in *Cole v. Cunningham, supra*, there was a strong dissenting opinion by Mr. Justice Miller, concurred in by Justices Field and Harlan; but the dissent there was upon the ground that the opinion of the majority was contrary to *Greene v. Van Buskirk*, the *situs* of the debt in *Cole v. Cunningham*, which it was sought to reach by attachment, being in the state where the attachment was levied, and not in the state of the residence of the parties where the injunction was granted. So that, taking either the majority opinion or the dissenting opinion in *Cole v. Cunningham*, we think that the case lends force to the views we have expressed.

Even the courts of Iowa have refused to apply to their own citizens the rules which they seek to enforce extra-territorially against the citizens of other states, and have restrained a citizen of Iowa from prosecuting a suit by attachment in Minnesota against another citizen of Iowa by garnishment reaching a debt due for wages earned in Iowa. (*Teager v. Landsley*, 69 Ia., 725.) As said by Judge Shiras in *Mason v. Beebee*, "Is it consistent for the courts of Iowa to forbid by injunction its own citizens from suing in Illinois for the purpose of evading the exemption laws of Iowa and at the same time entertain suits by citizens of Illinois brought here for the purpose of evading the exemption laws of Illinois?" If full faith and credit have in these proceedings not been given to the public acts, records, and judicial proceedings of another state, it is certainly not the legislature or courts of Nebraska which have been in fault.

The conclusion reached does not conflict with the decision in *Chicago, B. & Q. R. Co. v. Moore*, 31 Neb., 629. It was there held that earnings so seized in Iowa could not be recovered from the garnishee, the Iowa courts having acquired jurisdiction so far as to require the garnishee to pay the money, and the judgment binding the parties to that extent. It is for that reason that a cause of action arose against the creditor for wrongful proceedings in evasion of our exemption laws.

3. Finally, it is urged that if the law be constitutional, it cannot be made to apply to foreign corporations. It is stipulated in the bill of exceptions that the Singer Sewing Machine Company was and has continued doing business in Nebraska. It is stipulated that the debt out of which the controversy arose was contracted in Nebraska. As said by this court in *Turner v. Sioux City & P. R. Co.*, 19 Neb., 241, "There is great force in the argument that the exemption existing where a debt is contracted is a vested right *in rem*, which follows the debt into any jurisdiction in which an action may be brought; that is, that the law in force when and where a debt was contracted should govern as to the rights of the creditor and debtor in that case." (See on this subject *Dorrington v. Myers*, 11 Neb., 388; *De Witt v. Wheeler & Wilson Sewing Machine Co.*, 17 Neb., 533.) It is only upon a principle of comity that a foreign corporation is permitted to here do business. When it does come here and do business, it does so with reference to our laws. It claims the rights and privileges of our laws and it cannot evade their obligations. It would be monstrous to permit a foreign corporation to hold property here, to conduct business here, to enforce contractual rights obtained under our laws, and at the same time to avoid the contractual obligations imposed by the same laws. But it is said that the judgment complained of grew out of an act committed elsewhere and innocent where it was committed. The general principle is conceded that the law of the place

where an act is done determines its validity; but the tort complained of was not committed in Iowa. The tort consisted in seizing property in Nebraska exempt under the laws of Nebraska. The plaintiff in error was enabled to do this by instituting proceedings in another state; but the tort consisted not in instituting those proceedings in Iowa. A suit might rightfully be begun there *in personam* had Fleming brought himself within the jurisdiction of the Iowa courts. No action would have arisen had the property attached been situated in Iowa or in a state other than Nebraska. The wrong was in seizing the debt situated in Nebraska, payable in Nebraska to a citizen of Nebraska. The statute in this respect is not confined to actions begun in another state, but extends to every attachment or garnishment of exempt wages whether the proceeding be instituted in this state or elsewhere. It is true that if the proceeding had been instituted in Nebraska, a partial redress could have been had by way of defense in the original action, but that consideration only affects the *quantum* of damages. The tort, the cause of action, would have been precisely the same. There is no question raised as to the jurisdiction of the court over the person of the plaintiff in error. It has committed an act here which is a tort, and it must here answer for that tort. A somewhat similar question was presented in the case of *O'Connor v. Walter*, 37 Neb., 267. It was there said: "In extending credit, every one dealing with the head of a family must take into account this right of exemption, and, presumably, in every extension of credit, this right is recognized. It therefore in no way operates to the injury of the law abiding creditor. The rapacity which respects neither implied contract obligations nor statutory enactments must, in damages, respond for this, as for any other act of misappropriation."

We neglected, perhaps, in the proper place to notice one objection to the act, but it is one which can be appropriately

noticed in closing,—that is, that the act is "a vicious example of class legislation," and *Atchison & N. R. Co. v. Baty*, 6 Neb., 37, is cited in support of that proposition. The act under discussion in that case applied to one class only, and there was perhaps no basis founded upon any reasonable distinction for selecting that class as the recipients of that peculiar privilege. Here the case is different. The act we are now considering applies to every one who falls within the purview of the law exempting wages. The validity of that exemption cannot be doubted; and if it were proper for the legislature to provide that exemption, then it certainly was also proper for the legislature, by appropriate action, to enforce the rights so granted. The mischief, to prevent which the act was passed, is a matter of common knowledge. An extensive and thriving business was being conducted by the institution of suits precisely similar to that out of which this action arose and having for their sole object the evasion of the laws of this state. The act was passed to prevent, and should be so construed as to prevent, the continuance of this infamous business. It is perhaps only fair to say that neither the representatives of the corporation in Nebraska nor counsel for the corporation engaged in this case are shown to have had any part in the Iowa proceedings.

JUDGMENT AFFIRMED.

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## WESTERN UNION TELEGRAPH COMPANY V. CITY OF FREMONT.

FILED MARCH 20, 1894. No. 6208.

1. **Municipal Corporations:** OCCUPATION TAX: AUTHORITY TO LEVY. Under section 52, chapter 14, article 2, Compiled Statutes, 1891, each city of the second class having more than

five thousand inhabitants has the power to levy a tax upon every business or occupation carried on within the territorial limits of the municipality, excepting alone those enumerated in the proviso clause of said action.

2. **Municipal authorities** are powerless to license or tax any business or avocation conducted exclusively outside of the municipality.

3. **Telegraph Companies**: CITIES: POWER TO IMPOSE LICENSE TAX. A city of the above class may lawfully enact an ordinance imposing on telegraph companies a license tax of a reasonable sum per annum for the privilege of transacting the business of telegraphy within the city; and the fact that the telegrams received and delivered within the city were transmitted over the lines of the telegraph company from other points within the state, or that the messages received by it at its office or place of business in the city were transmitted to various other places in the state, does not invalidate the tax. IRVINE, C., dissenting.

4. **Interstate Commerce**: MUNICIPAL CORPORATIONS: TAX ON MESSAGES. State and municipal authorities are powerless to impose a tax upon messages to or from other states, since such a tax would be in conflict with that clause of the federal constitution which gives to congress the exclusive power to regulate commerce among the several states.

5. **Telegraph Companies**: INTERSTATE COMMERCE: OCCUPATION TAX. Where a telegraph company is engaged in both interstate and intrastate business, an ordinance levying an occupation tax on that portion of such business which is carried on wholly within the state is not repugnant to section 8, article 1, of the constitution of the United States, since it in no way interferes with, or regulates, interstate commerce.

6. **An occupation tax** may be collected by ordinary suit, where the ordinance imposing the tax so provides.

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

The opinion by the chief justice contains a statement of the case.

*Estabrook & Davis*, for plaintiff in error:

The legislature has not invested the city of Fremont

with the power to tax the business described in the ordinance. (*Leloup v. Port of Mobile*, 127 U. S., 640; *Western Union Telegraph Co. v. Alabama*, 132 U. S., 472; *City of San Francisco v. Western Union Telegraph Co.*, 31 Pac. Rep. [Cal.], 10; *Robbins v. Shelby County Taxing District*, 120 U. S., 489; *Moran v. City of New Orleans*, 112 U. S., 69; *Harman v. City of Chicago*, 147 U. S., 396; *Pacific Express Co. v. Seibert*, 44 Fed. Rep., 316, 142 U. S., 339; *City of St. Louis v. Laughlin*, 49 Mo., 559; *City of Dubuque v. Northwestern Life Ins. Co.*, 29 Ia., 9; *Mays v. City of Cincinnati*, 1 O. St., 273; *Caldwell v. City of Lincoln*, 19 Neb., 574; *City Council of Charleston v. Postal Telegraph Co.*, 9 Ry. & Corp. Law J. [S. Car.], 129.)

It is not within the power of the legislature to delegate to one municipal corporation the power to tax a business which is not carried on within the limits of such corporation. (*Wells v. City of Weston*, 22 Mo., 384; Desty, Taxation, ch. 11; Cooley, Taxation, ch. 3; *City of Charleston v. Postal Telegraph Co.*, 9 Ry. & Corp. Law J. [S. Car.], 129; Thompson, Law of Electricity, sec. 518.)

*F. Dolezal, City Attorney, contra:*

The license tax in this case is not a tax on or a regulation of interstate commerce. (*Ratterman v. Western Union Telegraph Co.*, 127 U. S., 411.)

In addition to the tax on realty, personal property, and money an occupation tax may be levied. The legislature has the power to vest municipal corporations with authority to levy and collect license or occupation taxes. (*State v. Bennett*, 19 Neb., 191; *City of Columbus v. Hartford Ins. Co.*, 25 Neb., 83; *Magneau v. City of Fremont*, 30 Neb., 843; *Templeton v. City of Tekamah*, 32 Neb., 542.)

The ordinance levies the tax only upon that business of the telegraph company which is done within the city. The tax is valid. (*City of Los Angeles v. Southern P. R. Co.*,

61 Cal., 59, and cases cited; *City of Sacramento v. California Stage Co.*, 12 Cal., 134.)

NORVAL, C. J.

This was an action by the city of Fremont to recover from the plaintiff in error an occupation tax levied under and in pursuance of an ordinance of said city. A general demurrer to the petition was overruled, and the telegraph company having elected to stand upon its demurrer, judgment was entered by the court in favor of the city for $150 and costs of suit.

The petition, after alleging the incorporation of plaintiff and defendant, avers, in substance, that on the 1st day of April, 1891, and continuously ever since said day, there was and now is conducted and carried on within the corporate limits of said city of Fremont, by various persons and corporations, the business and occupation of receiving, transmitting, and delivering telegraph messages, not including the receipt, transmission, or delivery to or from any department, agency, or agent of the United States, and not including the receipt, transmission, or delivery of any message which is interstate commerce; that on the 23d day of April, 1891, the duly constituted authorities of the city of Fremont, in the manner provided by law, duly passed and adopted an occupation tax ordinance, a copy of which is attached to the petition; that said ordinance was duly approved by the mayor of said city, and published as required by statute, and ever since continuously has been, and now is, in full force and effect, by which said ordinance a license tax of $150 per annum was levied upon the aforesaid business and occupation, and it became and was the duty of each person and corporation engaged therein within said city to pay such tax; that the defendant, on the date aforesaid and prior thereto, and continuously ever since, was, and is, engaged in, and carrying on within the territorial limits of said city, the business and occupation specified

in paragraph No. 1 of section 1 of said ordinance; that there was due the plaintiff from said defendant on the date last aforesaid the sum of $150, as a license tax on its said business and occupation, no part of which has been paid, although the payment of said sum has been requested by the city, and refused by the defendant. It is further alleged in the petition "that besides the business and occupation aforesaid, and in addition thereto, the said defendant at the time aforesaid was, and has since continuously been, engaged in the business of sending and receiving messages by telegraph which are interstate commerce in said city, and said defendant had theretofore duly accepted the terms of the act of congress passed in the year 1866 relating to telegraphs and telegraph companies and was and is entitled to all the benefits of said act, and has availed itself of all the benefits of said act and performed its duties thereunder, and has telegraph lines extending throughout the several states of the United States, and to and from and among said several states, all of which said lines said defendant operates and operated during all the aforesaid times by the transmission on and by means of said telegraph lines telegraph messages; that for and during the several years herein mentioned under the laws of this state there has been assessed and defendant has paid property tax on the lines, poles, instruments, realty, and office furniture and stationery supplies that said defendant owns and has located and kept within the state of Nebraska, which said tax on said articles thus paid is and was imposed and collected under and by virtue of sections 39 and 40 of chapter 77, relating to revenue, of the Compiled Statutes of Nebraska, annotated, 1891."

Section 1 of the ordinance levying the tax in question reads as follows:

"Section 1. That there is hereby levied a license tax on each and every occupation and business within the limits of this city, in this section hereinafter enumerated, to raise

a revenue thereby in the several different sums of the several different businesses and occupations respectively, as follows:

"No. 1. The sum of one hundred and fifty dollars per year on the business and occupation of receiving messages in this city from persons in this city and transmitting the same by telegraph from this city within this state to persons and places within this state; and receiving in this city messages by telegraph transmitted within this state from persons and places in this state to persons within this city and delivering the same to persons in this city, excepting the receipt, transmission, and delivery of any such messages to and from any department, agency, or agent of the United States, and excepting the receipt, transmission, and delivery of any such messages which are interstate commerce; the business and occupation of receiving, transmitting, and delivering of the messages herein excepted is not taxed hereby."

Paragraphs 2 to 16 inclusive of said section impose taxes on various other occupations.

Section 2 of said ordinance provides that "the license tax by this ordinance levied is not levied upon any business or occupation which is interstate or which is done or conducted by any department of the government of the United States or of this state, or any officer of the United States or of this state in the course of his official duties, or by any county or other subdivision of this state, or its officer as such."

Section 3 provides, among other things, that on all occupations on which a tax is levied at a yearly rate the year shall begin on the last Tuesday in April of each year and end on the last Tuesday of the year following, and that such tax shall be due and payable in advance.

Section 4 makes it the duty of every person, partnership, firm, and corporation carrying on any business within the city on which a tax is imposed by the ordinance to pay

said tax at the time specified in the ordinance for its payment.

Section 5 declares that "the tax hereby levied shall be paid to the treasurer of this city, who, upon payment thereof by any person, shall give a receipt, properly dated and specifying the person paying, the occupation, amount, and for what time said tax is paid; said treasurer shall keep proper account of said tax."

Section 6 provides for the collection of the unpaid license tax by the city treasurer by distress and sale of the personal property of the person or corporation owing such tax.

Section 7 authorizes the city attorney to bring a suit in any court of competent jurisdiction to recover the amount of any tax levied by the ordinance, whenever the city treasurer shall deem himself unable to collect the same by distress.

It has been repeatedly decided by this court that under the constitution of the state the legislature may by general law confer upon cities and villages the power to levy and collect occupation taxes. (*State v. Bennett*, 19 Neb., 191; *City of Columbus v. Hartford Ins. Co.*, 25 Neb., 83; *Magneau v. City of Fremont*, 30 Neb., 843; *Templeton v. City of Tekamah*, 32 Neb., 542.) The authority of the law-making body to invest municipal corporations with the power to pass ordinances imposing license or occupation taxes is not now questioned; but it is insisted on the part of the telegraph company that the legislature has not invested the city of Fremont with authority to license or tax the business described in the ordinance in question. The proposition stated we will now consider.

Section 52, chapter 14, article 2, Compiled Statutes, 1891, reads as follows:

"Section 52. In addition to the powers heretofore granted cities under the provisions of this chapter, each city may enact ordinances or by-laws for the following pur-

poses: * * * VIII. To raise revenue by levying and collecting a license tax on any occupation or business within the limits of the city, and regulate the same by ordinance. All such taxes shall be uniform in respect to the classes upon which they are imposed; *Provided, however*, That all scientific and literary lectures and entertainments shall be exempt from such taxation, as well as concerts and other musical entertainments given exclusively by citizens of the city."

It will be observed that the foregoing section authorizes cities of the class of the city of Fremont to impose a tax upon every business and occupation carried on within the territorial limits of the municipality, excepting only those mentioned in the proviso clause of the section quoted. The tax must be reasonable, and not burdensome, as well as uniform in respect to the class upon which the same is levied. No question, however, is raised as to the reasonableness of the tax sought to be collected by this action. The legislature has not vested municipal corporations with authority to license or tax any business or occupation carried on exclusively outside of the municipality. There can be no doubt of it. The language of the statute is "on any occupation or business within the limits of the city."

It is argued that the ordinance before us levies a tax on the business of plaintiff in error which is not carried on within the boundaries of the city of Fremont. If this be true, the tax is invalid, for the want of power in the municipality to impose it. But such is not the scope and effect of the ordinance, since it does not attempt to tax the business of telegraphy, which is conducted wholly outside of the corporate limits of the city, but is restricted to that portion of such business as is entirely within the limits of the municipality. It further excludes government messages and messages which are interstate commerce. It is the business and occupation only of receiving, delivering, and transmitting messages within the city which are sought to be

taxed by the ordinance. The fact that the telegrams received and delivered by plaintiff in error within the city of Fremont were transmitted over its lines from other points within the state, or that the messages received by it at its office or place of business in Fremont are transmitted to various other places in the state, does not invalidate the tax. It is that portion of the business alone the telegraph companies transact in the city upon which a license tax is levied by the ordinance. The petition expressly avers, which the demurrer admits to be true, that plaintiff in error was and is engaged in and carrying on within the corporate limits of said city the business and occupation described in paragraph 1 of the ordinance under consideration. Plaintiff in error is therefore carrying on a business or occupation in the city of Fremont, within the meaning of the statute, and is liable to the license tax imposed by the municipal authorities.

*City of Sacramento v. California Stage Co.*, 12 Cal., 134, was an action for the recovery of a license tax levied by an ordinance of the city of Sacramento upon stage companies engaged in the business of carrying passengers to and from Sacramento city. It was claimed there, as here, that the ordinance was invalid because it authorized the imposition of a tax upon a business not carried on entirely within the city limits. The ordinance and the tax levied thereunder were sustained. Baldwin, J., speaking for the court, says: "The question is made whether, inasmuch as the larger portion of this work of transportation is done without the territorial limits of the city, the authorities have a right to levy the tax upon them; and on this question we have no doubt. The company receive and discharge their passengers, and make contracts here for their conveyance, and they have their offices and property here, within the protection of the municipal laws. The mere fact that the business of carrying the passengers is not within the municipal limits does not make the receiving

and discharging of them, and for contracting for them, less a business here. If this business is not a business in Sacramento, it is difficult to say where it is." The principle announced in the above case was recognized and applied by the same court in the *City of Los Angeles v. Southern P. R. Co.*, 61 Cal., 59. In that case the ordinance of the city of Los Angeles levied a license tax of $60 on every steam railroad company having a depot in said city. The court, in passing upon the case, say: "The fact that the business of defendant extends beyond the city limits does not relieve it from the payment of a license tax for conducting its business within the city. (*City of Sacramento v. California Stage Co.*, 12 Cal., 134.) Defendant is subject to regulation in many respects by the state, yet it is doing a business in Los Angeles, which, with its property there situate, is protected by local authorities. It is interested in many police expenditures, and may as reasonably be charged a local license as may those engaged in other business."

It is difficult to perceive a distinction in principle between the cases above referred to and the question before us. These authorities, it seems to us, are directly in point and sustain the authority of the defendant in error to impose a specific license tax upon the telegraph company for conducting its business within the corporate limits of the city of Fremont. Similar taxes have often been levied on avocations and callings where a portion of the business is transacted and carried on outside of the territorial jurisdiction of the city imposing the same. Physicians and lawyers are frequently called upon to pay an occupation tax, yet the persons belonging to either of these professions transact a large portion of their business outside of the city in which their offices are located. The same is likewise true of wholesale dealers, livery men, contractors and builders, also persons engaged in other callings which could be mentioned; and will it be contended that the li-

cense tax levied upon any of the occupations, or pursuits named, would be invalid? Clearly it would be, if the tax in the case at bar cannot be sustained.

In *Commonwealth v. Stodder*, 2 Cush. [Mass.], 562, cited in the brief of counsel for plaintiff in error, the opinion of the court contains language directly opposed to the holding of the California court in the cases above cited, and from which we have quoted, but the reasoning of the Massachusetts court is unsatisfactory; besides, the statute, under which the ordinance there considered was adopted, is quite different from the one governing the city of Fremont. The Massachusetts statute authorized the mayor and aldermen of the city of Boston to adopt rules and orders "for the due regulation in such city, of omnibuses, stages," etc. The title of the act was "An act to prevent obstructions in the streets of cities and to regulate hackney coaches and other vehicles." It was held that the power conferred was not a tax-leving power, but that "all the apparent object of the act may be secured by due regulations as to the time, place, and mode of using such vehicles, irrespective of any payment of a special duty or tax upon them, as provided in the ordinance." Since the statute there under review conferred no power upon the municipality to levy an occupation tax upon omnibuses and stage coaches, it is obvious that what the court say about want of authority of the city of Boston to require the proprietors of omnibuses and other vehicles running into and out of Boston to pay a license tax was not necessary to a decision of the case before the court.

In the case at bar it is urged that the ordinance we have been considering does not impose a license tax, therefore the tax in question is invalid. The charter of the city of Fremont authorizes levying and collecting "a license tax." Section 1 of the ordinance declares that "there is hereby levied a license tax on each and every occupation and business within the limits of this city," etc. The ordinance, therefore, does levy a "license tax." That

the ordinance makes no provision for the issuance of a fomal license is immaterial. By section 5 the city treasurer is required to give a receipt to the person paying the tax, "properly dated and specifying the person paying, the occupation, amount, and for what time said tax is paid." It is not believed that a provision for the issuance of a license is essential to the validity of the tax, but if it were, the receipt provided for in section 5 is a sufficient compliance. It will be observed that the ordinance authorizes the collection of occupation taxes levied thereunder by suit in any court of competent jurisdiction. That the payment of such taxes may be enforced by an ordinary action at law, when the ordinance provides for the collection in that manner, we do not doubt. (*City of Sacramento v. Crocker*, 16 Cal., 119; *City of Los Angeles v. Southern P. R. Co., supra.*)

It is further urged by counsel for the telegraph company that the ordinance imposes a burden upon interstate commerce, and consequently is repugnant to that clause of the federal constitution which gives to congress the power to regulate commerce with foreign nations and among the several states. The power to regulate interstate commerce is within the exclusive power of congress, and it is well settled by repeated decisions of the highest judicial tribunal of the land that a state law which imposes regulations, or restrictions, which operate to hinder or embarrass the free and speedy transportation of commerce between the states, is unconstitutional and void. It has likewise been decided that the telegraph is an instrument of commerce, and that the power to regulate telegraph companies in respect to interstate business is vested in congress alone. In other words, the states are powerless to impose a tax upon messages where communication is transmitted from one state to another. (*Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S., 1; *Western Union Telegraph Co. v. Texas*, 105 U. S., 460; *Western Union Telegraph Co. v. Alabama State Board of Assessment*, 132 U.S., 472.)

The supreme court of the United States in more than one case has said that a state may lawfully impose a tax upon a telegraph company for telegrams carried wholly within the limits of the state in which such tax is levied. We will now refer to some of the decisions of that tribunal so holding.

In *Western Union Telegraph Co. v. Texas, supra,* the question under consideration was the validity of a statute of Texas requiring telegraph companies doing business in the state to pay tax upon each telegram passing over its lines whether wholly within the limits of the state or coming into the state from a point without, or going from the state out of it. The statute was held void, in so far as it related to messages carried through more than one state, as an interference with or a regulation of commerce among the states. It was further decided that the state had the power to levy a tax on telegrams carried entirely within the limits of the state. Chief Justice Waite, in delivering the opinion of the court in that case, said: "The Western Union Company, having accepted the restrictions and obligations of this provision by congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the state is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the state, or sent by public officers on the business of the United States." The learned chief justice in the same opinion, after holding that the tax on telegraph messages sent from points without the state to points within, and from points within to points without, is a regulation of interstate commerce and therefore void, uses the following language: "The rule that the regulation

of commerce, which is confined exclusively within the jurisdiction and territory of a state and does not affect other nations, or states, or the Indian tribes, that is to say, the purely internal commerce of a state belongs exclusively to the state, is as well settled as that the regulation of commerce which does affect other nations, or states, or the Indian tribes, belongs to congress. Any tax, therefore, which the state may put on messages sent by private parties, and not by the agents of the government of the United States, from one place to another, exclusively within its own jurisdiction, will not be repugnant to the constitution of the United States." To the same effect is *Western Union Telegraph Co. v. Pennsylvania*, 128 U. S., 39.

In *Leloup v. Port of Mobile*, 127 U. S., 640, it was ruled that telegraphic communications, when carried on between different states, are interstate commerce and within the power of regulation conferred upon congress, and that a general occupation tax on a telegraph company affects its entire business, interstate as well as domestic, and is unconstitutional. In that case a tax ordinance of the city of Mobile imposed a license tax of $1,225 on each telegraph company for the privilege of transacting telegraph business in the city. It is clear that the ordinance is repugnant to the commercial clause of the federal constitution, since it was a restriction upon interstate commerce. In that case the tax was levied upon its entire business, interstate as well as that carried on wholly within the state, while in the case at bar the tax was upon intrastate business alone. In the case referred to, the right of the state to tax the telegraph company's intrastate business was stated.

In *Ratterman v. Western Union Telegraph Co.*, 127 U. S., 411, it was held that a single tax, assessed under the Revised Statutes of Ohio, upon the receipts of a telegraph company which were derived partly from interstate commerce and partly from commerce within the state, but which were returned and assessed in gross and without sep-

aration or apportionment, is not wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce. (See *Western Union Telegraph Co. v. Alabama State Board of Assessment, supra.*)

In the *Case of the State Freight Tax*, 15 Wall. [U. S.], 232, the court had under consideration a statute of the state of Pennsylvania which provided for a tax upon all freight carried by any railroad or canal in the state. The Reading Railroad Company resisted the tax, claiming that it was levied on interstate commerce. The supreme court of the United States held that the tax on the freight transported wholly within the state was valid, but that such freight as was brought into or carried out of the state, being interstate commerce, was not subject to state taxation.

The legislature of the state of Missouri in 1889 enacted a law imposing a tax upon express companies of two per cent of their "receipts for business done within the state." Under the provision of said law taxes were assessed against the Pacific Express Company, a Nebraska corporation carrying on business as an express company in the state of Missouri and several other states. The express company brought suit in the circuit court of the United States for the district of Missouri to restrain the collection of said tax, alleging, among other grounds, that the statute of Missouri, above mentioned, imposed a tax upon interstate commerce and therefore infringed the constitution of the United States. The court, by Caldwell J., held that the tax was not a regulation of, or an interference with, interstate commerce. (*Pacific Express Co. v. Seibert*, 44 Fed. Rep., 310.) An appeal was prosecuted to the supreme court of the United States, where the decree was affirmed, the opinion being reported in 142 U. S., 339. Mr. Justice Lamar, speaking for the court, uses this language: "The first proposition, that the statute imposes a tax upon interstate commerce, and is, therefore, violative of what is

known as the commercial clause of the constitution, is unsound. It is well settled that a state cannot lay a tax upon interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs to congress. (*Lyng v. Michigan*, 135 U. S., 161; *Leloup v. Port of Mobile*, 127 U. S., 640; *Western Union Tel. Co. v. Alabama*, 132 U. S., 472; *McCall v. California*, 136 U. S., 104; *Norfolk & Western R. Co. v. Pennsylvania*, 136 U. S., 114.) The question on this branch of the case, therefore, is, was the business of this express company in the state of Missouri, on the receipts from which the tax in question was assessed under this act, interstate commerce? The allegation of the bill is very positive that in the prosecution of its business as an express company the complainant is engaged, in part, in the transportation of goods and other property between the states of Nebraska, Kansas, Texas, and other states of the Union and the state of Missouri; and also in the business of carrying goods between different points within the limits of the state of Missouri. The question on this point, therefore, is narrowed down to the single inquiry, whether the tax complained of in any way bears upon or touches the interstate traffic of the company, or whether, on the other hand, it is confined to its intrastate business. We think a proper construction of the statute confines the tax which it creates to the intrastate business, and in no way relates to the interstate business of the company. The act in question, after defining in its first section what shall constitute an express company or what shall be deemed to be such in the sense of the act, requires such express company to file with the state auditor an annual report 'showing the entire receipts for business done within this state of each agent of such company doing

business in this state,' etc., and further provides that the amount which any express company pays 'to the railroads or steamboats within this state for the transportation of their freight within this state' may be deducted from the gross receipts of the company on such business; and the act also requires the company making a statement of its receipts to include, as such, all sums earned or charged 'for the business done within this state,' etc. It is manifest that these provisions of the statute, so far from imposing a tax upon the receipts derived from the transportation of goods between other states and the state of Missouri, expressly limit the tax to receipts for the sums earned and charged for the business done within the state. This positive and oft-repeated limitation to business done within the state, that is, business begun and ended within the state, evidently intended to exclude, and the language employed certainly does exclude, the idea that the tax is to be imposed upon the interstate business of the company. 'Business done within this state' cannot be made to mean business done between that state and other states. We, therefore, concur in the view of the court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce or to interfere with it in any way whatever; and that the statute, when fairly construed, does not in any manner interfere with interstate commerce."

The principle deducible from these decisions is, that while the state cannot tax either the interstate or government business of a telegraph company, it possesses the power to impose a tax upon the business of such company as is carried on wholly within the state, provided such tax is not levied in gross upon state as well as interstate business, but is restricted to intrastate business solely. And in view of the foregoing authorities, and especially the last one quoted from, we have no hesitation in holding that the ordinance of the city of Fremont in no manner places a

burden or restriction upon interstate commerce, nor does it tax the agency of the federal government. The ordinance expressly excludes from its operation all government and interstate business. The plaintiff in error could transmit messages relating to government business and carry communications from this state to points in other states to persons and places within this state unmolested and without paying to the city of Fremont a cent as license tax therefor. The only difference between this case and *Pacific Express Co. v. Seibert, supra,* is this: In the latter the tax levied was a certain per cent on the gross amount of the receipts of the express company derived from the business done by it within the state, while here a specified sum was imposed upon telegraph companies for the privilege of transacting within the city of Fremont intrastate business. The case cited is directly in point on the question before us and must control our decision herein. The judgment of the district court is right, and is therefore

AFFIRMED.

IRVINE, C., dissenting.

Having taken part in the hearing and consideration of this case, and having reached a conclusion upon one branch thereof different from that stated in the opinion of the court, I desire to express my views upon that branch of the case.

The conclusion reached by the court is that the occupation described in the ordinance is an occupation or business "within the limits of the city" and therefore within the legislative grant of authority to tax. In this view I cannot concur. As a question of authority I concede that the case referred to, of *Commonwealth v. Stodder,* 2 Cush. [Mass.], 562, is not in point, and I further concede that the case of *City of Sacramento v. California Stage Co.,* 12 Cal., 134, supports the view of the court. It is to be re-

marked in regard to the latter case that it is an early case in the history of California jurisprudence decided by two judges only. Mr. Justice Field, now of the supreme court of the United States, and then a member of the California supreme court, either took no part in the consideration of the case or did not concur in the opinion of the majority. The opinion is very brief and unsatisfactory. So far as the reasons of the court can be gathered from the opinion, the decision was based principally upon the theory that the business of receiving and discharging passengers within the city was separate from that of transporting passengers between Sacramento and other places. I do not think this view sound. It might as well be said that in a mercantile establishment the business of wrapping up goods and handing them over the counter to the customers is separate from the business of selling the goods. Another case relied upon in the opinion of the court is that of *City of Los Angeles v. Southern P. R. Co.*, 61 Cal., 59. There the tax was imposed upon every steam railway company "having a depot in the city." The tax was not imposed upon the business of discharging from its trains within the city passengers carried into the city from points without, or upon the business of taking upon its trains within the city passengers to be transported to points without. That form of an ordinance would have made the case analogous to that before us. The tax was not even upon the business of operating a railroad within the city, but extended only to railroads having a depot in the city, and seems to be rather a tax upon the privilege of maintaining a depot than a tax upon the occupation. Even in that view the correctness of the decision may well be doubted. I think a better test of what constitutes an occupation within the limits of a city is found in the cases relating to interstate commerce, where courts have been called upon to define what constitutes a business within a state. As a preliminary to this discussion it may be well

to state that in considering the validity of a tax the language employed, or the form or agency for its enforcement, is not the point to be regarded, but the court should look beyond the form of the tax and determine upon what the real burden is imposed. This point is well stated by Mr. Justice Strong in the *State Freight Tax Case*, 15 Wall. [U. S.], 232, as follows: "It has repeatedly been held that the constitutionality or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. This was decided in the cases of *Bank of Commerce v. New York City*, 2 Black [U. S.], 620, in the *Bank Tax Case*, 2 Wall. [U. S.], 200, *Society of Savings v. Coite*, 6 Wall. [U. S.], 594, and *Provident Institution v. Massachusetts*, 6 Wall. [U. S.], 611. In all these cases it appeared that the bank was required by the statute to pay the tax, but the decisions turned upon the question what was the subject of the tax, upon what did the burden really rest, not upon the question from whom the state exacted payment into its treasury."

If we examine this ordinance it seems perfectly clear that the burden of the tax here sought to be imposed is not merely upon the receiving and delivery of messages within Fremont, but that it is upon the business of transmitting messages between Fremont and other points outside of Fremont but within the state. The delivery of messages received in Fremont from the wires to the persons to whom they are addressed, and the receipt of messages from senders thereof at the telegraph office for transmission over the wires, are acts merely incidental to the business of the telegraph company. They are not in themselves a business or an occupation. The gist of the business of the company consists of the transmission of messages over the wires; and the transcription of the messages to paper, their delivery to the persons addressed, and the receipt of written messages at the office of the company from senders thereof are mere

incidents, and inseparable from the principal operations, just as the business of a carrier consists of transporting goods, and the delivery to and receipt from the carrier of the goods at the terminal points are incidental to the transaction of the business, and do not constitute in themselves a business or occupation. The authority of a municipality does not extend beyond its limits. The grant of power to impose taxes, upon which this ordinance is founded, does not purport to confer upon the municipality the power to tax anything beyond the limits of the city. For the purpose of this discussion all occupations may be divided into three classes. First—Occupations without the limits of the city. Second—Occupations partly without and partly within the city. Third—Occupations wholly within the city. I think that the grant of authority to tax could only be conferred and was only conferred as to such occupations as are wholly within the city. Where a portion of a business is wholly carried on within a city, such portion might be taxed, although another portion were conducted wholly outside. But where the business in its nature requires that every part thereof shall extend beyond its borders, it is different. No portion can then be said to be within the city. In the opinion of the court reference is made to occupation taxes upon physicians and lawyers who have made their domicile within the city but a large portion of whose practice may be beyond its borders. The cases are not analogous for the reason that professional engagements are personal in their character and necessarily follow the domicile of the taxpayer. Reference is also made to wholesalers of merchandise and persons engaged in similar occupations. I will concede that a wholesale grocer, for instance, might be subjected to an occupation tax by the city in which his place of business is located, although all his sales might be to persons outside of the city and involve the shipment of the goods sold to points outside; but that business consists in its essentials in the sale

of the goods, and is within the city. I contend, however, that the business of transporting the goods after their sale from the city to points outside the city would not be a business within the city and not subject to taxation.

As I stated before, I believe a test of the question what constitutes a business within the city may be found in the cases relating to interstate commerce. A license tax may not be levied upon a business not within the city, because upon general principles, as well as because of express legislation, the city has no power to impose a tax upon business not "within the city." Similarly, a state may not levy a tax upon business not within the state, for the reason that the federal constitution grants to congress the exclusive power of regulating commerce among the states, and therefore prohibits a state from imposing a tax upon commerce extending beyond its borders, that is, not "within the state." If, therefore, the business of transmitting telegraphic messages between a city and points without the city is business within the city, then the business of transmitting messages between a point within a state and points without the state is business within the state, and therefore not interstate commerce. If that position be correct, then a tax levied by a state upon the business of a telegraph company, a part of which business consists in transmitting messages between points in the state and points without, is not a burden upon interstate commerce and is valid. The law, however, is otherwise. Many cases in the supreme court of the United States might be cited upon the question. There is one, however, which reviews the prior cases in so clear and forcible a manner that a reference to that case will be made in lieu of here reviewing the prior cases.

By a statute of Alabama a tax was levied "on the gross amount of the receipts by any and every telegraph * * * company derived from the business done by it in this state." The Western Union Telegraph Company included in its report to the state board of assessments simply its

receipts from business transacted wholly within the state of Alabama. The board, however, required a report of receipts from all messages, whether carried wholly within or partly without the state. The supreme court of the state affirmed the action of the board of assessments, and the case was brought on a writ of error before the supreme court of the United States. Mr. Justice Miller, delivering the opinion (*Western Union Telegraph Co. v. Alabama*, 132 U. S., 472), said: "The question on which the jurisdiction of this court depends has been decided in this court so frequently of late years, several of the decisions having been made since the judgment of the supreme court of Alabama was delivered, that but little remains to be said in the present case except to show that it comes within the principle of the cases referred to. That principle is, in regard to telegraph companies which have accepted the provisions of the act of congress of July 24, 1866, sections 5263 to 5268 of the Revised Statutes of the United States, that they shall not be taxed by the authorities of a state for any messages or receipts arising from messages from points within the state to points without, or from points without the state to points within, but that such taxes may be levied upon all messages carried and delivered exclusively within the state. The foundation of this principle is that messages of the former class are elements of commerce between the states and not subject to legislative control of the states, while the latter class are elements of internal commerce solely within the limits and jurisdiction of the state, and therefore subject to its taxing power. The following cases in this court have fully developed and established this proposition: *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S., 1; *Western Union Telegraph Co. v. Texas*, 105 U. S., 460; *Western Union Telegraph Co. v. Massachusetts*, 125 U. S., 530; *Ratterman v. Western Union Telegraph Co.*, 127 U. S., 411; *Leloup v. Port of Mobile*, 127 U. S., 640; *Fargo v. Michigan*, 121 U. S.,

230; *Philadelphia & S. S. Co. v. Pennsylvania*, 122 U. S., 326." Mr. Justice Miller then states the case and the conclusion of the supreme court of Alabama to the effect that the statute was valid in including all receipts from business done in the state, although the message may have been delivered at or may have been sent for delivery from some office out of the state. He then reviews the cases cited in the opening paragraph in the opinion, showing that all of them hold that no tax can be imposed upon messages or upon receipts derived from messages where the communication is carried either into the state from without, or from within the state to another state and concludes as follows: "We think these cases are so directly in point on the questions arising in the present case that they must control, and, as the record of the case presents the means by which the receipts arising from commerce wholly within the state, and from that which under these definitions may be called interstate commerce, can be separated, the judgment of the supreme court of Alabama is reversed." To my mind this case and those therein reviewed conclusively establish the proposition that the transmission of messages between points within the state and points without constitutes interstate commerce, in other words, business not within the state; and, by a parity of reasoning, that the business of transmitting messages between a city and points without such city is not business within the city.

The case of *Pacific Express Co. v. Seibert*, 44 Fed. Rep., 310, cited in the opinion of the court with approval upon another branch of the case, is, I think, equally conclusive. The facts of that case are stated in the opinion of the court. It was there said by Judge Caldwell: "The tax is imposed on the receipts for 'all sums earned or charged for the business done within this state.' These words qualify the whole act. They are plain and unambiguous. The words 'for the business done within the state' *ex vi termini* import business begun and ended in the state, and include

only intrastate commerce and not interstate commerce. The interjection of the intensifying words 'wholly' or 'entirely' would not alter their meaning or change their legal effect. Interstate commerce is not 'business done within' the state of Missouri. It is business done between two or more states. A package carried by the plaintiff from Omaha to St. Louis is not business done within the state of Nebraska, or the state of Missouri, but is business done between those two states. A contract for the carriage of goods from one state to another is an entire contract and is an interstate contract, and the carriage of goods under such contract is interstate commerce and is not 'business done within' any of the states from, through, and to which they are carried on such contract." That case went to the supreme court of the United States (142 U. S., 339), where it was affirmed. Mr. Justice Lamar said: "The opinion of the court below on this branch of the case is elaborately argued and is conclusive. We concur in the reasoning of it as well as in the language employed, and refer to it as a correct expression of the law upon the subject."

As stated repeatedly by the supreme court of the United States, the transmission of messages by telegraph is analogous to the transportation of goods by common carriers. The tax in the express company case was valid, because it extended only to goods transported wholly within the state of Missouri, and the case was distinguished from the cases already cited upon the ground that the business taxed lay wholly within the state. It is upon the same ground that the opinion of the court declares that this ordinance is not a burden upon interstate commerce, a conclusion in which I entirely concur; but for the very reason that the whole of the business must be transacted within the state in order to prevent the ordinance from being in violation of the federal constitution, I think that it should be wholly transacted within the city in order to be within the legislative grant.

## CITY OF FRIEND V. DANIEL INGERSOLL, ADMINISTRATOR.

FILED MARCH 20, 1894. No. 5579.

1. **Personal Injuries:** EVIDENCE: TABLES OF EXPECTANCY. In an action for damages for personal injuries, where such injuries resulted in the death of the party injured, or are shown to be permanent, the Carlisle table of expectancy of life is competent and admissible in evidence as bearing upon and tending to prove the expectancy of life, but not conclusive of the question, and is to be received and considered by the jury as any other evidence, and subject to the same rules as to its weight and sufficiency as other testimony; and its statements as to expected duration of life may be varied, strengthened, weakened, or entirely destroyed by other competent evidence on the question of the expected continuance of life of the injured party, such as testimony pertaining to the health of the party at the time of the injury upon which the action is based.
2. ———: ———: DAMAGES. Where an injured party, by reason of the injury which is the foundation of the action, has incurred necessary expenses for medical attendance, nursing, etc., and has become liable or indebted for the payment of such expenses, the reasonable and fair valuation of such services may be recovered, although not yet paid by the party injured.
3. ———: MEDICAL ATTENDANCE: EVIDENCE OF VALUE: REVIEW. The evidence in the case *held* sufficient to sustain the verdict generally, but that there was no testimony of the reasonable and fair value of the services of the physicians, and defendant in error is allowed to file a remittitur of the sums charged for their services, and the judgment then to stand affirmed. If the remittitur is not filed, the case reversed and remanded.

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

*E. E. McGintie, J. D. Pope,* and *Robert Ryan,* for plaintiff in error:

The Carlisle tables of expectancy were not competent evidence.) *Shippen's Appeal,* 2 W. N. C. [Pa.], 468; *Den-*

*man v. Johnston*, 48 N. W. Rep. [Mich.], 567; *Sellars v. Foster*, 27 Neb., 126; *Milton v. State*, 6 Neb., 144; *Ballard v. State*, 19 Neb., 609.)

There can be no recovery for alleged services of physicians and nurses, because there was no evidence of the reasonable and fair value thereof. (*Meredith v. Kennard*, 1 Neb., 319; *Neihardt v. Kilmer*, 12 Neb., 38; *Republican V. R. Co. v. Fink*, 18 Neb., 92; *Ballard v. State*, 19 Neb., 619; *Stough v. Stefani*, 19 Neb., 471; *City of Lincoln v. Holmes*, 20 Neb., 47; *Rosewater v. Hoffman*, 24 Neb., 222; *Mills v. Saunders*, 4 Neb., 194; *Atchison & N. R. Co. v. Baty*, 6 Neb., 37.)

*F. I. Foss* and *W. H. Morris, contra*, contending that the Carlisle tables of expectancy were properly admitted in evidence, cited: *City of Lincoln v. Smith*, 28 Neb., 762.

HARRISON, J.

Minerva C. Doxtater, plaintiff in the court below, commenced an action in the district court of Saline county, Nebraska, July 16, 1891, to recover damages of the city of Friend, in said county, for an alleged personal injury sustained by her April 5, 1891, in falling upon the sidewalk of said city, the fall being caused by the defective and unsafe condition of the sidewalk, according to the statements of the petition. In her petition she pleads that Friend was, on the 5th day of April, 1891, a city of the second class, duly organized and incorporated, and in the exercise of its powers constructed a sidewalk on the south side of one of its streets, and further states: "That in building said sidewalk the city was negligent in this, to-wit, that it used poor material, that which was unfit for the building of sidewalks for people to pass over; that said material was rotten and full of knots, and the boards were too wide and not of sufficient thickness to have the necessary strength for people of ordinary weight to walk upon.

And plaintiff says that at the place just mentioned the city did use at one point at or about sixty feet west from the northeast corner of said lot, and put in, a board about twelve inches wide, and about three-fourths of an inch thick, laid upon three stringers, in which was a knot from six to eight inches wide and about a foot and a half to two feet north of the south side of said walk, and which when stepped upon broke, and on account of the breaking of said knot the board became loosened, and was loosened and unfastened from the stringers from the south side of said walk to the north side, and said board was of poor material, rotten, and knotty; that it had been broken, and it was also loose and unfastened from the stringers and unsafe for people to pass to and fro across; that the same had been known to this defendant for more than a month before the 5th of April, 1891. And plaintiff says that while passing along said sidewalk on the 5th of April, 1891, in company with her daughter, and while passing over said board, to-wit, at a point about sixty feet west from the northeast corner of said lot, without any negligence on her part, or upon the part of her daughter, her daughter stepped upon the board above mentioned, which was in its proper position, but unfastened from the stringers, which fact was unknown to this plaintiff and her daughter, and as the daughter of this plaintiff stepped upon said board, it being unfastened, it flew up, and as this plaintiff stepped forward, not having seen the board fly up, and supposing the sidewalk was all right, her foot caught and she stepped into the hole made by the removal of said board, which was from eight to twelve inches deep, and thereby was thrown down; and plaintiff alleges that by reason of the dangerous and unsafe condition of said sidewalk and of said board she unavoidably fell, and her left limb, hip, and hip joint were thereby broken, sprained, bruised, crushed, and mangled so that said plaintiff became lame and diseased, and has remained lame and diseased ever since the

5th day of April, 1891. And the plaintiff further alleges and charges the truth to be that the said defendant, disregarding its duties in the premises, negligently and carelessly allowed said sidewalk above described to remain in such dangerous condition, and wholly failed, neglected, and refused to repair the same, and make the same safe and secure for the use and purpose for which the same was constructed, to the great damage of persons passing along and over the said sidewalk." Then follows in paragraph 4 of the petition a second statement of the facts, descriptive of the fall and the injury resulting therefrom, and the pain and suffering of the plaintiff and its continuance up to the time of the filing of the petition, and a further allegation of the permanent nature of the injury. Paragraphs 5, 6, and 7 are as follows:

"5. And plaintiff further says that she has been prevented from attending to her necessary duties and vocation all of said time, and been put to a great deal of trouble and expense, to-wit, amounting to the sum of $3,457.15, as follows:

| | |
|---|---|
| Bill of Dr. Hewitt | $96 65 |
| Bill of Dr. Watson (assistant) | 10 00 |
| Nursing | 144 00 |
| Board and washing | 42 00 |
| Extra help | 96 50 |
| Extra fires, lights, bandages, and cotton | 6 00 |
| Loss of time | 62 00 |
| Damages for injury | 3,000 00 |
| | $3,457 15 |

"That all of this has been spent in and about trying to get healed and cured of said injuries, and for expenses attendant thereto.

"6. And said plaintiff alleges that on the 7th day of July, 1891, this plaintiff duly presented in writing to defendant, the city of Friend, her claim against said defend-

ant, duly verified by the oath of this plaintiff, and demanded payment of the same, and that said defendant then and there refused to pay the same or any part thereof.

"7. And plaintiff says that she has been, up to the time that she sustained the injury aforesaid, a skilled nurse, and that by reason of said injury aforesaid she has, since said 5th day of April, 1891, been a constant burden and care to herself and her friends."

The prayer is for judgment in the sum of $3,500.

The defendant city filed answer as follows:

"And now comes the above named defendant and for answer to the plaintiff's petition herein filed denies that in the building of said sidewalk, as set forth in plaintiff's petition, that said city was negligent; denies that the material used in the construction of said sidewalk was poor; denies that the defendant had any notice, or knew of the defects in said sidewalk, as set forth in plaintiff's petition; and further answering denies each and every other allegation in plaintiff's petition contained."

Of the issues thus formed, on the 18th day of February, 1892, there was a trial to the court and a jury, which resulted in a verdict for the plaintiff in the sum of $1,050. The city filed a motion for a new trial, which was overruled, and judgment was rendered for the plaintiff for the amount fixed by the verdict, and for costs, and the case was brought here by the city on petition in error for our consideration.

The counsel for plaintiff in error, in their brief, first call our attention to the allegations of the plaintiff's petition on the subject of the negligence of the defendant city, and the evidence produced on the trial, directed thereto, quoting quite largely from the testimony, and insist, in an extended and able argument, that the evidence was not sufficient to sustain the verdict, especially when viewed in connection with the statements of the petition. We have examined the petition and conclude that it states a cause of action, founded upon the negligence of the city by its proper offi-

cers. We have carefully read all of the evidence contained in the record and are satisfied that although there is a conflict in it on probably every point involved in the question of the negligence of the defendant, yet it is sufficient to support a verdict for plaintiff. It was submitted to the jury for their consideration, on the conflicting evidence, and they have passed upon it as to its weight and sufficiency, and it is not for us to disturb their conclusions, if not manifestly and clearly wrong. Such is the rule of this court often expressed.

On the point of notice to the city, of the defects, there was proof of facts and circumstances sufficient to bring the case within the rule announced in *City of Lincoln v. Smith*, 28 Neb., 762, where it was said by NORVAL, J. (now chief justice): "The rule of law adopted by the courts is that it is not necessary that the authorities of a city should have actual notice that a sidewalk is defective in order to make the city liable. It is sufficient for the plaintiff to prove that the defendant had notice of the defective condition of the sidewalk or establish the existence of facts from which notice would be inferred, or circumstances from which it appears that the defect ought to have been known. (*City of York v. Spellman*, 19 Neb., 383.) There is in the bill of exceptions testimony which tends to establish the fact that the defendant city had both actual and constructive notice of the defective condition of the walk."

The court below allowed parol evidence to be introduced that "a claim such as is in the petition" was presented to the city council by attorney for plaintiff in person. This is assigned as error. Our statute requires all such claims to be verified by the oath of the party claimant, his agent, etc. If error, this could only affect the question of costs. (*City of Crete v. Childs*, 11 Neb., 252), and was not reversible error. To be reviewed here it must have been brought to the attention of the court below, by motion to retax costs and passed upon, and if overruled, then such an action

would be subject to review here if presented by proper record. (*Wilkinson v. Carter*, 22 Neb., 186.)

The plaintiff offered in evidence the Carlisle tables of expectancy of life, to which the defendant interposed the objection that they were incompetent and irrelevant under the facts proved as to the condition of this woman. This objection was overruled and defendant excepted. There was testimony in the case, by physicians and other persons, from which it might be concluded that the plaintiff was as healthy a woman as any of her age. One of the witnesses was the physician who attended her after and during the time she was suffering from the effects of the injury alleged in this case, and he states that he had known her for about ten years; that about seven years prior to the accident he had performed an operation by which he removed a cancer from her breast; that he had prescribed for her about a couple of years before the accident, and that at the time of the injury her health was good for a woman of her age. On the other hand, it was shown that since the injury the cancer had returned, or was again active and causing Mrs. Doxtater considerable trouble and sickness; that if a person was afflicted with cancer, notwithstanding its removal, there would remain a cancerous or diseased condition of the blood or system and the germ or seed of the cancer exist in the body of the person and a return of the cancer more than probable to occur in the near or remote future. It will be gathered from the above summary or general statement of the substantial purport of the testimony *pro* and *con*, as to the physical condition of Mrs. Doxtater at the time of the injury, that it was one of the disputed elements of the case and upon which the evidence was conflicting,—an inquiry to be determined by the jury, in the same manner as any other disputed fact in the case, from all the testimony introduced bearing upon it and tending o either prove or disprove it; and from this, coupled with other facts, the expectancy of life of the plaintiff ascer-

tained. Under such an existing condition of the testimony did the court err in allowing the Carlisle tables of expectancy to be introduced? This table is almost, if not universally, admitted in evidence as competent in cases of damages for death of a person caused by injury or in actions for damages where death does not ensue, but the injury is shown to be permanent. The admissibility of the table should, it seems to us, depend to some, if not to a great, extent upon what facts enter into it as a table, as its constituent elements or parts, or, in other words, upon what facts or upon the lives of what class of persons were the calculations based or made, and were they correctly and accurately made? If the calculations which resulted in the Carlisle tables were predicated upon a particular or selected class of lives, or of healthy persons alone, then it cannot be introduced in any case except where the same kind of a life is involved in the controversy; but if based upon the general or average of all lives, then it can be introduced, or is competent in any proper case in which the expectancy of the life of a party enters as an element of inquiry, not as conclusive or as specially governing the inquiry, but to be considered as any other piece of testimony and its weight and sufficiency to be determined in the same manner.

The supreme court of Pennsylvania, in the case of *Steinbrunner v. Pittsburg & W. R. Co.*, 23 Atl. Rep. [Pa.], 239, in passing upon the admissibility of testimony of this kind, held: "In a case where the expectation of life of deceased is a question for the jury, the Carlisle mortality tables are admissible in evidence, but are not conclusive; the expectation being affected by the particular circumstances in the case," and in the body of the opinion stated as follows: "In estimating the damages for the death of the deceased, his expectation of life became an element of importance. His earning power being fixed by the evidence, the next question to be settled by the jury would naturally be, how

many years will he probably live to exercise this power? This can never be decided accurately in single cases. The most a jury, or any one else, can do is approximate it. A man may die in a day, or he may live to earn wages for twenty years. It follows that there must always be an element of uncertainty in every such case. But there are some rules to be observed which aid to some extent in such investigations. Thus, if a man is in poor health, especially if he is suffering from some organic disease which necessarily tends to shorten life, his expectancy is much less than that of a man in robust health. Again, the age of the person and his habits are among the important matters for consideration. It needs no argument to show that the expectation is much greater at twenty-one years than at fifty. The value of the Carlisle tables in bearing upon this question depends in a measure upon the manner in which they are made up. * * * The evidence in this case is not very clear as to the mode in which these tables were composed. I have therefore consulted the Encyclopædia Britannica, a very high authority, (vol. 13, p. 176), from which I extract the following: 'The Carlisle table was constructed by Mr. Joshua Milne from materials furnished by the labors of Dr. John Heysham. These materials comprised two enumerations of the population of the parishes of St. Mary and St. Cuthbert, Carlisle [England], in 1780 and 1787, (the number in the former year having been 7,677, and in the latter 8,677,) and the abridged bills of mortality of those two parishes for the nine years, 1779 to 1787, during which period the total number of deaths was 1,840. These were very limited data upon which to found a mortality table, but they were manipulated with great care and fidelity. The close agreement of the Carlisle table with other observations, and especially its agreement in a general sense with the experience of assurance companies, won for it a large degree of favor. No other mortality table has been so extensively

employed in the construction of auxiliary tables of all kinds for computing the values of benefits depending upon human life. Besides those furnished by Mr. Milne, elaborate and useful tables * * * have been constructed by David Jones, W. T. Thompson, Chisholm, Sang, and others. The graduation of the Carlisle table is, however, very faulty, and anomalous results appear in the death rates at certain ages.' It appears, therefore, that the Carlisle table is based upon general population, and not upon selected or insurable lives."

We conclude that in the case at bar the table offered and received was competent evidence, not conclusive but subject to be varied, or modified, or entirely contradicted as to the expectancy of life of plaintiff by any other competent evidence introduced on the same subject, such as proof that she was unhealthy or diseased at the time of the injury, which would certainly tend to weaken and, if strong enough, to destroy the force of the rule for determining such expectancy given in the table. For the general rule that the table is competent, see the following authorities: Rogers, Expert Testimony, 231, and cases cited in note; Abbott, Trial Brief, 84; Abbott, Trial Evidence, 724; 22 Am. L. Reg., 105, note.

We do not think the instructions on the question of the expectancy of life of plaintiff were nearly as full as they should have been. In fact it was only covered incidentally in instructions upon other points; but no further instructions were asked on the subject, and, furthermore, we do not think any prejudice to defendant's rights resulted from the lack of further instructions on this subject. The rule announced in this case does not conflict with the one heretofore given in the cases of *Roose v. Perkins*, 9 Neb., 304; *Sellars v. Foster*, 27 Neb., 118, and *City of Lincoln v. Smith, supra*, in all of which the court was only called upon to pass on the question of admissibility of the table in cases where it was either proved beyond contradiction or

admitted that at the time of injury the injured party was a healthy, robust person, and the point raised and decided in this case was not involved and not considered.

Complaint is made of the giving of instruction No. 13, requested by plaintiff, or rather of the use of the two last words in the instruction. It is more than probable that a better choice of words could have been made, but when read, considered, and construed in connection with the other portions of the same instruction and with the instructions in the case taken as a whole, we cannot discover wherein it could have misled the jury.

There was the further assignment of error that Mrs. Doxtater was not entitled to recover for alleged services of physicians and nurses. In this was included two propositions which were argued by counsel for plaintiff in error, one being that there was no proof that Mrs. Doxtater had paid any of these bills, and hence she was not entitled to have them considered as elements of damage or to recover them as such. The evidence shows that they had not been paid, but we understand the rule to be that where expenses of this nature have been incurred and the party has become liable for their payment, they may be recovered although they have not been paid. (3 Sutherland, Damages, 721, and cases cited in note.) The other proposition included in the above assignment of error presented in brief of counsel for the city was that the court erred in giving the following instruction on the subject of the services of physicians, etc.: "If you find for the plaintiff and find from the evidence that the plaintiff has been injured and that it has been necessary for her to procure the services of physicians and nurses, you should allow such sum as would be a reasonable and fair value for such services of physicians and nurses as shown from the evidence were necessary on account of the injury, not exceeding in all $3,500," when there had been no evidence introduced whatever of the reasonable and fair value of the physicians' services. This proposition

is correct; and the giving of the above instruction was error, as there was no testimony in the case in regard to the reasonable and fair value of the services of the physicians upon which to base it or to warrant the court in giving it. "Instructions to a jury must be based on the evidence adduced on the trial." (*Ballard v. State*, 19 Neb., 610.) "It is the fair and reasonable value of services which may be recovered." (Sutherland, Damages, 720, 721, and notes; *Neihardt v. Kilmer*, 12 Neb., 38; *City of Crete v. Childs*, 11 Neb., 253.) The amount of the bill for one physician was $96.65, and of the other $10. The plaintiff may file a remittitur of the above sums within thirty days from this date as of the date of the verdict, and, if done, the case will stand affirmed. If not, it will be reversed and remanded for further proceedings.

JUDGMENT ACCORDINGLY.

POST, J., not sitting.

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JOHN D. GLADE, APPELLEE, V. CHARLES C. WHITE, APPELLANT.

FILED MARCH 20, 1894. No. 5599.

1. **Partnership**: EVIDENCE: REVIEW. In an agreement for the settlement of partnership matters, the stipulation that one of the partners individually assumed and agreed to pay all the outstanding debts and liabilities of the firm presented a question of fact whether or not taxes on property used by said firm, though not owned by it, constituted part of its firm liabilities, and a finding in the affirmative of such proposition, not being without support of evidence, will not be set aside as unsupported by sufficient proof.

2. ——: ——: ——. The finding of the trial court adversely to an arbitrament having been entered into between partners

for the settlement of differences between them will not be disturbed when there were such proofs as would justify the conclusion reached as one which might reasonably be attained upon due consideration thereof.

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

*F. I. Foss*, for appellant.

*J. W. Dawes* and *J. R. Webster*, *contra*.

RYAN, C.

On the 22d day of December, 1888, C. C. White made to John D. Glade his promissory note for the sum of $10,000, with eight per centum interest, due on or before January 1, 1891. To secure payment of the note Mr. White and his wife executed to Glade a mortgage on certain real property situated in Saline county, Nebraska. On the 14th day of February, 1891, the whole of said note not being paid, proceedings for the foreclosure of the aforesaid mortgage were begun in the district court of the aforesaid county. The defendant C. C. White answered, admitting the alleged execution of the aforesaid note and mortgage, but averring payment thereof by having and keeping on deposit in the State Bank at Crete (the bank where by its terms said note was payable) money sufficient to pay the balance due on the note aforesaid, which money the plaintiff had ever refused to accept in payment thereof. The defendant further answered that on December 22, 1888, defendant had bought of plaintiff certain real property in Saline county, which property was in plaintiff's two warranty deeds to defendant duly described. The defendant alleged that the real property described in each of said deeds was by plaintiff warranted free and clear of incumbrance, but, as defendant alleged, these warranties were broken by the existence of incumbrances warranted

against by reason of taxes to the amount of $530.36 having been assessed and existing as a lien on said real property at the date of the aforesaid conveyances. The defendant alleged in his answer that he had tendered to plaintiff tax receipts evidencing the payment by defendant of the taxes aforesaid to the amount of $530.36, together with the entire balance due on said note after credit given for the taxes paid as aforesaid. The plaintiff in his reply denied the alleged tender, and further alleged that while it was true that the defendant had purchased of plaintiff the property described in the deeds referred to in defendant's answer, that at and long prior to December 22, 1888, plaintiff and said defendant C. C. White were copartners doing business in owning and operating flour mills, and had owned and operated them as part of the real estate covered by said conveyances long prior to July 8, 1887, as copartnership property, and long before said taxes in defendant's answer mentioned were assessed or levied for the year 1888, and on said 22d day of December, 1888, and as a part of the same transaction with the conveyance of plaintiff's partnership interest in the property conveyed by the aforesaid warranty deeds, plaintiff and said defendant dissolved their copartnership; that as part of the said dissolution a written agreement was entered into between plaintiff and defendant by which the defendant, designated as the "party of the second part," contracted as follows: "The party of the second part assumes and agrees to pay all outstanding debts and liabilities of the said copartnership," and in the language of said reply, "and a charge and a lien on said copartnership property, and were, by the terms of said copartnership, assumed and agreed to be paid by the said defendant Charles C. White, and were not and are not a proper set-off or charge against this plaintiff or of the indebtedness due him." It is not very clear just what facts it was intended should be stated by the above language. Probably, however, it was the intention to plead

that the tax lien set up by defendant by way of set-off, as having been paid, should not be treated as such set-off, because in paying the taxes defendant had done no more than by the language above quoted from the agreement he had assumed to do. This intention of the pleader is further evidenced by the following language of the reply: "And the said note and mortgage here in suit were given to the plaintiff by the defendant Charles C. White, as part of the consideration to be paid by said defendant Charles C. White to this plaintiff, for his interest in said copartnership property, said deeds and the printed covenants thereof were expressly limited by the written clauses of the deeds to the interest of the plaintiff grantor." In the reply were these further averments: "And the plaintiff shows and avers that the above contract against incumbrances was not intended to apply to, and cannot have a legal effect to apply to, any incumbrance that had been assumed by said copartnership or had accrued against said property as a copartnership liability, but must be held to apply to and to covenant against such incumbrance as had accrued against said property by the act of this plaintiff, or as may have existed against the said property prior to its becoming the property of the copartnership, and not assumed by said copartnership."

The description of the property and the history of its title are rather confusing, for which reason they have been ignored until the claims of the parties litigant, as stated in the pleadings, should have been stated as clearly as possible without further details. The appellant states the history of the title of the property conveyed (using designations "A" and "B," which we shall adopt as descriptive of the property) in the following language: "There are two flouring mills on the Big Blue river, one on the north and one on the south side of Crete. The south mill is designated as mill 'A,' the north one as mill 'B.' The south mill, 'A,' was owned by one Bridges and one Johnston,

each having an individual one-half interest therein. Johnston sold his half to defendant White. Bridges sold his half to John D. Glade, plaintiff, and under the agreement herein plaintiff Glade in January, 1889, sold his half interest to the defendant herein. The north mill was owned by one Seeley, who sold a half interest in the same to the plaintiff and the defendant herein as the firm of White & Glade, and one-half interest to George H. Glade. George H. Glade subsequently sold one-half of his interest, to-wit, one-quarter interest in mill 'B,' to his father, the plaintiff herein, and also sold to the defendant White the other quarter interest in said mill 'B,' and John D. Glade, under the agreement herein, sold to defendant White his individual quarter interest in mill 'B' and also his interest in said mill as a member of the firm of White & Glade. These several transfers concentrated the title to the entire property in defendant White."

The two deeds referred to in the answer were of date December 22, 1888, the status of the title being at that time as indicated by the quotation made from appellant's brief. Each of these deeds was made by John D. Glade and wife to Charles C. White, and described the property conveyed as the undivided half interest in the following property, followed in one deed by the description for which "A" stands as represented by appellant's brief, and in the other deed by the description which "B" represents therein. It will be observed that the copartnership firm of White & Glade, as such, at the date of said two deeds had title to only an undivided one-half of the mill property designated as "B." In his individual name, therefore, the plaintiff held title to one-half of one-half of the mill property last referred to, while he owned in his individual name one-half of the property referred to as "A" in appellant's brief. The covenants in the deed made by Mr. Glade of date December 22, 1888, were printed and were of the usual form of warranty employed in conveyances described

as "warranty deeds." These warranties could only be held to apply to such interest as by the limitations of his conveyance the grantor assumed to own and convey. The appellant in his brief says payment of taxes on all the property in which Glade had conveyed his interest to White was made by White, except that White, discovering that the taxes for 1888 had not been paid by Glade on his several interests, was obliged to and did pay the same, and sought to retain the same from the last payment on the note as to which foreclosure proceedings were instituted in this case. In first examining the facts of this case and the arguments in respect thereto, it seemed to the writer that the question presented was simply as to the effect of the covenants of warranty and Mr. Glade's liability thereon. To the assertion of these payments of $520.36 as a set-off by reason of a breach of the covenants of warranty contained in the deed of Mr. Glade there is one insuperable objection, and that is that there was introduced in evidence no record or copy thereof showing a levy of taxes in Saline county for the year 1888 or any other year, neither was there introduced the original assessment roll, or a copy thereof, showing how the property was assessed. It is true there were introduced two schedules which apparently are copies of the treasurer's book upon which usually taxes are paid and so marked, but this book is neither a copy of the record of the levy of taxes, nor of their assessment. The parties presented their evidence in the trial court not as though the question was whether or not the defendant was liable upon his covenants of warranty, but whether or not the copartnership should have paid the taxes for the year 1888 as a liability of the firm. The firm of White & Glade used the property in 1885, 1886, and 1887 without payment of rent, and during those years the taxes were paid by the check of the aforesaid firm apparently without any special arrangement, but as a matter of course. All the taxes for the year 1888 seem,

from the tax receipts given in evidence, and the oral testitimony, to have been assessed to White & Glade as against the property used by them. Under these circumstances the trial court found that these taxes for the year 1888 were among the liabilities of the firm of White & Glade, and that, therefore, by paying them the defendant did not create in his own favor a right of set-off as against the amount evidenced by the note, which, with the mortgage securing it, formed the basis of this action. As the evidence above referred to was sufficient to justify the court in arriving at the conclusion which was reached, that the taxes for 1888 were firm liabilities within the purview of the agreement of the parties, such conclusion will not be disturbed as being without support of evidence. There was evidence offered with a view of showing that these matters in dispute had been settled by an arbitration between the parties. The alleged submission to arbitrament was not in writing, and was denied by the plaintiff and one, at least, of his witnesses. A finding that there was an arbitrament would be contradictory of the essentials necessary to sustain the judgment of the trial court. In view of the contradictory nature of the evidence upon which the judgment of the court was based, we could not set aside its decree as unsupported by the evidence. Indeed, as an original question, we should reach the same conclusion upon the evidence as was reached by the trial court. The judgment of the district court is

AFFIRMED.

POST, J., not sitting.

## WILLIAM WALDORF V. ISAAC HAGGIN.

FILED MARCH 20, 1894. No. 5537.

**Trial: FAILURE TO GIVE INSTRUCTION ON ISSUE.** The failure or refusal of a district court to instruct the jury on the only material issue in the case being tried is reversible error.

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

*E. E. McGintie* and *Robert Ryan*, for plaintiff in error, cited: *Klosterman v. Olcott*, 27 Neb., 685; *Sandwich Mfg. Co. v. Shiley*, 15 Neb., 111; *McPherson v. Wiswell*, 19 Neb., 117; *Grim v. Robinson*, 31 Neb., 542; *Uhl v. Robison*, 8 Neb., 277.

*Abbott & Abbott, contra.*

RAGAN, C.

On the 20th of May, 1889, Isaac Haggin was the owner of, and living upon, a quarter section of land in Saline county. On that day he conveyed it by a warranty deed, recorded three days later, to his brother, John B. Haggin. On the 18th of November, 1889, John B. Haggin and his wife, by warranty deed, reconveyed this land to Isaac Haggin, which deed was recorded on the 24th of November, 1890. On the 8th day of January, 1890, John B. Haggin and his wife conveyed the land by warranty deed to one J. William Haggin. This deed was recorded on the 22d of the same month, and on that day J. William Haggin sold and conveyed the land to the plaintiff, William Waldorf, who brought this suit in ejectment against Isaac Haggin. Isaac Haggin set up as a defense to the action that the conveyance made on the 20th of May, 1889, to John B. Haggin, his brother, was in pursuance of a sale then

made to him of the premises, and the consideration of the conveyance was that John B. Haggin assumed the payment of certain incumbrances on the land and would pay him, Isaac, the remainder of the purchase price in money, (what amount John B. Haggin was to pay, however, is not stated in the answer); that he, Isaac, was to, and did, remain in the possession of the premises conveyed, in pursuance of a verbal agreement with his grantee to that effect, until he should pay the balance of the purchase money; that such balance of purchase money was not paid, and on the 18th day of November, 1889, the contract of sale was rescinded, and John B. Haggin and his wife reconveyed the premises to him, Isaac, by a warranty deed; that he was then in the exclusive possession of the premises, and had since remained in the possession, claiming title under this deed of November 18, 1889, although the deed was not recorded until the 24th of November, 1890; and that the deed made by John B. Haggin and wife on the 8th day of January, 1890, to J. William Haggin, and the deed from him to Waldorf on the 22d of January, 1890, were made in fraud of his, Isaac's, rights, and that plaintiff and plaintiff's grantor were not innocent purchasers of the premises without notice, as his, Isaac Haggin's, possession of the premises at said time was notice to Waldorf and his grantor of his, Isaac Haggin's, rights. Waldorf replied to this answer by general denial. Isaac Haggin had a verdict and judgment below, and Waldorf brings the case here for review.

The first error alleged is that the verbal agreement between John B. Haggin and Isaac Haggin, under and by which he held possession of the premises conveyed until such a time as the balance of the purchase money should be paid, was void, as a secret trust reserved in his favor; but in the view that we take of the case this point is wholly immaterial. At the time that John B. Haggin and wife conveyed the premises to Waldorf's grantor, to-

wit, January 8, 1890, Isaac Haggin was in the actual possession of these premises, claiming title thereto by virtue of a deed from John B. Haggin under date of November 18, 1889. At the time that John B. Haggin conveyed the premises to Waldorf's grantor, Isaac was not in the possession of the premises claiming to hold such possession by virtue of the verbal agreement made with his brother on May 20, 1889. That agreement, according to Isaac Haggin's theory of the case, was rescinded by the reconveyance made to him by John B. Haggin on November 18, 1889. There is no dispute in this case that, at the time Waldorf's grantor obtained title to these premises from John B. Haggin, and at the time that Waldorf obtained his title to the premises, Isaac was in the possession of these premises, claiming absolute title to them by virtue of the reconveyance made to him by his brother, John B. Haggin, on November 18, 1889. This possession, then, of Isaac Haggin was of itself notice to Waldorf and his grantor of Isaac Haggin's rights to the land. Isaac Haggin's case must stand or fall on the reconveyance he alleges his brother, John B. Haggin, made to him on November 18, 1889. If that conveyance was made and delivered as alleged by Isaac Haggin, then his title to the premises must prevail over that of Waldorf. On the other hand, if the conveyance under which Isaac Haggin claims, dated November 18, 1889, was not in fact so made, but if such conveyance was in fact a forgery, then Waldorf's title and right to the possession of these premises is superior to the claim of Isaac Haggin.

On the trial the evidence introduced by Isaac Haggin tended to prove that on the 18th day of November, 1889, his brother, John B. Haggin, and his wife duly made, acknowledged, and delivered to him the deed in evidence, conveying the premises in question to him, Isaac Haggin, and by virtue of that deed he was in possession of the premises at the time the suit was brought, and had been

since the execution of the deed, claiming title under it. On the other hand, the evidence offered on the trial by Waldorf tended very strongly to show that John B. Haggin and his wife, at the time they signed the deed of November 18, 1889, did so not knowing that it was a deed of the premises, and thinking and believing it was a writing or paper which gave them a title or right to the possession of some horses which they say Isaac Haggin had, before that, agreed they should have. John B. Haggin testified that he never did sign a deed of these premises to Isaac Haggin; that he signed the paper at the time and place that the deed purports to have been signed; that he was then seventy-five years of age and had not been able to see to read for ten years; that he had owned the premises in controversy from the 5th day of May, 1889, until he conveyed them to J. William Haggin; that he purchased them from his brother, Isaac Haggin, and paid for them by assuming certain incumbrances on the land and paying his brother a balance of $—— in cash; that he renewed the mortgages on the land in his own name, and that on the 18th of November, 1889,—the date of the deed which Isaac Haggin alleges that he, John B. Haggin, made,—Isaac Haggin was then indebted to him and still remains indebted to him. His wife testified that she signed a paper at the time and place that the deed purports to have been signed, but that she thought that the paper she signed was a writing which granted to herself and husband the title or possession of the horses, as mentioned above, and that she was at that time sixty-nine years of age.

From what has been stated above of the pleadings and evidence it will be seen that the real issue in this case was whether or not the deed under which Isaac Haggin claims title and possession of the premises, alleged by him to have been made and delivered to him by his brother and wife on November 18, 1889, was in fact made, or whether the grantors in such deed were imposed upon and deceived,

and signed the paper, when in fact they thought they were executing something else.

The learned judge who presided at the trial below, and for whom, both as a gentleman and a jurist, we have the highest respect, refused all instructions asked by both parties to the suit and charged the jury orally. This charge covers more than twelve pages of closely printed matter, and in this charge the only reference to the real issue in the case is contained in the following excerpt: "The plaintiff further makes this claim that the deed from John B. Haggin and his wife, which they allege was made subsequently to the deed from John B. Haggin, they allege was not in fact made by John B. Haggin and his wife, but that John B. Haggin and his wife had a supposition that they were signing some other paper. You must remember this is not a suit by the plaintiff to recover any damages for any cheat perpetrated on him. This is a suit where he alleges that he has a legal interest in the land and is entitled to the possession of it, and defendant has the right in opposition to that to set up any answer that he may, showing in himself or another a legal interest in the land, or any equitable defense. He has the right to put up either." This instruction was not applicable to the evidence introduced to prove and disprove the issue. Waldorf was entitled to an instruction to the effect that if the jury found that the deed of November 18, 1889, under which Isaac Haggin claimed title and possession to the premises in controversy, was not in fact made and delivered by John B. Haggin and wife; that at the time they signed the conveyance they were imposed upon, deceived, and fraudulently induced by Isaac Haggin to execute the deed, when in fact they thought and believed that they were executing some other paper, then Waldorf was entitled to a verdict at their hands for the title and possession of the premises. The execution and delivery of the deed under which Isaac Haggin claims these premises was put in issue both by the

pleadings and the proof, and Isaac Haggin's case depended upon the question as to whether his brother, John B. Haggin, and his wife did actually make the deed of reconveyance to the premises to him; and on this issue it was the duty of the trial court to instruct the jury, and his failure to do so was error. It is true, as the learned court said, that the suit was not brought by Waldorf to recover damages for any cheat perpetrated upon him; but this language of itself had a tendency to mislead the jury. It was an intimation to them that whether the deed under which Isaac Haggin claimed was fraudulently obtained by him from his brother was immaterial, so far as Waldorf was concerned; but it was not immaterial. Waldorf had succeeded to the rights of John B. Haggin in these premises. If John B. Haggin had no title to the premises when he conveyed them to Waldorf's grantor, then Waldorf perhaps had no title; but Isaac Haggin's entire case, both his title to the premises and his right to the possession of them, depended entirely upon the validity of this conveyance which he alleges his brother made to him.

The judgment of the district court must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

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

POST, J., not sitting.

GEORGE W. PLEASANTS, APPELLEE, V. HARRISON H. BLODGETT ET AL., APPELLANTS.

FILED MARCH 20, 1894. No. 4284.

1. **Vendor and Vendee:** RIGHT OF OCCUPANT: NOTICE. A person buying real property in the actual possession and occupancy of another is charged with notice of any right, title, or interest which such occupant has in such property.
2. ———: QUITCLAIM DEEDS: BONA FIDE PURCHASER. One who holds real estate by virtue of a quitclaim deed from his immediate grantor, whether a purchaser or not, is not a *bona fide* purchaser in respect to outstanding and adverse equities and interests against his grantor shown by the record, or which are discoverable by the exercise of reasonable diligence in making proper examination and inquiry.
3. **Quitclaim Deeds.** One who purchases real estate and takes a quitclaim deed therefor, takes only the interest his grantor has in the property at the time of such conveyance. *Pleasants v. Blodgett*, 32 Neb., 427, followed and adhered to.
4. **Vendor and Vendee:** RECORD OF MORTGAGE. The existence of record of a mortgage on real estate is of itself sufficient to put an intending purchaser of the property on inquiry as to the interest of such mortgagor in such real estate.
5. **Statute of Limitations.** In an action to quiet title the statute of limitations does not begin to run in favor of the defendant until some assertion of ownership or claim to the premises is made by him.

REHEARING of case reported in 32 Neb., 427.

*H. H. Blodgett*, for appellants.

*Charles O. Whedon* and *Charles L. Hall, contra.*

RAGAN, C.

This is a rehearing of *Pleasants v. Blodgett*, 32 Neb., 427. The opinion there reported contains a sufficient

statement of the facts in the case. Counsel for appellants on the rehearing contends:

1. That they are *bona fide* purchasers for value without notice of Pleasants' title, and strenuously insists that the district court had not before it evidence to support its finding that appellants were not *bona fide* purchasers, and that this court was entirely wrong in affirming the decree of the district court. This contention of appellants has led us to a re-examination of the entire evidence in the record. This record contains evidence showing that on the 3d of February, 1874, Pleasants bought the property in controversy from one Boyd and paid for it by assigning to Boyd a judgment, and for the balance of the purchase price gave his note to Boyd, secured by a mortgage on the property; that this mortgage was at once recorded; that at this time the property was a vacant lot without any improvements; that Boyd promised Pleasants to execute a deed and leave it with one Scott for Pleasants, and afterwards told him he had done so; Scott does not remember whether the deed was left with him or not, but says it might have been; that some of his papers were destroyed by fire; that Pleasants in 1885 paid off the mortgage he had given Boyd, and in April, 1886, paid up the taxes and took actual possession of this lot until then vacant and unoccupied; that Boyd left the state about 1875, having sold the Pleasants note and mortgage; that in 1887 Blodgett was advised that in 1874 he had sold the property to Pleasants and taken a mortgage from Pleasants; thereupon Boyd executed a second deed for the property to Pleasants; that appellant Blodgett claims title to this lot by virtue of a quitclaim deed from Boyd, dated August 6, 1875, and recorded by Mr. Blodgett eleven years and three days later; that Mr. Blodgett took no possession of this lot; that he exercised no act of ownership over it; that his first assertion of ownership of the property was the filing of his deed; that he never paid any taxes on the lot; that he was present when Pleasants bought

the lot of Boyd; that the transaction—that is, the purchase of the lot and the giving of the mortgage—occurred in Mr. Blodgett's office. Boyd, by his deed to Blodgett, expressly quitclaimed such interest as he, Boyd, had in the property. Boyd at that time had no interest in the property and hence conveyed none. (*Hoyt v. Schuyler*, 19 Neb., 657; *Johnson v. Williams*, 37 Kan., 179.) We cannot say from this evidence that the district court erred in finding that Mr. Blodgett was not an innocent purchaser of this property.

2. So far as appellants, the Ritcheys, are concerned, they claim to have purchased this property from Mr. Blodgett, taking from him a quitclaim deed and giving him back a mortgage to secure the entire purchase money. At the time they took their quitclaim deed Pleasants was in the actual and open possession of this lot. His possession was notice to all the world of his rights and interest in the property. (*Uhl v. May*, 5 Neb., 157; *Scharman v. Scharman*, 38 Neb., 39.)

3. The next complaint of appellants is that to Pleasants' action to quiet title to this lot they set up as a defense that "Boyd and Pleasants confederated together to make a security and sale of the mortgage," and for this purpose Pleasants gave his note without consideration to Boyd for $25, secured by a mortgage on this property. This note Boyd was to pay, and as a matter of fact Pleasants never bought the lot, and that the district court, and this court as well, wrongfully refused under the evidence to so find. This was a good defense, if proved, but, in our humble opinion, the finding of the district court adversely to the contention of appellants as to this defense is supported by the evidence. The fact that there was of record a mortgage from Pleasants to Boyd on this property was sufficient of itself to warn a prudent intending purchaser thereof that Pleasants probably claimed some interest in the property. When one makes a mortgage on real estate to another the presumption, at least, is that the mortgagor is the owner of the property mortgaged.

4. The fourth complaint of appellants is that the district court in its former opinion disregarded the plea of the statute of limitations set up by appellants to appellee's action. Counsel seems to overlook the fact that this is an action brought by appellee to quiet his title; and we are not aware of any rule of law that requires the owner of real estate to bring such an action until some one in some manner sets up or asserts some title or claim against the property, the title of which is sought to be quieted. So far as the evidence in the record shows, the first assertion of title or ownership to the property in controversy ever made by any of the appellants was made by appellant, Mr. Blodgett, when he filed his quitclaim deed in August, 1886. If the statute of limitations is a defense to such an action as this, then the statute did not begin to run until the filing of the quitclaim deed, and was not a bar at the time this suit was begun.

5. The final contention of the appellants is that both the district court and this court ignored the statute of frauds pleaded by the defendants as a defense to the action of Pleasants. It seems to be the opinion of the learned counsel for appellants that because a deed was not made and delivered by Boyd to Pleasants at the time of his purchase of the lot, Pleasants cannot be heard to claim title to this lot, and his only remedy is to sue Boyd for the purchase money. But this is not an action by Boyd against Pleasants to compel him to convey the real estate mentioned. The question here is one of equities between two parties holding deeds for the same property from the same grantor, and we confess our inability to see that the statute of frauds is applicable. It may be that this inability on our part is unpardonable, but the fact remains that we are unable to comprehend that which to the learned counsel seems so lucid. The former opinion of this court is adhered to.

AFFIRMED.

POST, J., not sitting.

## STATE OF NEBRASKA, EX REL. SCHOOL DISTRICT OF OMAHA, V. MAYOR AND CITY COUNCIL OF THE CITY OF OMAHA.

FILED MARCH 20, 1894. No. 6773.

1. **School Tax**: BOARD OF EDUCATION: CITY COUNCIL. Section 21 of subdivision 17, chapter 79, Compiled Statutes, relating to schools in metropolitan cities, does not grant to the board of education authority to determine what amount of funds must be raised by taxation for the support of schools, or what levy is required for that purpose, but it requires the board of education to report to the city council an estimate of the total amount of funds required for the purposes specified in the section, and leaves with the city council the power to determine what proportion of this amount will be realized from sources other than taxation, what amount it is necessary to raise by taxation, and the levy required for that purpose.

2. ———: MANDAMUS TO CITY COUNCIL. Therefore, where the board of education reports to the council the total amount of funds required, with an estimate of the proportion thereof which it will be necessary to raise by taxation, the council cannot by *mandamus* be required to make a levy sufficient to raise the amount so reported as necessary to be raised by taxation.

ORIGINAL application for *mandamus*.

*James B. Meikle*, for relator, cited: *State v. Smith*, 11 Wis., 65; *People v. Bennett*, 54 Barb. [N. Y.], 480; *Atkins v. Disintegrating Co.*, 18 Wall. [U. S.], 301; *Taylor v. Taylor*, 10 Minn. 107; *Bourland v. Hildreth*, 26 Cal., 182; *Kennedy v. Gibson*, 8 Wall. [U. S.], 498; *Donohue v. Ladd*, 31 Minn., 244; *Big Black Creek Improvement Co. v. Commonwealth*, 94 Pa. St., 455; *Follmer v. Nuckolls County*, 6 Neb., 204; *People v. Commissioners of the Ill. & M. Canal*, 3 Scam. [Ill.], 153; *Mayor of Jeffersonville v. Weems*, 5 Ind., 547; *Commissioners of La Grange County v. Cutler*, 6 Ind., 354; *Stayton v. Hulings*, 7 Ind., 144; *Hedrick v. Kramer*, 43 Ind., 362; *State v. Forkner*, 70 Ind., 241; *Bell v. Davis*,

75 Ind., 314; *State v. Canton*, 43 Mo., 48; *People v. Lacombe*, 99 N. Y., 43; *People v. Commissioners of Taxes of New York City*, 95 N. Y., 558; *Burch v. Newbury*, 10 N. Y., 389; *Oswego Starch Factory v. Dolloway*, 21 N. Y., 461; *Donaldson v. Wood*, 22 Wend. [N. Y.], 397; *Watervliet Turnpike Co. v. McKean*, 6 Hill [N. Y.], 619; *Commonwealth v. Kimball*, 24 Pick. [Mass.], 370.

*W. J. Connell, City Attorney, contra*, cited: *Kemerer v. State*, 7 Neb., 130; *People v. Yeates*, 40 Ill., 126; Merrill, Mandamus, sec. 291; *Smails v. White*, 4 Neb., 353; *In re House Roll No. 284*, 31 Neb., 505; *Sovereign v. State*, 7 Neb., 412.

IRVINE, C.

The facts in this case are undisputed. Omaha is a city of the metropolitan class, and by virtue of subdivision 17 of chapter 79, Compiled Statutes, the territory embraced in that city is constituted a corporation for school purposes, governed by a board of education. The board of education, on the 22d day of January, 1894, made an estimate of the amount of funds required for school purposes, and on the following day reported that estimate to the city council. This estimate contained items of proposed expenditures amounting to $389,351. As against this there were itemized estimates of resources other than from taxation, and an item "to be made up by taxation, $70,000." This was followed by an estimate that it would require a levy of three and one-half mills on the dollar to supply this amount, and a request was made to the council that a levy to that amount should be made. The assessed valuation of the city of Omaha is $20,322,201. Upon the 6th of February an ordinance was passed by the city council making a levy of taxes for numerous purposes, including therein a levy of three mills on the dollar for the school district. The relator seeks to compel the mayor and council to make

a levy of three and one-half mills, or such a levy as will be sufficient to raise the sum of $70,000. The statute under which the relator claims authority to require this levy is as follows: "That the board of education shall annually, during the month of January, report to the city council an estimate of the amounts of funds required for the support of the schools, for the purchase of school sites, the erection and furnishing of school buildings, the payment of interest upon all bonds issued for school purposes, and the creation of a sinking fund for the payment of such indebtedness, and the city council is hereby authorized and required to levy and collect said amount, the same as other taxes." (Comp. Stats., ch. 79, subd. 17, sec. 21.)

The question presented is simply this: Does the law empower the board of education to determine the amount necessary to raise by taxation and the levy required therefor, and compel the council, acting ministerially, to make a levy sufficient to provide the amount so determined? Or, on the other hand, is the board simply authorized to report to the council the whole sum required for school purposes, leaving with the council, in the exercise of its discretion, the power to determine what part of that sum must be raised by taxation and what levy will be sufficient for that purpose?

The argument made on behalf of the relator is very able and demands close consideration. It is argued that the manifest intent of the statutes relating to the schools is to vest in the school district, through its board of education, sole legislative power. By the act relating to schools in metropolitan cities, being subdivision 17 of chapter 79, Compiled Statutes, already referred to, the school district is constituted a body corporate. The title to all school property is vested in the district. The board of education is given exclusive control of the property for all the purposes contemplated in the act. All schools are placed under the direction and control of the board of education. The

affairs of the school district are to be conducted exclusively by the board of education, except as otherwise provided in the act. The board is required to provide for the payment of the indebtedness of the school district, including the bonded indebtedness. Different qualifications are provided for electors of the school district than those required for general electors of the city. The board of education canvasses the vote at school elections. The board disburses school funds; and, in general, it is clear that it was the policy of the law to make the school district independent of the city government, so far as practicable. These features, however, existed in the act of February 6, 1873, providing for public schools in cities of the first class.

*State v. Mayor and Council of the City of Omaha*, 7 Neb., 267, was a case precisely like the one at bar, arising under the act of 1873, Omaha being then a city of the first class. The report of that case contains no adequate statement of facts, and the language of the opinion lacks certainty, owing to the want of such a statement, but a reference to the briefs in the case shows that all the arguments here advanced by the relator were presented in that case, and all the authorities now called to our attention were there cited. The conclusion there reached was that the power of the board was merely to report an estimate of the funds required; that the board had no power to levy a tax, but that it was for the council, in the exercise of its discretion, to make such levy, and the writ was accordingly denied. The statute there under consideration differed from the one here invoked only in one respect. The language of that statute was: "The city council is hereby authorized and required to levy and collect the necessary amount, the same as other taxes." Here the language is "said amounts." In the brief on behalf of relator in the former case it was argued that the terms "amounts of funds required" and "necessary amounts" were synonymous, and we think that such argument was sound so

far as applied to those particular expressions. The necessary amount can be neither more nor less than the amount required; so we cannot see that the expression "said amounts," if it should be construed as referring back to the expression "amounts of funds required," can be given any different construction than the term "necessary amounts" used in the other statute. This being the only difference between the statutes applicable in the former case and in that now before us, it would seem that the former case should be treated as a decision controlling us here. Owing, however, to the uncertainty of the published report of the case in 7 Neb., an uncertainty which has led to continued litigation upon this question, we think it proper to pursue the subject further.

In this state, taxation of property within the school district is not the only source of income for the support of the schools. In fact, if the estimate presented by the board of education to the city council in this case approaches accuracy, the school tax forms but a small portion of the school fund. All license fees go to that fund, estimated in this case at $220,000. So all fines arising out of the police court, estimated at $25,000. From the state apportionment of the school funds a further estimate is made of $60,000. The statute does not require the board of education to estimate the amount of funds to be derived from sources other than taxation and to report to the city council simply the amount required to be raised by taxation, but requires an estimate of the whole amount required for the support of the schools and other purposes specified in the act. We think the obvious purpose of the act was to require an estimate to be made and reported to the council of the character designated in the act,—that is, of the total amount of funds required for the different purposes, —and that it was intended that the council should, having received this estimate, for itself determine what amounts would probably be realized from sources other than taxation

and then determine what taxes it would be necessary to levy in order to provide the board of education with the total amount estimated by it as necessary. It is true that in regard to some of the sources of revenue the board of education has facilities equal to those of the council for forming an estimate. This is not, however, in all cases true. All fines and licenses go to the school fund, and the mayor and council have authority, by ordinance, to impose certain licenses, and to a certain extent, in the exercise of their legislative powers, to fix the amount of the fines collectible. Further, it must be borne in mind that the act relating to schools in metropolitan cities is, in all essentials, a copy of the act of 1873 relating to schools in cities generally, and that that act was in effect during a period when councils also had the power of granting saloon licenses. In metropolitan cities this power is now committed to the board of fire and police commissioners, but the mayor and council may still fix within the limits of the statute the amount to be paid for such licenses. For this reason the mayor and city council, and not the board of education, is the body in the best position to estimate the receipts of the school district, and so to determine the amount necessary to raise by taxation, and this fact is important in ascertaining the legislative intent in regard to the statute we are considering.

Our attention is called to several cases which it is claimed sustain the position of the relator. The first of these is *Ex parte The Common Council of Albany*, 3 Cow. [N. Y.], 358. In that case it was held that the council could by *mandamus* compel the supervisors to levy a tax sufficient to raise the sum reported by the council as necessary for the support of the poor. But the statute there committed to the council the power to determine the sum necessary "to be raised by taxation" for that purpose. In *People v. Bennett*, 54 Barb. [N. Y.], 480, a *mandamus* was granted to compel the levy of a school tax for Saratoga Springs,

but it does not appear that the board of education had any other source of income than the tax, and the statute required the trustees of the village to raise and collect by tax such sums as "the board of education should deem needful." In *State v. Smith*, 11 Wis., 65, a similar *mandamus* was allowed, but there the charter of the city expressly required the council to raise by taxation "such sums as may be determined and certified by the board of education to be necessary and proper," in addition to the amount of moneys appropriated or provided by law. In all these cases the statute was explicit and clearly left to the levying body only a ministerial duty to perform. Were our statutes as plain, or were taxation the sole source of income, we might adopt a similar view, but we think that it was intended by our statute merely that the board of education should notify the council of the total amount required, and that to the council is committed a discretionary authority to estimate the receipts from different sources and for itself determine what tax will be necessary to make the total income sufficient to provide the total amount reported by the board. It is true that in *State v. Paddock*, 36 Neb., 263, a *mandamus* was allowed on behalf of the school district of South Omaha against the commissioners of Douglas county upon substantially similar statutes and under a very similar state of facts. An inspection of that case will show, however, that the allowance of the writ was resisted only upon two grounds. One of these related to the time when the estimate was reported to the commissioners. The other question in the case was as to whether it was the duty of the city council or the county commissioners to make the levy. This depended upon the further question as to whether South Omaha was a city of the first class or a city of the second class. The question now before us was not in that case. The refusal of the commissioners to make the levy being put upon entirely other grounds, and the question as to whether or not the

writ was controlling the exercise of a discretionary power not being before the court, that case cannot be considered as a precedent for this.

WRIT DENIED.

POST, J., not sitting.

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AARON MCKNIGHT V. SAMUEL THOMPSON ET AL.

FILED MARCH 21, 1894. No. 4998.

1. **Vendor and Vendee:** MISREPRESENTATIONS: DECEIT. Ordinarily, a mere misrepresentation of the value of real estate which is the subject-matter of the contract is not actionable, although falsely and fraudulently made by the seller and relied upon by the buyer.

2. ———: ———: RESCISSION OF SALE. The rule is otherwise where the purchaser resides a considerable distance from the location of the land, is ignorant of its value, and is prevented from examining the property or from making inquiries as to its condition and value by trick or fraud of the vendor.

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

*J. W. Cole*, for plaintiff in error, insisting that the petition states a cause of action, cited: *Phillips v. Jones*, 12 Neb., 213; *Tallon v. Ellison*, 3 Neb., 74; *Faulkner v. Klamp*, 16 Neb., 178; *School District v. Randall*, 5 Neb., 411.

*J. Byron Jennings, contra.*

No brief filed on behalf of defendants in error.

NORVAL, C. J.

Aaron McKnight traded to Samuel Thompson and John Cruts a stallion, and took in exchange therefor three lots in

the city of Topeka, Kansas. McKnight brought this action in the lower court for a rescission of the contract, or, if rescission cannot be had, for damages on account of alleged fraudulent representations of the defendants in the trade of the lots. The district court sustained a general demurrer to the petition and dismissed the action; to reverse which ruling plaintiff brings the case here on error.

The petition charges, among other things, in substance, that on the 25th day of March, 1890, the defendants, conspiring and confederating together to cheat and defraud plaintiff, represented that the defendant Thompson was the owner of lots 299, 297, and 301, on Kolon avenue, Jenkins M. Morris' addition to the city of Topeka, Kansas, and, for the purpose of inducing plaintiff to trade for said lots, defendants represented to plaintiff that said lots were of the value of $1,000, and that they were incumbered for the sum of $650, and no more; that defendants, for the purpose of inducing plaintiff to rely upon their statements as to the value of said lots, read and delivered to plaintiff a letter bearing date of January 7, 1890, purporting to have been written by one V. Franklin, of the Citizens Bank of McCook, Nebraska, to the First National Bank of Topeka, Kansas, inquiring as to the value of said lots, with the pretended answer thereto of the cashier of the said First National Bank; that said pretended answer placed the value of said lots at $350 to $400 each. The petition further charges that said representations and statements of the defendants were false and untrue, and were known to be such by the defendants when made; that said lots were of no value whatever over and above the mortgage incumbrance thereon of $650; that instead of the value of said lots having been placed at $350 to $400 each by said cashier in his said letter, their value was stated by him to be from $150 to $200 each, but that said defendants, for the purpose of defrauding plaintiff, changed and raised said figures; that plaintiff had never seen said lots

and was wholly ignorant of their value, but that, relying entirely upon the said statements and representations of the defendants, and believing the same to be true, and that said letter of the cashier was genuine and not forged, plaintiff was induced to and did give defendants in exchange for said lots a stallion of the value of $500, and assumed and agreed to pay said incumbrance of $650 on said real estate.

The question presented for our consideration is whether the petition was sufficient to entitle plaintiff to the relief demanded. Usually a mere assertion concerning the value of property made by the vendor is not actionable, although known by him to be untrue. In other words, a charge of fraud can seldom be predicated on the mere expression of an opinion, and representations or statements of the value of property are generally regarded of that character, and a vendor is not ordinarily warranted in placing any confidence in them. Such is undoubtedly the rule where the buyer is acquainted with the property and its value, or where he has negligently omitted to make inquiries for the purpose of ascertaining the real condition of the property. The rule, however, is otherwise where the purchaser resides at considerable distance from the location of the property which is the subject of the negotiations and is prevented from examining it or from making inquiries as to its value and condition by the fraud of the seller. In such case a false assertion concerning value will not be regarded as a mere expression of opinion, but will be treated as an affirmation of fact.

The supreme court of New York in *Chrysler v. Canaday*, 90 N. Y., 272, say: "The rule is well settled that a naked assertion by a vendor of the value of property offered for sale, even although untrue of itself, and known to be such by him, unless there is a want of knowledge by the vendee, and the sale is made in entire reliance upon the representations made, or unless some artifice is employed to prevent

inquiry or the obtaining of knowledge by the vendee, will not render the vendor responsible to the vendee for damages sustained by him. In this case there are facts proven which show artifice and conspiracy from the outset on the part of the defendant to cheat and defraud the plaintiff, who was put in communication with parties who aided in carrying out the deception and putting him under the influence of confederates who acted in collusion and with the palpable purpose to deceive and defraud him. The facts referred to would undoubtedly have great effect upon a jury, and if properly presented, would justify a verdict for the damages sustained." (See *Simar v. Canaday*, 53 N. Y., 298; *Lord v. French*, 61 Me., 420; *King v. Sioux City Loan & Investment Co.*, 76 Ia., 11; *Witherwax v. Riddle*, 121 Ill., 140; *Harris v. McMurray*, 23 Ind., 9.)

In *Simar v. Canaday, supra*, it was ruled that a statement made by the vendor, which is tantamount to an estimate of opinion, such as value, is not actionable, but that every assertion as to value of property sold is not regarded as a mere matter of opinion and belief; and whether it is merely the expression of an opinion, or an affirmation of a fact, is a question for the jury. Folger, J., in delivering the opinion of the court, observes: "And where they are fraudulently made of particulars in relation to the estate which the vendee has no equal means of knowing, and where he is induced to forbear inquiries which he would otherwise have made, and damage ensues, the party guilty of the fraud will be liable for the damage sustained."

The Indiana case cited above was an action upon a note given for a part of the purchase price of a quarter section of land. The defendant set up in his answer that the plaintiff falsely and fraudulently represented the land to be of the value of $33 per acre, and the soil rich, black loam, and that he had been offered $32 per acre; that defendant had never seen the land nor been in the neighborhood of it; that before closing the purchase he started to

see it, but was turned back by plaintiff's repeating his representations, and stating if the neighbors did not say it was worth that much there would be no trade; that defendant relied upon said representations; that the land was not of the value stated, but was worth only $18 per acre, and that such is the opinion of the neighbors; that urgent business called him to his home and he had no opportunity for three or four months of inquiring about, or going to see, the land. It was held that the answer stated a good defense.

The Iowa case was where a loan of $800 was made upon eighty acres of land which the borrower, in his written application for the loan, had falsely and fraudulently represented to be of the value of $30 per acre, when in fact it was not worth to exceed $5. Relying upon the application, plaintiff accepted the securities and paid the money for them. On the discovery of the fraud he tendered back the securities and brought an action to recover the money. Upon these facts the trial court at the close of plaintiff's case directed a verdict for the defendant. The supreme court reversed the case, and in speaking of the written application in the opinion, say: "It was more than a mere general declaration of the value of the property, based upon the opinion of either Wellman or the general manager. It was the deliberate preparation of a statement for the information of persons seeking to invest money, and upon which they were invited to rely without an examination of the land."

In the case at bar the trade was made in this state, while the land was in another. Plaintiff had never seen the lots, nor was he acquainted with their value. He had no opportunity of examining them, and was prevented from so doing by reason of the false statements made by the defendants and the forged letter already mentioned. We think the facts set up in the petition, if true, are sufficient to entitle plaintiff to have the contract of exchange set aside on the ground of fraud, and that the district court

erred in sustaining the demurrer to the petition. Judgment reversed and cause remanded.

REVERSED AND REMANDED.

POST, J., not sitting.

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## IN RE REUBEN NEWTON.

FILED MARCH 21, 1894. No. 5507.

1. **Criminal Law**: COSTS: COMMITMENT FOR NON-PAYMENT. A court or magistrate, upon entering judgment in a criminal prosecution against a prisoner, may order that he shall stand committed until the fine and costs are paid, or secured to be paid.
2. **Imprisonment for the non-payment of fines and costs** is no part of the punishment, but is merely one of the means of enforcing compliance with the order of the court.
3. **Criminal Law**: COSTS: DISCHARGE OF PRISONER. Where the offender is unable to pay the amount adjudged against him he may obtain relief under section 528 of the Criminal Code.
4. ———: APPEAL: RECOGNIZANCE. Under section 324 of the Criminal Code a defendant in a criminal case, in order to appeal from a judgment of a magistrate to the district court, must, within twenty-four hours after the rendition of the judgment, enter into a recognizance as required by said section.

ERROR to the district court for Antelope county. Tried below before ALLEN, J.

*B. B. Willey*, for petitioner:

The time of imprisonment must be limited in the judgment and set forth in the commitment upon which the prisoner is held in custody; otherwise the judgment and commitment, being indefinite, are void. (Maxwell, Pleading & Practice, 753; *State v. Prince*, 8 So. Rep. [La.], 591;

*Howard v. People*, 3 Mich., 210; *Lowrey v. Hogue*, 24 Pac. Rep. [Cal.], 995; *Robson v. Spearman*, 3 Barn. & Ald. [Eng.], 493; *Washburn v. Belknap*, 3 Conn., 502; *Elliott v. People*, 13 Mich., 375; *Crippen v. People*, 8 Mich., 117; *La Roe v. Roeser*, 8 Mich., 540; *Ex parte Soto*, 26 Pac. Rep. [Cal.], 530.)

The county judge should have accepted and approved the appeal bond offered by the accused. (*Monell v. Terwilliger*, 8 Neb., 362; *White v. German Ins. Co.*, 15 Neb., 660; *Berrer v. Moorhead*, 22 Neb., 691.)

*O. A. Williams, County Attorney, contra.*

No brief for defendant in error.

NORVAL, C. J.

This was a petition to the district court of Antelope county, by Reuben Newton against George P. Haverland, sheriff of said county, for a writ of *habeas corpus*. From a judgment denying the writ the petitioner prosecutes error.

The petitioner was tried and convicted in the county court of Antelope county of committing an assault upon one Herman Peiper, and was adjudged by the court to pay a fine of $10 and costs and stand committed until the amount of such fine and costs were paid. In default of payment of the fine and costs the court issued a *mittimus*, and the accused was committed to the county jail. Thereupon he instituted these proceedings.

The first point made by counsel for petitioner is that the judgment, or rather that portion of it which requires that the accused be imprisoned until the fine and costs are paid, is unauthorized and void. An assault is punishable by fine or imprisonment, or both. (Criminal Code, sec. 17.) By section 322 of chapter 29 of the Criminal Code, entitled "Trial of Minor Offenses Before Magistrates," it is provided that "whenever the defendant shall be tried under the provisions of this chapter, and found guilty either by

the magistrate or jury, or shall enter a plea of guilty, the court shall render judgment thereon, assessing such punishment either by fine or imprisonment, or both, as the nature of the case may require and the law permit; in such case the defendant shall, in addition to the fine or imprisonment, be adjudged to pay the costs, and to be committed to the county jail until the judgment be complied with," etc. Sections 500, and 501 of the Criminal Code are as follows:

"Sec. 500. In all cases wherein courts or magistrates have now or may hereafter have the power to punish offenses, either in whole or in part, by requiring the offender to pay a fine or costs, or both, the said courts or magistrates may make it a part of the sentence that the party stand committed and be imprisoned in the jail of the proper county until the same be paid, or secured to be paid, or the defendent is otherwise discharged according to law.

"Sec. 501. In every case of conviction of any person for felony or misdemeanor, it shall be the duty of the court or magistrate to render judgment for the costs of prosecution against the person convicted."

The last two sections were before this court for consideration in *Re Dobson*, 37 Neb., 449, in which case it was held that it was the duty of a court, upon the conviction of a person of a crime, to render a judgment for the costs of prosecution against the defendant, and that the court possesses the power to include in the sentence that the person convicted be imprisoned in the county jail until the costs are paid, or security be given for their payment. We adhere to the opinion in the case just mentioned. Authority is likewise conferred upon a court or magistrate to impose imprisonment on a defendant for the non-payment of a fine, convicted as the petitioner was. Such power is derived from sections 322 and 500 copied above. The first section declares that "in such case the defendant shall, in

addition to the fine or imprisonment, be adjudged to pay the costs, and to be committed to the county jail until the judgment be complied with;" and substantially to the same effect is section 500. Therefore, there is double statutory authority for rendering judgment of imprisonment for non-payment of fine and costs. Even at common law, courts had the power to imprison a defendant until the fine and costs were paid. (Bishop, Crim. Proc., sec. 1301; *Brown v. People*, 19 Ill., 613; *Hill v. State*, 10 Tenn., 247.)

Another ground upon which petitioner insists his imprisonment is unlawful is that he was ordered committed to jail for an indefinite period of time. We concede that imprisonment, as a punishment for crime, should be for a definite period, and that a sentence to an indefinite term of imprisonment is illegal; but the judgment under consideration does not violate the foregoing rules. The penalty imposed upon the petitioner is pecuniary merely. The imprisonment adjudged in this case forms no part of the punishment *per se*, but is one of the means of enforcing compliance with the judgment of the court. The fine and costs inflicted constitute the punishment, and under the statute they may be satisfied by the voluntary payment of the amount thereof, or by collection under execution issued against the property of the defendant, or by imprisonment in the county jail in case the defendant is unable to pay the same.

It is urged that under section 528 of the Criminal Code the county court should have fixed the number of days the petitioner should be confined for non-payment of the fine and costs. This section reads as follows: "Whenever it shall be made satisfactorily to appear to the district court, or to the probate judge of the proper county, after all legal means have been exhausted, that any person who is confined in jail for any fine or costs of prosecution, for any criminal offense, hath no estate wherewith to pay such fine and costs, or costs only, it shall be the duty of said court

or judge to discharge such person from further imprisonment for such fine and costs, which discharge shall operate as a complete release of such fine and costs; *Provided*, That nothing herein shall authorize any person to be discharged from imprisonment before the expiration of the time for which he or she may be sentenced to be imprisoned, as part of his or her punishment, nor until the convict shall have been imprisoned at least one day for every three dollars of the amount adjudged against him." Clearly the language quoted did not make it the duty of the court in passing sentence to fix the length of time petitioner should be committed to jail in default of the payment of the fine and costs imposed. Under the other statutory provisions already referred to the court was empowered to commit the petitioner until the judgment of fine and costs was complied with. Section 528 was enacted for the purpose of authorizing the discharge of a prisoner from custody who is unable to pay the fine and costs. Its object was not to require the court or magistrate in passing sentence upon a prisoner to specify the number of days he should be imprisoned for the non-payment of the amount imposed as a punishment. It is perfectly manifest the court cannot know, when judgment is being pronounced, that the fine and costs will not be paid, or that the same cannot be collected by legal process. It is only after all legal means for the collection of the fine and costs have failed that a prisoner is entitled to be discharged under section 528, and not then unless he has been imprisoned at least one day for each three dollars of the sum imposed. Our conclusion is that the county court did not exceed its powers in imprisoning the petitioner until the fine and costs were paid. (*Ex parte Bollig*, 31 Ill., 88; *Ex parte Bryant*, 4 So. Rep. [Fla.], 854; *In re MacDonald*, 33 Pac. Rep. [Wyo.], 18.) We have examined the authorities cited in the brief of petitioner, holding that imprisonment for the non-payment of a fine is illegal, but

as they are based upon statutory provisions materially different from our own we cannot follow their lead.

It is finally urged that the judgment and sentence of the county court were superseded by an appeal. If this were true, the petitioner would be entitled to his discharge. Section 324 of the Criminal Code, regulating appeals to the district court from tribunals inferior thereto, in criminal cases provides that "the defendant shall have the right of appeal from any judgment of a magistrate imposing fine or imprisonment, or both, under this chapter, to the district court of the county, which appeal shall be taken immediately upon the rendition of such judgment, and shall stay all further proceedings upon such judgment. No appeal shall be granted or proceedings stayed unless the appellant shall, within twenty-four hours after the rendition of such judgment, enter into a recognizance to the people of the state of Nebraska in a sum not less than one hundred dollars, and with sureties to be fixed and approved by the magistrate before whom said proceedings were had, conditioned for his appearance at the district court of the county at the next term thereof, to answer the complaint against him," etc. The record shows that petitioner was tried on May 9, 1892, and at 3:15 P. M. of said day the jury returned a verdict of guilty, and thereupon the court sentenced the prisoner. Although notice of appeal was immediately given, no appeal undertaking was offered or tendered to the court until 5:20 P. M. of the next day. This was not in time, since more than twenty-four hours had elapsed after sentence was pronounced. The court had no power to extend the time fixed by statute for taking an appeal. The judgment of the district court is

AFFIRMED.

POST, J., not sitting.

H. A. MERRILL, APPELLANT, V. JAMES E. JONES ET AL., APPELLEES.

FILED MARCH 21, 1894. NO. 5539.

**Tax Liens:** FORECLOSURE: ATTORNEY'S FEES. In an action to foreclose certificates of tax sale, during the litigation, and before trial or decree in the case, the owner of the property covered by the lien of the taxes evidenced by the certificates in suit tendered to the plaintiff in the case, owner and holder of the certificates, the total amount of the principal debt, interest and costs, then accrued. *Held*, That the plaintiff was not entitled to an award of any sum as an attorney fee to be taxed as a part of the costs in the case, as provided by section 181, chapter 77, Compiled Statutes of Nebraska, entitled "Revenue."

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

*Henry W. Pennock* and *Webster, Rose & Fisherdick*, for appellant.

*S. L. Geisthardt, contra.*

HARRISON, J.

In this case the appellant filed a petition in the district court of Lancaster county, containing sixteen separate causes of action, and alleged the purchase, by plaintiff, of sixteen tracts of land in said county, belonging to defendants, at a tax sale held December 8, 1888, also the payment by plaintiff of various sums, taxes on the premises, prior and subsequent to the date of sale; and further alleged that no tax deeds had ever been executed, or any application made for the same. The prayer of the petition was for a finding of amount due, a foreclosure of the tax certificates or liens, and sale of the premises; also, for an allowance, as an attorney's fee, of an amount equal to ten per

cent of the amount determined to be due the plaintiff, to be awarded and taxed as part of the costs in the action.

Defendant Carlos C. Burr answered, admitting that he was the owner in fee of all the land described in the sixteen causes of action in the petition of plaintiff; denied that plaintiff owned the tax certificates set forth and described in the petition, and also denied that there was any sum due upon the certificates or either of them. The answer further alleges that immediately prior to the date of the commencement of his ownership of said lands his co-defendant, James E. Jones, was the owner in fee of said premises. The answer further states that no notice was given by plaintiff, or any one for him, to Jones, or the answering defendant, Burr, personally, or by publication or otherwise, of any claim of plaintiff against the lands, or of any purchase of them by him at tax sale; that the assessor of said lands for the year of sale (1877) did not take or subscribe any oath; that the schedules and assessment rolls or lists for 1877 had no oath of the assessor attached thereto, and no oath of the assessor was contained therein, and hence they were invalid, and the taxes assessed and levied thereon were invalid and were not liens on the lands; that a large number of the items of taxes (enumerated in the answer), contained in the certificates of sale issued to plaintiff when he paid the taxes and sought to be foreclosed in this action, were levies of taxes made upon valuations of the property, which valuation had been raised by the board of equalization without any notice to plaintiff or his grantor, James E. Jones, and were void and not liens upon the lands. This answer was filed January 9, 1892.

February 10, 1892, plaintiff filed a reply, in which he admitted Burr's ownership in the lands, also admitted that no notice of tax sale, as a condition precedent to demand for tax deeds, had ever been served upon the owners of the lands as required by the statutes; and further denied each and every other allegation of the answer.

On March 30, 1892, defendant Burr filed a supplemental answer, in which he set forth that on March 29, 1892, he tendered to plaintiff, or to his attorney and agent, Halleck F. Rose, the sum of $3,718.70, as payment in full of all the several amounts due in the causes of action contained in plaintiff's petition, also the further sum of $40.50 costs of the action, being in all $3,759.20, which was sufficient to pay the amounts due in full and costs of action in full; that plaintiff refused to receive the money so tendered, and still refuses, and the answer contains the further offer of defendant to bring the money into court. (We will here state that the money was produced in court by defendant and there refused by plaintiff.)

Plaintiff, in reply to this supplemental answer of defendant, admitted the tender, in amount and for the purpose stated in the answer, and the refusal to accept the same by plaintiff, and denied each and every other allegation of the answer, and alleged that he had notified defendant Burr personally, and also by letter, of plaintiff's ownership of the tax certificates in suit before beginning the action, and requested or demanded payment of the amounts due upon the certificates, and informed defendant that if payment was not made plaintiff would institute action upon them, and that defendant refused to pay the amounts due; that the tender was not made until after the action was commenced, and that it was made now solely to defeat plaintiff's recovery of costs accrued and hereinafter to accrue in this action.

April 18, 1892, judgment was rendered for the amount of principal and interest due upon the certificates, foreclosing the liens and ordering sale of the lands. There was also a finding that the tender was made as pleaded in the supplemental answer of Burr; that plaintiff was not entitled to recover any attorney fee, and the recovery of an attorney fee of ten per cent was denied plaintiff.

The case is brought here on appeal by the plaintiff, and

the sole complaint made is of the action of the court below, by which the plaintiff was denied the recovery of the sum, equal to ten per cent of the amount ascertained to be due upon the tax certificates, as an attorney's fee. Section 181, chapter 77, Compiled Statutes of 1893, entitled "Revenue," is as follows: "In any case in which the plaintiff shall recover in an action for the foreclosure of tax liens, as provided in this act, he shall be entitled to interest on each amount paid by him, and evidenced by his certificates of tax sale and receipts for taxes paid, at the rate of twenty per cent per annum from the date of each payment for the term of two years, and at the rate of ten per cent per annum on each of said amounts from and after the expiration of said two years, and until the rendition of the decree of foreclosure, which decree shall draw interest as in other cases. At the time of the rendition of such decree, the court shall award to the plaintiff an attorney's fee equal to ten per cent thereof, which shall be taxed as a part of the costs in the action." In the case at bar it is not disputed that the tender was made, and of sufficient amount to extinguish the entire indebtedness and the costs of the action, save and except the attorney's fee, if any allowed. There is no conflict or controversy over the facts, and our only inquiry is, did the tender by the defendant, of the full amount of the liens, interest and costs, defeat the right of plaintiff to recover, as a part of the costs in the case, an attorney fee to be calculated upon the amount found due at the time of the rendition of the decree in the case?

This case, in its essential features, bears a very close resemblance to one in which the maker of a note, mortgage, or other instrument agrees in such instrument to pay a certain per cent of the judgment rendered, or recovery allowed, upon the note or other instrument, as an attorney fee. On February 18, 1873, an act passed the legislature of this state on this subject, with reference to instruments for the payment of money only, which was as follows:

"That in all actions brought for the foreclosure of a mortgage, or upon a written instrument for the payment of money only, there shall be allowed by the plaintiff, upon a recovery of judgment by him, a sum to be fixed by the court, in addition to the judgment, not exceeding ten per cent of the recovery, as an attorney's fee, in all cases wherein the mortgage or written instrument upon which the action is brought shall in express terms provide for the allowance of an attorney's fee." (Gen. Stats., p. 98.) It will be noticed from the above quotation that it is "upon the recovery of judgment" that the party becomes entitled to the assessment of the attorney fee, and the taxation of it as a part of the costs. It is conceded, by all the parties to this case, to be the established rule of this court that "attorneys' fees are in the nature of costs, when allowed by the court, and should be taxed as such and kept separate from the judgment." The allowance of the fee is no part of the judgment for the debt itself. (See *Rich v. Stretch*, 4 Neb., 186; *Dow v. Updike*, 11 Neb., 95; *Hendrix v. Rieman*, 6 Neb., 517.) In *Rosa v. Doggett*, 8 Neb., 48, it was held in an opinion written by MAXWELL, C. J., "No attorneys' fees can be allowed except in cases where a judgment has been recovered."

We call attention particularly to that portion of the law above quoted, and the decisions construing it, where it is definitely and clearly stated that the amount of the attorney's fee and its allowance is based upon the judgment and made to depend upon the recovery of a judgment. The low governing in the case at bar provides, as to the attorney's fee: "At the time of the rendition of such decree, the court shall award to the plaintiff an attorney's fee equal to ten per cent thereof, which shall be taxed as part of the costs in the action." It is provided in another section of the act in question in regard to "Revenue:" "The owner of any certificate or certificates of tax sale * * * may * * * proceed by action * * *

to foreclose the same, and cause the tract or lot to be sold for the satisfaction thereof, * * * in all respects as far as practicable, in the same manner and with like affect as though the same were a mortgage executed to the owner of such certificate or certificates for the amount named therein," etc. It will be gathered from the foregoing that in this case we have the right given to award attorney fees as costs, to be taxed as costs; the time of such award, the rendition of the decree; the amount, equal to ten per cent of the decree; and the action, one in the nature and to be governed by the rules of procedure, etc., applicable to mortgage foreclosures. It seems quite clear that the reasoning and rules in the cases of actions for foreclosure of mortgages or judgment upon instruments for the payment of money only, containing an agreement for the allowance of an attorney fee to be taxed as costs, should be equally forcible in the action under consideration. They differ most materially probably, in that the former is one where the right to tax the fee arises out of an act of the party, of his own will and choice, and in the latter, from nothing of his own choosing or determination, but purely by operation of law. It cannot be disputed that if a tender is made in an action of foreclosure or for the amount due upon a promissory note, of the sum due, with interest and costs to date of tender, it will be sufficient, and any further proceedings in the case by plaintiff will be at his cost; and this, we think, is fully pertinent and forcible in the case we are discussing. The allowance of the attorney fee in all these cases is an incident to and dependent upon the rendition of a judgment or decree upon the principal indebtedness, and whatever works an extinguishment of the principal, or a right to a judgment or decree for it, draws with it the incident and dependent right.

The rule of tender was in force at the time of the passage of the act under which the plaintiff claims the relief sought for in this action, and was, and had been for many

years, recognized and applied by the courts, and there is no conflict between it and the right given to parties by the act of the legislature in question; and we see no reason why, where an action is brought to recover the amount of taxes and interest in the manner provided by the act of the legislature, it should be exempted from the general rule of the law, in regard to tender, which holds good in all cases of similar nature. We are satisfied that when the tender was made in this case, before the decree, of the whole amount of the principal debt, with interest and costs which had accrued and were, from the nature of the case, ascertainable, and by law were taxable at the time of tender, that if it had been accepted by plaintiff it would have extinguished the principal debt, and that the plaintiff could not have further maintained the action for the purpose of recovering or having the amount of the attorney fee, as costs, determined, and, when not accepted by the plaintiff, any further proceedings in the case were at his own cost; that inasmuch as the right to the award or allowance of the attorney fee had not, at the time of tender, attached, as there was as yet no judgment or decree, the plaintiff, by refusing the tender, could not further prosecute the case, for the purpose alone, it would seem, of reaching a judgment or decree for the same amount offered, and thus attain the recovery of the attorney fee as further costs. (*Jennings v. McKay*, 19 Kan., 120; 2 Jones, Mortgages, sec. 1607; *Schmidt v. Potter*, 35 Ia., 426; *Two Rivers Mfg. Co. v. Beyer*, 42 N. W. Rep. [Wis.], 232.)

The attorneys for plaintiff, in their brief, cite us to the case of *Hand v. Phillips*, 18 Neb., 593, and strenuously insist that it supports their view of the case in regard to tender, and that in the case the doctrine is announced that the attorney fees being in the nature of costs, a portion of them accrued when the petition was filed. The syllabus of the case cited is as follows: "Under a statute which authorizes the allowance of an attorney's fee in certain cases,

proportioned to the amount of recovery, the debtor cannot, by paying a considerable portion of the debt immediately preceding the rendition of judgment, defeat the recovery by the attorney of fees upon the entire sum for which, but for the payment, judgment would have been rendered." The principal question involved in the case, as stated by the writer of the opinion (MAXWELL, J.) was, did a payment of a part of the mortgage debt, immediately preceding the entering of the decree of foreclosure, defeat the right to recover attorney's fees? and the answer is given to this in the negative. One of the cases cited by Judge MAXWELL in his opinion is *Dakin v. Dunning*, 7 Hill [N. Y.], 30, which was an action of assumpsit brought against Dakin, who, after issue joined, paid into court a sum of money which he claimed was all he owed Dunning, the plaintiff. A trial of the case was had, which developed the fact that the sum paid into court by defendant was not sufficient to pay the whole amount of the debt, or was only a partial payment. Defendant contended that this payment should be deducted as of the time made and a verdict, if any rendered against him, be for the balance. This, if done, would have reduced the amount recovered below the sum which it was necessary the plaintiff should recover to entitle him to costs in the case, and it was held: "Where the defendant resorts to the practice of paying money into court, but the sum thus paid was found by the jury to be less than was due at the time, the verdict and judgment should be for the whole amount of the plaintiff's demand, without any deduction on account of the payment. The defendant, however, is entitled to the benefit of the payment by way of indorsement upon the execution. If the sum paid into court is found by the jury to be equal to what was due at the time, the verdict should be for the defendant." And in the body of the opinion it was said: "The consequences which follow from the payment of money into court, in a proper case, are well settled in England. If the

amount brought into court is accepted by the plaintiff in satisfaction of his demand, his costs are to be paid by the defendant and the cause will thus be ended. But the plaintiff may insist that the amount paid is less than the actual indebtedness and proceed in the cause to recover the residue. In such case, if the sum paid into court is equal to what was due at that time, the verdict is to be for the defendant, but if the sum paid is short of that amount, the payment is to be allowed as a credit and a verdict found for the balance only. * * * The former practice of the English courts may have been well enough there and worked no injustice to either party, and it might be proper here if our law as to costs was the same as that of England. The sum brought into court belongs to the plaintiff in any event, and in England, if he recovers anything beyond that sum, he is entitled to costs. But it is otherwise in this court, and in the courts of common pleas of the several counties. The plaintiff's right to costs in these courts often depends upon the amount of the recovery, and that right ought not to be impaired or affected by a payment into court, unless the amount thus paid is equal to the whole sum due at the time." The case of *Hand v. Phillips, supra*, was decided upon the same theory, and the principle announced in *Dunning v. Dakin* adopted and applied. But in the case at bar the facts are not the same or similar. Here the whole amount of the debt, interest and costs was tendered, and the only further litigation was over the question of the right to the attorney fee. A further fact in the case of *Hand v. Phillips*, which does not appear n the one at bar, was the fact that the defendant had filed no answer and practically confessed the plaintiff's claim, while in this case he was contesting it at every point, but ertainly had a right to make payment and save costs if he so desired.

The plaintiff, it will be remembered, admitted that there was no notice to redeem served upon the defendant. It

has been twice stated by this court, that where notice was not served upon the owner or occupant of the real estate to redeem, at least three months before the expiration of the time of redemption, that the failure of plaintiff to serve such notice may bar his right to recover costs where the owner or occupant tenders the amount due at the time suit is brought. (*Lammers v. Comstock*, 20 Neb., 341; *Helphrey v. Redick*, 21 Neb., 80.) But the time at which such tender must be made has not been accurately given, except that if it is at the time suit is brought, it may have the effect of throwing the costs upon the plaintiff. We do not place the decision in this case upon the fact that the notice was not served, but upon the fact of the tender of the amount due. That notice was not served strengthens our position, and possibly, if the above doctrine in regard to notice was followed in its full intended scope, it might have barred the plaintiff of the recovery of any costs.

The attorney for appellees has, in his brief, gone into the question of the constitutionality of the portion of the revenue act which allows attorney's fees as costs in an action to foreclose tax certificates; but as the conclusion reached in the case, so far as we have now considered it, will dispose of it and favorably to the contention of appellees as to the only point in the case, we do not deem it necessary to here discuss or decide the constitutional query. The decree of the court below was right and is

AFFIRMED.

POST J., not sitting.

## JOHN BARRETT V. JOSEPH PROVINCHER.

FILED MARCH 21, 1894. No. 5141.

**Guardian and Ward.** After the death of his ward, a guardian cannot commence or maintain an action for the collection of a debt due such ward.

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

*F. B. Donisthorpe*, for plaintiff in error, cited: *Stinson v. Leary*, 34 N. W. Rep. [Wis.], 63; *Huntsman v. Fish*, 30 N. W. Rep. [Minn.], 455; *Jacobs v. Fouse*, 23 Minn., 51.

*John Barsby, contra*, cited: *Marlow v. Lacy*, 2 S. W. Rep. [Tex.], 52; *Alford v. Halbert*, 12 S. W. Rep. [Tex.], 75; *Fortson v. Alford*, 62 Tex., 580.

RYAN, C.

This action was commenced before a justice of the peace in Fillmore county, Nebraska, by the plaintiff in error, John Barrett, as guardian of Alanson Barrett, against the defendant in error, for the recovery of $72.30 for work and labor performed by Alanson Barrett for the defendant. The record recites that during the cross-examination of plaintiff it was developed that Alanson Barrett, his ward, was dead, and that thereupon counsel for the defendant moved the court to dismiss the case for the reason that the plaintiff had no legal capacity to sue. The motion was sustained and the cause dismissed at the cost of plaintiff.

The sole question presented in this court is whether or not, under the circumstances described, the plaintiff, as guardian, could maintain an action against the defendant for such sum as the defendant owed for labor of the deceased ward. Plaintiff relies upon *Stinson v. Leary*, 34

N. W. Rep. [Wis.], 63, and on *Huntsman v. Fish*, 30 N. W. Rep. [Minn.], 455. In neither of these cases was the ward dead. He had merely reached the age of majority; and it was properly held that for the purpose of the adjudication of rights as between the ward and guardian the relation continued until a settlement was made. In the case at bar, however, the relation was terminated by the death of the ward. For the collection of whatever sums that were due the estate of the deceased, an administrator or executor was the only representative party who could properly maintain the action. The judgment of the district court approving the proceedings in the justice court was right and is

AFFIRMED.

POST, J., not sitting.

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ALLEN S. RICHARDS v. CHARLES BOROWSKY.

FILED MARCH 21, 1894. No. 5375.

1. **Instructions.** A party cannot be heard to complain that the trial court gave an instruction embodying only the same propositions of law given by the court at the request of the complaining party.
2. **Taxation of Costs.** To a review of the taxation of costs in the trial court a ruling on a motion to retax the same, together with an exception to such ruling, must be shown by the party seeking such review. Following *Real v. Honey*, 39 Neb., 516; *Bates v. Diamond Crystal Salt Co.*, 36 Neb., 904.

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

*J. J. McAllister*, for plaintiff in error.

*Jay & Beck* and *J. B. Barnes, contra.*

RYAN, C.

Plaintiff, in an action for damages resulting from personal injuries inflicted by defendant, recovered judgment upon a verdict for $1. The verdict was upon such conflicting evidence as to preclude disturbing it because not sustained by sufficient evidence.

Plaintiff in error complains that one instruction of the court made reference to an altercation between the parties which occurred on the day before that on which the injuries sued for were received. This instruction, however, warned the jury that the incidents of the first quarrel could not be considered as justifying injuries subsequently inflicted by defendant upon the plaintiff. The second quarrel seems to have commenced with such reference to the first as precluded the possibility of ignoring it. A history of the first quarrel was therefore given, that the language used in the second quarrel referring to the first might be understood. The court instructed the jury that the incidents of the first quarrel could only be considered for the purpose last indicated and not as a justification of any act in the second quarrel. Plaintiff requested and obtained an instruction embodying the same propositions as were embraced by the above instruction of the court. If there had been error in the instruction given by the court, which there was not, it would not have been available to a party upon whose motion a like instruction was given the jury.

Plaintiff in error complains that certain numbered instructions asked were refused, but as they are neither contained in the record nor referred to by the petition in error they cannot be considered.

It is insisted it was error, upon the recovery of but $1 by plaintiff, that the costs, amounting to $310.68, should be taxed to him. Possibly this might have been considered upon exceptions to a motion to retax costs. It cannot otherwise be reviewed in this court. (See *Real v. Honey*,

39 Neb., 516, and *Bates v. Diamond Crystal Salt Co.*, 36 Neb., 904.) The judgment of the district court is

AFFIRMED.

POST J., not sitting.

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BERNARD CAHN ET AL. V. JOSEPH LIPSON ET AL.

FILED MARCH 21, 1894. No. 4767.

1. **Pleading:** JOINDER OF NEW PARTIES DEFENDANT: DISCRETION OF TRIAL COURT. The discretion of the district court in permitting the joinder of new parties defendant will not be reviewed unless prejudicial error is shown to have resulted from the manner in which such discretion has been exercised.
2. **Taxation of Costs:** REVIEW. An alleged improper taxation of costs cannot be presented in this court where no motion to retax the same has been made in the trial court. Following *Real v. Honey*, 39 Neb., 516; *Bates v. Diamond Crystal Salt Co.*, 36 Neb., 904.

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

*Spargur & Fisher*, for plaintiffs in error.

*E. S. Ricker, contra.*

RYAN, C.

Isaac Silverstein, in January, 1889, was a retail merchant at Chadron, Nebraska. On the 7th day of the month named he executed to Cahn, Wampold & Co. a mortgage upon his stock to secure the payment of $1,258, due January 8, 1889. This mortgage was filed for record at 3 o'clock P. M. of the aforesaid 7th day of January.

On the day last named there was executed by Isaac Silverstein a mortgage to Frankenthal, Frendenthal & Co. on the same stock of goods to secure payment of the sum of $1,472, due January 8, 1889. This mortgage was filed for record at 10:30 o'clock A. M. of January 7 aforesaid, being about four and one-half hours before the mortgage to Cahn, Wampold & Co. was filed. Silverstein, on January 7, 1889, made another mortgage to Austrian, Wise & Co., to secure payment of the sum of $1,356.72, due January 8, 1889. This mortgage was filed for record one minute later than was the mortgage to Frankenthal, Frendenthal & Co., to which, by its terms, it was expressly made subject. It seems that a mortgage had been made on January 5, 1889, by Mr. Silverstein to the Bank of Chadron on the same property above referred to as having been mortgaged, and that the bank had immediately thereunder taken possession of the mortgaged property. The claim of the bank was satisfied by sales of a part of the goods mortgaged, and this suit was instituted in replevin by Cahn, Wampold & Co. against James C. Dahlman, sheriff, and Clement J. Davis, constable, of Dawes county, Nebraska. From the fact that the bank filed an answer it is inferable that the officers named were still in possession of the stock mortgaged at the time this action was begun. What were the averments of its answer are wholly matters of conjecture, unless resort is had to a copy substituted for the original answer shown to have been lost from the files. On motion of Cahn, Wampold & Co. this substituted answer was stricken from the files, so that even this reflected light as to the original answer is denied us. Before judgment was rendered, the bank and Clement J. Davis, constable, having been dismissed as parties, the firms of Frankenthal, Frendenthal & Co. and of Austrian, Wise & Co., respectively, filed answers whereby the priority of each firm over plaintiffs' mortgage, by virtue of the mortgage of each of said firms, was as-

serted and judgment was prayed accordingly in each of said answers. Motions were made to strike each of these answers from the files, which were overruled, and exceptions were thereupon duly taken; but each of said motions was afterwards followed by a reply putting in issue the averments of said answers. It is insisted there was error in permitting Frankenthal, Frendenthal & Co. and Austrian, Wise & Co. to answer, and in refusing to strike out the answer of each. No ground is pointed out upon which such error can be predicated, and we have been unable to find any such error. The firms with whom plaintiffs' litigation was had were, upon the face of the record of their mortgages, entitled to a priority of right of possession over the right of plaintiffs. There was no error in admitting them as parties in this action to test the existence of such relative priorities. The evidence justified the finding of the court as to the value of the property in dispute, though there was evidence from which properly it could have been adjudged that such value was greater or was less than it was actually found. In view of these conditions the finding upon this point cannot be disturbed.

It is urged that the costs should not have been taxed against the plaintiffs, and that plaintiffs should have been allowed for the keeping and taking care of the property which was in dispute. It is possible that the items referred to might have been adjusted as costs in this case, and that upon motion for that purpose the taxation of costs generally would have been changed by the trial court. To a review of the question whether or not the trial court should have done so, a motion to that end should have been presented to, and acted upon by, that court precedent to its presentation in this court. (See *Real v. Honey*, 39 Neb., 516; *Bates v. Diamond Crystal Salt Co.*, 36 Neb., 904.)

There are other parties to this controversy, for instance Joseph Lipson, a judgment creditor of Isaac Silverstein;

but as no argument is made specially as against the rights of such other parties, they are omitted from the foregoing discussion in the interests of perspicuity. The judgment of the district court is

AFFIRMED.

POST, J., not sitting.

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ALFRED SHRIMPTON & SONS v. H. P. KING.

FILED MARCH 21, 1894. No. 5479.

**Failure to Obtain Ruling Upon Motion for New Trial:** REVIEW. This court will not review, upon petition in error, alleged errors occurring during the trial of a cause in the district court, unless a motion for a new trial was made in the trial court and a ruling obtained thereon. Following *Jones v. Hayes*, 36 Neb., 526.

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

*George H. Terwilliger*, for plaintiffs in error.

*J. D. Pope, contra.*

RYAN, C.

The plaintiffs in error were plaintiffs in the district court, and by petition therein filed claimed against the defendant a judgment for $194.21, with interest and costs. The right to this judgment was predicated upon an alleged sale by the plaintiffs to the defendant of two great gross and one hundred and twenty-nine and two-thirds packages of pins. The defendant in his answer admitted that he ordered of the plaintiffs three gross papers of pins, for

which he agreed to pay at the rate charged in the petition, that is, three and seven-eighth cents per paper, and that the total amount due was, at the time of the answer filed, $16.74. The defendant, further answering, averred that before the action was brought he tendered to the plaintiffs in payment of said pins the sum of $16.83, which plaintiffs refused to receive, and defendant alleged that he has ever since been, and still is, ready to pay that amount to the plaintiffs, but that plaintiffs refused to receive the same; and the defendant averred that with his answer he brought into court said sum and tendered the same to the plaintiffs. For a reply to this answer the plaintiffs denied each and every allegation therein contained. It would seem doubtful upon this condition of the pleadings whether or not judgment should have been rendered for at least the amount tendered. In the absence of a reply denying that that amount was due and denying the tender of it, most certainly plaintiffs should have recovered judgment for the sum admitted to be due and tendered. By replying, however, the plaintiffs put in issue the alleged tender as well as the fact averred by the answer, that that amount was due. Upon a trial had to the court, a jury having been waived, judgment was rendered generally in favor of the defendant and plaintiffs' cause of action was dismissed. There was filed a motion for a new trial, but in respect to that motion no action seems to have been taken; at least the record fails to disclose whether or not it was ruled upon and whether or not any exceptions were taken to any ruling. In the case of *Jones v. Hayes*, 36 Neb., 526, NORVAL, J., used the following language: "We cannot review the proceedings, for the reason the record fails to disclose that a motion for a new trial was presented to the trial court and its ruling obtained thereon. While the transcript contains the copy of a motion for a new trial, it does not appear that the attention of the court below was ever called thereto. It has been frequently decided by

this court that in order to review the proceedings of a district court by a petition in error a motion for a new trial must be made in that court and a ruling obtained on the motion. (*Cropsey v. Wiggenhorn*, 3 Neb., 108; *Gibson v. Arnold*, 5 Neb., 186; *Lichty v. Clark*, 10 Neb., 472; *Smith v. Spaulding*, 34 Neb., 128.)" The language quoted would seem to be decisive of the sole question presented for our consideration, and the judgment of the district court is therefore

AFFIRMED.

POST, J., not sitting.

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## W. A. SIMMS ET AL. V. CHARLES E. SUMMERS.

FILED MARCH 21, 1894. No. 4827.

1. **Contracts:** CONSTRUCTION. When a contract is to be construed by its terms alone, without the aid of extrinsic facts, it is the duty of the court to interpret it.
2. **Guaranty:** ACCOMMODATION NOTES: LIABILITY OF MAKERS. Where parties agreed to vouch for another in the purchase of goods to the amount of $100 each, and soon thereafter each executed to him an accommodation note to the amount named, which notes were taken by him and used in such purchase of goods, the parties thus having loaned their credit were subsequently in no way further liable than as evidenced by said notes and might purchase his stock of goods from the party whom they had thus accommodated, with the same rights and immunities as might any third parties and subject only to like disabilities.
3. **Contracts:** THIRD PARTIES. A party seeking to avail himself of the terms of a contract between other parties must do so subject to all its conditions and restrictions.

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

*Ong & Jensen* and *W. C. Sloan*, for plaintiffs in error.

*Edgar C. Ellis, Carson & Fifield*, and *F. B. Donisthorpe, contra.*

RYAN, C.

John H. Wright, in the fore part of the year 1890, was the owner of no property but his homestead; nevertheless he greatly desired to embark in the retail merchandising business in Strang, the village wherein he resided. There was one serious obstacle to this very laudable ambition—a total want of capital. At different times he presented these matters to F. H. Higgins, a traveling salesman, who, in the interest of the Grimes Dry Goods Company, of Kansas City, Missouri, occasionally visited the village of Strang, situated in Fillmore county, Nebraska, and from him received suggestions and advice as to his plans. It seems that he also consulted other philosophers of the peripatetic school with the same purpose, in each instance receiving the most disinterested encouragement. At length, in May of the year 1890, Mr. Wright was able to extend upon paper the terms of a contract to which if he could obtain the signature of a sufficient number of his neighbors having means, their credit would be his credit under the limitations of the proposed agreement itself. Mr. Wright was modest, as well as ambitious, and, therefore, when he learned that the attorney who managed the credit department of the aforesaid Grimes Dry Goods Company was attending court in Geneva, he forthwith visited the said attorney and submitted to him the writing relied upon as the basis of his credit scheme. This attorney having slightly amended the draft presented to him, approved the plan proposed. The approved writing, which Mr. Wright was thus encouraged to believe would meet a long-felt want, was in the following language:

"We, the undersigned, hereby covenant and agree with J. H. Wright to vouch for him in the purchase of goods to run a general store to the amount of $100 each. The period during which our names shall be used shall not be longer than one year from date of commencing said business, unless we shall at the close of such year, after making a careful examination of the condition of the store, see fit to continue our support. In consideration of allowing him to use our names in the purchase of goods, as above mentioned, J. H. Wright agrees to give each of us a discount of six per cent from the amount of goods we shall buy for our individual or family use, and we shall take out a coupon or pass book and shall be charged the regular retail price for goods, and in full settlement shall receive six per cent discount. It is further agreed that no claim, foreign or not pertaining to the proposed store, shall be paid out of any fund or stock of the store, for the reason that the said J. H. Wright owns and manages the store only by virtue of our vouching for him. Therefore, in case exigency of failure in part of J. H. Wright to be able to pay his bills, we, the below vouchers, then shall take into our hands the stock and employ a competent person to sell it to the best advantage possible and appropriate the proceeds to the payment of claims against the store and the expense of the sale. After which, if any amount remains, it shall be the property of said J. H. Wright. It is further a consideration of this agreement that the said J. H. Wright shall not buy to exceed one-third more than the total amount vouched for, and that the amount bought more than vouched for shall be at the risk of persons selling to him. The method of conducting the business shall be as nearly cash as possible. No note or account taken instead of cash shall be accepted without the approval of the bank, and no note or account shall run longer than sixty days without bearing ten per cent interest from commencement of the opening of such account. The banking busi-

ness shall be done with the Fillmore County Bank and the money taken in shall be deposited there at least once a week, and in payment of bills the said J. H. Wright shall check out of bank. It is also agreed that J. H. Wright shall offer to any grange or alliance, or other organization organized for financial benefits, a discount of four per cent on whatever goods its members may buy, except if they vouch equally with other vouchers they are to have the six per cent discount. It is hereby agreed that J. H. Wright shall have the privilege of using at least $35 per month as monthly wages for the family expenses and making payments on his house and lot, and shall not exceed $45 per month for his own family use. Also, the said J. H. Wright shall have the right to pay out from store the expenses of such store, such as freight, express, drayage, clerk hire, rent, etc.

"Subscribed and sworn to before me, a notary public, this —— day of ——, 1890."

This writing was never signed, and the evidence shows clearly that one or more plaintiffs in error never saw it or heard of its existence until after the collapse of Mr. Wright's enterprise. As none of the special findings of the jury have been attacked as wholly without the support of evidence, this lack of proof to conclude plaintiffs in error by the terms of this unsigned contract will receive no further notice and the said special findings will be assumed to be correct.

The evidence shows that about June 1, 1890, there were deposited in the Fillmore County Bank at Strang the accommodation notes of plaintiffs in error, payable to the order of J. H. Wright, as follows: That of George Whitman for $100; that of Eli Schultz for $100; that of W. A. Simms for $100, and that of Ira Wright for $200. There were other accommodation notes made to the order of J. H. Wright and deposited in the aforesaid bank, the aggregate amount of all the notes thus deposited, including

those of plaintiffs in error, being $1,950. These were put into the bank by J. H. Wright to his own credit, and upon the faith of them he received accommodations at the bank to the amount of $1,300. This last named amount Mr. Wright invested in goods with which he began business, and no signer of any one of these notes ever asked or received the benefit of the discount of six per cent, provided for in the written draft of contract above set out, upon such purchases as they made of Mr. Wright. If we found it necessary to review the special finding of the jury that the plaintiffs in error assented to this proposed contract, and under its provisions gave their accommodation notes, their failure to avail themselves of this the only provision to their advantage would of necessity be very important. As would naturally be expected, Mr. Wright found that the sum of $1,300 was insufficient to enable him to carry on a profitable business. He therefore bought merchandise from wholesale houses on credit in several instances. On the 6th day of February, 1891, the plaintiffs in error claim that they purchased from J. H. Wright his stock of goods. They certainly went into immediate possession of the same as owners and remained in such possession until dispossessed by the sheriff. The consideration of this sale was $2,400, according to the testimony of plaintiffs. The nineteen or twenty accommodation notes given J. H. Wright, and which were then in the Fillmore County Bank, were taken up as part of the above consideration, the amount paid therefor being $1,150. One of the plaintiffs in error frankly admitted that one inducement to the purchase was to avoid payment of the full aggregate amounts of these notes (about $1,950), which they would have been compelled to pay if they had not secured possession of the notes by paying the unpaid amount by the bank advanced on the faith of them. Of the balance of the $2,400 consideration there was paid to H. P. Lau, a creditor of J. H. Wright, the sum of $778; to Snyder & Loomis, also a

creditor, the sum of $256; and the balance was paid in cash to J. H. Wright himself. This stock was afterwards seized by the defendant in error, the sheriff of Fillmore county, to satisfy a writ of attachment for $603, including costs, in favor of Noyes, Norman & Co.; another writ of attachment in favor of Johnston-Fife Hat Company for $253, including costs; another writ of attachment in favor of Gilmore & Ruhl for $264, including costs; another writ of attachment in favor of J. T. Robinson Notion Co., for $305, including costs; in all, the above attachments were for the aggregate sum of $1,255 and $200 possible costs. Each of the above writs issued from the district court of Fillmore county. In his answer in this suit in replevin brought by plaintiffs in error for possession of above stock, the sheriff set up the above writs of attachment and his levy thereunder upon the above stock as that of J. H. Wright, against whose property in each instance the above writs had issued. He also justified his seizure of said stock as the property of J. H. Wright under a writ of attachment issued from a justice court in favor of Tychsen & Reusch for $46.05 and $50 probable costs, and another writ of attachment in favor of Katz, Nevens & Co. for $49.25 and $50 probable costs. The question presented in the replevin suit was whether or not the rights of possession of the plaintiffs in error, as purchasers, were superior to those of the creditors of J. H. Wright under their writs of attachment above described.

The jury being required to answer seven special interrogatories, made such answers as enable us to consider certain questions of law, for whether each finding was sustained by sufficient evidence or not certainly cannot be questioned by the defendant in error. The special interrogatories as answered were as follows:

"Question No. 1. When J. H. Wright went into business in June, 1890, did not the plaintiffs, together with other parties, at and near Strang, Nebraska, enter into an

agreement with said J. H. Wright to vouch for him to the wholesale houses?

"In answer to question No. 1, we, the jury, say 'yes.'

"Question No. 2. Does the memorandum agreement introduced in evidence as Exhibit 'D,' and identified by the witness Wright, constitute the agreement between Wright and his vouchers referred to in question No. 1?

"In answer to question No. 2, we, the jury, say 'yes.'

"Question No. 3. Did the plaintiffs deposit their personal notes on one year's time in the Fillmore County Bank to the order of J. H. Wright and for the purpose of giving Wright credit with the wholesale houses?

"In answer to question No. 3, we, the jury, say 'yes.'

"Question No. 4. Was it a part of the consideration of the sale of the goods from J. H. Wright to the plaintiffs that the notes referred to in question No. 3, together with the other notes deposited for a like purpose, should be delivered back to their makers by J. H. Wright?

"In answer to question No. 4, we, the jury, say 'yes.'

"Question No. 5. What was the fair and reasonable value of the stock of merchandise transferred by J. H. Wright to the plaintiffs at Strang, Nebraska, and at the time of such transfer?

"In answer to question No. 5, we, the jury, say '$3,650.'

"Question No. 6. Did the plaintiffs, at the time of the transfer to them of the property in controversy by Wright, know that by the terms of the purchase Wright was placing beyond the reach of his unsecured creditors all of his property that was liable to execution?

"In answer to question No. 6, we, the jury, say 'yes.'

"Question No. 7. Did J. H. Wright communicate to the plaintiffs his financial condition at the time of the transfer of the property in controversy by him to the said plaintiffs?

"In answer to question No. 7, we, the jury, say 'yes.'"

Following the above was a general verdict in favor of

the defendant in error, and the assessment by said general verdict of the value of the replevied property at $3,650, and of the value of defendant's possession at $1,983.21, upon which verdict judgment was duly rendered.

The above answers to the special interrogatories 1, 2, and 3 establish as facts that the draft of agreement prepared by J. H. Wright was assented to by the plaintiffs in error and governed the liability of plaintiffs in error to the parties who extended credit to J. H. Wright, among whom were included those creditors under whose writs of attachment the sheriff made his levies on the stock of goods in controversy and on whose behalf his defense was made in this action. The important question in this case arises upon the above three special interrogatories and the answers thereto, whereby the jury found that the accommodation notes on one year's time were deposited in the Fillmore County Bank for the purpose of giving Wright credit with the wholesale houses, and that the said deposits of notes by plaintiffs in error were made as required by the terms of the unsigned agreement hereinbefore referred to. Whether or not the unsigned memorandum of agreement (treated as signed) required the deposit of these notes for the benefit of the wholesale houses, was purely a question of construction of the terms of that instrument itself. In *Coquillard v. Hovey*, 23 Neb., on page 627, the rule applicable in such cases is laid down in the following language: "As we understand the rule for the construction of contracts, it is that, if a contract is to be construed by reference to its terms alone, and without calling in the aid of extrinsic facts and circumstances, it is the duty of the court to interpret it." The jury interpreted the writing as an agreement by the plaintiffs in error to vouch for J. H. Wright to the wholesale houses—what particular wholesale houses was left wholly in doubt. The undertaking was that the signers of the contract should vouch for J. H. Wright in the purchase of goods to run a general store to the amount of $100 each.

There is no room for doubt that each of the plaintiffs in error gave his accommodation note to J. H. Wright for a sum at least equal to $100, and that these notes were used by Wright in the purchase of his original stock. In the body of the unsigned contract was the following provision: "It is further a consideration of this agreement that the said J. H. Wright shall not buy to exceed one-third more than the total amount vouched for, and that the amount bought more than vouched for shall be at the risk of the persons selling to him." This is the only provision in the unsigned contract having special reference to wholesale houses. Such houses, if they relied upon the provisions of the unsigned contract, must have taken them *cum onere*. The terms of the contract upon which reliance is placed by these houses advised them that each of the plaintiffs in error was pledging his credit only to the extent of one hundred dollars, and whoever proposed an extension of credit to Mr. Wright was bound to ascertain whether or not each plaintiff in error had already responded to the full extent to which his credit was pledged to be given. This would probably follow without the language above quoted. From its restrictive limitation there was no escape. The trial judge, however, seems to have assumed that the plaintiffs in error owed some duty toward wholesale houses which had extended credit to J. H. Wright aside from the duty to furnish Wright with credit only to the extent of $100 each, for, at the request of the defendant, the jury was instructed as follows: "You are instructed that if you believe from the evidence that at the time J. H. Wright began business in June, 1890, plaintiffs and others entered into the agreement contained in the memorandum introduced in evidence as Exhibit 'D,' then plaintiffs could not make a valid purchase of the property in controversy from said Wright without assuming the liabilities of such wholesale houses as had furnished said Wright goods on the strength of said agreement," etc. This instruction was

clearly erroneous, for by the memorandum referred to no privity in any event was created as between the parties loaning a limited credit and the wholesale houses referred to. Not only so, but the limited credit required had been furnished by notes of plaintiffs in error deposited in the Fillmore County Bank before any credits whatever had been extended by either wholesale house to J. H. Wright. It was as though each plaintiff in error had agreed to sign with J. H. Wright a note for $100, and had already done so when these goods were bought by Wright from the wholesale houses. As to such goods, it would not seriously be contended that the sureties on notes already given would be liable further because they had agreed to sign notes for $100 each, and had already done so. Neither would it be seriously contended that because the sureties had signed said notes they were under obligations if they purchased the stock of goods of Wright to pay his debts other than those evidenced by the notes already signed. The instruction of the court given at the request of the defendant, however, laid down the rule that because the plaintiffs in error had agreed to vouch for Wright to the extent of $100 each, that thereby they were precluded from dealing with Wright with reference to his goods in the same manner as though they had never so vouched for him. It may have been true that the transfer was fraudulent as against the creditors of J. H. Wright. That question was to be determined by the jury upon proper instructions applicable to the evidence under consideration. At most, the court should have gone no further than to instruct that the relations existing between Wright and plaintiffs, as shown by the evidence, were proper to be taken into consideration in determining whether or not the transfer complained of was fraudulent as against creditors of J. H. Wright. The judgment of the district court is

REVERSED.

POST, J., not sitting.

JOSEPH GARNEAU, JR., COMMISSIONER GENERAL, v. EUGENE MOORE, AUDITOR OF PUBLIC ACCOUNTS.

FILED MARCH 21, 1894. No. 6741.

1. **Claims Against State:** DISALLOWANCE BY AUDITOR: APPEAL TO DISTRICT COURT: TRIAL. On appeal to the district court from the disallowance of a claim by the state auditor, such claim must be presented and acted upon, upon the same proofs as were submitted in support thereof when the action of the auditor was had thereon.
2. **Res Adjudicata.** When, by reason of the insufficiency of the statement or claim originally presented to the auditor, the action of the auditor was justifiable in disallowing the claim presented, and the same has been affirmed in the district court, the rights of the claimant are not thereby adjudicated to such an extent as that he is precluded from afterwards presenting for allowance to the auditor aforesaid his claim properly to entitle him to an allowance of the same.

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

*Frank T. Ransom*, for plaintiff in error.

*George H. Hastings, Attorney General, contra.*

RYAN, C.

There were originally presented to the auditor of public accounts of this state a large number of claims, which he disallowed upon different grounds; mainly, however, because there were no vouchers accompanying the claims, and because each was not approved by the commissioner general of this state at the Columbian Exposition. It appears from very many of these claims that they have been presented apparently by individuals, and paid. Probably these payments were made by the commissioner general, though there was no evidence that such was the fact when

they were presented to the auditor for allowance. The auditor disallowed all the claims presented, and from this disallowance an appeal was taken by the commissioner general to the district court of Lancaster county. There was a trial had in the district court which resulted in the affirmance of the action of the state auditor. From the action of the district court, aforesaid, error proceedings have been prosecuted to this court.

On the trial in the district court there was evidence given as to the origin, history, and merits of each of the claims which had been disallowed by the auditor. In the case of *State v. Moore*, found in 37 Neb., 507, it was held that the original vouchers must in all cases be sent to the auditor, and that the commissioner should approve the same before sending them. It was stated in that connection that "the auditor will then have the evidence of the debt before him, and know whether it is such a claim as the legislature has provided an appropriation for. If it is, it is his duty to draw a warrant. If it is not, then he should refuse. He is not to draw a warrant upon mere estimates," etc. The district court had before it the question simply whether or not the auditor properly disallowed the claims as presented to him. It was not proper, after an appeal to the district court from a disallowance of the claims, to supply statements which should have accompanied the presentation of the claims in the first instance to the auditor, and in consideration of which he might have reached a different conclusion from that which he did attain. The district court, therefore, properly sustained the action of the auditor in respect to those claims. It is but proper, however, to say in this connection that by this it is not held that such rights as Mr. Garneau may be able to show upon proper statements as to the claims presented to, and disallowed by, the auditor are by this judgment to be deemed finally adjudicated. On the contrary, if Mr. Garneau can hereafter by proper averments make relevant

proofs in reference to any of the claims involved in his appeal to the district court, which we have now under consideration, he has the right to do so, with the same effect as he might have presented them in the first instance. The judgment of the district court is

AFFIRMED.

POST, J., not sitting.

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W. J. CONNELL, APPELLEE, V. ELIZABETH GALLIGHER, APPELLANT.

FILED MARCH 21, 1894. No. 4780.

1. **Deeds**: FAILURE TO ACKNOWLEDGE AND RECORD: TITLE: SHERIFFS' DEEDS. The grantee in a deed of real estate acquires the legal title thereto on the execution and delivery to him of such deed, though said deed be neither acknowledged nor recorded and be afterwards lost; and a sheriff's deed, made in pursuance of a levy upon, and sale of, such real estate to satisfy a judgment against such grantee, will pass the legal title of such real estate to the grantee in such sheriff's deed.
2. **Quieting Title**: ADMISSIBILITY OF DECREE IN EVIDENCE. G. S. executed and delivered a warranty deed to G. J. for certain real estate. The deed was neither acknowledged nor recorded and was afterwards lost. The real estate was then levied upon and sold by a judgment creditor of G. J., and the purchaser thereof, in a suit in equity against the heirs of G. S., obtained a decree establishing the fact of the execution, delivery, and loss of the deed of conveyance made by their ancestors. After the sale of said real estate on execution, G. J. conveyed the premises to the defendant. In a suit to quiet the title brought by the purchaser at the said sheriff's sale against the defendant, *held*, that the decree in equity, establishing the execution, delivery, and loss of the deed made by G. S. to G. J., was competent evidence.

REHEARING of case reported in 36 Neb., 749.

*Gregory, Day & Day* and *George M. O'Brien*, for appellant:

Judgments and decrees cannot bind strangers to the record, but only parties and privies. (*Sock v. Suba*, 31 Neb., 228; *O'Brien v. Gaslin*, 24 Neb., 559; *State v. Sioux City & P. R. Co.*, 7 Neb., 357.)

No judgment or decree is admissible in proof of title when the parties against whom it is offered were in possession at the time of the commencement of such suit. (*Graves v. Ewart*, 11 S. W. Rep. [Mo.], 971; *Weed Sewing Machine Co. v. Baker*, 40 Fed. Rep., 56; *Orthwein v. Thomas*, 21 N. E. Rep. [Ill.], 430.)

*Connell & Ives, contra:*

The appellee contends that the decree and the deed are admissible as necessary links in his chain of title, and are of the same effect as a voluntary deed from the Graeter heirs. (1 Greenleaf, Evidence, secs. 538, 539; Freeman, Judgments, sec. 416; Van Fleet, Collateral Attack, sec. 12; *Barr v. Gratz*, 4 Wheat. [U. S.], 213; *Buckingham v. Hanna*, 2 O. St., 551; *Baylor's Lessee v. Dejarnette*, 13 Gratt. [Va.], 152; *Den v. Hamilton*, 12 N. J. Law, 109; *Key v. Dent*, 14 Md., 86; *Barney v. Patterson's Lessee*, 6 Har. & J. [Md.], 182; *Secrist v. Green*, 3 Wall. [U. S.] 751; *Freydendall v. Baldwin*, 103 Ill., 325; *Lathrop v. American Emigrant Co.*, 41 Ia., 349.)

RAGAN, C.

This is a suit in ejectment brought in the district court of Douglas county by Connell against Galligher, who set up an equitable defense in that court to Connell's action, and on her motion the case was transferred to the equity docket. The district court rendered a decree in favor of Connell, quieting and confirming in him the title to the

property in controversy, and Mrs. Galligher brought the case here on appeal. This court rendered a decree affirming that of the district court. The opinion will be found in *Connell v. Galligher*, 36 Neb., 749. Mrs. Galligher then filed a motion for a rehearing of the case, suggesting that we had overlooked and misapplied the law; and on this suggestion a rehearing was accordingly granted her. We have again read all the testimony and examined all the arguments and authorities made and cited by the counsel on both sides of the case, and are constrained to say that we are entirely satisfied with the reasoning and conclusion reached by us in the case on the first hearing.

1. The learned counsel for appellant, if we correctly understand their position, insist that our error in the former opinion of the case consists in a misunderstanding and a misapplication of the law as to two points. Graeter, Sr., at one time owned the premises in controversy. He conveyed these premises by an absolute deed to one Graeter, Jr. This deed was defectively executed, never recorded, and was lost. After the conveyance had been made to Graeter, Jr., a judgment was recovered against him, execution issued thereon, and the sheriff levied upon and sold the premises as the property of Graeter, Jr. Connell claims under the sheriff's deed made in pursuance of that sale. It seems to be the contention of the counsel who represent appellant that this deed, either because it was so defectively acknowledged as not to be entitled to record, and was not, therefore, recorded, or because the deed was not recorded and was lost, that Graeter, Jr., took only an equitable estate in the premises in controversy, and that, therefore, the legal title did not pass to Connell's grantor by virtue of the levy upon and sale of the premises by the sheriff. We do not understand that the deed is the legal title, but simply the evidence of the legal title. We do not understand that Graeter, Jr., lost his title to this real estate simply because he lost his deed. As we have al-

ready said in the reported opinion in this case, we think that by the conveyance of Graeter, Sr., to Graeter, Jr., the latter acquires the legal title to the premises even though the deed was never acknowledged nor recorded and was lost. But there is another thing to be said of this point. Appellant herself claims title to these premises through Graeter, Jr. Now, if he had sufficient title to the premises, notwithstanding his deed therefor was lost and never recorded, to convey to the appellant the legal title of the premises, it seems to us an absurdity to say that he did not have such a legal title as could be levied upon and sold on execution.

2. The second contention of appellant's counsel is that the district court erred in permitting Connell to introduce in evidence on the trial of this case in the district court a certain decree in a case brought by him as complainant against the heirs of Graeter, Sr., as defendants. It appears that Connell, before this suit was tried, brought a suit in equity in the district court of Douglas county against the heirs of Graeter, Sr. In that suit Connell alleged that the parties made defendants were the heirs of Graeter, Sr.; that he, in his lifetime, had sold and conveyed the premises in controversy to one Graeter, Jr., and that such deed had been lost and never recorded; that he, Connell, had become possessed of Graeter, Jr.'s, title and interest in the premises conveyed by said lost deed, and he prayed that the heirs made defendants might be by the court decreed to execute to him a proper deed of conveyance to take the place of the lost deed. On the trial of this cause the district court found and decreed that the allegations in Connell's petition were true, and that he was entitled to a deed of conveyance of the premises from the heirs of Graeter, Sr. On the trial of the case at bar in the district court Connell offered in evidence, as a link in his chain of title, this decree rendered in the case brought against the heirs of Graeter, Sr. Counsel for the appellant now insist that

this ruling of the district court in permitting this decree to go in evidence was error. Counsel say that their client was neither a party, nor privy to a party, to that suit, and that therefore the decree does not bind her. They further say that this suit by Connell was in effect an action to quiet his title to the premises, and that the appellant was a proper and necessary party to such action. The end and the object of the suit brought by Connell against the heirs of Graeter, Sr., was not an action to quiet the title of the premises in Connell as against any one but the heirs of Graeter, Sr. The object of that action was to establish by decree of court that Graeter, Sr., in his lifetime, had sold and conveyed to Graeter, Jr., the premises in controversy. To this action appellant was not a necessary party. She does not claim title to these premises either from Graeter, Sr., or his heirs. Again, the only effect of this decree, as evidence in the case at bar, was to make Connell's chain of title to the premises complete as against the heirs of Graeter, Sr. It did not estop or attempt to estop appellant. But we are unable to understand why the appellant should object to the introduction in evidence of this decree. This decree established the fact that Graeter, Sr., did convey the property in controversy to Graeter, Jr.; that is to say, it established that the conveyance from Graeter, Sr., to Graeter, Jr., alleged to be lost, was in fact made and had been lost. The appellant herself claims title from Graeter, Jr., and her claim of title is based on this lost conveyance. In no view of the case was the appellant prejudiced by the ruling of the trial court in permitting the decree in the case of Connell against the heirs of Graeter, Sr., to be read in evidence.

It would subserve no useful purpose to continue the discussion of this case further. We have already devoted to it more time and attention than we should, considering the large number of cases in this court that have had no consideration whatever. We are all of the opinion that the

judgment of the district court was right and its judgment must stand affirmed, and it is so ordered.

AFFIRMED.

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

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GEORGE W. WOOLSEY, ADMINISTRATOR, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED MARCH 21, 1894. No. 4882.

1. **Carriers:** PASSENGERS. A person riding on the locomotive engine of a freight train by agreement with the fireman of such engine to shovel coal for the privilege of riding, such person being on such train without the knowledge or consent of the conductor in charge thereof, is not a passenger of the carrier operating such train.

2. ———: ———. To constitute one a passenger of the carrier on whose train such person is, it is essential that such person should be rightfully on such train or should be thereon with the knowledge or consent of the carrier, or its agent in charge of such train.

3. ———: ———: TRESPASSER ON ENGINE: NEGLIGENCE. In a suit by an administrator against a common carrier for damages for negligently causing the death of his intestate, it appeared that the deceased was a man eighteen years of age; that he rode on a locomotive engine by permission of the fireman thereof, agreeing with him to handle coal in consideration of being permitted to ride; that the conductor in charge of the train did not know of the deceased's presence on the engine; that the fireman told the deceased to get off the engine before the train reached McCook, for should he be found on the engine at that place he would be arrested; that no one attempted or threatened to put deceased off the engine; that the fireman did not tell the deceased to get off at the time and place he did; that there was no impending danger from a wreck, collision, or otherwise, which caused deceased to jump from the engine. The administrator pleaded, "when said engine was running at a rate of speed which made it dangerous to life to attempt to alight

therefrom," the deceased jumped from the engine and was killed, and was induced to make such jump by the fear of arrest should he be found thereon when the engine stopped. *Held*, (1) That the deceased was not a passenger of the carrier on whose engine he was riding; (2) that reasonable men can draw but one conclusion as to the character of the act of the deceased in leaping from the engine at the time and under the circumstances that he did, and that conclusion is that the act of the deceased was criminal negligence, and the proximate cause of his death; (3) that there was no evidence of negligence on the part of the carrier or its servants which the trial court would have been justified in submitting to the consideration of the jury; (4) that the trial court did not err in instructing the jury to return a verdict in favor of the carrier.

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

The facts are stated by the commissioner.

*Daniel F. Osgood*, for plaintiff in error, contending that the defendant is liable for damages, cited: *Hussey v. Norfolk S. R. Co.*, 98 N. Car., 41; *Benton v. Chicago, R. I. & P. R. Co.*, 8 N. W. Rep. [Ia.], 330.

*T. M. Marquett* and *J. W. Deweese, contra*, cited: *Virginia M. R. Co. v. Roach*, 34 Am. & Eng. R. Cases [Va.], 271; *Robertson v. New York & E. R. Co.*, 22 Barb. [N. Y.], 91; *Chicago & A. R. Co. v. Michie*, 83 Ill., 428; *Snyder v. Hannibal & St. J. R. Co.*, 60 Mo., 413; *Flower v. Pennsylvania R. Co.*, 69 Pa. St., 213; *Illinois C. R. Co. v. Meacham*, 19 S. W. Rep. [Tenn.], 232; *Osborne v. Kline*, 18 Neb., 351; *Reynolds v. Burlington & M. R. R. Co.*, 11 Neb., 192; *Atchison & N. R. Co. v. Loree*, 4 Neb., 450; *Burlington & M. R. R. Co. v. Wendt*, 12 Neb., 81.

RAGAN, C.

1. George W. Woolsey, administrator, sued the Chicago, Burlington & Quincy Railroad Company (hereinafter called

the "railroad company") in the district court of Nuckolls county for damages for negligently causing the death of his intestate, Harry Y. Woolsey. At the close of the evidence the jury, in obedience to an instruction of the court to that effect, returned a verdict for the railroad company. The court refused to set this aside and overruled a motion for a new trial, and the administrator brings the case here for review.

The evidence in the record shows, or tends to show, that the deceased at the time of his death was eighteen years of age, and on the day that he was killed he and a man named Guidici, his companion, by an agreement with the fireman of an engine pulling a freight train of the railroad company, that they, the deceased and Guidici, would break and shovel coal, got upon the engine of said freight train to ride; that such persons' presence on the train was without the knowledge or consent of the conductor in charge of the train; that they paid no fare, nor agreed to pay any, further than to assist the fireman in handling coal; that they were not in the employ of the railroad company, nor in any manner whatever connected with it or the train on which they rode; that as the train was approaching the city of McCook and running at a high rate of speed the fireman told the deceased to get off the train before it stopped at McCook, as, if he should be found on the train there, he would be arrested; no employe of the company put, attempted, or threatened to put the deceased off the train; there was no impending or threatening danger from a wreck or collision or otherwise at any time; that the deceased, while the train was moving at a high and dangerous rate of speed, said to his companion that he was about to jump off; that Guidici put his hand on his shoulder and advised him not to jump, but the deceased voluntarily jumped from the train and was killed. It is now said by counsel for the administrator that the deceased was a passenger on this train. We do not think that he

was a passenger within the meaning of any statute, rule or law, or decision with which we are acquainted. The deceased was fraudulently on this train. He did not go upon this train having a ticket or free pass, nor with the intention of paying his fare. His agreement with the fireman to shovel coal in consideration of a ride was a fraud on the company. It was the duty of the fireman to handle the coal himself. He could not put the corporation which he served under obligations to the deceased as a passenger by allowing him to ride upon the engine in consideration of his shoveling coal, nor for any other consideration, certainly without the presence of the deceased on the engine being known to the conductor in charge of the train. One may become a passenger of a common carrier without ever being actually on the train of the common carrier. It is not easy to lay down a rule defining what in all cases constitutes one a passenger of the carrier on whose train such person is, but it is essential to constitute one a passenger riding on a train of the carrier operating such train, that such person should be rightfully on such train, or should be thereon with the knowledge or consent of the carrier, or his agent in charge of said train. (*Union P. R. Co. v. Nichols*, 8 Kan., 505; *Toledo, W. & W. R. Co. v. Brooks*, 81 Ill., 245; *Chicago & A. R. Co. v. Michie*, 83 Ill., 427.)

2. If we should hold as a matter of law that the deceased at the time he met his death was a passenger on the train of the railroad company, the judgment here sought to be reversed would still have to be affirmed. By section 3, article 1, chapter 72, Compiled Statutes, 1893, railroad companies are made insurers of the safety of a passenger, except in cases where the injury of such passenger arises from his criminal negligence. The administrator pleaded in his petition, and the evidence supports the plea, that the decedent jumped from the train, "when said engine and cars were running at a rate of speed which [made it] dangerous to life to attempt to alight there[from]." All rea-

sonable men can draw but one conclusion as to the character of the act of the deceased in leaping from this train at the time and under the circumstances that he did, and that conclusion is that in so doing the deceased was guilty of criminal negligence. It has been many times said in this court, and so often ruled as to be no longer an open question, that "when a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury; but where the facts are such that all reasonable men must draw the same conclusion from them, the question is one of law for the court." (*Omaha Street R. Co. v. Craig*, 39 Neb., 601, and the cases there cited.) The only act of negligence charged against the railroad company is that the fireman told the deceased to get off the train before it reached McCook, as, if he should be found upon the train there, he would be arrested; but it is neither pleaded nor proved that the fireman told the deceased to jump off the train at the time he did jump. He told him to get off the train before it reached McCook. The deceased was not an infant of tender years, insane or idiotic, and, as before stated, he did not leap from this train in pursuance of any threat made to push him off if he did not jump, nor under the stress of a fear implanted in his mind by reason of an impending danger, wreck, or collision. There is no evidence in the record which shows that any employe of the train knew that the deceased was about to jump from the train at the time that he did. His companion, Guidici, who was a witness for the administrator, remained upon the train and advised the deceased that it was dangerous for him to leap therefrom, and advised him not to do so. There is in all this record not one word of evidence of any negligent act or omission of duty on the part of this railroad company that conduced to the death of the deceased. We must not be understood as deciding that because the deceased was not a passenger upon the train of the railroad

company, that because he was wrongfully and fraudulently on its train and a trespasser thereon, that therefore the railroad company would not be liable for negligence in injuring or killing him. What we do decide is that the deceased, at the time he was killed, was not a passenger upon the train of the railroad company; and that the district court properly held that the uncontradicted evidence shows that he met his death, not from any negligence of the railroad company or any of its agents or servants, but from his own criminal negligence. The law does not require of district courts to do useless things, and in this case, had the jury returned a verdict in favor of the administrator, it would have been the duty of the district court to have set such verdict aside; and in such a case the court was entirely right in directing the jury to find a verdict for the railroad company. The judgment of the district court is

AFFIRMED.

POST, J., not sitting.

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## CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. MINNIE LANDAUER.

FILED MARCH 21, 1894. No. 4885.

1. **Carriers:** NEGLIGENCE. By the statutes of this state a common carrier is made an insurer of the safety of its passengers, except as against the gross negligence of such passenger, or his violation of some rule of the carrier brought to such passenger's notice.

2. **Common carriers** of passengers should be held to the strictest accountability and be required to exercise the highest degree of care and forethought of which the human mind is capable. This rule is founded on principles of public policy and enforced by the courts for the protection of the traveling public.

3. **Carriers: PERSONAL INJURIES: CONTRIBUTORY NEGLIGENCE.** When the proof shows that one was a passenger of a common carrier, and, while such passenger, was injured, the law raises the presumption of the carrier's liability from the fact of the injury; but this presumption is not a conclusive one; it is such a presumption as in the absence of all evidence as to the cause of the passenger's injury, would render the carrier liable; and in such case, when the carrier shows that the passenger was injured by stepping from its running train, the presumption of liability raised by law against the carrier is overthrown, and it then devolves upon the passenger to show some justifiable reason for such action to relieve himself from the imputation of gross negligence; and the supposition or belief of the passenger that the train was standing still when he took the step which injured him, is not competent evidence from which the jury may find that the passenger was not negligent, unless accompanied by evidence tending to show circumstances rendering this supposition reasonable, or at least excusable, as, in the absence of such evidence, no reasonable mind could honestly say that the passenger was not guilty of gross negligence, and a verdict for such passenger would be without evidence to sustain it.

4. **The former opinion** in this case, reported in 36 Neb., 642, adhered to.

REHEARING of case reported in 36 Neb., 642.

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

*Leese & Stewart, contra.*

RAGAN, C.

Minnie Landauer sued the Chicago, Burlington & Quincy Railroad Company for damages for an injury which she alleges she sustained through that company's negligence while a passenger on one of its trains. She had a verdict and judgment in the district court, and the railway company prosecuted a petition in error to this court, where the judgment of the district court was reversed and the cause remanded for a new trial. Miss Landauer's counsel then filed a motion for a rehearing, suggesting, in effect, that the judgment of reversal was erroneous because the

finding of the jury on which it was based had for its support competent evidence. On this suggestion, a rehearing was accordingly granted, and the cause has again been fully examined. The reported opinion of the case is *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 642.

By the statutes of the state, carriers of passengers are made insurers of their passenger's safety, and liable for all injuries sustained by such passengers, unless it be shown that the injuries were caused by the gross negligence of the person injured, or his violation of some rule of the carrier brought to such passenger's notice. On the trial of the case at bar the undisputed evidence showed that the railway company was a common carrier; that Miss Landauer was a passenger on one of its trains, and, while such passenger, was injured. In the absence of all further proof this would have entitled the passenger to damages, as the law presumes the carrier's liability from the fact of the passenger's injury; but this presumption is not a conclusive one; it is such a presumption as, in the absence of all evidence as to the cause of the injury, would render the carrier liable. After Miss Landauer had proved that the railroad company was a common carrier, that she was a passenger on its train, and that she was injured, the burden then fell to the carrier to show that her injury was the result of her gross negligence. The question then is, does the record show that the carrier made such proof? The undisputed evidence in the record is that the train on which Miss Landauer was a passenger stopped at the station where she was to alight; that after it had again started on its way she went out of the coach upon the platform in front thereof, stepped down on one of the steps of the car, and after the coach had passed the station platform, deliberately "stepped out into the air," and was injured. When the carrier made this proof, the presumption of liability raised against it by the law was overthrown, and it then devolved upon the passenger to show some reason for this conduct on her part

which justified her action and relieved her from the imputation of gross negligence. The only reason found in the record for this conduct on the part of Miss Landauer is her statement that at the time she "stepped into the air," she supposed the train was standing still; but such supposition on her part was not a competent fact to go to the jury, from which they might say that by reason thereof her act was not negligence, unless accompanied by evidence tending to show circumstances rendering this supposition reasonable, or at least excusable. There is no word of evidence in the record of any such explanation or attempted explanation of this conduct on her part; and it is not pretended but that her act of "stepping into the air," at the time and place that she says she did, produced the injury for which she now claims damage; and there is no evidence in the record that Miss Landauer was caused or induced to step from this moving train "into the air" by any act or omission of the carrier or any of its servants. Her counsel, indeed, argue the case on the theory that the train did not stop at the station a sufficient length of time to enable their client to alight with safety. The fallacy of this argument lies in the fact that there is no evidence in the record which tends to show that the passenger was injured by reason of any such cause, nor that, by reason of the short length of time which the train stopped, she took the step which injured her.

Counsel cite us to *Missouri P. R. Co. v. Baier*, 37 Neb., 235, and *Union P. R. Co. v. Porter*, 38 Neb., 226, but these cases have no application here. In the Missouri Pacific case a passenger was injured, and the attempt to show that her injury occurred by reason of her negligence was a complete failure. In the Union Pacific case, the passenger occupied a rear coach of the train. The train stopped at the station where the passenger was to alight, but the coach on which he was riding was not stopped opposite the station platform. The passenger went out on the platform of

the car, supposing that the engine was taking water, and that the train would be pulled up and the coach on which he was riding stopped at the station platform so that he could alight. After the train had been put in motion, the passenger discovered that it was not going to stop, and thinking that he could step to the platform with safety, he did so, and was injured. The railway company argued that this stepping from the moving train to the platform at the time and place was gross negligence on the part of the passenger, but this court said that it was the duty of the railway company to stop its train so that the coach on which the passenger was riding would stop opposite the station platform, or, in default of that, the railway company was under obligation to notify the passenger that the train would not stop and afford him an opportunity to pass through the coaches in front of the one on which he was riding, and then to step to the platform. The railway company having done neither of these things, this court said that the jury might say whether, under the circumstances of the case, the passenger was guilty of negligence in stepping from the platform of the moving train at the time and place and under the circumstances which he did. We are entirely satisfied with the reasoning in both cases, and with the rule there laid down, and reaffirm these cases.

In the case at bar, if Miss Landauer had started from her seat in the coach after the train had stopped, and then it had started while she was in the act of stepping, or attempting to step, to the platform, such explanation of her conduct would have been evidence to go to the jury in justification of her conduct. If the train had been so crowded with passengers that Miss Landauer had not time to go from her seat in the coach to the steps of the car and step to the platform before the train started, that would have been evidence from which the jury might have excused her act. But Miss Landauer's supposition that the train was standing still when she took the step that she did, was not

competent evidence to authorize the jury to find she was not negligent, unless coupled with evidence tending to show that the carrier, its agents or servants, by some act or omission of theirs, induced in her mind such false supposition, or other evidence rendering such supposition reasonable. Suppose that when this train was on the prairie, running at the rate of forty miles an hour, that Miss Landauer had deliberately walked out to the steps of the coach and "stepped into the air" and been injured, and sued the carrier for damages. When she proved the facts that the railroad company was a common carrier; that she was a passenger on its train, and her injury, the presumption of the carrier's liability for the injury would then arise. The carrier then, by proving that she had gone out to the steps and "stepped into the air" at the time and place supposed, would have relieved itself of the presumption of liability cast on it by the law. Can it be said in the case supposed that Miss Landauer could relieve herself of this imputation of negligence by showing that at the time she took the supposed step that she believed, or that she supposed, that the train was standing still? Yet there is no difference in principle between the case supposed and that at bar. Common carriers of passengers should be held to the strictest accountability and be required to exercise the highest degree of care and forethought of which the human mind is capable, and this is the rule both at common law and under the statutes. It is a rule founded on principles of public policy and enforced by the courts for the protection of the traveling public; but when a passenger on a moving railway train deliberately steps from such train "into the air" and is injured, then such passenger, to relieve himself from the imputation of negligence, must offer some competent evidence in explanation of his conduct from which a jury may say that his conduct, under the circumstances, was not gross negligence or the carrier will not be held liable; and in the absence of such evidence, no reasonable mind could honestly

say that the passenger was not guilty of gross negligence, and a verdict for him would be without evidence to sustain it. The judgment of the district court must stand

REVERSED.

POST, J., not sitting.

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## MIKE WARD V. SPELTS & KLOSTERMAN.

FILED MARCH 21, 1894. No. 5306.

1. **A contract for the sale and delivery of corn** at a time, place, and price therein mentioned is not wanting in mutuality because it is signed by only the vendor. By the acceptance of such contract by the vendee therein he becomes bound to accept and pay for the corn on its delivery as therein provided, as much so as if he signed the agreement, and it provided in express terms that he would accept and pay for the corn on its delivery.

2. **Breach of Contract: ACTION FOR DAMAGES: ESTOPPEL: INSTRUCTIONS.** In a suit for damages for failure of the defendant to deliver 3,000 bushels of corn to the plaintiff as per the terms of a written contract, the defendant pleaded, and his evidence tended to show, that he contracted with the plaintiff's agent to deliver the plaintiff sufficient corn, at twenty-three and one-half cents per bushel, to amount to $52.50; that he, the defendant, could neither read nor write; that plaintiff's agent reduced the contract to writing, and fraudulently inserted in said contract 3,000 bushels; and that defendant, supposing the writing embodied the contract actually made with the agent, signed it by making his mark. In such suit between the original parties to said contract the court instructed the jury as follows: "The defendant having admitted signing the contract under which the plaintiff claims, before he can avoid said written contract on the ground of fraud practiced upon him because he could not read it, he must satisfy you that he was not negligent or careless in affixing his signature by mark to said writing;

and that if he made his mark thereto without asking to have the contents read to him or to be told what the contents of the writing were, but so affixed his signature thereto on request of plaintiff's agent without anything further being said or done to induce him to sign it, then in that case he should be held to have duly made said contract and should be bound by the terms thereof." *Held*, (1) That the defendant's negligence or carelessness in affixing his signature or mark to the contract did not estop him from denying his liability thereon; (2) that if the written contract which he signed embraced the contract which he made, he was liable upon it, and if it did not embrace the contract which he made, he was not liable thereon; (3) that the instruction was erroneous.

3. Contracts: FAILURE TO SIGN: ESTOPPEL. The doctrine that the carelessness or negligence of a party in signing a writing estops him from afterwards disputing the contents of such writing, is not applicable in a suit thereon between the original parties thereto, where the defense is that such writing, by reason of fraud, does not embrace the contract actually made.

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

*Norval Bros. & Lowley*, for plaintiff in error, contending that the contract lacks mutuality, cited: Bishop, Contracts, secs. 77, 78, 153; *Mason v. Decker*, 72 N. Y., 595.

*Steele Bros., contra*, in support of the contract, cited: *Homan v. Steele*, 18 Neb., 652; Biglow, Estoppel, p. 684, and cases cited; *Justice v. Lang*, 42 N. Y., 493; *Weightman v. Caldwell*, 4 Wheat. [U. S.], 84; *Ives v. Hazard*, 4 R. I., 27.

RAGAN, C.

Spelts & Klosterman sued Mike Ward in the district of Seward county for damages for his failure to deliver to them three thousand bushels of corn, in pursuance of a contract in words and figures as follows:

"In consideration of $50 this day to me in hand paid by Spelts & Klosterman, and interest thereon at ten per

cent per annum until fulfillment of this contract, I hereby sell and convey unto the said Spelts & Klosterman 3,000 bushels of good, sound, dry, shelled corn at 23½ cents a bushel, the same being now on a certain quarter section of land, and agree to deliver the same in good order at Ulysses, Nebraska, at buyer's option, in the months of July and August, A. D. 1890. Dated this 31st day of June, 1890.

his
"MIKE × WARD."
mark.

Spelts & Klosterman pleaded that they had on the date of the execution of said writing paid Ward the $50; that Ward had delivered them only 250 bushels of corn; that they had demanded of Ward a delivery of the corn pursuant to said contract; that he had failed and refused to deliver; and that the corn, at the time and place it should have been delivered, was worth forty cents a bushel, and by reason of Ward's failure to comply with the agreement they had been damaged. Ward's defense, so far as material here, was that on the 1st day of July, 1890, he received from Spelts & Klosterman $52.50 in money, and at that time he agreed to sell and deliver to them, at twenty-three and one-half cents per bushel, sufficient corn to repay said money, and that he further agreed that if he had any other grain to spare he would sell the same to Spelts & Klosterman at the same price; that the agent of Spelts & Klosterman made a memorandum in writing, which he, Ward, supposed embraced the contract between him and Spelts & Klosterman and was his receipt for the money he had received of them; that said agent presented the memorandum to him, Ward, and informed him that it embraced the agreement to deliver sufficient grain to pay the $52.50 and any other grain that Ward might be able to spare; that he, Ward, could neither read nor write, and was induced to and did sign said memorandum believing the contract embraced the agreement actually made between him and Spelts & Klosterman. The case was tried to a jury

and a verdict returned against Ward; and he brings the judgment rendered on such verdict here for review.

1. The first assignment of error relates to the memorandum or contract sued on and quoted above. The objection urged to this memorandum or agreement is that by it Spelts & Klosterman were not bound to do anything and that therefore, as a contract, it lacks mutuality. The agreement recites that in consideration of $50 received from Spelts & Klosterman, Ward had sold them 3,000 bushels of corn, which he agreed to deliver at a future date. Spelts & Klosterman having accepted this agreement, became bound to accept and pay for the corn on its delivery as therein provided, as much so as if the agreement had, in express terms, provided that they would accept and pay for the corn at the time and place and at the price named. The agreement was not wanting in mutuality. By the contract Ward agreed to deliver the corn to the persons with whom he made this agreement, and because of their acceptance of the agreement the law raised a promise on their part to accept and pay for the corn when delivered according to the contract. (*Justice v. Lang*, 42 N. Y., 493; *Weightman v. Caldwell*, 4 Wheat. [U. S.], 84.)

2. The second error alleged is the giving by the court to the jury of an instruction as follows: "The defendant having admitted signing the contract under which the plaintiff claims, before he can avoid said written contract on the ground of fraud practiced upon him, because he could not read it, he must satisfy you that he was not negligent or careless in affixing his signature by mark to said writing, and that if he made his mark thereto without asking to have the contents read to him or to be told what the contents of the writing were, but so affixed his signature thereto on request of plaintiff's agent without anything further being said or done to induce him to sign it, then in that case he should be held to have duly made said contract and should be bound by the terms thereof." The princi-

pal question litigated in the case was whether the contract sued on was the contract made between Ward and Spelts & Klosterman through their agent. The testimony offered by Ward tended to prove that he could neither read nor write; that he contracted with Spelts & Klosterman to deliver them, not 3,000 bushels of corn, but a sufficient quantity to amount to $52.50 at twenty-three and one-half cents per bushel, and more corn at the same price if he ascertained he could spare it. It was not disputed that the agent of Spelts & Klosterman wrote the contract sued on, and that Ward signed it by making his mark. The instruction complained of told the jury, in effect, that if the agent of Spelts & Klosterman practiced a fraud on Ward by putting into writing a different contract from the one actually made, then, if Ward signed such contract at the request of the agent, without asking to have the contract read to him, that he was bound by it. This instruction was erroneous. The suit on this contract is between the original parties thereto, and Ward is liable for damages for his failure to perform the contract he made, not for his failure to perform the contract he did not make; but, by the instruction given, the jury are told that if he neglected to have this contract read over to him he is bound by it, simply because he signed it. Suppose that Ward had contracted to sell Spelts & Klosterman 3,000 bushels of grain at twenty-three and one-half cents per bushel, and that the agent had drawn up the contract and made it read 3,000 bushels of corn at three cents per bushel, and that Ward had been able to read and write and had signed the contract, supposing that the agent had drawn it correctly. Can it be true that because Ward was careless or negligent in not reading the contract for himself that the party who thus perpetrated a fraud upon him could take advantage of that fraud? Ward's negligence or carelessness in affixing his signature or mark to this contract has nothing whatever to do with his liability on it. If the written contract

which he signed embraced the contract which he made, he is liable upon it. If it does not embrace the contract he made, he is not liable. (*State Ins. Co. v. Jordan*, 29 Neb., 514.) But it is said that this instruction was copied from an instruction found in *Cole Brothers v. Williams*, 12 Neb., 440, and that the instruction copied from has been approved by this court. In that case one Williams sued Cole Brothers & Hart for a bill of goods. Cole Brothers & Hart filed a set-off for $404 for putting lightning rods on the house of Williams in pursuance of a written order attached to their answer. To this answer Williams replied that he made a contract with the agent of Cole Brothers & Hart, by which they agreed to put lightning rods on his property at a cost of $100, and thereafter this agent presented a writing to him to sign, informing him that it contained directions to the agent's principal as to the manner of putting up the lightning rods; that he did not see very well; that his glasses were not at hand, and that he did not read the memorandum or order, but signed it, relying upon its embodying the contract as made between him and the agent. Williams recovered a judgment in the district court and Cole Brothers & Hart brought the case to this court and assigned that the trial court erred in instructing the jury as follows: "If the plaintiff signed such paper, knowing its contents, or having the means of making himself acquainted with the contents therewith, which he declined or neglected to use, then he is bound by its stipulation." Other instructions were given which were also excepted to by Cole Brothers & Hart. The writer of the opinion does say: "These two instructions, taken together, very fairly express the law applicable to the inquiry before the jury." But the most casual reading of the opinion in that case will show that the conclusion arrived at did not depend upon the correctness or the incorrectness of the instruction quoted. The instruction was erroneous, but it was not prejudicial to Cole Brothers & Hart. The error in the in-

struction was only prejudicial to Williams. The doctrine, that the carelessness or negligence of a party in signing a writing estops him from afterwards disputing the contents of such writing, is not applicable in a suit thereon between the original parties thereto when the defense is that such writing, by reason of fraud, does not embrace the contract actually made. In the case at bar counsel for defendants in error insist that even if the instruction complained of was erroneous, still the case should not be reversed, because they say that under the evidence the jury could have reached no other conclusion than that the contract is and was the contract made between Ward and Spelts & Klosterman. In other words, counsel contend that had the jury found a verdict in Ward's favor, the trial court would have been compelled to set it aside as unsupported by the evidence. We do not desire to express any opinion on the weight of the evidence or the credibility of the witnesses or any of them; but the trouble with the contention of counsel is that by the instruction complained of the jury, if it obeyed such instruction, was compelled to find a verdict against Ward. The judgment of the district court must be reversed and the cause remanded for a new trial, and it is so ordered.

REVERSED AND REMANDED.

POST, J., not sitting.

PRENTICE BROWNSTONE COMPANY, APPELLANT, V. ORLANDO J. KING ET AL., APPELLEES,

AND

PRENTICE BROWNSTONE COMPANY, PLAINTIFF IN ERROR, V. ORLANDO J. KING ET AL., DEFENDANTS IN ERROR.

FILED MARCH 21, 1894. NOS. 5496, 6000.

1. **Review:** PROCEEDINGS IN ERROR. The judgment of a district court, pronounced in an ordinary action at law, can only be reviewed in this court on a petition in error.
2. **Appeal:** REVIEW. An appeal from an order dismissing a suit in the nature of an equitable garnishment, brought to restrain the defendant from paying money to an alleged debtor of the appellant during the pendency of his suit at law against such debtor, will be dismissed without an examination on its merits, when it appears that appellant failed in his suit at law in the court below to establish his claim, and the judgment in such case has been affirmed by this court.

APPEAL AND ERROR from the district court of Cass county. Heard below before CHAPMAN, J.

*Blair & Goss*, for appellant and plaintiff in error.

*A. N. Sullivan* and *H. D. Travis, contra.*

RAGAN, C.

The Prentice Brownstone Company (hereinafter called the "Stone Company") brought a suit at law in the district court of Cass county against Orlando J. King and Erath & Thym, a copartnership. The Stone Company alleged as its cause of action against King that he had the contract for furnishing the material and building a court house for Cass county; that he sublet the contract to furnish the stone, and to do some stone work, to Erath &

Thym, and that they purchased stone of the Stone Company, and, on the 9th of October, 1891, was indebted to it $1,888; that on said date, by an agreement between all the parties to the suit, King agreed to pay to the Stone Company $1,500 out of the money owing to him by Cass county and charge the same to the account of Erath & Thym, and that he had refused to make such payment. The defense made by Erath & Thym and the case, so far as they are concerned, are immaterial here. King, by his answer in the suit, expressly denied the agreement to pay the Stone Company $1,500 or any other sum of money as pleaded by it; but alleged, in effect, that on the 9th day of October, 1891, that he promised the Stone Company that when he should have a settlement with Erath & Thym and when they should complete their contract with him, he would pay over to the Stone Company any balance that might be found owing to Erath & Thym. This case was tried to a jury and a verdict returned in favor of King, and judgment rendered on such verdict. The Stone Company filed in the district court a motion for a new trial on the 29th of September, 1892, and on the 17th of February, 1893, filed in this court a transcript of the record and a bill of exceptions in the case; but no petition in error has ever been filed here, and for that reason we do not know of what errors, if any, the Stone Company complains; and as the time has long since gone by when the Stone Company could file in this court a petition in error, the judgment of the district court must be affirmed.

The Stone Company on the same day that it brought the aforesaid action at law brought also a suit in equity in the district court of Cass county against Orlando J. King and the county officers of Cass county. In this petition the Stone Company alleged the indebtedness of King to it on the same contract and in the same manner as it alleged in its suit at law; and further alleged that the county of Cass was indebted to King in a larger sum than $1,500; the

pendency of its suit at law; and that King was insolvent, and prayed for an injunction restraining the county of Cass and its officers from paying King any sum of money whatever, and for a decree of the court compelling the county authorities of Cass county to pay what they owed King into court, to abide its further order. The district court, on a final hearing of this equity suit, dismissed the same and the Stone Company brought that case here on appeal. The two cases have been considered together. The suit in equity was in effect an equitable garnishment to reach money in the hands of Cass county owing by it to King. Since the Stone Company failed in the court below to establish that King was indebted to it, and that judgment has been affirmed, this court will not examine the appeal in equity on its merits; and the appeal in the equity case must therefore be dismissed.

JUDGMENT ACCORDINGLY.

POST, J., not sitting.

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## OMAHA SOUTHERN RAILWAY COMPANY V. LEVI G. TODD.

FILED MARCH 21, 1894. No. 5443.

1. **Change of Venue:** DISCRETION OF COURT. When it shall be made to appear to a district court that a fair and impartial trial of a cause cannot be had in the county where brought, then such court has not only the discretion, but it is its duty to send the case to some adjoining county for trial.
2. **Review of Order on Motion for Change of Venue.** The decision of a district court, made on conflicting evidence, that a fair and impartial trial of a case cannot be had in the county where brought because of the bias and prejudice existing in such county against one of the parties to such suit, will not be disturbed by this court, if supported by competent evidence.

3. **Eminent Domain:** DAMAGES. The damages to which a land-owner is entitled by reason of the construction of a railway across his farm are (1) the actual value of the land taken at the time of the taking, without diminution on account of any benefit or other set-off whatsoever; (2) the depreciation in value of the remainder of the farm, caused by the appropriation of a part thereof for railway purposes, and the construction and permanent operation and occupation of the railroad thereon, excluding general benefits.

4. ———: ———: EVIDENCE. In an inquiry whether, and how much, the part of a farm not taken for railroad right of way is depreciated in value by the appropriation of a part, evidence as to the size of the farm; the purpose for which it is used; the improvements thereon, and how located; the direction of the road across the farm; the cuts and fills made or to be made in the construction of the road; the width of the right of way; the height of embankments; the depth of ditches; the inconvenience in crossing the track from one part of the farm to another; the liability of stock being killed; the danger from fire from passing trains, are all facts competent for the jury's consideration in determining the depreciation in value of the remainder of the farm. (*St. Louis & S. E. R. Co. v. Teters*, 68 Ill., 144; Mills, Eminent Domain, secs. 162, 163, followed.)

5. ———: ———: ———. Where a number of tracts of land, as described by government surveys, are used together as one farm or body of land, in determining the owner's damage by reason of the location of a railway across one or more of the tracts the injury to the whole farm or body of land should be considered. (*Northeastern N. R. Co. v. Frazier*, 25 Neb., 42; *Robbins v. Milwaukee & H. R. Co.*, 6 Wis., 610, followed.)

6. ———: ———: ———. On the trial of an appeal from an award made by commissioners appointed to assess the damages sustained by a land-owner by reason of the appropriation of a part of his land for railroad purposes, evidence as to what such land-owner paid for the land is incompetent. (*Dietrichs v. Lincoln & Northwestern R. Co.*, 12 Neb., 225.)

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

The facts are stated in the opinion.

*M. L. Hayward* and *A. N. Sullivan*, for plaintiff in error:

One of the parties to a suit cannot appeal in his own behalf and ignore his associates. (*Wolf v. Murphy*, 21 Neb., 472; *Hendrickson v. Sullivan*, 28 Neb., 790; *Curten v. Atkinson*, 29 Neb., 612.)

The change of venue granted was an abuse of discretion prejudicial to the rights of plaintiff in error. (*Hudson v. Hanson*, 75 Ill., 198; *Moss v. Johnson*, 22 Ill., 640; *Kelly v. Downs*, 29 Ill., 74; *Northeastern N. R. Co. v. Frazier*, 25 Neb., 42.)

The court erred in refusing to strike out the answer of the witness in reference to the trouble with the connections to the spring of water. (*State Historical Association v. City of Lincoln*, 14 Neb., 336; *High v. Merchants Bank*, 6 Neb., 155; *Cropsey v. Averill*, 8 Neb., 151; *Dunbier v. Day*, 12 Neb., 596; *Harrison v. Baker*, 15 Neb., 43; *First Nat. Bank v. Carson*, 30 Neb., 108.)

The refusal to permit the land-owner to testify on cross-examination as to what he paid for the land in controversy, or a portion of it, was error. (*Kansas City, W. & N. W. R. Co. v. Fisher*, 30 Pac. Rep. [Kan.], 111.)

The circumstance that the live stock of the land-owner will be liable to injury from operating the road should not be considered. (*Pennsylvania & N. Y. R. & C. Co. v. Bunnell*, 81 Pa. St., 414; *Baltimore P. & C. R. Co. v. Lansing*, 52 Ind., 229; *Baltimore P. & C. R. Co. v. Johnson*, 59 Ind., 188; *Alabama & F. R. Co. v. Burkett*, 46 Ala., 569; *Fremont, E. & M. V. R. Co. v. Lamb*, 11 Neb., 592.)

It was error to refuse testimony to show that no farm such as that owned by plaintiff was ever sold in Cass county as high as thirty dollars per acre. (*Markell v. Moudy*, 13 Neb., 322.)

*E. H. Wooley* and *Beeson & Root, contra:*

Damages caused by the location of a railroad are to be considered as affecting the whole farm through which the road passes. (*Kremer v. Chicago & St. P. R. Co.*, 52 N. W.

Rep. [Minn.], 978; *Northeastern N. R. Co. v. Frazier*, 25 Neb., 42; *Wilmes v. Minnesota & N. W. R. Co.*, 13 N. W. Rep. [Minn.], 39; *Sheldon v. Minneapolis & St. L. R. Co.*, 13 N. W. Rep. [Minn.], 134; *Ham v. Wisconsin, I. & N. R. Co.*, 17 N. W. Rep. [Ia.], 157.)

The refusal to permit the land-owner to testify on cross-examination as to what he paid for a portion of the land in controversy was proper. (*Dietrichs v. Lincoln & N. R. Co.*, 12 Neb., 225.)

No testimony was introduced for the purpose of recovering damages in advance for stock that might be injured or killed on the road. The liability of stock to be killed would have a tendency to depreciate the value of the land. (*Burlington & M. R. R. Co. v. Schluntz*, 14 Neb., 421; *Blesch v. Chicago & N. W. R. Co.*, 48 Wis., 168.)

RAGAN, C.

The Omaha Southern Railway Company, by proceedings duly instituted for that purpose in the county court of Cass county, condemned a right of way across the farm of Levi G. Todd. From the award of damages made to him by the commissioners appointed in said condemnation proceedings Todd appealed to the district court of Cass county. On application of Todd that court granted a change of venue in the case and it was tried in the district court of Otoe county, where Todd recovered a judgment against the railway company for a greater sum than that awarded him by the commissioners in the condemnation proceedings. The railway company brings the case here for review, and assigns the following errors:

1. That Mrs. Levi G. Todd, the wife of the defendant in error, did not join with him in the appeal taken by him from the award of the commissioners to the district court. This is not one of the errors assigned in the petition in error filed herein and for that reason will not be further noticed.

2. That the district court of Cass county erred in grant-

ing the defendant in error a change of venue. Section 61 of the Code of Civil Procedure provides: "In all cases in which it shall be made to appear to the court that a fair and impartial trial cannot be had in the county where the suit is pending, * * * the court may, on application of either party, change the place of trial to some adjoining county," etc. Whether Todd, by reason of the bias and prejudice existing against him in Cass county, was unable to have a fair and impartial hearing of this case in Cass county was a question of fact for the determination of the judge who heard the application for a change of venue, and his finding on that question, like any other finding of fact, ought not to be disturbed by this court, if supported by competent evidence. If the statements made in the affidavits filed by Todd to obtain this change of venue were true, then there can be no question but that he was unable, by reason of the bias and prejudice existing against him in Cass county, to obtain a fair and impartial trial of this case therein. We certainly cannot say that the evidence offered for that purpose did not make it appear to the court that a fair and impartial trial of this case could not be had in Cass county. We do not think that the court was in error in granting the application to change the venue of this case, nor do we think that he abused his discretion. When it shall be made to appear to the court in which a case is pending that a fair and impartial trial cannot be had where the suit is pending, then the court has not only the discretion to send the case to some other county for trial, but it is its duty to do so.

3. That the defendant in error was permitted on the trial to testify as to the width of the right of way appropriated by the railway company through his farm. The defendant in error testified in his own behalf and had been describing to the jury the course of the railroad across his land saying, that the road ran straight from the point where it entered the land until it came near a spring on his land.

He was then asked this question: "How wide is the right of way there?" To which the railroad company objected as follows: "Objected to, as the condemnation proceedings will tell that." Overruled and exception taken. The reason assigned for the objection was of no force. Besides the testimony was competent. The damages to which a land-owner is entitled by reason of the construction of a railway across his farm are (1) the actual value of the land taken at the time of the taking, without diminution on account of any benefit, advantage, or other set-off whatsoever; (2) the depreciation in the value of the remainder of the tract of land caused by the appropriation of a part thereof for railway purposes, and the construction and permanent operation and occupation of the railroad thereon, excluding general benefits. (*Rockford, R. I. & St. L. R. Co. v. McKinley*, 64 Ill., 339; *Chicago, K. & N. R. R. Co. v. Wiebe*, 25 Neb., 542; *Robbins v. Milwaukee & H. R. Co.*, 6 Wis., 610; *Grand Rapids & I. R. Co. v. Horn*, 41 Ind., 479.) In an inquiry whether, and how much, the part of a farm not taken for railroad right of way is depreciated in value by the appropriation of a part, evidence as to the size of the farm; the purpose for which it is used; the improvements thereon, and how located; the direction of the road across the farm; the cuts and fills made or to be made in the construction of the road; the width of the right of way; the height of embankments; the depth of ditches; the inconvenience in crossing the track from one part of the farm to another; the liability of stock being killed, and danger from fire from passing trains, are all facts competent for the jury's consideration in determining the depreciation in value of the remainder of the farm. (*Omaha Southern R. Co. v. Beeson*, 36 Neb., 61.)

4. Because the defendant in error was permitted on the trial to answer the following question: "Is there any point north of your private crossing on your farm where

stock can cross the railroad?" For the reasons just stated there was no error in permitting this question to be answered. (Mills, Eminent Domain, sec. 162, and cases there cited.)

5. It appears from the evidence that there was a spring of water upon the farm of the defendant in error and he had, by means of pipes and a hydraulic ram, conducted the water from this spring to his feed lots; and that the railway company's right of way interfered with this spring or the flow of water from it to the feed lots of the defendant in error. On the trial the defendant in error testified that prior to the construction of the road there was sufficient water from the spring to run the hydraulic ram; that since the construction of the road the ram would only run about five or six hours, and then stop. He was then asked: "Then what is necessary to start it?" Answer: "If the piston stops up, the water will gradually run off, and when all is out it will pass down. If it happens to stop down, then you have to start it. It is very easily started, but sometimes takes four or five minutes." It is now insisted that the court erred in overruling the motion of the railway company to strike out the answer of the witness to the above question. We think the answer of the witness was not responsive to the question, but we are unable to see how the plaintiff in error was prejudiced by it.

6. The substance of the next error assigned is that on the trial the defendant in error was permitted to testify to the damages resulting to his entire farm through which the railroad was constructed, the contention of the plaintiff in error being that Todd's damages, outside of the value of the land actually taken, should have been confined to the tracts through which the road was constructed. In *Northeastern N. R. Co. v. Frazier*, 25 Neb., 42, it is said: "Where a number of tracts of land as described by the government surveys are used together as one farm or body of land, in determining the owner's damage, by reason of the location

of a railway across one or more of the tracts, the injury to the whole farm or body of land should be considered." We are entirely satisfied with the rule as laid down in that case and adhere to the same. (See, also, *Robbins v. Milwaukee & H. R. Co.*, 6 Wis., 610; Mills, Eminent Domain, sec. 166, and cases there cited.)

7. The next error assigned is the refusal of the court to permit the defendant in error to testify on cross-examination what he paid for a portion of the land across which the road was constructed. It is to be said of this assignment (1) that the defendant in error, on his cross-examination, testified that he paid $5,500 for the piece of land inquired about, containing two hundred acres; (2) that the question propounded to the defendant in error on cross-examination, viz., "State to the jury what you paid for that quarter," was incompetent, and the court did not err in refusing to permit it to be answered. (*Dietrichs v. Lincoln N. R. Co.*, 12 Neb., 225.)

8. The next error relates to some testimony given by a witness named Foster. He was a carpenter and had testified that he had built some barns on Todd's farm, and had also testified as to the value of the buildings on the farm. He was then asked: "What are they [the buildings] worth to the farm?" Counsel for the railroad company to this question said: "We object to that form of question." Witness answered. The ruling of the court in permitting this question to be answered is the next error assigned. It will be observed that the objection was not made that the question called for incompetent, immaterial, or irrelevant evidence. The objection was simply to the form of the question. The objection was unavailing.

9. The next error assigned is as follows: "The court erred in permitting the witness Stein to testify as to the liability of stock being injured." Stein testified in chief that he was acquainted with the value of Todd's farm; that it was worth $50 an acre before the location of the

road across it, and that it was worth $40 an acre immediately after the location of the road across the farm. He was then turned over for cross-examination to the railway company's attorneys and was asked:

Q. You base the value of that land as a stock farm upon the water privileges?

A. Yes, sir; I do.

Q. You base adversely upon the loss of that privilege?

A. Yes, sir.

On redirect examination he was then asked:

Q. Is there anything else you base it on?

A. Yes, sir.

Q. What is it?

A. Opening gates.

Q. State if there is any danger to stock.

A. I think so.

Q. I will ask you whether the liability of stock getting injured on the road affects the value of the land?

This was objected to as incompetent, the objection being overruled and the railway company took an exception.

The witness was then asked by counsel for the railway company this question:

Q. How much would you say that farm was depreciated by reason of danger to the stock?

A. About ten dollars an acre less.

It will be observed that the question objected to was whether the witness considered the liability of stock being killed by the railroad affected the value of the farm. There was no error in permitting that question to be answered.

In *St. Louis & S. E. R. Co. v. Teeters*, 68 Ill., 144, it is said: "As the design of the law is to fully compensate a party for all injury he may sustain by reason of the appropriation of his land for railroad purposes, and which shall grow out of, or be occasioned by, the location and use of the road, evidence as to the danger of killing stock and

the danger of the escape by fire by reason of the construction of the road is proper to be considered by the jury." The question being tried was whether the farm was depreciated in value by reason of the location of the road across it, and everything which tended to show that the continuing presence and operation of the road across the farm tended to make it more valuable was competent, and everything which tended to show that the continuing presence and operation of the road across the farm depreciated its market value was competent. The object of the question objected to was not to show the value of the stock that might be killed or injured and have the value of such stock added to the damages of the defendant in error in this case, but the object of this evidence and of all such evidence in such cases is to show that the liability of such a thing happening as the killing of stock or the setting of fire tend to depreciate the market value of the real estate crossed by the railway.

10. A witness named Wolf testified on the trial in behalf of the defendant in error and was cross-examined by counsel for the railway company and was asked:

Q. Have you ever known of any improved farm having been sold in Cass county of 540 acres?

A. Yes, sir; I have.

Q. Whose was it?

A. I forget his name; I think he was a Canadian.

Q. Where was it?

A. South of Weeping Water.

Q. Is not it a fact that was bought for less than a quarter section were being sold for on account of the large quantities being bought at once?

This question was objected to, as incompetent and irrelevant and the objection sustained, and the railway company excepted. Counsel for the railway company then made this offer: "Defendant offers to prove by this witness that no farm in the condition of plaintiff's has ever been sold for

as high as $30 an acre in Cass county." The offer was objected to and the objection sustained. The railway company now alleges that the trial court erred in refusing to permit the question last above quoted to be answered and refusing the offer of proof. As to the question, the court did not err in refusing to permit it to be answered, as it was and is absolutely unintelligible. Neither was the ruling of the court erroneous in excluding the offer made by the railway company. If counsel thought that the evidence embraced in their offer was material and competent and that the witness on the stand would give such testimony they should have asked him the question.

11. The final error alleged relates to the instructions of the trial court; but this error is simply a criticism upon the instructions. The instructions were correct in every particular. There is no error in the judgment sought to be reversed, and the same is in all things

AFFIRMED.

POST, J., not sitting.

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## WILLIAM NOSTRUM V. ANDREW S. HALLIDAY.

FILED MARCH 21, 1894. No. 5604.

1. **Agency:** EVIDENCE. While evidence of the acts or declarations of a person alleged to be an agent is not admissible for the purpose of establishing the agency, the testimony of such person, if not otherwise incompetent, is admissible for that purpose.
2. **Vendor and Vendee:** STATEMENT AS TO VALUE OF LAND: RESCISSION. As a general rule, a statement by a vendor or his agent in regard to the value of land is merely the expression of an opinion and not a representation of a fact upon the falsity of which an action to rescind may be based.

3. **Action to Rescind Contract of Sale:** EVIDENCE. In an action to rescind a contract where the above general rule is applicable, evidence of the actual value of the land is immaterial.

4. ———: FALSE REPRESENTATIONS: EVIDENCE: PLATS. In an action to rescind a conveyance of land on the ground of false representations in regard to its character some of the representations relied upon were contained in a plat submitted to the vendee. There was evidence tending to show that the plat had been lost, but another plat was admitted in evidence upon proof by a witness that it was a copy to the best of his knowledge; that he thought his wife made it because it looked like her writing, but did not know who made it or under what circumstances, and he had not compared it with the original. *Held*, That this evidence was insufficient to prove that the plat offered was a copy of the original and that its admission was erroneous.

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

*E. E. McGintie* and *Robert Ryan*, for plaintiff in error.

*F. I. Foss* and *Palmer & Hendee, contra.*

IRVINE, C.

Prior to the 25th day of September, 1891, Andrew S. Halliday was the owner of the furniture and other personal property in a hotel at Friend, and William Nostrum was the owner of the northwest quarter of section 4, township 3, range 14, in Franklin county. On that day an exchange was effected whereby Halliday took the land in exchange for the hotel property. In November of the same year this action was instituted by Halliday before a justice of the peace in replevin and the hotel property seized under the writ and delivered to Halliday. The appraised value of the property being in excess of the jurisdiction of a justice of the peace, the case was certified to the district court of Saline county and there tried. The result was a verdict and judgment for the plaintiff Halliday.

The theory of Halliday's case was that he had been induced to make the exchange by false representations in regard to the land, and the action was in effect one at law for the rescission of the contract. It is somewhat difficult from the record to analyze the case, the absence of formal pleadings being probably sufficient to explain the difficulty. The only representation it is claimed Nostrum made in regard to the land is that it had cost him $2,800, and there is not a syllable of evidence tending to show that this representation was false. It is claimed, however, that one Davis was the agent of Nostrum in making the exchange, and that Davis made certain representations through letters passing chiefly between Davis and one Moeller, the agent of Halliday. The first point in controversy is in regard to Davis' agency, the question being raised upon assignments of error relating to the admissibility of the letters referred to. When these letters were offered and the objections made there was really no evidence sufficient to warrant a finding as to the existence of such agency. All that was made to appear by the plaintiff's testimony was the fact that Davis had acted in conducting the negotiations, and had introduced the principals who had completed the negotiations between themselves; and further, that after the transaction Nostrum had denied making any representations, to which Halliday made answer that Nostrum's agent, Davis, had done so, to which Nostrum replied that Davis was not his agent at the time the trade was made; that he had been prior to that time, but they had settled their affairs. There is also the testimony of Mr. Moeller, at first that Nostrum had told him that Davis was his agent, but upon further inquiry he states that all that Nostrum said was that if Moeller wished to correspond with Nostrum, Davis would know where to find him. It needs no argument to prove that this evidence was insufficient to establish an agency. All that it tends to show is that Davis was instrumental in bringing the parties to-

gether, but at whose instance and upon what authority, or whether upon any authority, does not appear. But Davis himself was called as a witness and stated that he was partly instrumental in bringing the parties together; that he introduced them; and on cross-examination he was asked if Nostrum had left him this land to trade. His answer was, "not especially;" that he and Nostrum "frequently had deals;" that they were both in the same business and helped one another to get trades; that he "was acting in the capacity of his copartner, not as his agent;" and that he was to get a commission if the trade went through. We think this was sufficient to justify the jury in finding that there existed some general authority from Nostrum to Davis to assist in making such trades and justified the court in leaving to the jury the question of agency.

In this connection our attention is called to the case of *Stoll v. Sheldon*, 13 Neb., 207. That case simply holds that an attorney at law, by virtue of his employment to make collections, has no authority to release a surety upon a promissory note; but in the opinion the case of *Graul v. Strutzel*, 53 Ia., 712, is cited as holding that an agent's authority cannot be shown by his own testimony. This was evidently a careless use of language by the court, for what *Graul v. Strutzel* decides is the familiar proposition that an agent's authority cannot be proved by the declarations of the agent, and that was the only question pertinent to the decision of *Stoll v. Sheldon*. The testimony of the agent, where not upon other grounds incompetent, is admissible to prove his authority, but his mere acts or declarations, not brought home to the principal, or ratified by the principal, are not admissible. As nearly as can be gathered, in the absence of formal pleadings of fraud, the representations relied upon as having been made by Davis are as follows: That the Franklin county land was worth $20 per acre; that the buildings were good, the land principally table land, smooth, with living water upon it, making a

good farm; that a large portion of the land was cultivated, and that the land had improvements in the nature of a house, a barn, a windmill, and a tank. There is sufficient evidence to justify the jury in finding that most of these representations, if made, were false.

Certain depositions were offered in evidence containing testimony as to the actual value of the land, the witnesses swearing that the land was worth about $5 per acre. This testimony was all received against Nostrum's objections, and its admission is assigned as error. We think that its admission was erroneous, and prejudicially so. While this was an action at law, its object was simply a rescission of the contract and not the recovery of damages; therefore, the question of value was immaterial. It is true that there was evidence that Davis had represented that the land was worth $20 per acre, but as a general rule a representation of this character upon the part of a vendor or his agent is merely an expression of opinion and cannot be made the basis of an action to rescind upon the ground of false representations. There is nothing in this case to create an exception to the rule. It was not pretended that Nostrum or Davis had any particular knowledge in regard to the value, or that the situation was such that Halliday was compelled to rely, or justified in relying, upon their opinion.

In one of Davis' letters to Moeller, offered in evidence, he states that he inclosed a description of the land. Moeller testifies that a plat was enclosed in the letter. A plat was received in evidence over Nostrum's objections, but it is admitted that this was not the original plat inclosed in the letter. Moeller testifies that he showed the plat to Halliday and that he afterwards lost it. The proof of the loss is not very satisfactory, but it was probably sufficient to justify the court in admitting secondary evidence. But there was not sufficient proof to justify the reception of the plat offered as such secondary evidence. Moeller says that

it is an exact copy, to the best of his knowledge. He cannot tell who made it. He did not compare it with the original; it looks like the original. He thinks his wife copied it because it looks like her writing. This is substantially all upon the subject. It will be observed that it was not shown that the plat was a copy, the person who made it was not produced, and the witness by whom it was proved did not know with certainty who made it or under what circumstances, and did not pretend to say that it was a copy, but merely that it looked like the original plat.

This plat was very material. One of the principal questions in controversy was as to the character of the land and the extent of the cultivated portion. The only representations upon this subject are found upon the plat introduced. Another of the representations counted upon was the existence of a windmill. The only representation as to this windmill is found upon this plat. A witness testified to a creek cutting through the land, in many places making deep depressions and rendering the surface uneven and broken. Except as to the general statement in one of the letters that the land was smooth and mostly table land, the only representation upon this subject is upon the plat, which shows only a creek passing through the southeast corner of the quarter section. We think the admission of this plat was erroneous.

Halliday testifies he discovered the fraud within a very few days after the completion of the contract, and complained of it to Nostrum. An agreement was entered into in writing on October 5, 1891, whereby Halliday was given the privilege of exchanging the Franklin county land before January 1, 1892, for any such lands or city property as Nostrum might own at the time of the agreement or at the time the exchange might be made, to the amount of $2,300. The effect of this agreement is the subject of much argument. No method was pointed out for selecting the land in exchange or determining its value. But the question of

its validity as an enforceable agreement would probably be not very material, as there is at least a strong foundation for argument upon the ground that it constituted an election on the part of Halliday to abide by the contract and retain the land for the purpose of making the exchange contemplated by the subsequent agreement. We find no assignment of error, however, sufficient to raise this question. No instructions were given upon the subject, but none was requested by either party, and it is not assigned as error that the verdict was not sustained by sufficient evidence or that it was contrary to law.

The sufficiency of the evidence as to Halliday's reliance upon the representations of Davis might also be commented upon had it been sufficiently assigned. The point is argued upon an instruction which omitted this element, but the instruction complained of did not purport to state all the elements necessary for a recovery. It only defined what was necessary in order to constitute a fraudulent misrepresentation, and the following instruction distinctly told the jury that in order to sustain the action the person to whom the representation was made must believe it to be true and act upon the faith of it.

For the errors in the admission of evidence the judgment is

REVERSED.

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

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## YORK PARK BUILDING ASSOCIATION v. JOHN W. BARNES.

FILED MARCH 21, 1894. No. 4946.

1. **Failure to Instruct Jury:** NEW TRIAL. It is the duty of the trial judge to instruct the jury upon the law of the case, whether requested by counsel to do so or not, and where the

judge has failed to instruct the jury, and it is apparent from the record that the jury probably took a wrong view of the law, a new trial will be awarded.

2. **Corporations.** A corporation which has for its object the purchase of land and the construction of houses thereon (the funds being realized from the capital stock paid in by subscribers in installments), and finally the allotment of the lots and houses among the stockholders in satisfaction of their stock, is one organized for the purpose of carrying on a lawful business and authorized by the general incorporation law.

3. **Pleading:** CONTRACTS. In pleading a contract which need not by common law be in writing, but where a writing is required by a positive statute, it is not necessary to plead that the contract was written, at least where no objection is made by motion to the certainty of the pleading.

4. **Corporations:** SUBSCRIPTIONS: ESTOPPEL. One to whom stock in a corporation is issued, who pays assessments on such stock, acts as an officer of the corporation and takes part in its management, is estopped to deny his subscription.

5. **Contracts:** SUBSCRIPTIONS: STOCK. An agreement made between promoters of a corporation and a subscriber to its stock, that such subscriber is to have the stock for the sake of the influence of his name, and that he will not be required to pay his subscription therefor, is void, and the corporation may enforce payment of such subscription, notwithstanding such agreement.

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

*Sedgwick & Power*, for plaintiff in error.

*George B. France, contra.*

IRVINE, C.

This was an action by the plaintiff in error against the defendant in error to recover on a stock subscription. In instructing the jury the court in the first place stated at considerable length the issues raised by the pleadings and submitted the pleadings to the jury with the instructions. The court next stated to the jury that the plaintiff, in or-

der to recover, must establish the material allegations of its petition by a preponderance of evidence. Then an instruction was given as to what constituted a preponderance of evidence, and this was followed by the usual instruction submitting to the jury the credibility of witnesses and the weight to be attached to evidence. No other instructions were given. One of the assignments in the motion for a new trial and the petition in error is that the court erred in not instructing the jury as to the law of the case.

In *Sandwich Mfg. Co. v. Shiley*, 15 Neb., 109, it was said: "It is undoubtedly the duty of the judge presiding at a trial to instruct the jury upon the law of the case which is to be observed by them, and should a case arise in which it shall appear from the record that the jury has taken a wrong view of the law applicable to the case, and where the judge has failed to instruct them, whether requested by counsel or not, this court would not hesitate to grant a new trial." The same principle was substantially announced in *Aultman v. Martin*, 37 Neb., 827. An entire failure to instruct the jury in regard to the law of the case is very different from an omission to instruct in regard to some particular phase of the case or some particular question arising upon the trial. In the latter case a proper instruction upon the subject must be requested before error can be predicated upon a failure to instruct; but the law imposes upon the court the duty of stating to the jury the law applicable to the case, and an entire failure to state the law to the jury has the effect of submitting to the jury the determination not only of facts but of the law. In this case there was a total failure to instruct the jury upon the law of the case. This would not be prejudicially erroneous if it were apparent that the jury had come to a correct conclusion. (*Sandwich Mfg. Co. v. Shiley, supra.*) But the error is prejudicial if it is apparent that the jury has taken a wrong view of the law. We must, therefore, examine the record in order to determine that question.

The petition alleges the corporate existence of the plaintiff since August 6, 1887, and the articles of incorporation and by-laws are made a part of the petition. It then alleges that on the 3d day of August, 1887, the entire amount of capital stock was subscribed; that the defendant subscribed for one share thereof and paid upon said share the sum of $108.65. The petition then alleges that further payments to the amount of $190 are due and unpaid, and that in addition thereto the defendant is indebted upon his share for certain fines, interest, and penalties.

The answer is quite long. In effect, it denies the corporate existence of the plaintiff; denies the power of the plaintiff to make assessments or impose fines; it alleges that, at the time of the pretended incorporation of the plaintiff, its officers and stockholders represented to the defendant that they would put one share of stock in his name for the sake of his influence, and that he should not at any time be required to pay therefor; that it was represented to him that street cars should be run through the property owned by plaintiff near defendant's residence, and that commodious and beautiful residences would be built near defendant's property, and that such promises had not been fulfilled. The defendant further alleged that he had acted as president of such pretended incorporation for one year, and that his services in that behalf were worth $1,000, for which he asks judgment. It was further averred that defendant had never at any time subscribed for stock of the plaintiff, but simply permitted, under the circumstances stated, stock to be placed in his name. It was also averred that sufficient stock was never subscribed to complete the organization of the plaintiff. The action was originally begun in the county court, and the answer asserts that that court had no jurisdiction of the subject-matter.

The plaintiff, in reply, in effect denies the allegations of new matter in the answer, and in addition to that denial avers that the defendant had acted as a stockholder in the

corporation and acted as president thereof; had paid for some time his assessments and dues, and as president had executed evidences of indebtedness on behalf of the corporation, and generally held himself out as a stockholder. The reply further denies that as president or other officer of the corporation the defendant was entitled to any salary for his services.

The defendant asserts that the petition does not state a cause of action. If this were so, of course the judgment in favor of the defendant would not be reversed; but we think a cause of action is stated. Upon this point the defendant urges illegality of the incorporation. There is good authority for holding that one who subscribes for stock in a corporation, acts as an officer thereof, and takes part in its management, cannot dispute the validity of the corporation. (*Phœnix Warehousing Co. v. Badger*, 67 N. Y., 294.) But the question raised in argument upon this point does not relate to any irregularity in the proceedings, but is directed to the point that the corporation was not for a legal object. While the name adopted by the corporation is one of the distinctive terms used in the act relating to building and loan associations (Session Laws, 1891, ch. 14), and while the use of such a name is forbidden to corporations not complying with that act, that prohibition applies only to corporations organized after the adoption of the act of 1891. This corporation was organized in 1887. It is not a building association, or building and loan association, as those terms are used in the recent statutes. Its objects, as stated in its articles of incorporation, are to buy and sell real estate, to purchase or erect buildings and to rent or sell the same, to sell its property, to borrow money and to give mortgages to secure the payment thereof. A further inspection of the articles shows that the specific purpose was, in effect, a scheme of co-operation whereby the stockholders, by obtaining the rights and assuming the duties of a corporation, obtained for that corporation a tract

of land subdivided into lots, erected houses upon these lots, provided for the payment of the stock in monthly installments, and finally provided for the allotment of the lots and lands among the stockholders in discharge and satisfaction of the stock. The general corporation laws, chapter 16, Compiled Statutes, section 123, permit any number of persons to become incorporated for the transaction of any lawful business. The business as outlined by the articles of incorporation is certainly lawful, and we cannot see any force to the argument that the formation of the corporation was not authorized by the law of the state.

It is next asserted that the petition does not allege any subscription in writing to the stock. By the more recent authorities a subscription in writing is not necessary (Cook, Stock & Stockholders, sec. 52); but if a writing were required, it would be only because of the statute of frauds and not upon any principle of the common law. In such a case it need not be pleaded that the agreement was in writing, at least when the question is raised after verdict and judgment. (*Schmid v. Schmid*, 37 Neb., 629.)

It is next asserted that the petition does not specifically allege that the entire capital stock had been subscribed. The petition does allege that on the 3d day of August, 1887, the entire amount of the capital stock required by the articles of organization was subscribed. This is a sufficient averment, at least, unless objection be made by motion as to its certainty.

Possibly the denial of the jurisdiction of the county court demands consideration. This contention seems to be based upon the proposition that the action relates to real estate. Upon this subject the law only denies to the county court jurisdiction in actions upon contracts for the sale of real estate, in matters wherein the title or boundaries of land may be disputed, and to order or decree the sale or partition of real estate. (Comp. Stats., ch. 20, sec. 2.) This case does not fall within any of these classes.

The mere fact that the corporation had for its object transactions in real estate makes the subscription for its stock none the less personal in its character.

Subscription to the stock was denied. There was evidence tending to show that the original subscription book had been destroyed by fire and it did not appear that the defendant ever had in his manual possession a certificate of stock, but it did appear that he authorized a share to be issued to him; that a certificate had actually been issued; that only stockholders were eligible to office; that he was, upon the organization of the company, elected its president and served for a long time in that capacity, and that he had paid a number of installments upon a share of stock. This was sufficient to charge him as a subscriber, and he was estopped to deny his subscription. (*Sanger v. Upton*, 91 U. S., 56.)

There was considerable evidence upon the issue raised by the answer as to the agreement made by promoters of the corporation that the defendant should never be required to pay. Such an agreement is void. To permit its enforcement would operate as a fraud upon the other stockholders subscribing upon the faith of the defendant's subscription, as well as upon the creditors of the corporation. The following cases, while not all precisely in point, firmly establish this principle: *Downie v. White*, 12 Wis., 195; *Bates v. Lewis*, 3 O. St., 459; *Wetherbee v. Baker*, 35 N. J. Eq., 501; *Phœnix Warehousing Co. v. Badger*, 67 N. Y., 294; *Mann v. Cooke*, 20 Conn., 178; *Upton v. Tribilcock*, 91 U. S., 45; *Connecticut & P. R. R. Co. v. Bailey*, 24 Vt., 465.

All these issues were stated to the jury in form of an abstract of the pleadings without stating any of the principles of law governing their determination. Some of them, as a matter of law, should have been withdrawn from the jury; all of them involved questions of law which under the charge the jury was permitted to deter-

mine. Upon a review of the whole case we are satisfied not only that the jury may have taken a wrong view of the law, but that in all probability it did so. Under these circumstances the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

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## G. C. ST. JOHN v. H. F. SWANBACK.

FILED MARCH 21, 1894. No. 5365.

1. **Replevin.** The plaintiff in replevin must recover on the strength of his own title or right of possession, and not on the weakness of his adversary's.

2. ———: EVIDENCE: REVIEW. Where, in replevin, there is a general denial and there is not evidence sufficient to show title or right of possession in the plaintiff, a judgment for the defendant will be affirmed, without considering errors in the admission of defendant's testimony or in the instructions relating to the right to recover.

3. ———: ———: DAMAGES: REMITTITUR. A replevied from B a buggy which B, as constable, had seized under an execution against C. The execution amounted to something over $10. The admitted value of the buggy was $150, and no damages were proved on behalf of defendant. The jury returned a verdict for the defendant, assessing the value of his possession at $150, and his damages at $10. The defendant remitted $150 from the verdict, and judgment was entered for $10. *Held*, That the remittitur cured the errors in the assessment of the amount of recovery.

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

*C. S. Polk*, *E. H. Wooley*, and *Mockett, Rainbolt & Polk*, for plaintiff in error.

*A. N. Sullivan, contra.*

IRVINE, C.

The defendant in error, a constable, levied upon a buggy as the property of one Baird. St. John replevied it. The theory of the plaintiff was that Baird had borrowed the buggy from plaintiff for the purpose of driving from Lincoln to Greenwood, in Cass county, and that it had been seized in Greenwood as Baird's property, when in fact it belonged to St. John. An answer containing a general denial was filed. The jury in the district court found a verdict in favor of the defendant, assessing the value of his possession at $150, and his damages at $10. The judgment under which the levy was made was $6.10, together with costs, taxed at $3.15. There were constable's fees upon the execution amounting to $1. The district court overruled a motion for a new trial upon the defendant's filing a remittitur for $150, and rendered judgment for the defendant for $10.

Numerous errors are assigned, but it will not be necessary to consider many of them. The proof wholly fails to show any ownership in St. John. St. John was not a witness. His whereabouts was apparently unknown to his attorneys at the time of the trial. Baird was not a witness. The only evidence directed in any degree towards proof of ownership in St. John was that of J. Cline and A. B. Cline. The former testifies that he owned a livery stable in Lincoln, and that St. John had a buggy which he kept at the stable, and that this was the buggy which Baird drove to Greenwood. But on cross-examination it appears that Baird had charge of the stable and that Cline knew nothing as to the ownership of this buggy, except that he had seen St. John's name in the books of the stable. A. B. Cline testifies that he was employed about the stable; that he knew St. John by sight, and had seen St. John drive into the stable with the buggy. This was all he knew. This was entirely insufficient to warrant

the jury in finding that St. John was the owner, and in any view of the evidence the defendant was entitled to a verdict. The plaintiff in replevin must recover on the strength of his own title, and the court would have been warranted in directing a verdict for the defendant. Any errors in the admission of defendant's evidence or in the instructions are, therefore, without prejudice.

It is said that there was prejudicial error in instructing the jury that if it found for the defendant it should find the value of the property at $150. This error was cured by the remittitur entered. There was no foundation for any verdict for substantial damages in favor of the defendant, and the verdict was in that respect erroneous. But the value of defendant's possession was shown by the execution to be at least $10, so that when a remittitur was filed for $150, and judgment entered for only $10, these errors were cured.

JUDGMENT AFFIRMED.

POST, J., not sitting.

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## SUSAN B. MYERS ET AL. V. ALEXANDER MCGAVOCK ET AL.

FILED MARCH 22, 1894. No. 5059.

1. **Guardian and Ward:** SALE OF MINORS' LAND: VALIDITY OF PROCEEDINGS: COLLATERAL ATTACK: RES ADJUDICATA. A sale and conveyance of the real estate of certain minors, made by their guardian in pursuance of a license of a district court of this state granted therefor, examined, and *held*, that such sale and conveyance would not be held void in this, a collateral proceeding, because (1) it appears that at the time such guardian made application to the district court for a license to sell the real estate of his wards they resided in the state of Illinois, and the guardian held his appointment from a court in the state of

Iowa, it appearing that at the time said guardian was appointed by the Iowa court his wards resided in that state; nor because (2) said wards took up their residence in the state of Illinois after the appointment of their guardian in the state of Iowa, as their change of domicile did not deprive said guardian of control over them or their property; nor did the residence of said wards in the state of Illinois, at the time the guardian made the application to sell, preclude the jurisdiction of the district court; nor because (3) the authenticated copy of the letters of guardianship, filed in said district court, did not contain the certificate of a judge or presiding magistrate of the Iowa court that the certificate and attestation of the clerk of the Iowa court, attached to said copy of letters of guardianship, was in due form of law; as the question whether the certified copy of the guardian's appointment was the best evidence, or competent evidence, was one for the district court hearing the application for license, and it was for that court to say whether it was satisfied with the evidence offered to prove that the guardian was the duly appointed, qualified, and acting guardian of the heirs whose real estate he had made application to sell; and the finding and judgment of a court cannot be successfully assailed as void, in a collateral proceeding, because such court made such finding or rendered such judgment on incompetent evidence (*Menage v. Jones*, 40 Minn., 254, followed); nor because (4) the petition for license to sell the real estate was not verified by the guardian, as this did not affect the jurisdiction of the district court, nor render its proceedings void; nor because (5) the verification of the petition for license was made by the guardian's attorney who conducted the proceedings (*Ellsworth v. Hall*, 48 Mich., 407, followed); nor because (6) the bond given by the guardian to the judge of the district court was not formally approved by him (*Emery v. Vroman*, 19 Wis., 724, and *Pursley v. Hayes*, 22 Ia., 11, followed); nor because (7) the record of the proceedings on which the guardian's sale was based contained no copy of a notice of the sale posted in three of the most public places in the county in which said sale was held, as the district court which licensed the sale, in its order confirming the same, made a finding that the proceedings of the guardian in making the sale had been in all respects regular and in conformity to law, and this court would presume that the district court had before it sufficient evidence on which to base such finding; nor because (8) the sale was not made by the guardian personally, but through his attorney who conducted the proceedings in court; nor because (9) the property sold and conveyed by the guardian was described as "the N. E. two-thirds ($\frac{2}{3}$) of lot eight (8) in block two hun-

dred and three (203), in the city of Omaha, being all that portion of said lot not belonging to the Union Pacific Railway Company," as this description was sufficient to enable the property to be identified, and therefore not void for uncertainty.

2. **Ejectment:** EVIDENCE. In an ejectment suit, where the defendant claims title by virtue of a guardian's sale and conveyance, the fact of the approval of the bond by the judge of the court granting the guardian a license to sell, like any other fact, may be proved by the best evidence attainable.

3. **Guardian and Ward:** POWER OF GUARDIAN: COURTS. The authority of a guardian to sell the real estate of his wards for any purpose must be found in the statute, and our laws confer no authority on a natural guardian, as such, to dispose of the real estate of his wards; and no district court has jurisdiction to authorize a natural guardian, as such, to sell the real estate of his wards. The only guardian a district court has jurisdiction to license to sell the property of his wards is a guardian appointed and commissioned by a court having authority to appoint guardians; and it must appear that such guardian had accepted such appointment, had qualified, and was acting.

4. **A natural guardian may become the legal guardian** of his wards, but in order to become such he must be appointed by the proper authority, accept such appointment, and qualify as such legal guardian.

5. **An application by a guardian for license to sell the real estate of his wards** for their maintenance and education is a proceeding *in rem*,—one instituted by their guardian for their benefit. It is, in effect, the application of the wards. It is not a proceeding adversary to them; and notice to them of such application is not essential to the jurisdiction of the district court to grant the license. *Mohr v. Manierre*, 101 U. S., 417; *Scarf v. Aldrich*, 32 Pac. Rep. [Cal.], 324; *Mohr v. Porter*, 51 Wis., 487, followed.

6. **Guardians:** BONDS: DUTY OF COURTS. The statutes of this state require courts having authority to appoint guardians to see to it that the persons so appointed are capable and honest; that they give and keep good the bonds required by the statute for the faithful execution of their trust; and render to the court, at frequent intervals, accounts of their guardianship.

7. **Sale of Ward's Land:** LICENSE: DISTRICT COURTS. The law has conferred on the district judges in the first instance the exclusive power to say whether the facts exist which justify the sale of a ward's property by his guardian; to say whether, in the

judgment of the court, the sale asked to be authorized is for the best interests of the ward; and this authority should not be exercised by the district judges as a matter of course, but only after investigation and inquiry into all the facts, and not then unless the judge is convinced that such sale is a necessity or is for the best interests of the ward.

8. ———: NOTICE TO WARD. It seems that notice to the wards of an application made by their guardian for the sale of their real estate to pay debts is essential to the jurisdiction of the district court to license such sale; and that a guardian's sale and conveyance of the real estate of his wards for such purpose without such notice is void. (*Mickel v. Hicks*, 19 Kan., 578.)

9. ———: NOTICE. The provisions of section 109, chapter 23, Compiled Statutes, 1893, are not applicable to a proceeding instituted by a guardian of minors for a license to sell their real estate for their education and maintenance. The meaning of said section is that when any person other than the minors—such as an insane person, an idiot, a spendthrift, or a drunkard—shall be under guardianship, and an application shall be made by such person's conservator or guardian for license to sell his real estate, then the heirs presumptive, that is, all such persons as would inherit such person's property, should he die immediately, shall be deemed interested in the estate, and notice of the application shall be served upon them.

10. ———: APPLICATION FOR LICENSE: APPEARANCES. Where an application was made by a guardian of minors to sell their real estate and the mother and an adult brother of such minors entered their appearance in said proceeding and consented that the license to make such sale might be granted as prayed, *held*, that the interest of said widow and adult son in said real estate was not therefore divested by the sale and conveyance of the real estate made by said guardian in virtue of said proceeding.

11. ———: PURCHASERS: ADVERSE POSSESSION: LIMITATION OF ACTIONS. But where such proceedings purported to dispose of the interest of the adult parties and the purchaser entered into exclusive possession, such proceedings and entry operated as an ouster of such adults, and such possession being adverse and continuing for the statutory period divested the adults' title.

12. A conveyance of real estate made to a railway corporation chartered by an act of congress, which, under our constitution, is incompetent to take title, is not void, but only voidable. The title of such corporation to such real estate is valid against every one but the state, and can be divested only

in proceedings brought by the state for that purpose. *Carlow v. Aultman*, 28 Neb., 672, followed.

13. **Corporations:** ADVERSE POSSESSION: TITLE. Where a corporation, chartered by an act of congress, and incompetent by reason of our constitution to acquire title to real estate in this state, has been in open, notorious, exclusive, and adverse possession of real estate under a claim of title for ten years, such corporation has a valid title to such real estate, as against all persons, except the state of Nebraska.

14. **Statute of Limitations:** CORPORATIONS. Where the statute of limitations has begun to run against the owners of real estate in the adverse possession of another, a conveyance and delivery of possession of such real estate by such adverse occupier thereof to one incompetent to take title to such real estate will not arrest the running of the statute of limitations against such owners.

15. **Statutes:** CONSTRUCTION. The rule that the legislature, by adopting the statute of another state, thereby adopts the construction placed on said statute by the highest court of that state, does not apply when such construction was not placed on said statute until after its adoption.

16. **Railroad Companies.** The provisions of chapter 16, Compiled Statutes, 1893, in so far as they are applicable, apply to all railroad corporations operating roads in this state, whether domestic or foreign corporations.

17. **Railroad Companies:** EASEMENTS: VALIDITY OF SETTLEMENT WITH GUARDIAN. In 1871 the Union Pacific Railway Company, a corporation chartered by act of congress, was operating its railroad in this state, and acquired the right to occupy, for depot purposes, certain real estate, the property of minor heirs, by making settlement with, and receiving a release and discharge from, the legal guardian of said minors for the damages sustained by them by reason of said occupation of their real estate. *Held*, That neither the constitution, nor any law in force at that time, prohibited such corporation from building and operating its road in this state, and that such settlement made with said guardian and release and discharge executed by him in pursuance of said settlement were valid, and vested in said corporation a perpetual easement in said real estate.

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

The facts are stated in the opinion.

*Guy R. C. Read* and *William D. Beckett*, for plaintiffs in error:

The statute of limitations had not run against the action. (*State v. Scott*, 22 Neb., 628; *Trester v. Missouri P. R. Co.*, 23 Neb., 242; *Koenig v. Chicago, B. & Q. R. Co.*, 27 Neb., 699; *Parker v. Starr*, 21 Neb., 680; *McCann v. McLennan*, 2 Neb., 289; *People v. Gosper*, 3 Neb., 310; *Albertson v. State*, 9 Neb., 437; Angell, Limitations; secs. 204, 246; *Murray v. Baker*, 3 Wheat. [U. S.], 541, *Ruggles v. Keeler*, 3 Johns. [N. Y.], 264; *Erskine v. Messicar*, 27 Mich., 84.)

The guardian who made the sale was not the guardian of the persons of the minors, but only for their property in the state of Iowa, and he was not authorized to make an application to sell their property in this state. The guardian's sale and deed were void. (Secs. 58, 110, ch. 17, Gen. Stats., 1873; Freeman, Void Judical Sales, sec. 10; *Bell v. Love*, 72 Ga., 125; *Dooley v. Bell*, 13 S. E. Rep. [Ga.], 284; *Pryor v. Downey*, 50 Cal., 388; *Pryor v. Madigan*, 51 Cal., 178; *Paty v. Smith*, 50 Cal., 153; *Roche v. Waters*, 72 Md., 264; *Frederick v. Pacquette*, 19 Wis., 541; *Chase v. Ross*, 36 Wis., 267; *Trester v. Missouri P. R. Co.*, 23 Neb., 242.)

The sale and deed are void because no notice of the application for license to sell was given to the wards either personally or by publication or in any other manner. (*Sitzman v. Pacquette*, 13 Wis., 325; *Frederick v. Pacquette*, 19 Wis., 569; *Blackman v. Bauman*, 22 Wis., 611; *Mohr v. Tulip*, 40 Wis., 66; *Mickel v. Hicks*, 19 Kan., 578; *Chicago, K. & N. R. Co. v. Cook*, 43 Kan., 83; *Bloom v. Burdick*, 1 Hill [N. Y.], 130; *Schneider v. McFarland*, 2 N. Y., 459; *Havens v. Sherman*, 42 Barb. [N. Y.], 636; *Stilwell v. Swarthout*, 81 N. Y., 109; *Pinckney v. Smith*, 26

Hun [N. Y.], 524; *Jenkins v. Young*, 35 Hun [N. Y.], 569; *Perry v. Adams*, 98 N. Car., 167; *Harrison v. Harrison*, 106 N. Car., 282; *Stancill v. Gay*, 92 N. Car., 462; *Taylor v. Walker*, 1 Heisk. [Tenn.], 734; *Frazier v. Pankey*, 1 Swan [Tenn.], 75; *Wheatley v. Harvey*, 1 Swan [Tenn.], 484; *Winston v. McLendon*, 43 Miss., 254; *Root v. McFerrin*, 37 Miss., 17; *Planters Bank v. Johnson*, 7 S. & M. [Miss.], 449; *Gwin v. McCarroll*, 1 S. & M. [Miss.], 351; *Smith v. Denson*, 2 S. & M. [Miss.], 326; *Donlin v. Hettinger*, 57 Ill., 348; *Tell v. Young*, 63 Ill., 106; *Marshall v. Rose*, 86 Ill., 374; *Babbitt v. Doe*, 4 Ind., 355; *Doe v. Anderson*, 5 Ind., 33; *Guy v. Pierson*, 21 Ind., 21; *Doe v. Bowen*, 8 Ind., 197; *Good v. Norley*, 28 Ia., 188; *Fiske v. Kellogg*, 3 Ore., 503.)

A sale by guardian without notice to ward is void where statute requires all persons interested residing in the state to be cited when such application is made. (*Rule v. Broach*, 58 Miss., 552; *Hamilton v. Lockhart*, 41 Miss., 460; *Lyon v. Vanatta*, 35 Ia., 521; *Boyles v. Boyles*, 37 Ia., 592; *Arrowsmith v. Harmoning*, 42 O St., 254; *Perry v. Brainard*, 11 O., 442; *Mauarr v. Parrish*, 26 O. St., 636; *Musgrave v. Conover*, 85 Ill., 374.)

Guardians' sale of real estate, without first giving bond required, is void. (*Sparhawk v. Buell*, 9 Vt., 41; *Stewart v. Bailey*, 28 Mich., 251; *Ryder v. Flanders*, 30 Mich., 336.)

On application to a court of equity for the support of a minor out of his separate estate, minors are always parties. (*Tompkins v. Tompkins*, 18 N. J. Eq., 303; *Stephens v. Howard*, 32 N. J. Eq., 244.)

A decided majority of the authorities is in favor of the position that notice to the minor whose real estate is to be sold is jurisdictional. (Freeman, Void Judicial Sales, sec. 16; Rorer, Judicial Sales, secs. 69–71.)

It has been the practice in Nebraska to give notice of some sort to the wards in cases of this kind. (*Trumbull v.*

*Williams*, 18 Neb., 144; *McClay v. Foxworthy*, 18 Neb., 295.)

The guardian's sale was void, because a bond was required by the court to be given as a condition precedent to the sale, in accordance with the provisions of section 61 of chapter 23, Compiled Statutes, and no such bond was given. (*McClay v. Foxworthy*, 18 Neb., 297; *McKeever v. Ball*, 71 Ind., 398.)

The receipt of money, from illegal sale, by heirs after becoming of age, does not estop them from disputing its validity. Their attention must be called specially to the point. (*Harmon v. Smith*, 38 Fed. Rep., 482; *Schnell v. City of Chicago*, 38 Ill., 382; *Messinger v. Kintner*, 4 Binn. [Pa.], 97; *Good v. Norley*, 28 Ia., 188; *Brant v. Virginia Coal & Iron Co.*, 93 U. S., 326; *Crest v. Jack*, 3 Watts [Pa.], 240; *Knouff v. Thompson*, 4 Harris [Pa.], 361; *Mohr v. Tulip*, 40 Wis., 66, 79; *Whyte v. City of Salem*, 4 Saw. [U. S. C. C.], 88; *Whyte v. Smith*, 4 Saw. [U. S. C. C.], 17; *Hill v. Ep'ey*, 31 Pa. St., 331; *Boggs v. Merced Mining Co.*, 14 Cal., 367; *Carpentier v. Thirston*, 24 Cal., 268; *Davis v. Davis*, 26 Cal., 38; *Fields v. Squires*, Deady [U. S. C. C.], 396; *Ryders v. Flanders*, 30 Mich., 336; *Stancill v. Gay*, 92 N. Car., 462; *Campbell v. Nesbitt*, 7 Neb., 300.)

In much stronger cases than this the courts have refused to apply the doctrine of estoppel so as to prevent the recovery of property by an heir or ward against one who holds a void administrator's or guardian's deed for it. (*Mohr v. Tulip*, 40 Wis., 66, 79; *Messinger v. Kintner*, 4 Binn. [Pa.], 97; *Good v. Norley*, 28 Ia., 188.)

*Francis A. Brogan*, for defendant in error McGavock:

The defendants McGavock and Hobbie had acquired a perfect title by prescription at the commencement of this action in ejectment, and the statute of limitations had run and was a complete bar to the action of the plaintiffs.

(*State v. Babcock*, 21 Neb., 602; *White v. Blum*, 4 Neb., 562; *State v. Silver*, 9 Neb., 89; *Green v. Sanford*, 34 Neb., 363; *Tyrrill v. Lamb*, 96 Pa. St. 464; *Van De Haar v. Van Domseller*, 56 Ia., 671; *Quimby v. Claflin*, 27 Hun [N. Y.], 611; *Western Union Telegraph Co. v. Way*, 83 Ala., 542; *Alabama Great Southern R. Co. v. Smith*, 81 Ala., 229; *Ely v. Early*, 94 N. Car., 1; *Bigham v. Talbot*, 63 Tex., 271; *Harral v. Gray*, 10 Neb., 187; *Fraedrich v. Flieth*, 64 Wis., 184.)

The first point urged is that the application should have been made by the guardian of the persons of the minors, instead of by the guardian of their property. There is no foundation for this either in reason, or in the terms of the statute, or in any adjudicated case. On the contrary the statute expressly says that it is the guardian who has been appointed, who should apply for leave to make the sale, and this has been uniformly held to mean the guardian of the property, not the guardian of the person or the natural guardian. (*Perry v. Carmichael*, 95 Ill., 519; *Fonda v. Van Horne*, 15 Wend. [N. Y.], 631; *Porter v. Tudor*, 9 Conn., 416; *Otto v. Schlapkahl*, 57 Ia., 226; *Shanks v. Seamonds*, 24 Ia., 131; *Deugenhart v. Cracraft*, 36 O. St., 549.)

The foreign court is presumed to have acted correctly in appointing a guardian. (*Taylor v. Kilgore*, 33 Ala., 214.)

A guardian of the property may remove his wards from one state to another without losing his relation to them, if the change is for the benefit of the wards, and is done with the consent of the surviving parent. (*Pedan v. Robb*, 8 O., 227; *Wheeler v. Hollis*, 19 Tex., 522; *Townsend v. Kendall*, 4 Minn., 412.)

The court hearing the application must determine whether a proper, authenticated copy of letters of guardianship from a foreign state has been presented to it, and its determination is final unless appealed from. It cannot be inquired into collaterally. (*Menage v. Jones*, 40 Minn., 254.)

This court has held that it will not reverse a judgment for failure to verify the petition upon a direct proceeding in error. (*Fritz v. Barnes*, 6 Neb., 435; *Hershiser v. Delone*, 24 Neb., 380; *Johnson v. Jones*, 2 Neb., 126.)

The same rule has been expressly held to apply to the verification by a guardian of the petition for license to sell real estate. (*Hamiel v. Donnelly*, 75 Ia., 93; *Ellsworth v. Hall*, 48 Mich., 407.)

The failure by an administrator to verify the petition under section 68 of chapter 23, Compiled Statutes, if it is a defect at all, does not affect the jurisdiction of the court, and cannot be attacked in a collateral proceeding. (*Trumble v. Williams*, 18 Neb., 144.)

A failure to formally approve the bond would not be fatal. (*Emery v. Vroman*, 19 Wis., 689*; *Pursley v. Hayes*, 22 Ia., 11; *Hamiel v. Donnelly*, 75 Ia., 93.)

A failure to give the bond would not be fatal. (*Watts v. Cook*, 24 Kan., 278.)

When special statutory powers are conferred upon courts of general jurisdiction, or upon the judges thereof, and such powers are exercised judicially, that is, according to the course of common law and proceedings in chancery, their judgments cannot be attacked or impeached collaterally, and they are conclusively presumed to have the jurisdiction which they exercise. (*Pulaski County v. Stewart*, 28 Gratt. [Va.], 872; *Mills v. Paynter*, 1 Neb., 445; *Miller v. Finn*, 1 Neb., 289; *State v. Buffalo County*, 6 Neb., 461; *Jennings v. Simpson*, 12 Neb., 565; *Bryant v. Estabrook*, 16 Neb., 217; *Gould v. Loughran*, 19 Neb., 394; *McCormick v. Paddock*, 20 Neb., 489; *Deseret Nat. Bank v. Nuckolls*, 30 Neb., 768; *Menage v. Jones*, 40 Minn., 254; *West Duluth Land Co. v. Kurtz*, 45 Minn., 380.)

Notice to the heirs is not of the essence of the court's jurisdiction. (*Grignon v. Astor*, 2 How. [U. S.], 319; *Seward v. Didier*, 16 Neb., 62; *Smith v. Race*, 27 Ill., 287; *Mason v. Wait*, 4 Scam. [Ill.], 127; *Mohr v. Porter*,

51 Wis., 487; *Trumble v. Williams*, 18 Neb., 154; *Miller v. Sullivan*, 4 Dillon [U. S. C. C.], 343; *Good v. Norley*, 28 Ia., 188; *Seward v. Didier*, 16 Neb., 58; *Gager v. Henry*, 5 Saw. [U. S. C. C.], 237.)

In the following cases it has been held that the court acquires jurisdiction to order the sale of a ward's property upon the filing of a proper petition by the proper person, and that the decree of the court ordering the sale is binding and conclusive, notwithstanding any irregularities in the proceedings: *Shaw v. Ritchie*, 136 U. S., 519; *Schaale v. Wasey*, 70 Mich., 414; *West Duluth Land Co. v. Kurtz*, 45 Minn., 380; *Menage v. Jones*, 40 Minn., 254; *Arrowsmith v. Gleason*, 46 Fed. Rep., 256; *Fitch v. Miller*, 20 Cal., 352; *Shelby v. Harrison*, 84 Ky., 144; *Butler v. Stephens*, 77 Tex., 599; *Mulford v. Beveridge*, 78 Ill., 455; *Mulford v. Stalzenback*, 46 Ill., 303; *Marquis v. Davis*, 113 Ind., 219; *Thompson v. Tolmie*, 2 Pet. [U. S.], 157; *Dexter v. Cranston*, 41 Mich., 448; *Pfirman v. Wattles*, 49 N. W. Rep. [Mich.], 40; *Williams v. Williams*, 18 Ind., 345; *Spring v. Kane*, 86 Ill., 580; *Benefield v. Albert*, 132 Ill., 665; *Palmer v. Oakley*, 2 Doug. [Mich.], 448.

The settlement between the guardian and ward after coming of age is binding and conclusive, and cannot be attacked collaterally, and must prevail as between the parties, unless impeached by a direct proceeding. (*Candy v. Hanmore*, 76 Ind., 125; *King v. King*, 40 Ia., 120; *Lynch v. Rotan*, 39 Ill., 14; *Brodrib v. Brodrib*, 56 Cal., 563.)

When a ward accepts the proceeds of a sale of real estate made by the guardian with apparent legal authority, he thereby ratifies the sale and makes the acts of the guardian his own. (*Seward v. Didier*, 16 Neb., 58; *Parmele v. McGinty*, 52 Miss., 475; *Handy v. Noonan*, 51 Miss., 166; *Hatcher v. Briggs*, 6 Ore., 31; *Brazee v. Schofield*, 2 Wash. Ter., 209; *Brazee v. Schofield*, 124 U. S., 495.)

*John M. Thurston* and *W. R. Kelly*, for defendant in error Union Pacific Railway Company.

*Montgomery, Charlton & Hall*, for defendants Hobbie.

RAGAN, C.

This is a suit in ejectment brought by Susan B. Myers, Sarah E. Myers, Luella G. Myers, Fannie B. Myers, and Stephen B. Myers against Alexander McGavock and wife, Henry C. Hobbie, and C. E. Hobbie, his wife, Helen C. Hobbie and her husband, and the Union Pacific Railway Company to recover possession of an undivided three-fourths interest in and to lot 8, block 203, in the city of Omaha. At the close of the evidence the jury, in obedience to an instruction of the court to that effect, returned a verdict in favor of the defendants. The court having refused to set this aside, and having rendered judgment thereon, the plaintiffs below bring the case here on error. All parties claim title under one Henry B. Myers, who died seized of the premises June 14, 1864. The plaintiffs in error claim as his widow and heirs. The defendant in error Alexander McGavock claims a portion of the premises by virtue of a sale and conveyance thereof to him, made by the guardian of the minor heirs of Henry B. Myers. The Hobbies hold under a conveyance from McGavock, and their claim will not be further noticed. The Union Pacific Railway Company holds possession of a portion of the lot occupied by it by virtue of a conveyance from McGavock, and holds possession of the remainder of such portion of said lot as it occupies by virtue of an appropriation thereof for railroad purposes on May 15, 1871, and a settlement then made with the guardian of the minor heirs of said Henry B. Myers for all damages accruing to said minors by reason of said appropriation of said portion of said lot.

We will first dispose of the case so far as the defendant in error Alexander McGavock is concerned. The point relied upon by the able and industrious counsel for plaintiffs in error to defeat McGavock's title is, that the guardian's deed, by virtue of which he claims, and the proceedings and sale on which said deed is based were and are void. Philip Myers, on the 8th of November, 1864, was, by the county court of Mahaska county, Iowa, appointed guardian for the minor children of Henry B. Myers, deceased, who, it appears, died intestate shortly before that time in said county. Philip Myers accepted said appointment and duly qualified as such guardian. On the 13th day of June, 1874, he filed a petition in the district court of Douglas county setting forth his appointment as guardian; the names and ages of his wards; that as heirs of Henry B. Myers, deceased, they were owners of the real estate in controversy here; that it was necessary for the support, care, maintenance, and education of his wards that said real estate should be sold, and prayed said district court for a license for such purpose. In accordance with the prayer of the petition of said guardian the district court of Douglas county made an order authorizing the guardian to sell the real estate of his said wards; and that portion of said lot not theretofore appropriated as hereinbefore stated by the Union Pacific Railway Company was sold to the defendant in error Alexander McGavock. The district court of Douglas county confirmed this sale, and, in pursuance thereof, and the order of the court, the guardian executed to the defendant in error Alexander McGavock the deed under which he claims title. The plaintiffs in error allege that this deed is void for the following reasons:

1. That the guardian making the sale was not the guardian of the persons of said minors, but only of their property in the state of Iowa, and he was not authorized to make the application to sell their property in this state. The contention of the counsel is that since the minors had

a guardian of their property and a guardian of their persons, the district court had jurisdiction to grant the license for the sale of their property to the guardian of their persons only. The minor children of Henry B. Myers had two guardians,—their mother, Susan B. Myers, who was their guardian by nature or natural guardian, and Philip Myers, who was their legal guardian; and if counsel are correct, then the only person the district court of Douglas county had jurisdiction to authorize to sell the property of these minor children was their mother. Section 58 of chapter 23, Compiled Statutes of 1893, provides: "When any minor, * * * residing without this state, shall be put under guardianship in the territory or country in which he resides, * * * the foreign guardian may file an authenticated copy of his appointment in the district court in any county in which there may be any real estate of the ward," etc. And section 59 of said chapter provides: "After filing such authenticated copy of his appointment, such foreign guardian may be licensed by the district court of the same county to sell the real estate of the ward of this state," etc. We are of opinion that the district court of Douglas county had no jurisdiction to grant the license to the natural guardian, as such, of the minor children of Henry B. Myers for the sale of their real estate. The authority of a guardian to sell the real estate of his wards for any purpose must be found in the statute; and our laws confer no authority on a natural guardian, as such, to dispose of the real estate of his ward, and no district court has jurisdiction to authorize a natural guardian, as such, to sell the real estate of his ward. The only kind of a guardian the district court has jurisdiction to authorize to sell the property of his ward is a guardian appointed and commissioned by a court having jurisdiction to appoint guardians; and to confer jurisdiction on a district court of this state to authorize a guardian to sell the property of his ward, it must appear that such guard-

ian had accepted such appointment and qualified and was acting as such guardian. The natural guardian may become the legal guardian of his ward, but in order to become such legal guardian he must be appointed such by the proper authority, accept such appointment and qualify as such legal guardian. (*Shanks v. Seamonds*, 24 Ia., 131.) As it appears that Philip Myers, at the time he made application to the district court of Douglas county for license to sell the property of his wards, was the duly appointed, qualified, and acting guardian of the minor children of Henry B. Myers, decea-ed, and such facts appeared in the petition filed by him for such license, on the face of the petition the district court had jurisdiction to grant him the license prayed for, and he was the proper party, and the only proper party, so far as the record discloses, to make such application.

2. That such guardian was not appointed in the state where the wards then resided. The evidence in the record does not sustain this point. In the petition filed in the district court, for the license to sell, it is stated that the wards were at that time residing in the state of Illinois; but it appears from the evidence that Henry B. Myers died at his residence in Mahaska county, Iowa. His widow petitioned the county court of that county to appoint Philip Myers guardian of her minor children. His estate was administered there, and he had there a homestead. These facts raise the presumption that at the time Philip Myers was appointed guardian his wards were residing in the county in which he was appointed, and since there is no evidence in the record to the contrary that fact must stand as established. It remains to be said of this point, however, that it would seem to be one which goes to the jurisdiction of the court that appointed the guardian rather than to the district court granting the license to sell. The fact that the wards of Philip Myers were residing in the state of Illinois at the time he made application to the Nebraska

court for license to sell their real estate did not deprive him of control over them or their property, nor the latter court of jurisdiction to grant the license.

3. That Philip Myers did not file in the district court of Douglas county an authenticated copy of his appointment as guardian. As already stated, Philip Myers was appointed guardian by the county court of Mahaska county, Iowa. This was done on the 8th of November, 1864. The application to sell the real estate of his wards was made to the district court of Douglas county in June, 1874. The guardian at that time filed in that court a copy of his said appointment as guardian by the Iowa court. This copy is certified to by the clerk and under the seal of the circuit court of said Mahaska county; and the contention here is that the district court of Douglas county was without jurisdiction to license this sale because the copy of the letters of guardianship was not such an authenticated copy of the guardian's appointment as is required by sections 58 and 59, quoted above. While it appears that the guardian received his appointment from the county court of Mahaska county, Iowa, the certificate of the clerk of the circuit court of said county attached to the letters of guardianship recites that said circuit court at that time had jurisdiction in probate matters; and that the copy of the letters of guardianship, to which the certificate is attached, is full, true, and complete, and that the original remains on file in the office of such clerk. It is argued that this certified copy of the guardian's appointment was incompetent evidence under section 414 of the Code of Civil Procedure, which provides that a judicial record of another state may be proved by the attestation of the clerk and the seal of the court, together with a certificate of a judge or presiding magistrate that the attestation is in due form of law. Whether this certified copy of the guardian's appointment was the best evidence, or competent evidence, was a question for the district court hearing the application for license to sell, in

which proceeding the evidence was offered. It was for that court to say whether it was satisfied with the evidence offered to prove that Philip Myers was the then appointed, acting and qualified guardian of the minor heirs of Henry B. Myers, deceased. That court accepted the testimony as sufficient to prove that fact, and its finding is conclusive unless appealed from. (*Menage v. Jones*, 40 Minn., 254.) The finding and judgment of a court cannot be successfully assailed as void, in a collateral proceeding, because such court made such finding or rendered such judgment on incompetent evidence.

4. That the petition for license to sell the real estate was not verified by the guardian. The petition was verified by an attorney of the Douglas county bar, being the attorney and counsel who conducted the proceedings for the guardian. The failure of the guardian to verify his petition did not affect the jurisdiction of the district court of Douglas county, nor render its proceedings void. (*Hamiel v. Donnelly*, 75 Ia., 93; *Ellsworth v. Hall*, 48 Mich., 407; *Trumble v. Williams*, 18 Neb., 144.)

5. That no notice, either actual or constructive, of the application to sell was given to the wards. Section 49 of said chapter 23 provides: "A copy of such order [to show cause why the license prayed for should not be granted] shall be personally served on the next of kin of such ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition, or shall be published at least three successive weeks in such newspaper circulating in the county as the court shall specify in the order." The next of kin of these wards were Stephen B. Myers, an adult brother, and Susan B. Myers, their mother. These two filed their consent in writing in the district court of Douglas county to the proceeding instituted by the guardian and in such proceeding. This complied with the statutes quoted above so far as the next of kin are concerned. If any one else than this adult brother and his

mother, other than the wards themselves, had any interest in the lot sought to be sold, the record makes no mention of it, nor is there any claim here that the guardian's deed is void because others than the wards interested in the real estate were not notified of the proceedings for its sale. So that we have this single question: In a proceeding by a guardian to sell his ward's real estate for the education and support of said ward, must notice of such application be served on said wards in order to give the district court jurisdiction of said proceeding? If such notice is required by the section of the statute above quoted, then the guardian's deed, under which McGavock claims, and all the proceedings leading up to and upon which it is based are void, for no such notice was given. Counsel for plaintiffs in error say "that the wards were persons interested in the real estate within the meaning of said section 49; that the application to sell is a proceeding, on its face, prejudicial to the wards, because, if the application is successful, its effect is to turn the real estate into money, which may be squandered before they become of age, and that, therefore, notice of the application for license to sell should have been served on the wards." It is true the wards are persons interested in the estate; but that an application by their legally appointed, qualified, and acting guardian for a license to sell such wards' real estate for the purpose of maintaining and educating them is, on its face, a proceeding prejudicial to such wards, or one in its nature adversary to them, cannot, we think, be successfully maintained. Had this been an application to sell the real estate of these wards for the purpose of paying debts, then, it seems, counsel's construction of the statute would be correct, for such proceeding would in its nature be an adversary one to such wards, and a sale made of their real estate for such purpose without the statutory notice to them of the time and place of the hearing of the application therefor would be void. (*Mickel v. Hicks*, 19 Kan., 578.) But the guardian's sale under consideration was not made to

pay debts. The petition filed for the license to sell the real estate in controversy here set forth facts, which, if true, showed that a sale of this real estate was for the advantage of these minors. The proceeding was instituted by their guardian for their benefit. It was on their application, in effect, that the license to sell their real estate was granted, and not in any proceeding against them. It is unfortunately true sometimes, through the lack of judgment or through the dishonesty of guardians or the failure to exercise vigilance on the part of courts, that minors are deprived of their property; but no legislature can enact a law, nor court lay down a rule of construction, that will always and in every case protect the orphan and secure him in his own. The statutes of the state require that courts having authority to appoint guardians shall see to it that the persons so appointed are capable and honest; that they give and keep good the bonds required by the statute for the faithful execution of their trust and render to the court at frequent intervals accounts of their guardianship. On the district court judges the law has conferred the exclusive power to say whether the facts exist which justify a sale of a ward's property by his guardian; to say whether the sale is a necessity to which the ward must submit; to say whether, in the judgment of the court, the sale asked to be authorized is for the best interests of the minor. This is a great discretion and a sacred trust confided to district judges by the law, and they are thus made the guardians of the orphans of the commonwealth. Their authority to authorize a guardian on his application to sell his ward's real estate was not meant to be exercised as a matter of course, but only after inquiry and investigation into all the facts and circumstances; and, not then unless the mind of the court is convinced that such sale is a necessity or is for the best interests of the ward. We shall not attempt a citation of all the cases, nor indeed many of them, for and against the

proposition that notice to a ward, of the application of his guardian for license to sell his real estate for the maintenance and education of such ward, is essential to the jurisdiction of the court to order the sale. The authorities are as conflicting as they are numerous; but we think that the weight of authority is that such proceeding is one *in rem*,—a proceeding on behalf of the ward and not adversary to him,—and that notice to such ward of such proceeding is not essential to the jurisdiction of the court to grant the license for the sale. In support of this view, see *Gringnon's Lessee v. Astor*, 43 U. S., 318; *Mohr v. Manierre*, 101 U. S., 417; *Thaw v. Ritchie*, 136 U. S., 519; *Scarf v. Aldrich*, 32 Pac. Rep. [Cal.], 324; *Mohr v. Porter*, 51 Wis., 487, and authorities there collated. Opposed to this view are *Good v. Norley*, 28 Ia., 188; *Washburn v. Carmichael*, 32 Ia., 475; *Lyon v. Vanatta*, 35 Ia., 521; *Rankin v. Miller*, 43 Ia., 11. Indeed, it seems to be the settled rule of the supreme court of Iowa that in order to invest a court with jurisdiction to license a guardian to sell his ward's real estate that such ward must have notice of the application; and the rule has been consistently adhered to by that court. The rule in Mississippi appears to be the same as that in the state of Iowa. (*Hamilton v. Lockhart*, 41 Miss., 460; *Rule v. Broach*, 58 Miss., 522.)

Under a statute substantially like the one quoted above, and of which it is said that the Nebraska statute is a copy, the supreme court of Wisconsin at one time held that notice to the ward of an application by his guardian to sell his real estate was essential to confer jurisdiction on the court to grant the license. (*Mohr v. Tulip*, 40 Wis., 66); but the case was overruled by that court in *Mohr v. Porter*, 51 Wis., 487.

The decisions of the supreme court of Illinois are not uniform as to the rule as to whether notice to the ward of the application to sell his real estate is jurisdictional. In *Mason v. Wright*, 4 Scam. [Ill.], 127, it was said that the

proceeding by a guardian for a license to sell his real estate is not a proceeding adversary to the ward's interest, and that notice of such proceeding is not necessary to confer jurisdiction on the court to authorize the sale. This was in 1842. The same doctrine was announced by that court in *Mulford v. Beveridge*, 78 Ill., 455; but in 1877, in *Musgrave v. Conover*, 85 Ill., 374, that court held: "Where the record of a proceeding by a guardian for the sale of his ward's land fails to show any notice of the application to the wards, the decree purporting to authorize the sale will be void for want of jurisdiction, and may be attacked collaterally." Again, in 1887, in *Spring v. Kane*, 86 Ill., 580, that court said: "A proceeding by a guardian to sell his ward's land for his maintenance, being *in rem* and made on behalf of the owner, it is only necessary the court should have jurisdiction of the subject-matter to make an order to sustain a sale made thereunder."

The cases cited from the state of Illinois serve to show the bewildering conflict in the authorities on the subject under consideration.

Counsel for plaintiffs in error insist, somewhat strenuously, that this court should follow the rule laid down by the supreme court of Wisconsin in *Mohr v. Tulip, supra*, because they say that our statute was adopted from Wisconsin, and that in adopting the statute the legislature intended to adopt and did adopt the construction placed thereon by the supreme court of the state from which it was taken. We have already seen that the supreme court of Wisconsin has overruled *Mohr v. Tulip*, but there is still another thing in this connection. *Mohr v. Tulip* was decided in 1876, while our statute, which is said to be a copy of the Wisconsin statute construed in that case, was enacted by our legislature in 1866, or about ten years before the supreme court of Wisconsin put a construction upon it. The point made by counsel then is not tenable. The rule that when one state adopts the statute of another that

it thereby adopts the construction placed on such statute by the highest court of the state from which it is taken has no application when such construction is not placed on the statute until after its adoption.

6. That no notice of the application to sell was served upon the heirs presumptive of the wards. The ingenious argument of the able counsel is thus stated by them in their brief: "Now, in this case, Henry B. Myers, Susan B. Myers, and Sarah E. Myers were minor children, brother and sisters, and each one was the heir presumptive of the other. Each one was therefore entitled to notice of the application to sell the other's property. The fact that the guardian made one application to sell the property of all said minors does not alter the case. If he had made application to sell the property of Harry B. Myers alone, he would have been obliged to notify Sarah E. and Susan B. Myers as heirs presumptive. The fact that he was seeking at the same time to sell their own property made his default greater instead of less. Now, even if the guardian does represent the ward for the purpose of selling his own property he does not represent him for the purpose of waiving notice of the application to sell his brother's property. In this view of it, Susan B. Myers and Sarah E. Myers, plaintiffs in error, say: 'In 1874 application was made in the district court of Douglas county, Nebraska, to sell our brother's property. We were his sisters, his heirs presumptive, interested in his estate, and we were entitled to notice of that application to sell. We received no such notice, and we claim that the sale as to us is void. Our brother has since died, and we have succeeded by inheritance to his property.'" This argument of counsel is based on their construction of section 109 of said chapter 23. The section is as follows: "All those who are next of kin and heirs apparent or presumptive of the ward shall be considered as interested in the estate, and may appear and answer to the petition of the guardian, and when per-

sonal notice of the time and place of hearing the petition is required to be given, they shall be notified as persons interested according to the provisions respecting similar sales by executors and administrators contained in this subdivision." But the provisions of this section 109 are not applicable to a sale of the real estate of the ward by his guardian when such sale is made for the support and maintenance of the ward. The meaning of this section is that when any person other than the minor, such as an insane person, an idiot, a spendthrift, or a drunkard, shall be under guardianship, and an application shall be made by such person's conservator or guardian for license to sell his real estate, then the heirs presumptive, that is, all such persons as would inherit such person's property should he die immediately, shall be deemed interested in the estate, and notice of the application shall be served upon them.

7. That no bond was given by the guardian to the district judge and approved by him. A bond in proper form and with proper sureties was executed and filed in the court in the proceeding as required by the statute; but the record of the proceeding, in which the license to sell the real estate of the wards was granted, does not show that this bond was formally approved by the judge who granted the license. It is now claimed that this silence of the record is conclusive evidence that the bond was not approved by the judge, and his failure to formally approve the bond renders the entire proceeding void. On the trial of the case at bar the defendants proved by the attorney who conducted the proceeding on behalf of the guardian that the bond was in fact presented to and approved by the presiding judge. The fact of the approval of the bond, like any other fact, might be proved by the best evidence attainable. We are of opinion, however, that in this collateral proceeding the guardian's deed could not be declared void because the bond filed for the purpose of ob-

taining the license to sell the real estate was not formally approved. (*Emery v. Vrooman*, 19 Wis., 724; *Pursley v. Hayes*, 22 Ia., 11; *Hamiel v. Donnelly*, 75 Ia., 93.)

8. That no sufficient notice of the sale was given. The guardian, in his report to the court of his proceedings under the license granted him to sell the real estate of his wards, stated that he gave due and public notice of the time and place of the sale by posting up in three of the most public places in Douglas county three notices of the time and place of the sale, and by publishing such notice in the *Omaha Weekly Herald*, a newspaper printed and in general circulation in said county for three weeks successively next before the date of said sale. There is no dispute but that the notice of the sale was published for three weeks in the newspaper as was stated in the guardian's return of his proceedings to the court. No copy, however, of the posted notices was found in the files of the records of the proceedings of the guardian's sale. The district court which granted the license to make the sale, in its order confirming the same, made a finding that the proceedings of the guardian in making the sale had been in all respects regular and in conformity to law. We think that it must be presumed, especially when this sale is attacked collaterally, that sufficient evidence was offered to the court, when the sale came on for confirmation, that the notices thereof had been posted as the statute required and the guardian reported.

9. That the sale was not made by the guardian personally. We have not been cited to any authority or statute showing that a sale of real estate made by a guardian is void because the guardian did not personally attend or cry the sale. It certainly cannot be said that because the statute says that a guardian may file his petition and procure the order of a court under certain circumstances for the sale of his ward's real estate, that therefore the guardian must draw the petition and the other papers in such pro-

ceeding and attend to it personally and cannot do the same by an attorney; and we see no good reason why a guardian may not entrust the conduct of the sale of the real estate which he is making to his attorney or an auctioneer; and we are quite clear that this sale is not void because the attorney of the guardian actually made or cried the sale of the property.

10. That the description of the property sold was ambiguous and indefinite. The property sold by the guardian to McGavock is described in the guardian's report to the court as "the N. E. two-thirds ($\frac{2}{3}$) of lot eight (8) in block two hundred and three (203) of the city of Omaha, being all that portion of said lot eight (8) not belonging to the Union Pacific Railway Company." This description, while not very definite, was not void for uncertainty. It was a sufficient description to enable the property to be identified. An examination of all the proceedings on which the deed is based, made by the guardian of the minor heirs of Henry B. Myers, deceased, to Alexander McGavock, leads us to the conclusion that such proceedings and deed were and are valid, and that the said minor heirs were, by said proceedings and deed, divested of all their title in and to the real estate conveyed by their guardian to McGavock. There is one feature, however, in McGavock's title that remains to be considered. Fanny B. Myers, the widow, and Stephen Myers, the adult son of Henry B. Myers, deceased, are plaintiffs in error here and were plaintiffs below. Have these parties any interest remaining in the real estate conveyed to McGavock by Philip S. Myers? This widow and son appeared in the proceeding instituted by the guardian to sell the real estate of his wards and consented that the district court of Douglas county should grant a license as prayed for by the guardian. This widow at that time had a dower interest in this land and the adult son was one of the owners. Does it follow that because this widow and adult son entered their appearance

and consented to the proceedings instituted by the guardian of the minors to sell their real estate, the guardian, in making such sale, sold the interests of the widow and the adult son therein? We do not think that such a conclusion results. The guardian was not the guardian of the widow nor of the adult son, nor had he any authority to sell their interest in any real estate, nor did the district court of Douglas county have jurisdiction or authority to authorize him to sell their real estate. In fact, the guardian did not attempt to sell their real estate, but only the interests of his wards therein. The court did not authorize him, and could not authorize him, to sell anything more than the interest of his wards in the lot. The appearance entered and the consent given by the widow and adult son to the proceeding was to avoid the formality of serving a formal notice on them of the proceedings. Such appearance and consent made them parties to the proceeding, but it does not follow that because they were parties that such sale and conveyance of the minors' interest divested the interest of the adult son and the widow in the real estate sold by virtue of such proceeding. We do not say that in a proceeding by a guardian to sell the real estate of his minor wards the adult heirs might not make themselves parties to such proceeding and take such steps therein, by pleading, disclaimer, or otherwise, so that a sale and deed made in pursuance of such proceeding by the guardian would divest the interest of such adult heirs or other persons interested in the real estate; but we do say that this record does not disclose that the proceedings had by the guardian and the sale and deed of the real estate made by him pursuant to said proceedings were intended to, or did, divest the interest which the widow and adult son had in this real estate. This point is not argued, except perhaps incidentally, by counsel, but we have thought it but right that every point connected with the proceedings on which the title of the defendants in error depends

should be considered to avoid possible future trouble and to set at rest the title of the real estate in question so far as the defendants in error are concerned. McGavock, as a defense to this action, pleaded and proved in the court below that he had been in the open, exclusive, notorious, and adverse possession of the premises purchased by him at the guardian's sale for more than ten years prior to the bringing of this action. During all this time he had occupied the premises under a claim of title thereto, and it does not appear that either the widow or the adult son ever paid any taxes on these premises during all this time, nor in any other manner asserted any claim of title or ownership thereto. Now, this widow and adult son, having voluntarily made themselves parties to this proceeding, were charged with notice of what was done therein. The court, by its order confirming the sale, directed the guardian to pay this widow a stated sum in lieu of her dower interest in the property, and to the adult son his distributive share, as heir, of the proceeds of the sale. This order was made by the court on the theory that McGavock had acquired by his purchase not only the interest of the minors in the real estate sold, but that of the widow and adult son as well. McGavock entered into possession of the real estate then, not as a co-tenant of the widow and adult son, but under a claim of title in himself to the whole property, and this entry of McGavock, and the proceedings on which his possession was based, all being with notice to the widow and adult son, operated as an ouster of the widow and adult son, and McGavock's possession from its incipiency was adverse. This adverse possession, then, of McGavock to this real estate had, at the time this suit was brought, vested in him whatever title the widow and adult son had previously had therein. It is by reason of this adverse possession and the statute of limitations, rather than by reason of the guardian's proceedings and sale of the land, that the interest therein of the adult son and widow has been divested.

"One who has been in the open, notorious, exclusive, and adverse possession of real estate for ten years becomes vested with a valid title to the same." (*Parker v. Starr*, 21 Neb., 680.)

We next turn our attention to the consideration of the claim of title of the Union Pacific Railway Company to the portion of the property in controversy occupied by it. This corporation is in possession, claiming title to a portion of that part of the lot in controversy occupied by it by virtue of a conveyance from McGavock and his wife, under date of March 22, 1877. We have already seen that McGavock's title to this property was acquired by virtue of the guardian's deed and the proceedings on which the same was based. It is now argued by counsel for plaintiffs in error that the Union Pacific Railway Company was incompetent to take the title of this property by the conveyance from McGavock, and this contention is predicated on section 8, article 11, of the constitution of 1875, which is as follows: "No railroad corporation, organized under the laws of any other state, or of the United States, and doing business in this state, shall be entitled to exercise the right of eminent domain, or have power to acquire the right of way, or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this state." The Union Pacific Railway Company is, and was at that time, a corporation organized under the laws of the United States, and by reason of the constitutional provision just quoted was incompetent to take title to the real estate by the conveyance from McGavock; but this conveyance is not therefore void. It is, at most, voidable. Its title is valid against every one but the state, and can be divested only by proceedings brought by the state for that purpose. (NORVAL, J., in *Carlow v. Aultman*, 28 Neb., 672.) The Union Pacific Railway Company, because it took title to this property in violation of the constitution, did not thereby become

an outlaw; nor does the fact of its incompetency to be a grantee of such property authorize any one to appropriate the property who may see fit to bring a suit for that purpose. The citizen has no right, title, or claim, as such, to property attempted to be acquired in contravention of law, whether the person attempting such acquisition be an English lord, a Turkish pasha, or an ordinary foreign railroad company. It would be a monstrous construction of this constitution to say that if A should, for a valuable consideration, convey his real estate to B, that because B was incompetent under the law to take such conveyance, that therefore the title should revert to A. It remains to be said, of the part of the property occupied by this corporation which it attempted to acquire from McGavock, that the incompetency of the corporation to take the title does not in any manner help the claims of the plaintiffs in error, the widow and adult son of Henry B. Myers, deceased, whose title, we have seen, to this part of the real estate was not divested by the guardian's sale. The statute of limitations began to run when McGavock entered under his guardian's deed, and his conveyance and surrender of possession of part of the premises to a grantee incompetent to take did not arrest the running of the statute. But the railway company, like McGavock, pleaded and proved that it had been in the open, notorious, exclusive, and adverse possession of this real estate, claiming title thereto, for more than ten years prior to the bringing of this suit. This adverse possession then vested the title to the real estate occupied by the railway company in it as against all persons except the state of Nebraska.

The right to the possession of the other portion of the real estate occupied by the railway company was acquired on the 12th day of May, 1871, in pursuance of a writing in words and figures as follows:

"Be it known that I, Philip Myers, of the city of Chicago, state of Illinois, as administrator of the estate of

Henry B. Myers, deceased, late of the county of Mahaska, and state of Iowa, and also as agent of Stephen B. Myers, one of the children and heirs, and as guardian of the property of Harry B. Myers, Sarah E. Myers, and Susan B. Myers, remaining children and minor heirs at law of said Henry B. Myers, who died seized of lot number eight (8), in block two hundred and three (203), in the city of Omaha, Douglas county, have received from the Union Pacific Railway Company the sum of fifteen hundred dollars in the bonds of said city, in full payment and satisfaction of the damages accrued and awarded by reason of appropriation of a part of said lot eight (8), in block two hundred and three (203), in said city, by said Union Pacific Railway Company for depot grounds. * * *

"Witness my hand at the city of Chicago, Illinois, this 12th day of May, A. D. 1871.

"PHILIP MYERS,

"*Administrator of the Estate and Agent and Guardian of Heirs, as the Friend of Henry B. Myers, deceased.*"

Section 96 of chapter 16, Compiled Statutes, 1893, in force at the date of said writing quoted above, provides: "Whenever any railroad corporation shall take any real estate as aforesaid of any minor, insane person, or any married woman whose husband is under guardianship, the guardian of such minor or insane person or such married woman with the guardian of such husband may agree and settle with said corporation for all damages or claims by reason of the taking of such real estate and may give valid releases and discharges therefor." The evidence shows that the Union Pacific Railway Company has been in possession of the real estate, using and occupying it for railroad purposes, since the date of said writing or receipt quoted above. The able counsel for plaintiffs in error say: "Said receipt does not purport to be a settlement under said section 96, but on its face shows that it is a mere receipt for the amount of an award which had pre-

viously been made in some other proceeding; that the language of the receipt indicates the railway company had in some proceeding appropriated the portion of the lot referred to for depot grounds and that an award of damages for such appropriation had been made in favor of the owners of said real estate; that the real source of title of the railway company to the property in question is the proceeding for the appropriation of said lot and not the receipt." We think the deductions made by counsel are reasonable and probably correct, but we do not see how that helps their clients' case. The argument, in brief, is that the Union Pacific Railway Company, some time prior to May, 1871, had instituted condemnation proceedings, and in pursuance thereof took possession of this real estate, and that the amount of money paid to Philip Myers as guardian was the amount awarded as damages to the minors by reason of the appropriation of such real estate by the railway company, and that as the railway company was a corporation created under the laws of the United States, or in other words, that it was not a domestic corporation, it had no power or authority to exercise the right of eminent domain in this state; and that section 96, quoted above, is only applicable to domestic corporations. This section is a part of the general railroad corporation act in force at the time that the railroad company appropriated the property in controversy. The constitution of 1866, in force at that time, did not prohibit foreign railroad companies from building or operating roads in this state; and, since foreign railroad corporations were not then prohibited by the constitution or the laws from building and operating their roads in this state, we do not know of any rule of law or comity which prevented their acquiring, by purchase or settlements made for damages, the right to occupy and use such real estate as they needed. It is no doubt true that it was competent, then and now, for the legislature to prohibit a foreign railroad company from exercis-

ing the powers of eminent domain in this state, but in the absence of legislation and in the absence of any constitutional provision on the subject we cannot say that the appropriation of this property with the guardian's consent was wrongful or illegal. It is true that some sections of the act, of which said section 96 is a part, apply exclusively to domestic corporations, but we think that the provisions of that act, in so far as they are applicable, apply not only to railroad corporations organized under the laws of this state, but also to all railroad corporations operating roads in this state. Certainly it is true that the authority of the railway company to operate its road, and to acquire by contract with the owner the necessary real estate for that purpose, is a question which cannot be inquired into in an action of this character. But whether the railway corporation had the right to exercise the power of eminent domain and condemn the real estate in controversy is, under the evidence here, wholly immaterial, as the receipt affords evidence that if the railway company did appropriate this property by condemnation proceedings, it also acquired the right to the possession of it by means of a settlement made with the guardian of the minor heirs in pursuance of said section 96. It certainly cannot be questioned but that this railway corporation might have taken a deed of conveyance of this real estate for railroad purposes from Henry B. Myers, had he been living, and had it done so and entered into possession of the real estate his heirs would not be entitled to oust the railway company therefrom whether the corporation had the right to build and operate a road in this state at that time or not. We have been cited to no authority, and indeed the argument has not been advanced, that it is not competent for the legislature to provide that the legal guardian of minor heirs may make settlement with a railway corporation for damages to their real estate by reason of its occupancy by a railway company. Counsel say, however, that the act of congress under which the railway

company exists provides in what manner settlement shall be made with a minor when his real estate is taken for railway purposes, and that as the receipt is not in conformity with this provision of the act of congress that it is no protection to the railway company. There are several things to be said of this argument. It is competent for the United States government, for its own purposes, to exercise the powers of eminent domain in any state of this Union. If congress can delegate the power to exercise the right of eminent domain in the states to a corporation created by the laws of congress, which we by no means concede, then, in that case, such corporation, in the exercise of such power, would have to comply with the laws of the state where it exercised such power. The provision cited by counsel from the act of congress probably had reference to the exercise of the power of eminent domain by the railway company in the territories of the Union, and where land was appropriated, the possession of which was in the citizen, but the legal title to which was still in the United States government. It is also to be remembered that a railway corporation does not acquire the absolute fee-simple title to real estate purchased or condemned by it for railway purposes, but only an easement therein, subject to be divested by non-user or abandonment; hence the provisions in said section 96, which authorize guardians of minors, whose real estate has been appropriated for railway purposes, to give valid releases and discharges for the damages sustained by such minors. It remains to be said of this portion of the real estate under consideration that the widow and adult son of Henry B. Myers, deceased, at the time of the execution of the receipt to the railway company by the guardian, quitclaimed all their interest in said real estate to said railway company.

Aware of the grave importance of the questions involved in this record we have held this case for some time, it has been examined by the commissioners and the and

judges, and the views expressed herein embody the unanimous opinion of the court. We have patiently and carefully considered all the points and arguments made by the counsel for the plaintiffs in error, and have reached the conclusion that the plaintiffs in error are not entitled to the possession of any of the real estate sued for herein, and that the learned district judge was entirely right in instructing the jury to find a verdict for the defendants in error. It follows that the judgment of the court below must be and the same is

AFFIRMED.

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BELLEVUE IMPROVEMENT COMPANY ET AL., APPELLANTS, V. VILLAGE OF BELLEVUE ET AL., APPELLEES.

FILED MARCH 22, 1894. NO. 5502.

1. **Pleading:** TRANSCRIPT: REVIEW. Where an answer traverses certain allegations of a petition, not in direct language, but merely by reference to the numbers of the lines of the original petition where those allegations occur, and where the transcript filed in this court does not disclose the numbering of the lines upon the original petition, there having been a general finding for the defendants in the district court, this court will presume all the material allegations to have been put in issue by the answer.

2. **Taxes:** INJUNCTION TO RESTRAIN. A court of equity will not interfere to prevent the collection of taxes merely because the assessment was invalid. To obtain relief the plaintiff must bring himself within some recognized rule of equitable jurisprudence.

3. **Taxation:** VALUE OF PROPERTY: OATH OF ASSESSOR: INJUNCTION. Neither the fact that an assessment was not based upon the assessor's judgment as to the value of the property, nor that the assessor did not make or return an oath with the assessment roll, so vitiates the assessment as of itself to justify an

injunction against the collection of a general tax founded upon such assessment. *South Platte Land Co. v. City of Crete*, 11 Neb., 344, and *Wood v. Helmer*, 10 Neb., 65, followed.

4. ———: MULTIPLICITY OF SUITS: INJUNCTION. In such a case the fact that plaintiffs were the owners of a large number of lots affected by the tax will not justify interference for the purpose of preventing multiplicity of suits or to remove a cloud cast upon the title, section 144 of the revenue act providing an adequate remedy at law.

5. **Local Assessments.** Where a village board undertakes to levy and collect a local assessment for the construction of sidewalks, without in fact constructing the sidewalks, before obtaining any proposals for their construction, and before in any manner ascertaining or estimating the cost of their construction, *held*, that such local assessment is absolutely void.

6. **Void Taxes:** INJUNCTION. Where a tax is void, that is, where there is no tax which the plaintiff is in equity bound to pay, he may invoke the aid of a court of equity to protect his rights by an injunction, notwithstanding section 144 of the revenue act. *Touzalin v. City of Omaha*, 25 Neb., 817, followed.

APPEAL from the district court of Sarpy county. Heard below before SCOTT, J.

The facts are stated in the opinion.

*Arthur C. Wakeley*, for appellants:

The assessment for the regular taxes is void because plaintiffs' lots, utterly regardless of their value, relative situation, or local condition, were, by the assessor, lumped together, and indiscriminately assessed at a valuation of ten dollars each. (*California & Oregon Land Co. v. Gowen*, 48 Fed. Rep., 771.)

The assessment is void because the assessor did not actually view the lots in controversy, as required by the provisions of section 52, chapter 77, Compiled Statutes. (*Marsh v. Board of Supervisors of Clark County*, 42 Wis., 502; *State v. Dodge County*, 20 Neb., 598.)

The assessment is void because not verified as required

by section 63, chapter 77, Compiled Statutes. (*Morrill v. Taylor*, 6 Neb., 236; *Lynam v. Anderson*, 9 Neb., 367; *Hallo v. Helmer*, 12 Neb., 87; *McNish v. Perrine*, 14 Neb., 582.)

The assessment is void because of the hostility of the deputy assessor to the improvement company. (Cooley, Taxation, ch. 24, p. 547.)

There can be no valid tax without a previous legal and valid assessment. It is not enough that there should be a mere formal assessment by some process. The rule by which the value is determined must be one that may lead to approximately correct results. If an arbitrary rule or process is resorted to for determining the value instead of the best judgment of the assessor, it is fatal to the validity of the assessment. (Cooley, Taxation, ch. 12, p. 258; Blackwell, Tax Titles [5th ed.], sec. 194; *City of Nebraska City v. Nebraska City Hydraulic Gas & Coke Co.*, 9 Neb., 339; *Lynam v. Anderson*, 9 Neb., 367; *South Platte Land Co. v. City of Crete*, 11 Neb., 344; *Hallo v. Helmer*, 12 Neb., 87; *McNish v. Perrine*, 14 Neb., 582; *Hersey v. Board of Supervisors of Barron County*, 37 Wis., 75; *Johnson v. City of Milwaukee*, 40 Wis., 315; *Marsh v. Board of Supervisors of Clark County*, 42 Wis., 502; *Plumer v. Board of Supervisors of Marathon County*, 46 Wis., 163; *Watkins v. Zwietusch*, 47 Wis., 513; *Graves v. Bruen*, 11 Ill., 431; *City of Chicago v. Burtice*, 24 Ill., 489; *Chicago, B. & Q. R. Co. v. Cole*, 75 Ill., 594; *McCready v. Sexton*, 29 Ia., 356; *State v. Cook*, 82 Mo., 185; *Woodman v. Auditor General*, 52 Mich., 28; *Perry County v. Selma, M. & M. R. Co.*, 58 Ala., 546; *McReynolds v. Longenberger*, 57 Pa. St., 13; *California & Oregon Land Co. v. Gowen*, 48 Fed. Rep., 771.)

That injunction is a proper remedy to remove or prevent a cloud upon title to real estate by the assessment of an illegal tax or the issuing of a tax certificate or tax deed based upon such illegal tax, creating a lien, real or appar-

ent, on real estate, is no longer doubted. (*South Platte Land Co. v. Buffalo County*, 7 Neb., 253; High, Injunctions, sec. 494; Blackwell, Tax Titles [5th ed.], sec. 1056; *Town of Ottawa v. Walker*, 21 Ill., 605; *Dunnovan v. Green*, 57 Ill., 63; *Olmstead v. Henry County*, 24 Ia., 33; *Louisville & N. R. Co. v. Warren County*, 5 Bush [Ky.], 243; *Palmer v. Rich*, 12 Mich., 414; *Scofield v. City of Lansing*, 17 Mich., 437; *Chicago, B. & Q. R. Co. v. Cole*, 75 Ill., 591; *Johnson v. Hahn*, 4 Neb., 139; *Crane v. City of Janesville*, 20 Wis., 305*; *Milwaukee Iron Co. v. Town of Hubbard*, 29 Wis., 57; *Marquette, H. & O. R. Co. v. City of Marquette*, 35 Mich., 504.)

The plaintiffs are entitled to an injunction, notwithstanding section 144 of the revenue law. (*Touzalin v. City of Omaha*, 25 Neb., 824; *Thatcher v. Adams County*, 19 Neb., 486.)

*John Q. Goss, contra:*

The assessor evidently adopted the suggestion of the board of assessors, as to the valuation of the lots in Bellevue, and made the value suggested by them his assessment, which, while irregular, does not render a tax levied thereunder void. (*Hull v. Kearney County*, 13 Neb., 539; *South Platte Land Co. v. City of Crete*, 11 Neb., 344.)

The informality complained of as to the signing of the oath by the assessor does not affect the validity of the tax levy. (Comp. Stats., secs. 141, 142, ch. 77; *Wood v. Helmer*, 10 Neb., 65; *South Platte Land Co. v. City of Crete*, 11 Neb., 344; *McClure v. Warner*, 16 Neb., 447.)

The authority to levy special assessments for sidewalks is clearly vested in the boards of trustees of villages. The tax was not for an illegal or unauthorized purpose, and the action of the board will not be interfered with by injunction. (Comp. Stats., sec. 69, subd. 7, ch. 14; *Wilson v. City of Auburn*, 27 Neb., 435; 1 High, Injunctions, sec. 490.)

Injunction is not the proper remedy, and cannot be al-

lowed in cases of this character. (Comp. Stats., sec. 144, ch. 77; *Burlington & M. R. R. Co. v. Seward County*, 10 Neb., 211; *Wilson v. City of Auburn*, 27 Neb., 435; 1 High, Injunctions [2d ed.], secs. 485–488, 502, 503, 544, 545.)

A person deeming himself aggrieved by the assessment of his property has his remedy before the board of equalization. (Comp. Stats., sec. 70, ch. 77.)

From the decision of that board error lies to the district court, and the action of the board will not be reviewed in equity proceedings. (Code of Civil Procedure, sec. 580; *Sioux City & P. R. Co. v. Washington County*, 3 Neb., 30; *McGee v. State*, 32 Neb., 154.)

IRVINE, C.

This is an action to enjoin the collection of certain taxes. A temporary injunction was granted, but on final hearing dissolved and the action dismissed. The county clerk was made a defendant, and it was sought to enjoin him from transcribing and carrying out upon the assessment rolls the taxes complained of and delivering the tax list to the treasurer. The parties, pending the action, stipulated that this portion of the injunction should be vacated. This practically discharged the county clerk from the action, and the decree, so far as it affects him, must, in any view of the case, be affirmed.

The petition commenced by pleading a number of acts of the territorial legislature incorporating the city of Bellevue, and by pleading that in 1893 certain proceedings were had for the purpose of incorporating the same territory as the village of Bellevue under the general law. It is alleged that these later proceedings were void; that the alleged city of Bellevue remains in existence, and that there is no such municipality as the village of Bellevue. The answer upon this point denies certain of the allegations of the petition, but it does not traverse them in direct lan-

guage, but refers to them by the numbers of the lines upon which they appeared in the original petition. No motion was made to make the answer more specific. We have not the original petition before us, and cannot, therefore, ascertain what facts were put in issue. Upon appeal, the presumption is in favor of the correctness of the judgment, and we must resolve such doubts as arise as to the issues framed, in such manner as to support the judgment below, and therefore treat all these allegations as in issue. No evidence was introduced in their support. No argument is addressed to that portion of the case. Without deciding the question as to the validity of taxes sought to be imposed by a municipal corporation *de facto* and not *de jure*, we must presume the legal existence of the village of Bellevue.

The plaintiffs show that they are the owners of about 3,300 lots in that village and they complain of two classes of taxes sought to be imposed upon them. One of these classes consists of general taxes, attempted to be levied for municipal purposes. The other consists of local assessments levied for sidewalk purposes. These classes require separate treatment.

1. As to the general taxes, the petition contains many allegations to the effect that while the corporate limits are large, the actual village is very small, and that nearly all of plaintiffs' lots lie entirely outside of the village proper; that except upon paper they have no existence as lots; that no streets pass along them, and that they constitute an open, uncultivated area of land. There is some evidence in support of these allegations, but no right is claimed in argument by reason thereof, except indirectly as affecting the justice of the tax, and we shall therefore pass over these issues without further comment as to their legal effect. It is alleged that each of said lots, regardless of its value, has been by the assessor valued at $10; that such valuation is greatly in excess of the true value of a portion of the lots,

and that the assessed valuation is enormously in excess of the valuation of other property similarly situated, and that an excessive valuation was placed upon plaintiffs' property because of an animosity toward the plaintiffs upon the part of the assessor. The petition further alleges that the assessment was not verified or sworn to according to law. Upon these averments the decision must rest. Some of them are established by the proof. As to others the evidence is uncertain or conflicting. The decree finds generally for the defendants, and this finding is supported by the evidence, in so far as it relates to the charges against the good faith of the assessor. It does, however, appear, without substantial contradiction, that the assessors for the different precincts of the county at their meeting determined arbitrarily that such lots should be uniformly assessed at $10 each, and that the assessment was so made in the case of the plaintiffs' lots because of such resolution and without any exercise of judgment upon the part of the assessor or his deputy, without a view of the property, and wholly regardless of the actual value of the different lots. It also appears that the valuation placed upon these lots was greatly in excess of the assessed valuation upon much other property in the vicinity apparently of as great actual value. But this feature is not important, because the remedy for a disproportionate valuation would be before the board of equalization. It further appears that the assessment was made by a deputy and that the oath taken and returned therewith is in statutory form, and purports to be the oath of the assessor; but that it was signed and made not by the assessor but by his deputy.

Section 51 of the revenue law permits an assessor, under certain circumstances, to appoint deputies, but it provides that such deputies shall make their returns to the assessor. It is the assessor himself who is required to make the returns to the county clerk, and by section 63 of the revenue act, required to make oath thereto. Perhaps, where a dep-

uty acts, an oath should be made by the deputy, but this does not excuse the assessor from making oath, whether or not he has a deputy. It is his duty to make the return to the county clerk under oath, and an assessment roll returned by a deputy to the county clerk under the oath of the deputy and without any oath by the assessor does not satisfy the law. If an injunction can be granted against the enforcement of a tax based upon this assessment, it must be based upon the theory that the assessment was absolutely void because of the fact that it was not the result of the assessor's estimate of the value of the property and because there was no proper oath returned therewith. There is a marked distinction between the position of a taxpayer who, in proceedings at law, defends upon the ground of illegality of the tax, and that of one who comes into a court of equity seeking affirmative relief. In the former case the taxpayer may stand upon his legal rights and insist upon a more or less strict compliance with the requirements of law. In the latter he must bring himself within some recognized principle of equitable jurisdiction. (*Wood v. Helmer*, 10 Neb., 65; *South Platte Land Co. v. City of Crete*, 11 Neb., 344; *Spargur v. Romine*, 38 Neb., 736.)

In *South Platte Land Co. v. City of Crete, supra*, the following language was used by LAKE, J.: "Instead of valuing the property according to his own judgment of its worth, the averment is that the city assessor adopted an assessment made by the precinct assessor, under the state law for general revenue purposes, returning to the city council a copy thereof as his own valuation. While the mode here adopted was not the one contemplated for fixing the value of property for the proposed levy, it was by no means void. In form, at least, it was correct, and, for aught that is shown, was entirely just and equitable to the plaintiff." It would seem that this case should be conclusive upon the one we are considering, in so far as relief is claimed upon the ground that the assessment proceeded

upon the basis of an arbitrary resolution of the county assessors and not upon the assessor's judgment of the value of the property. Nor will equity interfere to enjoin the collection of a tax for the reason that no oath was taken by the assessor or returned with the roll. (*Wood v. Helmer*, 10 Neb., 65; *South Platte Land Co. v. City of Crete*, 11 Neb., 344.)

The writer was at first of the opinion that the fact that the plaintiffs were the owners of 3,300 lots affected by this tax afforded a basis for the interposition of a court of equity for the purpose of preventing multiplicity of suits. Section 144 of the revenue act undertakes to prohibit the courts from restraining the collection of any tax unless it be assessed for an illegal or unauthorized purpose, but provides for the payment of invalid taxes under protest and the recovery of the sums so paid by a method pointed out by the statutes. Without determining at this point whether this section is valid in its entire scope, it is safe to say that it provides an adequate remedy at law against taxes which are merely irregular and not absolutely void, and its validity to that extent has been several times tacitly recognized by the court. (*Thatcher v. Adams County*, 19 Neb., 485; *Caldwell v. City of Lincoln*, 19 Neb., 569; *Price v. Lancaster County*, 18 Neb., 199.) Such a proceeding, so far as practicable, would be governed by the general provisions of the Code of Civil Procedure, and we can see no reason why a claim for the refunding of such taxes upon all these lots should not be embraced in a single proceeding.

We have not overlooked the fact that the taxes here complained against are levied for village purposes and not for general, state, or county purposes. But we think that section 144 applies to such taxes. The authority for the levy of such taxes is found in section 82 of the act relating to cities of the second class and villages. It provides for the certification of the levy to the county clerk, for the entry by the county clerk of that levy upon the proper

tax list, and for the collection of the same in the manner provided for the collection of state and county taxes. The provisions of the revenue act are, therefore, applicable to village taxes, at least in so far as their enforcement is concerned. Section 144 of the revenue law in some of its parts refers expressly to village taxes, and it is clear that that section is applicable.

In many states courts of equity interfere to restrain the enforcement of invalid taxes upon real estate upon the ground that they cast a cloud upon plaintiff's title, but an inspection of the decisions of this court shows that this principle has not been here recognized. This feature has existed in each of the cases where relief has been refused upon the general ground that no established rule of equity jurisprudence has been invoked to sustain the suit. While if the writer were free to exercise his individual judgment he might reach a conclusion other than the one now expressed, he feels bound by the past adjudications of the court to declare that this tax is not absolutely void; that no ground has been shown for equitable interposition, and that section 144 of the revenue act provides the plaintiffs with an adequate remedy. Upon this branch of the case the judgment of the district court was right.

2. As to the local assessment for sidewalks the situation is as follows: On May 18, 1891, there was a special meeting of the village board to "make arrangements for certain sidewalks in the village of Bellevue, as per notice given." The following resolution was passed:

"*Resolved*, By the board of trustees of the village of Bellevue, Sarpy county, Nebraska, that there shall be a sidewalk laid upon the following streets and avenues of the said village of Bellevue, to-wit: [Here follows a designation of the places where sidewalks were to be built]; and be it further resolved by the board of trustees of Bellevue that the valuation of the lots abutting on and adjoining the sidewalks and the amounts to be charged against each said

lot for the construction of said sidewalks shall be and hereby is assessed and levied as follows:" Then follows a list of lots with a valuation and the amount of assessment opposite each description.

On July 15 an ordinance was passed providing that sidewalks at the places designated should be constructed, describing the manner of construction, requiring the clerk, on or before August 1, to notify, in writing, the owners of lots abutting on the sidewalks, requiring said sidewalks to be laid, and providing that such owners might, at their option, build sidewalks adjoining their lots on or before the 1st of September, and that to such owners as complied with that provision the village clerk should issue certificates showing that such sidewalks had been built and that such owners should be entitled to a credit upon the county tax list for the full amount charged for sidewalk purposes against said lot. The ordinance also provided further that after the 1st day of September the committee on streets and alleys should advertise for proposals for the construction of the sidewalks remaining then unbuilt and the proposals laid before the board of trustees for acceptance or rejection. The ordinance then provided in a general way for contracts based upon the bids so received. These are all the proceedings upon the subject.

This case was tried in March, 1892, at which time no sidewalks had been constructed. Section 69 of the act relating to cities of the second class and villages gives villages, in the fourth subdivision, the power to construct sidewalks and to levy a special tax on the lots of land fronting on "said highway" to pay the expense of said improvement. Subdivision 7 provides that the assessments for such purposes shall be made by the board of trustees by a resolution fixing the valuation of each lot assessed, taking into account the benefit derived or injury sustained in consequence of such contemplated improvement, and the amounts charged against the same. The principal objec-

tion urged by counsel against these assessments is that it does not appear that they were made in proportion to the special benefits conferred. It is clear from an inspection of the resolution that the assessment was not made in proportion to street frontage, and we are aware that some courts have held that where an estimate of benefits does not affirmatively appear, the question as to whether or not the assessment was based upon benefits is open to inquiry by the court. (*Chamberlain v. City of Cleveland*, 34 O. St., 551.) But we think the better rule to be that it should be presumed that such assessments are based upon the special benefits conferred and do not exceed such benefits. The record does not show that these lots would not be benefited by such an improvement to the full amount of the tax. The argument is made that because they are assessed at only $10 each, while the assessment for sidewalks in many cases greatly exceeded this assessed valuation, said assessment must exceed the benefits conferred; but it is not impossible that a lot which, because of inaccessibility, was only worth $10 should become worth many times that sum where, by the improvement of streets, it is rendered accessible. To our mind the serious feature of this local assessment lies in the fact that it was levied before any work was done, before any contract was made for the performance of the work, and before any estimate was made of the cost of the improvement. The authority of villages is only to defray the expense of the improvement by local assessment. There is required, as a basis for the assessment, at least some estimate made with reasonable certainty of that expense.

It is said in Cooley, Taxation [2d ed.], 665: "There is no reason in the nature of things why an assessment should not be made before the work is actually done and before the cost shall be finally and conclusively determined. * * A city must also, in order to be enabled to perform its agency to advantage, be allowed to make the assessment and even the collection, if it shall be deemed proper, in ad-

vance. It has been repeatedly held that this is admissible." Three cases are cited in support of that rule. Of these *Manice v. City of New York*, 8 N. Y., 120, holds, not that the assessment may be made before the work is done, but that the city might do the work at its own expense and make the assessment after the work was completed. *Henderson v. City of Baltimore*, 8 Md., 352, was under a very broad statute, and does hold that payment might be enforced before any portion of the work is commenced; but it appears from the statement of the case that a contract had been made prior to the assessment, so that the cost of the work was determined. *Scovill v. City of Cleveland*, 1 O. St., 126, holds that an assessment was not void because in excess of the actual cost, but that was under a statute requiring the appointment of a committee of freeholders, first, to estimate the cost of the improvement, and, second, to assess the expense thereof to the property benefited. Here a fair method of estimating the expense was provided, and it clearly appears from the opinion that the making of such an estimate must precede the assessment and is an essential prerequisite thereto.

In the case before us there was no estimate of the expense, but the assessment was made arbitrarily months before any steps were taken for ascertaining the expense. Moreover, at the time of trial the improvements had not been made. To permit a village board or city council to impose local assessments in this manner, without regard to the cost of the improvement and without in fact making the improvement, would be to permit a confiscation of property under the guise of an assessment for contemplated improvements which, if made, would benefit the property, but without a *bona fide* intention of making them. We think, therefore, that these assessments were absolutely void. The case in this feature is analogous in principle to that of *Touzalin v. City of Omaha*, 25 Neb., 817. In that case the court granted an injunction against the enforcement

of a tax for grading a street upon the ground that the place graded had not been laid out as a street, and that plaintiff's property was not adjacent to or abutting upon the street graded, it being held in that case that a court of equity would enjoin the enforcement of a void tax, notwithstanding a section of the city charter substantially similar to section 144 of the revenue act. We think the assessment for sidewalks was absolutely void, there being a marked distinction between a tax for general purposes to which all property is equitably and legally bound to contribute, the plaintiff merely seeking relief because the forms required by law were not complied with, and a local assessment for the cost of improvements, where the only constitutional basis is benefits conferred, and the plaintiff asserts and proves that the cost was not considered and no benefits were conferred.

DECREE ACCORDINGLY.

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## E. HURLBUT, JR., v. A. W. HALL.

FILED APRIL 3, 1894. NO. 5327.

1. **Witnesses:** CROSS-EXAMINATION. Ordinarily, the cross-examination of a witness should be restricted to matters brought out on his examination in chief. If it is desired to examine the witness upon other matters, the cross-examining party must make the witness his own, and call him as such. *Boggs v. Thompson*, 13 Neb., 403, followed.

2. **Admission of Evidence:** OBJECTIONS: REVIEW. Generally, in order to predicate error on the overruling of an objection to testimony, specific ground of objection must have been brought to the attention of the trial court prior to the ruling; but where a general objection to evidence is sustained, the party against whom the ruling was made cannot urge, as a ground of reversal, that the objection was not specific.

3. ———: EXCEPTIONS: REVIEW. An exception must be taken to the ruling of a trial court on the admission or exclusion of testimony, in order to obtain a review of the question in this court.

4. **Alteration of Instruments.** Where a promissory note has been altered in a material part after its delivery to the payee, without the knowledge or consent of the maker, it is invalid, even in the hands of an innocent purchaser.

5. ———: MATERIAL ALTERATIONS. The insertion of the figures "10" in a promissory note, thereby making the instrument draw interest at ten per cent, when no rate of interest was originally specified, is a material alteration.

6. **Instructions:** HARMLESS ERROR: REVIEW. A judgment will not be reversed for the giving of an instruction not based upon the evidence, where it is clear that the party complaining of it could not have been prejudiced thereby.

7. ———. It is not error to refuse to give an instruction not applicable to the pleadings and evidence, although correct as an abstract proposition of law.

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

*Truman A. Barbour* and *Thomas H. Matters*, for plaintiff in error.

*J. L. Epperson & Sons, contra.*

NORVAL, C. J.

This is an action brought by the plaintiff in error upon a promissory note, a copy of which is set out in the petition as follows:

"$120. HARVARD, NEB., August 31, 1888.

"On or before the 31st day of August, 1889, I promise to pay to the order of W. T. Magee one hundred and twenty dollars, value received, with interest at 10 per cent per annum. A. W. HALL.

"Payable at Clay County Fence Factory."

The note was indorsed as follows: "Pay without recourse. W. T. MAGEE."

The petition alleges the making and delivering of the note by the defendant to the payee therein named; that plaintiff is the owner and holder thereof, and that he purchased the same before maturity for a valuable consideration, and without notice of any equities in favor of the defendant.

The answer denies that the defendant executed and delivered the note declared upon, and that plaintiff purchased the same as averred in the petition, and alleges that the defendant executed a promissory note on the 31st day of August, 1888, for $120, payable to the order of W. T. Magee, but that said note did not bear interest; that after the delivery of the note it was materially altered, without the knowledge or consent of the defendant, by inserting the figures "10," so as make the instrument draw ten per cent interest per annum. The answer further alleges, in substance, that the note so executed by the defendant was given to the said Magee in consideration of the defendant being appointed agent of the payee for the sale of a certain slat and wire fence, which Magee agreed to keep in stock at Clay Center, and to furnish to the defendant at 35, 40, 55, 60, and 65 cents per rod, according to the number of wires used; that Magee agreed to assist in the selling of said fence, so that the net profits to the defendant should be $48 per mile, and that said Magee failed to perform his part of said agreement.

The allegations of the answer are denied by the reply.

Upon the issues thus formed, the cause was tried to a jury, who returned a verdict in favor of the defendant, upon which judgment was rendered by the court.

A number of rulings of the trial court on the admission of testimony are assigned as error, which we will notice in the order stated in the brief of counsel for plaintiff in error.

Upon the trial in the court below the plaintiff called, as a witness in his behalf, the defendant A. W. Hall, for the purpose of proving that the latter signed the note sued on;

and it is insisted by counsel that the cross-examination of the witness exceeded the bounds of a proper examination. We quote from the bill of exceptions the entire testimony of the defendant:

Q. (Handing paper.) Did you ever see that paper before?

A. Yes.

Q. Is that your signature?

A. Yes.

Q. Did you write that letter to Mr. Hurlbut?

A. Yes, sir.

Said paper was marked Exhibit "A," and offered in evidence by the plaintiff, and read to the jury.

Q. (Handing paper.) Is that your signature?

A. I think it is; yes, sir.

Note offered in evidence by plaintiff, marked Exhibit "B."

Cross-examination by Mr. Epperson:

Q. Look at that note and state whether, or no, there has been any alteration made in it since you signed your name to it.

Objection by plaintiff, as incompetent, the note not being introduced in testimony at the present time, and that counsel has no right to cross-examine until the party calling the witness has examined in chief. Objection overruled.

Exhibit "B" offered in evidence by plaintiff. Note admitted. Plaintiff excepts.

Witness excused.

It is a familiar rule of evidence that ordinarily the cross-examination of a witness must be restricted to the matters brought out on his examination in chief. Where it is desired to examine the witness upon other matters, the cross-examining party must make the witness his own, and call him as such. (*Boggs v. Thompson*, 13 Neb., 403.) The plaintiff called the defendant to the stand for the single

purpose of having him identify his signature to the note, and while the testimony sought to be elicited on cross-examination by the question objected to tended to establish the defendant's plea that the instrument had been materially altered after the execution thereof, the question was not proper to be put to the witness on his cross-examination, since it did not relate to the facts testified to on his direct examination. The plaintiff, however, was not prejudiced by the overruling of his objection to the question, inasmuch as the record fails to show the witness answered the question. Counsel for plaintiffs in error in their brief say the defendant, after the overruling of the objection, then gave this answer to the question: "Yes, sir, the ten per cent has been inserted." This assertion is not sustained by the bill of exceptions. It is insisted "that the court then refused to admit the note and have it called a note, and would admit it only as a paper signed by the defendant, Mr. Hall." The record fails to sustain the contention, as it will be observed that the copy of the record above quoted shows that the note was admitted without any qualification whatever. It was received in evidence for all purposes. The bill of exceptions, on page 3, shows that the note a second time was admitted in evidence and was read to the jury, and must have been fully considered by them.

Complaint is made because the court sustained the defendant's objection to the following question propounded to the plaintiff's witness, T. A. Barbour, who was one of the attorneys who brought this suit in the court below: "Q. By what authority did you bring this suit in Mr. Hurlbut's name? Objection by defendant. Sustained." There was no error in this ruling, since the question was directed to a matter irrelevant to the issues in the case. The authority of Mr. Barbour to bring the suit was not raised by any pleading in the case, therefore it must be presumed that such authority existed. Again, the ruling complained of is not properly raised, for the reason the record fails to

disclose that the plaintiff stated to the trial court what answer the witness would make to the question. That this was necessary, in order to have the ruling reviewed by this court, is too well settled to require the citation of the authorities in support thereof.

But it is urged that the court erred in sustaining the objection to the question last stated, because the ground of objection was not given at the time the ruling was made, and Thompson, Trials, sec. 693, and several other authorities to which our attention has been directed, sustain the doctrine contended for. Mr. Thompson, in his work to which reference has been made, at section 693 states the rule thus: "Where evidence is objected to at the trial, if the party would save an exception to the ruling of the court if adverse to him, such as will be available on appeal or error, he must frame his objection so as to bring to the attention of the trial court the specific ground upon which he predicates it, and this must be stated in his bill of exceptions. He waives all grounds not so specified." Had the objection to the question been overruled, the answer of the witness taken, and the defendant was seeking to have the ruling reversed, perhaps then the plaintiff would be in a position to invoke the above rule and insist that the objection was not sufficiently specific to present any question for review. But the doctrine stated by Mr. Thompson has no application where, as in the case at bar, the court sustains the objection to the question propounded. If the testimony was for any reason properly excluded, which was clearly the case, plaintiff has no just grounds for complaint of its exclusion. The ruling cannot be reviewed, for the obvious reason that no exception was taken at the time the testimony was excluded. (*Republican V. R. Co. v. Arnold*, 13 Neb., 485.)

Counsel for plaintiff in the brief say: "During the further examination of the same witness the following question was asked by the plaintiff's attorney: 'Q. Did

you ever have any talk with Mr. Hall about this matter before the note was due?' To which the defendant objected without giving any reason for his objection, and the court thereupon sustained the objection, to which the plaintiff then and there duly excepted." The question was asked, but no objection was made thereto by the defendant. The record also shows that the witness answered the interrogatory as follows: "I cannot say positively. I made a trip to Mr. Hall's place of residence before the note came due, and he was not at home. My remembrance is that some of his family were, and I left word that I (objection by defendant) had such a note; whether I had a personal interview (interrupted)." The witness, after the interruption, made no further response to the question. It was certainly incompetent to prove the conversation between the witness and a member of the defendant's family, in the absence of the defendant. The answer of the witness was objected to, but the court did not rule thereon, nor did the plaintiff take any exception, or further press the witness for an answer.

It is urged that the court erred in permitting the defendant to answer the following question put to him by his counsel while being examined as a witness in his own behalf: "State to the jury where you were and all the circumstances surrounding the signing of the note. State where you were, and what you were doing. State all the circumstances of your signing the note." The brief states: "To which the plaintiff there and then objected for the reason it was incompetent and immaterial, which objection the court overruled, to which ruling of the court the plaintiff there and then excepted." Here counsel again are mistaken. No objection to the question was made when the same was asked. The record shows that the objection was first made after the witness had answered the question. This was too late. Besides, the question was proper, and the answer pertinent and competent as tending to prove the defense set up in the pleading.

Objection is urged to the court's permitting the defendant to testify that the note had been materially altered after the execution and delivery thereof, and in allowing the circumstances surrounding the signing of the note to be given, without it being first shown that the plaintiff was not an innocent purchaser of the note. The defendant was not required to prove that the plaintiff was not a *bona fide* holder of the instrument for value, in order to be entitled to introduce evidence tending to establish his defense that the note had been changed. The rule is that where a note is materially altered without the knowledge or consent of the maker, it is void even in the hands of an innocent purchaser. (*Brown v. Straw*, 6 Neb., 536; *State Savings Bank of St. Joseph v. Shaffer*, 9 Neb., 1.) The insertion of the figures "10" in the note, so as to make it draw ten per cent interest, was such an alteration as avoids the note. (*Davis v. Henry*, 13 Neb., 497.) We are unable to discover any error prejudicial to the rights of the plaintiff in the rulings of the court below on the taking of the testimony.

Exception was taken by plaintiff to the fourth paragraph of the court's charge, which reads as follows: "It is a general rule of law that possession of a promissory note, indorsed by the payee thereof in blank, is *prima facie* evidence of ownership, but if the indorsement be denied, then it is for the plaintiff to establish the fact of such indorsement by proof thereof." The foregoing instruction was not applicable either to the evidence or the issues raised by the pleadings in the case. No question was made but that plaintiff was the owner of the instrument declared on. Plaintiff could not have been prejudiced by the giving of the instruction, since the jury were told, in effect, by the seventh paragraph of the court's charge, that the plaintiff was entitled to recover the face of the note and interest, as by its terms expressed, unless they should find from the evidence that the note had been materially altered after the making of the same, as alleged by the defendant, without

the consent of the maker. The instruction complained of, although not applicable to the case, in view of the positive language of the seventh instruction given by the court on its own motion already referred to, could not have misled the jury. A judgment will not be disturbed for the giving of an improper instruction to the jury, where it is clear that the party complaining of it could not have been prejudiced thereby. (*Converse v. Meyer*, 14 Neb., 190; *O'Hara v. Wells*, 14 Neb., 403; *Labaree v. Klosterman*, 33 Neb., 150.)

Complaint is made of the refusal of the court to give to the jury the following instructions, requested by the plaintiff:

"1. The jury are instructed that the fact that the plaintiff is the holder of the note sued on is *prima facie* evidence he is the owner of the same, and that presumption exists until the contrary is shown by the defendant.

"2. The jury are instructed that negotiable paper before maturity is intended, to some extent at least, to represent money. Possession therefore is *prima facie* evidence of ownership when it is payable to bearer or indorsed in blank, and that presumption exists until the contrary is shown by the defendant.

"3. The jury are instructed that should they find from the evidence that the plaintiff was not the owner of the note, this would constitute no defense to the action and affords no protection to the defendant in this suit, his plea of no consideration having entirely failed.

"4. The court instructs the jury that the purchaser of negotiable paper for a valuable consideration before maturity, without notice of any defense in favor of the maker of the instrument, takes it free from all equities existing between the original parties, and it is incumbent on the defendant to first show bad faith on the part of the purchaser of the note in question before he can be allowed to introduce any testimony or interpose any defense as to the

original transaction between the original parties to the note, which, in this case, the defendant has failed to do."

While it is true, as a proposition of law, that the possession by the plaintiff of a negotiable promissory note, duly indorsed by the payee thereof, is *prima facie* evidence of the holder's ownership, and that he received the same upon a valuable consideration before due, in the usual course of business, without notice of any equities between the maker and the payee, it was not reversible error to refuse to instruct the jury as requested by the plaintiff, inasmuch as the ownership of the note was not a controverted issue in the case. The only question submitted to the jury was whether or not the note had been materially altered after its execution. If the jury found that it had been so changed, then they were directed to find for the defendant, otherwise to return a verdict for the plaintiff. The fact that plaintiff was an innocent purchaser of the paper was no protection to him as against the defense of a material alteration.

It is finally insisted that the verdict is not sustained by the evidence. The defendant testified positively that "10" per cent had been inserted in the note after it was delivered, without the defendant's consent. The jury believed him, and we think the evidence fully justified them in so doing. The judgment is

AFFIRMED.

POST, J., not sitting.

## STATE OF NEBRASKA, EX REL. JOHN H. HERSHEY, v. JOHN H. CLARK, COUNTY TREASURER.

FILED APRIL 3, 1894. No. 5977.

1. **Contract of Purchase of School Lands: DEFAULT IN PAYMENT OF INTEREST: FORFEITURE: NOTICE.** Before a contract of purchase of school lands entered into with the state can be declared forfeited, because of a default in the payment of annual interest, notice to the delinquent purchaser of such proposed cancellation must first be given by the commissioner of public lands and buildings.
2. ———: ———: ———: NOTICE TO NON-RESIDENTS. In case the purchaser is a resident of the state and his address is known, such notice must be personally served upon him; but where he is a non-resident, or his address is unknown, the notice may be published in some newspaper published or of general circulation in the county where the land is located.
3. *State v. Graham*, 21 Neb., 329, and *Richardson v. Doty*, 25 Neb., 420, distinguished.

ORIGINAL application for *mandamus*.

*Frank T. Ransom*, for relator, cited: *Richardson v. Pratt*, 20 Neb., 196; *Richardson v. Doty*, 25 Neb., 420.

*George T. French*, *Thomas Darnall*, and *Grimes & Wilcox*, *contra*, cited: *State v. Eberhardt*, 14 Neb., 203; *State v. Scott*, 17 Neb., 690; *People v. Martin*, 4 Neb., 54; *McGee v. State*, 32 Neb., 149; *State v. Graham*, 21 Neb., 354.

NORVAL, C. J.

On the 3d day of February, 1893, the relator, John H. Hershey, applied to this court for a peremptory writ of *mandamus* to compel the respondent, John H. Clark, as county treasurer of Lincoln county, to receive from the relator the amount of money due the state on a school land

contract of purchase for the southwest quarter of section 16, township 14, range 32 west of the 6th principal meridian, entered into by the state with one C. S. Guthrie, and by *mesne* assignments now owned by the relator, and to issue to him a receipt for said money. The issues were formed by proper pleadings, whereupon the cause was referred to Hon. J. H. Broady to take the testimony and report the same to the court, with his findings of fact and conclusions of law. Subsequently the referee made and returned to the court his findings, embracing eleven type-written pages, exclusive of the testimony upon which the same was based. The testimony and findings of facts of the referee may be summarized as follows:

On the 7th day of June, 1884, one C. S. Guthrie purchased of the state the land in controversy for the sum of $1,120, he paying down one-tenth of the principal and the interest on the remainder up to January 1, 1885, amounting to $30.78. By the terms of the contract he also agreed to pay the balance of the purchase price on June 7, 1904, with $60.48 interest thereon on the first day of January of each year. On July 11, 1884, Guthrie, by written indorsement, bargained, sold, and assigned said contract and his interest in said land to Anna S. Guthrie, which assignment was entered of record in the office of the commissioner of public lands and buildings on June 22, 1885. On the 14th day of April, 1887, the said Annie S. Guthrie duly sold, assigned, and conveyed her interest in said contract, and the said land, to the relator, and on the 18th day of the same month said assignment was duly recorded in the office of the commissioner of public lands and buildings. Immediately upon receiving said assignment relator took actual possession of the land in dispute, and ever since has held actual, open, and notorious possession thereof under claim of right under said contract, and has actually resided with his family during said time within a mile of said land. The relator has paid to the state on said contract, as assignee thereof, all

payments up to January 1, 1891, but through inadvertence has made no payment thereon since then. The relator did not intend to abandon, but expected to comply with, said contract. On the 1st day of January, 1892, the commissioner of public lands and buildings prepared and sent to the respondent for service upon relator a written notice to the effect that the interest due on said contract was delinquent for more than a year, and, unless all payments due thereon were paid within six months from the date of the service of the notice, such contract would be declared forfeited. George E. Prosser, the respondent's deputy, usually had charge of the notices of this character, and said deputy was at that time, and for a long time prior thereto had been, well acquainted with the relator and knew that he was a resident of Lincoln county. The respondent, with slight diligence, could easily have ascertained the residence of relator, and made personal service of said notice upon him. No effort was made either to ascertain the residence of relator or to make personal service upon him, but the notice was returned to the commissioner of public lands and buildings without service and without statement of the residence of the relator unknown. Afterwards, in June, 1892, the said commissioner caused to be published in the *North Platte Telegraph*, a newspaper of general circulation in Lincoln county, for three successive weeks, a notice to the effect that the interest upon said contract was delinquent, and if said delinquency was not paid within ninety days said contract would be declared forfeited. The publication of said notice was the only notice given that the rights of the relator under said contract of sale would be forfeited. On the 14th day of September, 1892, the board of educational lands and funds, by resolution unanimously adopted, declared said contract canceled, and notice of said cancellation was given by the commissioner of public lands and buildings on October 15, 22, and 29, and November 5 and 12, 1892, in the said *North Platte Telegraph*. Said notice fur-

ther provided that if said contract is not reinstated by the payment of the delinquent interest, said lands would be offered for lease by the county treasurer on the 21st day of November, 1892. On the date last aforesaid a lease in proper form was executed and delivered to one Thomas Stimson for said land, who paid to the respondent $1.87 to be applied as rental to January 1, 1893, and on January 23, 1893, said Stimson paid the further sum of $8.43 to be applied as rental to July 1, 1893. At the time said Stimson leased the land he was aware, as he admitted on the trial, that relator claimed some interest in the land, but refrained from making any inquiry of him on the subject. The first notice or knowledge relator had of the said forfeiture of his contract, or the lease to Stimson, was January 27, 1893, and on the 31st day of said month relator tendered to defendant $193.21 on said contract of sale, which was all that was due the state thereon, and he has kept said tender good.

The relator for fourteen years past has been a resident of Lincoln county, living within a mile of the land in dispute and near a station and post-office on the Union Pacific railroad named "Hershey," after the relator, and during the period covered by the transactions in the case at bar said Stimson has been a neighbor of and acquainted with the relator.

The question involved is the validity of the forfeiture of the contract. The contention of counsel for the relator is that the board of public lands and buildings had no jurisdiction or power to annul or cancel the contract issued to Guthrie, and assigned to plaintiff, inasmuch as no notice of the contemplated proceedings to declare a forfeiture of the contract was personally served upon the relator. If this position of counsel is well founded, then relator is entitled to the relief demanded. Section 16, chapter 80, Compiled Statutes, relating to the forfeiture of school land contracts, reads as follows: "If any lessee of educational

lands shall be in default of the semi-annual rental due the state for a period of six months, or any purchaser of educational lands be in default of the annual interest due the state for one year, the commissioner of public lands and buildings may cause notice to be given to such delinquent lessee or purchaser that, if such delinquency is not paid within six months from the date of the service of such notice, his lease or sale will be declared forfeited by the board of educational lands and funds. If after such notice the amounts due are not paid within six months from the date of the service of such notice thereof, the said contract of lease or sale may be declared forfeited; and the lands therein described shall revert to the state the same as though such lease or sale had never been made; and the order making such forfeiture shall be spread upon the records of the board of educational lands and funds. In case the owner of such contract of sale or lease be a non-resident of this state, or his address be unknown, the notice herein contemplated shall be published three weeks in some newspaper published or of general circulation in the county where the land is situated. The forfeiture may be entered by said board after ninety days from the date of such published notice. The provisions of this section shall apply alike to all the lands heretofore sold or leased, and to all lands hereafter sold or leased as educational lands of this state; *Provided,* The owner of any contract of sale or lease so forfeited may redeem the same by paying all the delinquencies and costs at any time before such land is again sold or leased." Under the statute just quoted no forfeiture of any contract of purchase of educational lands of the state can be declared because of the default of the purchaser in the payment of the annual interest due the state until notice to the delinquent purchaser of such proposed action has been given by the commissioner of public lands and buildings. Manifestly such is the import of the section. The giving of the notice is jurisdictional, and unless

it is given in the manner pointed out by the legislature, the board of educational lands and funds is powerless to act. This is no new doctrine. In *Smith v. White*, 5 Neb., 407, this court, in discussing the power to cancel a contract of purchase of school land, under the statute then in force, said: "The payment of the purchase money is a condition precedent which must be fully performed on the part of the purchaser to entitle him to an estate in fee; but the mere failure of a purchaser to pay the interest at the time it became due will not of itself forfeit the estate of the purchaser in the land. The statute requires notice to be given by the county treasurer to the purchaser, stating the delinquency complained of, and requiring the removal thereof by the fulfillment of the conditions of the covenants of the bond and contract." The statute under review, in the case quoted from, differs from the one now in force, which is copied above, in that it required the county treasurer to give to the purchaser the notice of the delinquency, but how the notice should be given is not expressly provided, while the present statute directs that the commissioner of public lands and buildings shall give the notice, and provides how it shall be given. But this change in the statute does not modify the rule so as to permit a forfeiture without notice to the delinquent purchaser. True, a notice was given to the relator in the case at bar by publication in a newspaper; but such notice was insufficient to confer jurisdiction on the board to declare a forfeiture of the relator's contract. The statute declares that "in case the owner of such contract of sale or lease be a non-resident of this state, or his address be unknown, the notice herein contemplated shall be published three weeks in some newspaper published or of general circulation in the county where the land is situated." (Comp. Stats., sec. 16, ch. 80.) Notice by publication is only authorized where the owner of the contract is a non-resident of the state, or his address is unknown. In all other cases the statute contemplates that

personal service of the notice must be made upon the delinquent. Doubtless such service may be made in the manner required by law for the service of a summons in a civil action, or any other mode which will afford the delinquent personal notice of the proposed action. It is conceded in this case that no notice of the proposed action of the board of educational lands and funds was ever personally given Hershey, although he was a resident of the state and his address and residence were known. The conclusion is irresistible that the notice by publication is void, and the personal service of notice on the relator was necessary as a preliminary to confer jurisdiction to declare a forfeiture of the contract.

*State v. Graham*, 21 Neb., 329, does not conflict with the conclusion here reached. In that case the proof showed that the relator was duly notified of the default in the payment of the interest on his school land contract, prior to the time the same was declared forfeited by the state, and the resale of the lands. Besides, there the relator knowingly suffered, without objection, the second purchaser from the state to expend money in making valuable improvements on the land. The relator was therefore estopped to afterwards assert that he had any title or interest in the premises. Here there was no estoppel, nor did the relator have notice that his contract was about to be canceled or annulled.

The conclusion we have reached in the case at bar does not conflict with the decision of this court in *Richardson v. Doty*, 25 Neb., 420. In that case the purchaser under a school land contract had failed to pay the interest thereon due the state for fifteen years, and during ten years of which period the land had been in the actual possession of a subsequent, good-faith purchaser from the state, who made valuable improvements thereon in the belief that he held the title, the first purchaser permitting him to so do without objection. The court held that the first purchaser was

barred, by his conduct, from asserting title against that of the second purchaser.

In the case we are considering Stimson had notice that the relator claimed the land, and therefore was not an innocent purchaser. As soon as the relator was apprised that his contract had been canceled by the state, and the land had been leased to Stimson, he tendered to the respondent the amount due on the contract, and brought this action to compel the defendant to receive the money thus tendered. The exceptions to the report of the referee are overruled, the report in all things is confirmed, and upon the relator depositing the amount of money heretofore tendered with the clerk of this court for the use of the county treasurer of Lincoln county, a writ of *mandamus* will issue as prayed.

WRIT ALLOWED.

POST, J., not sitting.

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1. Statements of vendor of land as to its value are generally mere expressions of opinion and not ground of rescission. *Nostrum v. Halliday*..... 828
   *McKnight v. Thompson*..... 752
2. But misrepresentations as to the value of real estate are sufficient ground for setting aside a trade for property in another state than that where the parties reside, and the vendee is prevented by the fraud of the vendor from making inquiries. *Id.*

**Fraud**—*concluded.*

3. A party is not estopped because of carelessness to deny liability on a writing which he has signed, if it was fraudulently altered before he signed it. *Ward v. Spells*.....812–815

**Fraudulent Conveyances.** See CHATTEL MORTGAGES.

1. *Landauer v. Mack* ..... 8
2. To make a sale fraudulent, purchaser must have notice of facts which would put one of ordinary prudence on inquiry. *Edwards v. Reid*.....648, 649
3. A decree annulling a conveyance to a party as fraudulent cannot be entered without a finding against such party. *Id.*.....649, 650
4. Retention and sale of chattels in usual course of business by mortgagor will not *per se* render void the mortgage; whether it is fraudulent is a question of fact. *Sherwin v. Gaghagen*.....249–251
5. Nor is a mortgage given for the purchase price of the property mortgaged void because value of property is greatly in excess of amount of debt. *Id.*.....251, 252
6. Fraud in a chattel mortgage by reason of stipulation for possession and sale by mortgagor is available only to creditors who have levied before delivery to mortgagee. *Id.*... 250

**Garnishment.**

1. *Prentice Brownstone Co. v. King* ..... 816
2. The act of 1889, p. 369, for the better protection of laborers' wages, does not contravene the state constitution as class legislation, nor as being broader than its title, nor as imposing a penalty for the benefit of an individual. *Singer Mfg. Co. v. Fleming*.....682–686, 692
3. Nor does it contravene sec. 1, art. 4, of the federal constitution relating to the faith and credit to be given to judicial proceedings of other states. *Id.*.....686–690
4. Whether that portion of the act which makes its violation a crime is valid is not decided. *Id.*.....679–685
5. The act applies to a foreign corporation having a place of business in Nebraska which, by virtue of a contract made and performable here, institutes proceedings in another state and seizes wages earned and payable in Nebraska and exempt by its laws. *Id.*.....690–692

**General Denial.** See PLEADING, 7.

**Guaranty.** See SURETYSHIP AND GUARANTY, 6.

**Guardian and Ward.**

1. Guardian has no capacity to sue for debt due deceased ward. *Barrett v. Provincher*..... 773
2. Numerous objections to validity of sale of ward's real estate in pursuance of license by district court examined, and *held* insufficient in a collateral proceeding. *Myers v. McGavock*.....855–869
3. Application by guardian for such license is a proceeding *in rem* and requires no notice to the wards, or wards presumptive, where the purpose of the sale is their education and maintenance, not the payment of debts. *Id.*.....859–865
4. Natural guardians may become legal guardians and be licensed to sell ward's real estate only by appointment under the statute. *Id.*.....856, 857
5. Duties of district judges in supervising guardians and authorizing such sales. *Id.*.....861, 862
6. Purchaser at such sale may acquire title by adverse possession against ward's mother and adult brother who have appeared and consented to the sale. *Id.*.....863–870

**Handwriting.**

A witness may testify to the signature of one whom he has never seen write, if he has sent to, and received in reply letters, the replies coming apparently from such person. *Violet v. Rose*.....672, 673

**Harmless Error.**

1. Improper instruction not grounds for reversal unless prejudicial. *Hurlbut v. Hall*.....896, 897
2. An instruction defective, but not prejudicial, is not ground for reversal. *Roggencamp v. Hargreaves*..... 544
3. An instruction, though erroneous, is, where the verdict is supported by other evidence admissible regardless of such instruction. *Omaha & R. V. R. Co. v. Brady*..... 42
4. Submission incidentally by an instruction, of a matter not in issue, is, where jury could not have been misled thereby. *Violet v. Rose*.....669, 670
5. Error cannot be predicated upon a charge similar to one requested by the complaining party. *Richards v. Borowsky*, 774

**Hermeneutics.** See CONTRACTS, 1, 5. STATUTES.

**Homesteads.**

1. Conveyance of, must be signed and acknowledged by both husband and wife. *Violet v. Rose*..... 661

**Homesteads**—*concluded.*

2. To constitute abandonment of, there must be both actual removal and the intention not to return. Absence, though prolonged, for some temporary purpose is not abandonment. *Edwards v. Reid* .....651, 652

3. Extent of, is measured by claimant's interest in the land and not the fee-simple value thereof; hence judgments rendered after the execution of a mortgage which, when deducted, leaves claimant's interest less than $2,000 are not liens on the property. *Hoy v. Anderson*.....388-390

**Husband and Wife.** See HOMESTEADS, 1.

**Imprisonment.** See CRIMINAL LAW.

**Indorsement.** See NEGOTIABLE INSTRUMENTS, 2, 3.

**Infants.** See GUARDIAN AND WARD.

**Injunction.** See TAXATION, 4-6. WASTE.

**Instructions.** See HARMLESS ERROR. NEGLIGENCE, 3. REVIEW, 2.

1. Use of phrase "considerable length of time" instead of "reasonable time" *held* error. *City of Lincoln v. Calvert*, 312, 313

2. Use of expressions "slight negligence," etc., criticised. *Omaha Street R. Co. v. Craig* .....601, 618

3. Should be given by the court on the law of the case whether requested by counsel or not. *York Park Building Association v. Barnes* ..... 836

4. Failure of court to charge on a material issue is reversible error. *Waldorf v. Haggin*..... 735

5. Submission to the jury of issues upon which the evidence is uncontradicted is prejudicial where it withdraws attention from the real issues. *Dayton v. City of Lincoln*.....81, 82

6. When already given in substance, or inapplicable to the evidence, are properly refused. *Omaha Nat. Bank v. Thompson* .....274, 275
*Jonasen v. Kennedy* ..... 313
*American Building & Loan Association v. Mordock* ..... 420
*Hurlbut v. Hall* ..... 890

**Insurance.**
*Phenix Ins. Co. v. Bachelder*..... 95

**Interest.** See USURY.

**Interpretation.** See CONTRACTS, 1, 5. STATUTES.

**Interstate Commerce.** See CONSTITUTIONAL LAW, 1.

**Joinder.** See PARTIES. PLEADING, 2, 3.

**Judgments.** See HOMESTEADS, 3. PARTNERSHIP, 3.

1. On pleadings *held* to be erroneous. *Mollyneaux v. Wittenberg*..... 547
2. When rendered against a party who is described and summoned by using his initial and surname, are void unless there is actual personal service; and he may interpose that fact as a defense, in a proceeding to revive the judgment. *Enewold v. Olsen*.....63–65
3. Become dormant in five years, unless execution is issued, and thereby lose priority over mortgages attaching during the continuance of the judgment lien. *Flagg v. Flagg*, 232–237
4. Neither the commencement nor the pendency of an action by the judgment creditor to subject defendant's real estate to the payment of a judgment will prevent it from becoming dormant or preserve its priority over a mortgage attaching within the period of the judgment lien. *Id.*

**Judicial Sales.** See FORECLOSURE, 1–3. GUARDIAN AND WARD, 2–6. TAX SALES.

1. Administrator's sale of real estate is. *Maul v. Hellman*... 328
2. Purchaser at such sale becomes a party to the proceeding and may be compelled to perform his bid; and it is no ground for release that the administrator refuses to perform an alleged agreement to apply proceeds of sale to discharge of incumbrances on property, especially where purchaser failed to object at confirmation, and order of court had directed sale subject to incumbrances. *Id*...329, 330
3. Purchaser at sale to enforce a lien takes free from it, but cannot tack lienor's prior possession to his own so as to establish title adverse to another. *Carson v. Dundas*.....503–507

**Jurat.** See MECHANICS' LIENS, 8.

**Jurisdiction.** See COUNTY COURT. MUNICIPAL CORPORATIONS, 4. NAMES, 2.

1. Objections to, not appearing on the face of the record, may be raised by answer which contains also a defense to the merits, and in such case the latter does not constitute a general appearance or waive the jurisdictional defense. *Hurlburt v. Palmer*.....169–179
2. An alleged abuse of criminal process by which one defendant is brought into a county in order to serve him with summons there, and thus obtain jurisdiction over his co-defendants, is a defense which may be so raised. *Id.*

**Jurisdiction**—*concluded.*

3. Jurisdictional defects are not waived by prosecuting error or appeal. *Id.*.....179, 180

4. Nebraska courts will not generally, of their own motion, deny equitable relief on the ground that there is an adequate remedy at law; objection must be made on that ground, and the court's attention called to it before submission of the cause or it will be waived. *Sherwin v. Gaghagen*.....248, 249

**Jurors.** See TRIAL, 4.

One who admits that his acquaintance with one of the parties would interfere with his judgment is incompetent. *Omaha Street R. Co. v. Craig*.....625, 626

**Justice of the Peace.**

Cannot sign bill of exceptions in case tried before him without a jury, nor can evidence taken in such case be reviewed on error in district court. *Real v. Honey*..... 520

**Laborers.** See GARNISHMENT, 2-5.

**Landlord and Tenant.** See FIXTURES. LEASE.

**Lease.** See FIXTURES.

Agreement for, to extend one year, and under which possession is taken, if reduced to writing, though not signed by lessor, and though rent payments are monthly, is valid as a parol lease for one year. *Nickolls v. Barnes*..... 108

**Legislature.** See EVIDENCE, 11.

**Libel.** See BLACK-LISTING.

**Licenses.** See GUARDIAN AND WARD, 2, 3. LIQUORS.

**Liens.** See JUDGMENTS, 3, 4. JUDICIAL SALES, 3. MECHANICS' LIENS. STATUTE OF FRAUDS, 2.

**Limitation of Actions.** See USURY, 6.

Statute does not begin to run in favor of defendant in action to quiet title, until he asserts ownership. *Pleasants v. Blodgett*..... 744

**Liquors.**

1. Legislature, in exercise of police power, may prohibit sale of. *Hunzinger v. State*..... 653

2. It is no defense to an indictment for selling without license that no license could be procured. *Id.*..... 658

3. The first proviso to sec. 1, ch. 50, Comp. Stats., is not unconstitutional because residents within two miles of cities and villages are deprived of the privilege of having the sale of liquors licensed within such limits. *Id.*.....657, 658

**Liquors**—*concluded.*

4. Nor is the next proviso class or special legislation as assuming to "regulate county and township offices;" nor because there is but one county to which it may apply. *Id.*.....654–657

**Loans.** See AGENCY, 2. USURY.

1. *Hurlburt v. Palmer*.....167–169
2. *State v. Bartley*.....364–367
3. *American Building & Loan Association v. Mordock*..... 413

**Local Assessments.** See TAXATION, 5.

**Locus.** See ACTIONS.

**Lost Instruments.** See DEEDS.

**Maintenance.** See CHAMPERTY.

**Malicious Prosecution.**

1. Instruction defining "probable cause" approved. *Jonasen v. Kennedy*.....319, 320
2. Reliance upon advice of counsel as a defense must be proved by showing facts constituting a full disclosure to such counsel and action upon his advice in good faith. *Id.*.....313, 317
3. Mere suspicion or belief that a ring lost by theft is the same as one found in another's possession is not probable cause for prosecuting latter. *Id.*.....317, 318

**Mandamus.** See SCHOOL ORDERS.

Relator's right and respondent's duty must be clear. *State v. Sabin*..... 573

**Marshalling Assets.**

Resort to one of two funds, for benefit of another creditor entitled to but one, will not be compelled to the prejudice of creditor entitled to double fund. *Farmers & Merchants Bank of York v. Anthony*..... 351

**Maxims.** See CAVEAT EMPTOR.

**Measure of Damages.** See DAMAGES.

**Mechanics' Liens.** See SURETYSHIP AND GUARANTY, 5.

1. Rule of *caveat emptor* applies to those claiming benefits of, and they are charged with notice of interest of parties with whom they contract. *Hoagland v. Lowe*.....407–413
2. An agreement between a vendor and vendee that the former would make certain improvements on the premises, will not subordinate a mortgage for the purchase money to a lien for labor and material furnished for such improvements. *Id.*

Mechanics' Liens—*continued.*

3. Nor is such mortgage subordinated to the lien by the mere fact that it is made subject to another mortgage given by the vendee to obtain a loan for the purpose of making such improvements, the proceeds being in part used instead as a cash payment on the purchase price, and received by the vendee without knowing whence it was obtained. *Id.*
4. Mortgagee is not an "owner" within the meaning of the statute, and his interest will not generally be subordinated to liens for labor and material furnished after recording of mortgage. *Id.*
5. Do not attach by virtue of a contract with a proposed vendee of real estate who has received no conveyance and refuses to complete his purchase by payment. *Burlingim v. Warner* .....493–499, 500
6. The vendor is not estopped from asserting his title against those claiming such liens, because he visits the premises and complains of the manner in which some of the work is being performed. *Id.*.....500, 501
7. Such lien claimants have no equity by which they can require the conveyance to be executed and money to be advanced on a mortgage, which had been taken by a loan company, and released. *Id.*.....493, 502
8. Affidavit for, whose jurat shows the venue to have been a county different from that for which the notary was appointed, is insufficient to perfect the lien and renders it incompetent in evidence. *Byrd v. Cochran* .....117–120
9. In suit to foreclose lien upon one piece of property for labor and materials furnished for it jointly with other property it must be shown definitely and not by mere approximation that the amount charged against the one property is the value of labor and materials used thereon. *Id.*..... .....122, 123
10. A joint lien will attach to several pieces of property for material delivered there under single contract. *Wakefield v. Latey*.....291, 292
11. Affidavit attached to account of items is not defective because it fails to state name of real estate owner, or of party with whom contract for furnishing materials was made; especially where the account itself discloses contractee's name. *Id.*.....288–290
12. *Semble*, That under a contract for material to be used in "dwellings" lien attaches if it is used in outhouses. *Id.*, 291

**Mechanics' Liens**—*concluded.*

13. Sufficiency of "account of items" is a question of law, and such account cannot be used to prove statutory requirements except oath and filing. Performance of other requirements is a mixed question of law and fact. *Id.*...289, 290

**Monopolies.** See TRUSTS.

**Mortgages.** See CHATTEL MORTGAGES. FORECLOSURE. HOMESTEADS, 3. JUDGMENTS, 3, 4.

1. An agreement to assume a mortgage as a part of the consideration for a conveyance, is an independent undertaking, whose existence is a question of fact upon which the finding of a trial court will not be disturbed where the evidence is conflicting. *Reynolds v. Dietz*.....185-188
2. An averment that a deed to a trustee, in whose name a conveyance was taken, recited that he had assumed a mortgage, does not warrant the conclusion that the *cestuis que trustent* are liable for a deficiency judgment. *Id.*
3. Create only a lien and do not convey title; mortgagee is not owner within meaning of mechanics' lien statute, and his interest will not generally be subordinated to lien for labor and materials furnished after recording of mortgage. *Hoagland v. Lowe*.....407-413

**Motions.** See PLEADING, 5, 9. TRIAL, 3.

**Municipal Corporations.** See NEGLIGENCE, 5, 6. TAX SALES. TAXATION, 1-5, 7.

1. Damages to property from grading streets; "special," "general," and "common" benefits discussed. *Kirkendall v. City of Omaha*..... 6-8
2. "Special" but not "general" benefits are to be deducted in awarding compensation for such damages, and an instruction which fails to exclude a deduction for "general" benefits is erroneous. *Dayton v. City of Lincoln*.....82, 83
3. "Special benefits" are none the less such because they accrue as well to adjacent property. *Kirkendall v. City of Omaha*..... 8
4. Sec. 36 of act relating to cities of first-class (sec. 2518, Cons. Stats.) does not provide for judicial action by the council upon claims for unliquidated damages; such claims may be prosecuted in the courts. *Dayton v. City of Lincoln*.....77-79
5. Ordinary liability of, for unsafe streets, is suspended as to conditions which are reasonably necessary, and for a reasonable time, during repairs and improvements; but they

**Municipal Corporations**—*concluded.*

must still exercise reasonable care. *City of Lincoln v. Calvert*..... 309

6. Are chargeable with notice of defects caused by their direct orders. *Id.*
7. Or of which they should have known. *City of Friend v. Ingersoll*..... 722

**Names.** See SURETYSHIP AND GUARANTY, 6.

1. Where a party is designated in pleadings and process by his initials, court should permit an amendment and not dismiss *Real v. Honey*..... 516
2. A party's full legal name consists of his Christian or given, and his surname or partronymic; and except in cases mentioned in sec. 23 of the Code, unless both names are stated in the summons in full, there must be actual personal service on defendant in order to confer jurisdiction. *Enewold v. Olsen*.....63, 64

**National Banks.** See USURY, 5, 6.

**Negligence.** See CONTRIBUTORY NEGLIGENCE. EVIDENCE, 4. MUNICIPAL CORPORATIONS, 5–7. QUESTIONS OF FACT, 3, 4.

1. Defined. *Omaha Street R. Co. v. Craig*.....602–616
2. Question of, is for the jury, where reasonable men may fairly differ on the effect of the evidence; hence whether a street car passenger is negligent in alighting from a moving car, and not grasping the braces, is for the jury, and its finding will not be disregarded because it is contrary to the testimony of a majority of the witnesses. *Id.*, 602
3. The expressions "slight negligence," "slight want of ordinary care," etc., should not be used in instructions. *Id.*.....601, 618
4. Jumping from a moving train is. *Woolsey v. Chicago, B. & Q. R. Co*.....801–803
   *Chicago, B. & Q. R. Co. v. Landauer*..... 803
5. The statutory right of railroads to lay tracks on streets, carries with it the duty to maintain grade crossings there; and failure so to do is evidence of negligence rendering the company liable. *Omaha & R. V. R. Co. v. Brady*.....27, 36–38
6. In the absence of a municipal ordinance requiring the company to keep a flagman at such crossing, whether its failure to do so is negligence is a question of fact. *Id.*.....38, 39
7. Unnecessary noise from the escape of steam is not *per se*

**Negligence**—*concluded.*

evidence of negligence. The surrounding circumstances must show neglect. *Id.*....39–42
*Omaha & R. V. R. Co. v. Clarke*.... 65

8. Negligence and contributory negligence are questions of fact where different minds might reasonably draw different conclusions. *Omaha & R. V. R. Co. v. Brady*...42, 43, 52, 53

9. Remittitur of $5,000 ordered from judgment for $7,000, for permanent injury not shown by competent evidence to be the actual result of the negligence complained of. *Id.*....53–58

10. A champertous agreement between plaintiff and his counsel is not available as a defense in an action against a railroad company for damages. *Id.*.... 50

**Negotiable Instruments.** See BANKS AND BANKING.

1. Note given for privilege of using article not shown to be patented, but apparently open to use by all, is *nudum pactum*. *Schroeder v. Nielson*.... 338

2. Where maker, in action by indorsee, denies latter's ownership, indorsee must prove that note was indorsed by payee. *Id.*.... 339

3. In an action by the indorsee of a note, where the defendant pleads fraud and failure of consideration, it is not error to permit defendant to testify as to transactions between the original parties, before showing that plaintiff was not a *bona fide* purchaser. *Violet v. Rose*....665–668

4. A note showing on its face alteration in rate of interest should not be received in evidence until such alteration is explained. *Courcamp v. Weber*.... 538

5. Insertion of figures "10" expressing rate of interest where none was provided for previously is a material alteration and avoids a note even in the hands of an innocent purchaser. *Hurlbut v. Hall*.... 896

**New Trial.**

Evidence not produced at the trial because its existence is forgotten will not justify a new trial on ground of newly discovered evidence. *Upton v. Levy*....333, 334

**Notary Public.**

Can act only in the county for which he is commissioned, and claim for lien sworn to before him in another county is invalid. *Byrd v. Cochran*....117–119

**Notes and Bills.** See NEGOTIABLE INSTRUMENTS.

**Notice.** See ADMINISTRATION OF ESTATES, 2. CHATTEL MORTGAGES, 2. FORECLOSURE, 1–3. GUARDIAN AND WARD, 3. MUNICIPAL CORPORATIONS, 6, 7. SCHOOL LANDS. VENDOR AND VENDEE.

Permission to file supplemental pleading without, is not reversible error where adverse party is in court room when application is made and allowed and fails to object on that ground. *Flagg v. Flagg* ..... 232

**Oaths.** See TAXATION, 4.

**Occupation Tax.** See TAXATION, 1-3.

**Onus Probandi.** See ATTACHMENT.

**Opinion Evidence.** See EVIDENCE, 1, 2, 12, 14.

**Parties.** See GUARDIAN AND WARD, 1. NAMES. SURETYSHIP AND GUARANTY, 6.

Discretion of district court in permitting joinder of additional, not reviewed unless exercised prejudicially. *Cahn v. Lipson* ..... 776

**Partnership.** See CONTRACTS, 7, 8. SURETYSHIP AND GUARANTY, 2.

1. *Glade v. White* ..... 728
2. An arrangement to share profits, though not losses, by two persons, one of whom contributes capital and the other services, constitutes. *Roggencamp v. Hargreaves* .....542, 543
3. In an action against, for firm debt judgment may be rendered against one partner whose debt the testimony shows it to be. *Id.* .....545, 546

**Passengers.** See CARRIERS.

**Patent Right.** See NEGOTIABLE INSTRUMENTS, 1.

**Payment.** See VOLUNTARY PAYMENT.

**Penalties.**

The recovery allowed under act of 1889, p. 369, to one whose exempt wages have been garnished is not a penalty. *Singer Mfg. Co. v. Fleming* .....685, 686

**Personal Injuries.** See DAMAGES, 2. NEGLIGENCE, 9. REVIEW, 14.

**Pleading.** See BASTARDY, 1. EMINENT DOMAIN, 1. JUDGMENTS, 1. JURISDICTION, 1, 2. NOTICE. REVIEW, 12. TRESPASS. USURY, 4.

1. Defenses are not inconsistent unless proof of one disproves the other. *Blodgett v. McMurtry* ..... 212, 213

**Pleading**—*concluded.*

2. Plea of estoppel may be joined with general denial. *Id.*
3. Jurisdictional defense, not appearing on face of record, may be joined with one to the merits. *Hurlburt v. Palmer*.....169–180
4. Reply may allege any new matter of defense not inconsistent with the petition. *Mollyneaux v. Wittenberg*..... 558
5. Motion for more specific statement is remedy for defects of form and not of substance. *Chicago, R. I. & P. R. Co. v. Shepherd*..... 527
6. Presumption is against the existence of a material fact not pleaded. *Id.*
7. Facts in nature of confession and avoidance must be specially pleaded in the reply. General denial puts in issue only allegations of new matter in answer. *Phenix Ins. Co. v. Bachelder*..... 97
8. Contract, required by statute of frauds to be written, need not be alleged to be such, especially if no objection is raised until after verdict. *York Park Building Association v. Barnes*..... 839
9. Petition in action on corporate subscription which alleges that on a certain date, long past, the full capital stock was subscribed is sufficient on that point, at least if not objected to by motion. *Id*..... 839

**Police Power.** See LIQUORS, 1.

**Practice.** See ERROR PROCEEDINGS. EVIDENCE, 7–10. HARMLESS ERROR. NOTICE. TRIAL.

**Presumptions.** See PLEADING, 6. REVIEW, 4, 7, 12.

**Principal and Agent.** See AGENCY. FACTORS AND BROKERS. USURY, 3.

**Principal and Surety.** See SURETYSHIP AND GUARANTY.

**Priority.** See JUDGMENTS, 3, 4.

**Privileged Communications.** See CONFIDENTIAL COMMUNICATIONS.

**Proceedings in Personam.** See TAX SALES.

**Proceedings in Rem.** See GUARDIAN AND WARD, 3.

**Prohibition.** See LIQUORS, 1.

**Promissory Notes.** See NEGOTIABLE INSTRUMENTS.

**Proximate Cause.** See BANKS AND BANKING, 2.

**Public Funds.** See SCHOOL ORDERS.

1. The phrase "several current funds," as used in sec. 1, Laws of 1891, p. 347, means all state money under state treasurer's control, and the provisions of the act apply to each of the different funds in the treasury. *State v. Bartley*.....357–363
2. Deposit of, in banks under above act is a loan, and so far as its provisions apply to permanent state educational fund, they are inoperative under sec. 9, art. 8, Const. *Id.*.....363–370
3. The term "voucher" defined and form set out and approved. *Moore v. Garneau*.....513, 514
4. State is liable at contract price for labor and materials furnished by virtue of a contract with World's Fair commissioner. *Id.*..... 515
5. A claim appealed to the district court after rejection by the state auditor must be presented there upon the same proofs; but if auditor's ruling is affirmed for deficient statement of claim, it may be again presented to the auditer and the defect remedied. *Garneau v. Moore*..... 791

**Publication.** See FORECLOSURE, 2.

**Questions of Fact.**

1. *Anderson v. Vallery*..... 626
2. *Glade v. White*..... 728
3. Negligence and contributory negligence are. *Omaha & R. V. R. Co. v. Brady*.....42, 43, 52, 53
   *Omaha Street R. Co. v. Craig*..... 601
4. Negligence is, subject to province of court to say whether evidence justifies its submission, or supports the verdict. *Omaha Street R. Co. v. Clair*..... 454
5. Whether grantee in conveyance assumes mortgage is. *Reynolds v. Dietz*.....185–188
6. Fraud in a chattel mortgage is, where instrument is not fraudulent on its face. *Sherwin v. Gaghagen*.....249–251
7. Time and circumstances of the alteration of a promissory note are. *Courcamp v. Weber*..... 533

**Questions of Law.**

1. Construction of terms of a contract is. *Simms v. Summers*, 781
2. Negligence is, where reasonable men could not draw different conclusions from the facts. *Omaha Street R. Co. v. Craig*..... 601
   *Woolsey v. C., B. & Q. R. Co*..... 802

**Questions of Law**—*concluded.*

3. Sufficiency of "account of items" for mechanic's lien is, but compliance with statutory requirements generally is a mixed question of law and fact. *Wakefield v. Latey*...289, 290

**Quieting Title.** See ACTIONS QUIA TIMET. DEEDS, 2. LIMITATION OF ACTIONS.

**Quitclaim Deeds.**

1. *Violet v. Rose* ..... 675
2. *Pleasants v. Blodgett* ..... 741

**Railroads.** See DAMAGES, 5–8. EMINENT DOMAIN. NEGLIGENCE, 4–10.

1. Provisions of ch. 16, Comp. Stats., apply to both foreign and domestic corporations. *Myers v. McGavock*..... 874
2. Acquire only an easement in land condemned for railway purposes. *Id*..... 875

**Rape.**

1. Evidence found sufficient to sustain conviction for. *Redfield v. State*..... 192
   *Hammond v. State* ..... 258
2. Instruction as to amount of resistance required of prosecutrix set out, and *held*, not open to the objection of giving undue prominence to age of prosecutrix and her relations to accused. *Id.*.....256, 257
3. Prosecutrix need be corroborated only as to material facts tending to prove the principal one; and not as to the particular act. *Id.*.....257, 258

**Receivers.**

Measure of damages for wrongful appointment of, by whom plaintiff's mercantile business was closed and the stock sold is value of latter when receiver took possession and actual loss from suspension during such possession. *Haverly v. Elliott*.....206, 207

**Recording.** See CHATTEL MORTGAGES. DEEDS, 1. VENDOR AND VENDEE.

**Religious Societies.** See TAXATION, 8.

**Remittitur.** See NEGLIGENCE, 9. REPLEVIN, 2. REVIEW, 14.

**Replevin.**

1. Where evidence fails to show title or right of possession in plaintiff, a judgment for defendant will be affirmed, regardless of erroneous instructions or admissions of testimony. *St. John v. Swanback*.....842, 843

**Replevin**—*concluded.*

2. A remittitur of that portion of a verdict for defendant in, which covers value of his possession, cures error in assessing damages therefor. *Id.* ..... 843

**Reply.** See PLEADING, 4.

**Reputation.** See BASTARDY, 3.

**Res Adjudicata.** See SURETYSHIP AND GUARANTY, 5.

**Rescission.** See CONTRACTS, 8.

**Restraint of Trade.** See CONVEYANCES.

**Review.** See COSTS. ERROR PROCEEDINGS. HARMLESS ERROR. JUSTICE OF THE PEACE. PARTIES. REPLEVIN, 2.

1. *Glade v. White* ..... 728
2. Instructions must be excepted to at trial in order to be reviewed. *American Building & Loan Association v. Mordock* ..... 420
3. Affidavits to be considered must be embodied in bill of exceptions. *Barry v. Barry* ..... 523
   *Aldrich v. Bruss* ..... 569
4. Error must affirmatively appear and is never presumed. *Real v. Honey* ..... 520
5. Error proceedings cannot be prosecuted without motion for new trial. *Shrimpton v. King* ..... 779
   *Dillon v. State* ..... 92
6. Findings below conclusive if supported by competent evidence. *Upton v. Levy* ..... 331
   *American Building & Loan Association v. Mordock* ..... 421
   *Omaha Street R. Co. v. Clair* ..... 454
7. The presumption of correctness applies to findings of a court and to cases brought up on appeal as well as otherwise. *Burlingim v. Warner* ..... 497, 498
8. But admission of improper testimony in trial to court alone, and upon which judgment is based, is reversible error. *Courcamp v. Weber* ..... 538
9. A judgment for less than uncontracted evidence shows plaintiff in error entitled to will be reversed. *First Nat. Bank of Dorchester v. Smith* ..... 90
10. Improper evidence introduced under an evasion of the court's adverse ruling will be presumed to be prejudicial and is ground for reversal. *Bank of Commerce v. Goos* ..... 437
11. The admission in evidence of an answer not responsive to the question, the latter being objected to, will not be con-

**Review**—*concluded.*

sidered by the supreme court unless by motion to strike out, or otherwise, a ruling of the trial court on that particular testimony is invoked. *Violet v. Rose* .....661–670, 671

12. Where an answer traverses the allegations of the petition by references to numbers of lines therein, and such numbering is not preserved in the transcript, it will be presumed that all material allegations were denied. *Bellevue Improvement Co. v. Village of Bellevue* .....880, 881

13. Objections to form of verdict should be made in trial court. *Roggencamp v. Hargreaves* ..... 540

14. Verdict in action for personal injuries *held* to be generally sustained, but remittitur ordered as sums charged for medical service, of the fair value of which there was no evidence. *City of Friend v. Ingersoll*.....717, 727, 728

15. Evidence *held* sufficient to support findings of trial judge in support of creditor's bill. *Rathbun v. Dooley*..... 560

**Sales.** See CONTRACTS, 5, 6. JUDICIAL SALES.

**School Lands.**

Contract of purchase by a resident cannot be forfeited for nonpayment of interest without personal notice. *State v. Clark*.....903–905

**School Orders.**

*Mandamus* will not lie to compel district treasurer to cash at maturity an interest-bearing order, payable at a definite future time, out of "the fund for general purposes." *State v. Sabin* ..... 570

**Schools.** See TAXATION, 7.

County superintendent cannot change boundaries of school district without giving the notice required by sub. 8, sec. 4, par. 3, ch. 14, Comp. Stats. *School District v. Coleman*, 396, 397

**Seals.** See TAX TITLES, 6.

**Settlement.** See ACCORD AND SATISFACTION.

*Glade v. White* ..... 728

**Sheriffs' Sales.** See DEEDS, 2.

**Signatures.** See HANDWRITING.

**Societies and Clubs.**

1. Members of a voluntary unincorporated association are not liable, unless by express contract, for debts incurred by it before they became members. *Hornberger v. Orchard* .....642–644

2. The liability of such members is governed by the law of agency. *Id*..... 641

**Special Legislation.** See CONSTITUTIONAL LAW, 3, 4.

**State Auditor.** See PUBLIC FUNDS, 5.

**State Treasurer.** See PUBLIC FUNDS, 1, 2.

**Statute of Frauds.** See LEASE. PLEADING, 8.

1. A quitclaim deed signed by the parties, but neither witnessed nor acknowledged, is, as between them, a sufficient memorandum of a contract for conveyance. *Violet v. Rose*, 674, 675
2. A verbal promise by a mortgagee of live stock made to an agister who has a lien thereon for keeping, that if he will surrender possession to such mortgagee the latter will pay the amount due for keeping, is a direct promise and not within the statute. *Joseph v. Smith*..... 259

**Statute of Limitations.** See LIMITATION OF ACTIONS. USURY, 6.

**Statutes.** See CONSTITUTIONAL LAW, 3-5.

1. Must be so construed as to harmonize and give effect to all parts. *State v. Bartley*..... 358
2. A proviso should be construed as referring to what immediately precedes it, unless a different intent is apparent. *School District v. Coleman*..... 396
3. The construction placed upon a statute by the courts of another state after its enactment in Nebraska is not binding here. *Myers v. McGavock* .....847-863

**Stock (Corporate).** See BUILDING AND LOAN ASSOCIATIONS.

**Stockholders.** See PLEADING, 9.

1. One to whom stock is issued, who pays assessments thereon, acts as an officer and takes part in management of corporation, is estopped to deny his subscription. *York Park Building Association v. Barnes*..... 840
2. An agreement between promoters and subscribers that the latter need not pay is void. *Id.*
3. Subscription may be in parol. *Id*..... 839

**Street Railways.** See NEGLIGENCE, 1, 2.

**Streets.** See ADVERSE POSSESSION, 1. MUNICIPAL CORPORATIONS, 1-3, 5-7. NEGLIGENCE, 5, 6.

**Subscriptions.** See STOCKHOLDERS.

**Summons.** See JURISDICTION, 2. NAMES.

**Suretyship and Guaranty.** See CONTRACTS, 3.

1. A surety signing a bond upon condition that he should be held liable only in case another surety signs it can claim the benefits of such condition only by showing that it was assented to by the obligee. *Owen v. Udall*..... 24
2. A partnership which accepts benefits under a building contract is liable on a bond for its performance to which the firm name is signed by one of its members, even though such signing is contrary to the articles of partnership. *Id*.....20–22
3. Where the sureties on such bond claim release because of departures from plans and specifications, but the latter are not introduced in evidence, it will be presumed that there were no such departures. *Id*..... 23
4. So as to alleged payments without required certificates, when the evidence fails to support such allegations. *Id.*, 25
5. A decree for mechanics' lien in favor of subcontractors cannot be invoked against the owner of the property in a subsequent suit by him on a bond signed by the subcontractors as sureties, though the subject of such suit is in part the repayment of the amount of such decree. *Id*...25–27
6. A contract of guaranty running to a corporation cannot be enforced by it after it has changed its name. *Crane v. Specht*.....128–136

**Surprise.** See TRIAL, 4.

**Tacking Possession.** See ADVERSE POSSESSION, 4.

**Tax Deeds.** See TAX TITLES, 3–7.

**Tax Liens.**

Attorneys' fees cannot be awarded in foreclosure of, where owner tenders full amount of principal and interest before trial. *Merrill v. Jones*..... 763

**Tax Sales.** See TAX TITLES.

A sale to enforce tax liens, decreed in an action *in personam* and not against the land, passes title only of parties and privies; not that of strangers. *Carson v. Dundas*..... 503

**Tax Titles.**

1. Rule of *caveat emptor* applies to purchasers at tax sales. *Pennock v. Douglas County*..... 304
2. In the absence of a statute a municipal corporation cannot be compelled to refund money received by it from purchaser at county treasurer's sale for special taxes afterwards adjudged illegal. *Id*.....297–304

**Tax Titles**—*concluded.*

3. Legislature may make tax deed *prima facie* evidence that every requirement necessary to its validity has been complied with. *Larson v. Dickey*..... 471
4. It may also make such deed conclusive evidence of directory and non-essential requirements, such as those relating to the manner of charging delinquent taxes, the place of sale, the price and the year's taxes for which sale was made. *Id.*.....472, 474
5. But it cannot make such deed conclusive evidence that the grantee therein named was the purchaser at tax sale or his assignee. *Id.*.....478–480
6. No valid tax deed can be executed in this state, because the law has failed to provide an official seal for county treasurers. *Id.*.....477, 478
7. Tax deed need not recite place of sale, or price, or year's taxes for which sale was made. *Id.*.....472, 474

**Taxation.**

1. Municipal corporations may impose taxes on occupations plied within their limits, but not upon a business conducted exclusively outside. *Western Union Telegraph Co. v. City of Fremont*.....698, 699
2. Hence they may impose upon telegraph companies doing business within their limits taxes for intrastate though not for interstate messages. *Id.*.....698–709
3. Such tax may be collected by ordinary action at law where statute so provides. *Id.*..... 693
4. Collection of regular and general taxes will not be enjoined because assessment was invalid; or because it was not based upon assessor's judgment; or because he failed to return an oath with the assessment roll. *Bellevue Improvement Co. v. Village of Bellevue*.....881–885
5. But a local assessment for sidewalks, before construction, contract, or estimate of cost is void, and the collection of the tax will be enjoined. *Id.*.....885–889
6. One who lists property with the assessor as his own is not entitled to an injunction restraining collection of the tax on the ground that the property really belonged to a corporation of which he is manager. *McGillin v Chase County*.....431, 432
7. Subdiv. 17, sec. 25, ch. 79, Comp. Stats. (3747, Cons. Stats.), requiring metropolitan school board to report to city council amount needed for certain purposes does not

**Taxation**—*concluded.*

entitle such board to compel the council to levy a tax for the amount so reported. *State v. Mayor and City Council of the City of Omaha*.....745

8. City lots owned by a religious society, but not used for religious purposes, and entirely distinct from the property on which a church edifice owned by the denomination stands, are not exempt from, though the church has decided to build a church edifice thereon at some future time. *First Christian Church of Beatrice v. City of Beatrice*, 432

**Telegraph Companies.** See TAXATION, 1–3.

**Tender.** See TAX LIENS.

*Anderson v. Vallery*.....630, 631

**Trespass.** See EMINENT DOMAIN, 1. RECEIVERS.

Plaintiff must allege ownership or possession at time of acts complained of. *Chicago, R. I. & P. R. Co. v. Shepherd*.... 527

**Trial.** See CHANGE OF VENUE. CROSS-EXAMINATION. EVIDENCE. HARMLESS ERROR. NEGOTIABLE INSTRUMENTS, 3. NEW TRIAL. REVIEW, 2, 5, 13. VERDICT.

1. Cross-examination must be confined to matters brought in chief. *Hurlbut v. Hall*..... 892
2. Sustaining of a general objection not a ground of reversal, especially where no exception was taken. *Id*.....894, 895
3. Motion to strike out irresponsive answers must be made in order to have error in admitting them reviewed. *Violet v. Rose*.....667, 670, 671
4. Leave to withdraw a juror and continue the case is discretionary with trial court, and refusal thereof is not error when asked only upon the ground that the applicant expected certain evidence, admitted under the pleadings, to be ruled out. *Id*..... 669
5. Imputations upon veracity of witnesses by opposing counsel in argument to jury, *held* proper and warranted by the evidence. *Omaha & R. V. R. Co. v. Brady*.....45–47

**Trusts (Commercial).**

A contract not to use premises for hotel purposes is not within the provisions of the anti-trust law. *Mollyneaux v. Wittenberg*.....556, 557

**Trusts (Equitable).** See FACTORS AND BROKERS. MORTGAGES, 2.

**Unincorporated Associations.** See SOCIETIES AND CLUBS

**Usury.**

1. When original loan is usurious it taints all renewals. *Exeter Nat. Bank v. Orchard*..... 485
   *Doyle v. Holland*.....89, 90
2. Loan of money for one year at twelve per cent is not purged of usury because borrower retains it for a second year paying only eight per cent. *Id.*
3. Where an agent charges a bonus or collection fee of $10 for a loan of $165, and makes the note for the entire $175, payable to his principal, such note is usurious. *Anderson v. Vallery* .....628, 629
4. Plea of, must state facts showing when, where, at what rate, and with whom alleged usurious agreement was made; otherwise no evidence should be admitted in support of it. *Rainbolt v. Strang* ..... 339
5. In an action by a national bank to recover on renewals to it of usurious notes given to a private bank which plaintiff has succeeded, defendant is entitled to have all payments of interest applied on the principal, and he is not estopped from claiming this right by the fact that he has made such renewals to the national bank and has also sued and recovered from it the penalty provided by the federal statute. *Exeter Nat. Bank v. Orchard*..... 485
6. This application of interest payments on principal is not in the nature of a set-off or counter-claim and is not barred by the statute of limitations. *Id*.....490, 491

**Value.** See DAMAGES, 6. FRAUD, 1, 2.

**Vendor and Vendee.** See CONTRACTS, 5, 6. DAMAGES, 9. FRAUD, 1, 2. FRAUDULENT CONVEYANCES, 2, 3. SCHOOL LANDS.

1. Purchaser of real property is charged with notice of occupant's rights. *Pleasants v. Blodgett*..... 743
2. Grantee of quitclaim deed takes only grantor's existing interest. *Id.*
3. Record of mortgage is notice to intending purchaser, of mortgagor's interest. *Id.*

**Venue.** See ACTIONS. CHANGE OF VENUE.

**Verdict.**

Defect in title of, will not vitiate. *Roggencamp v. Hargreaves*, 544, 545

**Verification.**

*City of Friend v. Ingersoll*.....722, 723

**Voluntary Payment.**

1. Money paid for property purchased at county treasurer's sale for special taxes afterward adjudged illegal is. *Pennock v. Douglas County*.....297-304
2. Payment of another's debt for which payor was not liable, induced by acts and expressions of payees and their attorney indicating that they would attach his stock of goods and ruin his business, is not. *Weber v. Kirkendall*.....196-200

**Vouchers.** See PUBLIC FUNDS, 3.

**Wages.** See GARNISHMENT, 2-5.

**Waiver.** See COMPLETE RECORD. JURISDICTION, 1-3.

**Warehousemen.**

Action against operators of cold storage warehouse for negligence in failing properly to preserve eggs stored there; judgment for plaintiff affirmed. *First Nat. Bank of Omaha v. Krug* ..... 208

**Warrants.** See SCHOOL ORDERS.

**Waste.**

Action to restrain; decree of trial court upon findings that no waste had been committed affirmed. *St. Clair v. Sedgwick* ..... 562

**Wills.** See ADMINISTRATION OF ESTATES, 3, 4.

**Witnesses.** See CONFIDENTIAL COMMUNICATIONS. EVIDENCE. HANDWRITING.

**Words and Phrases.**

1. "Benefits;" general, common, special. *Kirkendall v. City of Omaha*.....6-8
2. "Creditors." *Farmers & Merchants Bank of York v. Anthony* ..... 348
3. "Current funds." *State v. Bartley* .....357-363
4. "Due process of law." *Larson v. Dickey* .....479, 480
5. "Investment." *State v. Bartley* .....363-368
6. "Loan." *Id.*
7. "Negligence." *Omaha Street R. Co. v. Craig* ..... 616
8. "Passengers." *Woolsey v. Chicago, B. & Q. R. Co*..... 801
9. "Pools." *Mollyneaux v. Wittenberg* ..... 557
10. "Probable cause." *Jonasen v. Kennedy* .....319, 320
11. "Situated." *Fremont Butter & Egg Co. v. Snyder* .....634, 635
12. "Subsequent purchasers in good faith." *Farmers & Merchants Bank of York v. Anthony*..... 350
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**Writs.** See JURISDICTION, 2.