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ALICE A. MINICK, APPELLANT, V. NELSON C. BROCK ET AL., APPELLEES.

FILED JUNE 26, 1894. No. 5421.

1. **Injunction:** PRINCIPAL AND SURETY. A court of equity, in a proper case, will restrain the sale of the property of a surety for the satisfaction of a judgment against him, when it appears that the principal debtor has sufficient property liable to execution within the jurisdiction of the court for the satisfaction of such judgment, at least until after the property of the principal debtor has been exhausted.
2. ———: ———. It seems that a court of equity, upon the application of a surety in a judgment, will restrain the sale of such surety's property for the satisfaction of such judgment until the property within the jurisdiction of the court belonging to his co-surety has been exhausted, when it appears that such surety incurred the obligation on which the judgment is based, at the request of the co-surety and upon his promise to indemnify and save him harmless by reason thereof.
3. ———: EXECUTIONS: PRINCIPAL AND SURETY. Where the liabilities of sureties in a judgment are all equal, and where the relations between them are not such that one surety is surety or guarantor for the other, a court of equity will not, in any manner, assume to control an officer holding an execution for the satisfaction of a judgment, and will not direct whether he levy the execution upon the property of all the sureties or satisfy the entire judgment out of the property of one of them.

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

W. Henry Smith, for appellant.

J. E. Philpott, contra.

RAGAN, C.

On the 22d day of January, 1889, Marilla B. Hubbell, V. H. Gibson, E. T. Huff, and Alice A. Minick executed and delivered to John G. Southwick a promissory note for

fifteen hundred dollars, due ten months after date, drawing interest at the rate of ten per cent per annum from date until paid. On the 11th day of March, 1891, in the district court of Lancaster county a judgment was rendered upon this note in favor of the Nebraska Savings Bank, to whom Southwick had indorsed and sold the note, and against Marilla B. Hubbell, as principal, and Gibson, Minick, and Huff, as sureties. Some time after this the Nebraska Savings Bank sold and assigned this judgment to one Nelson C. Brock, and he caused a transcript to be filed in the office of the clerk of the district court of Gage county and an execution to be issued out of said clerk's office and delivered to the sheriff of said county. Alice A. Minick owned lands in Gage county, and the sheriff having levied said execution upon her lands in that county for the satisfaction of said judgment, she brought this case in equity in the district court of Lancaster county against the said Nelson C. Brock, the Nebraska Savings Bank, John G. Southwick, Edward T. Huff, and the sheriff of said Gage county to restrain the latter from selling her lands for the satisfaction of said judgment. She alleged in her petition, in substance, as grounds for such injunction that at the time she signed the note to Southwick Mrs. Hubbell was the owner of some furniture in a hotel in Lincoln; that E. T. Huff had a mortgage upon such furniture; that he was receiving the rents and profits from said hotel, and desiring that the hotel should continue in operation and that he should continue in receipt of the profits from the hotel business, he requested Mrs. Minick to become surety with him on Mrs. Hubbell's note to Southwick, promising her that if she did so that he, Huff, would pay the note at maturity and save her harmless from any damages, costs, or expenses by reason thereof; that she became surety on the Southwick note, relying upon this promise of Huff; that Huff in fact had paid the judgment to the Nebraska Savings Bank, and that he and Brock had procured the

bank to assign the judgment to Brock, and by issuing an execution now sought to compel her, Minick, to pay the entire judgment; that Brock really had no interest in the judgment, and that Huff had abundant property in Lancaster county, where the judgment was rendered, and upon which property the judgment was a lien, to satisfy the same; and that the property of Huff should be exhausted before coming upon her, Minick's, property. The answer of the defendants to this action made the following issues of fact: First, whether Huff promised Mrs. Minick that he would indemnify her for signing with him as surety Mrs. Hubbell's note; second, whether the judgment rendered had in fact been paid by Huff and was held by Brock for his, Huff's, benefit, or whether Brock in good faith bought the judgment from the Nebraska Savings Bank and was the owner of the same. The district court found the issues in favor of the defendants and dismissed Mrs. Minick's case. From this judgment of the district court Mrs. Minick appeals.

The evidence that Brock was the owner in his own right of the judgment rendered in favor of the Nebraska Savings Bank and against Hubbell and others, that he purchased said judgment from said Bank with his own money for his own use for the face of the judgment and interest, was practically undisputed. The other issue as to whether Huff agreed to indemnify Mrs. Minick for becoming surety with him on Mrs. Hubbell's note was conflicting, and the finding of the court against Mrs. Minick on that issue cannot be disturbed.

Section 511 of the Code of Civil Procedure provides that when a judgment has been rendered against one as principal and others as sureties, the property of the principal debtor within the jurisdiction of the court shall be exhausted before the property of the sureties shall be taken. There is no evidence in this case that Mrs. Hubbell, the principal debtor, has any property liable to execution

within the jurisdiction of the court, and since the court has found that Mrs. Minick and Mr. Huff are co-sureties equally liable for the judgment held by Brock, and as to the liabilities of Huff and Minick, Huff is not a principal debtor, Mrs. Minick's case must fail. A court of equity would, no doubt, in a proper case, restrain a sale of the property of a surety for the satisfaction of a judgment against him on a showing that the principal debtor had sufficient property liable to execution within the jurisdiction of the court for the satisfaction of such judgment, at least until after the property of the principal debtor had been exhausted; and a court of equity, on application of one surety in a judgment, might restrain the sale of such surety's property for the satisfaction of the judgment until the property within the jurisdiction of the court belonging to his co-surety had been exhausted, when it clearly appeared that the surety incurred the obligation, on which the judgment was based, at the request of such co-surety and upon his promise to indemnify him and save him harmless by reason thereof; but where the liabilities of sureties are all equal, and where the relations between them are not such that one is surety or guarantor for the other, a court of equity will not, in any manner, assume to control the officer holding the execution. He may levy it upon the property of all the sureties, or he may make the entire judgment out of the property of one of them. The decree is

AFFIRMED.

ALICE A. MINICK V. EDWARD T. HUFF ET AL.

FILED JUNE 26, 1894. No. 5422.

1. **Review**: ERROR PROCEEDINGS: FAILURE TO POINT OUT ERROR. It is no part of the duty of this court to search a record for the purpose of ascertaining if there is error in it. On the other hand, every reasonable presumption will be indulged in favor of the correctness of the judgment of a district court, and any ruling of that court, alleged to be erroneous, must be specifically pointed out to be reviewed here.

2. **Principal and Surety.** Before a surety can recover of his principal, because of his suretyship, he must first have paid the debt of his principal or some part thereof. *Stearns v. Irwin*, 62 Ind., 558, followed.

3. **New Trial**: JOINT MOTION: REVIEW. The rule of this court is that a motion for a new trial is indivisible, and when made jointly by two or more parties, if it cannot be allowed as to all it must be overruled as to all. *Dorsey v. McGee*, 30 Neb., 657, followed.

4. **Statute of Frauds**: PROMISE TO ANSWER FOR DEBT OF ANOTHER. The verbal promise of A to B to indemnify him if he will become surety for C for a debt of the latter to D is not a promise on the part of A to answer for the debt of C, within the meaning of subdivision 2, section 8, chapter 32, Compiled Statutes, 1893.

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

W. Henry Smith, for plaintiff in error.

J. E. Philpott, contra.

RAGAN, C.

Alice A. Minick sued Edward T. Huff and Marilla B. Hubbell in the district court of Lancaster county. In her petition she alleged two causes of action, the substance of which are:

First Cause of Action.—That on the second of November, 1888, Mrs. Hubbell was conducting a hotel in Lincoln and owned the furniture therein; that Huff had a chattel mortgage on such furniture; that Huff and Hubbell were receiving about $200 per month income from the hotel, and in order that Huff might continue to receive such income Mrs. Minick, at the request of Huff and Hubbell, became surety for Mrs. Hubbell on a note she executed on that date to one Southwick for the sum of $500, said Huff and Hubbell promising Mrs. Minick that if she would become surety on said note that they, Huff and Hubbell, would pay said note at maturity without trouble or damage to Mrs. Minick; that Mrs. Minick, relying on the promises of Huff and Hubbell, signed as surety for Mrs. Hubbell her note to Southwick; that said note was not paid at maturity; that Southwick had reduced the same to judgment and she, Mrs. Minick, had been compelled to pay the same, to her damage in the sum of $550 and interest.

Second Cause of Action.—That on the 22d day of January, 1889, Mrs. Hubbell was conducting a hotel in Lincoln and owned the furniture therein; that Mr. Huff owned a chattel mortgage on said property; that Huff and Hubbell were in receipt of a monthly income from said hotel of about $200, and in order that said Huff might continue to receive said income from said hotel, Huff and Hubbell requested Mrs. Minick to become surety for them on a note made by them on that date to one Southwick for $1,500, said Huff and Hubbell promising Mrs. Minick that if she would sign as surety their note to Southwick that they would pay said note at maturity without costs or damage to Mrs. Minick; that relying upon said promises Mrs. Minick signed as surety the note of Huff and Hubbell to Southwick; that said note was not paid at maturity; that she, Mrs. Minick, had been sued on said note and was liable to have judgment rendered against her

at any time thereon, and to have her property exposed to execution for the payment of such judgment, to her damage in the sum of $1,500.

The answer of Mrs. Hubbell, so far as material here, was that she was the principal debtor in both of the notes made to Southwick; that Mrs. Minick was her surety on both of said notes; that Huff was also a surety on the $1,500 note; that at all the times mentioned in plaintiff's petition she was the owner of the hotel furniture, and that Huff held a chattel mortgage thereon; that the $500 note had been reduced to judgment and that Mrs. Minick had paid the same; that the $1,500 note had also been reduced to judgment against herself as principal and Mrs. Minick and Mr. Huff as sureties, and that Mrs. Minick had not paid said judgment, nor any part thereof.

The answer of Huff, so far as the same is material here, was, in substance, that at all the times mentioned in plaintiff's petition he held a chattel mortgage upon the hotel furniture of Mrs. Hubbell, and a general denial of all the other averments of Mrs. Minick in her first cause of action; that he signed the $1,500 note as a co-surety with Mrs. Minick for Mrs. Hubbell; that said $1,500 note had been reduced to judgment against Mrs. Hubbell as principal and Mrs. Minick and himself as sureties, and that no part of said judgment had ever been paid; and a general denial of all the other averments of Mrs. Minick in her second cause of action.

The case was tried to a jury and a verdict rendered against Mrs. Hubbell and Mr. Huff in favor of Mrs. Minick on her first cause of action. From the judgment pronounced on this verdict both parties prosecute proceedings in error here.

We will first dispose of the petition in error of Mrs. Minick. The errors alleged by her are:

"1. The court erred in refusing the instructions prayed for on behalf of the plaintiff in the first, second, third,

fourth, fifth, sixth, seventh, and eighth sections thereof. (Transcript, pp. 1–13.)" An examination of these instructions discloses the fact that at least one of them ought not to have been given, and as the error alleged is that the court erred in refusing to give all of them, the assignment of error must be overruled.

"2. The court erred in refusing additional instructions by plaintiff as per paragraphs 1 and 2 (Transcript, 18)." What has already been said disposes of this assignment.

"3. The court erred in refusing and admitting evidence for and against the plaintiff as per bill of exceptions, pp. 22, 33, 34, 35, 40, 44, 46, 55, 56, 57, 58, 59, 69, 71, 72, 75, 89, 117, 118, 119, 124, 125, 126, 129, 130, 139, 140, 143, 144, 148, 149, and as per numbered exceptions on the respective pages aforesaid from 1–42." This is not a specific assignment of error. It is equivalent to saying to this court that it will find in the record on the pages mentioned certain rulings of the district court which the plaintiff in error thinks were erroneous. It is no part of the duty of this court to search a record for the purpose of ascertaining if there is any possible error in it. On the other hand, every reasonable presumption will be made in favor of the correctness of the judgment of a district court; and any ruling of that court alleged to be erroneous must be specifically pointed out here in order to have it reviewed.

"4. The court erred in giving paragraph No. 6 of the instructions given to the jury by the court on its own motion." The instruction is as follows: "6. If, from the evidence, you find upon the said second cause of action that plaintiff signed the note therein mentioned, with these defendants, for the sum of $1,500; and if you find from the evidence that said note was sued and judgment obtained thereon against the defendant Hubbell, as principal, and the plaintiff and the defendant Huff as sureties; and if you find from the evidence that defendants Huff and Hubbell undertook and faithfully promised and guarantied

the plaintiff herein, in consideration of her signing said $1,500 note, that said defendants, or one of them, would pay or cause to be paid said note without trouble, delay, cost, or damage to the plaintiff, then you are instructed that plaintiff would be entitled to recover herein from defendants herein the amount of said judgment, if any, with interest thereon and costs of suit, as shown by the evidence; provided you further find from the evidence that the plaintiff herein has paid or secured the payment of said $1,500 note or the judgment, if any, obtained thereon." The evidence is undisputed that the $1,500 note had been reduced to judgment against Mrs. Hubbell as principal and Huff and Mrs. Minick as sureties, and that Mrs. Minick had not paid said judgment, nor any part thereof. The court, then, did not err in giving this instruction. The theory of counsel for the plaintiff in error is, that since the evidence showed judgment had been rendered against Mrs. Minick for the amount of $1,500, and that such judgment had become a lien upon her property, that she was entitled to recover the amount of the judgment, interest, and costs before she paid it. This is not the law. Before a surety can recover of his principal, because of his suretyship, he must first have paid the debt of his principal, or some part thereof. (*Stearns v. Irwin*, 62 Ind., 558; *In re Estate of Hill*, 67 Cal., 238.) If Mrs. Hubbell was the principal on the $1,500 note and Huff and Minick were co-sureties, then neither one of them would have a right of action against Mrs. Hubbell, by reason of their suretyship, until they had paid the debt for which they were surety, or some part thereof. If Hubbell and Huff were both principals and Mrs. Minick was their surety, then she would have no cause of action against either of them until she had paid the debt, or some part thereof. The argument of counsel for Mrs. Minick is that the promise made to his client by Hubbell and Huff was, in effect, to save and keep her harmless by reason of signing the $1,500 note; that they

have not done so, and therefore Mrs. Minick's cause of action against them is complete. The answer to this is that Mrs. Minick in her petition does not aver, nor in her evidence does she prove, that she has been put to any expense or costs whatever by reason of the failure of Huff and Hubbell to keep their promise. It is doubtless true that the promise pleaded against Huff and Hubbell is one of indemnity; that by it they, in effect, did promise to save and keep Mrs. Minick harmless from all damages; and if it appeared that Mrs. Minick had been put to any costs or expense whatever by reason of the failure of Huff and Hubbell to keep their promise of indemnity, I have no doubt she would be entitled to recover the damages sustained, whether she had in fact paid the judgment rendered on the note which she had signed as surety. (*Powell v. Smith*, 8 Johns. [N. Y.], 248.) There is no error in this record of which Mrs. Minick can complain.

We now direct our attention to the error proceedings of Huff and Hubbell. Their assignments of error are as follows:

"1. The court erred in excluding the evidence as offered by plaintiffs in error, being the offer taken by the reporter in open court on the trial." This assignment is too indefinite for consideration. We will not search the record for the purpose of ascertaining the location of an alleged error. Parties complaining of an error must specifically point it out.

"2. The court erred in refusing to give instructions Nos. 1, 2, 3, 4, 5, 6, and 7 asked by plaintiffs here." There are no such instructions in this record.

"3. Errors of law occurring at the trial, duly excepted to." This is a sufficient assignment in a motion for a new trial, but is too indefinite as an assignment in a petition in error.

"4. The verdict is not sustained by sufficient evidence." The undisputed evidence in the record is that Mrs. Hubbell

was the principal on the $500 note, and that Mrs. Minick was her surety thereon; that such note had been reduced to judgment against Mrs. Hubbell as principal and Mrs. Minick as surety, and that such judgment had been paid by Mrs. Minick. There can then be no doubt but that the evidence sufficiently sustains the verdict and judgment as against Mrs. Hubbell. Mrs. Hubbell and Mr. Huff filed a joint motion for a new trial; the first ground of which was that "the verdict is not supported by sufficient evidence." The rule of this court is that a motion for a new trial is indivisible, and when made jointly by two or more parties, if it cannot be allowed as to all it must be overruled as to all. (*Long v. Clapp*, 15 Neb., 417; *Real v. Hollister*, 17 Neb., 661; *Boldt v. Budwig*, 19 Neb., 739; *Dunn v. Gibson*, 9 Neb., 513; *Dutcher v. State*, 16 Neb., 30; *Wiggenhorn v. Kountz*, 23 Neb., 690; *Dorsey v. McGee*, 30 Neb., 657.) We adhere to the rule announced in these cases. The assignment of error is that the verdict rendered against Huff and Hubbell is not supported by sufficient evidence. There is no assignment of error on the part of Huff alone that the verdict against him is not supported by sufficient evidence; and where two or more parties jointly assign as error that a verdict rendered against them is not supported by sufficient evidence, if the evidence supports the verdict rendered against either of them, the assignment of error will be overruled.

5. The final assignment is that the verdict and judgment are contrary to law. The uncontradicted pleading and proof, so far as Mrs. Hubbell is concerned, is that she was the principal and Mrs. Minick her surety on the $500 note reduced to judgment and paid by Mrs. Minick and made the subject of her first cause of action, the one on which she recovered the judgment which it is alleged was contrary to law. There can then be no question but that this judgment against Mrs. Hubbell is not contrary to law. A surety who has paid the debt of his principal in order

to recover the amount so paid is not compelled to either plead or prove an express promise of the principal to reimburse such surety as the law implies such a promise. Subdivision 2 of section 8, chapter 32, Compiled Statutes of 1893, commonly called the "Statute of Frauds," provides that "every special promise to answer for the debt, default, or misdoings of another person" shall be void unless such agreement or some note or memorandum thereof be in writing and subscribed by the party to be charged therewith. If the judgment in this case against Huff is contrary to law, it must be because the promise made by him to Mrs. Minick to indemnify her for becoming the surety of Mrs. Hubbell on the $500 note, not being in writing, is void.

The evidence tends to show that Huff made the promise of indemnity to Mrs. Minick as pleaded by her; that at that time he had a chattel mortgage upon Mrs. Hubbell's property; that he was in receipt of a monthly income from the hotel in which Mrs. Hubbell's property was used; that Mrs. Hubbell was largely in debt for rent, and that it was necessary for her to raise money to discharge the rent in order that the hotel might continue to run. The promise then of Huff was supported by a sufficient consideration. The promise of Huff was made to Mrs. Minick. It was not made to Southwick, Mrs. Hubbell's creditor. If Huff had performed his promise, its effect would have been to pay Mrs. Hubbell's debt to Southwick; but his purpose in making the promise was not so much to be responsible for the debt of Mrs. Hubbell to Southwick as it was to keep the hotel in operation, on the property of which he held a chattel mortgage, and to continue in receipt of the income from the operation of such hotel. The question then is: Was this promise of Huff's within the statute just quoted; that is, was it a promise on his part to answer for the debt of Mrs. Hubbell to Southwick, or was it an original promise on his part? Perhaps no statute ever

enacted has been so often before the courts as this statute of frauds; and the cases that have arisen and in which the courts have been called upon to say whether the promise made came within the statute are as various as the transactions of human affairs. Perhaps no general rule can be laid down that will afford a safe and correct test in all cases as to whether a promise is or not within the statute, and no such attempt will be made. The weight of authority, however, in this country sustains this rule: The verbal promise of A to B to indemnify him if he will become surety for C for a debt of the latter to D is not a promise on the part of A to answer for the debt of C, and is not within the statute. The following cases, and perhaps others, sustain the rule stated: *Sanders v. Gillespie*, 59 N. Y., 250; *Yale v. Edgerton*, 14 Minn., 194; *Goetz v. Foos*, 14 Minn., 265; *Horn v. Bray*, 51 Ind., 555; *Mills v. Brown*, 11 Ia., 314; *Garner v. Hudgins*, 46 Mo., 399; *Vogel v. Melms*, 31 Wis., 306; *Green v. Brookins*, 23 Mich., 48; *Potter v. Brown*, 35 Mich., 274; *Perley v. Spring*, 12 Mass., 296; *Chapin v. Lapham*, 37 Mass., 467; *Aldrich v. Ames*, 75 Mass., 76; *Atgar v. Hiler*, 24 N. J. Law, 812. These cases follow the doctrine of the English case, *Thomas v. Cook*, 8 Barn. & Cr. [Eng.], 728. On the other hand, such a promise is held to be within the statute in *Easter v. White*, 12 O. St., 219, and *Kelsey v. Hibbs*, 13 O. St., 340; and these cases and others like them follow the doctrine of the English case, *Green v. Crosswell*, 10 A. & E. [Eng.], 453. We think the cases first above cited as sustaining the rule are in accord with the weight of authority both in this country and in England, and we cheerfully follow those cases.

There is no error in the record and the judgment of the district court is

AFFIRMED.

THEODORE L. VON DORN, PLAINTIFF IN ERROR AND APPELLANT, V. FRED MENGEDOHT ET AL., DEFENDANTS IN ERROR AND APPELLEES.

FILED JUNE 26, 1894. No. 6278.

1. **Damages for Breach of Builder's Contract.** Where a contractor agrees with the owner of real estate to furnish the material and labor and erect for him an improvement thereon, and such contractor voluntarily abandons the work before completion, the owner may charge the contractor with (*a*) the necessary costs of completing the improvement as the contractor agreed to complete it, (*b*) the amount of all payments made to the contractor on the contract, (*c*) the amount of all valid liens on the real estate for labor and material furnished the contractor and used by him in such improvement, and (*d*) the amount of actual damages the owner has sustained by reason of the contractor's default. The difference between the total of these items and the contract price is the measure of damages of both the owner and contractor. If such total exceeds the contract price, such excess is the amount the owner may recover of the contractor. If the contract price exceeds such total, such excess is the amount the contractor may recover from the owner.

2. **Builders' Contracts:** TERMINATION: PARTIAL PERFORMANCE: COMPENSATION OF CONTRACTOR. Where such a contract exists and the owner rightfully terminates the same by virtue of some provision therein authorizing him to do so upon the happening of certain contingencies, then the contractor is entitled to recover from the owner the actual benefit he has received from the contractor's partial performance; and this is found by ascertaining the reasonable worth of such partial performance appropriated or received by the owner at the time of such receipt or appropriation, and deducting therefrom payments made to the contractor, and the actual damages, if any, the owner has sustained by the contractor's default, if he has made one.

3. ———: WRONGFUL TERMINATION BY CONTRACTOR: MEASURE OF DAMAGES. Where such a contract exists and the owner wrongfully terminates the same or the contractor's employment thereunder before the completion of the improvement, the contractor's measure of damages is the reasonable value of his partial performance increased by all actual damages sustained by

him by reason of the owner's unjustifiable termination of the contract.

4. **Mechanics' Liens:** SKILLED AND UNSKILLED LABOR. The mechanics' lien law of this state makes no distinction between skilled and unskilled labor, and its policy is to insure to both classes remuneration for whatever they may do towards increasing the value of an owner's real estate by the erection of improvements thereon.

5. ———: CLAIM OF ARCHITECT. An architect, who furnishes drawings and plans for an improvement on real estate, and superintends the erection of such improvement in accordance with such plans, in pursuance of a contract with the owner, is entitled to a lien upon such improvement and the real estate upon which it is situate upon compliance with the mechanics' lien law of the state.

6. **Woman as Notary Public.** There is nothing in our constitution or laws that prohibits a woman from holding the office of notary public.

7. ———. The right of a woman to hold the office of notary public when she has been appointed and commissioned to such office by the governor can only be inquired into in a suit or proceeding brought against her for that purpose.

8. **New Trial:** NEWLY DISCOVERED EVIDENCE. A motion for a new trial on the ground of newly discovered evidence should be overruled, even if the evidence alleged to be newly discovered is competent under the pleadings, when it appears that the witness, by whom it is proposed to prove the facts alleged to be newly discovered, testified on the trial of the case, was examined by the applicant for a new trial, and no effort was made at that time to elicit the facts claimed to be newly discovered evidence. *Brandt v. Fitzgerald*, 36 Neb., 683, followed.

9. **Judgments:** MOTION FOR NEW TRIAL: SUPERSEDEAS. The pendency of a motion for a new trial does not supersede a decree or judgment rendered or stay the execution thereof.

10. **Judicial Sales:** NOTICE. A judicial sale occurred on the 25th of April. The first publication of the notice of such sale was made on the 21st of March. As thirty days intervened between the date of the first publication and the date of the sale, *held*, sufficient. *Carlow v. Aultman*, 28 Neb., 672, followed.

ERROR AND APPEAL from the district court of Douglas county. Heard below before IRVINE, J.

The facts are stated by the commissioner.

Kennedy, Gilbert & Anderson, for plaintiff in error and appellant:

The architect was not entitled to a mechanic's lien. (Comp. Stats., secs. 1, 3, ch. 54; *Bank of Pennsylvania v. Gries,* 35 Pa. St., 423; *Price v. Kirk,* 90 Pa. St., 47; *Bush v. Able,* 90 Pa. St., 153; *Foushee v. Grigsby,* 12 Bush [Ky.], 75; *Pennsylvania & D. R. Co. v. Leuffer,* 84 Pa. St., 168.)

Under the laws of Nebraska a female is not eligible to the office of notary public. (Comp. Stats., sec. 1, ch. 60; *Robinson's Case,* 131 Mass., 376; *Bradwell v. State of Illinois,* 16 Wall. [U. S.], 130.)

G. W. Covell, also for plaintiff in error and appellant.

J. W. West and *Estabrook & Davis, contra:*

Plaintiff was not entitled to a new trial on the ground of newly discovered evidence, for the reason that the proposed witnesses were sworn on the hearing, and the plaintiff had an opportunity to examine them. (*Fitzgerald v. Brandt,* 36 Neb., 683.)

The notice of judicial sale was sufficient. (*Carlow v. Aultman,* 28 Neb., 672.)

The architect is entitled to a lien. (Phillips, Mechanics' Liens [2d ed.], 158, and authorities cited; *Knight v. Norris,* 13 Minn., 473; *Parker v. Bell,* 7 Gray [Mass.], 432.)

RAGAN, C.

November 3, 1890, Theodore L. Von Dorn owned certain real estate in the city of Omaha and on that date a contract in writing was entered into between him and Frederick Mengedoht and Adam Feichtmayer, copartners, by the terms of which they, in consideration of $18,540 to be paid them, agreed to furnish all material and labor

and construct for Von Dorn a building on his real estate, the same to be completed by April 1, 1891. This contract, amongst other things, provided that all material and labor used in the construction of such building should be first-class in every respect; that the building should be constructed according to certain plans and specifications made part of the contract; that "the contractor shall and will well and sufficiently perform and finish, under the direction and to the satisfaction of James McDonnell, architect, acting as agent of said owner, all the works, * * * agreeably to the drawings and specifications made by the said architect;" that the architect, or his representative, should superintend the work; that should the contractors at any time refuse or neglect to supply a sufficiency of properly skilled workmen or of material of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, then, if the architect should certify that such refusal, failure, or neglect of the contractors was a sufficient reason therefor, that the owner should be at liberty to terminate the employment of the contractors and enter upon the premises, take possession of and complete the work. The contractors at once entered upon the performance of said contract and furnished a large amount of labor and material towards the construction of the building they had agreed to erect. Before April 1, 1891, Von Dorn discharged McDonnell as architect and superintendent and appointed one Field in his place; and having obtained a certificate from him to the effect that the material being used by the contractors in the erection of the building was not of the character or quality called for by the contract, and that the building was not being erected according to the plans and specifications, Von Dorn terminated the employment of said contractors, took possession of and finished the building himself. One Specht brought this suit in the district court of Douglas county to have established and foreclosed against Von Dorn's property a

mechanic's lien which he claimed for certain labor and materials furnished by him to the contractors, and used by them in the partial construction of Von Dorn's building. Von Dorn and wife, the contractors, McDonnell, and a large number of material-men were made defendants. The controversy here, however, concerns only Von Dorn, Mengedoht, and McDonnell. Mengedoht, having succeeded by assignment to all the rights of Mengedoht & Feichtmayer, copartners, filed an answer in the nature of a cross-bill, claiming judgment against Von Dorn and a lien upon his real estate for the value of the labor and materials furnished by Mengedoht & Feichtmayer under the contract of November 3, 1890. McDonnell also filed an answer in the nature of a cross-petition, claiming judgment against Von Dorn and a lien on his real estate for services as architect and superintendent of the premises. The answer of Von Dorn to the cross-petition of Mengedoht and the reply of the latter thereto put in issue between them the following questions of fact: First—Were the labor and materials furnished by Mengedoht & Feichtmayer, toward the construction of the Von Dorn building, of the character and quality called for by the contract? Second—Was the building, so far as completed, erected according to the plans and specifications? Third—Were Mengedoht & Feichtmayer, at the time Von Dorn terminated their employment, able, ready, and willing to complete the building according to their contract? In other words, was the termination of Mengedoht & Feichtmayer's employment by Von Dorn wrongful? The answer of Von Dorn to the cross-petition of McDonnell and the latter's reply thereto made this issue of fact, viz., was the discharge of McDonnell by Von Dorn wrongful? The district court referred the case to an able lawyer and two skilled builders as referees. These referees found all the issues of fact and law in favor of Mengedoht & Feichtmayer and against Von Dorn, and duly reported the same to the district court. Von Dorn

filed exceptions to the report, which were overruled, and judgment entered according to the findings and conclusions of the referees. The property was advertised and sold and the sale confirmed. Von Dorn brings the judgment rendered against him in favor of Mengedoht and McDonnell here on error, and from the decree of the district court confirming the sale made to satisfy the mechanics' lien judgments he appeals.

We will first dispose of Von Dorn's petition in error.

1. The first alleged error is assigned in the following language: "That in the hearing of said cause below divers and sundry errors occurred in the introduction of evidence notwithstanding the objections of the plaintiff in error, which evidence was immaterial, irrelevant, incompetent, and prejudicial to the plaintiffs in error, and excepted to by plaintiff in error at the time; all which fully appears in the bill of exceptions on file in this court." This assignment of error is too indefinite for review. We cannot look through a record for the purpose of ascertaining if it contains error. If a litigant is of opinion that a ruling of the district court was erroneous and prejudicial to him, he must set out in his petition in error the precise action of the district court which he claims was erroneous.

2. The second error is like unto the first, and assigned in substantially the same language, and what has already been said disposes of that assignment.

3. The third and fourth assignments of error are, in substance, that the findings of the referees are unsupported by sufficient evidence. The evidence as to the character of the material used and the labor performed by the contractors in their partial construction of Von Dorn's buildings, and the evidence as to the manner in which the work was done, —that is, as to whether it corresponded to the plans and specifications,—was conflicting. Two of the referees who passed upon this evidence were skilled builders, and the other referee was an able lawyer who had filled the office

of judge of the district court for a number of years. It is not claimed that either of these men were incompetent or partial. They heard and saw the witnesses testify. They examined the work that had been done by the contractors; and two of these referees at least were, by training and profession, possessed of qualifications for passing a more correct judgment upon the character of the work and the materials used therein than we are. These referees were far more competent to weigh the evidence before them and to say what conclusions such evidence warranted than we are; and a careful reading of the testimony in the case satisfies us that the findings of fact, and each of them, made by the referees are abundantly supported by the evidence.

4. The fifth assignment of error is that the judgment of the district court is contrary to the law of the case. We shall first examine this assignment with reference to the judgment in favor of Mengedoht. The argument, in effect, is that the referees in the district court adopted and applied an erroneous measure of damages in the controversy between Von Dorn and Mengedoht. The referees found that while Mengedoht & Feichtmayer were prosecuting the work of erecting the building according to their contract, and were ready, able, and willing to so complete it, that Von Dorn wrongfully terminated their employment and refused to permit them to complete the work. What, then, was Mengedoht's measure of damages? This question generally arises in suits growing out of contracts of the character of the one involved in this controversy in either one of three ways, viz., where the contractor voluntarily abandons the work, where the owner wrongfully refuses to permit the contractor to perform, and where the owner rightfully terminates the contract or the contractor's employment by virtue of some provision in the contract authorizing him to do so upon the arising of certain contingencies. The rules as to the measure of damages in such suits, between the owner and the contractor, in the class of cases just stated are as follows:

First—Where a contractor agrees with the owner of real estate to furnish the material and labor and erect for him an improvement thereon, and such contractor voluntarily abandons the work before completion, the owner may charge the contractor with (*a*) the necessary costs of completing the improvement as the contractor agreed to complete it, (*b*) the amount of all payments made to the contractor on the contract, (*c*) the amount of all valid liens on the real estate for labor and material furnished the contractor and used by him in such improvement, and (*d*) the amount of actual damages the owner has sustained by reason of the contractor's default. The difference between the total of these items and the contract price is the measure of damages of both the owner and contractor. If such total exceeds the contract price, such excess is the amount the owner may recover of the contractor. If the contract price exceeds such total, such excess is the amount the contractor may recover of the owner. Second—Where such a contract exists, and the owner rightfully terminates the same by virtue of some provision authorizing him to do so upon the happening of certain contingencies, then the contractor is entitled to recover from the owner the actual benefit he has received from the contractor's partial performance; and this is found by ascertaining the reasonable worth of such partial performance appropriated or received by the owner at the time of such receipt or appropriation, and deducting therefrom payments made to the contractor, and the actual damages, if any, the owner has sustained by the contractor's default, if he has made one. Third—But where such a contract exists and the owner wrongfully terminates the same or the contractor's employment thereunder before the completion of the work, the contractor's measure of damages is the reasonable value of his partial performance increased by all actual damages sustained by him by reason of the owner's unjustifiable termination of the contract. The referees found that the just and reasonable value of the labor done

and materials furnished by Mengedoht & Feichtmayer towards the erection of the building—that is, the reasonable value of their partial performance—was $14,224, and for this sum the court gave Mengedoht judgment and a lien on the real estate and building of Von Dorn. This was correct. If there had been a finding supported by competent evidence that Mengedoht & Feichtmayer had sustained any other damages by reason of Von Dorn's wrongfully discharging them, they would have also been entitled to the amount of such damages; and it seems that such damages would have been the profits they would have made by the performance of their contract had they been allowed to complete the same.

Is the judgment in favor of McDonnell contrary to law? The referees found that by the contract between Von Dorn and McDonnell the latter was employed as an architect to prepare the plans, drawings, and specifications for the building and to superintend the construction of the same; that Von Dorn wrongfully discharged him, and that in pursuance of his contract he performed labor and services towards the erection of said building as were of the just and reasonable value of $574.39, and that he was entitled, under the mechanics' lien law of the state, to a lien upon the real estate and the building of Von Dorn to secure its payment. This finding of the referees was approved by the court and McDonnell was given a judgment for the amount found due him by the referees and a mechanic's lien upon Von Dorn's property. The argument now is that this judgment of McDonnell's is contrary to law, because services performed by an architect in making plans, drawings, and specifications for an improvement on real estate and in superintending the construction of such improvement are not labor, within the meaning of section 1, chapter 54, Compiled Statutes, 1893, the mechanics' lien law. That section is as follows: "Any person who shall perform any labor * * * for the erection * * * of any

house * * * or building * * * by virtue of a contract * * * with the owner thereof * * * shall have a lien to secure the payment of the same upon such house, * * * building, * * * and the lot of land upon which the same shall stand," upon complying with the other requirements of the statute. There is some conflict in the reported decisions as to whether the services of an architect in drawing plans and specifications for an improvement on real estate and superintending the construction of such improvement are labor within the meaning of such a statute as this. It has always been the rule of this court to give this statute a liberal construction, and we see no good reason why we should depart from that rule in the present instance. The statute makes no distinction between skilled and unskilled labor, and its policy is to insure to both classes remuneration for whatever they may do towards increasing the value of an owner's real estate by the erection of improvements thereon. To make drawings, plans, and specifications for an improvement upon real estate and to superintend its erection in accordance with such plans and specifications are labor, within the ordinary meaning of that term, as much so as the painting, decorating, or polishing the floors of a building would be. We think, therefore, that an architect who furnishes drawings and plans for an improvement on real estate and superintends the erection of such improvement, in accordance with such plans, in pursuance of a contract with the owner, is entitled to a lien upon such improvement and the real estate upon which it is situate upon compliance with the mechanics' lien law of the state. (*Knight v. Norris*, 13 Minn., 473; *Stryker v. Cassidy*, 76 N. Y., 50.)

But it is contended that the judgment of the district court giving McDonnell a lien upon the property of Von Dorn is contrary to law for another reason, viz., that the oath made by McDonnell to "the account of items of labor" was administered by a person not authorized by

the laws of the state to administer oaths, and that, therefore, even if the services he performed entitled him to a lien, he never acquired one. It is said by counsel that this oath was administered to McDonnell by a notary public and that she was a female, and that the governor was not authorized to appoint and commission a female as notary public. There are several things to be said of this argument. In the first place, neither "the account of items," the mechanic's lien, nor the oath which it is said McDonnell took, nor the jurat of the notary public, nor the name of such notary are in the record. McDonnell in his cross-petition alleges that he made an account of the items of labor he furnished and that he made oath thereto. Von Dorn, in his answer to this cross-petition, does not deny these averments, and, of course, they stand admitted. There is nothing then before us by which we are enabled to review the error assigned. By section 1, chapter 61, Compiled Statutes, 1893, the governor is authorized to appoint and commission such number of persons to the office of notary public in each of the counties in this state as he shall deem necessary. The word "persons" in this statute is broad enough to include women, and we know of no constitutional provision or law that prohibits a woman in this state from holding the office of notary public; but whatever may be the correct interpretation of the statute, this woman was appointed and commissioned a notary public by the governor. She is then a public officer, and performing her duties as such, and we will not try her title to the office she holds in this proceeding. The right of a woman to hold the office of notary public under the laws of this state, when she has been appointed and commissioned as such officer by the governor, can only be inquired into in a suit or proceeding brought against her for that purpose. The judgments in favor of Mengedoht and McDonnell are neither of them contrary to law.

5. Finally, it is said the court erred in overruling the

motion of Von Dorn for a new trial made on the grounds of newly discovered evidence. The evidence which it is alleged was newly discovered is, in substance, that Mengedoht & Feichtmayer consented to and ratified Von Dorn's removal of McDonnell as architect and the appointment of Field in his place. In *Brandt v. Fitzgerald*, 36 Neb., 683, it was held that a motion for a new trial, on the ground of newly discovered evidence, was properly denied, although such evidence was competent under the pleadings in the case, where the witness who was to furnish the new evidence testified on the trial, was examined by the applicant for a new trial, and in which examination no effort was made to elicit any of the facts now claimed to be newly discovered evidence. Two of the witnesses by whom Von Dorn claims that he can prove the facts which he alleges constitute newly discovered evidence were witnesses on the trial of this case. True, Von Dorn sets out in his affidavit for a new trial that he did not know, until after the decree had been rendered herein, the witnesses would give such evidence. We do not see how this can possibly be true, as Von Dorn alleges that Feichtmayer met Field and Von Dorn at the house of the latter, after McDonnell had been removed, and at that meeting Feichtmayer agreed to the substitution of Field as architect. If this meeting occurred at Von Dorn's house, and in his presence, he certainly knew it as well when this suit was being tried as he did after the decree was rendered. He was aware of the knowledge in possession of Feichtmayer, and yet it does not appear that Von Dorn made any effort whatever to have Feichtmayer testify to what occurred at Von Dorn's house. In other words, it does not appear that Von Dorn, by the exercise of reasonable diligence, could not have discovered and produced at the trial the evidence which he now alleges is newly discovered. The assignment of error must be overruled. There is no error in the decree of the district court and the same is affirmed.

We next direct our attention to Von Dorn's appeal from the order of the district court confirming the sale made in pursuance of the decree rendered in this action. To reverse this order eight reasons are assigned:

1. The first, fourth, sixth, and seventh of which are, in substance, that an order for the sale of the property described in the decree was issued by the clerk of the district court while Von Dorn's motion for a new trial was pending and undecided. The record does not show that the order for the sale of the property was issued while the motion for a new trial was pending. The decree, in the record signed by the judge of the district court, recites that Von Dorn's exceptions to the report of the referees and his motion for a new trial were overruled on the 6th day of February, 1893, the date of the rendition of the decree; but the pendency of a motion for a new trial does not supersede a decree or judgment rendered or stay the execution thereof.

2. The substance of the second, third, and fifth reasons assigned for reversing this order are, in substance, that the sale was made after a bond had been filed by Von Dorn to supersede the execution of the decree. The decree was rendered on the 6th day of February, 1893. It was journalized or formally entered of record in the office of the clerk of the district court on the 23d day of February, 1893. The supersedeas bond of Von Dorn was filed on the 15th day of April, 1893, or more than twenty days after the rendition of the decree and its entry of record. If Von Dorn's object in filing this supersedeas bond was to appeal from the decree rendered, then the bond did not operate as a supersedeas, because not filed within twenty days after the rendition of the decree, as provided by section 677 of the Code of Civil Procedure. If his object in filing the supersedeas bond was to review the decree on error in this court, then the bond filed did not supersede the decree rendered until after the filing of his petition in

error here, in accordance with section 590 of the Code of Civil Procedure; and the petition in error was not filed in this court until the 23d of June, 1893, and the sale was made on the 25th of April, 1893.

3. The final reason alleged for reversing the order confirming the sale is, that the first publication of the notice of sale was made on the 24th of March and the last publication on April 21. There is no merit in this contention. As already stated, the sale occurred on the 25th of April, and, as the first publication of the notice was made on the 21st of March, more than thirty days intervened between the date of the first publication and the date of the sale. This was sufficient. (*Carlow v. Aultman*, 28 Neb., 672.)

The order of the district court confirming the sale is affirmed. There is no merit whatever in this appeal and it appears to have been prosecuted solely for the purposes of delay. The decree rendered by the district court is in all things

AFFIRMED.

IRVINE, C., not sitting.

ALONZO PATTERSON V. STATE OF NEBRASKA.

FILED JUNE 26, 1894. No. 6075.

Criminal Law: EVIDENCE OF CHARACTER. Where a person accused of crime introduces evidence of his good character or reputation it is not competent for the prosecution to put in evidence specific acts tending to prove it to be bad. *Olive v. State*, 11 Neb., 1, followed.

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

Greene & Hostetler, for plaintiff in error.

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

RAGAN, C.

Alonzo Patterson was convicted in the district court of Custer county of an assault with intent to commit rape. From the judgment pronounced against him upon such conviction he comes here on error. Of the errors alleged we notice only the following: On the trial Patterson introduced several witnesses whose testimony tended to show his previous good character or reputation for chastity. One of these witnesses, on cross-examination by the state, against the objection of Patterson, was permitted to testify that on the preliminary examination of the prisoner she heard a witness testify that Patterson had hired or attempted to hire him to get two negro wenches out in a cañon for him to have sexual intercourse with. This evidence was not only erroneous but highly prejudicial to the prisoner. In the first place it was not the best evidence of the alleged conduct of Patterson; and in the second place, this act of Patterson was not competent evidence against him in this case.

In *Olive v. State*, 11 Neb., 1, Olive was being tried for murder. During the trial a witness was called in his behalf and testified that Olive had the reputation of being a peaceable, law-abiding citizen. On cross-examination of this witness by the state he was asked if he had not heard of Olive having, on a certain occasion, drawn a revolver on someone, to which the witness gave an affirmative answer. The permitting of the witness to thus testify on cross-examination was assigned as error and the error sustained by this court. LAKE, J., delivering the opinion, said: "Where a person accused of crime introduces evidence of his good character or reputation it is not compe-

tent for the prosecution in reply to put in evidence particular facts tending to prove it to be bad." This case and the rule laid down therein are decisive of the one at bar. The judgment of the district court is reversed and the cause remanded with instructions to grant the plaintiff in error a new trial.

REVERSED AND REMANDED.

JOHN J. GILLILAN ET AL. V. JOHN A. ROLLINS.

FILED JUNE 26, 1894. No. 5565.

1. **Damages:** STIPULATION OF AMOUNT FOR BREACH OF CONTRACT: CONSTRUCTON. When parties to a contract stipulate that in case of a violation thereof the party making default shall pay to the other a stipulated sum, the courts will take the sum so fixed as the innocent party's measure of damages only when it appears that to do so will no more than compensate his losses.

2. ———: ———: ———. But in such case if the taking as the measure of damages the sum fixed in the contract to be paid for its breach will more than compensate the innocent party, the court will regard such sum as a penalty.

3. ———: ———: ———. It is not the policy of the law to punish a party for violating his contract, but to compel him to make good to others the losses they have sustained by his default.

4. ———: ———: ———: LIQUIDATED DAMAGES OR PENALTY. The courts, in determining whether a sum fixed by a contract to be paid for its violation is liquidated damages or a penalty, will take into consideration the subject-matter of the contract, the consideration on which it is based, the intention of the parties, and the language of the contract; but these facts, nor any of them, nor all of them, will not necessarily control the court's construction.

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

Leese & Stewart, for plaintiffs in error:

The sum stipulated to be paid on a breach of the agreement was intended between the parties as liquidated damages. The jury should have been instructed accordingly. (1 Pomeroy, Equity Jurisprudence [2d ed.], secs. 440-445; 3 Parsons, Contracts [8th ed.], p. 156; 2 Sedgwick, Measure of Damages [7th ed.], p. 243, note *a*; Bispham, Principles of Equity [4th ed.], sec. 179; *Chase v. Allen*, 13 Gray [Mass.], 45; *Cushing v. Drew*, 97 Mass., 445; *Grasselli v. Lowden*, 11 O. St., 349; *Gobble v. Linder*, 76 Ill., 157; *Peine v. Weber*, 47 Ill., 47; *Morse v. Rathburn*, 42 Mo., 594.)

Davis & Hibner, contra, cited: *Brennan v. Clark*, 29 Neb., 385; *Squires v. Elwood*, 33 Neb., 126.

RAGAN, C.

On the 29th day of December, 1888, John A. Rollins duly executed and delivered to John J. Gillilan and Aldridge D. Kitchen a writing obligatory, in words and figures as follows:

"I, John A. Rollins, of the city of Lincoln, Nebraska, for a good and valuable consideration, am held and firmly bound unto John J. Gillilan and A. D. Kitchen in the penal sum of five thousand (5,000) dollars, for the payment of which I bind myself, my heirs, administrators, and executors firmly by these presents, upon conditions as follows, to-wit: First—That I build the line of the Capitol Heights Street Railway Company on E street in the city of Lincoln, Nebraska, to Twenty-seventh street on or before May 1, 1889. Second—That I operate said railway for three years, from May 1, 1889, from said Twenty-seventh over said E street to the corner of Twelfth and O streets, in said city of Lincoln, giving at least one-half hour service from 7 o'clock A. M. to 7 o'clock P. M. each day, excepting Sundays, and on Sundays at least one hour

service from 9 o'clock A. M. to 7 P. M. Third—That I commence operating said line on said E street on or before May 1, 1889. Therefore, if I, John A. Rollins, the above bounden, shall faithfully and fully perform and carry out all of the above conditions and agreements, then this obligation to be void; otherwise to remain in full force and effect.

"Witness my hand hereto subscribed this 29th day of December, 1888. JOHN A. ROLLINS."

John J. Gillilan and Aldridge D. Kitchen brought this suit on this contract against John A. Rollins in the district court of Lancaster county, alleging in their petition, in substance, that at and before the time of the execution of said writing by said Rollins they were the owners of certain real estate laid out in an addition to the city of Lincoln; that the construction and operation of a street railway along and adjacent to their property and connecting it with the business portion of Lincoln would greatly enhance its value. For the purpose of procuring the operation and construction of such line of railway along and through their property the agreement quoted above was entered into between them and Rollins; that they were at the time engaged in the business of buying and selling real estate for profit; that they held the lots of their addition for sale; that they transferred and assigned to said Rollins forty-four shares of stock in said street railway company of the par value of $4,400; that Rollins did not complete the street railway on E street to Twenty-seventh on or before May 1, 1889; that the service given by Rollins was not half hour service, but was very irregular; that the cars were not run on any schedule time, but would vary from one-half hour to six hours in making runs, and on many occasions the operation of the railway was wholly abandoned for days at a time; that on May 1, 1891, Rollins wholly abandoned and discontinued the operation of the railway; that by reason of Rollins' failure to perform

his contract their real estate had become less desirable for residences, and had greatly depreciated in value; that they had been deprived of opportunities to sell the same, and had been compelled to take back a large number of lots which they had already sold on the assurance that the street railway would be properly operated; and they prayed judgment against Rollins for the sum of $15,000. The answer of Rollins to this petition was, in effect, a denial that he had in any respect violated his contract with the plaintiffs; that the street railway stock assigned by them to him was of any value whatever, and he further averred that he had fully and faithfully performed all the conditions of his agreement. Gillilan and Kitchen had a verdict for one dollar, and from the judgment pronounced thereon they prosecute to this court a petition in error. The eight errors assigned by them we notice as follows:

1. The third error alleged is in the following language: "The court erred in giving paragraphs 2, 3, 4, 5, and 6 of the instructions on its own motion." An examination of the record discloses the fact that one of the instructions excepted to was properly given, and the other instructions will not be reviewed for the purpose of ascertaining if the court erred in giving them or any of them.

2. The eighth error alleged is in the following language: "Error of law occurring at the trial." Under the well settled practice of this court, time and again announced, this assignment is too indefinite for review.

3. The fourth error assigned is as follows: "The court erred in refusing to give paragraph 2 of instructions asked by plaintiffs." That instruction is in the following language: "In this case you are instructed that if you find from the evidence that there has been a substantial breach of the condition of the bond on the part of the defendant, then you will find for the plaintiffs and fix the amount of their recovery at the sum of $5,000." This instruction was framed upon the theory of counsel for plaintiffs in

error, that the sum of $5,000 promised by Rollins in his bond to be paid to Gillilan and Kitchen in case he failed to keep his contract with them is not a penalty, but is in the nature of liquidated damages. In other words, the argument of counsel is that it was intended by the parties to this suit that in case Rollins failed to comply with his contract, he should pay that sum to Gillilan and Kitchen as compensation for the damages that they would or might suffer by reason of Rollins' default. We do not agree to this construction of this contract. The reported decisions in which contracts of this nature are construed are very numerous and the conclusions reached by the courts very conflicting, and it would subserve no useful purpose to collate or review these authorities. We think that the better rule, and the one supported by the weight of authority, is, when parties to a contract stipulate that in case of a violation thereof the party making default shall pay to the other a stipulated sum, the courts will take the sum so fixed as the innocent party's measure of damages, only when it appears that to do so will no more than compensate his loss; but if taking as a measure of damages the sum fixed in the contract to be paid for its breach will more than compensate the innocent party, the courts will regard the sum a penalty. It is not the policy of the law to punish a party for violating his contract but to compel him to make good to others the losses they have sustained by his default. The courts, in determining whether a sum fixed by a contract to be paid for its violation is liquidated damages or a penalty, will take into consideration the subject-matter of the contract, the consideration on which it is based, the language of the contract, and the intention of the parties; but these facts, nor any of them, nor all of them, will not necessarily control the court's construction. One is entitled to recover from another with whom he has made a contract, and which the other has violated, such damages as will put him in as good a position as he would have occu-

pied had the contract been performed; but he is not entitled to recover such damages as would make him a gainer by reason of the other party's violation of the contract. In *Brennan v. Clark*, 29 Neb., 385, MAXWELL, C. J., speaking of the construction to be placed by the courts on such contracts as the one here, said: "If the construction is doubtful, the agreement is considered as a penalty merely." This is doubtless a correct rule and we adhere to it; but there is nothing in the contract of Rollins, nor in the transactions out of which it grew, that causes us to doubt that the proper construction of this contract is the one placed thereon by the learned district court, and it accordingly follows that he did not err in refusing to instruct the jury as requested by the plaintiffs in error.

4. The fifth error is assigned in the following language: "The verdict is contrary to the first, second, third, fourth, fifth, and sixth instructions of the court as given." The first of these instructions was a statement of the issues on trial, and since the verdict of the jury can in no sense be said to be contrary to that instruction, and the assignment is that the verdict is contrary to all the instructions, the assignment must be overruled.

5. The sixth and seventh errors assigned here relate to a couple of questions propounded by the court to witnesses on the stand. It is said these questions were improper and immaterial. We do not think that they were either, nor that the district court committed any error whatever in asking them.

6. The first and second errors assigned are that the verdict is not supported by sufficient evidence, and is contrary to law. The testimony shows that Rollins did not complete the street car line by the 1st of May, 1889, as he contracted, but that it was completed some time about the 1st of June, 1889. The evidence as to the character of the street car service rendered was conflicting. The testimony of the plaintiffs in error tended to show that the cars were

run at very irregular intervals, and that the trips were not half hour trips during the week, nor hour trips on Sundays, as the contract called for. The testimony on behalf of Rollins was a traverse of that of the plaintiffs in error as to the character of the street car service. The testimony on behalf of the plaintiffs in error tended to show that about the 14th of May, 1891, Rollins abandoned the operation of the street railway, while the testimony on his part tended to show that the cars were taken off only temporarily and that the road was in complete operation at the time of this suit. The evidence tends to show that between the date of the contract made with Rollins and the bringing of this suit that the property of the plaintiffs in error had greatly depreciated in value, but whether this depreciation was caused by the manner in which the street cars were operated was a question which went to the jury on conflicting testimony. In other words, the evidence on behalf of the plaintiffs in error tended to support their theory of the case, while the evidence on behalf of Rollins tended to support his theory. The verdict of the jury must be taken to mean that the jury awarded the plaintiffs in error nominal damages for the failure of Rollins to complete his road by May 1, 1889, and that the plaintiffs in error had sustained no damages by reason of the failure of Rollins to operate his road and render the character of street car service as promised in his contract. We cannot say that this verdict is either not supported by sufficient evidence or contrary to law. The judgment of the district court is

AFFIRMED.

BURLINGTON VOLUNTARY RELIEF DEPARTMENT OF CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. ANNA E. WHITE.

FILED JUNE 26, 1894. No. 5226.

1. **Mutual Insurance Associations in Connection with Railroad Companies:** MEMBERSHIP: ASSESSMENTS: ESTOPPEL: WAIVER OF REQUIREMENTS: LIABILITY OF INSURER. A relief department, in the nature of a mutual insurance association, was maintained in connection with a railroad company. The members of the relief department were employes of the railroad company. By their contract of membership they authorized the company to withhold from their wages certain sums to provide a fund for the payment of benefits in the case of sickness or death of members. The railroad company contracted to make up any deficiencies in the funds so provided. It also furnished the clerks and other employes for conducting the affairs of the department. The department was under the general management of a superintendent and subject to the supervisory control of an advisory committee. The by-laws of the department required an employe who desired to become a member to make application in a prescribed manner and submit himself to a physical examination. His application was then subject to the approval of the superintendent. W. was an employe of the railroad. July 21 he expressed to a soliciting agent of the department his desire to become a member. The agent gave written notice of W.'s application to the superintendent of the department, the paymaster of the road, and W.'s superior officer in the employ of the road. This notice specified July 21st as the day when the application was to take effect. July 22d W. was taken sick. No application was made in the form prescribed by the by-laws and no physical examination was had. No demand was made upon W. either for such application or for such examination. W.'s name was placed upon the roll of members of the department, and from the July pay roll there was deducted by the company for the benefit of the department the assessment due from W. on the basis of membership from July 21st to September 1st. On August 7th the officers of the department were notified of W.'s disability. September 19th the superintendent wrote to W.'s superior officer, stating that W. was not a member of the department; that his contribution should be refunded by time check, and that the notice of disa-

bility should be canceled. September 20th an instrument called a "time check" was tendered to W. and by him refused. A few hours thereafter W. died. *Held*, (1) That the department, by causing to be deducted from W.'s pay assessments on the basis of membership with knowledge of the fact that no formal application had been made and no examination had, was estopped from disputing W.'s membership; (2) that the fact that the relief department was a mutual insurance company did not relieve it from the operation of the rules of equitable estoppel; (3) that all of the transactions being with the knowledge of the superintendent of the department, there was no question of the authority of subordinate employes to waive requirements, their acts being in such case the acts of the department; (4) that the department was not relieved from liability because of a rule which provided that where an employe had made a proper application and passed a physical examination the department should only be liable during a delay in the approval of his application for injuries or death caused by accident. The department, under the facts stated, was estopped not only from denying that there had been an application and examination, but from denying that the application had been approved; (5) that the tender of the time check before W.'s death did not release the department from liability, first, because it was not a legal tender; and second, because liabilities had already accrued against the department from which it could not discharge itself by refunding the assessment.

2. ———: RULES OF DEPARTMENT: DECISION OF SUPERINTENDENT: RIGHTS OF BENEFICIARIES: ACTIONS. A rule of the department providing that all questions or controversies arising between any parties or persons in connection with the relief department or operation thereof, whether as to the construction of language, or the meaning of regulations, or as to any right, decision, or act in connection therewith, should be submitted to the determination of the superintendent, whose decision should be final, subject, however, to an appeal to the advisory committee, did not prevent the maintaining of this action, for the reasons (1) that in disclaiming W.'s membership before his death the superintendent was not acting judicially after a hearing of a controversy upon the subject, but was acting in an administrative capacity on behalf of the department alone; and (2) that this was not a controversy with the department as to transactions between it and a member, but was an action by the widow after W.'s membership had ceased to enforce a liability accruing to her. *Railway Conductors Mutual Aid & Benefit Association v. Loomis*, 43 Ill. App., 599, followed.

3. ———: BENEFICIARIES. No beneficiary having been designated by W., the rules of the department construed and *held* to constitute W.'s widow his beneficiary.

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

The facts are stated in the opinion.

Marquett & Deweese, John H. Ames, and *Byron Clark,* for plaintiff in error:

There was no beneficiary named, and the wife had no right to bring this suit. (Bacon, Benefit Societies & Life Insurance, sec. 241, and cases cited; Niblack, Mutual Benefit Societies, sec. 166*a*; *Esty v. Clark,* 3 Am. Rep. [Mass.], 320, and cases cited.)

It was error to instruct the jury that a person could become a member in a manner different from that prescribed by the association. (*Clevenger v. Mutual Life Ins. Co.,* 2 Dak., 114; Niblack, Mutual Benefit Societies, sec. 69.)

Retention of premium does not constitute a contract, but the application must be accepted before the minds of the parties meet, which is a necessary condition to completion. (*Alabama Gold Life Ins. Co. v. Mayes,* 61 Ala., 163; *Heiman v. Phœnix Mutual Life Ins. Co.,* 17 Minn., 153; *Taylor v. Merchants Fire Ins. Co.,* 9 How. [U. S.], 390; *Supreme Lodge Knights and Ladies of Honor v. Grace,* 60 Tex., 570; *Covenant Mutual Benefit Association v. Conway,* 10 Brad. [Ill. App.], 348.)

The officers of a mutual insurance company cannot waive by-laws which relate to the substance of a contract. (*McCoy v. Roman Catholic Mutual Ins. Co.,* 25 N. E. Rep. [Mass.], 289, and cases cited; *Bolton v. Bolton,* 73 Me., 299; *Sweet v. Citizens Mutual Relief Society,* 78 Me., 541; *Baxter v. Chelsea Mutual Fire Ins. Co.,* 1 Allen [Mass.], 294; *Evans v. Trimountain Mutual Fire Ins. Co.,* 9 Allen [Mass.], 329; *Burland v. Northwestern Mutual Benefit Association,* 11 N. W. Rep. [Mich.], 269.)

Officers cannot waive medical examination when the rules require it. (*Lyon v. Supreme Assembly Royal Society of Good Fellows*, 26 N. E. Rep. [Mass.], 236, and cases cited.)

Plaintiff in error did not waive requirements by inaction of its officers after receiving notice that the deceased intended to make application. (Bacon, Benefit Societies & Life Insurance, secs. 268, 270; *Globe Mutual Life Ins. Co. v. Snell*, 19 Hun. [N. Y.], 561; 1 Parsons, Contracts, 550; *Real Estate Mutual Fire Ins. Co. v. Roessle*, 1 Gray [Mass.], 336; *Misselhorn v. Mutual Reserve Fund Life Association*, 30 Fed. Rep., 545.)

Words of the by-laws become part of the contract and must receive the ordinary interpretation put upon contracts containing them. (*Wiggin v. Knights of Pythias*, 31 Fed. Rep., 124; *Rood v. Railway Passenger & Freight Conductors Mutual Benefit Association*, 31 Fed. Rep., 62.)

The following authorities are referred to on the question of estoppel: 2 Hermann, Estoppel, secs. 20–749; *Pickard v. Sears*, 6 Ad. & El. [Eng.], 469; 2 Pomeroy, Equity Jurisprudence, sec. 812.

Matthew Gering, for defendant in error:

The plaintiff in error is not entitled to have the rulings on evidence reviewed, for the reason that the errors complained of in its brief are not specifically pointed out in the petition in error. (*Lowe v. City of Omaha*, 33 Neb., 587; *Lowrie v. France*, 7 Neb., 192; *Tagg v. Miller*, 10 Neb., 442; *Birdsall v. Carter*, 11 Neb., 143.)

The company may waive the making of a formal application, and may make a valid contract of insurance, either by parol or in writing, without such application. (*Blake v. Exchange Mutual Ins. Co.*, 12 Gray [Mass.], 265; *Liberty Hall Association v. Housatonic Fire & Marine Ins. Co.*, 7 Gray [Mass.], 261; Bacon, Benefit Societies & Life Insurance, sec. 427.)

The acceptance by the association of the assessments and premium is a waiver of the requirements relating to application and medical examination, and estops it from disputing the membership of deceased. (*Millard v. Supreme Council American Legion of Honor*, 22 Pac. Rep. [Cal.], 864; *Stylo v. Odd Fellows Mutual Ins. Co.*, 34 N. W. Rep. [Wis.], 151; *Schunck v. Gegenseitiger Wittwen und Waisen Fond*, 44 Wis., 369; *Erdmann v. Mutual Ins. Co.*, 44 Wis., 376; *Matt v. Roman Catholic Mutual Protective Association*, 30 N. W. Rep. [Ia.], 799; *Roswell v. Equitable Aid Union*, 13 Fed. Rep., 840; *Bloomington Mutual Life Benefit Association v. Blue*, 11 N. E. Rep. [Ill.], 333; *Tobin v. Western Mutual Aid Society*, 33 N. W. Rep. [Ia.], 664; *McDonald v. Supreme Council*, 20 Pac. Rep. [Cal.], 41; *United Brethren Mutual Aid Society v. Schwartz*, 13 Atl. Rep. [Pa.], 769.)

IRVINE, C.

There is maintained in connection with the Chicago, Burlington & Quincy railroad and certain allied companies what is called "The Burlington Voluntary Relief Department," which is the plaintiff in error. This voluntary association is somewhat in the nature of a mutual benefit society, paying to its members stipulated sums during disability caused by sickness or accident, and paying to designated beneficiaries certain sums upon the death of members. The members are employes of the railroad companies operating the department. The employing railroad company contracts to make up deficiencies in the relief fund for the payment of losses accruing to those employes. It also furnishes clerks and other employes to conduct the affairs of the department. The department has a superintendent charged with the general conduct of its business, but subject to the supervisory control of an advisory committee, consisting of the general manager of the Chicago, Burlington & Quincy railroad, certain members chosen by the di-

rectors of that road, and other members chosen by employes of different divisions of the road who are members of the department. The method prescribed for obtaining membership is for the employe to make an application upon a form prescribed by the by-laws and submit himself to a physical examination by an examiner appointed by the department. His application is then passed upon by the superintendent, and if approved a certificate of membership is issued. The principal source of income is by deducting specified amounts monthly from the wages of the members. The railroad company makes this deduction and retains the fund, paying interest to the department upon monthly balances in its hands. These are the general features, to some of which it will be necessary hereafter to refer more specifically.

Landon T. White was in 1890 employed as an engineer by the Chicago, Burlington & Quincy Company. On July 21 of that year he met a soliciting agent of the department, also an employe of the company, and suggested to him his desire to become a member of the department. The agent then filled out, in triplicate, a printed form used for the purpose, headed "Notice of Application for Membership," stating the applicant's name, date at which application was to take effect, applicant's occupation, age, wages, and the class of membership to which he desired to be admitted. On this form the date at which the application was to take effect was stated as July 21, 1890, the day the form was filled and dated. One of these forms was sent to the superintendent at Chicago, one to the paymaster, and one to the superintendent of motive power. The following day White was taken sick. Upon a subsequent day the medical examiner called at his house, but testified that finding White not in a physical condition to make the examination none took place. According to Mrs. White some kind of an examination was made, but its nature does not appear. On August 7th the employe of the company charged with that duty filled out another form in triplicate, entitled

"Notice of Disability," the contents being indicated by the title, sent one form to the department physician, one to the superintendent of motive power, and one to the superintendent of the relief department. In the meantime White's name had been placed on a roll of members of the relief department and from the pay roll for July there had been deducted from the wages of White by the officer charged with that duty $4.10, being an assessment upon White for all of August and for that portion of July following the 21st. On September 19 the superintendent of the department wrote to the superintendent of motive power as follows:

"CHICAGO, ILL., September 19, 1890.

"*Mr. D. Hawksworth, Supt. Motive Power, Plattsmouth, Neb.*—DEAR SIR: L. T. White, engineman, Plattsmouth, made preliminary application on form 3 July 21 for membership in the fourth class, to take effect July 21, and was taken sick on July 22, as per form 8, No. 15753, issued by J. E. Barwick, before medical examination could be made. Mr. White is not a member of the fund, and the contribution of $4.10 deducted on the July roll should be refunded him at once by time check. Will you please see that this is done, also that the form 8 is canceled.

"Yours truly, J. C. BARTLETT, *Supt.*"

On the 20th an employe was sent to White's house, where he made a tender of what is designated a "time check." This was on a printed blank, in form a certificate signed by the master mechanic of an amount due for labor for a specified time; but taking this document as it was written it reads as follows:

"BURLINGTON & MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA.

"(C., B. & Q. R. R. Co., OWNER.)

"PLATTSMOUTH, NEB., Sept. 20, 1890.

"L. T. White has worked for this Company Relief Dept. C. R. in month of September.

"Amount due, four dollars & $\frac{10}{100}$ ($4.10).

"D. HAWKSWORTH, *Master Mechanic.*

"S. W. DUTTON."

This was refused by White and his wife. A few hours afterwards White died. No application according to the form prescribed had ever been made by White, and it may be assumed that there had been no physical examination. The defendant in error is White's widow and she brought this action to recover the amount of the death benefit.

A portion of the argument is addressed to the rulings of the court on the admission of evidence. It has been so frequently decided that such rulings will not be reviewed in the absence of specific assignments in the petition in error calling attention to the particular rulings complained of, that it is unnecessary to cite those decisions. There is no assignment in the petition in error herein of the character required to present any of these questions for review. This leaves the case to be determined practically upon a consideration of the instructions given and refused. The court charged the jury quite at length and refused nine of the instructions asked by the defendant below. One so requested was given with modification, but the transcript is in such shape that it is impossible to determine in what the modification consisted, and it is only by the exceptions noted on the margin that we ascertain that there was any modification. Fortunately for the ends of conciseness, the case is presented in such a manner that it becomes unnecessary to review the instructions in detail. The burden of the instructions excepted to was to the effect that if the jury should find that a verbal application for insurance was made, that the deceased was not called upon to make a written application; that he was not called upon to submit to a physical examination; that he had not agreed as a condition to his insurance to submit to such examination; that the relief department had taken from his pay the assessments due from a member and had retained the same,

then that these facts would estop the department from denying his membership and would constitute a waiver of the written application and physical examination. The jury was furthermore instructed that the tender of the time check was not a sufficient tender of a return of the assessment withheld. The effect of the instructions requested and refused was that by the by-laws of the department the assessments were to be made in advance; that the application for membership must be made according to the form prescribed; that a physical examination must take place and thereafter the application must be approved by the department before the applicant should become a member; that the applicant was bound by all the conditions of the constitution and by-laws. Under the evidence in the case the instructions asked by the defendant amounted practically to an instruction to find for the defendant, and the instructions given practically amounted to an instruction to find for the plaintiff. We may, therefore, consider the questions presented generally, without reference to the specific instructions.

We think that upon every principle of equity the court took the correct view of the law. The notice of application was transmitted by the soliciting agent to the superintendent of the relief department, notifying that officer of White's desire to become a member. It was also sent to White's immediate superior as an employe of the railroad company, for what purpose is not so clear, but from the testimony evidently, in part at least, for the purpose of enabling clerks in that department to keep their records upon the basis of White's membership in the department. A third copy was sent to the paymaster evidently for use in connection with the collection or rather withholding of assessments. The department certainly had notice of his application. His name was entered upon a membership roll of the department with a statement that his application took effect July 21, 1890. Upon the subject of as-

sessments the rules are as follows: "Contributions will be due on the first day of the month and will, ordinarily, be deducted from the members' wages from the pay roll of the preceding month." "The contribution for a month or any unexpired part of a month in which an application takes effect shall be made on the pay roll for that month, together with the contribution for the following month." "A member shall not make contribution for any time during which he is entitled to benefits except for the month in which the disability begins." The deduction was made in accordance with these rules from White's pay, contribution for the fraction of July and the whole of August being taken from the July pay roll. The only right which the company could claim for withholding these assessments from the members' pay, and the only right which the department could claim for receiving them, is derived from a clause of the application, which is a part of the by-laws, whereby the company is authorized to withhold such moneys. The application also is required to specify the date when it is to take effect. Another provision of the by-laws is that if the application is approved it shall take effect on the date specified therein. We have here, then, this association, acting through the same officers as the railroad company, or, in other words, the railroad employes acting under authority of the association, receiving notice of White's application for membership and that it was to take effect on July 21. We have them deducting from his pay assessments from July 21, their sole right to do so being by virtue of White's being a member of the department. We have them holding this money until the day before his death, when an effort is made to disclaim his membership and refund his contribution by the tender of a paper which was neither money nor a promise to pay money. In a case unincumbered by the technicalities of the law of insurance there could be little doubt that a party so conducting itself would be estopped from denying lia-

bility. While the authorities are very numerous in regard to contracts of mutual insurance and in regard to benefit associations, but little light is derived from them in the solution of the questions here presented. The cases are nearly all inapplicable, because of the peculiar constitution of this association. Most of the mutual benefit associations perform social functions or are such organizations that the insurance is only an incident of the membership. There, the question as to whether one is or is not a member must be solved with a view to other objects of the association. In the case of mutual insurance companies, every payment is voluntarily made by the member and may be with the express or implied understanding that its payment is merely conditional. Here, while the assessments are termed voluntary contributions, they are only voluntary in the sense that an employe of the railroad may enter the association or not as he sees fit. If he elect to enter, he must in so doing give to his employer and the association the power to seize the assessments without any further exercise of his own volition. White did not voluntarily make a payment in connection with his application, knowing that the money might be held for some time and then his application refused; but the department seized his money, and its act in doing so was wrongful, unless by becoming a member he had given the department the right to take it. By its own acts it subjected him to the obligations of membership, and it cannot deny him its privileges.

It is urged in argument that White's application had simply been delayed by reason of his sickness, and inaction for that reason would not estop the department. If there had been merely inaction the case would not be difficult, but there was very decided action on the part of the department. It seized White's money, which it had no right to do unless he was a member, and retained it until a loss occurred and for some six weeks after notice of his sickness. If I give to another authority to take my property

in consideration of certain agreements by him to be performed, and he goes and seizes my property and retains it, it is not difficult to determine that he should not be permitted to disclaim liability upon his agreement. He cannot receive the fruits of his contract and reject its burdens. We know of no principle of law exempting a mutual insurance company from the operations of such an estoppel. If there were authority to that effect, we would not recognize it. The doctrine of estoppel is based upon the requirements of morals and conscience, obligations which even mutual insurance companies should recognize. But it is said that White did not alter his condition in reliance upon the acts of the department and that, therefore, the principle of equitable estoppel does not apply. We presume that counsel do not think that his parting with a portion of his pay was an alteration of his position. Generally, the payment of money is sufficient as an act of reliance to render an estoppel operative, and we do not think that the amount of money paid affects the case. Next it is said that neither the soliciting agent nor different clerks who took part in the transactions had authority to waive compliance with the by-laws of the association. We need not inquire into the special authority of subordinate employes. The evidence shows that every material fact was speedily communicated to the superintendent who was charged with the general management of the business and had authority to approve or reject applications. This is true except as to the entry of White's name upon the roll of members; but this we consider, in the light of the evidence, an immaterial fact, except as such entry may have led to the withholding of White's pay. The superintendent's power was general; his knowledge was that of the department; his acts were those of the department. We think, so far, there was a complete case of estoppel made out and the court's instructions were fully warranted.

Much stress is placed upon rule 49 of the department,

whereby it is provided that an employe who has passed a satisfactory medical examination and has made a proper application for membership shall, notwithstanding the delay in examining his application, be entitled to the benefits and subject to the obligation of membership; but shall in the meantime be entitled only to benefits on account of injury or death caused by accident. The objection to applying this rule is that White was not within its provisions. This was not the case of a delay after a proper application and medical examination where the application would bind him by all its terms, but the case of the department treating White as a member, seizing a portion of his pay in a way only authorized under such circumstances, and thereby estopping itself from setting up that there had not been an application and examination and approval on the 21st of July. The department cannot invoke this rule without admitting that there had been both an application and an examination. The facts, indeed, require it to admit this much, but require it to admit more, that is, that the application had been accepted. But little is required to be said as to the effect of the department's attempt to refund the so-called contribution to the defendant before White's death. Perhaps the company recognized such a document as we have above set forth as an instrument for the payment of money. Certainly no one else would so recognize it, and even if money had been tendered it would be extremely doubtful whether a tender made to a man upon his death bed, within a few hours of final dissolution, would amount to a valid tender in any case. Certainly in this case, White's money having long before been taken and the disability having already accrued by which he became entitled to compensation by the department, he was not then required to accept a return of his money in lieu of a discharge of the obligations already incurred by the department.

A section of the rules of the department provides that all questions or controversies of whatsoever character arising

in any manner or between any parties or persons in connection with the relief department or operation thereof, whether as to the construction of language or the meaning of the regulations of the relief department, or as to any right, decision, instruction, or acts in connection therewith, shall be submitted to the determination of the superintendent of the department, whose decision shall be final and conclusive, subject to the right of appeal to the advisory committee. Based upon this rule the defendant requested an instruction that if the jury believed that the superintendent had passed upon this claim and rejected the same, such decision was conclusive unless an appeal had been taken to the advisory committee. This instruction was properly refused. We have no doubt of the power of members of voluntary associations to restrict themselves, at least as to matters incidental to the operation of the association, to remedies before tribunals created by the association. It is only to this extent that the rule seems to apply. It certainly does not apply to this case. In the first place, while the superintendent, immediately after notification of White's death, did write a letter denying White's membership, there was no hearing before him. In so doing he was acting as the executive officer of the association in disclaiming liability, and was not judicially examining and determining a controversy between the association and one of its members. In the next place, we fail to see how the association, while denying White's membership, can invoke the protection of a rule necessarily affecting members alone. Finally, this was not a controversy arising during White's membership. His membership terminated with his death. Mrs. White's rights were then complete. She had no voice in the management of the association, and her interests were adverse thereto. She was not, and could not be, bound by the decision of the officers of the association. This was the view taken in the opinion of Judge Gary in *Railway Conductors Association*

v. Loomis, 43 Ill. App., 599. The supreme court of Illinois reversed Judge Gary's judgment, but upon an entirely different point. (*Railway Conductors Association v. Loomis*, 32 N. E. Rep. [Ill.], 424.

Finally, it is contended that the widow was not the beneficiary and cannot maintain the action. The application in the by-laws contains the following: "Death benefits shall be payable to —— (here designate the beneficiary or beneficiaries), or to such other person or persons as I shall subsequently designate in writing in substitution thereof, * * * otherwise to my wife." To this form there is a foot-note as follows: "If no beneficiary is designated, a line will be drawn through the blank space and through the following words beginning 'or such other person or persons' and ending and including the words 'otherwise to.'" White not having designated a beneficiary, his application, if one had been filed, would read under this by-law "death benefits shall be payable to my wife." It is clear that the contract of the department is to pay the death benefit, where no beneficiary is named, to the wife of a member, if he have one, and Mrs. White was, therefore, the proper person to maintain the action.

JUDGMENT AFFIRMED.

BURLINGTON VOLUNTARY RELIEF DEPARTMENT OF THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. ANNA E. WHITE, ADMINISTRATRIX.

FILED JUNE 26, 1894. No. 5356.

Mutual Insurance Associations in Connection with Railroad Companies: MEMBERSHIP: ESTOPPEL: WAIVER. The questions presented by this case being substantially the same as those decided in *Burlington Voluntary Relief Department v. White*, 41 Neb., 547, the judgment is affirmed for the same reasons.

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

Marquett & Deweese, John H. Ames, and *Byron Clark,* for plaintiff in error.

Matthew Gering, contra.

IRVINE, C.

This case is based upon the same state of facts as that of *Burlington Voluntary Relief Department v. White,* 41 Neb., 547, just decided. Here Mrs. White, as administratrix, sues to recover the disability benefits which accrued to White before his death. The trials were separate, and there are some differences in the evidence and in the instructions, but none of them is material. The cases were submitted upon the same briefs, and it is recognized by the parties that upon the principal questions involved the same considerations must control both cases.

Upon an examination of rules 54 and 55 of the association it is perhaps doubtful whether, in the case of the death of a member at a time when disability benefits have accrued, those benefits do not become consolidated with the death benefit and payable to his beneficiary rather than to his personal representative. We do not understand, however, that counsel contend for this construction, nor do we find that the question is raised by the record.

JUDGMENT AFFIRMED.

THADDEUS J. FOLEY, APPELLEE, V. WILLIAM M. HOLTRY, APPELLANT.

FILED JUNE 26, 1894. No. 5446.

1. **Pleading:** ESTOPPEL. A party is estopped from denying the truth of averments in his own pleadings.
2. **Estoppel:** EXCHANGE OF STOCK OF CORPORATION FOR LAND: FRAUD: RESCISSION: RATIFICATION: EQUITY. Where stock in a corporation had been exchanged for land and the person receiving the stock learned that the representations inducing him to make the exchange were false, and thereafter, without notifying the other party of any intention to rescind, knowingly permitted such other party to make valuable improvements upon the land, and in the meantime acted as a director of the corporation and took part in its affairs, *held*, that these acts constituted an election to abide by the contract and deprived him of the right to seek rescission in equity.

APPEAL from the district court of Lincoln county. Heard below before CHURCH, J.

Grimes & Wilcox, for appellant.

E. J. Hainer, *B. I. Hinman*, and *T. Fulton Gantt*, *contra*.

IRVINE, C.

In February, 1890, the defendant Holtry was the owner of two hundred shares of stock in the North Platte Milling & Elevator Company. Foley was the owner of certain real estate in North Platte, which has been referred to generally in the record as the Spruce street property. On February 24, 1890, Holtry transferred the stock to Foley and received in exchange a conveyance of the Spruce street property and $1,500 in cash. In January, 1891, Foley began this action to rescind the contract and conveyances because of alleged false representations made by Holtry to Foley inducing the transfer. There was a general finding

for the plaintiff and a decree requiring the reconveyance of the Spruce street property and rendering judgment for $1,000 for the plaintiff, coupled with an order for the retransfer of the stock to the defendant.

The defendant, in his amended answer, pleads that between the first days of May and October, 1890, he improved the Spruce street property, expending $1,500; that the plaintiff stood by and saw defendant making such improvements and made no objection thereto; that on March 1, 1890, plaintiff was elected a director of the elevator company and that he filled and occupied such office, taking an active interest and part in the management of the business, until the bringing of this action. The reply admits that the defendant made improvements on the property, but alleges that they were made before plaintiff learned of the falsity of the representations alleged in the petition. The reply also avers that the cost of the improvements did not exceed $1,300, of which $1,000 remained unpaid and a lien on the property. We think there was no delay in bringing this action, which of itself would bar the plaintiff from relief. Our statute provides the period of four years after the discovery of the fraud for instituting an action to obtain relief therefrom, and in the absence of special circumstances it is probable that a plaintiff would not be barred from relief for inaction during that period. It is also a recognized principle that an equitable estoppel will not operate where the party seeking the benefit of the estoppel knew the facts by virtue of which the estoppel was claimed. (*Nash v. Baker*, 37 Neb., 713; 2 Pomeroy, Equity Jurisprudence, sec. 810.)

We find, however, a somewhat different question presented. The petition and the amended petition state distinctly that "as soon as plaintiff discovered that such representations were false, to-wit, on or about the 30th day of April, 1890, and at several times since," plaintiff applied to defendant and tendered back the stock transferred and

requested a reconveyance. The plaintiff introduced evidence tending to show that this averment had been made after a hasty consultation and because of a misunderstanding between him and his attorney, but no amendment was made, nor was there any application made to amend the petition in this regard. The plaintiff is therefore estopped by his averment, and it must be taken as admitted that he had knowledge of the fraud alleged on April 30, 1890. The uncontradicted evidence shows that the defendant did not begin the improvements until May; that the property was so situated that the plaintiff had knowledge of the commencement and progress of the improvements; in fact the plaintiff does not deny this. Although the plaintiff may have become aware of the fraud in April, we do not think that his mere inaction until the following January would deprive him of the right to rescind, especially as it does not appear that he was in possession of evidence sufficient to sustain the action until a much later time; but it is a well recognized principle that a party who has been led into a contract by false representations has two courses open to him. He may rescind the contract, or he may let it stand and bring his action for damages. It is equally well established that if he elect to rescind, he must act promptly on the discovery of the fraud, and, in the language of Pomeroy (2 Equity Jurisprudence, 965), "when a party, with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although origi-

nally impeachable, becomes unimpeachable in equity." Applying this rule, we have Mr. Foley admitting in the record that he knew of the fraud April 30, 1890. We have him, with that knowledge, permitting Holtry to make valuable improvements on the premises conveyed to him without in any manner informing Holtry of his intention to rescind; for there is not a particle of evidence to substantiate the plea of tender and demand of reconveyance, and this allegation was put in issue. Furthermore, we have, by the uncontradicted evidence, Mr. Foley, who had in March become a director of the elevator company, attending the meetings of that company and taking part in its affairs down to the very time when this action was commenced. Under these circumstances we do not think, whatever the plaintiff's rights may be in an action at law, that he can claim relief by rescission in a court of equity. The acts referred to must be treated as an election upon his part to abide by the contract, or at least as estopping him from exercising a contrary election.

It is claimed that defendant has only paid a small portion of the cost of the improvements. The evidence shows part paid and part unpaid, but does not disclose the proportion. This is immaterial, because defendant is obligated for all.

At the very close of the appellant's brief there is an insinuation that the trial judge was influenced by social relations with the plaintiff. Had this been called to our attention before the brief had been examined, the brief would have been stricken from the files and the court would have refused to consider any further brief in the case from the same counsel. We have several times had occasion to reprimand counsel for reflections on the trial judge. It has been hoped that there would be no occasion for further action in this respect. If the rule heretofore resorted to prove insufficient to deter attorneys from such conduct, other means will be adopted which will place it beyond the

power of attorneys so disposed to make such comments. We have examined this whole record, embracing more than 600 pages, with care, and we are convinced that the learned judge who tried the case conducted the proceedings with dignity, fairness, and precision.

For the error referred to the judgment of the district court must be reversed and the cause remanded, with leave to plaintiff, if he so desire, to amend his petition and pray judgment for damages.

REVERSED AND REMANDED.

F. M. RUSSELL ET AL. V. HORN, BRANNEN & FORSYTH MANUFACTURING COMPANY.

FILED JUNE 26, 1894. No. 5183.

1. **Principal and Agent:** AGENT'S EXCLUSIVE RIGHT TO SELL GOODS: BREACH OF CONTRACT: DAMAGES. R. & P. claimed to have a contract with the H. Company whereby H. & P. were to have the exclusive right to sell goods manufactured by the H. Company in certain territory and whereby the H. Company was forbidden to sell these goods to others within that territory. At the request of R. & P., a salesman of the H. Company made an estimate to a third person of the price of certain goods, the evidence tending to show that the salesman was introduced to such third person by R. & P. with the statement that anything he did would be satisfactory to R. & P. The salesman sold the goods directly to such third person for the H. Company and not for R. & P. R. & P. sought to recover from the H. Company for profits lost because of such transaction. The H. Company claimed that R. & P. had waived their exclusive right in this instance. The court instructed the jury, in effect, that if R. & P. introduced the salesman to such third person with the statement that any agreement he made would be satisfactory, and if the third person did not then understand that he was to procure the goods from R. & P., then such facts constituted a waiver. *Held*, Erroneous, because in an action between R. & P. and the H. Company the purchaser's understanding was im-

material, and it was for the jury to determine from all the evidence whether or not there had been a waiver, this instruction substituting the judgment of the purchaser for that of the jury upon this point.

2. ———: ———: ———: ———. There also being a claim for damages because of alleged sales by the H. Company to others within R. & P.'s territory in violation of the contract, *held*, that the measure of damages because of such sales was the profit which R. & P. might with reasonable certainty show that they were prevented from realizing by reason of the breach of contract.

3. ———: ———: ———: ———. A third claim of damages was based upon the alleged failure of the H. Company to deliver to R. & P. goods which they had contracted to sell and deliver. *Held*, That on this cause of action R. & P.'s measure of damages was the difference between the price at which the H. Company had agreed to deliver the goods and the market value of such goods at the time and place when and where they should have been delivered.

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

Kennedy & Learned, for plaintiffs in error.

Breckenridge, Breckenridge & Crofoot, contra.

IRVINE, C.

The Horn, Brannen & Forsyth Manufacturing Company, hereinafter called the "Horn Company," brought an action in the district court of Douglas county to recover from F. M. Russell and Orlo H. Pratt, copartners doing business as Russell, Pratt & Co., and hereinafter referred to as "Russell & Pratt," $1,285.22, with interest, alleged to be due the Horn Company as a balance for goods sold and delivered to Russell & Pratt. The account attached to the petition showed charges against Russell & Pratt amounting to $4,562.93, and credits amounting to $3,277.71. Russell & Pratt answered, admitting payments to the Horn Company of large sums of money for gas fixtures and mer-

chandise sold and delivered to Russell & Pratt, but denying indebtedness in any amount, and further denying every allegation of the petition not expressly admitted. The answer then set up three counter-claims, the first being for $1,086.65, as commission and profits to which Russell & Pratt were entitled on the sale of certain gas and electrical fixtures to one Hendrix, it being charged that the list price of said fixtures was $1,898.10, and that under the contract existing between the parties Russell & Pratt were entitled, as their profit on said transaction, to fifty, ten, and five per cent off said list price. The second counter-claim charged that on March 1, 1889, an agreement was entered into between the Horn Company and Russell & Pratt whereby the Horn Company agreed to give Russell & Pratt the exclusive agency for its wares for the state of Nebraska and certain other territory, and agreed not to sell any of its fixtures to or through any other person within the territory mentioned save to Russell & Pratt; that the agreement was to remain in force for one year; that the Horn Company, in violation of its agreement, sold to and through other persons in the city of Omaha, and elsewhere in the territory mentioned, fixtures and merchandise covered by the agreement, whereby Russell & Pratt were deprived of large profits and were unable to dispose of a large quantity of merchandise purchased from the Horn Company in reliance upon such agreement, wherefore damages were prayed in the sum of $1,200. The third counter-claim alleged that on May 13, 1890, they ordered from the Horn Company merchandise at the agreed price of $648.50, which order was accepted by the Horn Company, and which the Horn Company agreed to fill, but subsequently refused to fulfill, to Russell & Pratt's damage in the sum of $373.74. The reply was a general denial. There was a trial to a jury and a verdict and judgment for the Horn Company for $922.17, from which Russell & Pratt prosecute error.

Certain rulings of the court on the admission and rejec-

tion of evidence are discussed in the briefs, but cannot be considered, for the reason that the assignments of error do not point out the rulings complained of.

Upon the subject of the first counter-claim, the sale of goods to Hendrix, the evidence tended to show that Hendrix was erecting a number of houses and that Russell & Pratt had made, or caused to be made, two bids for furnishing gas fixtures therefor. These bids contemplated the use of fixtures other than those of the Horn Company's manufacture. Mr. Ryan, a traveling salesman of the Horn Company, appeared in Omaha. At the request of Russell & Pratt, he went with Mr. Russell to Balfe & Read, who were gas fitters in Omaha, was introduced to a member of that firm by Russell and made for Balfe & Read an estimate for the fixtures for the Hendrix houses. The bid formulated by Balfe & Read upon that estimate was accepted by Hendrix and the goods sold directly without the further intervention of Russell & Pratt. Russell & Pratt claim that it was the agreement between them and the Horn Company that the Horn Company's salesman should assist them when desired in making sales; that Ryan acted ostensibly for that purpose; that it was the understanding with Ryan that while he should make the estimate, the sale was to be to Balfe & Read on behalf of Russell & Pratt, not a direct sale by the Horn Company; that Russell & Pratt would be entitled under their agreement to purchase the goods at a discount of $1,086.65 from the list price, and that in violation of their contract with the Horn Company they were deprived of this sum by reason of Ryan's making the sale directly. There was evidence tending to establish this contention. The Horn Company claims that it was the voluntary proposition of Russell & Pratt that Ryan should make the estimate and the sale, and that Russell & Pratt had in this instance waived their right of insisting that the Horn Company should sell no goods except through them. This contention is also not

without some support in the evidence. Upon this subject the court, at the Horn Company's request, instructed the jury as follows: "You are instructed that even if you believe from the evidence that Russell, Pratt & Co. had, at or about the time the contract for furnishing gas fixtures for the Hendrix houses was entered into, an exclusive agency for the sale of the plaintiff's goods in the city of Omaha; that if you further believe from the testimony that they, defendants, introduced the plaintiff's salesman, Ryan, to Messrs. Balfe & Read and stated to Balfe & Read that any agreement Ryan made would be satisfactory to them, and that there was no understanding on the part of Balfe & Read at that time that they were to procure the goods ordered through Ryan from Russell, Pratt & Co., such action and statements constitute a waiver on the part of Russell, Pratt & Co. of their exclusive agency, if any existed, and they are not entitled to recover from the plaintiff any damages under the first counter-claim set up in the answer." We think in giving this instruction the learned judge erred. It will be observed that it stated that if Russell & Pratt introduced Ryan to Balfe & Read, and stated to them that any arrangement Ryan made would be satisfactory to Russell & Pratt, and that Balfe & Read did not then understand that they were to procure the goods from Russell & Pratt, then that these facts constituted a waiver by Russell & Pratt of their exclusive right. This would be a correct statement if this were a proceeding against Balfe & Read. If Balfe & Read did not understand that their purchase was to be from Russell & Pratt, and if Russell & Pratt informed them that any arrangement they made with Ryan would be satisfactory, and Balfe & Read had acted upon that statement, Russell & Pratt would be estopped, as against them, from claiming anything to the contrary. But this case does not affect Balfe & Read at all, and such an estoppel would not operate in favor of the Horn Company.

If the understanding was, as Russell & Pratt claimed, that Ryan should make the estimate to Balfe & Read on behalf of Russell & Pratt, then it was immaterial what Balfe & Read understood, and there would in such case be no waiver. The statement claimed to have been made by Russell to Balfe & Read, that Russell & Pratt would be satisfied with any arrangement that Ryan made, is susceptible of two constructions, according as the other evidence in the case may be viewed. It might mean that Russell & Pratt were willing to allow Ryan to sell directly for the Horn Company, or it might mean merely that Russell & Pratt authorized Ryan to make any arrangements he saw fit for them, and that Russell & Pratt would supply the goods according to any contract as to prices or terms which Ryan might make. It was for the jury in this case to determine the nature of the transaction and decide this question. This instruction left it to be determined by Balfe & Read's judgment, or more accurately by the jury's determination of what Balfe & Read's understanding of what Ryan's authority might be. It must not be understood from the foregoing discussion that the court is committing itself to Russell & Pratt's contention that their measure of damages on account of this transaction would be the discount from the list price to which Russell & Pratt were entitled. There is some evidence tending to show that Russell & Pratt were under obligations to sell at the list prices, but their measure of damages would be the amount of profit which they would have made had the sale been through them. It was clearly not contemplated that this sale should be at list prices, otherwise there was no occasion for calling into activity the discretionary authority of Ryan to make an estimate. There can be no doubt that Ryan was authorized to fix the price at which the goods were to be sold to Balfe & Read, and if the facts in relation to this counter-claim should be determined in favor of Russell & Pratt, the measure of damages would be the

difference between the price at which, under their contract, Russell & Pratt were entitled to buy the goods from the Horn Company and the price at which Ryan agreed to sell them to Balfe & Read. We think the court correctly refused an instruction asked by Russell & Pratt stating a different rule.

Complaint is made of the eighth instruction given by the court at the request of the Horn Company. It is as follows: "You are instructed that before the defendants are entitled to recover any damages under their second counter-claim, they must first prove that the plaintiff has sold his goods within the defendants' territory between the date of March 1, 1889, and March 1, 1890, and the amount which the defendants would be entitled to recover would be the profit which the plaintiff made by selling to outside dealers over what it would have realized had it sold to Russell, Pratt & Co., unless you further find that the defendants have suffered actual pecuniary loss by reason of the plaintiff's so selling its goods; and if you find the defendants have suffered such loss, then the measure of damages is such an amount as the defendants have proven by a clear preponderance of the evidence they lost in profits on the sale of plaintiff's goods, which they can show with reasonable certainty they would have made had the plaintiff not sold any of its goods within the defendants' territory." We do not think that Russell & Pratt were prejudiced by this instruction. We agree with them that where one person has by contract the exclusive right to buy from another and resell within a certain territory goods in which such other person enjoys a monopoly, and such other person, in violation of his contract, sells such goods to other persons within the territory, the measure of damages is the profit which such first person may with reasonable certainty show that he would have realized if the contract had been performed by the other party. (*Mueller v. Bethesda Mineral Spring Co.*, 50 N. W. Rep. [Mich.], 319; *Hale v. Hess*, 30 Neb., 42.)

The difficulty in such case is always to establish with legal certainty the amount of such profits, but if proper proof be made, the law permits such recovery. (*Anvil Mining Co. v. Humble*, 14 Sup. Ct. Rep., 876.) The instruction quoted states this rule to the jury, and the fact that it also states that Russell & Pratt might recover whatever the Horn Company realized by selling the goods to others over and above what it would have realized by selling to Russell & Pratt does not prejudice them. It was an extension and not a restriction of the rule of damages.

Upon the subject of Russell & Pratt's measure of damages upon the third counter-claim the following instruction was given at the Horn Company's request: "You are instructed that under their third counter-claim the defendants are only entitled to recover as damages the difference between the agreed price of the goods purchased of the plaintiff and their market value at the time the plaintiff refused to deliver them, and the defendants must prove that market value, which would be the amount Russell, Pratt & Co. and other like dealers would have to pay the plaintiff for such goods at the time of the refusal to ship them." The measure of damages upon this counter-claim would be the difference between the price at which the Horn Company had agreed to sell the goods to Russell & Pratt and the market value of such goods at the time and place when and where they should have been delivered. There was evidence tending to establish both of these facts. The failure in this instruction to state the place where the market price was to be fixed was probably cured by another instruction, but the definition given of market value in this instruction was erroneous. There was evidence tending to show that such fixtures as those ordered were purchasable in Omaha at the time of the alleged breach of contract at a discount of twenty per cent from the list price. This instruction practically excluded such evidence from consideration. The market value at

Omaha was the price at which the goods were obtainable there without regard to the person from whom they were to be obtained. It was not the amount that Russell & Pratt or any one else would have to pay to the plaintiff, and the jury should not have been restricted to a consideration of the plaintiff's prices.

There were many other assignments of error, but upon consideration we find that in respect to them the action of the trial court was substantially correct, and the conclusions reached upon the instructions referred to render a further discussion of the record unnecessary.

REVERSED AND REMANDED.

CITY OF LINCOLN V. DORINDA C. FINKLE.

FILED JUNE 26, 1894. No. 5720.

1. **Municipal Corporations:** CITIES OF THE FIRST CLASS: UNLIQUIDATED CLAIMS. Section 36 of the charter of cities of the first class, requiring, in order to maintain an action against the city for an unliquidated claim, that the claimant shall, within three months from the time such right of action accrues, file with the city clerk a statement of the time, place, and circumstance of the injury and damage, is a reasonable exercise of the legislative power, and the filing of such a statement is a condition precedent and must be alleged and proved in order to maintain an action. *City of Lincoln v. Grant*, 38 Neb., 369, followed.

2. ———: ———: ———: TIME. In order to maintain such an action the statement required must be filed within the time limited by the statute, at least in the absence of averment and proof of facts constituting a legal excuse for the delay.

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

N. C. Abbott, City Attorney, and *Abbott, Selleck & Lane*, for plaintiff in error.

Leese & Stewart, contra.

IRVINE, C.

This is a proceeding in error by the city of Lincoln to reverse a judgment recovered by Dorinda C. Finkle against the city for damages to the property of the defendant in error caused by a change of grade in a street. But one assignment of error need be noticed. The plaintiff in the court below alleged that the grade had been changed in 1884, and that in 1888 or 1889 the street had been worked to the new grade, and that on or about September 15, 1891, she presented her claim for damages to the city. The proof was in accordance with the last allegation. The city requested the court to instruct the jury that the action could not be maintained unless the claim for damages was presented within three months from the time the damages accrued. This instruction was refused. Compiled Statutes, chapter 13*a*, section 36, provide that "to maintain an action against said city for any unliquidated claim it shall be necessary that the party file in the office of the city clerk, within three months from the time such right of action accrued, a statement giving full name and the time, place, nature, circumstance, and cause of the injury or damage complained of." If this provision be valid and mandatory, the action could not be maintained under the pleadings and proof of this case, as it appears both by the petition and by the evidence that the statement was not filed until at least two years after the commission of the acts complained of. The validity and construction of this statute were questions involved in some doubt at the time this case was tried in the district court. Since then this court has had occasion to investigate the questions presented and has held that the statute referred to is a reasonable exercise of the legislative

power, and that the filing of the statement required is in the nature of a condition precedent, and must be alleged and proved in order to maintain an action in such a case as this. (*City of Lincoln v. Grant*, 38 Neb., 369.) We adhere to and follow the conclusion reached in that case. The only difference between the case cited and that under consideration is that in the former case no statement of damages had been filed, while here there was such a statement, but it was not filed within the time limited by the statute. There can be no doubt that the statute is as much mandatory as to the time when the statement is to be filed as it is as to the fact of filing and the nature of the statement. This must be true at least in the absence of an averment and proof of a sufficient excuse for failing to file the statement within the time limited. No such excuse is here pleaded or proved and that question is not presented. The court should have given the instruction requested by the city.

REVERSED AND REMANDED.

HERMAN R. VANDECAR, APPELLEE, V. PETER JOHNSON ET AL., APPELLANTS.

FILED JUNE 26, 1894. No. 5304.

Fraudulent Conveyances: SUFFICIENCY OF EVIDENCE. No question of law was presented by the record in this case. The sole question was as to the sufficiency of the evidence, and upon examination it was *held* sufficient.

APPEAL from the district court of Howard county. Heard below before COFFIN, J.

Rasmus Hannible and *W. H. Thompson*, for appellants.

Kendall & Taylor and *Hatch & Shangle, contra.*

IRVINE, C.

This suit was in the nature of a creditor's bill by Vandecar to set aside certain conveyances to the defendant Jensen as fraudulent as against the creditors of Peter Johnson, and to subject the land covered by these conveyances to the payment of a judgment in favor of Vandecar against Peter Johnson. The trial judge submitted the issues of fact to the determination of a jury, which answered all the interrogatories submitted in favor of Vandecar. The findings of the jury were sustained by the court and a decree entered in accordance with the prayer of the petition. The defendants Jensen and Peter Johnson appeal, admitting that the findings of the jury were such as to require a decree for the plaintiff. The appellants furthermore concede that no questions of law are presented for review and raise in this court the sole question of the sufficiency of the evidence. No question of law being directly or indirectly involved, it would serve no useful purpose to make a more detailed statement of the case or to discuss the evidence. An examination of the record persuades us that while the evidence, taken as a whole, was not of a very convincing character, it was sufficient to sustain the findings of the jury and the action of the trial court in affirming these findings and entering a decree thereon.

JUDGMENT AFFIRMED.

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY v. JONATHAN CHOLLETTE.

FILED JUNE 26, 1894. No. 5692.

1. **Liability of Carriers: INJURIES TO PASSENGERS: NEGLIGENCE.** *Chollette v. Omaha & R. V. R. Co.*, 26 Neb., 159, and 33 Neb., 143, followed and reaffirmed.

2. **Review**: RULING ON MOTION FOR NEW TRIAL: FAILURE TO POINT OUT ERROR. C. sued a railroad company on account of personal injuries sustained by his wife. The jury returned a general verdict for the plaintiff and a number of special findings. The court overruled defendant's motion for a judgment on the special findings and sustained plaintiff's motion for a new trial. A second trial resulted in another verdict and a judgment for plaintiff. The defendant assigned as error the overruling by the court of its motion for judgment on the special findings at the first trial. *Held*, That as it was nowhere pointed out wherein the district court erred in sustaining the motion for a new trial and as there were assignments in such motion referring to matters not preserved in the record, this court must assume that the motion for a new trial was properly sustained and therefore the motion for judgment properly overruled.

3. **Trial**: SPECIAL FINDINGS: NEGLIGENCE: REVIEW. Among such special findings were a number of isolated facts in relation to the conduct of the plaintiff's wife and of the railroad company, upon which defendant sought to have judgment rendered. *Held*, That the court properly refused to render judgment upon such findings, because the inference as to whether such facts constituted contributory negligence was for the jury and not for the court.

4. **Rulings on Admission of Evidence.** Certain rulings upon the admission of evidence examined, and *held* not erroneous.

5. **Railroad Companies**: LIABILITY TO THIRD PERSONS FOR INJURY TO PASSENGERS: NEGLIGENCE. Section 3, article 1, chapter 72, Compiled Statutes, providing that every railroad company shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, etc., is not restricted in its application to actions by the passengers so injured, but extends to actions by third persons for damages sustained in consequence of such injuries to passengers.

6. **Husband and Wife.** Therefore, the rule of liability in this case by the husband for injuries sustained by the wife is to be determined by the statute referred to.

7. **Contributory Negligence**: PLEADING: REVIEW. Whether a want of ordinary care or "criminal negligence" on the part of the plaintiff himself would defeat a recovery in this case is a question not examined, for the reason that the defendant did not plead the plaintiff's negligence but only that of his wife.

8. **Construction of Statute Exempting Railroad Companies from Liability for Injury to Passengers on Platform of Moving Cars.** Section 110 of chapter 16, Compiled Statutes, providing that in case any passenger of a railroad shall be injured while on the platform of a car while in motion, in violation of the printed regulations of the company posted up at the time, in a conspicuous place inside of its passenger cars, then in the train, said company shall not be liable for the injury, etc., being a limitation upon a recognized liability, is to be strictly construed; and in order that such statute shall be applicable the car must be in motion when the accident occurs and there must be some connection of cause and effect between the injury of the passenger and his being upon the platform, and the notices required by the statute must be posted in the cars of the train wherein the accident occurs.

9. **Husband and Wife: MARRIED WOMAN'S ACT.** The married woman's act does not deprive the husband of his right of action for the loss of services or companionship of his wife, and notwithstanding that act he may still recover to the extent that the injury sustained by his wife incapacitated her from performing the duties that reasonably devolve upon her in the marriage relation. *Mewhirter v. Hatten*, 42 Ia., 288, followed.

10. **Where a married woman is injured by the negligence of another** two causes of action arise, one for the wife, for physical and mental suffering, past and future, loss of her earning capacity, and other elements ordinarily existing in such cases; the other, for the husband, for the loss of his wife's services and society and for reasonable expenses by him incurred.

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

The facts are stated by the commissioner.

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

The court erred in admitting in evidence the plaintiff's statement of the remark make by the brakeman. (1 Greenleaf, Evidence, sec. 113; *Felt v. Amidon*, 43 Wis., 471; *Hazleton v. Union Bank of Columbus*, 32 Wis., 49; *Lund v. Tyngsborough*, 9 Cush. [Mass.], 36; *Kittle v. St. John*, 7

Neb., 73; *Village of Ponca v. Crawford*, 18 Neb., 551; *Gale Sulky Harrow Co. v. Laughlin*, 31 Neb., 103; *Adams v. Hannibal & St. J. R. Co.*, 74 Mo., 553; *Patterson v. Wabash, St. L. & P. R. Co.*, 19 N. W. Rep. [Mich.], 761; *Luby v. Hudson River R. Co.*, 17 N. Y., 133; *McCartny v. State*, 1 Neb., 123.)

The court erred in not permitting the conductor to testify whether or not the train stopped a sufficient length of time for the passengers to alight. (Lawson, Expert and Opinion Evidence, pp. 86, 87; *Mobile & M. R. Co. v. Blakeley*, 59 Ala., 472; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 586; *Ardesco Oil Co. v. Gilson*, 63 Pa. St., 146; *Seaver v. Boston & M. R. Co.*, 14 Gray [Mass.], 466.)

A married woman is entitled to her own time, and is not under any legal obligation to contribute to, or render her services for, her husband. He has no interest in, or right of action for, any loss resulting from personal injury to her. (*Lewis v. Babcock*, 18 Johns. [N. Y.], 443; Schouler, Domestic Relations, 107–110, 243; *Weldon v. Winslow*, L. R. 13, Q. B. Div. [Eng.], 786; 1 Chitty, Pleading [11th Am. ed.], 73; *Connors v. Connors*, 4 Wis., 112; *Elliott v. Bentley*, 17 Wis., 591; *Todd v. Lee*, 15 Wis., 365*; Compiled Statutes, sec. 4, ch. 53; *Pope v. Hooper*, 6 Neb., 178; *Omaha Horse R. Co. v. Doolittle*, 7 Neb., 481; *Shortell v. Young*, 23 Neb., 408.)

The measure of damages was erroneously submitted in an instruction of the court under which the jury was allowed to consider the amount expended in employing physicians and for medicine. There was no evidence that such expenses were reasonable and necessary. (*Union P. R. Co. v. Ogilvy*, 18 Neb., 643; *Smith v. Evans*, 13 Neb., 316; *Walrath v. State*, 8 Neb., 91; *Steele v. Russell*, 5 Neb., 216; *Holmes v. Boydston*, 1 Neb., 346; *Galveston H. S. & A. R. Co. v. Thormsberry*, 17 S. W. Rep. [Tex.], 521; *International & G. N. R. Co. v. Simcock*, 17 S. W. Rep. [Tex.], 47; 1 Greenleaf, Evidence, sec. 124.)

It was error for the court to refuse the seventh instruction asked by the defendant. (*Cheney v. Boston & M. R. Co.*, 11 Met. [Mass.], 121; *O'Brien v. Boston & W. R. Co.*, 15 Gray [Mass.], 20; *O'Neill v. Lynn & B. R. Co.*, 29 N. E. Rep. [Mass.], 630.)

Simpson & Sornborger, contra, cited: *Chollette v. Omaha & R. V. R. Co.*, 26 Neb., 159; *Omaha & R. V. R. Co. v. Chollette*, 33 Neb., 143; *Mewhirter v. Hatten*, 42 Ia., 291.

IRVINE, C.

In 1886 Jonathan Chollette and Eliza Chollette, his wife, boarded a train at Wahoo for the purpose of going to Elkhorn. Mrs. Chollette was injured either in alighting from the train at Elkhorn or by being thrown from the steps of the car as she stood there preparing to alight. This action was brought by Jonathan Chollette to recover damages for the loss of his wife's services and society and the expenses of her care and treatment. A former action brought by the wife on her own behalf on account of the same injuries has been twice before this court and is reported in 26 Neb., 159, and 33 Neb., 143. All the questions presented upon either hearing of the former case are again presented by this record. We will not here restate these questions nor re-examine them. As to the questions involved in the case reported in 33 Neb., this court has repeatedly declared the law to be in accordance with the views there expressed. As to the questions presented upon the first hearing reported in 26 Neb., whatever might be the writer's individual views, were the questions now presented for the first time, the decision has stood without question for more than five years, and the conclusions there reached would not now be disturbed in the absence of a clear conviction on the part of the court that a fundamental error had then been committed.

A brief statement of the issues in this case may be nec-

essary to an understanding of the questions first presented by this record. The plaintiff alleged that the railroad company failed to stop the train at Elkhorn a sufficient time to permit his wife to alight and negligently started its cars before she had reasonable time to alight, and while alighting caused her to be violently thrown upon the platform without any negligence upon her part. In addition to the defense set up in the former case and passed upon in the first hearing thereof the defendant answered denying any negligence upon its part and averring "that the injuries received by the said Eliza occurred by reason of the carelessness and negligence of the said Eliza contributing thereto;" that the injuries she received were sustained while she was standing upon the platform of the car while it was in motion; that there was posted in a conspicuous place inside said car printed regulations warning passengers not to stand upon the platform while the car was in motion; that there was inside said car sufficient and safe seats and accommodations for her; and that there was no necessity of her standing or being upon the platform. Further answering the defendant alleged that theretofore the said Eliza, with plaintiff's knowledge and consent, brought suit upon the same cause of action and recovered thereon, and pleaded that action in bar of the present. There was a trial in 1891, resulting in a general verdict for the plaintiff for $150 and a number of special findings. The defendant moved for judgment notwithstanding the general verdict upon the special findings, and the plaintiff moved for a new trial. The court overruled the defendant's motion for judgment and sustained the plaintiff's motion for a new trial. Upon the second trial there was a general verdict for the plaintiff for $900, upon which judgment was rendered, and which judgment plaintiff seeks to reverse.

1. The defendant procured to be settled a bill of exceptions embracing the proceedings upon the first trial, and

now complains that the court erred in sustaining the plaintiff's motion for a new trial and in overruling defendant's motion for judgment. We cannot say that there was any error in sustaining the motion for a new trial. There is nothing in the record to indicate upon what ground the motion was sustained and the defendant does not point out wherein the court erred, if at all, in sustaining the motion. Among the many grounds assigned in that motion was the giving of certain instructions. The transcript of the record before us contains certain instructions given by the court upon that trial, but they are not consecutively numbered; they do not appear to be complete, and several of those of which the plaintiff complained in his motion do not appear at all in this record. If the court was right in awarding a new trial, it follows that it was right in refusing to enter judgment for defendant upon the special findings made at the first trial; but aside from this the court was not warranted by those findings, if they had stood, in rendering judgment notwithstanding the general verdict. These findings were for the most part of isolated facts. To have entered judgment thereon would have required the court to draw the inference that defendant was not negligent or that Mrs. Chollette was negligent from the facts so found. It has been repeatedly held that where different inferences may reasonably be drawn from the facts, the ultimate question as to negligence is for the jury, and, as held in *Omaha & R. V. R. Co. v. Chollette*, 33 Neb., 143, the facts of this case were such as to render that inference one for the jury and not for the court. Among the findings were the following: "22. Was the plaintiff's wife, in her effort to alight from the car in question, guilty of the want of any ordinary care contributing to her injury? No." "23. Were the agents and employes of the Union Pacific Railroad Company guilty of negligence in not stopping long enough to allow the plaintiff to alight from the train? Yes." Following this was a finding

that the injury resulted from the negligence of the railway company without any contributory negligence on the part of the plaintiff and his wife. These direct findings upon these issues properly left to the jury could not be disregarded by the court's determining that upon other special findings the jury should have drawn the inference of contributory negligence. Section 110, chapter 16, Compiled Statutes, provides the following: "In case any passenger on any railroad shall be injured while on the platform of a car while in motion, * * * in violation of the printed regulations of the company posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the injury, provided such company furnished room inside its passenger cars sufficient for the accommodation of its passengers." The jury found that there was posted inside the car such a notice, and that there were at the time seats sufficient to accommodate the passengers; but it also found that Mrs. Chollette did not go upon the platform when the train was in motion, nor was there any finding that she remained upon the platform voluntarily while the car was in motion, or that her injury was due to her remaining on the platform under such circumstances. There were, therefore, no findings sufficient to bring the case within the provisions of section 110. The court, therefore, did not err in refusing to enter judgment on the special findings at the first trial.

2. Passing now to the errors assigned relating to the second trial, we will first consider two objections which were made to rulings upon the evidence, the only assignments upon this subject which are referred to in the briefs. One of these assignments is that the court erred in overruling the objection to the following language testified to by the plaintiff as used by the brakeman: "It beats hell they cannot stop long enough to let people get off." The plaintiff had been asked the following question: "Now, when the conductor went out, what transpired? You may

tell that story in your own way, right through as you think of it." There was no objection to this question, and the witness proceeded to state the circumstances of the accident at a considerable length. He had just stated that the engineer seemed to open the engine and that the train lurched so that it wheeled his wife half way round off the steps, and proceeded, "then the brakeman grabbed hold of the rail on the end of the baggage car right opposite to where we were standing, and as he done so he made the remark that 'it beats hell they cannot stop long enough to let people get off.'" The defendant then moved to exclude the last part of the answer, as incompetent, immaterial, and irrelevant, which motion was overruled. We think that this remark was fairly admissible as a part of the *res gestæ*. This witness and others stated what other people said as Mrs. Chollette was about to alight. It would seem that the remark of the brakeman was concurrent in time with the accident, and while it did not serve to characterize any act of his at the time, still, being contemporaneous with the principal fact and made under such circumstances as to justify the inference that it was a spontaneous exclamation, we think it was not reversible error to refuse to strike it out. In *Hewitt v. Eisenbart*, 36 Neb., 794, it was said that the trial court must be left largely to exercise its discretion in determining whether such remarks are made under circumstances justifying their admission as a part of the *res gestæ*. If a question had been asked tending to call forth this answer, and objection had been made thereto, we would have been more doubtful upon the point; but when the defendant permitted the witness, without objection, to relate in narrative form the whole transaction, we would hesitate to reverse a judgment even if a statement ordinarily inadmissible crept in in the course of that narrative. The conductor of the train when on the stand was asked the following question: "Now, having reference to the number of passengers on your train and the number of

passengers which were through passengers, and having reference to the business of your train at Elkhorn station, I will ask you whether or not the train stopped a sufficient length of time for such passengers as were on that train to alight therefrom, using due diligence?" An objection to this question was sustained. Whether or not such a question would under any circumstances be admissible, the witness had just before shown himself incompetent to answer this question, by testifying that he did not remember how many passengers there were that morning for Elkhorn station. Not knowing this fact, he could not know whether or not the train stopped a sufficient time to permit this unknown number of passengers to alight. Furthermore, he had just testified that the train had stopped half a minute at the station, and immediately afterwards he testified, without objection, that fifteen seconds was ample time to permit the passengers to alight. The defendant, therefore, got all the benefit that it could have had from an answer to the question objected to.

3. Complaint is made of a series of instructions which left the liability of the defendant to be determined in accordance with the provisions of section 3, article 1, chapter 72, Compiled Statutes. This section is as follows: "Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." The instructions complained of were substantially the same as those approved in *Omaha & R. V. R. Co. v. Chollette*, 33 Neb., 143. The constitutionality of the act now questioned by defendant has been impliedly recognized in a number of cases and distinctly affirmed in *Union P. R. Co. v. Porter*, 38 Neb., 226. It is urged that the statute is not applicable to this case; that

it refers only to damages sustained by the person injured and not to consequential damages sustained by a third person on account of those injuries. The language of the act is such as to lend countenance to this construction, and the writer was at first of the impression that the term "damages inflicted upon the person of passengers" should be confined to damages sustained by passengers through injuries to their own persons. This section was, however, a portion of an act passed in 1867, entitled "An act to define the duties and liabilities of railroad companies." In its first section it required railroads to erect and maintain fences sufficient to prevent cattle, horses, sheep, and hogs from going on the railroad, and provided that in case of failure to erect and maintain such fences the railroad should be liable for "any and all damages which shall be done * * * to any cattle, horses, sheep, or hogs thereon." (Gen. Stats., p. 202.) This language in the same act indicates that the legislature used the word "damage" not in its technical sense but in the sense of injury. Unless in the two sections of this same statute we should give this language different constructions, we must hold that in the section in question it was intended to refer to legal damages sustained by any person on account of injuries inflicted upon passengers; otherwise we would be led to the absurd conclusion that in the first section the action for injuries caused by failing to erect and maintain fences could only be maintained by the cattle or other animals injured.

4. It is next complained that the court erred in giving instructions to the effect that the negligence which would defeat a recovery must be the gross negligence of either the husband or the wife. The error which it is particularly claimed lies in this instruction is that conceding that Mrs. Chollette's negligence must be gross in order to prevent a recovery, still the statute does not extend to third persons, and the court should have instructed the jury that a recovery would also be prevented if the injury was contrib-

uted to by the failure of plaintiff himself to exercise ordinary care. We cannot inquire into the rather interesting legal question presented by this argument, for the reason that the defendant in its answer does not plead contributory negligence on the part of the plaintiff but only contributory negligence on the part of his wife. The instruction was, therefore, more favorable to the defendant than the pleadings justified by permitting an inquiry at all into the question of plaintiff's negligence.

5. A number of instructions requested by the defendant were given. Many were refused. The only one of these to which attention is specially directed in the brief is as follows: "7. You are further instructed that if you shall find from the evidence that the plaintiff's wife at and before the time of her injury had notice that it was usual and customary upon passenger trains to have a notice upon metal plates upon the car or door thereof, containing a notice warning passengers not to stand upon the platform while the train was in motion; and if you shall further find from the evidence that the plaintiff's wife in the exercise of ordinary care and attention might have seen such plate upon said car or car door; and if you shall further find from the evidence that with such knowledge or notice the plaintiff's wife then went upon the platform of the car while the train was in motion, and that while so upon the platform of said train thrown from the said car to the station platform, and that she then and there received the injuries of which complaint is made, then the law is that for such an injury received under such circumstances there can be no recovery, and your verdict must be for the defendant." It was evidently intended by this instruction to present the law as stated in section 110, chapter 16, Compiled Statutes, already quoted. Such a statute, being a limitation upon liability, should be strictly construed. (*Willis v. Long Island R. Co.*, 32 Barb. [N. Y.], 398.) It certainly was not intended by the statute to absolutely exempt a railroad company from

liability for all injuries sustained by passengers while on the platform of a car in motion regardless of whether the passenger's being upon the platform was the cause of the injury or contributed thereto. The instruction requested told the jury that if Mrs. Chollette went upon the platform while the train was in motion there could be no recovery, if while upon the platform she was thrown from the car. It did not tell the jury that the car must be in motion at the time the accident occurred, to make the statute applicable; nor did it tell the jury there must be a connection of cause and effect between her being on the platform and the injury. Furthermore, it instructed the jury that the company would not be liable under such circumstances if it was usual and customary on passenger trains to have a metal plate upon the car door warning passengers not to stand upon the platform while the car was in motion, without submitting to the jury the question whether such warnings were posted in a conspicuous place upon the cars of this particular train. The instruction was, therefore, vicious in three respects and was properly refused. As to other instructions refused they were objectionable in grouping together certain facts and instructing the jury that if those facts existed they would as a matter of law constitute contributory negligence. Such instructions should not be given except where there can be no reasonable difference of opinion as to the inference to be drawn. (*Missouri P. R. Co. v. Baier*, 37 Neb., 235.)

6. Certain assignments may be grouped in relation to the defense alleged by reason of the prosecuting of the former action. The evidence shows that the first action was begun originally by Chollette and his wife jointly, and prayed for damages both to the wife and to the husband. The case was dismissed as to the husband and an amended petition, filed by the wife alone, praying for the damages by her sustained. The case was tried on this amended petition. Even under the common law, where the husband and wife

joined in an action for injuries to the wife, this action was not a bar to another action by the husband for loss of his wife's services, although it was then usually held that the judgment in one action was *res judicata* as to the right to recover in the other; but the actions were separate, the measure of damages different, and no damages were recoverable in the second case which were recoverable in the first. Under our law, the husband not being a party to the first action, one cannot be said, in any view of the case, to be a bar to the other. In the first action the wife could recover for physical and mental anguish and for her own loss of time and incapacity. Under our married woman's act she could, in a proper case, recover for loss of earnings and decreased ability to conduct her business. In this case the husband recovers for the loss of his wife's services and society and for reasonable expenses by him incurred. As we shall presently show, the court carefully excluded from the jury in this case all the elements of damages which the wife was entitled to recover in her own name.

7. Upon the measure of damages the following instruction was given: "If, from the evidence in this case, and under the instructions of the court, you should find for the plaintiff, you are instructed that the only items of damages that you can find in favor of the plaintiff are: First—The value of the loss of services and companionship of his wife to the extent that such injuries have incapacitated her from performing all the duties of a wife that reasonably devolve upon her in the marriage relation. Second—For money laid out and expended in employing physicians and expended for medicines to cure her of such injury, if any. Third—His time, or that of his family, if any shown, for nursing her during her sickness from such injury, if any, not to exceed in all the sum of $25,000." Complaint is now made that each of these three subdivisions was erroneous, but in the motion for a new trial the third was not complained of, so that it will not here be considered. The

complaint made of the second subdivision is that there was no evidence of the reasonable expenditures of the husband in employing physicians and for medicines, and that, therefore, this branch of the instruction should not have been given. There was evidence sufficient to justify the jury in finding that the actual expenses incurred were about $150, but we agree with counsel that there was no evidence to show that such expenditures were reasonably incurred; but at the request of the defendant the court charged the jury that "for damages on account of care for medical attendance and for medicines such damages could not exceed the sum of $150." Having thus asked an instruction submitting this element to the consideration of the jury, the defendant cannot complain because the court of its own motion submitted the same question. As to the first subdivision of the instruction, the argument is that as our married woman's act gives to the wife the right to her own business and her own earnings and emancipates her property and earnings from her husband's control, the husband can no longer recover for loss of services. It will be observed that the court in this instruction did not submit to the jury generally the determination of the value of the wife's services, but restricted the jury to a consideration of the extent to which her injuries had incapacitated her from "performing all the duties of a wife that reasonably devolved upon her in the marriage relation." To this extent the husband can recover notwithstanding the married woman's act. As said in *Mewhirter v. Hatten*, 42 Ia., 288, on a precisely similar question, "We feel very clear that the legislature did not intend by this section of the statute to release and discharge the wife from her common law and scriptural obligation and duty to be a help-meet to her husband. If such construction were to be placed upon the statute, then the wife would have a right of action against the husband for any domestic services or assistance rendered by her as wife; for her assistance in the care and

nurture and training of his children she could bring her action for compensation; she would be under no obligation to superintend and look after any of the affairs of the household unless her husband paid her wages for so doing. Certainly such consequences were not intended by the legislature, and we cannot so hold in the absence of positive and explicit legislation."

Only two or three questions remain. One relates to the refusal of the court to submit certain questions to the jury for special findings. The submission of such questions must be left to the sound discretion of the trial court, and there was in this case certainly no abuse of discretion. The other question raised is that the damages were excessive. The wife's injuries were severe and probably permanent. The verdict was only $900, including probably $150 for actual expenditures. The claim that the damages are excessive seems, under this state of affairs, trivial.

JUDGMENT AFFIRMED.

POST, J., not sitting.

WILLIAM FULLERTON, APPELLANT, V. SCHOOL DISTRICT OF THE CITY OF LINCOLN ET AL., APPELLEES.

FILED JUNE 26, 1894. No. 6847.

1. **School Districts:** POWER OF BOARD TO CALL BOND ELECTION. Under the law as it stood prior to April 5, 1893, a district school board, except in cities of the metropolitan class, had no power to call an election on the question of issuing bonds for purchasing sites or erecting school houses until a petition had been presented to the board suggesting that such a vote be taken and signed by at least one-third of the qualified voters of the district. The presenting of such petition was a condition precedent to a valid election.

2. ———: ———: SUFFICIENCY OF PETITION: DETERMINATION OF BY BOARD. Where the law requires a petition of a certain character in order to confer power upon a board to call an election for the purpose of issuing bonds or authorizing a tax, the determination of that board is not conclusive as to the sufficiency of the petition or the qualifications of the petitioners. But these subjects are open to inquiry in judicial proceedings to nullify the action, where the parties complaining have not, by acquiescence or laches, estopped themselves from contesting the question.

3. ———: ———: ———: EVIDENCE. The phrase in section 3, subdivision 15, chapter 79, Compiled Statutes, "one-third of the qualified voters of such district," means one-third of the qualified voters of the district when the petition was presented, and what number constitutes such one-third is a judicial question to be determined upon any competent legal evidence. Neither the number of votes cast at the election held in pursuance of the petition nor the number cast at any preceding election is conclusive upon this question, but such facts are admissible, together with others of like character, as tending to prove the issue.

APPEAL from the district court of Lancaster county. Heard below before TIBBETS, STRODE, and HALL, JJ.

The facts are stated by the commissioner.

F. A. Boehmer and *N. Rummons*, for appellant:

The number of signers to the request for submission of the proposition to vote bonds is less than one-third of the qualified voters of the district at date of presentation of the petition. The school district being a *quasi*-corporation, its powers are limited, and it has no authority except that given by statute, and was without authority to submit the proposition to the electors. (*School District v. Stough*, 4 Neb., 361; *Gehling v. School District*, 10 Neb., 239; Dillon, Municipal Corporations, secs. 24, 266; *Hayward v. School District*, 2 Cush. [Mass.], 419; *School District v. Atherton*, 12 Met. [Mass.], 112; *Sherwin v. Bugbee*, 17 Vt., 340; *Jordan v. School District*, 38 Me., 164; *Central*

School Supply House v. School District, 58 N. W. Rep. [Mich], 324.)

It is essential that a request be presented to the board, properly signed by the requisite number of voters. The board of education does not sit as a court of justice, and its finding as to the sufficiency of the petition is not conclusive. (*Sharp v. Spier*, 4 Hill [N. Y.], 76; *In the Matter of Sharp*, 56 N. Y., 259; *Henderson v. Mayor and City Council of Baltimore*, 8 Md., 360.)

Webster, Rose & Fisherdick, for appellees:

The object of the provision requiring the presentation of a petition to the board is to prevent school officers from calling a bond election when there is no desire for it or sentiment in its favor in the district. Accuracy in the estimate by the board of numerical sufficiency of petitioners is not jurisdictional, and error in that respect does not vitiate proceedings taken in good faith and participated in by the electoral body without objection or protest. (McCrary, Elections [3d ed.], sec. 173; *State v. School District*, 13 Neb., 470; *Kimball v. School District*, 13 Neb., 86.)

Without allegation and proof of fraud the determination of the board of education to which it was addressed is final and conclusive. There is a plain distinction between a statute requiring a fixed number and one requiring a certain proportion. One calls for no exercise of judicial function, and the other does. (Spelling, Extraordinary Relief, sec. 701; *Pierce v. Wright*, 6 Lansing [N. Y.], 306.)

Henry E. Lewis, also for appellees.

IRVINE, C.

The appellant, as a taxpayer of the defendant school district, brought this action, on behalf of himself and others similarly situated, against the school district and the individual members of its board of education, praying for an

injunction to restrain the defendants from registering, issuing, and selling certain bonds of the school district. The injunction was refused by the district court and the plaintiff appeals. The petition is quite long and avers many facts by way of attacking the validity of the proceedings under which it was proposed to issue the bonds. The conclusion reached upon one aspect of the case renders it unnecessary to consider the other questions. At the time the election was held whereunder the power to issue these bonds is claimed, the authority of such a school district as that in question, to-wit, one organized from an incorporated city in pursuance of section 1, subdivision 14, chapter 79, Compiled Statutes, was derived from the general provisions in regard to school district bonds, found in subdivision 15 of chapter 79. By section 1 of this subdivision the district officers of any school district were given power to issue bonds of the district for the purpose of purchasing a site for and erecting thereon a school house or school houses and furnishing the same, on the terms and conditions set forth in the succeeding sections. Section 2 provided that "no bonds shall be issued until the question has been submitted to the qualified electors of the district and two-thirds of all the qualified electors present and voting on the question shall have declared by their votes in favor of issuing the same, at an election called for the purpose, upon a notice given by the officers of the district at least twenty days prior to such election." Section 3 provided that no vote shall be ordered upon the issuance of such bonds unless a petition shall be presented to the district board, suggesting that a vote be taken for or against the issuing of such amount of bonds as might therein be asked for, which petition shall be signed by at least one third of the qualified voters of such district; provided that the board of education in any city of the metropolitan class may order a vote without a petition therefor. It is charged in the petition that while a petition was presented it was not signed by one-third of the qualified

voters of the school district. The petition is attacked for other reasons, but we shall only consider the questions arising from the averment referred to. The defendants put in issue the truth of this averment and also contest its legal sufficiency. The court made special findings in the case among which are the following:

"5. The court further finds that a proper petition asking for the submission of a vote for the issuing of bonds was presented to the board of education of said city and that said petitions were signed by 1,846 persons, and that said number of signers is sufficient for such a request; that a copy of said petition is correctly set out in plaintiff's petition and is sufficient authority for such school board to call an election for such bonds."

"10. The court further finds that the population of said district is about 55,000 and that there are 11,542 children of school age in said district; and that at the date when the request for submission of this election was presented to said board there were at least 9,000 qualified voters in said school district who were entitled to vote upon this bond election; that there were 7,886 male voters registered upon the registration books of said city of Lincoln at said time, and that there were at least 2,000 female voters in said district who had a right to vote upon this bond question."

The court also found that there were cast for members of the school board the number of votes set out in plaintiff's petition. The number so alleged shows an average of 4,549 for each office to be filled.

The sufficiency of the evidence upon these points is unquestioned except as to the finding of the number of qualified voters. This will be hereinafter referred to. It may be well to here state that the school district was shown to comprise the territory embraced in the city of Lincoln, with the exception of 460 acres which lay within the city, but without the school district. The district also included 7,680 acres contiguous to but not within the city, and there

was a finding that there were about 200 qualified voters of the school district who did not reside within the city. There is no finding as to the number of qualified voters of the city who were not qualified voters of the school district. If we accept the findings of fact as correct, we have but 1,876 qualified voters out of 9,000 petitioning for the election, and if these findings are supported by the proof, they must control the general statement in the fifth finding, that the number of signers was sufficient. This statement was a conclusion of law and not a finding of fact.

The questions which we conceive to be presented under this state of the record are as follows: First—Is the presenting of a petition in accordance with the statute an essential prerequisite to the calling of an election to vote bonds? Second—If so, does the board of education, in calling the election, act judicially in determining whether or not the petition was signed by the requisite number of qualified voters, and is its determination of that question conclusive against a collateral attack? Third—If the last question be answered in the negative, how is the requisite number of qualified voters to be determined?

1. It may be assumed that a court of equity will not interfere by injunction even for the purpose of preventing the registration or issuance of bonds at the suit of a taxpayer for mere irregularities in the proceedings not going to the jurisdiction or power of the officers making the issue, where such irregularities are not of a nature of themselves to prejudice the plaintiff's rights. If, therefore, the election was in other respects regularly called and conducted, and if it resulted in the requisite vote in favor of issuing the bonds, their issue should not be restrained because of a defect in the petition unless the presenting of a proper petition, signed by the stated proportion of electors, was a necessary step and essential to confer upon the board of education authority to call the election. The first question presented is, therefore, whether or not the presenting of a

petition complying with the law as to the number and qualifications of its signers is an essential step in order to confer upon the board the power to submit the question to vote. We think this question must be answered in the affirmative. All the cases under similar statutes recognize this rule. Thus, where the statute provided that special meetings of the school district might be called by the district board, or any one of them, on the written request of five legal voters of the district, the court, in the case of *State v. School District*, 10 Neb., 544, speaking through MAXWELL, C. J., said: "It was necessary—a condition precedent to the right of the school district board, or any member of it, to call a special meeting, that such written request signed by five legal voters of the district should be presented to the board or one of its members, and a meeting called without such request could have no legal existence. The so-called election, therefore, was an absolute nullity." This rule was approved in *State v. School District*, 13 Neb., 82, and in *Orchard v. School District*, 14 Neb., 378. The statute requiring, in order to submit to voters the question of relocating a county seat, that a petition for such election should be presented containing the names of persons purporting to be electors equal in numbers to three-fifths of all the votes cast in said county at the last general election, the court plainly intimated that if the question were raised in the proper manner, such a petition would be held essential. (*Ellis v. Karl*, 7 Neb., 381.) Some features of this case will be referred to hereafter. The same inference is to be drawn from *State v. Nelson*, 21 Neb., 572.

The law required county commissioners to call an election upon the question of issuing bonds in aid of works of internal improvement upon the presenting of a petition signed by not less than fifty freeholders. The court in *State v. Babcock*, 21 Neb., 187, construing this statute, used the following language: "Under this section the authority of

the county commissioner to call a special election for the purpose of voting precinct bonds is based upon the fact that a petition, signed by not less than fifty freeholders of the precinct, has been presented to the county commissioners, which petition shall set forth the nature of the work contemplated, the amount of bonds sought to be voted, the rate of interest and the time when the principal and interest shall become due. It is only upon the reception of such a petition that the commissioners have authority to call an election for the purpose of voting bonds in the precinct. It is claimed, on behalf of the relator, that the section above quoted, so far as it requires a petition signed by fifty freeholders, to authorize the county commissioners to call an election, is in conflict with the constitution, because it restricts the right of suffrage, and therefore it is void. A county or any of its subdivisions has no inherent right to vote bonds. (*Hamlin v. Meadville*, 6 Neb., 227; *Hallenbeck v. Hahn*, 2 Neb., 397.) The right, therefore, is derived entirely from the statute, the terms of which must be substantially complied with. The effect of voting and issuing bonds by a precinct is to create a lien upon all the realty of such precinct for the payment of such bonds and interest. It is eminently proper, therefore, that at least fifty freeholders of such precinct should certify to the county commissioners their desire to have such incumbrance placed upon their property. * * * It is a condition precedent, therefore, to the right of the commissioners to call a precinct election for the purpose of voting bonds of such precinct, that a petition, signed by fifty freeholders thereof, stating the facts required by the statute, be presented to such commissioners for that purpose." So in *Wullenwaber v. Dunigan*, 30 Neb., 877, the court said: "It is indispensable that a petition requesting the calling of an election must be signed by at least fifty freeholders, and without such petition such commissioners have no jurisdiction."

A distinction suggests itself, and upon a slightly different subject has been discussed by counsel, between bonds issued for municipal purposes and what are generally known as "aid bonds." It would be quite reasonable to require a greater strictness of procedure where it is sought to invoke the taxing power in aid of an enterprise wholly disconnected with the operations of government than is required for the exercise of that power for the creation of an indebtedness for the purpose of enabling the governing body to perform its functions; but if such a distinction exists, it is quite clear that it does not arise upon the question of the necessity of a petition as a foundation for the calling of an election. As stated in *State v. Babcock, supra*, and in several other cases, a county or other municipal subdivision has no inherent power to issue bonds at all. The right is derived from statute, and the effect of issuing the bonds is to create a lien for their payment on all the taxable property of the territory. It is for these reasons that it has been held that the procedure pointed out by the statute must be substantially complied with, and these reasons apply as well to bonds issued for governmental purposes as to donations. The same principle is involved where the statute requires a petition of property owners to set in motion the power of a city to improve a street, in which case it is held that where the statute requires such a petition, a petition in compliance with the statute is necessary to confer jurisdiction upon the council to make such improvement. (*Von Steen v. City of Beatrice*, 36 Neb., 421; *State v. Birkhauser*, 37 Neb., 521.) We are persuaded by the authorities cited, as well as by the current of decisions elsewhere and by a consideration of legal principles, that where the statute provides for the calling of an election upon the presenting of a petition of a certain character and by certain persons, the requirement of such a petition is not merely directory but is a condition precedent to a valid election and necessary to confer authority to call such an election.

2. A petition being essential to the validity of the election, the question next arises as to whether the sufficiency of the petition is a judicial question cognizable by the courts in a collateral proceeding, or whether, on the other hand, the board or officer to whom the petition is presented has jurisdiction to determine its sufficiency, and whether the determination of such board or officer is conclusive. Upon this question the authorities elsewhere are not in accord and it is not easy upon their first examination to harmonize the decisions of this court. We think, however, that when they are more closely examined our own decisions map out a safe and sound rule. In *State v. School District*, 10 Neb., 544, it was held that school district bonds were void even in the hands of an innocent purchaser where no notice of the election had been given and no request signed by five legal voters for the calling of a meeting had been presented. A meeting held without such request was said to be an absolute nullity. This was so held upon proof that there were but three legal voters in the district and that two of these did not sign the request. In *State v. Babcock*, 21 Neb., 187, where the election had been called and the bonds voted, the court refused a *mandamus* to compel their registration where it was shown that the petition had not been signed by the requisite number of freeholders, the bonds in this case being aid bonds. In a series of cases the court has refused to permit an inquiry into the qualifications of signers of petitions after the bonds had been issued and passed into the hands of innocent purchasers; but these cases are all based upon the distinction between the position of a taxpayer seeking relief promptly, and one who has stood by until the rights of innocent purchasers have accrued. This distinction is well stated by MAXWELL, J., in *Cook v. City of Beatrice*, 32 Neb., 80, as follows: "Had the action in that case been brought to enjoin the issuance of the bonds, the result might have been different, as it requires a much stronger case

to enjoin the collection of taxes for the payment of the interest or principal of bonds issued in pursuance of apparent authority, and duly registered, and which have passed into the hands of *bona fide* purchasers, than to enjoin the issuing of the same in the first instance, and it is probable that the bonds in question would be valid in the hands of innocent purchasers for full value; but that question is not before the court. In this state every reasonable opportunity is offered to taxpayers to protect their rights, by enjoining the issue or registration of illegal bonds, and unless there is a want of power to issue the same, bonds duly issued and registered will not be declared invalid for mere irregularity in the exercise of power to issue such bonds. Here a taxpayer is alert, and asks the court to restrain the issuing of the bonds for the causes set forth, evidently fully realizing that if the bonds were issued and passed into the hands of a *bona fide* purchaser they would be valid." That this is the distinction governing the cases referred to, and that relief was not refused because of the conclusive effect of the board's determination of the sufficiency of the petition, is seen from an inspection of the cases. *State v. School District*, 13 Neb., 82, was an application for *mandamus* compelling the levying of a tax to pay bonds already issued. A question was raised as to the qualifications of the five persons who had signed the request for the meeting at which the bonds were voted. The court used this language: "We will not in a collateral proceeding inquire whether all the persons signing said request had resided in the district a sufficient length of time to entitle them to vote therein or not. If they had not, any taxpayer of the district could enjoin the issuing of bonds, because unauthorized; but after the meeting has been held in pursuance of the notice, the bonds issued and sold, and the district has received the avails, it is too late to raise the objection." The same principle controlled the case of *State v. School District*, 13 Neb., 466. *Orchard v.*

School District, 14 Neb., 378, was an action upon a bond and was determined upon the same ground, the court saying, "Here was a meeting called and held by the *bona fide* residents of the district and they cannot be permitted to hold a special meeting, vote bonds and sell the same, and, after receiving the avails, say that there was an irregularity in calling the meeting." It is, therefore, apparent that the court in all the cases referred to has considered the question of the sufficiency of the petition a judicial question open to inquiry in a proper collateral proceeding, but has held parties precluded from the inquiry upon a reasonable doctrine of estoppel where they have acquiesced in the proceedings until the rights of third persons have accrued.

Counsel suggest that the cases referred to are not applicable, for the reason that both in the calling of special district meetings and in the calling of elections for aid bonds the statute requires a petition having a fixed number of signers, and not a certain proportion of voters. We can see no force in this distinction. Where a fixed number of signers is required the office of the board is then not merely to count the names but, after ascertaining that there is a sufficient number of names, the duty still remains of ascertaining whether the persons whose names are signed have the requisite qualifications. This creates a discretionary power as great as that of ascertaining whether the number of names signed represents a given proportion of the whole number of voters, and we can see no reason for permitting the board's determination of one question to be conclusive and of the other not. The only doubt which we have upon this question arises from those cases in reference to elections upon the question of relocating county seats. In *Ellis v. Karl*, 7 Neb., 381, it was held that the law gave to the county commissioners the exclusive authority to determine whether the signatures to petitions for such elections were genuine, and those of persons authorized to sign them, and that where no question was raised

before the commissioners themselves, the plaintiff was in no situation to ask the aid of a court of equity; but the court added that this was especially so because the plaintiffs had rested content until three elections, in which they had participated, were held and the result finally declared. *State v. Nemaha County*, 10 Neb., 32, and *State v. Nelson*, 21 Neb., 572, are in the same line and rest largely upon the proposition that a remedy existed through error proceedings. *Ellis v. Karl* was an action for an injunction to restrain the removal of the county seat after the election; while *State v. Nelson* and *State v. Nemaha County* were applications for *mandamuses* to compel the calling of an election. It is worthy of note that in each case the facts as to the sufficiency of the petition were examined, and in the last case cited the reason given for refusing the writ was that it did not appear that the requisite number of names was signed to the petition. Furthermore, in *State v. Crabtree*, 35 Neb., 106, a *mandamus* was allowed to compel the calling of an election after an inquiry as to the sufficiency of the petition and a determination that it was sufficient. Without inquiring whether the earlier cases were sound in principle, it is sufficient to say that the distinction between proceedings to relocate a county seat, merely as a matter of convenience to the inhabitants, and proceedings to incur an indebtedness which, when incurred, would constitute a lien upon all the property of the inhabitants and require the levying of taxes for its payment, is sufficient to account for the apparent departure of these cases from the rules laid down in those involving the issuing of bonds. Our conclusion is that where law requires a petition of a certain character in order to confer power upon a board to call an election for the purpose of issuing bonds or authorizing a tax, the determination of that board is not conclusive as to the sufficiency of the petition or the qualifications of the petitioners, but that these subjects are open to inquiry in judicial proceedings to nullify the action,

where the parties have not, by acquiescence or laches, estopped themselves from contesting the question.

3. Finally, the question is presented as to how the sufficiency of the petition in this case must be determined. It is urged that the law does not require that the petition should be signed by one-third of all the qualified voters of the district, but only by one-third of those who are voters at the election, or at least that the number voting upon the proposition at the election must be taken as the sole evidence of the number of qualified voters of the district. To adopt such a construction would, in our minds, be to effect a judicial amendment of the statute. The phrase "one-third of the qualified voters of such district" cannot be construed away. Wherever similar expressions have existed in statutes they have been construed to refer to the total number of qualified voters except where language was employed indicating another sense of the term. The number who voted at the election in controversy as well as the number who have voted at other elections may be competent evidence as tending to establish the number of qualified voters, but it cannot be conclusive. It certainly was not the intention of the legislature to make the jurisdiction of the board to call an election dependent upon the result of the election, nor could it have been the legislative intent, by the use of such language as occurs in this statute, to adopt the vote of any particular preceding election as the test. This is clear when we compare this statute with that for the relocation of county seats, where the requirement is that the petition shall be signed by resident-electors "equal in numbers to three-fifths of all the votes cast in such county at the last general election held therein." The legislature having used this language in a similar act, it is fair to presume that it would have used it in this had it so intended. The law requires that the petition be signed by one-third of all the qualified voters of the district at the time it is presented, and what number constitutes this one-third is a

question of fact to be determined like any other. The court found that there were at least 9,000 qualified voters in this district. The evidence upon the subject was not very exact. The registry lists of the city of Lincoln, containing 7,886 names, did not afford an accurate test, for the reason that the boundaries of the school district and of the city were not coincident, and for the reason that the qualifications of the voters were different. But the map of the city in evidence shows that that portion of the city not within the school district was an outlying portion and could not have embraced any very large proportion of the inhabitants. It was shown that over 4,500 votes were cast for members of the board of education at this election, and 5,600 for mayor of the city; that the population of the district was about 55,000; that it embraced over 11,000 children of school age, and that there were on the personal tax lists 4,443 names of persons entitled to vote. Whether or not there was evidence of sufficient certainty to sustain the court's finding of the existence of 9,000 qualified electors there was sufficient evidence to convince the court that the number of electors must have exceeded 5,538, which would be the limit to sustain the petition here presented.

Counsel on both sides call attention to the inadequacy of the law when applied to populous districts. The law was clearly devised with reference to districts of small population, and the cities of the state have developed to such an extent that it is difficult now to apply it generally. Some years ago the legislature, recognizing this difficulty, exempted metropolitan cities from the provision requiring a petition. The legislature of 1893, by an act which went into force soon after the acts here in controversy, made certain amendments intended to adapt the law better to the requirements of the other larger cities. The amendment came too late, however, to apply to this case. The courts cannot amend or repeal the statute because it has grown cumbersome in its application. The legislature must be

left to judge of the necessity or expediency of such a course.

We think that the district court erred in holding the petition sufficient and its judgment is for that reason reversed and an injunction allowed as prayed.

JUDGMENT ACCORDINGLY.

REUBEN C. PEARSON, APPELLEE, V. EDWARD F. DAVIS, SHERIFF, ET AL., APPELLANTS.

FILED JUNE 27, 1894. NO. 4792.

1. **Deeds:** SUFFICIENCY OF EVIDENCE TO SHOW EXECUTION AND DELIVERY. The evidence examined and considered, and *held* sufficient upon which to base a finding that the lots in controversy were sold and conveyed in December, 1884, and that the grantor, in February following, executed and delivered to the same grantee another conveyance of the lots for the purpose of correcting an irregularity in the execution of the first deed.

2. ———: FAILURE TO WITNESS: VALIDITY BETWEEN PARTIES. A deed to real estate, executed, acknowledged, and delivered by the grantor, is valid as between the parties thereto and those having knowledge of its existence, although the conveyance be not witnessed.

3. **Judgment Lien on Land.** It is the established doctrine in this state that the lien of a judgment attaches merely to the actual interest of the judgment debtor in the land, and such lien is subordinate to every equity existing against the debtor at the time same attached. Rule applied.

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

Griggs & Rinaker, for appellants.

R. S. Bibb, contra.

NORVAL, C. J.

This was an action brought by appellee to enjoin the sheriff of Gage county from selling upon execution lots 2 and 3, in block 24, in the town of Adams. From a decree in favor of the plaintiff the defendants appeal to this court.

A single question is presented for our consideration, namely, whether or not the findings and judgment of the court below are sustained by the evidence? It is admitted by the pleadings that on the 6th day of January, 1885, Tootle, Hosea & Co. recovered a judgment in the county court of Gage county against Hannah Noxon and Egbert Shaw for the sum of $463.71; that a transcript of said judgment was filed in the district court of said county on the 13th day of January, 1885; that said judgment has been assigned by Tootle, Hosea & Co. to James I. Shaw, one of the appellants herein, and who is the present owner thereof; that an execution has been issued out of the district court on said judgment at the instance of the owner thereof and placed in the hands of the appellant Edward F. Davis, sheriff of said county, who levied the same upon the lots above mentioned as the property of said Hannah Noxon, and was proceeding to advertise and sell the same under said writ, until restrained by this action. It is also uncontradicted that on and prior to the 26th day of December, 1884, the said Hannah Noxon was the owner in fee-simple of the lots in controversy; that she sold and conveyed the same to one Henry Norcross, who on the 1st day of April, 1886, in consideration of the sum of $110, sold and conveyed to the plaintiff and appellee the aforesaid premises by deed of general warranty, and the plaintiff has been in full possession of the lots ever since, and has made lasting improvements thereon of the value of $800.

The appellants insist that Mrs. Noxon did not sell the

lots to Norcross until after the recovery of the aforesaid judgment and the filing of the transcript thereof, and hence said judgment is a lien upon said real estate. There was recorded in the deed records of Gage county on March 20, 1885, a deed to said lots from Mrs. Noxon to Norcross bearing date February 23, 1885; therefore, so far as the records disclose, the lien of the judgment had attached prior to the time Norcross became the owner of the property. The appellee alleges that in December, 1884, Mrs. Noxon executed and delivered to Norcross a deed for the lots; that when he went to place the same upon record he was informed that it was not properly witnessed, and that the deed of February 23, 1885, was taken to cure the supposed defect in the first conveyance. The only disputed question in the case is whether Mrs. Noxon made Norcross more than one deed to the premises. The appellants insist that the evidence conclusively shows that but one deed was executed and delivered. We are persuaded that they misconceive the force and effect of the testimony in the case.

Henry H. Norcross testified positively that he purchased the lots of Mrs. Noxon in December, 1884, for the sum of $110; that he paid her the money on the 26th of that month and received the deed, which she had executed before N. T. McClunn, a notary public, a few days prior; that he afterwards carried said deed to the office of the county clerk of the county for the purpose of having the same recorded, and showed the same to Mr. Emery, the deputy county clerk, who, after looking the instrument over, called witness' attention to the fact that it was not properly witnessed, since Herbert Silvernail had signed his name below that of the grantor, instead of the usual place for witness to sign, and that on the suggestion of Mr. Emery he returned the deed to Mrs. Noxon, and she executed and delivered the deed bearing date February 23.

T. H. Moore testified to having seen the original deed, and that it was acknowledged in December, 1884, and

witnessed by Silvernail in the manner stated by Mr. Norcross.

George E. Emery, being examined as a witness on the trial, in every respect confirms the testimony given by the plaintiff as to alleged defect in the witnessing of the original deed, and that under witness' advice plaintiff took the deed away for the purpose of having the same corrected.

Herbert Silvernail's name is attached to the last deed as a witness, and he testified that he could not say whether he witnessed more than one deed to the property or not, but if he did he has no recollection of it.

N. T. McClunn testified that he has no recollection of taking the acknowledgment of the first deed, and that he was not in Gage county between December 24, 1884, and December 27.

Hannah Noxon testified that she remembers selling the lots and making the deed, but could not tell whether the transaction was before or after January, 1885, but does not recollect whether she made more than one deed to the lots or not, but "if there was a mistake in the first deed, I presume there would be another deed made; that would be my way of doing business."

The fact that the grantor, the subscribing witness, and the officer taking the acknowledgment have no recollection of the original deed does not outweigh the direct and positive testimony of Norcross, Emery, and Moore, who saw the deed in question. The testimony of these three witnesses is certainly ample upon which to predicate a finding that Mrs. Noxon conveyed the lots to Norcross in December prior to the rendition of the judgment against her in favor of Tootle, Hosea & Co. The original deed was sufficiently executed and acknowledged to have entitled the same to be admitted to record, notwithstanding it was irregularly witnessed. Whether this statement is strictly accurate or not is not important in this case, for a deed to real estate, executed, acknowledged, and delivered

by the grantor, is valid as between the parties to it, although the same is not witnessed. (*Kittle v. St. John*, 10 Neb., 605; *Missouri Valley Land Co. v. Bushnell*, 11 Neb., 192; *Harrison v. Mc Whirter*, 12 Neb., 152; *Weaver v. Coumbe*, 15 Neb., 167.) Under the foregoing decisions the original deed was sufficient to pass the title from Mrs. Noxon to her grantee, Norcross. That the judgment was rendered and the transcript filed prior to the rendition of the deed from Noxon to Norcross cuts no figure in the case. It is the established doctrine of this state that the lien of a judgment attaches merely to the actual interest of the judgment debtor in the land, and is subordinate to every equity existing against the debtor at the date the lien attaches. If the debtor has conveyed his real estate prior to date of the judgment, there is no lien, even though the grantee did not place his conveyance upon record until after judgment. (*Galway v. Malchow*, 7 Neb., 285; *Dorsey v. Hall*, 7 Neb., 460; *Berkley v. Lamb*, 8 Neb., 399; *Leonard v. White Cloud Ferry Co.*, 11 Neb., 340; *Mansfield v. Gregory*, 11 Neb., 297; *Courtnay v. Parker*, 21 Neb., 582; *Dewey v. Walton*, 31 Neb., 824.) Norcross having purchased and paid for these lots in December, 1884, according to the undisputed testimony, and having received his deed for the same, Mrs. Noxon had no interest in the premises when the transcript was filed upon which a lien could attach. The decree of the court below was right and is

AFFIRMED.

STATE OF NEBRASKA, EX REL. T. J. RESSEL, V. S. A. WHITNEY ET AL.

FILED JUNE 27, 1894. No. 6915.

Municipal Corporations: INCORPORATION: ATTACK IN COLLATERAL PROCEEDING. Where the existence of a municipal corporation is not questioned by the state, it cannot be put in issue by a private individual in a collateral proceeding.

ORIGINAL application for *mandamus*.

W. S. Morlan and *Gomer Thomas*, for relator.

R. L. Keester, *J. G. Thompson*, and *John Everson*, *contra*.

POST, J.

This is an original application for a writ of *mandamus*. The relator in his petition alleges that he is a resident of the city of Alma, which is a city of the second class; that at the regular election held in said city on the first Tuesday of April, 1894, he was a candidate for the office of councilman for the third ward thereof, and that according to the votes as certified and returned to the city clerk he received a majority of all the votes cast for said office, but that the respondents, of whom J. Zerbe is the acting mayor, Charles Sadler the acting clerk, and the others who are acting councilmen, refused, and still refuse, to canvass said vote and declare the result thereof. The respondents Hunt, Lafferty, and Traver join in an answer, in which they admit the material allegations of the petition, and allege their willingness to canvass the vote, but that the other councilmen oppose such action, and the mayor, who has the deciding vote, supports the last named members in their refusal. That allegation is verified by the record of the council duly certified. They allege further that during the year last

prior to April 3, 1894, three councilmen and the mayor favored the licensing of saloons, while three councilmen opposed license. Accordingly licenses were allowed, but which terminated by operation of law on the 1st day of May, 1894. At the election named the officers of the preceding year were all re-elected, except that Daniel Sullivan, one of the councilmen who favored license, was defeated by the relator, so that a majority of the council elect are opposed to the licensing of saloons, but that the mayor and the other councilmen have conspired to keep the relator out of office until they shall have allowed licenses for the year commencing May 1, 1894. A separate answer was filed in behalf of the city, the mayor, and Sullivan, Turkington, and Whitney, councilmen, in which they deny that they were ever requested by relator to canvass the vote as charged, and allege that according to a census of the city taken in the month of January, 1894, there were less than 1,000 inhabitants therein, and that said city did not at the time of the election in question, and does not now, contain 1,000 inhabitants, thus in effect denying the corporate existence of the municipality named as a city of the second class. Upon the completion of the issues the cause was sent to a referee for trial, who subsequently submitted the following findings:

"1. That Alma, Harlan county, Nebraska, is now, and has been for more than five years last past, exercising all the rights, powers, and privileges of a city of the second class, under the act providing for the organization and government of cities having a population of one thousand and not more than ten thousand.

"2. That in pursuance of the election for said city held on the 3d of April, 1894, the relator, T. J. Ressel, received as candidate for councilman from the third ward of said city a majority of all the votes cast for councilman in said ward.

"3. That all the other candidates named in the petition

as having been elected on the 3d day of April, 1894, each received a majority of the votes cast for the respective officers in question.

"4. That the presiding mayor, city clerk, city treasurer, and one member of the present council were re-elected at said election, and are now holding their respective offices and exercising the rights, powers, and privileges of the same.

"5. That the relator at the time of said election was, and now is, a resident elector and taxpayer of the said third ward of said city.

"6. That at the first regular meeting of the city council after the said election the said council refused to canvass the votes of said election and issue certificates of election to the parties entitled thereto, as requested by relator, and that said council at its succeeding regular meeting refused to canvass said votes and issue said certificates as requested by relator, and still refuse to canvass the vote and issue the certificates as aforesaid.

"7. That the poll books and returns of said election were in the custody of the city clerk at each of the meetings of the city council last named, and of easy and convenient access to said council.

"8. That on the 10th day of January, 1894, said city council made an order instructing the city clerk to proceed to take the census of said city, and in pursuance of said order the said clerk, on the 14th day of March, 1894, made his return in the premises to the council then in session, which return showed the population of Alma to be less than one thousand, but more than nine hundred, which report was adopted by said city council.

"9. That after the adoption of this census report of the clerk, to-wit, on the 14th day of March, 1894, the said city council proceeded, as provided by law in cities of this class, to call and hold an election for mayor, three members of the city council from the three separate wards, a city

clerk, and city treasurer. That said election appears to have been regular in all things, conforming to the laws touching the elections for cities of the second class having one thousand population and not more than ten thousand.

"10. That there are no existing records of the organization of the city of Alma, but there was parol evidence tending to show such organization, and that the same was made of record, and that said record has since been lost.

"Respectfully submitted, WM. R. BURTON,
"*Referee.*"

The reliance of the respondents is apparently upon the proposition that on the completion of the census mentioned the said corporation ceased to be a city of the second class, and became *eo instanti* a village, and that there exists no authority for the division of villages into wards, and that the election of councilmen by wards is without authority and void. To that proposition we cannot give assent. The rule is well settled upon authority that the existence of a municipal corporation cannot be questioned in collateral proceeding. In Dillon, Municipal Corporations [4th ed.], sec. 43*a*, it is said: "Where a municipal corporation is acting under color of law, and its existence is not questioned by the state, it cannot be collaterally drawn in question by private parties; and the rule is not different although the constitution may prescribe the manner of incorporation." The conduct of the respondents appears to have been contumacious in the extreme and is inexcusable in any view of the case. The writ is allowed as prayed, and the costs, including $60 to the referee, will be taxed to the respondents Zerbe, Whitney, Sullivan, and Turkington.

WRIT ALLOWED.

UNION STOCK YARDS COMPANY v. CHARLES M. CONOYER, ADMINISTRATOR.

FILED JUNE 27, 1894. No. 5417.

1. **Contributory negligence** is a matter of defense, and the burden of its proof is on the defendant. If the plaintiff proves his case without disclosing any contributory negligence, he will be assumed to be free therefrom.
2. **Death by Wrongful Act:** NEGLIGENCE: EVIDENCE. A fact may be considered as established which may be reasonably inferred from all the facts and circumstances proved in a case; and in civil actions it is sufficient if the evidence on the whole agrees with and supports the hypothesis which it is adduced to prove and it is the duty of the jury to decide according to the reasonable probability of the truth.
3. ———: ———: ———. Evidence examined, and *held* sufficient to warrant the submission of the questions of negligence and proximate cause of the injury to the jury for their consideration and to sustain the verdict rendered.
4. **Motion to Direct Verdict:** NEGLIGENCE: EVIDENCE. The former decision of this case, reported in 38 Neb., 488, reaffirmed.

REHEARING of case reported in 38 Neb., 488.

Breckenridge & Breckenridge and *L. F. Crofoot*, for plaintiff in error.

Mahoney, Minahan & Smyth, contra.

HARRISON, J.

This case was heard in this court and decided. The opinion was filed November 28, 1893, and reported in 38 Neb., 488. A motion for rehearing was filed and presented by th plaintiff in error, and on February 20, 1894, the motion was sustained and a rehearing ordered upon the one question alone, of the sufficiency of the evidence to sustain the verdict. The action was commenced by the

defendant in error, as administrator of the estate of William McAnnelly, deceased, to recover damages in the sum of $5,000 from the Union Stock Yards Company of South Omaha for the death of McAnnelly, which, it is alleged, was caused by, or the result of, the negligence of the company.

The stock yards company own and operate a number of railroad tracks uniting the various packing houses at South Omaha with the railways centering there. Over these tracks cars are moved from the railways to the packing houses and from the packing houses to the railways. At the time this cause of action arose there were in the employ of the stock yards company two "engine crews," so called, one employed at night, the other by day. An engine crew consisted of an engineer, fireman, two brakemen and a foreman. The deceased, William McAnnelly, was foreman of the engine crew operating during the day-time. On the 5th of February, 1890, at 8 o'clock in the morning, the stock yards company's foreman, the immediate superior to McAnnelly, directed McAnnelly to take his crew and engine, go west over the tracks of plaintiff in error to the Omaha Packing Company's establishment and bring from there a number of freight cars. He went as directed and did what was necessary to get the cars together preparatory to hauling them away. After the train was made up, and about five or ten minutes before it started east, McAnnelly was seen looking the train over,—we assume, for the purpose of seeing that everything was all right, as it is in evidence that to do so was included in his duties. That was the last seen of him alive. The train started east. After it had gone a short distance, a brakeman on the draw-bar of the last car discovered McAnnelly's dead body between the rails of the track over which the train had passed. The forward trucks of the box car next to the last in the train had jumped the track. The theory of the defendant in error was that McAnnelly was on the end

of the car under which were the trucks discovered to be off the track; that cinders and coal and rubbish which had accumulated on the track, over which the train was passing at the time McAnnelly was killed, caused the trucks to leave the track; that this caused an unusual and unexpected movement of the end of the car, or a jar or jolt, sufficient to and which did throw McAnnelly from the car and down between the cars to the track, where he passed under the cars and was dragged and crushed to death.

Whether there was sufficient evidence to warrant a finding of the jury that McAnnelly's death was caused substantially as indicated in the above statement, or sufficient evidence to justify the court in submitting some of the questions of fact to be determined in the case to the jury, are the questions mainly discussed and to be determined on the rehearing. It must be borne in mind that the company did not introduce any testimony during the trial in the district court, but at the close of the testimony by plaintiff in that court, moved for an instruction to the jury to return a verdict for the company, and, upon overruling of the motion, did not introduce any testimony, and the case was submitted to the jury on the evidence adduced on behalf of the plaintiff in the lower court. To reach a conclusion upon the inquiry now before us involves a close and careful examination of some portions of the testimony, and we can think of no better way than to quote it in substance or literally, more or less largely, as a thorough understanding of the part under discussion demands.

August Ericson, a watchman for the Omaha Packing Company, in the yards, stated that McAnnelly passed him where he was standing on a platform, attached to one of the packing houses, going east towards the engine, about five or ten minutes before his death; that the next time he saw him he was dead and his body lying between or on the middle of the tracks; that the cars had been pulled over him; that one car was off the track.

Charles L. Bowers, one of the switchmen of the crew handling the train, testifies that when he last saw McAnnelly alive, the morning of the 5th of February, 1890, he was repeating signals to the engineer, and when he next saw him he was lying between the tracks; and he was further questioned and answered in this connection as follows:

Q. What was his condition then?

A. Mangled and dead.

Q. Where were you when you discovered that he was between the tracks?

A. I was riding out, standing on the draw-bar of the rear car.

Q. How did you come to discover that he was on the track?

A. I seen a cap laying on the ground. I jumped off and lit right by the remains. * * *

Q. Describe to the jury just how you found the deceased. Where was he lying in relation to the cars on the track?

A. He was lying with his head north, on his back, with his arm (right) under his back.

Q. Was he lying across the track or lengthwise?

A. With the track (indicating).

Q. What was the condition of the cars as to their being on or off the track?

A. There were the forward trucks of one car off the track.

Q. What kind of a car was that? Was it a box car?

A. Box car.

Q. Whereabouts was he lying as to being under the car or otherwise when you found him?

A. I don't understand you.

Q. Where was he lying with reference to the cars on the track; that is, was he under the car?

A. He just passed out here under the cars. The cars passed over him.

Q. Did the entire train pass over him?

A. Two cars, I believe.

Q. Well, had the last car of the train gone over him?

A. Yes, sir. * * *

Q. You may state, Mr. Bowers, what the condition of the track was just immediately west, I believe, of where he lay.

A. Track was all full of cinders, rubbish, and things of that kind.

Q. Well, I will ask you now as to the condition of it just between the rails?

A. Pretty well filled up.

Q. You may state whether or not there were any marks there of any kind.

A. Don't understand you.

Q. I am asking you if you noticed where the cars left the tracks—trucks.

A. Yes, sir.

Q. How did you notice that fact?

A. From the prints of the cinders and rail, where they had crossed over the rail.

Q. What were the prints made by, do you know?

A. By the wheels of the cars.

Q. Now did you notice any other prints there?

A. Noticed the prints of the body where it had been trailing in the cinders.

Q. The point at which these marks, or impressions, between the rails commenced, how far was it west of where you found the body?

A. About thirty-six or eight feet.

Q. You may describe, Mr. Bowers, in your own way, the character of these marks between the rails, size, etc.

A. First mark I could discover was six or eight feet from where the car first left the track.

Q. In which direction?

A. East. It looked like print in the cinders of a man's hip and shoulder.

Q. Go on and describe where you found the body.

A. Then it was mussed up and deeper in places.

Q. How far was this impression, if at all; that is, near to what rail?

A. It was near to the north rail.

Q. Just at the point where the car left the track, what was the condition of the track there in having impressions, etc., that you have testified about?

A. The impression—cinders and coal and rubbish was laying there.

Q. How far did these cinders, coal, and rubbish extend over the track; that is, what distance of the track did they cover east and west?

A. About four car lengths.

Q. What height were these cinders above the rails, if above them at all? (Withdrawn.)

Q. You may state how the cinders were piled on the track, and how high they were, with reference to the height of the rail.

A. They were kind'a in bunches. The height of the rail I could not state.

Q. What is that?

A. I could not tell how much higher than the rail they were, some places deeper than others.

On cross-examination he testified:

Q. Did the train move back at this time, or was it standing still?

A. Stood still for a short time.

Q. And when it moved, it moved toward the east?

A. Yes, sir.

And in re-direct examination:

Q. At the time you discovered that the truck was off, was the train made up and pulling out then?

A. Yes, sir.

Q. At that time did you know where the places of the switchmen and crew were as to being on the train, or off of it?

A. After things were all right, as a general thing two of us got on, me and the foreman, McAnnelly.

Q. What is that?

A. After we slack back and see that things are all right get on, as a usual thing.

Q. Yourself and McAnnelly?

A. Yes, sir.

Q. Where was Ferguson?

A. He was on already.

Q. And then would you accompany the train to where it was going?

A. Yes, sir.

Q. The whole crew?

A. Yes, sir.

And another witness, Don Martin Ferguson, a switchman belonging to the crew, testifies that he saw McAnnelly probably five minutes before his death; that he was then walking up the north side of track No. 1 looking the train over; that he next saw him lying in the track, flat, and with the track lengthways and about a foot from the nearest rail; that one truck of one car at the east end was off the track; that the marks of where the wheel had run indicated where it had left the track. He further testifies to about the same condition of the track, as indeed do all the witnesses who saw it, as was testified to by Bowers. He also testifies that there was one mark between the rails which, from the appearance, he thought was made by McAnnelly's hip pressed in the dirt in the track, along to where they found the body; that this mark was first to be noticed about eight or ten feet east of where, from appearances, the wheels had left the track; that this mark continued from its point of commencement to where the body was found, about two car lengths, or sixty feet; that at this time they were "pulling out," had completed the train; that they were running three or four miles an hour; that probably two cars were backed over this place where the truck is

supposed to have left the track, when they backed in, and probably six or seven ran over it when they were pulling out; that the cinders were frozen that morning.

Albert W. Williams, who was a member of the coroner's jury which inquired into the cause of McAnnelly's death, testifies that, from the looks of the dirt there, the body had been dragged east down the track from some five or six feet from where the car had run off the track. He was asked this question:

Q. You have stated, I believe, you noticed where the wheels left the track?

A. Yes, sir.

Q. What indicated that, the marks?

A. I could see the mark where the wheel left the track and run on the ties.

The following is a portion of the testimony of one of the switchmen:

Q. The next time you saw Mr. McAnnelly at all, after the time when you—when he stood four feet from you, four feet north of you, repeating the signal you gave him, to the engineer, to give you the slack, was when you saw him lying on his back between the tracks?

A. Yes, sir.

Q. Between the rails of the track?

A. Yes, sir.

Q. Did you look and see whether there was any blood stains around there on the ties or on the rails?

A. I could not discover any. I looked.

Q. Didn't see any anywhere could you there?

A. No, sir.

The counsel for plaintiff in error, in an able brief and argument, strenuously contend that there was no evidence which even tends to prove that there was any negligence on the part of the company which was the proximate cause of the injury to plaintiff; that the verdict of the jury was predicated upon speculation and conjecture, and not upon

facts proved or admitted in the case, or inferences deduced from such proved or admitted facts.

We will now go back to what we have heretofore alluded to, viz., that the plaintiff in error did not introduce any testimony, but allowed the case to be submitted to the jury on the evidence on behalf of the plaintiff. The rule of the law in this state, on the subject of contributory negligence, as expressed in the case of *City of Lincoln v. Walker*, 18 Neb., 244, and *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb., 95, is as follows: "In an action for negligence, where the plaintiff can prove his case without disclosing any negligence on his part, contributory negligence is a matter of defense, the burden of proving it being on the defendant;" and the supreme court of Wisconsin has said that there being no witnesses as to how the death of a traveler at a railroad crossing occurred, deceased will be assumed to have been free from contributory negligence, where the circumstances and position in which he is found are as consistent with that presumption as with the presumption of contributory fault. (*Phillips v. Milwaukee & N. R. Co.*, 46 N. W. Rep. [Wis.], 543.) There was no evidence in the case which tends in the least degree to show any contributory negligence or any fault on the part of McAnnelly, and we must consider the case as to the other points and the different positions in which McAnnelly was placed by the evidence, bearing in mind that there is no contributory negligence. After a careful reading of the evidence we are convinced that there was a strong showing of the bad condition of the track, and sufficient evidence to submit to the jury and to sustain their finding as to what caused the trucks of the car to leave the track, and also of the knowledge on the part of the company, or lack of it, of this condition; and now we reach the main contention of the plaintiff in error, that there was no testimony to connect the occurrence of the death of McAnnelly with the negligence of the company.

In Sackett's Instructions to Juries, page 36, we find the following: "The jury are instructed that in determining what facts are proved in this case, they should carefully consider all the evidence given before them, with all the circumstances of the transaction in question as detailed by the witnesses, and they may find any fact to be proved which they think may be rightfully and reasonably inferred from the evidence given in the case, although there may be no direct testimony as to such fact," citing *Binns v. State*, 66 Ind., 428; and in Thompson, Trials, sec. 1039: "What inferences are to be drawn from the facts in evidence is, within reasonable limits, a question for the jury;" and again in section 1077: "In actions for damage for negligence the general rule is, within limits already indicated, that whether the damage which accrued to the plaintiff is the proximate or the remote result of the negligence of the defendant is a question of fact for the jury; that is to say, when doubt arises as to whether the damages are direct and proximate, or speculative and remote, the question should be submitted to the jury under proper instructions." In section 1678 of the same work is the following statement: "In an action for damages for negligence, where the evidence entirely fails to connect the negligence with the fact of the accident, the court should direct the jury that the plaintiff cannot recover; though in many cases the physical facts surrounding the accident will be such as to create a probability that the accident was the result of negligence, in which case the physical facts are themselves evidential, and furnish what the law terms evidence of negligence."

In *Bromly v. Birmingham M. R. Co.*, 11 So. Rep. [Ala.], 341, it was held: "Plaintiff's intestate, a brakeman on defendant's railroad, was killed by falling from a box car, in the top of which, near the brake, was a hole, according to some witnesses, four feet long, and according to others, four feet square. Deceased was last seen alive standing at the brake near this hole. Held, that there was evidence

for the jury to consider that the death of deceased was owing to the hole in the top of the car. * * * Where evidence is conflicting, or different inferences can be reasonably drawn from the evidence, or where there is any evidence tending to establish the case of the other side, the general affirmative charge should not be given in favor of either party."

In *Lillstrom v. Northern P. R. Co.*, 55 N. W. Rep. [Minn.], 624, the facts were as follows: "The facts as established on the trial were that, when living, the deceased resided with his family on a farm in a prairie country about one mile east of defendant's line of railway. On the morning of February 18, 1890, Lillstrom, the intestate, left home with a pair of horses attached to bob sleighs to go several miles northwesterly for a load of wood, to obtain which he had to cross to the west side of said line of railway. Leading in the direction he had to go was a generally traveled wagon road, which crossed the railway about five miles from his residence. This road, at least where it crossed the track, was not a regularly laid out highway, but it, including the crossing, had been used by the public for several years. Immediately after the railway was constructed, some five years before the accident in question, two farmers residing in the vicinity had prepared the crossing by digging the approaches, and by placing planking inside and outside the rails. The defendant's section men took charge of the crossing at once, repaired the planking, replaced the same as needed, and otherwise kept the same in proper condition for travel as fully as if it had been a legally laid out or established highway. The evidence was abundant upon this point, and also that the traveling public had very generally crossed the railway at this point while it had been maintained, preferring it to other crossings on either side. The planking between the rails before mentioned had been kept in place continuously from the time it was first put in until about one month

prior to the day on which Lillstrom received his injuries, and was then removed by defendant's section men to prevent the accumulation of snow at that point, and thus facilitate the operation of the railway. No sign was put up or barriers erected to notify the traveler of this removal. On the trial it was shown that Lillstrom in his lifetime had used this crossing and when it was in good repair. It appears that he crossed at another place when going for the wood, and it was not shown that he had been at this crossing at all after the planks were taken up, until he was injured. The 19th of February was a stormy day. About 4 P. M. a neighbor discovered Lillstrom lying upon the ground, then covered with snow, at this crossing. His horses, attached to the bob sleighs with one trace only, stood on the west side of the rails. One single-tree was broken. Upon the sleighs was a heavy load of wood. He had evidently approached the place along the road from the west (the railway running north and south), for the rear bob stood west of the rails in the traveled track, while the forward bob stood lengthwise and upon the rails, faced to the south. Lillstrom lay across the rails in front of the forward bob. He was conscious and said that he had broken his neck. His injuries were such as to cause his death the following day." It was held: "In civil actions it is sufficient if the evidence on the whole agrees with and supports the hypothesis which it is adduced to prove, and it is the duty of the jury to decide according to the reasonable probability of the truth;" and in the text it is said: "It is further contended by the defendant company, even if its negligence be established, that there was no testimony tending to connect the accident which befell Lillstrom with such negligence; in other words, that it was not shown that the removal of the planks was the cause of his death. We have stated the circumstances under which he was found, and undoubtedly the jurors came to the conclusion that they were warranted in believing that, while Lillstrom

was attempting to cross defendant's track at the crossing with a heavy load of wood upon his bob sleighs, the runners of either the forward or the rear bob, or both together, struck the rails, which projected a few inches above the snow, with such violence as to suddenly stop the horses, cause one single-tree to break, three out of the four traces to become detached, and to throw the forward bob at right angles with the one in the rear, all concurring to precipitate Lillstrom, who, as driver of the horses, would naturally sit upon the top of the load of wood, with great force to the ground, across the rails and in front of his sleighs, where he was found so injured that he died the next day. The facts as related upon the trial fully justified the jury in believing that the accident happened in this way and that the removal of the planking was the primary cause of the injuries. It was not necessary for plaintiff to show by an eye-witness exactly how these injuries were received, and that is really what was demanded by defendant's counsel on the argument here. It is not necessary in any action, civil or criminal, that the material facts should be established by direct evidence. In civil cases it is sufficient if the evidence on the whole agrees with and supports the hypothesis which it is adduced to prove, and it is the duty of the jury to decide according to the reasonable probability of the truth. (1 Greenleaf, Evidence [15th ed.], sec. 13*a*.) There was no direct evidence as to the exact manner in which Mr. Lillstrom was fatally injured, but there were circumstances in evidence from which it may be justly and fairly inferred that when the runners of his sleigh struck the projecting rails, the shock was such as to throw him upon and across the rails with great force and violence. If such be the fair and just inference to be deduced from the evidence, it was sufficient;" citing *Indianapolis, P. & C. R. Co. v. Collingwood*, 71 Ind., 476; *Indianapolis, P. & C. R. Co. v. Thomas*, 84 Ind., 197; *Hays v. Gallagher*, 72 Pa. St., 136.

In the case of the *Omaha & Republican Valley R. Co. v. Morgan*, 40 Neb., 604, it was held: "Issues as to the existence of negligence and contributory negligence, and as to the proximate cause of an injury, are for the jury to determine, when the evidence as to the facts is conflicting and where different minds might reasonably draw different conclusions as to these questions from the facts established."

In the case at bar the last time McAnnelly was seen alive by any of the witnesses he was about four feet from the train and was apparently looking it over to see that everything was all right as the train was then completed or "made up," as the railroad men term it, and after it stood for a short time, "pulled out." One witness says: "After things were all right, as a general thing, two of us got on, me and the foreman, McAnnelly, and after we slack back and see that things are all right get on, as a usual thing." Mr. Breckenridge: "Yourself and McAnnelly?" "Yes, sir." Mr. Smythe: "And then you would accompany the train to where it was going?" "Yes, sir." "The whole crew?" "Yes, sir." It will doubtless be remembered that there was testimony that at the time McAnnelly was killed they were, as the witness stated it, "pulling out." This fact of the usual custom of the crew when they were "pulling out," coupled with the facts that McAnnelly's body was discovered between the rails, stretched out lengthwise and parallel with the rails, with a mark or track, apparently made by the body, from a point at which it would have fallen from the car, the forward trucks of which were derailed, to the place where it was found;—that the first evidences of the body being upon the track were, as one witness expresses it: "First mark I could discover was about six or eight feet from where the car left the track." "In which direction?" "East. It looked like print in the cinders of man's hip and shoulder;"—that from here to where McAnnelly's body was found there was a distinct mark, which, as all the witnesses testify, ap-

peared to be made by the hip and shoulder;—that there were no blood spots or marks, or indications of any kind or nature whatsoever, on either the rail or ties, that McAnnelly had been struck by the wheels; that the truck had been derailed and was running with one wheel on the ties on the outside of the rail, constitute an array of physical facts and set of circumstances which fully warranted the trial judge in submitting the case to the jury for their determination; and finding as the jury did, they would not be called upon, at any point in the case entering into such finding, to draw any inferences which would necessarily be violative of the rule of law which prescribes that "inferences must be drawn from facts proved;" nor do we think that the verdict rendered necessarily involved any speculation and conjecture, or other than reasonable and fair inferences in view of all the facts and circumstances proved on the trial as surrounding the killing of McAnnelly. The jury were well instructed as to their duty in the case and there was evidence sufficient to sustain the verdict rendered.

AFFIRMED.

JOSEPH LEE SHELLENBERGER v. FRANK T. RANSOM ET AL.

FILED JUNE 27, 1894. No. 3147.

1. **Statutes should be so construed** as to give effect to the intention of the legislature, and if a statute is plain and unambiguous, there is no room for construction or interpretation.

2. **Our statute of descent** is plain and unambiguous, and by its own operation, and solely in accordance with its own terms, vests in the heir such estate as he is thereby entitled to, *eo instanti*, upon the death of the intestate from whom the inheritance comes.

3. **Descent in Case of Murder of Ancestor by Heir.** The former opinion in this case, reported in 31 Neb., 61, disapproved.

REHEARING of case reported in 31 Neb., 61.

M. L. Hayward, for plaintiff in error.

John C. Watson, Frank T. Ransom, George D. Scofield, and *E. F. Warren, contra.*

RYAN, C.

An opinion was filed in this case on the 2d day of January, 1891. Subsequently a rehearing was granted, and thereon renewed arguments were made, and the case was again submitted. No controversy is now made as to the applicability of section 30, chapter 23, Compiled Statutes. This question was finally settled by the opinion already filed, which is found reported in 31 Neb., 61. The simplification thus accomplished has left but one question for consideration. This arose upon the demurrer, from which fact it is rendered necessary to state as concisely as possible the facts pleaded.

The petition was filed by Frank T. Ransom and John C. Watson, as plaintiffs, against Joseph L. Shellenberger, as defendant. In brief, this petition contained the averments that Emma Shellenberger, the owner of the northeast quarter of section 5, township 7 north, range 14 east of the 6th P. M., died intestate, leaving as her sole heirs at law her husband, Leander Shellenberger, and her two children, Maggie Shellenberger and Joseph L. Shellenberger; that upon her death the said land descended to her husband, Leander Shellenberger, during his life, during which time he was tenant of said land by his right of curtesy, Maggie and Joseph L. being entitled to the remainder after his death; that on April 29, 1886, Maggie Shellenberger died intestate, leaving as her only heir her father, Leander Shellenberger, whereupon Joseph L.

Shellenberger and Leander Shellenberger became tenants in common of the aforesaid property; that on May 3, 1886, said Leander Shellenberger and his wife, Miranda Shellenberger, by warranty deed duly conveyed their interest in said real property to plaintiffs, the same being, as alleged, the life estate of Leander and the undivided one-half of the remaining estate; that on the 23d day of July, 1887, said Leander Shellenberger departed this life, whereupon plaintiffs and Joseph L. Shellenberger became the owners of said land as tenants in common. There were other allegations made with the view of demonstrating the necessity of a partition. The prayer was as follows: "The plaintiffs therefore pray for judgment confirming the shares of the parties as above set forth, and for a partition of said real estate according to the respective rights of the parties interested therein; or, if the same cannot be equitably divided, that the premises may be sold and the proceeds thereof divided between the parties according to their respective rights, and for such other relief as equity may require."

The initial averments of the answer were in denial of each and every allegation of the petition except as in said answer the same should be expressly and specifically admitted. Following this denial the answer was in this language: "That on or about the —— day of ——, 18—, said Emma Shellenberger died intestate, seized of the premises, leaving as her sole heirs at law the defendant Joseph L. Shellenberger and Maggie Shellenberger, and her then husband, Leander Shellenberger, and upon the death of the said Emma Shellenberger the said land descended to the said Joseph L. Shellenberger and Maggie Shellenberger, her children and sole heirs at law, subject to the life estate of her husband, Leander Shellenberger, during his life, and said Leander became and was the tenant of said land by his right of curtesy, with the remainder after his death to the defendant and Maggie Shellenberger; that on or

about the 27th day of April, 1886, the said Leander Shellenberger, willfully, feloniously, and of his deliberate, premeditated malice, did kill and murder his daughter, Maggie Shellenberger, and she then and there died intestate and without issue, leaving her father, Leander Shellenberger, who murdered her for the purpose of possessing himself of her estate and title in fee-simple to the land aforesaid, and said plaintiffs claim that by and through said murder and the death of said Maggie Shellenberger the said Leander Shellenberger became a tenant in common of said premises with the survivor, Joseph L. Shellenberger; that on or about the 1st day of May, 1886, the said Leander Shellenberger was arrested and charged with the murder of said Maggie Shellenberger; that the said complainants herein, well knowing of the facts, and being attorneys at law, undertook the defense of said Shellenberger, and to secure them for their said services the said Leander Shellenberger did, on or about the 3d day of May, 1886, with his wife, Miranda Shellenberger, duly convey to the plaintiffs, by warranty deed duly executed, their interest in said premises, being the estate, as claimed by the complainants, for life of Leander Shellenberger, and one undivided one-half of the remainder; that shortly thereafter the said Leander Shellenberger was indicted and charged with the murder of said Margaret Shellenberger, and such proceedings were had in said cause in the state of Nebraska against Leander Shellenberger, indicted for the murder of his daughter, the said Maggie Shellenberger, that at the November term of the district court, sitting within and for Otoe county, in the year 1886, he was convicted and sentenced for said murder, which sentence and judgment of the court remains unreversed in said court; that afterwards, and on or about the 23d day of July, 1887, the said Leander Shellenberger was * * * hanged, and the defendant herein answering, charges and avers the fact to be that the said plaintiffs in said petition, at the time they

took a conveyance of said premises from said Leander Shellenberger and wife, well knew the facts, that the said Leander Shellenberger came to the said lands by the murder of his child, Maggie Shellenberger, and well knew all the proceedings in said court, resulting in his conviction, the judgment and sentence, and this defendant herein answering says, that the said Leander Shellenberger could acquire no estate, interest, or right, or title in and to the lands in controversy by and through his act of the murder of Maggie Shellenberger; and this defendant in further answering says, that the said Leander Shellenberger did willfully, maliciously, and of his premeditated malice kill and murder the said Maggie Shellenberger, * * * for the sole purpose of removing her from this life that he might inherit the lands which descended to her by and through the death of her mother; that the defendant in further answering says, that it is contrary to the law of the land that any should be permitted to come to an estate or an inheritance by their own willful act of murder; and the said defendant further answering says, that the said Leander Shellenberger could take no estate from the said Maggie Shellenberger, whose death he had compassed and produced, and that he took no estate to himself, and conveyed none to the said plaintiffs herein, and the said plaintiffs acquired no right, title, or interest in and to the said estate by and through the death of said Maggie Shellenberger, caused by said Leander Shellenberger as hereinbefore alleged.

"The said defendants therefore pray that this court will order a judgment and decree that the said Leander Shellenberger took no estate from the said Maggie Shellenberger, whose death was by him compassed and produced by willful murder, and that the said estate upon her death, and her interest in said estate upon her death, caused by the willful murder of the said Leander Shellenberger, descended to this defendant, and the said Leander Shellen-

berger took nothing by and through his act of willful murder of his own daughter; and for such other and further relief in the premises as equity and good conscience shall decree. O. P. MASON,

"*Guardian ad litem for Joseph L. Shellenberger.*"

To this answer plaintiffs demurred on the ground that it "did not state the facts sufficiently to constitute a defense to the said plaintiffs' cause of action." This demurrer was sustained, and, the defendant having elected to stand on his answer, judgment was rendered for such relief as was prayed in plaintiffs' petition, and appointing referees to make partition accordingly. These referees reported that partition could not be advantageously made of the property in kind, whereupon it was ordered sold, and that the proceeds of the sale should be divided between the parties plaintiffs of one part and the defendant of the other part. The defendant Joseph L. Shellenberger, by his guardian *ad litem*, as plaintiff in error, then brought the case to this court for a review of the ruling on the aforesaid demurrer and the judgment which logically followed it.

In the answer it was alleged, as will be noted by reference to the quotation just made, that plaintiffs, well knowing the facts, and to secure payment of their fees as attorneys at law in the defense of said Leander Shellenberger, received the conveyance by virtue of which they claim to be vested with the title to one-half of the property in question. This averment, admitted as it is by the demurrer, does away with the argument attempted as respecting the rights of *bona fide* purchasers. Under the circumstances charged, and admitted to be true for the purposes of the demurrer, the defendants in error are vested with no higher or better rights than could be asserted by Leander Shellenberger in his own behalf. The naked question presented is, whether or not the murder of an intestate by one to whom ordinarily as heir the property would have descended formed an exception to the statutory rules of inheritance.

The opinion hereinbefore filed affirmed this proposition; its correctness will now receive consideration.

Section 30, chapter 23, Compiled Statutes, provides: that "When any person shall die seized of any lands, tenements, or hereditaments, or of any right thereto, or entitled to any interest therein in fee-simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, in the manner following: * * * Second—If he shall have no issue, his estate shall descend to his widow during her natural lifetime, and, after her decease to his father; and if he shall have no issue nor widow, his estate shall descend to his father." This statute has regulated the descent of real property in this state at least since 1866, for it is found in the Revised Statutes of that date. In the former opinion, COBB, C. J., said: "The principle of these cases [*New York Mutual Life Ins. Co. v. Armstrong*, 117 U. S., 599, and *Riggs v. Palmer*, 115 N. Y., 506], especially that of *Riggs v. Palmer*, is applicable to the case at bar; their analogies are immediate and certain." As these two cases seem to have specially influenced the court in arriving at its former conclusion, a brief consideration and analysis of them will not be foreign to our purpose.

New York Mutual Life Ins. Co. v. Armstrong was an action brought by the administratrix of the estate of John M. Armstrong, deceased, upon a life insurance policy issued to said intestate. This policy was what is known as an endowment policy; that is, a policy payable to the assured if he live a designated time, but to some other person named if the assured should die before the expiration of that time. It was payable, subject to certain conditions, to the assured, or his assigns, on December 8, 1897, or, if he should die before that time, to his legal representatives. Within six weeks after the issue of the policy the assured was murdered, and suspicion fell upon one Hunter, who held an assignment of the aforesaid policy, and who had been very

officious in procuring it to be issued to Armstrong. Upon a trial duly had Hunter was convicted of the aforesaid murder, and was accordingly hanged. The company set up several defenses to the action, one of which was that the policy was obtained by Hunter with the intent to cheat and defraud the company by compassing the death of the assured by felonious means and collecting the amount of the insurance,—a design which he attempted to carry out by causing the death of the assured. Mr. Justice Field, in delivering the opinion of the court, discussed the right of the company to show that Hunter had in like manner procured to be issued other policies of insurance in the same manner as he had procured the issue of the policy upon which a recovery was sought. No other discussion, except incidentally of the assignability of the policy, is to be found in the opinion of Justice Field, though in closing it he said: "But independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of the party whose life he had feloniously taken; as well might he recover insurance money upon a building which he had willfully fired." No representative of Hunter was a party to the suit, and the language quoted was, therefore, in so far as it referred to the rights of Hunter, mere *obiter dictum*.

It may be that our statement, that the language above quoted was the only language which bore on the proposition which we have under consideration, should in a slight degree be qualified. That it may be literally exact, a quotation will be made of expressions used argumentatively by Justice Field in his discussion of the admissibility of the evidence of the contemporaneous conduct of Hunter, to which reference has heretofore been made. He said: "The

assignment conveying to Hunter the whole interest of the assured, his representatives alone would have a valid claim under it if the policy were not void in its inception. Proof, therefore, that he caused the death of the assured by felonious means must necessarily have defeated a recovery, and the court erred in refusing to admit testimony tending to prove that such was the fact." The language of Justice Field first above quoted, standing alone, is inapplicable to the facts stated in his opinion. From the statement of the case which he was discussing, considered in connection with the quotation from his opinion last made, it is evident that both his quotations had reference to the admissibility of proffered evidence of like contemporaneous conduct of Hunter. From his opinion, as an entirety, it is evident that proof of this conduct was deemed admissible because of the relationship of Hunter to the policy, independently of the assignment thereof to him. If, as it was claimed, the evidence showed that Hunter acted as the agent of the assured, or in the interest of the assured in obtaining the issue of the policy in question, his own fraudulent conduct was rightfully considered in determining the validity of such policy as forming a basis for a recovery, no matter though the action had been brought by the representative of the assured. As the language quoted was pertinent to the issues presented, and the rights of the parties depended on no other theory, it must be assumed that upon this theory alone the case was decided. While this view renders the quoted language applicable to matters under discussion, it in equal degree renders it foreign to the facts of the case at bar. This court was, therefore, mistaken in assuming that the analogies of the case of the *New York Mutual Life Ins. Co. v. Armstrong*, *supra*, were, as applied to the case at bar, "immediate and certain."

The majority opinion in *Riggs v. Palmer*, 115 N. Y., 506, was, however, that upon which the former conclusion of this court was specially based. In the statement of

that case it was said that "this action was brought to have the will of Francis B. Palmer, deceased, so far as it devises and bequeaths property to Elmer E. Palmer, canceled and annulled." The facts involved, as given by Earle, J., in delivering the majority opinion, were as follows: "On the 13th day of August, 1880, Francis B. Palmer made his last will and testament, in which he gave small legacies to his two daughters, Mrs. Riggs and Mrs. Preston, the plaintiffs in this action, and the remainder of his estate to his grandson, the defendant Elmer E. Palmer, subject to the support of Susan Palmer, his mother; with a gift over to the two daughters, subject to the support of Mrs. Palmer, in case Elmer should survive him and die under age, unmarried and without any issue. The testator at the date of his will, owned a farm and considerable personal property. He was a widower, and thereafter, in March, 1882, he was married to Mrs. Bresee, with whom, before his marriage, he entered into an ante-nuptial contract, in which it was agreed that in lieu of dower and all other claims upon his estate, in case she survived him, she should have her support upon his farm during her life, and such support was expressly charged upon the farm. At the date of the will, and subsequently to the death of the testator, Elmer lived with him as a member of his family, and at his death was sixteen years old. He knew of the provisions made in his favor in the will, and that he might prevent his grandfather from revoking such provisions, which he had manifested some intention to do, and to obtain the speedy enjoyment of possession of his property he willfully murdered him by poisoning him. He now claims the property, and the sole question for our determination is, can he have it?" Much of the opinion of Judge Earle was devoted to a defense of what he calls "rational interpretation." Quoting from Rutherford's Institutes, he said: "When we make use of 'rational interpretation,' sometimes we restrain the meaning of the writer so as to take in less,

and sometimes we extend or enlarge its meaning so as to take in more than his words express." In the former opinion filed in this case there is quoted approvingly from the aforesaid majority opinion, delivered by Judge Earle, this language: "It is a familiar canon of construction that a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers." The language just quoted was originally used with reference to the construction of a will, but was by COBB, C. J., applied to our statute of descent. For this reason it will hereinafter be considered as though applicable to statutory construction. The conclusion reached by the reasoning of Judge Earle in *Riggs v. Palmer*, as well as that in this case, was based very largely on that species of judicial legislation above characterized as "rational construction." If courts can thus enlarge statutory enactments by construction, it may be that the references in the majority opinion in *Riggs v. Palmer* to the provisions of the civil law were very apt as illustrating how, by rational interpretation, our statutes should be made to read. This reference to the civil law was as follows: "Under the civil law, evolved from the general principles of natural law and justice by many generations of jurisconsults, philosophers, and statesmen, one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered. (Domat's Civil Law, part 2, book 1, tit. 1, sec. 3; Code Napoleon, sec. 727; Mackeldy's Roman Law, 530–550.) In the Civil Code of Lower Canada the provisions on the subject in the Code Napoleon have been substantially copied." If our statutes of descent contained the above provisions, there would be no difficulty in sustaining the conclusion reached in the former opinion. It is because of their absence that the difficulty arises. The necessity of resorting to what is denominated "rational interpretation"

is a confession that our statute in that respect falls short of what it is deemed proper it should have provided. Indeed, there are expressions in the former opinion which in terms very nearly confess that the result reached was by judicial legislation. An instance of this is found in the following quotation therefrom: "I quite agree with the court of appeals that had it been in the minds of the framers of our statute of descent that a case like this would arise under it, they would have so framed the law that its letter would have left no hope for the obtaining of an inheritance by such means."

Similar illustrations and applications of the principle of rational interpretation to those made use of by the writer of the majority opinion in *Riggs v. Palmer* will be found referred to in Sedgwick on the Construction of Statutory and Constitutional Law, at the beginning of the sixth chapter. They are commented on in this language: "These and similar discussions have amused the fancy and exhausted the arguments of text-writers. I cannot, however, consider them of much value for the student of jurisprudence. Ours is eminently a practical science. It is only by an intimate acquaintance with its application to the affairs of life, as they actually occur, that we can acquire that sagacity requisite to decide new and doubtful cases. Arbitrary formulæ, metaphysical subtleties, fanciful hypotheses, aid us but little in our work." Later on in the same chapter this author says: "We may, therefore, affirm, as a general truth, that independently of constitutional questions, and independently of those doctrines of liberal and strict construction which really, as I have said, vest a sort of legislative power in the judge, the object, and the only object, of judicial investigation, in regard to the construction of doubtful provisions of statute law, is to ascertain the intention of the legislature which framed the statute. This rule, though often asserted, has been in practice frequently lost sight of; but there is abundant authority to sustain it.

'The only rule,' says Lord Ch. J. Tindal, 'for the construction of acts of parliament is, that they should be construed according to the intent of the parliament which passed the act;' [citing *Dukedom of Sussex*, 8 London Jur., 795]. The rule is, as we shall constantly see, cardinal and universal, that if the statute is plain and unambiguous, there is no room for construction or interpretation. The legislature has spoken; their intention is free from doubt, and their will must be obeyed. 'It may be proper,' it has been said in Kentucky, 'in giving a construction to a statute, to look to the effects and consequences when its provisions are ambiguous, or the legislative intention is doubtful; but when the law is clear and explicit, and its provisions are susceptible of but one interpretation, its consequences, if evil, can only be avoided by a change of the law itself, to be effected by legislative and not judicial action; [citing *Bosley v. Mattingly*, 14 B. Monroe [Ky.], 89]. So, too, it is said by the supreme court of the United States: 'Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction;" [citing *United States v. Fisher*, 2 Cranch, 358–399; *Case v. Wildridge*, 4 Ind., 51].

GANTT, J., delivering the opinion of this court in *Hurford v. City of Omaha*, 4 Neb., 352, said: "It is said that 'no principle is more firmly established, or rests on a more secure foundation, than the rule which declares, when a law is plain and unambiguous, whether it be expressed in general or limited terms, that the legislature shall be intended to mean what they have plainly expressed;' and again, that the intention of the legislature should control absolutely the action of the judiciary. Where that intention is clearly ascertained, the courts have no other duty to perform than to execute the legislative will, without any regard to their own views as to the wisdom or justice of

the particular enactment. (Sedg. on Stat. and Con. Law, 325.)"

In our statute of descent there is neither ambiguity nor room for construction. The intention of the legislature is free from doubt. The question is not what the framers of our statute of descent would have done had it been in their minds that a case like this would arise, but what in fact they did, without perhaps anticipating the possibilty of its existence. This is determined, not by hypothetical resort to conjecture as to their meaning, but by a construction of the language used. The majority opinion in *Riggs v. Palmer*, as well as the opinion already filed in this case, seem to have been prompted largely by the horror and repulsion with which it may justly be supposed the framers of our statute would have viewed the crime and its consequences. This is no justification to this court for assuming to supply legislation, the necessity for which has been suggested by subsequent events, but which did not occur to the minds of those legislators by whom our statute of descent was framed. Neither the limitations of the civil law nor the promptings of humanity can be read into a statute from which, without question, they are absent, no matter how desirable the result to be attained may be. The legislature of this state, in 1873, adopted chapter 21, Compiled Statutes, providing for compensation for the widow and next of kin of a person whose death is caused by the wrongful act of another, even when such wrongful act amounts to a felony. This created a right of action which, but for the statute, would have had no existence. The facts of the case at bar may impress upon some future legislature the necessity of an amendment of our law of descent. From that source alone can such an amendment come. Originally, it is probable that the necessity for the act of 1873 was suggested by a case of hardship. The case at bar may prompt other legislation with respect to our statute of descent.

As the case of *Riggs v. Palmer* afforded the precedent which strongly influenced this court in reaching the conclusion heretofore announced, it will be profitable, as illustrating the dangers attending the use of case law, to call attention to a portion of the opinion delivered by Judge Earle, and to his misplaced reliance upon *New York Mutual Life Ins. Co. v. Armstrong, supra,* of which an analysis has hereinbefore been given. He said: "Besides, all laws, as well as all contracts, may be controlled in their operation and effect by general fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes. They were applied in the decision of the case of *New York Mutual Life Ins. Co. v. Armstrong,* 117 U. S., 591. There it was held that the person who procured a policy upon the life of another, payable at his death, and then murdered the assured to make the policy payable, could not recover thereon. Mr. Justice Field, writing the opinion, said: 'Independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken; as well might he recover insurance money upon a building that he had willfully fired.'" It is apparent from this quotation that the author of the opinion assumed that the action in the case of *New York Mutual Life Ins. Co. v. Armstrong* was brought by the representative of Hunter, and not by the representative of the assured. This misapprehension of the real interests in

controversy, and which were really adjudicated in that case, influenced the majority of the court of appeals of New York, and, by the superadded force thereby given it, this court was also led into error by the majority opinion in *Riggs v. Palmer*. From the application of an improper rule for the construction of statutes, and from the evident misconception of the points decided in *New York Mutual Life Ins. Co. v. Armstrong, supra*, we are led to believe that a rehearing was very properly granted in this case, and that it should be determined independently of the controlling force which at first was accorded to the cases cited, as supporting the views already announced in the opinion heretofore filed.

Reference has hereinbefore been confined to the majority opinion in *Riggs v. Palmer, supra*. Two of the seven judges, constituting that court, dissented. Gray, J., wrote the dissenting opinion, in which he said: "I cannot find any support for the argument that the respondent's succession to the property should be avoided because of his criminal act, when the laws are silent. Public policy does not demand it, for the demands of public policy are satisfied by the proper execution of the laws and the punishment of the crime. There has been no convention between the testator and his legatee, nor is there any such contractual element in such a disposition of property by a testator as to impose or imply conditions in the legatee. The appellant's argument practically amounts to this: That as the legatee has been guilty of a crime, by the commission of which he is placed in a position to sooner receive the benefits of the testamentary provision, his rights to the property should be forfeited, and he should be divested of his estate. To allow their argument to prevail, would involve the diversion by the court of the testator's estate into the hands of persons whom, possibly enough, for all we know, the testator might not have chosen or desired as its recipients. Practically the court is asked to make another will

for the testator. The laws do not warrant this judicial action, and mere presumption would not be strong enough to sustain it." This language commends itself as more nearly correct in principle, as applied to the case at bar, than to the case in which it was used, for in the latter it applied to the result effected by a will duly executed and probated. In the case at bar there is presented for determination the effect of a statute under and by virtue of which there is vested a certain estate, independently of every other consideration than the death of the ancestor. The force of this distinction is the more apparent when we recall the fact that the case of *Riggs v. Palmer* was brought to have the will of the testator canceled and annulled in so far as it devised and bequeathed property to the testator's murderer. Under such circumstances it might be very plausibly urged that if the testator had understood that his murder had been contemplated by his legatee to prevent the possibility of a revocation of the bequest to him, such revocation would have speedily followed, and upon this assumption the court might have been asked, with a show of propriety, to declare the revocation, which, but for the wrongful act of the legatee, would have deprived him of the bequest in his favor. It is not to be understood that we undertake to determine this either way. What we mean is, merely to illustrate the fact that in the case of *Riggs v. Palmer* the question of properly inferable unconsummated intention might have been plausibly urged, while in the case at bar there is no room even for plausibility.

The case of *Owens v. Owens*, 100 N. Car., 240, was where a widow was convicted of being accessory before the fact for the murder of her husband. She afterwards brought suit to have her dower assigned in the real property of which her husband died seized. As applicable to the facts of the case at bar, we quote from the opinion delivered in that case, as follows: "The natural feeling in-

spired by her proved co-operation in the unnatural and wicked act of taking her husband's life, and thus availing herself of the generous provision of the law that secures her surviving a home for life, is repugnant to a claim preferred under such circumstances of perfidy to the marital relations. In the absence of authority, the well instructed and able judge who tried the cause ruled against the allowance of dower, as it would in fact be 'to reward crime' by conferring benefits that result from and are procured by its commission. We feel ourselves unable to concur in this conclusion, for the reason that, while the law gives the dower and makes it paramount to the claims of creditors even, there is no provision for its forfeiture for crime, however heinous it may be, and even when the husband is its victim. The only statutory provision which, for criminal misbehavior, bars an action prosecuted for the recovery of dower is where she shall commit adultery, and shall not be living with her husband at his death. * * * As there is no other act of the wife which by statute known to us works a forfeiture, we do not see how any legal obstacle can be in the way of her seeking to get what the law in unqualified terms gives her." These conclusions have the countenance of other courts of more limited jurisdiction than those whose views have been given, but whose powers of discernment should not therefore be underestimated.

In the circuit court of Preble county, Ohio, the case of *Deem v. Milliken* was determined, and is found reported in 6 Ohio Circuit Court Rep., 357. The opinion of the three judges comprising that court was delivered by Shauck, J. The defendants in error, by their answers and cross-petitions, alleged, in the court of common pleas, that Caroline Sharkey died intestate January 11, 1889, seized in fee of certain real estate, leaving surviving her a son, Elmer L. Sharkey, her sole heir at law; that thereafter Elmer executed to the defendants in error several mortgages to secure the payment of certain promissory notes. Their cross-

petition contained appropriate averments as to the execution of the notes and mortgages, and for the assertion of a lien upon said real estate by virtue thereof. Answering this cross-petition, the plaintiffs in error, who are brothers and sisters of said Caroline Sharkey, deceased, admitted that said Elmer L. Sharkey was the son and only child of said Caroline Sharkey; that she died intestate, and alleged that on or about the 11th day of January, 1889, the said Elmer L. Sharkey murdered his mother for the purpose of succeeding to her title to the real estate, and that by due process of law he had been hanged on December 19, 1890, wherefore the plaintiffs in error alleged that said real estate did not descend to said Elmer L. Sharkey. In the court of common pleas demurrers to these answers were sustained, and distribution was ordered in favor of the mortgagees. In the opinion delivered in the circuit court, on error, the following apt and forcible language occurs: "The statute of descents neither recognizes a mischief nor provides a remedy. It is a legislative declaration of a rule of public policy. With respect to remedial statutes the rule quoted has frequent and salutary operation. The mischief and the remedy indicate the intention of the legislature and guide the court in giving it effect; but the rule affords no warrant for adding an important exception to a statute which, in clear language, defines a rule of public policy. Even in the consideration of remedial statutes courts should be guided by the maxim '*index animi sermo*,' and the interpretation should be consistent with the language employed. Knowledge of the settled maxims and principles of statutory interpretation is imputed to the legislature. To the end that there may be certainty and uniformity in legal administration, it must be assumed that statutes are enacted with a view to their interpretation according to such maxims and principles. When they are regarded, the legislative intent is ascertained. When they are ignored, interpretation becomes legislation in disguise.

The well considered cases warrant the pertinent conclusion that when the legislature, not transcending the limits of its power, speaks in clear language upon a question of policy, it becomes the judicial tribunals to remain silent. (*Hadden v. Collector*, 5 Wall. [U. S.], 107; *Hyatt v. Taylor*, 42 N. Y., 258; *In re Powers*, 25 Vt., 261; *State v. Liedtke*, 9 Neb., 468; *Flint Plank Road Co. v. Woodhull*, 25 Mich., 99; *Jewell v. Weed*, 18 Minn., 272; *Woodbury v. Berry*, 18 O. St., 456; *Bruner v. Briggs*, 39 O. St., 478; *Kent v. Mahaffey*, 10 O. St., 204.) The decision in *Riggs v. Palmer* is the manifest assertion of a wisdom believed to be superior to that of the legislature upon a question of policy. Chief Justice Redfield (*In re Powers*) observes: 'It is scarcely necessary, we trust, at this late day, to say that the judicial tribunals of the state have no concern with the policy of legislation.'"

It is unnecessary to enlarge upon this subject. We cannot, however, forbear observing that the title vested in Leander Shellenberger by operation of law, and was dependent upon no condition, not even his acceptance. Upon the death of Maggie Shellenberger, the title vested in her father *eo instanti*. The language of section 30, chapter 23, Compiled Statutes, is comprehensive and free from ambiguity, and we have been able to find no justification for interference with it.

The former opinion filed in this case is disapproved and the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. FIRST NATIONAL BANK OF STANTON, NEBRASKA, V. H. E. OWEN ET AL.

FILED JUNE 27, 1894. No. 5623.

1. **County Boards: DUTIES: DEPOSITORIES: APPLICATIONS: BONDS.** Under the provisions of chapter 50, Session Laws of 1891, it is the duty of the county board to act on the propositions of each bank to become a depository of current funds of the county, as well as to approve the bond incident to that relation.

2. ———: ———: ———: **MANDAMUS.** The mere fact that a county treasurer has assumed to designate the bank in which he himself shall deposit current funds of the county, and to fix the penal sum of the necessary bond, confers upon the bank designated no right by *mandamus* to compel the county board to approve the sufficiency of the sureties on such bond.

ORIGINAL application for *mandamus*.

John A. Ehrhardt, for relator.

C. C. McNish, *W. W. Young*, *A. A. Kearney*, and *Barnes & Tyler*, *contra*.

RYAN, C.

This was an original application in this court, made in 1892, for a *mandamus* to compel H. E. Owen, F. P. Carroll, and John W. Tyler, county commissioners of Stanton county, to approve a bond for the safe keeping of the current funds of Stanton county. The county treasurer was made a defendant, the prayer as to him being that, upon the approval of the bond above referred to, he should be required to deposit the said funds with the relator, the First National Bank of Stanton. This last prayer was entirely unnecessary, for from the whole record, including briefs of counsel, it is very evident that the said treasurer was exceedingly anx-

ious to make the deposit according to the relator's prayer. This county treasurer received the application of the relator, approved it and accepted it, provided a bond of $50,000 should be given and be accepted by the county board, and said board was immediately notified of this action of the treasurer. The case was referred for findings as to certain facts alleged to exist. The referee found, and it is uncontradicted, that the county treasurer was a stockholder and director of the relator. On the 12th of July, 1892, Mr. Pilger, the county treasurer, notified the relator that its proposition had been accepted. The Stanton State Bank, on the 14th of July, offered to pay for the privilege of keeping the deposits five per cent per annum, reckoned on the daily average balances. This was one and one-half per cent higher than had been offered by the relator. It was found by the referee that Mr. Carroll, one of the county commissioners, was a stockholder and director in the aforesaid Stanton State Bank, but it was also found that each of the two banks was solvent, and no doubt is suggested as to the sufficiency of the bond of either. The question presented is, whether or not the county commissioners should by *mandamus* be compelled to approve the bond tendered by the relator.

Chapter 50 of the Session Laws of 1891 requires the county treasurer of every county in this state to deposit at all times, and keep in deposit for safe keeping, in state or national banks, the amounts of the several current funds on hand. Payments are to be made as demanded by the county treasurer, on his check. The depository banks are required to pay for the privilege of keeping such deposits interest amounting to not less than three per cent per annum upon the amounts deposited, subject to such regulations as are imposed by law and the rules adopted by the county treasurer for holding and receiving such deposits. For the security of the funds deposited, the county treasurer is required to exact from the depository the giving of a bond

for the safe keeping and payment of such deposits and the accretions thereof, which bond shall run to the people of the county, and be approved by the county board, conditioned that certain statements shall be made, as well as payments, as required by the county treasurer. The making of profit, directly or indirectly, by the county treasurer upon the funds belonging to the county, or improper removal of the same, is made punishable by fine and imprisonment. So also is the county treasurer's willful failure or refusal to perform any act required of him by the provisions of the chapter under consideration. The last proviso in this act is in the following language: "Sec. 11. *Provided further*, That no treasurer shall be liable on his bond for money on deposit in bank under and by direction of the proper legal authority, if said bank has given bond." The relator asserts, in effect, that the proper legal authority under and by whose direction are to be made the deposits in bank is the county treasurer. The provisions which have any reference whatever to the duty of the county treasurer under this act have been set forth fully, and nowhere therein is there found any authority for him to direct in what bank deposit shall be made. It may be truly said that the act is silent as to this matter. In such event resort must be had to the law in force, independently of this particular statute. The general supervision of county affairs and finances, including the power to make orders respecting the property of the county, are intrusted to the discretion of the county boards of the several counties. (Sec. 23, ch. 18, Comp. Stats.) As there was no attempt by the provisions of chapter 50, Session Laws, 1891, to amend the section just referred to, it must be assumed that the reference to "proper legal authority" in section 11, chapter 50, aforesaid, was to the county board, except in so far as by law it was otherwise specially provided. It would be anomalous to hold that this section (11) recognized the county treasurer as the proper legal authority to

designate in what bank deposits should be made, when by the very fact of compliance with such requirement made by himself he is released from liability on his bond. As if to illustrate the practical working of such a construction, the county treasurer in this case seeks to have designated as the place of deposit a bank in which he is a stockholder and an officer. The act expressly provided that he should be punished if he made any profit, directly or indirectly, on any county money with the custody of which he was intrusted, and yet this court is asked upon his designation of the place of deposit to require the county board to enable him indirectly to make such profit, by approving the bond which he has seen fit to require. A *mandamus* will lie for no such purpose. It may be said that one of the county commissioners is a stockholder and director of the Stanton State Bank. He is refusing to act, however, and for this reason a proceeding in *mandamus* is being prosecuted as against him. If he is acting as a partisan of the Stanton State Bank, he is reflecting little credit upon himself as an officer of the county, and is very censurable. We are not justified in ascribing to him so base a motive, and even if we did, there are two other members of this board and they could be safely trusted to act,—at least the statute devolves the duty upon a majority of the county board. The presumption is that they will perform their duty according to law, and upon them must devolve this responsibility. The relator has shown no reason whatever for the issue of the writ prayed and it is accordingly denied.

WRIT DENIED.

LEOPOLD DOLL ET AL. V. CHARLES CRUME.

FILED JUNE 27, 1894. No. 5663.

1. **Contracts:** CONSIDERATION: MUNICIPAL CORPORATIONS. The awarding of a contract by a municipal corporation for an improvement for it is a sufficient consideration to support the promise of a contractor, made to the corporation, to pay for all labor and material furnished him in executing said contract.

2. **Municipal Corporations:** AUTHORITY TO REQUIRE CONTRACTOR TO GIVE BOND TO PAY FOR LABOR AND MATERIALS. Neither an express statute of the state nor an ordinance of a municipal corporation is necessary to its authority to require of its contractor a bond to pay for all labor and material furnished him in the execution of his contract with such corporation.

3. ———: ———. *Sample v. Hale*, 34 Neb., 220, and *Lyman v. City of Lincoln*, 38 Neb., 794, followed and reaffirmed.

4. **Actions:** PROMISE FOR BENEFIT OF THIRD PERSON. Where one person makes a promise to another for the benefit of a third person, such third person can maintain an action upon the promise, although the consideration does not move directly from him. *Shamp v. Meyer*, 20 Neb., 223, and *Barnett v. Pratt*, 37 Neb., 349, followed and reaffirmed.

5. **Bonds:** PRINCIPAL AND SURETY: CONTRACTS WITH MUNICIPAL CORPORATIONS: ESTOPPEL. The city of South Omaha let a contract for grading its streets to one Davis. McGavock and Doll signed the contract as sureties for Davis. The contract provided that Davis should be paid forty-five per cent of the estimated cost of the work when two-thirds of it was completed; that Davis would complete the work in one hundred and eighty days; that he would pay for all labor and material furnished him in executing his contract; that "said parties of the third part [McGavock and Doll] hereby guaranty that the said party of the second part [Davis] will well and truly perform the covenant hereinbefore contained to pay all laborers employed on said work; and if said laborers are not paid in full by said party of the second part, that said third party hereby agrees to pay for said labor, or any part thereof, which shall not be paid by said second party within ten days after the money for said labor becomes due and payable." On completion of two-thirds

of the work the city paid Davis ninety per cent of the estimated cost thereof. The city granted Davis an extension of time for the completion of his contract beyond the time fixed therein. One Crume sued McGavock and Doll for the value of labor he had performed for Davis under his contract with the city. *Held*, (1) That the contract between the city and Davis and his sureties, and the promises and liabilities of the latter thereon, were of a dual nature,—a promise to the city that Davis should perform the work in the time and manner he had agreed, and a promise, in effect, to Crume to pay him for the labor he should perform for Davis; (2) that the city's overpaying Davis and extending the time of performance of his contract did not release the sureties from their contract to pay Davis' laborers; (3) that if the city had precluded itself from calling on the sureties to make good to it any default of Davis, its acts did not estop the laborers of Davis from enforcing against the sureties their contracts and promises.

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

Guy R. C. Read and *Francis A. Brogan*, for plaintiffs in error.

George A. Magney, contra.

RAGAN, C.

On the 28th day of January, 1890, one Oliver Davis entered into a contract with the city of South Omaha to grade certain of its streets. By the terms of this contract Davis was to have the work completed in one hundred and eighty days from the date of the contract. He promised not to assign the contract nor sublet the work. The city, on its part, agreed to pay him for the work certain of its warrants drawn on certain funds. Davis was first to grade L street, and when that was completed was to have forty-five per cent of the estimated cost of grading that street; and when two-thirds of all the work was completed he was to have another estimate of forty-five per cent of the cost of the work completed. This contract between Davis and

the city was also signed by Leopold Doll and Alexander McGavock and they signed as sureties for Davis. The work was not completed in one hundred and eighty days. The city, instead of making payments to him of forty-five per cent of the cost of the work done, paid him ninety per cent of the estimated cost of such work. On the 31st day of May, 1890, Davis assigned all his interest in the contract to a bank, and on September 8, 1890, the city granted to Davis a further time in which to complete the work under the contract. The contract contained two provisions, as follows:

"The second party [Davis] further agrees that he will pay all laborers and material-men on the work embraced in this contract."

"Said parties of the third part [Doll and McGavock] hereby guaranty that the said party of the second part [Davis] will well and truly perform the covenant hereinbefore contained to pay all laborers employed on said work; and if said laborers are not paid in full by said party of the second part, that said party of the third part hereby agrees to pay for said labor, or any part thereof, which shall not be paid by said second party within ten days after the money for such labor becomes due and payable; and this provision shall entitle any and all laborers performing labor on the improvements to be done under this contract to sue and recover from said third parties, or either of them, the amount due and unpaid to them, or either of them, by said second party; but said third party shall not be liable on this guaranty on account of said labor beyond $15,000, the estimated cost of the labor on said work."

One Charles Crume sued Leopold Doll and Alexander McGavock on this contract, in the district court of Douglas county, for labor which he had performed for Davis under his contract with the city of South Omaha. Crume had a verdict and judgment and Doll and McGavock bring the case here for review.

1. The first argument relied on here for a reversal of this judgment is that the city of South Omaha had no authority or capacity to exact from the contractor or his sureties a condition that they pay the claims of laborers. This question was before this court in *Sample v. Hale*, 34 Neb., 220, and decided adversely to the contention of the plaintiffs in error. In that case the board of public lands and buildings of the state of Nebraska had awarded a contract for the erection of a public building to one John Layne. Layne promised in his contract with the state board that he would pay for all labor and material furnished him in the erection of the building. To secure the performance of Layne's contract he, as principal, and one Hale and one Sweet, as sureties, executed a bond to the state of Nebraska. Sample furnished Layne certain material which he used in the construction of the building contracted for with the state. The material not having been paid for, Sample sued Hale and the sureties on his bond for the value of the material. The defense in the district court was that the said board had no right to insert in the contract the provision requiring Layne to pay for labor and material furnished him. This defense was sustained by the district court and Sample brought the case to this court on error, where the judgment of the district court was reversed and the defense set up in the district court overruled. The opinion was written by MAXWELL, C. J., and in the syllabus of the case it is said: "The state, when constructing a public building, is chargeable with the moral duty to protect the persons who furnish labor and material for the erection of the building as far as possible. Therefore, the provision in a contract for the erection of such building by which the contractor 'agrees to pay off and settle in full with the parties entitled thereto all accounts and claims that may become due by reason of laborers' and mechanics' wages, or for materials furnished or services rendered, so that each and all persons may re-

ceive his and their just dues in that behalf,' is not in excess of the powers of the board of public lands and buildings, and the sureties on the contractor's bond for the faithful performance of the contract will be liable for debts arising under the above provision." The question was again before this court in *Lyman v. City of Lincoln*, 38 Neb., 794. In that case the city of Lincoln had awarded a contract for the erection of an engine house to Layne & Sweet. The contract contained a provision that they would pay for all labor and material furnished them in the construction of the engine house. They gave a bond to the city to faithfully perform their agreement. Lyman furnished Layne & Sweet certain material which they used in the construction of the engine house and failed to pay for. He then sued Layne & Sweet and their sureties on the bond they had given to the city for the balance remaining due him from Layne & Sweet for the material he had furnished them. The sureties demurred to this petition and the district court sustained the demurrer. Lyman prosecuted a petition in error to this court, and it was held that the awarding of the contract by the city to Layne & Sweet was a sufficient consideration to support their promise to pay for the labor and material furnished them in the performance of said contract; and that the existence of an express statute or ordinance of the city of Lincoln was not necessary to the authority of the city to require of Layne & Sweet a bond to pay their material-men and laborers. We think these cases state the rule correctly and we adhere to them.

2. The next argument is that Crume cannot maintain this action; that, as the bond runs to the city of South Omaha, it, and it alone, can sue thereon. This question was before this court in *Shamp v. Meyer*, 20 Neb., 223, where it was held that "where one makes a promise to another for the benefit of a third person, such third person can maintain an action upon the promise, though the

consideration does not move directly from him." In *Sample v. Hale, supra*, this case was reaffirmed. This question was again before this court in *Barnett v. Pratt*, 37 Neb., 349, and the doctrine of *Shamp v. Meyer, supra*, was again adhered to, and, in addition, the court held that a promise made by one to another for the benefit of a third party and omitted from a written contract, might be proved by parol where the promisee was induced to execute the writing on the faith of the oral promise.

3. The third argument of the plaintiffs in error is that as they are sureties of Davis for the performance of his contract with the city, they have been released and are not liable on said contract by reason of the fact of the city's paying Davis ninety per cent instead of forty-five per cent of the estimated cost of the work performed by him, and by reason of the extension by the city of the time allowed Davis for completing his work under the contract. To sustain this contention we are cited by counsel for the plaintiffs in error to *Brennan v. Clark*, 29 Neb., 385, *Dorsey v. McGee*, 30 Neb., 657, and *Bell v. Paul*, 35 Neb., 240. None of these cases are in point. These are all cases in which the owner sued the contractor and his sureties for the contractor's failure to perform his contract with the owner. If this was a suit by the city of South Omaha against Davis and his sureties for some default of Davis in the manner or time of performing the work for the city, then the acts of the city in extending the time to Davis in which to perform his contract, and in overpaying him on the work performed, might be a defense to the plaintiffs in error; but this is not a suit by the city. The contract entered into by Davis as principal, and the plaintiffs in error as sureties, was dual in its nature. By this contract Davis promised the city that he would do a certain work in a certain manner at a certain time, and the plaintiffs in error guarantied to the city that Davis would perform his promises; and by the contract made with the city, Davis

and plaintiffs in error, in effect, also promised Crume that they would pay him, Crume, for any labor which he might perform for Davis in carrying out his contract with the city. The case then stands precisely as if Davis and the plaintiffs in error had made the written promise directly to Crume instead of to the city. Now, how can it be said that any act of the city in overpaying Davis or extending the time in which he might perform his contract with the city release Davis and the plaintiffs in error from their contract made with Crume? It may be that the city, by its actions, has precluded itself from recovering from the plaintiffs in error for any default of Davis in the premises, but it by no means follows that the city's action estops Crume. Suppose that Davis had borrowed one hundred dollars for ninety days from a bank, and given his note therefor, which note had been signed by the plaintiffs in error as sureties. Now if the bank, without the knowledge of the plaintiffs in error, had extended the time of the payment of this note, then such extension would have released the sureties from liability thereon; but in the case supposed, if at the time Davis borrowed the money plaintiffs in error had promised the bank that, in consideration of its lending the money to Davis, they would pay a debt of $10 which he owed to C., then any agreement between Davis and the bank for an extension of the time of payment of the note would not affect C. There is no difference in principle in the case at bar and the one supposed. Here Davis and his sureties promise the city that Davis will do certain things for it, and they also promise the city that Davis will pay certain debts to third parties, the consideration for both promises being the letting of the contract by the city to Davis. In other words, there were two contracts with one consideration to support both. There is no error in the record and the judgment of the district court is

AFFIRMED.

BEATRICE GAS COMPANY V. HIRAM R. THOMAS.

FILED JUNE 27, 1894. No. 5816.

1. **Nuisance:** POLLUTION OF WELL: DAMAGES. One who collects injurious or offensive matter upon his premises, which, by percolation, transmission through subterranean streams, or otherwise, pollutes his neighbor's well, is liable for the damages thereby sustained.
2. ———: ———: SCIENTER. It is not necessary for the recovery of such damages that the fact of the contamination of plaintiff's well was known by the defendant. It is sufficient that such contamination was the natural and probable consequence of defendant's acts.
3. ———: ———: DAMAGES. Where an injury of such character causes permanent and irremediable damage to plaintiff's land, the plaintiff should recover in one action all damages, present or prospective; but if the injury was temporary in its character and capable of being avoided in the future without permanent injury to plaintiff's land, damages can only be recovered up to the commencement of the action, the injury then being in the nature of a continuing nuisance.
4. ———: ———: ———: EVIDENCE. The fact that the injury could be avoided by digging a new well would not be a bar to the action, but would be admissible in mitigation of damages by restricting the plaintiff to such recovery as would compensate him for reasonable expenses incurred in avoiding the injury.
5. **Witnesses:** EVIDENCE OF POLLUTION OF WELL. The plaintiff having introduced evidence that other wells in the neighborhood of the source of pollution complained of were likewise affected, *held*, that evidence on behalf of the defendant to show that other wells situated at a great distance from such source were also likewise affected was admissible.

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

The facts are stated in the opinion.

W. S. Summers, for plaintiff in error:

The petition does not state a cause of action. (*Brown v.*

Illius, 27 Conn., 84*; *Terry v. Munger*, 49 Hun [N. Y.], 560; *City of Greencastle v. Hazelett*, 23 Ind., 186; *Ballard v. Tomlinson*, 26 L. R., Ch. Div. [Eng.], 194; *Upjohn v. Board of Health*, 46 Mich., 542.)

If offensive matter percolated from defendant's condense well and polluted the water in plaintiff's well and thereby became a private nuisance, it was a continuing nuisance. (*Sherman v. Fall River Iron Works Co.*, 2 Allen [Mass.], 524.)

Where a nuisance is a continuing one, in consequence of which damages are sustained, recovery is limited to damages which accrued before the action was brought. (*Omaha & R. V. R. Co. v. Standen*, 22 Neb., 343; *Close v. Samm*, 27 Ia., 503; *Nashville v. Comar*, 88 Tenn., 415.)

The manufacture of gas is not a nuisance *per se*. It is a lawful and necessary business. If gas escapes from the mains of a gas company or from its gas works, or if substances escape from its condense well, it is not liable for injuries that may result therefrom, in the absence of proof that it was negligent in the construction or care of its plant. (*Strawbridge v. City of Philadelphia*, 13 Reporter [Pa.], 216.)

Reasonable care was exercised by defendant in the disposition of the waste substances from its gas works. It was not liable for damages alleged to have been sustained by the plaintiff before it received notice of the alleged injury. (*Bartlett v. Boston Gas Light Co.*, 122 Mass., 209; *Holly v. Boston Gas Light Co.*, 8 Gray [Mass.], 123; *Hunt v. Lowell Gas Light Co.*, 1 Allen [Mass.], 343; *Terry v. City of New York*, 8 Bosw. [N. Y.], 504.)

It was the plain duty of the plaintiff to have attempted to secure another supply of water, and to have thus mitigated the alleged damages to his premises. He was not entitled to damages for permanent injuries thereto. (*Long v. Clapp*, 15 Neb., 417; *Chase v. New York C. R. Co.*, 24 Barb. [N. Y.], 273; *Bisher v. Richards*, 9 O. St., 495;

Campbell v. Miltenberger, 26 La. Ann., 72; *Terry v. New York*, 8 Bosw. [N. Y.], 504; *Van Pelt v. City of Davenport*, 42 Ia., 308; *Simpson v. City of Keokuk*, 34 Ia., 568; *Barrick v. Schifferdecker*, 123 N. Y., 52; *Nashville v. Comar*, 88 Tenn., 415; Sutherland, Damages, secs. 85, 155.)

R. W. Sabin and *J. B. Betts, contra:*

The defendant gas company is liable if it so constructed its cess-pool that the foul and noxious substances therefrom saturated the ground and penetrated the hidden and unknown veins of water feeding the plaintiff's well. (*Kinnaird v. Standard Oil Co.*, 12 S. W. Rep. [Ky.], 937; *Ottawa Gas Light Co. v. Graham*, 28 Ill., 74; *Pottstown Gas Co. v. Murphy*, 39 Pa. St., 257; *Columbus Gas Light Co. v. Freeland*, 12 O. St., 392; *Pensacola Gas Co. v. Pebley*, 5 So. Rep. [Fla.], 593; *Collins v. Chartiers Valley Gas Co.*, 21 Atl. Rep. [Pa.], 147; *Ball v. Nye*, 99 Mass., 582; Wood, Nuisances, secs. 114, 115, 116.)

It was proper to introduce proof of damages up to the time of trial. (1 Sutherland, Damages, pp. 187, 193, 196; 3 Sutherland, Damages, pp. 409-419; *Cooper v. Randall*, 59 Ill., 321; *Hayden v. Albee*, 20 Minn., 159.)

It was unnecessary for plaintiff to give defendant notice before the commencement of the action. (*Bohan v. Port Jervis Gas Light Co.*, 25 N. E. Rep. [N. Y.], 246; *Cooper v. Randall*, 53 Ill., 22; *People v. Detroit White Lead Works*, 46 N. W. Rep. [Mich.], 735; *Susquehanna Fertilizer Co. v. Malone*, 20 Atl. Rep. [Ind.], 900; *Dunsback v. Hollister*, 2 N. Y. Supp. [N. Y.], 94.)

IRVINE, C.

Thomas brought this action against the gas company, alleging that the plaintiff was the owner of a certain lot in South Beatrice and had been such owner for five years, occupying the premises as a homestead; that he dug a well thereon suitable for use; that the gas company operated

and maintained its manufactory one block from the property of the plaintiff; that contiguous to this factory the gas company made a large excavation in the ground reaching into the sand, into which it emptied all the filth and waste coming from its factory, consisting of a deadly and poisonous liquid which was absorbed into the sand and by said sand carried and percolated itself from the cess-pool through the ground to the plaintiff's well, rendering the water therein unfit for use, dangerous, and unwholesome; that by reason of the premises the plaintiff had lost his well, his land had been rendered unfit to make another well, he had been compelled to carry water necessary for household use and for stock for a long distance; that he had expended large sums of money in efforts to remedy the evil; that the value of his property had been destroyed, all to his damage in the sum of $900. The answer amounted to a general denial. There was a trial to a jury and a verdict and judgment for the plaintiff for $453.78, from which the gas company prosecutes error.

The evidence on the trial tended to show that the gas company sank what it calls a "condense well" on its own property at a distance of 492 feet from plaintiff's well; that into this condense well the company permitted to flow certain waste products; that some months after this condense well went into use it was discovered that plaintiff's well was contaminated. Some time afterwards the water became wholly unfit for use. There seems here to be a stratum of sand between beds of rock and clay. The condense well reached the sand. Plaintiff's well passed through the sand and into the rock. The odor of the water in plaintiff's well after its contamination was similar to the odor in the neighborhood of the condense well. The odor resembled that of naphtha, and there was evidence tending to show that the gas company used naphtha in its process. During the trial evidence was introduced tending to show that other wells in the neighborhood of plaintiff had been

contaminated in like manner. The admissibility of this evidence under ordinary circumstances would be at least doubtful, but under the circumstances of this case we think the action of the trial judge was correct. The evidence first came in in connection with proof that the plaintiff was compelled to carry all the water for his household use from a great distance, and he accounted for this fact by proving that a nearer well was polluted in the same manner as his own. Moreover, there were suggestions in the course of the examination of witnesses that plaintiff's well had been polluted by the voluntary act of himself or some other person. After this evidence was in, and near the close of the defendant's case, an effort was made by the gas company to show that a well had been sunk on the opposite side of the river and that the water obtained in that well was contaminated in the same manner. This evidence was excluded. The record does not show how far this well was from the gas works, but it does appear it was in another portion of the city. We think the court should have admitted this evidence. The fact that other wells at a considerable distance were likewise polluted would not conclusively show that the pollution of plaintiff's well was not due to the gas company, but it would tend in that direction, and the greater the distance the stronger the inference would be that the cause in both cases was a general cause affecting the whole region, and not the act of the gas company complained of. We are aware that the introduction of such testimony leads to the danger of introducing collateral issues into the trial. At the same time we think that such evidence was material and, within reasonable limits, should have been admitted, especially as the plaintiff had introduced proof of the contamination of neighboring wells. For this error the judgment must be reversed, but as a new trial must be had it is proper that we should consider the fundamental questions raised by the record.

The gas company contends that there could be no lia-

bility for an injury of the character complained of. This question is raised by the assignment that the petition does not state a cause of action, and by exceptions to the instructions, which were to the effect that if matter in the condense well percolated through the ground into plaintiff's well, polluting the water, then the condense well was a nuisance, for the maintenance of which the plaintiff was entitled to damages. The law on the subject, as stated in the adjudicated cases, is not in a condition very satisfying to the reason. The cases are so numerous that a complete review would be unprofitable and almost impossible. We shall select certain cases which are probably those most frequently cited and those which have served as landmarks for the discussion.

In a number of cases, of which *Acton v. Blundell*, 12 M. & W. [Eng.], 324, is representative, it has been held that the law in relation to surface water-courses is not applicable to subterranean streams, and that a proprietor has no cause of action because of the fact that another, by sinking a well or by the proper opening of a mine, taps a subterranean water-course and deprives such proprietor of the water supply for his own well. This doctrine is put chiefly upon the ground that the existence, course, and extent of a subterranean water-course must be largely unknown; a reason not altogether satisfactory. In such cases the maxim is applied that the proprietor of land owns from the center of the earth to the heavens. The applicability of this maxim is doubtful, for the reason that it would seem to apply as well to a stream on the surface as to a subterranean stream. Still we think the doctrine must be accepted because of its firm establishment, and upon the principle that each proprietor is entitled to the use of such streams while on his premises, although the effect of that use may be to diminish his neighbor's use thereof. Together with these cases came a series represented by *Womersley v. Church*, 17 L. T. Rep., n. s. [Eng.], 190, wherein

it was held that a man has no right to place offensive matter upon his land where percolation through the soil takes place, contaminating his neighbor's well, and that for such acts an action may be maintained. In *Ball v. Nye*, 99 Mass., 582, this doctrine was followed where a vault had been constructed from which percolation took place through the soil to the injury of another's well and cellar. Following these cases came a series best represented by *Brown v. Illius*, 27 Conn., 84, and *Ballard v. Tomlinson*, 26 L. R., Ch. Div. [Eng.], 194, wherein it was attempted to reconcile the two classes of cases we have referred to, by drawing a distinction between a percolation through the soil and a contamination produced by means of a subterranean water-course, it being said that if a man had no right of action because his supply of water was cut off by tapping the subterranean stream he could have no right of action because it was polluted through such subterranean stream. This was, we think, a *non-sequitur*. While a man may use water from a stream to the diminution of his neighbor's supply, it does not follow that he may pollute the water and pass it on to him in its polluted state. So in the case of subterranean streams, I have, as much as my neighbor, the right to tap them and use them while they are on my premises, and he cannot complain of that use; but it does not follow that I may contaminate them on my premises and permit the pollution to pass upon my neighbor's. The fallacy referred to drove the courts to the distinction pointed out. The effect of such distinction would give the plaintiff here a right of action, provided he could prove that the offensive matter percolated through the soil to his well without the aid of a subterranean water-course, but would deprive him of his action in case such water-course was a conductor of the offensive matter. It is rather strange that so absurd a distinction should have obtained such strong support in the authorities. It has even received the approval of Judge Cooley in *Upjohn v.*

Richland Township, 46 Mich., 542, but that case is not authority in support of the doctrine, for the reason that Judge Cooley's remarks in that case are clearly *obiter* and the case was decided upon other grounds. The fallacy of these cases has recently been recognized by the courts, and the more recent decisions tend strongly to overthrow this doctrine, which seemed in danger of becoming fixed in our law by repeated decisions.

Collins v. Chartiers Valley Gas Co., 139 Pa. St., 111, was a case where the gas company, in digging a well for natural gas, tapped a fresh-water water-course and also a salt water stream. By negligence in its manner of drilling its well the salt water was commingled with the fresh water, injuring a spring of plaintiff. It was held that the defendant was liable because of this unnecessary injury of plaintiff's property.

In *Pensacola Gas Co. v. Pebley*, 25 Fla., 381, *Ballard v. Tomlinson* was distinguished upon the theory that in *Ballard v. Tomlinson* the pollution had been caused by the plaintiff himself in pumping his own well so as to draw water from the other. In drawing this distinction the court went perhaps too far to sustain the English case; but we think the conclusion reached was in accordance with sound principle, to-wit, that it was the duty of the gas company to confine the refuse from its works so that it could not enter upon and injure its neighbors, and if it failed to do so, it was at its peril.

The most satisfactory exposition of the subject which has come to our notice is found in the case of *Kinnaird v. Standard Oil Co.*, 89 Ky., 468, where, after a review of some of the cases already referred to, the court says: "It seems to us, after a careful review of the authorities referred to by counsel for the corporation, all of which are entitled to great weight, that there is a manifest distinction between the right of the owner of land to use the underground water upon it that originates from percolation, or

is found in hidden veins, and the right to contaminate it so as to injure or destroy the water when passing to the adjoining land of his neighbor. It is a familiar doctrine, that one must so use his property as not to injure his neighbor; and, because the owner has the right to make an appropriation of all the underground water, and thus prevent its use by another, he has no right to poison it, however innocently, or to contaminate it, so that when it reaches his neighbor's land it is in such condition as to be unfit for use, either by man or beast. One may be entitled, by contract with his neighbor, to all the water that flows in a stream on the surface that passes through the land of both, and, while he can thus appropriate it, he has no right to pollute the water in such a manner as, when it passes to his neighbor, its use becomes dangerous or unhealthy to his family, or to the beasts on his farm. As soon as the water leaves the land of the one who claims the right to use it, and runs on the land of another, the latter has the same right to appropriate it, and, if property, it then becomes as much the property of the last as the first proprietor. The owner of land has the same right to the use and enjoyment of the air that is around and over his premises as he has to use and enjoy the water under his ground. He is entitled to the use of what is above the ground as well as that below it; and, still, it will scarcely be insisted that he can poison the atmosphere with noxious odors that reach the dwelling of his neighbor to the injury of the health of himself or family; if not, we see no reason why he should be permitted to so contaminate the water that flows from his land to his neighbor's, producing the same results, and still escape liability for the damages sustained; and whether the water escapes the one way or the other is immaterial."

Our conclusion is, therefore, that the distinction made in the earlier cases is not well founded, and that one who collects injurious or offensive matters upon his premises, which, by percolation, transmission through subterranean streams,

or otherwise, pollutes his neighbor's well, is liable for the damages sustained.

The defendant contends that no action will lie for any damages sustained prior at least to the time when defendant had notice of the injury. We can see no force in this contention. It is true that some of the cases base the right to recover upon defendant's knowledge that he was committing the injury. But the injury was as great before as after notice. An action in tort is not a proceeding to punish a defendant for a willful act but to compensate the plaintiff for the invasion of his rights. It was not necessary, in order to constitute the pollution of the well a tort, that it should be done willfully. The most that can be said is that the defendant would not be liable for damages unless the injury was one which was the natural and probable consequence of his acts. While the defendant may not have known and probably did not know that its condense well would pollute the plaintiff's well, it was bound to know that the natural and probable consequence of collecting waste matter in its condense well would be the injury of some wells which might be connected with the condense well by the stratum of sand referred to.

Complaint is also made of the court's instruction in regard to the measure of damages, for the reason that it allowed the jury to take into consideration all damages sustained to the time of trial. It was held in *Omaha & R. V. R. Co. v. Standen*, 22 Neb., 343, that a bridge negligently constructed so as to make an unlawful obstruction to the Platte river, injuring land above the bridge, was a continuing nuisance, for which damages could only be recovered to the time that action was brought. We presume this was upon the theory that there was no permanent injury to the land and that the damages only existed while the bridge was maintained in the manner complained of. The general policy of the law is to avoid multiplicity of actions and if practicable, without injustice, to afford compensation

in one action for all injuries. We think the rule is stated correctly in Wood, Nuisances, section 869, as follows: "Where the damages are of a permanent character, and go to the entire value of the estate affected by the nuisance, a recovery may be had of the entire damages in one action. Thus, in an action for overflowing the plaintiff's land by a mill-dam, the land being submerged thereby to such an extent and for such a period as to make it useless to the plaintiff for any purpose, the jury were instructed to find a verdict for the plaintiff for the full value of the land. So, too, when a railroad company by permanent erections imposed a continuous burden upon the plaintiff's estate, which deprived the plaintiff of any beneficial use of the portion of the estate so used by it, it was held that the whole damage might be recovered at once; but where the extent of a wrong may be apportioned from time to time, and does not go to the entire destruction of the estate, or its beneficial use, separate actions not only may but must be brought to recover the damages sustained." There was in the case under consideration evidence that the value of plaintiff's property had been diminished by the contamination of the well. The inquiry we think should have been as to whether or not the defendant's acts had caused a permanent and irremediable injury to plaintiff's property. If so, the plaintiff was entitled to compensation in this action for all such injury, present or prospective. If, on the other hand, the injury was temporary in its character and capable of being avoided in the future without permanent injury to plaintiff's freehold, the case was one of a continuing nuisance, and damages should have been restricted to the commencement of the action.

There is some discussion in the briefs of the law of avoidable consequences as applied to the case. The court properly refused to instruct the jury that there could be no recovery because plaintiff had not endeavored to pro-

cure a good well upon his premises. His failure to do so would not be a defense to the action, but would go in mitigation of damages, provided the jury should find that by making another well the injury could be avoided, and it is for the same reason that the plaintiff would be entitled to recover any reasonable expenses he might have incurred in an effort to purify the old well or obtain a new one.

For the errors referred to the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1894.

PRESENT:

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

ORIN P. WHIPPLE v. LUCY D. FOWLER.

FILED SEPTEMBER 18, 1894. No. 5614.

1. **Pleading:** AMENDMENT TO CONFORM TO TESTIMONY: TRIAL. Where, upon the trial of an action, testimony is admitted without objection, it is not error for the court to permit the pleadings to be amended to conform to the proof.

2. **Trial to Court:** ADMISSION OF INCOMPETENT TESTIMONY: REVIEW. In a cause tried to the court without the intervention of a jury, the admission of incompetent testimony is not reversible error.

3. **Mortgages:** RELEASE: ESCROW: EFFECT OF UNAUTHORIZED DELIVERY. Where a mortgagee executes a release of a mortgage and places the same in the hands of a third party to be deliv-

ered to the mortgagor upon his paying the mortgage debt, which condition the mortgagor never performed, and the release is placed upon record without the knowledge or consent of the mortgagee, neither the mortgagor, nor one who is not a *bona fide* purchaser without notice, will acquire any rights or advantage by the recording of such release.

4. **A mortgage of real estate** is regarded as a mere incident of the debt, which, by the legal transfer of the debt, passes with it to the assignee.

5. **Unauthorized Satisfaction of Mortgage:** LIEN: BONA FIDE PURCHASERS. A satisfaction entered on the record by a mortgagee, after he has sold and delivered the notes secured by the mortgage to a third party, will protect a subsequent mortgagee in good faith, or *bona fide* purchaser, of the mortgaged premises, in case he had no notice at the date of the purchase, or the payment of the consideration, that the debt was assigned, or was unpaid, or that the release was unauthorized; but as to all other persons the lien of the mortgage will not be impaired.

6. **Conflict of Laws:** LEX REI SITÆ: MORTGAGES: ASSIGNMENT OF NOTES: DISTRIBUTION OF PROCEEDS. In the state of Iowa the rule is that the transfer of one of several notes, maturing at different times and secured by the same mortgage, operates as an assignment *pro tanto* of the mortgage, and that the proceeds arising from the sale of the mortgaged property would be applied first to the payment of the notes in the order of time in which they fell due; but in this state, in such a case, the several holders are entitled to share *pro rata* in the proceeds.

7. ———: ———: ———. In the construction by the courts of this state of a mortgage executed in Iowa, upon real estate situate in that state, the *lex rei sitæ*, or the law of Iowa, governs.

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

The facts are stated in the opinion.

Mockett, Rainbolt & Polk, for plaintiff in error, contending that the release discharged the lien of the mortgage and that the mortgaged premises cannot be subjected to the payment of the notes held by plaintiff, cited: *Executors of Swartz v. Leist*, 13 O. St., 419; *Torrey v. Deavitt*, 53 Vt.,

331; *Fox v. Wray*, 56 Ind., 423; *Reeves v. Hayes*, 95 Ind., 532; Thomas, Mortgages [2d ed.], sec. 421; Jones, Mortgages [4th ed.], secs. 472, 791, 820, 878, 967; *Ahern v. Freeman*, 24 Am. St. Rep. [Minn.], 206; *Blight v. Schenck*, 51 Am. Dec. [Pa.], 478.

The defendant is liable for damages caused by executing the release and permitting it to be filed. (1 Jones, Mortgages [4th ed.], sec. 814; Thomas, Mortgages [2d ed.], sec. 358; *Fox v. Wray*, 56 Ind., 423; *Lincoln v. Purcell*, 73 Am. Dec. [Tenn.], 196; *Ferris v. Hendrickson*, 1 Edwards' Ch. [N. Y.], 132.)

The court erred in admitting the evidence of George M. Traver on the question of value. The witness had not shown himself competent to testify. (*Missouri P. R. Co. v. Coon*, 15 Neb., 232.)

Ricketts & Wilson, contra:

A deed deposited in escrow, to be delivered on conditions named, does not become the deed of the maker until the conditions have been complied with; and any delivery of the deed prior to the performance of the conditions, or any placing thereof of record prior to the performance of the conditions, does not give to the deed any validity whatever. (*Stanley v. Valentine*, 79 Ill., 544; *Smith v. South Royalton Bank*, 32 Vt., 341; *People v. Bostwick*, 32 N. Y., 450; *Everts v. Agnes*, 4 Wis., 356; *Black v. Shreve*, 13 N. J. Eq., 458; *Dyson v. Bradshaw*, 23 Cal., 536; *Ogden v. Ogden*, 4 O. St., 191.)

When the defendant in error had transferred the debt secured by the mortgage, she had no power to release the mortgage of record, and any attempt at release would be a nullity. (*Studebaker Mfg. Co. v. McCargur*, 20 Neb., 500; *Daniels v. Densmore*, 32 Neb., 40; *Reeves v. Hayes*, 95 Ind., 521; *James v. Morey*, 2 Cow. [N. Y.], 246; *Lee v. Clark*, 89 Mo., 553; *Wolcott v. Winchester*, 15 Gray [Mass.], 461; *Burhans v. Hutcheson*, 25 Kan., 625.)

The sale and delivery, before maturity, of mortgage notes carry with them an assignment of the real estate security; and satisfaction of the mortgage by the payee, after he sold and delivered the notes, is a mere nullity, and can neither weaken the security of the notes sold, nor strengthen the title of the party who afterwards buys the land. Parties buying mortgaged premises must at their peril ascertain who owns the notes and whether the same have been actually paid. (*Lee v. Clark*, 1 S. W. Rep. [Mo.], 142; *Vandercook v. Baker*, 48 Ia., 199; *Scott v. Field*, 75 Ala., 419; *Martindale v. Burch*, 57 Ia., 291; *Brayley v. Ellis*, 32 N. W. Rep. [Ia.], 254; *Treadwell v. Brooks*, 50 Conn., 262.)

The record of the mortgage was sufficient to lead a prudent man to inquire as to the payment of the notes. Wright was not a *bona fide* purchaser. (*Burhans v. Hutcheson*, 25 Kan., 625; *Campbell v. Vedder*, 3 Keys [N. Y.], 174.)

A vendee who has notice of adverse rights before payment is not a *bona fide* purchaser. (2 Pomeroy, Equity Jurisprudence, 715; *Kitteridge v. Chapman*, 36 Ia., 348; *Roseman v. Miller*, 84 Ill., 297; *Haughwout v. Murphy*, 21 N. J. Eq., 118.)

NORVAL, C. J.

This was an action to recover damages for the wrongful releasing of record of a certain real estate mortgage by Lucy D. Fowler, the mortgagee, after she had transferred to the plaintiff, Orin P. Whipple, two of the promissory notes secured by said mortgage, and before said notes had been paid. Upon a trial to the court there was judgment for the defendant, to reverse which the plaintiff prosecutes error to this court.

The undisputed facts, as disclosed by the record, may be summarized thus: M. C. and A. A. Hazard on the 16th day of October, 1888, executed and delivered to the defend-

ant their thirty-four promissory notes, aggregating the sum of $7,000; one for the sum of $500, due February 12, 1889, $100 maturing March 12, 1889, and the remaining thirty-two notes for the sum of $200 each, one payable on the 12th day of April, 1889, and one falling due on the 12th day of each month thereafter. To secure the payment of the said several notes, the Hazards executed and delivered to the defendant a mortgage on lots 841, 842, and 843, in the town of Shenandoah, Page county, Iowa, which instrument was duly recorded in the recorder's office of the said county on November 13, 1888. Subsequently the mortgagee, Lucy D. Fowler, sold and transferred several of the said notes to different parties,—the two maturing May 12, 1890, and June 12, 1890, respectively, being transferred by her, by indorsement without recourse, to the plaintiff, Orin P. Whipple, on the 4th day of December, 1888. No formal assignment of the mortgage to the plaintiff was made. The remaining twenty-two notes secured by said mortgage, and being the ones last falling due, which were held and owned by the defendant, were sold and transferred by her to one T. J. Evans on the 29th day of December, 1888, and on the same day, without the knowledge and consent of plaintiff, she executed and acknowledged a written release, or satisfaction, of said mortgage, which was filed for record in the office of the recorder of said Page county on January 21, 1889. Afterwards, on the 13th day of July, 1889, the Hazards conveyed the lots covered by said mortgage to one W. H. Wright, which conveyance was recorded on the 15th day of the same month. The two notes transferred to the plaintiff remain wholly unpaid, although judgment has been recovered thereon against the makers, and execution has been issued on such judgment, which was placed in the hands of the sheriff and the same has been by him returned wholly unsatisfied. At the time of the release of the mortgage the Hazards were insolvent, and so have been ever since. The sum of $2,600 was due

on the mortgage prior to the notes transferred to and held by plaintiff. It is admitted by both parties that there is upon record a mortgage of $5,000 on the property, given by one Parks to one Kennedy, which is wholly unpaid, and which is prior in point of time to the said mortgage of the Hazards to Fowler. The foregoing facts appear without controversy. In fact the only substantial conflict in the testimony is upon two points, namely, the value of the mortgaged premises, and the facts and circumstances surrounding the execution of the release of the mortgage in controversy, which will be adverted to hereafter.

We will notice the several errors relied upon for a reversal of the judgment, although we will not attempt to follow the order in which they are discussed in the brief of plaintiff. We will first consider the objection urged to the allowing the defendant to amend her answer during the trial to correspond to the evidence introduced. The plaintiff had alleged in his petition in the court below, which the original answer when first filed admitted to be true, that by the laws of the state of Iowa the transfer of one of several notes secured by the same mortgage operates as a transfer *pro rata* of said mortgage. After the plaintiff had rested, the defendant, when making out her case, introduced, without objection, the opinion in the case of *Walker v. Schreiber*, reported in 47 Iowa, 529, for the purpose of showing that under the laws of that state, where a mortgage secures several notes, which are transferred to different persons, each holder of the note takes a *pro tanto* interest in the mortgage, and the note first maturing must be the first paid. The defendant was thereupon permitted by the court, over plaintiff's objection, to withdraw her said admission in the answer and to amend her pleading to conform to the evidence. This was proper and in accordance with a familiar and just rule in this state of long standing, that where testimony is received without objection, the court may permit the pleadings to be amended to

conform to the facts proved. (*Keim v. Avery*, 7 Neb., 54; *Catron v. Shepherd*, 8 Neb., 308; *Brown v. Rogers*, 20 Neb., 547; *Ward v. Parlin*, 30 Neb., 376.)

Error is assigned upon the ruling of the court below in admitting the testimony of the defendant's witness, George M. Traver, on the question of the value of the mortgaged premises. It is insisted that the witness had not shown himself competent to testify upon that subject. We are satisfied that the criticism upon the ruling referred to is not without merit, and that Traver's testimony was incompetent and should have been excluded; but it does not follow that the judgment should be disturbed for that reason. It is the established doctrine of this court that the admission of incompetent testimony, where the cause is tried to the court without a jury, is not sufficient ground for the reversal of the case. (*Enyeart v. Davis*, 17 Neb., 228; *Willard v. Foster*, 24 Neb., 213; *Richardson v. Doty*, 25 Neb., 424; *Ward v. Parlin*, 30 Neb., 376; *Stabler v. Gund*, 35 Neb., 651.) The reason for the rule given in the opinion in the cases cited need not be now restated. These authorities control the decision in the case before us upon the question under consideration.

Errors were likewise assigned upon the admission, over the objection of plaintiff, of the testimony of several of the witnesses; but these rulings require no special attention, since they fall within the rule stated above.

It is urged that the judgment is unsupported by the evidence and is contrary to the law of the case. It is undisputed that the defendant executed a release of the mortgage in controversy, and that the same was recorded in the proper county, prior to the transfer of the mortgaged premises to Wright. There is, however, an irreconcilable conflict in the testimony as to who placed the release upon record, how the same came to be executed, and whether there was an actual delivery of the release to Evans. The testimony adduced on the part of the plaintiff tended to show that there

was no agreement between the defendant and Evans at the time of the transfer of the notes by the former to the latter that a release of the mortgage should be executed, but on the contrary the arrangement between them was that there should be executed an assignment of the mortgage to Evans; that defendant agreed to make it out and carry the same to the county seat of Page county, Iowa, and cause it to be recorded; that Evans paid defendant the recording fees; that instead of executing an assignment, a release of the mortgage was made, which was never delivered to Evans, but was placed upon record by the defendant. L. D. Fowler, the agent of the defendant and acting for her in the transaction, testified that an assignment of the mortgage was not talked of, but that it was expressly agreed between Evans and witness that the defendant should execute a release of the mortgage, and place the same in Evans' hands in escrow, to be held by him and delivered to the mortgagors when all the notes secured by the mortgage were paid, and not before; and that upon the execution of the release it was so deposited with Evans. The bill of exceptions also contains evidence conducing to establish that the defendant neither recorded the release, nor authorized its record, nor gave her consent to its being filed on any condition except that all the notes secured by the mortgage were first fully paid. That plaintiff's notes have not been paid, nor any part thereof, all agree. While the testimony of the greater number of the witnesses tends to support the contention of the plaintiff, there is in the record before us ample evidence, if true, to sustain the defendant's theory. The trial court made no special findings, hence we are not advised of the ground, or grounds, upon which the decision was placed. In other words, whether it was held that the release was deposited with Evans in escrow, and was subsequently filed for record without the conditions of the holdings having been complied with, and, therefore, in law the release was a mere nullity; whether the case was decided

in the lower court upon the ground that plaintiff was not damaged by reason of the discharge of the mortgage, or because Wright was not a *bona fide* purchaser of the property covered by the mortgage, but acquired the same chargeable with notice of plaintiff's lien, and, therefore, that plaintiff could have foreclosed his mortgage had he so desired. There being a general finding of the issues against the plaintiff, we must assume that every conflict in the testimony was settled by the court in favor of the defendant, hence that the release of the mortgage was deposited in escrow, and that the release was filed for record before the conditions were performed upon which it was placed in Evans' hands. There is no pretense that the release was ever delivered to the mortgagors, or to the recorder for them, but was delivered for record by mistake, it being supposed that the instrument was an assignment of the mortgage, instead of the release thereof, as it in reality was. As to the mortgagors, the release was inoperative and absolutely void.

In *Stanley v. Valentine*, 79 Ill., 544, it was held that where a mortgagee executed a release of a mortgage and places the same in the hands of a third party, to be delivered to the mortgagor upon the performance by him of certain conditions, which the mortgagor never performed, and by accident or mistake was afterwards placed upon record, without ever having been delivered to the mortgagor, such a release is a nullity. Mr. Justice Walker, in delivering the opinion of the court, in discussing the question observed: "It is manifest to all that a deed cannot be operative until it is delivered. Perkins, who wrote his treatise on conveyancing more than three centuries since, says: 'And if I make a deed and deliver it to a stranger as an *escrowl*, to keep until such a day, etc., and upon condition that if, before that day, he to whom the *escrowl* is made shall pay me ten pounds, give me a horse, enfeoff me of a manor, or perform any other condition, then the stranger

shall deliver the *escrowl* to him as my deed. In this case, if he deliver the same to him as my deed before the conditions or condition fulfilled, it is not my deed *simpliciter;* but if the condition be fulfilled and the *escrowl* delivered by him, after the conditions performed, as my deed, then it is my deed and shall bind me, and then begins to be my deed, and shall not have relation to the first delivery.' This, perhaps, is as early an announcement of the rule as may be found in the books, and is the same as the definitions given by the courts and text-writers since that time. We are aware of no change in the rule since he wrote. (*Price v. Pittsburgh, F. W. & C. R. Co.*, 34 Ill., 13.) Then, if a delivery before condition performed confers no title, it is difficult to perceive how others can acquire title from the grantee named in the *escrow.* Washburn on Real Property (vol. 3, p. 372*a*) says: 'If a deed is delivered before the previous condition is performed, it will not be the deed of the grantor, or have any effect as such;' and he refers to numerous authorities which support the text. The case of the grantee getting possession of the escrow by fraud, before the condition performed, and then selling the land to an innocent purchaser, was fully discussed in *Shirley v. Ayers*, 14 O., 308. The court say: 'Until the performance of the condition, it (the deed) must remain a mere scroll in writing, of no more efficacy than any other written scroll; but when, upon the performance of the condition, it is delivered to the grantee or his agent, it then becomes a deed to all intents and purposes, and the title passes from the date of the delivery. The delivery, to be valid, must be with the assent of the grantor. If the grantee obtain possession of the escrow without performance of the conditions, he obtains no title thereby, because there has been no delivery with the assent of the grantor, which assent is dependent upon compliance with the condition. The recording of an escrow does not make it a deed." The learned judge, after citing numerous authorities in support

of the doctrine announced, says: "From these authorities it would appear that even a grantee is not protected by a purchase, however honestly and fairly he may have acted, unless there was a delivery to his grantor. But we are not required to go the length of the rule announced in these cases to hold the release inoperative and void in this case. But here, the release never went into the hands of Mrs. Valentine. She did not know or intend that the release should be placed on record, hence this case is not as strong as some of those referred to above. * * * In the light of the decisions referred to, there is no force in the objection that appellant, by making the escrow and placing it in the hands of an agent, and it having got upon the record, should be estopped to deny that it is his deed. We have seen that such is not the rule, and it should be especially so here, as the judgment creditors have advanced no money, given no credit, or done any act by which they have changed their attitude to the case."

In the case at bar it is urged that Wright was a *bona fide* purchaser of the real estate covered by the mortgage, since at the time the conveyance was made he found the record of the mortgage released by the mortgagee, and he had no actual notice of the transfer of the notes, or that they had not been paid; hence it is contended that the purchaser had a perfect right to rely on the record, and he took the land free of the lien of the mortgage. How far an innocent grantee would have been protected it is unnecessary to stop to consider, since it does not appear that Wright was an innocent purchaser of the property. To become such he should have paid full value, and parted with the consideration before he learned of the existence of the mortgage. The rule is too familiar to require the citation of authority to support it. The records fail to disclose that Wright ever paid the purchase price. The mortgage was of record, which showed on its face that the last of the notes secured thereby matured on November 12, 1891, or

more than two years subsequent to the date of the purchase. The deed from the Hazards to Wright contained the following clause: "And we hereby covenant with the said W. H. Wright that we hold said premises by good and perfect title; that we have good right and lawful authority to sell and convey the same; that they are free and clear of all liens and incumbrances whatsoever of record except mortgage above, and we covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever, with exceptions herein." The mortgage of $5,000 from Parks to Kennedy was excepted in the deed. We think the phrase "of record" in the foregoing covenant against incumbrances, when taken in connection with the fact that the mortgage had been released long before the notes secured thereby fell due, was sufficient to put a prudent man on inquiry as to whether there were not liens against the premises which did not appear on such record. At least it was ample to have led a cautious person to inquire whether the notes secured by the mortgage in controversy had in fact been paid so long before their maturity. Our conclusion, taking all things into consideration, is that Wright was not a *bona fide* purchaser within the meaning of the law; therefore plaintiff could have successfully maintained a foreclosure of the mortgage against him.

There is another question argued in the brief of counsel which may be properly noticed at this time, and that is whether a mortgagee can execute a valid release of a mortgage after he has assigned to a third party the notes secured by the mortgage, and whether such satisfaction, entered of record, will operate to discharge and cancel the record of the mortgage, as to subsequent purchasers or mortgagees in good faith, and without notice. There is considerable conflict in the adjudicated cases upon the proposition. Some state the doctrine broadly that a discharge entered upon the record of a mortgage, by a mortgagee, after he has sold

and delivered the notes, is a nullity, and neither weakens the security of the party to whom the notes were transferred, nor strengthens the title of a subsequent vendee who purchased the mortgaged premises in good faith. (See *Lee v. Clark*, 1 S. W. Rep. [Mo.], 142; *James v. Morey*, 2 Cow. [N. Y.], 246; *Reeves v. Hayes*, 95 Ind., 521; *Scott v. Field*, 75 Ala., 419; *Treadwell v. Brooks*, 50 Conn., 262.) There is another line of well considered cases, and which we prefer to follow, which lays down the rule that the entry of satisfaction of a mortgage of record by the mortgagee, after he has sold the notes secured by the mortgage to a third party, will protect a subsequent *bona fide* purchaser of the mortgaged property, in case he had no notice at the time of such purchase, or the payment of the consideration, that the note was unpaid, or that the release or discharge of the mortgage was unauthorized; but as to all other persons the lien of the mortgage will not be impaired. As sustaining this view the following authorities may be cited: *Executors of Swartz v. Leist*, 13 O. St., 419; *Bank of the State of Indiana v. Anderson*, 14 Ia., 544; *Vannice v. Bergen*, 16 Ia., 555; *McClure v. Burris*, 16 Ia., 591; *Cornog v. Fuller*, 30 Ia., 212; *Ogle v. Turpin*, 102 Ill., 148; *Ahern v. Freeman*, 46 Minn., 156; *Livermore v. Maxwell*, 55 N. W. Rep. [Ia.], 37.

The case cited in 13 Ohio State is very much like the one at bar. The facts were these: William Hurel executed and delivered to one Peter Little a mortgage on certain real estate to secure a note for $200, which mortgage was duly recorded. Little sold the note to plaintiff's testator, William Swartz. Afterwards, but before the maturity of the note, Little wrongfully, and without the knowledge of Swartz, entered on the margin of the record of the mortgage a release in due form. Subsequently, the mortgagee sold and conveyed said mortgaged premises to the defendant Leist. The holder of the note brought his action against the purchaser, praying the foreclosure of the mort-

gage. Scott, J., in the opinion of the court, says: "In the case before us, Swartz, by becoming the legal owner of one of the notes protected by the mortgage, acquired an interest in the security which it afforded, in the absence of any special agreement to the contrary, and this interest he might assert as against both mortgagor and mortgagee, so long as the security subsisted. Under these circumstances, it cannot be doubted that the release of the mortgage by Little was wrongful. It was a fraud upon the rights of Swartz, and those rights would remain unaffected as against all parties participating in, or cognizant of, the fraud. But the question in this case is, whether the rights of Swartz were such that they can be asserted against a *bona fide* purchaser from the mortgagor, who, without notice of the lien claimed by Swartz, has parted with his money, relying upon a statutory discharge of the mortgage, which he found executed by the mortgagee, and properly entered upon the record. The rights of Swartz were, as we have said, purely equitable. No title to, or estate in, the mortgaged premises had been conveyed to him. A legal title to lands cannot, either at common law, or under our statutes, pass by the sale and delivery of a promissory note. The legal title to the conditional estate, granted by the mortgage, remained in the mortgagee as fully after the transfer of the note as before. True, he may have held it as a trustee, in part, for the benefit of Swartz; but a trust of this kind, not apparent on the face of the mortgage deed, evidenced by no record, and unknown to the world, cannot affect the rights of a *bona fide* purchaser, who, in ignorance of its existence, confides in the acts of the mortgagee falling within the apparent scope of his powers as the legal owner of the mortgage. As against such parties, the discharge must operate to cancel the record of the mortgage, and thereby extinguish its lien. The equities of a *bona fide* purchaser, in such a case, are certainly as strong as those which arise from a latent trust, and when they are

accompanied by the legal title, must, for that reason, prevail. But the parties here are not equally faultless, and do not stand *in equali jure*. Swartz negligently or confidingly permitted Little, the mortgagee, to retain the legal title conveyed by the mortgage, and the power of control over it. Little had thus the legal power, and, ostensibly, a perfect right to discharge and release it. Leist, the purchaser, having no reason to suspect fraud, was justified in regarding the release legally made, by one who was ostensibly the proper party, as an effectual discharge of the lien; and, as between these parties, he who unwisely reposed confidence in Little, and gave him the power to defraud, should suffer the consequences."

In *Ogle v. Turpin*, *supra*, the rule is stated in this language: "Where a mortgagee, after an assignment of the notes secured by his mortgage, acquires the equity of redemption, and enters a formal release of the mortgage upon the record, a party taking the mortgage from him upon the same premises, without notice of the assignment of the notes, will acquire a lien superior to that of the holder of the assigned notes. There being no presumption of law that the payee of notes secured by mortgage has transferred the same before purchasing the equity of redemption from the mortgagor, a person taking a mortgage from the payee will not be held chargeable with the notice that the notes secured in the first mortgage have been assigned, but he may rely upon the record as showing title in his mortgagor."

The rule which we adopt does not conflict with the opinions of this court in *Studebaker v. McCargur*, 20 Neb., 500, and *Daniels v. Densmore*, 32 Neb., 40. In the first case it was merely decided that the assignment of one of several notes secured by the same mortgage, without any assignment of the mortgage, is an assignment *pro tanto* of the mortgage. In the second case it was held that the party to whom the note is transferred, on being paid the

amount due thereon, may be required to acknowledge satisfaction of the mortgage of record, and that the mortgagee, after he has transferred the debt, cannot release the mortgage so as to defeat the rights of the holder of the debt. We find no fault with these decisions; but it is obvious that the rights of a *bona fide* purchaser of mortgaged property, who became such subsequent to the release of the lien of the mortgage by the mortgagee after he had transferred the note given as evidence of the debt, was not involved or passed upon in either of the cases to which reference has just been made. Conceding then, as plaintiff contends, and his evidence tends to establish, that the release of the mortgage in the case under consideration was not deposited in escrow, but was wrongfully placed upon record by the mortgagee, without the knowledge or consent of the plaintiff, the lien created by the mortgage was not canceled as against the mortgagors nor as against Wright, their vendor, since, as we have already seen, the former had not paid the debt, and the latter was not a good faith purchaser of the property and without notice.

There is another ground upon which an affirmance of the judgment may be properly placed, and that is plaintiff has not been damaged by reason of the release of the mortgage. Stated differently, owing to the low value of the premises, the mortgage was no security for the payment of the notes owned and held by plaintiff. The different witnesses examined at the trial do not agree in their estimates of the value of the property. Those given by plaintiff's witnesses vary from $14,000 to $18,000, while defendant's witnesses fixed the value from $5,300 to $7,500. As a reviewing court, we must accept as the correct value of the property the amount as stated by the persons who testified in favor of the successful party in the lower court. As stated above, the highest estimate of value named by any witness on that side of the case was $7,500. There was an unpaid first, or prior, mortgage on this real estate for the

sum of $5,000, besides interest, and the total amount of the notes secured by the mortgage in controversy, maturing before the notes held by plaintiff, was $2,600. Thus, it will be observed, the amount of the liens upon the property, exclusive of interest, was $7,600, which amount would have to be paid out of the proceeds arising from the sale of the property before anything could be applied on the notes held by plaintiff, unless all the notes secured by the second mortgage should be paid *pro rata*. It is the established doctrine of this state that where several notes secured by the same mortgage are sold to different parties without any accompanying assignment of the mortgage, the several holders are entitled to share *pro rata* in the proceeds arising from the sale of the mortgaged property. (*Studebaker v. McCargur*, 20 Neb., 500; *Harman v. Barhydt*, 20 Neb., 625; *Todd v. Cremer*, 36 Neb., 430.) A different rule, however, prevails in the state of Iowa, where the mortgage in question was executed and where the real estate therein described is situated. In that state it has been held by repeated decisions of its highest court that the transfer of one of several notes, maturing at different times and included in the same mortgage, operates as an assignment *pro tanto* of the mortgage, and that the proceeds arising from the foreclosure of the mortgaged premises must be applied first to the payment of the note first falling due, and then to the discharge of the other notes in the order of time in which they mature. (*Rankin v. Major*, 9 Ia., 297; *Grapengether v. Fejervary*, 9 Ia., 163; *Walker v. Schreiber*, 47 Ia., 529.) It is perfectly plain, if the latter rule shall control our decision in this case, that plaintiff has not been injured by a discharge of the mortgage, while a different result will be reached should the rule of our own state be adhered to in this case. The question therefore presented is which of the conflicting rules should be applied in determining the rights of the parties. If the lands covered by the mortgage were situate here, unquestionably our former decisions would

be followed. In a recent case this court, in an opinion written by Judge HARRISON in *Riley v. Burroughs*, 41 Neb., 296, held that in an action upon a covenant of warranty against incumbrances, where the conveyance is executed in this state for land situate in the state of Iowa, the law of the state in which the land is located will govern the rights of the parties in the enforcement of the covenant. The principle announced in the precedent just referred to is certainly decisive of the point under consideration. There is stronger reason why the law of Iowa, rather than our own, should govern in the construction of this mortgage, since not only is the land located in that state, but Iowa is the place where the contract or mortgage was executed. We feel constrained to hold that the construction of the mortgage and the rights of the parties thereunder are governed by the law of Iowa, and that plaintiff has suffered no damage by reason of the discharge of record of the mortgage. The judgment is

AFFIRMED.

MILES H. MILLER ET AL., APPELLANTS, V. CHARLES S. LEWIS, APPELLEE.

FILED SEPTEMBER 18, 1894. No. 5405.

Review: FAILURE TO FILE BRIEFS: AFFIRMANCE. This cause having been submitted to the supreme court upon the transcript, without either a brief or oral argument from either party the decree of the lower court is affirmed. (*Zimmerman Mfg. Co. v. Tower*, 40 Neb., 306.)

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

E. O. Kretsinger, for appellants.

Griggs, Rinaker & Bibb, contra.

NORVAL, C. J.

This was an action to perpetually enjoin the defendant, as road overseer, from opening a public road or highway across plaintiffs' land. From a decree in favor of the defendant, plaintiffs appeal.

The record contains a draft of a bill of exceptions purporting to contain all the evidence in the case, but the same has never been allowed by the trial judge. On the contrary, attached to the proposed bill is the certificate of the judge disallowing the same on the objection of the defendant that the same was not reduced to writing within the time allowed by law. The evidence, therefore, cannot be reviewed. The cause was submitted to this court without either brief or oral argument, and, following *Stabler v. Gund*, 35 Neb., 648, and *Zimmerman Mfg. Co. v. Tower*, 40 Neb., 306, the decree is

AFFIRMED.

JABEZ C. CROOKER V. AMANDA STOVER.

FILED SEPTEMBER 18, 1894. No. 5219.

1. **Objection to the form of a verdict** will be of no avail in this court, where the same was not made in the motion for a new trial or petition in error.
2. **Sufficiency of Evidence to Support Verdict for Services of Housekeeper and Nurse.** The evidence in the case examined, and *held* to support the verdict.

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

J. C. Crooker and *J. E. Philpott*, for plaintiff in error.

Davis & Hibner, contra.

NORVAL, C. J.

This suit was instituted by Amanda Stover to recover the sum of $45 alleged to be due her for services to plaintiff in error as nurse and housekeeper during the fall of 1889. There was a trial in the court below to a jury, which resulted in a verdict for the plaintiff in the sum of $15. The defendant prosecutes error.

Complaint is made in the brief of counsel for plaintiff in error to the form of the verdict returned by the jury, which, omitting caption and title of the cause, reads as follows:

"We, the jury, duly impaneled and sworn in the above entitled cause, do find for the plaintiff and assess the amount of her recovery at the sum of $5 per week.

Total, thirty dollars	$30 00
Received fifteen	15 00
Balance due	$15 00

"D. B. HOWARD,
"*Foreman.*"

It is true the verdict is not in the usual form, but we think it sufficiently appears therefrom that the jury intended to and did find the sum due from defendant to plaintiff, after deducting payments made before suit was brought, to be $15. However, no objection was made to the verdict when the same was returned to the court below. Had there been, the court probably would have ordered the jury to return to their room and correct the same. Again, no objection to the form of the verdict was made either in the motion for a new trial or the petition in error.

The only other ground urged for reversal of the judgment is that the verdict is contrary to, and is not supported

by, the evidence in the case. It is wholly undisputed that plaintiff was employed by, and worked for, defendant in the capacity of housekeeper and nurse. The conflict in the testimony is upon two points, namely, the length of time the plaintiff worked, and the amount of compensation per week she was to receive. The defendant insists that plaintiff entered his employ at the stipulated sum of $2 per week, that under which agreement she worked four and one-half weeks, and that he has paid her the sum of $15. Both parties agree as to the amount paid; but the plaintiff below insists that she was in the employ of the defendant six weeks; that there was never any agreement as to the amount of compensation she should receive; and that her services were reasonably worth the sum of $10 per week. There is in the record testimony tending to sustain the contention of each party. The defendant's theory is sustained by the greater number of witnesses, and we would have been better satisfied had the jury found in his favor; but we do not feel like disturbing the verdict, since there was ample competent evidence before the jury to support their finding. The value of plaintiff's services was placed by the witnesses from $5 to $10 per week, and the jury allowed her the smaller sum, with which we are content. The judgment is

AFFIRMED.

AGNES BLOEDEL ET AL. V. JOHN ZIMMERMAN ET AL.

FILED SEPTEMBER 18, 1894. No. 4977.

1. **An assignment in a petition in error** as to the admission or exclusion of testimony, which does not indicate what testimony out of a great mass is referred to or intended, is too indefinite to be considered.
2. **An instruction not excepted to** at the time it was given cannot be complained of in the supreme court.

3. **Intoxicating Liquors:** ACTION BY MINOR CHILDREN AGAINST SALOON-KEEPER: LOSS OF SUPPORT: INSTRUCTIONS. *Held*, That the defendants' first request to charge was not warranted by the evidence, was misleading, and should not have been given.

4. ———: ———. Where, by reason of intoxication, a father is rendered incapable of providing for his family, his minor children may maintain an action for loss of means of support, caused by reason of the intoxication of the father, against the person furnishing the intoxicating liquors, and the sureties on his liquor bond.

5. The verdict *held* to be against the evidence.

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

Moriarty & Langdon and *Anthony E. Langdon*, for plaintiffs in error.

James P. Grove, contra.

NORVAL, C. J.

This action was brought by the plaintiffs in error, Agnes, Bloedel, Matilda Bloedel, and Alexander Bloedel, by Amelia Bloedel, their next friend, against John Zimmerman and several saloon-keepers in the village of Papillion, and the sureties on their liquor bonds, to recover damages for injury to the plaintiffs' means of support resulting from the selling to their father of intoxicating liquors. The petition, after alleging that the plaintiffs are the minor children of Andrew Bloedel, the execution and delivery of the bonds sued on, and the issuing and delivery of the licenses to the principals in said bonds, avers, in substance, that each of said saloon-keepers sold and gave malt, spirituous, and vinous liquors to said Andrew Bloedel at the times therein stated and during the existence of their licenses; that said Bloedel has become an habitual drunkard through the excessive use of intoxicating liquors so furnished as aforesaid; that said plaintiffs have no means of

support except that furnished by their father; that prior to the year 1886 said Andrew Bloedel was industrious and temperate, and that by virtue of said furnishing of said liquors to him, he thereby became unable to support the plaintiffs, and that they were thereby damaged in the sum of $3,000, for which amount plaintiffs pray judgment. The defendants, for answer to the petition, deny each and every allegation therein, except that they have been engaged in the saloon business, and gave the bonds set out in the petition. There was a verdict for the defendants, upon which judgment was rendered by the court. The plaintiffs prosecute error.

Several rulings of the trial court on the admission and rejection of testimony are urged in the brief of counsel as grounds for reversal; but the rulings complained of, and pointed out in the brief, cannot be reviewed by this court, for the reason that the same are not assigned with sufficient particularity in the petition in error, they there being assigned in the following language:

"4. The court erred in overruling the objections made by the plaintiffs to testimony offered by defendants, which ruling of the court was duly excepted to at the time.

"5. The court erred in sustaining objections made by defendants to evidence offered by the plaintiff, which ruling was excepted to at the time."

The bill of exceptions discloses that numerous objections and exceptions were taken by the plaintiffs to the rulings of the court, both in admitting and excluding testimony, yet neither of the foregoing assignments indicate what rulings are referred to or intended. The assignments are too indefinite to be considered. (*Wanzer v. State*, 41 Neb., 238; *Kirkendall v. Davis*, 41 Neb., 285.)

It is insisted that the court erred in giving instruction No. 9 on its own motion, for the reason that it was not based upon the evidence. We are precluded from giving this instruction any consideration, inasmuch as the plaint-

iffs took no exceptions thereto at the time the same was read to the jury. It appears from this record that the cause was tried, and the jury were instructed as to the law of the case, on October 22, 1890, and the verdict was returned into court and filed the next day, while the ninth paragraph of the court's charge, as shown by the entry on the margin thereof, was not excepted to by the plaintiffs until October 24th. An instruction, to which no exception was taken at the time it was given, cannot be complained of in the reviewing court. (*Levi v. Fred*, 38 Neb., 564.)

Complaint is likewise made of the giving of the defendants' first request to charge, which is in the following language: "First—That if the jury believe from the evidence in the case that Andrew Bloedel, the father of the minor children, plaintiffs in this case, during the four years immediately preceding the commencement of this suit, was able and willing to provide such children a suitable home, but they refused and neglected to occupy such home with the father, Andrew Bloedel, that then such father was under no legal obligation to provide or support them elsewhere, unless they had been compelled to leave such home by reason of abuse and ill-treatment by such father." We have been unable to find any testimony in the record which would warrant the giving of the above instruction. On the contrary, the undisputed proofs show that plaintiffs' father, during the four years preceding the bringing of this suit, had no means with which to support his children; that during that time he was a hard drinker, was often intoxicated, and saved scarcely sufficient, with the rents derived from his property, to support himself. It further appears that plaintiffs and their mother were compelled to leave the father and husband on account of his failure to support them. The instruction is misleading and should not have been given.

After a careful review of the evidence, we are persuaded that it fails to support the verdict. The testimony shows,

without conflict, that the defendants (saloon-keepers) frequently sold and furnished to Andrew Bloedel during the four years immediately preceding the bringing of this action, which is the period covered by the several bonds declared upon, intoxicating liquors in quantities sufficient to produce intoxication; that by the drinking of said liquors to excess said Bloedel became unfitted and disqualified from pursuing his usual avocation of wagonmaker, but spent most of his time in idleness and loafing in the saloons, drinking whiskey and beer. He was often intoxicated, earned but little money, and contributed scarcely anything to the support of his children, the plaintiffs herein, who by reason thereof were forced to leave home, their adult sisters contributing largely to their maintenance and support during the four years referred to. The evidence is quite meager and unsatisfactory as to the amount of loss of means of support the plaintiffs have sustained, but under the proofs they were entitled to recover some damages from the defendants. Under the statutes an action can be maintained by the minor children for damages resulting from a loss of means of support by reason of the intoxication of the father, against the person furnishing him the intoxicating liquors, and the sureties on his bond. (*Kerkow v. Bauer*, 15 Neb., 150.) Under the evidence the verdict cannot be sustained. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

R. H. HOWARD ET AL. V. GOODRICH LODGE HALL ASSOCIATION.

FILED SEPTEMBER 18, 1894. NO. 5791.

Appeal from Justice Court: FAILURE TO FILE TRANSCRIPT IN TIME: EXCUSE FOR DELAY. A mere mistake of fact, for which the appellee is in nowise responsible, will not excuse the filing in the district court, within thirty days, of the transcript required on appeal from a judgment of a justice of the peace or the county court.

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

Saunders, Macfarland & Dickey, for plaintiffs in error:

In absence of default or laches on the part of an appellant his right of appeal cannot be defeated by the absence or neglect of a justice of the peace. (*Dobson v. Dobson*, 7 Neb., 296; *Noble v. Houk*, 16 S. & R. [Pa.], 421; *Smiley v. Sampson*, 1 Neb., 83; *Lytle v. State of Arkansas*, 22 How. [U. S.], 193; *Louderback v. Boyd*, 1 Ashm. [Pa.], 380; *Republican V. R. Co. v. McPherson*, 12 Neb., 480.)

Lake, Hamilton & Maxwell, contra:

The appellant must be diligent and file his transcript within the time limited by statute or the appeal will fail. (*Lincoln Brick & Tile Works v. Hall*, 27 Neb., 877; *Oppenheimer v. McClay*, 30 Neb., 654; *Converse Cattle Co. v. Campbell*, 25 Neb., 37; *Slaven v. Hellman*, 24 Neb., 646; *Gifford v. Republican V. & K. R. Co.*, 20 Neb., 538.)

POST, J.

This is a petition in error from the district court of Douglas county. From the record it appears that judgment was rendered against the plaintiffs in error by the

county court of said county on the 12th day of July, 1892. On the 22d day of the same month they filed an appeal bond and ordered a transcript of the proceedings in the county court for the purpose of prosecuting an appeal. A transcript was prepared and duly certified on the 26th day of July, but was not called for by the plaintiffs or filed in the district court until the 15th day of August, which was after the expiration of the thirty days allowed for the perfecting of the appeal. (Secs. 1008, 1011, Code Civil Procedure.) On motion of the defendants the appeal was dismissed by the district court, and which is the ruling now assigned as error.

It is shown by the affidavits submitted to the district court that the county judge was absent from the state continuously from the 4th to the 15th day of August, and that counsel for plaintiffs were not advised that the transcript had been prepared in accordance with their request. It is conceded that it was procured and filed with the least possible delay after the return of the judge. The county judge of Douglas county has a clerk appointed under the provisions of the act of March 31, 1887 (sec. 46*a et seq.*, ch. 28, Comp. Stats.), who, according to affidavits filed in support of the motion to dismiss, was in charge of the office during the absence of the judge, and would have delivered the transcript had application been made therefor at any time during business hours. Upon the facts thus stated appeal was properly dismissed. The case of *Dobson v. Dobson*, 7 Neb., 296, relied upon by plaintiffs, is not in point. The rule which must control in this case has been frequently applied by this court. (See *Gifford v. Republican V. & K. R. Co.*, 20 Neb., 538; *Slaven v. Hellman*, 24 Neb., 646; *Converse Cattle Co. v. Campbell*, 25 Neb., 37; *Lincoln Brick Works v. Hall*, 27 Neb., 874; *Oppenheimer v. McClay*, 30 Neb., 654.) There is no error in the record and the judgment of the district court is

AFFIRMED.

CHARLES E. STRATTON ET AL. V. SIDNEY B. OLDFIELD.

FILED SEPTEMBER 18, 1894. No. 5789.

Acts and declarations of conspirators which are parts of the *res gestæ*, and therefore admissible against their co-conspirators, include those only which are done and made during the pendency of the conspiracy and in furtherance of its objects.

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

C. A. Baldwin and *Weaver & Giller*, for plaintiffs in error, cited: *Logan v. United States*, 144 U. S., 263; *People v. Dilwood*, 29 Pac. Rep. [Cal.], 420; *Brown v. Herr*, 21 Neb., 113.

De France & Richardson, contra.

POST, J.

This was an action for damage in the district court for Douglas county, in which the defendant in error, plaintiff below, recovered judgment. The cause of action stated in the petition is substantially as follows: The defendants below, Stratton, Lewis, Petty, and Emminger, knowing the plaintiff therein to be the owner of certain real estate in Saunders county, conspired together to cheat and defraud him out of the value thereof. That in pursuance of such conspiracy to defraud they falsely represented to him that certain notes held by them were good securities, and that the makers thereof were solvent and able to pay in full, when in fact said makers were insolvent and said notes were entirely worthless; that, relying upon such false statements, he conveyed to them the said real estate and accepted in exchange therefor said worthless securities. The defendants answered separately by a general denial. At

the trial the plaintiff below was permitted, over the objection of Stratton and Emminger, to show admissions by Petty, made six months after the consummation of exchange of property, tending to prove the allegations of the petition as against the objecting defendants. In that the court erred. The admissions of acts and declarations of co-conspirators is limited to what is said and done while the conspiracy is pending and in furtherance of the objects thereof. (3 Greenleaf, Evidence, 94; Wright, Conspiracy, 113, 116.) The judgment is reversed as to the plaintiffs in error Stratton and Emminger and remanded for further proceedings in the district court.

REVERSED AND REMANDED.

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

FILED SEPTEMBER 18, 1894. No. 4676.

1. **Fraudulent Conveyances:** EVIDENCE OF COLLATERAL FACTS. In all cases where the issue is fraud considerable latitude will be allowed the party upon whom the burden rests, and evidence will be received of collateral facts, including subsequent events, provided they shed light upon the transaction involved and tend to explain the motives of the parties.
2. ———: ———: RELEVANCY. In determining the relevancy of collateral facts in such cases the proximity in point of time to the principal transaction is not the exclusive test, but also whether they are capable of affording any reasonable presumption or inference with reference to such transaction.

REHEARING of case reported in 37 Neb., 592.

J. C. Crawford, for plaintiffs in error.

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

POST, J.

This case was before us at the September, 1893, term, at which time a decision was announced affirming the judgment of the district court. (See *Sonnenschein v. Bartels*, 37 Neb., 592.) Subsequently, it appearing that we had overlooked the fourteenth assignment of the petition in error, a rehearing was ordered. The error therein assigned is the receiving, over the plaintiffs' objection, of evidence tending to prove that the sureties on certain notes executed by Anton and Dominick Brazada in the firm name of Brazada Bros. to Bartels, had incumbered and disposed of their property subsequent to the transaction between the plaintiffs and the Brazadas, which is the subject of the present controversy.

It is disclosed by the record that the Brazadas had purchased the stock of goods in controversy from Bartels about eight months previous to the sale thereof by them to plaintiffs, and were, at the time of the last named transaction, indebted to Bartels therefor in about the sum of $7,000. Of the amount above named some $400 was past due, and all represented by notes of said firm, with W. Brazada, F. Brazada, Frank Korn, John Welna, and Joseph Kofka as sureties. On the second day after the sale of the stock to plaintiffs the sureties above named executed numerous deeds and mortgages purporting to convey and incumber a large amount of property, real and personal. It is claimed by defendants that such conveyances included all of the property then owned by the makers, which contention we assume to be fully sustained by the record. It is a reasonable assumption, also, that the object of said conveyances was to defraud the defendant Bartels. But is the fraud of the sureties of Brazada Bros. against Bartels admissible in this action, where the question at issue is the fraud or good faith of the sale by the Brazadas to plaintiffs? We find in the record no evidence tending to prove

that the fraudulent purpose of the sureties was inspired by the plaintiffs, or ever known to them before the filing for record of the conveyances mentioned; nor does it appear from the proofs that the Brazadas, Anton and Dominick, were informed of the intention of their sureties to dispose of their property until after the execution of said conveyances. In all such cases, where the issue is fraud, considerable latitude will be allowed the party upon whom the burden rests, and evidence of collateral facts, including subsequent events, will be received, provided they shed light upon the transaction involved and tend to explain the motives of the parties. (1 Greenleaf, Evidence, 53.) But subsequent events within the above rule are limited to those acts which are in contemplation by the parties at the time of the principal event, and such others as tend to show a fraudulent intent at the time of the transaction involved. (May, Fraudulent Conveyances, 35.) The test by which the relevancy of collateral facts in such cases is to be determined is not their proximity in point of time with the principal transaction, but whether they are capable of affording any reasonable presumption or inference with respect thereto. (1 Greenleaf, Evidence, 52.) Judged by that test it would seem that evidence of the subsequent conveyances by third parties in fraud of the rights of Bartels is inadmissible, as in nowise tending to explain the motives of the parties to the contract here involved. The fact that the parties to the fraudulent conveyances are sureties for the Brazadas we must, upon the record, regard as immaterial. It follows that the ruling assigned is error, for which the judgment of the district court must be reversed and the cause remanded for further proceedings therein. That we should have overlooked this question upon the former hearing is a fact to be deplored, although it is not astonishing, in view of the fact that in the 130 pages of printed briefs we are not referred to a single page of the record, comprising over 400 pages of testimony, be-

side as much more of exhibits; but that fact, although to be regretted, because imposing additional and unnecessary burdens upon us, is not the most flagrant transgression of professional ethics, or the rules of the court, which it is our duty to notice.

We find a considerable part of the several briefs devoted to an interchange of courtesies between counsel for the respective sides, in which the personal and professional character of each is violently assailed. Such a course, inexcusable upon any condition or provocation, is the more culpable in this instance, since the mutual charges are based upon matters confessedly outside of the record. In addition to what has recently been said in condemnation of such a practice it may not be amiss to remind counsel that such briefs are neither entertaining nor instructive to the members of the court, and that by inserting like objectionable matter they take the risk of our overlooking the meritorious part thereof.

REVERSED AND REMANDED.

WILLIAM D. GULICK, APPELLEE, V. MARY WEBB ET AL., APPELLANTS.

FILED SEPTEMBER 18, 1894. No. 5544.

1. **Review:** FAILURE TO MAKE ARGUMENTS: WAIVER. Points not argued in the supreme court will be deemed to be waived.
2. **Judicial Sales:** AGREEMENT TO MAKE JOINT BID. Persons who desire to make a joint purchase of the property may enter into an agreement by which one person is authorized to bid on their joint account and for their joint benefit, on property about to be sold at sheriff's sale; and such agreement will not be illegal if it does not include the purpose not to compete, or not to bid, or to chill bids, or to prevent competition, or deter others from bidding; nor does the fact that such agreement may indirectly have the effect to keep others from bidding make it un-

lawful. To render it illegal it must further appear that the purpose of entering into the agreement was to avoid competition.

3. ———: AGREEMENT BY JUDGMENT LIENORS TO MAKE JOINT BID. At a sheriff's sale of real property, five holders of liens against such property, none of whom were financially able to bid individually at such sale, entered into an agreement whereby one of their number, by attorney, bid in the property, which was struck off to him as trustee for himself and the other four lienholders. *Held*, That this was not such a combination as would of necessity discourage or prevent competition in bidding, and was therefore insufficient to vitiate the sale.

4. ———: CONFIRMATION: SUFFICIENCY OF EVIDENCE. The evidence examined, and *held* sufficient to sustain the finding and judgment of the lower court in confirming the sale.

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

W. Henry Smith, for appellants:

The agreement of the judgment lienors to purchase the property was of such a character as to invalidate the sheriff's sale. (*Wooten v. Hinkle*, 20 Mo., 290; *Stewart v. Nelson*, 25 Mo., 309; *Miltenberger v. Morrison*, 39 Mo., 71; *Forelander v. Hicks*, 6 Ind., 448; *Phippen v. Stickney*, 3 Met. [Mass.], 385; *Jenkins v. Frink*, 30 Cal., 586; *Abbey v. Dewey*, 25 Pa. St., 413; *Mapps v. Sharpe*, 32 Ill., 13; *Griffith v. Judge*, 49 Mo, 536; *Bunts v. Cole*, 7 Blackf. [Ind.], 265; *James v. Fulcrod*, 5 Tex., 512; *Hawley v. Cramer*, 4 Cow. [N. Y.], 718; *Jones v. Caswell*, 3 Johns. Cas. [N. Y.], 29; *Doolin v. Ward*, 6 Johns. [N. Y.], 194; *Hannay v. Eve*, 3 Cranch [U. S.], 242; *National Bank of Metropolis v. Sprague*, 20 N. J. Eq., 13, 159; *Staines v. Shore*, 16 Pa. St., 200; *Wheeler v. Collier*, 1 M. & M. [Eng.], 123; *Jackson v. Crafts*, 18 Johns. [N. Y.], 110; *Dexter v. Shepard*, 117 Mass., 480.)

Stevens, Love & Cochran, contra:

An agreement to unite in a bid at an auction sale for the

joint benefit of the parties thereto is not void, if not dishonest in its motives or injurious in its consequences. (*James v. Fulcrod*, 5 Tex., 512; *Phippen v. Stickney*, 3 Met. [Mass.], 385; *Goode v. Hawkins*, 2 Dev. Eq. [N. Car.], 393; *Hunt v. Elliott*, 80 Ind., 245; *Small v. Jones*, 6 Watts & S. [Pa.], 122; *Smith v. Greenlee*, 2 Dev. Law [N. Car.], 126; *Switzer v. Skiles*, 3 Gilman [Ill]., 529; *National Bank of Metropolis v. Sprague*, 20 N. J. Eq., 159; *Bellows v. Russell*, 20 N. H., 427; *Jenkins v. Frink*, 30 Cal., 586; *Breslin v. Brown*, 24 O. St., 565; *Marie v. Garrison*, 83 N. Y., 14; *Smith v. Ullman*, 58 Md., 183; Benjamin, Sales [4th Am. ed.], notes under sec. 444; Bishop, Contracts [Enlarged ed.], sec. 528; 1 Lawson, Rights, Remedies & Practice, sec. 220; Rorer, Judicial Sales [2d ed.], sec. 77; 2 Freeman, Executions, sec. 297; Story, Sales, sec. 484; 1 Warvelle, Vendors, 257; Tiedeman, Sales, sec. 169.)

HARRISON, J.

As the result of an action in the district court of Lancaster county to foreclose certain mechanics' and mortgage liens the property proceeded against, to-wit, lots Nos. 7 and 8, in block No. 315, of Jane Y. Irwine's addition to the city of Lincoln, otherwise known as subdivision 62 of S. W. Little's subdivision of the west half of the southwest quarter of section 24, in township 10 north, range 6 east of the 6th P. M., in the city of Lincoln, Nebraska, was sold by the sheriff of said county under and by virtue of an order of sale issued in accordance with the terms of a decree rendered in the suit. The sale was made on the 16th day of February, 1892, to William H. Tyler for the sum of $13,000, which was more than two thirds of the appraised value. To the confirmation of the sale objections were filed by George E. Bigelow, as follows:

"Comes now the defendant George E. Bigelow and shows and represents to the court that he is the owner of

the equity of redemption in and to the property described in plaintiff's petition in the above entitled cause, and in the several answers and cross-petitions of the defendants therein, and objects and protests against the confirmation of the sale heretofore made by the sheriff of the said premises described in said petitions, for the following reasons, to-wit:

"1. That said premises were not appraised in accordance to the laws of the state of Nebraska; that they were not appraised at their real value in money, but were appraised at a sum far below and vastly less than their real value in money.

"2. That there was a confederation and combination on the part of the judgment lien-holders in this cause to bid said property in at a certain sum far less than its value and far less than two-thirds of its real value in money, and that by said combination and confederation, so formed and entered into by the said judgment lien-holders, purchasers were prevented from bidding at said sale, and said property was prevented from selling for a sum equal to what it would have brought had such confederation and combination not been formed; that said confederation and combination so formed prevented competition in bidding at the sale of said property and prevented purchasers from bidding thereon, and was in fraud of the rights of the owner of the equity of redemption of said premises; and if said sale is confirmed and allowed to stand, it will work great and permanent loss and injury to this defendant.

"This defendant therefore moves the court that said sale be not confirmed, but that the same be set aside and held of no force or effect."

Subsequently additional objections were filed by D. T. Coffman and George E. Bigelow, as follows:

"And now, February 23, 1892, come the above named parties and by leave, etc., file the following objections and protests against the confirmation of the sheriff's sale, etc.:

"1. The property was not properly appraised, as appears by appraisement filed.

"2. No proper return of sale was made by the sheriff, as required by law, prior to the first order of confirmation.

"3. No proper notice was posted in the sheriff's office, as is the custom of law prior to sale.

"4. The property was not properly described in the newspaper publication, as per affidavits of D. T. Coffman and Geo. E. Bigelow, filed herewith and made a part hereof, in that it was not sufficiently identified and located, nor was it sufficiently described by improvement, so as to distinguish or identify it or to attract bidders or to assure them that the improvements belonged to the property.

"5. An unlawful combination was entered into by several of the claimants and lien creditors to prevent competition at the bidding or crying of the sale, and that such combination was carried out and rival bidding was prevented, to the injury of the defendant and certain of the creditors.

"6. The property was sold at a grossly inadequate price, far below what it would have brought had not an unlawful combination been entered into to prevent bidding, and to cause it to be sold at a sacrifice and to the injury of the defendants Coffman and to the second mortgage creditor, Geo. E. Bigelow.

"7. The description of the property in the published advertisement was inadequate, vague, and uncertain, and calculated to mislead purchasers.

"8. The liens in the district court, Lancaster county, Nebraska, against the property sold were not properly certified to the sheriff. Witness the certificate, made a part hereof, under date of February 15, 1892.

"9. The sale was contrary to law."

Upon a hearing in the district court the objections to confirmation were overruled and the sale confirmed, to which action of the court the parties objecting duly excepted and

have removed the case to this court for an examination and adjudication upon the question of the confirmation of the sale.

Counsel for appellants in his brief filed in this court argues but one of the grounds of objection to confirmation of the sale, and, conforming to a well established rule that questions not argued here will be deemed to be waived, we conclude that he rests the case upon the one ground alone and has abandoned all others. The objection then upon which the appellants rely is as follows: "An unlawful combination was entered into by certain of the claimants and lien-holders to prevent competition at the bidding or crying of the sale; that such combination was carried out and rival bidding was prevented, to the injury of the defendant and certain of the creditors." The evidence (which consists of affidavits of various persons) discloses that five of the lien-holders, whose liens were of the liens foreclosed in the action, no one of them being of sufficient financial ability to purchase the property, entered into an agreement or combination to the effect that one of their number, William Tyler, was to bid at the sale in behalf of all the five lien-holders and bid until the amount offered for the premises would equal the mortgage liens of one Gulick, which was prior to the liens of the five who entered into the agreement, and eighty per cent of the aggregate amount of their liens. A careful reading and analysis of all the evidence contained in the affidavits presented and used during the hearing in the district court, as preserved in the bill of exceptions and record filed in this court, satisfies us that the judge who rendered the decision and confirmed the sale was fully warranted in the conclusion which he evidently formed as a basis for the disposition made of the matters in controversy, that the agreement between the five lien-holders was one by which they combined to jointly purchase the property for their common benefit, and not an agreement not to bid or to

avoid competition or to deter others from bidding or competing at the sale; that in so combining they had no fraudulent or illegal intent or purpose. This being established, then the question arises whether such an agreement is forbidden by or is contrary to law, and sufficient to set aside the sale to the trustees acting or bidding for the parties to such contract. We have no doubt that in the earlier cases in which this question arose and was decided, some courts of high authority have announced a doctrine which would avoid this sale solely upon the grounds of the formation of such an association, regardless of the intent or motives of the parties, assigning as a reason that its necessary and unavoidable effect is to tend to discourage or prevent competition; but the later cases have in effect overruled the above doctrine and established what we consider a better and more practical one, that where an examination of all the facts and circumstances shows the object of the association was to enable the parties to compete where without combining they could not do so, formed for an honest purpose and with such an intent, and not with any view to preventing competition, or deterring bidders or "chilling bids," the sale will be upheld and completed. (See Rorer, Judicial Sales, sec. 94; *Hunt v. Elliott*, 41 Am. Rep. [Ind.], 794, 80 Ind., 245; Herman, Executions, sec. 205; Freeman, Executions, sec. 297; 1 Lawson, Rights, Remedies & Practice, sec. 220; *Phippen v. Stickney*, 3 Met. [Mass.], 385; *Smull v. Jones*, 6 Watts & S. [Pa.], 122; *Jenkins v. Frink*, 30 Cal., 586; *Fidelity Trust & Safety Vault Co. v. Mobile S. R. Co.*, 54 Fed. Rep., 26; *Breslin v. Brown*, 24 O. St., 565; *National Bank of Metropolis v. Sprague*, 20 N. J. Eq., 159; *Switzer v. Skiles*, 3 Gilman [Ill.], 529; *Marie v. Garrison*, 83 N. Y., 14; *Hopkins v. Ensign*, 25 N. E. Rep. [N. Y.], 306; *Wicker v. Hoppock*, 6 Wall. [U. S.], 94; *Maffet v. Ijams*, 103 Pa. St., 266; *Barling v. Peters*, 25 N. E. Rep. [Ill.], 765; *Neely v. McClure*, 1 Cen. Rep. [Pa.], 230; *Ritchie v.*

Judd, 27 N. E. Rep. [Ill.], 682; *James v. Fulcrod*, 5 Tex., 512; *Bellows v. Russell*, 20 N. H. 427; *Smith v. Greenlee*, 2 Dev. Law [N. Car.], 126; *Goode v. Hawkins*, 2 Dev. Eq. [N. Car.], 393; *Smith v. Ullman*, 58 Md., 183.) The decree of the district court confirming the sale was right and is

AFFIRMED.

DORSEY MCDANIEL, APPELLANT, V. VALENTINE LIPP ET AL., APPELLEES.

FILED SEPTEMBER 18, 1894. No. 5812.

1. **Replevin:** BUILDINGS: PERSONALTY. An action of replevin may be maintained for property which as between the parties is personalty.
2. **Injunction to Prevent Moving Building Under Writ of Replevin:** HOUSES AS PERSONALTY. The judgment of the trial court, dismissing the action, approved and affirmed, as an examination of the evidence shows that it is insufficient to sustain the allegations of the petition or warrant the issuance of an injunction.

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

John T. Cathers, and *W. L. Peart*, for appellant.

Lane & Murdock and *W. W. Slabaugh*, *contra*.

HARRISON, J.

It appears in this case that on February 7, 1887, Valentine Lipp, of defendants, purchased lot 1, in block 114, in South Omaha, receiving therefor a contract of purchase, signed by the South Omaha Land Company, which contract, after a number of assignments, was finally assigned

to Fred and Ernst Stenger, who performed the conditions and received a deed from the company, conveying the lot to them, of date March 31, 1891. Soon after purchasing the lot, Valentine Lipp built a house, or cottage, on what he supposed was the lot, or a portion of it, for one O'Connor, to whom he had contracted the house before building it. O'Connor failed to pay for the house, and in a final settlement had between them, some three months after the erection of the cottage, it became the property of Lipp. Lot 1, the evidence shows, was a portion of a hill which sloped toward the alley of block 114, in which it was situated, and was very steep and could not in its condition, at the time of purchase, be used for building purposes. It further appears that the ground in the part of the city in which it was located was very hilly and broken, and covered with a growth of small timber and underbrush, and the streets had not been opened or graded, and the lines of the block and its lots were not easily discoverable by the ordinary observer or searcher for them. Mr. Lipp made an effort to discover them, without, however, having them surveyed, and, supposing he had found them, put up the house in controversy and afterwards ascertained that it stood partly on the alley of block 114, back of lots 1 and 2 of the block, and partly on lots 17 and 18 of the same block, and extended more than half the way across the alley toward lot 1 from lot 18, the house standing on blocks of wood placed under the corners. After the sale of the cottage to O'Connor and its becoming again his property through the latter's failure to pay for it, and releasing any right to it, Lipp leased it and collected the rents during several months, and at some date during this time mortgaged it to a Mr. Doud to secure a loan of $150, which, immediately prior to this and other suits connected with it, he paid and the lien was released. On or about April 3, 1891, the lots 17 and 18 referred to were purchased by Dorsey McDaniel, the plaintiff herein, the agent from

whom they were purchased stating to him that the house was on lot 18 and he could move it up to the front a little and fix it up and make a residence of it. Very soon afterwards McDaniel succeeded in inducing one Gray, the tenant of Lipp, to remove from the house, having, however, prior to Gray's removal, pried it up and moved it a short distance over toward lot 18. After Gray moved out, McDaniel placed some of his own furniture in the house, which was thrown out at the instance of Doud, who was then claiming the right to a partial control, at least, of the house by virtue of his lien for the money loaned to Lipp. It remained for a short time in the possession of the party holding it in Doud's behalf, but was abandoned by him, presumably when Lipp gave Doud other security and released this. Then McDaniel (the parties moving it for him commencing on Saturday night at somewhere between 9 and 12 o'clock and working until afternoon of the Sunday following) had the house removed to about the center of lot 18, placed brick piers under it and built an addition to it, and sold it with lot 18 to Frank Lee about September or October, 1891. The change of position of the house to the center of lot 18 was effected about the middle of April, 1891. May 5, 1891, an action in replevin was instituted by Lipp to recover possession of the house, which was afterwards dismissed, and on May 14, 1891, he commenced another replevin action to get possession of the building and had spoken to one John Woodward to move the house, who informed McDaniel of it. This action was then commenced by McDaniel to enjoin Valentine Lipp, John Woodward, and A. A. Donnelly, constable, from removing or interfering with his possession of the house. A trial of the case in the district court resulted in a finding in favor of defendants Lipp, Woodward, and Donnelly and a dismissal of the action, from which plaintiff appealed to this court.

It is very clear from the evidence that Lipp had always

considered and treated the house as personal property, and that it was not attached to lot 18 in such a manner as to become a part of it or belong to its owner, and that as between Lipp and McDaniel, when the last named party moved it over on his lot 18, it was personal property, and the act of McDaniel in moving it did not and could not change its character as such. (*Mills v. Redick*, 1 Neb., 437; *Central B. R. Co. v. Fritz*, 20 Kan., 430; *Hartwell v. Kelly*, 117 Mass., 235.) The evidence shows nothing further than that defendants proposed to attempt to take possession of the house by virtue of the action of replevin and the writ issued therein. There is no evidence of an attempt to interfere with the plaintiff's possession of the building in any other manner, or any threats of any other or different movements or efforts by defendants, or either of them, toward any molestation of the plaintiff in his enjoyment of it. That replevin was the proper action, see Cobbey, Replevin, secs. 363, 365; *Mills v. Redick*, 1 Neb., 437; *Fitzgerald v. Anderson*, 81 Wis., 341, 51 N. W. Rep., 554. It is very clear that the district court was right and its judgment of dismissal a correct one, according to the facts developed in the testimony in the case.

AFFIRMED.

MINNEAPOLIS HARVESTER WORKS v. GUSTAVE KAESSNER.

FILED SEPTEMBER 18, 1894. No. 5835.

Usury. The evidence examined, and *held* insufficient to sustain the verdict.

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

Silas Cobb, for plaintiff in error.

John P. Davis, contra.

HARRISON, J.

Defendant in error commenced an action in the district court of Douglas county, against the Minneapolis Harvester Works and Silas Cobb, alleging in his petition as cause of action: "That on the 15th day of December, 1887, plaintiff made and executed to the defendant corporation a certain promissory note for the sum of one thousand and thirty dollars ($1,030), to be due and payable on the 10th day of June, 1888, which said note was for a consideration of nine hundred and ten dollars ($910) and was usurious to the extent of the remaining one hundred and twenty dollars ($120)." The petition further states that, as collateral security for the payment of the $1,030 note, Kaessner delivered to the company a number of notes of other parties belonging to him, and on the 16th day of October, 1889, paid to the company the sum of $250 to apply on the note for $1,030; that the plaintiff in error collected of the collaterals the sum of $775.65, which, together with the $250, amounted to the sum of $1,025.65, or $115.65 of a surplus or overpayment of the $910, which, deducting the usurious portion of the $1,030, *i. e.* $120, was the true amount due on said note; that there remained of the collaterals in the hands of plaintiff in error notes aggregating the sum of $325, to which, by the payment of the amount due on the $1,030 note, or $910, Kaessner became entitled. He alleges a demand for the remaining notes of the collaterals, a refusal to deliver them to him, their conversion, and asks judgment for the $115.65, overpayment on the note, and $325, alleged value of the converted collaterals. To this the answer was: "The defendant admits that the note mentioned in the petition was executed for $1,030, due and payable at the time

therein alleged, and denies that said note is usurious to the extent of $120, or any other amount;" an admission of the payment of the $250, but a statement that it was not to be credited upon the $1,030, unless Kaessner performed certain conditions (particularly stated in the answer, but not necessary here); the non-performance of the conditions and the crediting of the $250 on an account then existing between the parties; an admission of the collection of the amount of $775.65 from the collateral notes, and a denial of the allegation of the petition in regard to the value of the uncollected collateral notes and a denial of their conversion; a claim of a balance yet due plaintiff in error on the $1,030 note, and a further allegation of a claim of amount due on account in the sum of $65.88, and $16 and interest, and $120, and accrued interest on promissory notes described in the answer, signed by Kaessner and in favor of plaintiff in error. The answer concludes with a prayer for judgment against Kaessner in the sum of $456.21 and interest, etc. Kaessner filed a reply, in which all new matter contained in the answer was denied except the allegation of the execution and delivery by him to plaintiff in error of the notes of $16 and $120, which it admitted, but stated that they were obtained through the fraud and misrepresentation of its general agent and were without consideration, or that the consideration therefor had failed, and a further allegation of labor and material performed and furnished by Kaessner for plaintiff in error during the years 1888 and 1889, in and about the repairing of sixteen machines, of the alleged worth and value of $160. There was a trial and verdict by the jury in favor of Kaessner in the sum of $521.11. Motion for new trial was argued and overruled and judgment rendered in accordance with the verdict for Kaessner, and the case was removed to this court for review by petition in error on behalf of the Minneapolis Harvester Works.

The only assignment of error we will notice is, that the

verdict was not sustained by sufficient evidence. Mr. Kaessner's claim or action is based upon the allegation that $120 of the amount of the $1,030 note was usurious or illegal interest, and that when he had paid the amount ($910) remaining after deducting the $120 from $1,030, the face of the note, he was entitled to the return of the collateral notes which were still in the hands of plaintiff in error uncollected. An examination of the testimony discloses that there is a total failure of proof on the subject of usury. There is nothing in the evidence which tends in the least to show that the $120, or any portion of the $1,030, was interest, either legal or illegal, on this sum or any part of it, or any other sum. The most that can be said of the evidence is that it tends to show that there was $120 of the $1,030 which was made a part of the amount of the note without any consideration therefor. Mr. Kaessner says of it in one portion of his testimony as follows:

Q. What was this $120 difference between the $910 and $1,030 for?

A. It was for forfeiture of overdue payments.

And in another place, during cross-examination, states:

Q. You stated that there was $120 in this note that you do not owe?

A. Yes, sir.

Q. Why then did you execute a note for an amount that you didn't owe?

A. I did the year before, and I got my note.

The Court: You are asked to state why you did it.

A. It was their custom. They requested me to do so.

Mr. Cobb: How do you know it was their custom?

A. I done it the year before.

Q. You did that because it was their custom, did you?

A. Yes; that is what I did.

Q. You executed a note for $120 more than you were indebted to them simply because it was their custom to

have it done that way, and that is the only reason you can give?

A. That is the way we done it.

Q. Is that the only reason you executed a note for $120 more than you owed?

A. That is all.

There is nothing in this which shows the taking of illegal interest or contracting for it. A failure to prove that the $120 was a usurious amount as pleaded in the petition left the amount of the note as expressed by its terms, $1,030, and the payments made were insufficient to extinguish the indebtedness and entitle Kaessner to the collateral notes. It follows that the evidence is not sufficient to sustain the verdict and the judgment must be reversed. If it be claimed that, notwithstanding the proof on behalf of Kaessner was not sufficient to establish that the $120 of the $1,030 consideration of the note was usurious, yet it did tend to establish that the amount of the note should have been $910, it will not cure the error or assist us, as we must then apply the rule that a party is not allowed to allege in his petition one cause of action and prove another upon trial. (*Imhoff v. House*, 36 Neb., 28.)

There are some other points argued in the briefs in reference to other branches of the case, but as the case must be returned to the lower court for another trial, we will not discuss them at this time.

REVERSED AND REMANDED.

ORRIN R. CAIN, APPELLANT, V. MINNIE D. BOLLER ET AL., APPELLEES.

FILED SEPTEMBER 18, 1894. No. 5386.

Estoppel. Where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of facts, and induces him to act on that belief or to alter his previous condition, the former is concluded from averring against the latter a different state of things as existing at the same time.

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

B. G. Burbank, for appellant.

Cowin & McHugh, contra.

RYAN, C.

The contention on this appeal is between Orrin R. Cain, as appellant, and Minnie D. Boller and C. E. Boller, as appellees, as to the correctness of the findings of the district court of Douglas county in favor of the parties last named. On April 30, 1890, one A. R. McCandless was the owner of a lot and a half lot in Isabel's addition to the city of Omaha, which, in a writing of that date, he agreed to sell to Burton A. Karr, who agreed to purchase the same upon the terms in said writing provided; that is to say, Karr was to build a certain dwelling house thereon, and pay one-third of the purchase price in lumber and the other two-thirds out of a loan which he expected to effect, secured by a mortgage on the premises to be conveyed to him. About the 28th day of May, 1890, Karr contracted in writing with appellant for the erection by Cain of the dwelling house, to be built on the property which McCandless had agreed to convey to Karr. For building this house Cain was to receive from Karr the actual cost of

the necessary labor and material, with ten per cent in addition thereto. On June 11, 1890, Karr entered into a written contract with C. E. Boller for the sale by Karr to Boller of the property on which Cain, the appellant, was then erecting a building for Karr. As between Karr and Boller, the agreed price for the house, when completed, and the lots was $2,800, of which $900 was to be paid in Boller's architectural work, $300 in a second mortgage, and the $1,600, not otherwise provided for, by a first mortgage on the house and lots. The erection of the house proceeded under the contract between appellant and Karr until July 18, 1890, when Karr surrendered his contract for the purchase of the lots to McCandless, by whom, at Karr's request, another like contract relating to the same subject-matter was made with appellant Cain. On the same day, and as part of the same transaction, appellant transferred all his title, right, and interest in the lots mentioned. This assignment by Cain to Karr recited that the said Cain had received the said contract and made the same with McCandless at the request of said Karr, and that said Karr had furnished all the money therefor, and that said Cain had made said contract for the use and benefit of Karr and had paid nothing therefor. This arrangement and assignment were made because just previously thereto an attachment had been levied upon some lumber designed for use in the erection of Karr's building. Neither McCandless nor Boller had any knowledge of the assignment from Cain to Karr. Indeed, its existence was concealed from every one not a party to it, so that no process should be levied upon property improved or being used for that purpose, in satisfaction of claims against Karr. That both McCandless and Boller had knowledge of the transfer to Cain, and dealt with him as the only party concerned, except themselves, must be accepted as established by the findings of the trial court upon conflicting evidence. When the time came for McCandless to convey, it was suggested that the title be vested in

the wife of C. E. Boller for convenience in effecting a loan, and the deed was made accordingly. With a view to satisfying the company which was making the loan just referred to, and before said deed was made, Mr. Karr and his wife executed a writing which recited that all moneys which would have been payable to Karr from Boller, under the contract between Karr and Boller, should be paid to appellant Cain. Of the $1,500 net obtained by this loan, Boller handed $800 to appellant Cain as the first payment due on the contract for purchase. Out of this $800 Cain made payment to McCandless of the balance, of $695, still owing him. Boller at different times paid Cain sums aggregating $327.50 at Cain's request. Cain applied to Boller for a payment of $300 additional under the contract, in which, by Cain's own representations, Boller had been led to suppose Cain had been substituted in place of Karr. When Cain asked for this, the last cash payment required, Mr. Boller demanded that there should be delivered to him waivers of all claims for liens. Cain answered that as the laborers were at work he would not be able to obtain their waivers, but that as to the lumber and mill work he would furnish the waivers, and accordingly procured and delivered to Boller a written waiver of liens on the property signed by the Bohn Sash & Door Company, which furnished the mill work, and the Star Union Company, which had furnished the lumber. By the contract of Boller he was entitled to a waiver of liens before he made this payment, and in reliance upon these waivers he was induced to make payment to Cain, in whose petition a foreclosure was sought in part for the whole amount as to which these liens were waived. The monstrous nature of this claim becomes evident when it is noted that the whole amount of the items for labor done and material furnished aggregate but $2,068.30, for which appellant's lien was claimed, on which claim filed there was credited a payment in cash of $758.40, leaving a balance of but

$1,309.90, of which the sum total of the two liens waived was $950. When appellant secretly assigned and transferred to Karr all his right, title, and interest in and to the lots now sought to be charged with a mechanic's lien, it is very doubtful, to say the least, whether under the circumstances of this case, independently of every other consideration, he did not part with all existing right to enforce a mechanic's lien against the lots in question. The district court properly held that added to this consideration it could not be tolerated that Cain should, as owner, procure payments to himself to be made on the faith of deceitful appearances of which he was the guilty author, and afterwards assert, as against the party who had acted on the faith of such appearances, a state of facts inconsistent therewith to the detriment of such other party. The judgment of the district court is

AFFIRMED.

IRVINE, C., not sitting.

PHENIX INSURANCE COMPANY OF BROOKLYN V. OTTO COVEY ET AL.

FILED SEPTEMBER 18, 1894. No. 5827.

1. **Pleading:** RULING ON MOTION FOR SPECIFIC STATEMENT: REVIEW. Where no prejudice has resulted from the ruling of the trial court upon a motion for a more specific statement, such ruling will afford no ground of complaint on error.
2. **Fire Insurance:** AGENTS: CONCURRENT INSURANCE: CONSENT: ESTOPPEL. Where an insurance agent, with authority to receive premiums and issue policies, exercises such authority with knowledge of the existence of concurrent insurance on the premises, the company is estopped, after a loss, to insist that the policy is void because consent to such concurrent insurance was not given in writing.

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

Jacob Fawcett and *F. M. Sturdevant*, for plaintiff in error.

Ricketts & Wilson, contra.

RYAN, C.

On the 29th of January, 1890, Sarah J. Suddith and her husband made to Otto Covey a mortgage to secure payment of eight promissory notes for the aggregate amount of $1,685. On the 10th of February, following, the Phenix Insurance Company of Brooklyn, New York, issued its policy of insurance upon the mortgaged property to its owner, Sarah J. Suddith, containing a provision that "loss, if any, payable to Otto Covey, mortgagee, as his interest may appear." The building insured was wholly destroyed by fire February 18, 1890. The premium was not paid till after the fire, when, with full knowledge of the fact of loss, this premium was accepted by Palmer & Hendee, who, as local agents of the insurance company, had authority to fill out and issue policies on behalf of said insurance company and receive payment of premiums thereon. At the time of the issue of the policy in question it was agreed between the agent of Mrs. Suddith and the aforesaid local agents of the insurance company that payment of the premium might be made at some subsequent time. After the loss the mortgagee brought an action in the district court of Lancaster county, and, upon a trial had, a verdict was returned in his favor against the insurance company, which, as plaintiff in error, presents for our consideration several objections to the judgment and proceedings leading up to it.

It is first insisted that there was error in allowing a reply to be filed during the trial in which a waiver of a re-

striction in the policy as to concurrent insurance was for the first time pleaded. In the answer it was alleged that there was contained in the policy a provision that concurrent with the plaintiff in error's policy of insurance but $1,000 concurrent insurance could be had without the express consent of the company in writing, and that no consent had been obtained, nevertheless the owner of the property had caused to be issued to her policies of concurrent insurance to the amount of $1,500, and that by the express terms of the policy herein sued on said policy was thereby rendered absolutely void. It was in avoidance of these averments that there was in reply pleaded a waiver of this condition by the plaintiff in error. It is quite probable that under many circumstances the motion to make this reply more definite and certain so as to disclose by what officer or agent this waiver was consented to should have been sustained, because otherwise the insurance company might be at a great disadvantage in making its defense to this new affirmative matter. In the case under consideration, however, the waiver was claimed in evidence to have taken place through Palmer & Hendee, agents of the plaintiff in error. Both of these gentlemen were present at the trial and testified on this question, so that it is apparent that no prejudice resulted to the plaintiff in error by the ruling complained of on its motion. No condition is shown to have existed when this ruling was made, which indicates that the discretion of the trial court was abused in allowing the reply to be filed when it was.

There was evidence sufficient to sustain the contention that Messrs. Palmer & Hendee issued the policy sued on with full knowledge that concurrent insurance to the amount of $500 in excess of the limitation of $1,000 had been or was being effected by the assured. It may be true that these agents had no authority to waive the limitation at all. Certainly they could contract for a waiver if thereto empowered, only in the manner fixed by the policy; that is,

in writing. We do not understand, however, that the defendants in error rely upon a simple contract of waiver. The evidence shows that the premium was received by Palmer & Hendee several days subsequent to the issue of the policy—indeed, after a fire had destroyed the property insured—with full knowledge of the excess in amount of the then existing concurrent insurance. While they were local agents, it is not shown by the evidence in what respect their powers were special or limited. It is quite clear, however, that in the first instance they had full power to fix the figures in excess of which no concurrent insurance would be valid by the terms of the policy. From the fact of being local agents, having necessarily a knowledge of the value of the property insured, this limitation was properly intrusted to them to be fixed. If the proposed concurrent insurance was more than the value of the insured property justified, the local agents of necessity must be relied upon to refuse to issue a policy. In this instance, with full knowledge—as the jury must have found—that the concurrent insurance was in excess of the limitation fixed by them, these agents accepted the premium upon the policy issued on behalf of the plaintiff in error, and there has never been an offer to return the said premium or any part of it. The company was bound, not because its agents had contracted that it should thus be bound, but because the company is estopped to insist upon conditions inconsistent with those by virtue of which it received and has retained the premium on the policy sued on. (*Hughes v. Ins. Co. of North America*, 40 Neb., 626; *Phenix Ins. Co. of Brooklyn v. Dungan*, 37 Neb., 468, and authorities therein cited. See, also, *Hibernia Ins. Co. v. Malevinsky*, 24 S. W. Rep. [Tex.], 804.)

The allowance of attorneys' fees is, in argument, criticised because the allowance was in favor of Messrs. Lamb, Ricketts & Wilson by name. These fees were, however, taxed as costs, and it would seem that whether taxed as

attorneys' fees by that general designation, or by specially naming the attorneys of record, the power in the court would equally exist, and with equal regularity should be held to have been exercised.

As the insured property was wholly destroyed, there was no requirement or room for arbitration or other ascertainment of the amount of the loss otherwise than as fixed by the statute. (*German Ins. Co. v. Eddy*, 36 Neb., 461.) Shortly after the loss the adjuster for plaintiff in error visited the place where the fire occurred. It was shown that this adjuster was a general agent of the plaintiff in error, and that he repeatedly inquired into all the facts attending the loss complained of and talked with both the mortgagor and mortgagee upon that subject. This adjuster is shown to have denied that the plaintiff in error was liable to Otto Covey, and to have stated to Mr. Covey's attorney that nothing would be paid to him on account of this loss. The effect of this, if found as a fact, was fairly submitted to the jury. The judgment of the district court is

AFFIRMED.

GERMAN-AMERICAN INSURANCE COMPANY V. OTTO COVEY ET AL.

FILED SEPTEMBER 18, 1894. No. 5828.

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

Jacob Fawcett and *F. M. Sturdevant*, for plaintiff in error.

Ricketts & Wilson, contra.

RYAN, C.

This cause was tried upon the same issues and evidence, and argued upon the same briefs, as were submitted in *Phenix Ins. Co. v. Covey*, 41 Neb., 724, and, following that case, is

AFFIRMED.

SAMUEL S. CAMPBELL ET AL. V. GEORGE BAXTER.

FILED SEPTEMBER 18, 1894. No. 5397.

1. **Real Estate Agents:** DOUBLE EMPLOYMENT: COMMISSIONS. A real estate agent acting for both parties in effecting an exchange of their property can recover compensation from neither unless such agent's double employment was known and assented to by both said contracting parties.
2. **Right of Vendor to Recover Commission Paid Real Estate Agent in Employ of Vendee.** Money paid by a principal to his agent for the latter's services in effecting a sale or exchange of the principal's property may be recovered back, in an action at law, when it appears that such agent had or was to receive a commission or compensation from the other party to the trade or exchange for his services in bringing it about, if it also appear that at the time such principal made such payment he was ignorant of the fact that his agent was acting for both parties to such trade or exchange.

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

The opinion contains a statement of the case.

Switzler & McIntosh, for plaintiffs in error:

The compromise, settlement, and dismissal of the suit of Campbell & Hervey against Baxter was a sufficient consideration for the payment of the money and the making of the note in controversy.

The compromise and settlement of an asserted claim involved in legal controversy, be it never so doubtful, constitute a sufficient consideration for any obligation given by one party to the other in consideration of such settlement. (*Weed v. Terry*, 2 Doug. [Mich.], 344; *Parker v. Enslow*, 102 Ill., 272; *Dunham v. Griswold*, 100 N. Y., 224.) Campbell & Hervey, in the suit so settled, were honestly asserting a claim which they had a reasonable ground to believe could be maintained. In an action brought upon an obligation given by a defendant in consideration of the compromise and settlement of a prior suit against him, the court will not inquire into the validity of the claim so settled. It is enough if a claim involving a legal controversy, which the plaintiffs had a reasonable ground to believe they could maintain, was honestly asserted. (*Flannagan v. Kilcome*, 58 N. H., 443; *Bozeman v. Rushing*, 51 Ala., 529; *Wehrum v. Kuhn*, 61 N. Y., 623; *Keefe v. Vogle*, 36 Ia., 87; *Sullivan v. Collins*, 18 Ia., 228; 1 Parsons, Contracts [7th ed.], p. 439; *Boyce v. Berger*, 11 Neb., 399; *Treitschke v. Western Grain Co.*, 10 Neb., 360.)

The plaintiffs in error did not represent or claim to represent Van Closter and McLaughlin in the deal. Their claim was that they brought the parties together, and for that service Van Closter and McLaughlin agreed to pay them $500. The evidence tends to show that, at the time of the settlement in controversy, Baxter knew, or at least had such knowledge that by using reasonable diligence he might have known, all the facts relating to the matter which he claims the plaintiffs in error concealed from him at and prior to said settlement. Not merely was the burden upon Baxter of proving his ignorance, but, under the circumstances in this case, and for the purpose of going behind a compromise and settlement solemnly entered into by him, it was incumbent upon him to establish the allegation of ignorance by evidence that was clear and con-

vincing, and that could not reasonably be doubted. (*Allis v. Billings*, 2 Cush. [Mass.], 19; *Stitt v. Hindekopers*, 17 Wall. [U. S.], 384.)

Where a real estate agent is employed to find a purchaser at a price fixed by the seller, or at a price which shall be satisfactory to the seller when he and the purchaser meet, he may, if he has so agreed, recover commissions from both parties to the transaction, for he is then only a middle-man, and his duty is performed when the buyer and seller are brought together. (*Herman v. Martineau*, 1 Wis., 136; *Stewart v. Mather*, 32 Wis., 344; *Mullen v. Keetzleb*, 7 Bush [Ky.], 253; *Rupp v. Sampson*, 82 Mass., 398.)

Greene & Baxter, contra:

A real estate agent or broker, who is acting as agent for the purchaser without the knowledge of the seller, is not entitled to commissions from the latter; and such commissions, when paid without such knowledge, may be recovered back, even though the sale was an advantageous one. (*Cannell v. Smith*, 21 Atl. Rep. [Pa.], 793; *Kelley v. Solari*, 9 M. & W. [Eng.], 54.)

The defendant in error compromised and settled the claim of plaintiffs in the attachment suit on the supposition that they were his sole agents, and that as such they were entitled to recover. To sustain a settlement or compromise it is essential that the claim be sustainable in law or equity. (1 Parson, Contracts, 366, 367, note *c*; Chitty, Contracts [10th Am. ed.], 33, 35, 41, note *m*; Addison, Contracts [12th Am. ed.], 21, note *n*; Story, Contracts, 435, 436; Smith, Contracts [4th Am. ed.], 102; *Jones v. Ashburnham*, 4 East [Eng.], 455; *Smith v. Algar*, 1 Barn. & Ad. [Eng.], 604; *Wade v. Simeon*, 2 C. B. [Eng.], 548; *Gould v. Armstrong*, 2 Hall [N. Y.], 266; *Cabot v. Haskins*, 3 Pick. [Mass.], 83; *Warder v. Tucker*, 7 Mass., 449; *Durbar v. Marden*, 13 N. H., 311; *Jarvis v. Sutton*, 3 Ind.,

289; *Stewart v. Ahrenfeldt*, 4 Denio [N. Y.], 189; *Sullivan v. Collins*, 18 Ia., 228.) If the parties know, or ought to know, that the claim has no foundation, it is not a good consideration. (*Pitkin v. Noyes*, 48 N. H., 294; *Headley v. Hackley*, 50 Mich., 43; *Feeter v. Weber*, 78 N. Y., 334.) To make forbearance to sue a good consideration for a promise to pay, there must be a well founded claim in equity or law for one, or there must be a compromise of doubtful right. (*McKinley v. Watkins*, 13 Ill., 140; *Zimmer v. Becker*, 66 Wis., 527.)

If the plaintiffs in error acted as agents for both parties, and not as middle-men, they could not recover commissions from either, unless the double agency was unequivocally expressed and clearly made known. (*Scribner v. Collar*, 29 Am. Rep. [Mich.], 543; *Everhart v. Searle*, 71 Pa. St., 256; *Raisin v. Clark*, 41 Md., 158; *Walker v. Osgood*, 93 Am. Dec. [Mass.], 168; *Bell v. McConnell*, 41 Am. Rep. [O.], 528; *Rice v. Wood*, 18 Am. Rep. [Mass.], 459; *Farnsworth v. Hemmer*, 1 Allen [Mass.], 494.)

If the broker acts adversely to his principal in any part of the transaction, omits to disclose any interest which would naturally influence his conduct in dealing with the subject of the employment, it amounts to such a fraud upon the principal as to forfeit any right to compensation for services. (*Carman v. Beach*, 63 N. Y., 97; *Murray v. Beard*, 102 N. Y., 505.)

The plaintiffs in error could not consistently be agents for both parties. (*Lynch v. Fallon*, 11 R. I., 312; *Siegel v. Gould*, 7 Lans. [N. Y.], 177.)

RAGAN, C.

George Baxter sued Samuel S. Campbell and George W. Hervey, copartners, in the district court of Douglas county to recover back from them the sum of $250 which he had paid them. Baxter had judgment and Campbell & Hervey bring the case here for review.

The theory on which Baxter predicates his right to recover back the money paid, as disclosed by his petition and evidence, is that in 1888 he owned a cattle ranch and some cattle in Kansas and in the spring or summer of this year employed Campbell & Hervey, who were real estate agents in the city of Omaha, to effect a sale of his cattle ranch for $45,000 in money, or effect an exchange of said cattle ranch for property in Omaha or vicinity; that Campbell & Hervey undertook to effect this sale or exchange of this cattle ranch as his, Baxter's, agents; that through the instrumentality of Campbell & Hervey, Baxter effected an exchange of his cattle ranch with Van Closter and McLaughlin for real estate of theirs in the city of Omaha, the latter paying Baxter a difference of $14,000 in cash; that Campbell & Hervey, subsequently to the exchange of said properties, brought suit against Baxter to recover from him their commissions for their services rendered in and about the exchange of said properties; that in compromise and settlement of that suit Baxter executed to Campbell & Hervey his note for $250, which is past due and which he has since refused to pay, and also at the same time paid them $250 in cash, the money sought to be recovered back by this suit; that at the time Campbell & Hervey were acting as Baxter's agents for the purpose of effecting a sale or exchange of his ranch they were also acting as agents for Van Closter and McLaughlin, and were to receive from them a commission or compensation for effecting an exchange of their property for the property of Baxter; that he, Baxter, until he had paid the money which he now seeks to recover back, had no knowledge that Campbell & Hervey were acting for Van Closter and McLaughlin. The defense of Campbell & Hervey, as disclosed by their pleadings and evidence, is that though they were to receive a commission or compensation from Van Closter and McLaughlin for services rendered them in effecting the exchange of their property for Baxter's ranch, yet they

took no part in the negotiations between Baxter and Van Closter and McLaughlin on behalf of either of said contracting parties which resulted in the exchange of their properties; that their employment by Baxter and Van Closter and McLaughlin was merely for the purpose of bringing the parties together, they to make their own trade, and that they did conduct the negotiations and make the trade without their, Campbell & Hervey's, interference in any manner; that in the transaction they were merely "middle-men;" and that Baxter, at the time he paid them the money which he now seeks to recover back, knew that they, Campbell & Hervey, were to receive a commission from Van Closter and McLaughlin.

1. One argument of counsel for the plaintiffs in error is that the findings made by the district court are unsupported by sufficient competent evidence. The chief issues of fact presented to the trial court were (*a*) whether Campbell & Hervey, in the part they took in the transaction between the trading parties, were mere "middle-men,"—that is, whether they were employed merely for the purpose of bringing the trading parties together, leaving them to conduct their own negotiations and make their own trade, or whether they undertook for Baxter to effect a sale or exchange of his ranch and such exchange was effected through their efforts; (*b*) whether Baxter knew, at the time he paid the money now sought to be recovered in this action, that Campbell & Hervey were acting for and were to receive a commission from Van Closter and McLaughlin. Both these issues must have been found by the trial court in favor of Baxter; and while there was a sharp conflict in the evidence it supports the conclusions reached by the trial court.

2. A second argument is that the judgment of the court is contrary to the law of the case. The findings of the trial court do not place the plaintiffs in error in this transaction in the status of "middle-men," as was the case with

the brokers in *Orton v. Schofield*, 61 Wis., 382, and cases of a like class, but brings the plaintiffs in error within the rule laid down in *Rice v. Wood*, 113 Mass., 133, where it was held: "A broker acting for both parties in effecting an exchange of property can recover compensation from neither, unless his double employment was known and assented to by both." (*Walker v. Osgood*, 98 Mass., 348.) In *Bollman v. Loomis*, 41 Conn., 581, it was held: "The policy of the law forbids that a person acting as the friend and confidential adviser of a purchaser should at the same time be secretly receiving compensation from the seller for effecting the sale; and a contract for such compensation is void." In *Meyer v. Hanchett*, 43 Wis., 246, it was held: "One cannot act as agent for both seller and purchaser, unless both know of and assent to his undertaking such agency and receiving commissions from both." (*Holcomb v. Weaver*, 136 Mass., 265; *Byrd v. Hughes*, 84 Ill., 174; *Atlee v. Fink*, 75 Mo., 100; *Scribner v. Collar*, 40 Mich., 375.) From these cases it quite clearly appears that if Campbell & Hervey had sold Baxter's property for $45,000 cash, they could not have recovered their commissions from Baxter for making such sale if it had appeared that they received or were to receive a commission also from the purchaser. That the property of Baxter was exchanged for other property did not alter the relations of Campbell & Hervey to Baxter. It was the duty of Campbell & Hervey, in acting as agents for Baxter, to use their best endeavors for him. If they were to sell the property for cash, it was their duty to obtain for him the highest price they could. While acting as agents for the seller they could not also act as agents for the purchaser, because as his agents it would be their duty to buy the property as cheaply as possible. In acting as agent for Baxter to find some person who would exchange Omaha property for this ranch it was the duty of Campbell & Hervey to give their principal, Baxter, an opportunity to

trade or exchange his ranch for any Omaha property that might be for trade or exchange, and to introduce to him any person within their knowledge owning property which he desired to trade for such property as Baxter's; but Campbell & Hervey, by accepting employment and the promise of a commission from Van Closter and McLaughlin as the result of an exchange of their property for Baxter's, put themselves in such a position that it was to their interest that Baxter should trade with Van Closter and McLaughlin instead of with other persons. We do not say that Campbell & Hervey acted in bad faith nor were influenced by improper motives; but we do say that their relations with Van Closter and McLaughlin afforded Campbell & Hervey the temptation to keep from Baxter the acquaintance of other parties owning property in Omaha and which they would trade for Baxter's.

Another argument under this heading is, since Baxter paid the money sought to be recovered back in compromise and settlement of a suit brought against him by Campbell & Hervey, and as the law favors settlements and compromises and discourages litigation, that therefore Baxter should not be allowed to recover. It is clear from the authorities that Baxter could have interposed the double agency of Campell & Hervey as a defense to the suit they brought against him for their commissions. He did not interpose such defense, for the very good reason, as the court finds, that at the time he made the settlement and paid the money he was ignorant of the relations which Campbell & Hervey sustained towards Van Closter and McLaughlin. We know of no principle of law or public policy that precludes Baxter's right to recover back money paid under such circumstances. (*Cannell v. Smith*, 21 Atl. Rep. [Pa.], 793.) There is no error in the record and the judgment of the district court is

AFFIRMED.

IRVINE, C., not sitting.

KILPATRICK-KOCH DRY GOODS COMPANY, APPELLEE, v. HENRY H. COOK ET AL., APPELLANTS.

FILED SEPTEMBER 18, 1894. No. 4631.

Review: FAILURE TO FILE BRIEFS No brief having been filed in this case by the appellants, the decree of the district court is affirmed without an examination of the record.

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

John P. Davis, for appellants.

Montgomery & Montgomery, contra

RAGAN, C.

This is an appeal from Douglas county. No brief having been filed by the appellants, the decree of the district court is therefore affirmed without an examination of the record.

AFFIRMED.

LINCOLN STREET RAILWAY COMPANY v. CHRISTIAN H. ADAMS.

FILED SEPTEMBER 18, 1894. No. 5572.

Surface Water: STREET RAILWAYS: DAMAGES. A proprietor may not collect surface waters on his estate into a ditch or drain and discharge them in a volume on the lands of his neighbor. *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 138, followed.

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

The opinion contains a statement of the case.

William G. Clark, for plaintiff in error:

An adjoining owner cannot, by a ditch or canal, empty a natural reservoir, such as a pond, slough or "sag hole," onto his neighbor. (*Davis v. Londgreen*, 8 Neb., 43; *Pettigrew v. Village of Evansville*, 25 Wis., 223.)

After receiving surface water onto his land, the proprietor cannot collect the fugitive waters which would otherwise soak into the ground or would run off in many streams and directions, and discharge the accumulations in a single stream onto his neighbor. (*Pettigrew v. Village of Evansville*, 25 Wis., 236; *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 138; *Barkley v. Wilcox*, 86 N. Y., 146.)

A man may stand at the boundary line of his estates and, by ditch, dike, or erections of any character, may fight surface waters as a common enemy, without regard to accumulations or to directions such accumulated waters may take or to damage they produce. (*Dickinson v. Worcester*, 7 Allen [Mass.], 19; *Parks v. City of Newburyport*, 10 Gray [Mass.], 28; *Turner v. Inhabitants of Dartmouth*, 13 Allen [Mass.], 291; *Flagg v. City of Worcester*, 13 Gray [Mass.], 603; *Gannon v. Hargadon*, 10 Allen [Mass.], 106; *Morrison v. Bucksport & B. R. Co.*, 67 Me., 353; *Phinizy v. City Council of Augusta*, 47 Ga., 260; *Schlichter v. Phillipy*, 67 Ind., 202; *Pettigrew v. Village of Evansville*, 25 Wis., 236; *Ulrich v. Richter*, 37 Wis., 229; *Freburg v. City of Davenport*, 63 Ia., 119; *Morris v. City of Council Bluffs*, 67 Ia., 344; *Barkley v. Wilcox*, 86 N. Y., 146; *Johnson v. Chicago, St. P., M. & O. R. Co.*, 80 Wis., 641; *Jordon v. St. Paul, M. & M. R. Co.*, 42 Minn., 175; *Kansas City & E. R. Co. v. Riley*, 33 Kan., 376; *Atchison, T. & S. F. R. Co. v. Hammer*, 22 Kan., 763; *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 83 Mo., 286; *Schneider v. Missouri P. R. Co.*, 29 Mo. App., 68; *Burke v. Missouri*

P. R. Co., 29 Mo. App., 370; *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 138.)

A municipal or railway corporation has precisely the rights of an individual. It may keep off surface water. It is not bound to provide sewers or culverts or protect parties owning low, undesirable property. Such parties are presumed to protect themselves when purchasing, and buy with reference to the right of neighbors or public to fight surface water. (*Heth v. City of Fond du Lac*, 63 Wis., 228; *Waters v. Village of Bay View*, 61 Wis., 642; *Hoyt v. City of Hudson*, 27 Wis., 656; *Weis v. City of Madison*, 75 Ind., 241; *Lambar v. City of St. Louis*, 15 Mo., 610; *White v. Corporation of the City of Yazoo*, 27 Miss., 357; *Lynch v. City of New York*, 76 N. Y., 60; *Town of Union v. Durkes*, 38 N. J. Law, 21; *Mills v. City of Brooklyn*, 32 N. Y., 489; *Henderson v. City of Minneapolis*, 32 Minn., 319; *Barry v. City of Lowell*, 8 Allen [Mass.], 127.)

Pound & Burr, contra:

Adams is not an upper land-owner upon whose land surface water is kept by the erections of the company, but a lower owner upon whose land it is discharged in great quantities by the artificial channel made by the company. Whether or not a lower owner can keep back surface water and restrain it on the land of an upper owner; whether or not one owner can prevent it from spreading out over his land by elevating it or by embankments and thus cause it to stand on or to spread out over adjoining lands, it is well settled and undisputed that no one can collect surface water and discharge it in an artificial channel on the land of another. Much less can he collect in a large cut the surface water of an entire district, conduct it in channels of his own making over one hundred yards, and pour it in a torrent upon another's land. (*Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 139; *Davis v. Londgreen*, 8 Neb., 43; *Gregory v. Bush*, 64 Mich., 37, 44; *Noonan v. City of Al-*

bany, 79 N. Y., 470; *Livingston v. McDonald*, 21 Ia., 160; *Templeton v. Voshloe*, 72 Ind., 134; *Yerex v. Eineder*, 86 Mich., 24; *Hogenson v. St. Paul, M. & M. R. Co.*, 31 Minn., 224; *Miller v. Laubach*, 47 Pa. St., 154; *Crabtree v. Baker*, 75 Ala., 91; *Knight v. Brown*, 25 W. Va., 808; *Cairo & V. R. Co. v. Stevens*, 73 Ind., 278; *Gulf, C. & S. F. R. Co. v. Helsley*, 62 Tex., 593; *Benson v. Chicago & A. R. Co.*, 78 Mo., 504.)

A city cannot collect surface water and pour it on private land. (*Gillison v. City of Charleston*, 16 W. Va., 282; *Byrnes v. City of Cohoes*, 67 N. Y., 204.)

Drainage commissioners and other public officers cannot collect surface water in ditches and discharge it on private land. (*Chapel v. Smith*, 80 Mich., 101; *Young v. Commissioners of Highway*, 134 Ill., 569.)

RAGAN, C.

This suit was brought by Christian H. Adams in the district court of Lancaster county against the Lincoln Street Railway Company for damages. As the petition is well drawn and concisely states the facts relied upon for a cause of action we quote it at length. It is as follows:

"The plaintiff, for cause of action against the said defendant, alleges that he is and was on and prior to the —— day of April, 1891, the owner in fee-simple and in possession of lot A, in South Park addition to the city of Lincoln, in said county, and the lessee and in possession of lots thirty-two and thirty-three (32 and 33), in block four (4), in said South Park addition; that upon said lot A are the dwelling house of the plaintiff, where he and his family resided on said —— day of April, 1891, and now reside, and his barn, well, and outhouses; that said lots 32 and 33 then were and are used by plaintiff as a market garden; and the plaintiff alleges that the grade and track of the Burlington & Missouri River Railroad Company runs along the west side of said lots, and that one of the public

streets of said city of Lincoln, known as Hill street, runs between said lot A and the said lots 32 and 33, across said railroad track, the said lot A being on the south side thereof and said lots 32 and 33 on the north side; that the said railroad grade and track are elevated some three or four feet above the surface of said lots; that prior to said —— day of April, 1891, said Hill street was on the same level with said lots, and that prior to said —— day of April, 1891, the surface water in case of rains was wont to and did flow across said Hill street to the east of said lots and to a ravine and culvert under said railroad track and thence to the west side of said track; that east of said lots, about one hundred yards on said Hill street, there is a hill which, prior to said —— day of April, 1891, sloped gradually to said ravine so that the surface water from said hill in case of rain was wont to and did flow into said ravine and through said culvert to the west side of said railroad track.

"And the plaintiff further alleges that the said defendant is a corporation duly organized under the laws of the state of Nebraska; that on said —— day of April, 1891, the said defendant began to lay its track upon and along said Hill street from a public street of said city known as Tenth street, two blocks east of plaintiff's said lots, across said railroad track and grade and beyond the same; that in laying said track the said defendant carelessly and negligently made a deep cut of the depth of three feet and upwards in said hill east of plaintiff's said lots along said Hill street, and from the base of said Hill street west to said railroad track carelessly and negligently raised and graded up the middle of said Hill street to a level with said railroad track and grade and over two feet above the surface of said lot and built and laid their said track thereon, and carelessly and negligently omitted and failed to put culverts under their said track and grade and carelessly and negligently failed to provide for carrying off the

surface water from said cut in said hill, and in constructing said grade and laying said track carelessly and negligently dug ditches on each side thereof for the purpose of obtaining earth for said grade and failed to provide means for conducting the water therefrom at the place where said track crosses said railroad track, by reason whereof all the surface water from the south side of said Hill street which was wont to flow across said Hill street and into said ravine is now stopped by said grade and track of the defendant and accumulates, stands, and remains upon said lot A, and the surface water from said hill which was wont to flow into said ravine now flows into said cut and along either side of said grade and track of defendant in the ditches on either side thereof and cuts and wears ditches and channels on either side thereof and flows from and out of such ditches and channels in and upon said lots of the plaintiff on either side of said street and there stands and accumulates, and is unable to flow off plaintiff's said lots, owing to the carelessness and negligence of the defendant in not providing proper culverts under said track and grade, and in constructing said cut so as to divert the surface water from said hill and from its natural course and direction, and cause it to flow into said cut and thence into and along said Hill street instead of into said ravine as it had been wont to flow.

"And the plaintiff further alleges that on or about the first day of June, 1891, he had growing in his market garden in said lots 32 and 33 upwards of 3,000 cabbages and 5,000 egg plants, of the value of $800; that on or about said date there were heavy rains, and that by reason of the negligence of the defendant, as above set forth, all the surface water from said hill flowed in and upon said lots and deposited large quantities of waste and refuse matter thereon and there accumulated, stood, and remained for the space of two weeks and upwards, being unable to run off by reason of the negligence of the defendant in

constructing said cut and track as above set forth, and thereby destroyed said cabbages and egg plants and rendered said lots utterly unfit to be used as a market garden and deprived the plaintiff of the use of the same; that on said date, by reason of the negligence of the defendant in constructing said cut and grade as above set forth, the surface water from said hill and from the south side of said Hill street flowed in and upon said lot A, and, owing to the negligence of said defendant in not providing culverts under their said grade and track, was unable to flow off from said lot but accumulated thereon to the depth of two feet and stood and remained thereon for the space of two weeks and upwards and brought and deposited large quantities of refuse and waste matter thereon, and filled up the well of the plaintiff with foul water and refuse matter, by reason whereof the water in said well became unwholesome and unfit to use, so that plaintiff was and is obliged to go more than 100 yards distant from his said house for water, and filled the cellar of plaintiff's house on said lot and destroyed his goods therein and rendered his house unhealthy, and the said waste and refuse matter brought and deposited upon said lot by said water decayed and produced foul, noisome, and unhealthy odors, and rendered the family of the plaintiff, to-wit, his wife and five children, sick and diseased for the space of several months, and from which sickness they have not yet recovered, and the plaintiff was compelled and obliged by reason thereof to neglect his necessary business to attend to and care for his family for the space of two months, and has been compelled to pay out and expend for medicines and services of a physician in caring for his family a large sum of money, to-wit, the sum of $250 and upwards; and the plaintiff alleges that said water stood in his barn on said lots and covered the floor thereof and caused the hay and manure therein to rot and decay and give rise to noxious and unhealthy odors, and rendered the same unfit to be used by

the plaintiff, by reason whereof plaintiff was compelled to tear down, remove, and rebuild the same, and in so doing to expend a large sum of money, to-wit, the sum of $50; and that by reason of the water standing upon said lot as aforesaid, and depositing said refuse and waste matter thereon, said premises have been rendered unhealthy and uninhabitable."

The answer of the street railway company was, in substance, a general denial. Adams had a verdict and judgment, and the street railway company brings the case here for review.

Counsel for the street railway company insists that the grievances pleaded and proved against his client arose from its acts and efforts to protect its property from surface water, and that if Adams sustained any damages by reason thereof, the street railway company is not liable therefor. In other words, the contention of counsel is that the facts pleaded and proved against the street railway company bring it within the rule of the common law, that a proprietor, by dikes or erections on his own land, may fight surface water as a common enemy without regard to its accumulation or to directions such accumulated water may take or to damages it may do. (See the rule stated and the authorities collated in 24 Am. & Eng. Ency. Law, 917.) But we think that the pleadings and evidence in this case do not bring it within the rule just stated. The petition in this case was framed upon the theory that the cut made by the street railway company in Hill street gathered together the surface waters which would otherwise have flowed off in many streams and in other directions and discharged them in a body on the property of Adams. The evidence supports the allegations of the petition and the findings of the jury in this respect. This case then falls within the rule that a proprietor may not collect surface waters on his estate into a ditch or drain and discharge them in a volume on the land of his neighbor. (*Hogenson v. St. Paul, M. &*

M. R. Co., 31 Minn., 224.) Such is also the doctrine of this court. (*Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 139. See the rule stated and cases in support thereof, 24 Am. & Eng. Ency. Law, 928.)

There are a number of errors assigned as to the admission and rejection of testimony and to the giving and refusing of instructions by the trial court. It would subserve no useful purpose to discuss here these assignments, as no one of them can be sustained. The learned counsel for the plaintiff in error strenuously insists that the verdict of the jury is unsupported by sufficient evidence, and that, in any event, the amount of damages awarded Adams by the jury is excessive. The evidence is not of the most satisfactory or convincing character, but it is sufficient to support the verdict. The judgment must be and is

AFFIRMED.

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

FILED SEPTEMBER 18, 1894. No. 6762.

1. **Custody of Infants.** In a controversy for the custody of an infant of tender years the court will consider the best interests of the child and will make such order for its custody as will be for its welfare, without reference to the wishes of the parties. *Sturtevant v. State*, 15 Neb., 459, *Giles v. Giles*, 30 Neb., 624, and *State v. Schroeder*, 37 Neb., 571, approved and followed.

2. **The right to the custody of an infant child** which the law confers upon its father is not for the benefit of the father, but for the benefit of the child; and this right of custody is conferred on the father because the law presumes that he will avail himself of the child's custody for its benefit; but he may forfeit his right to the custody of his child by abandonment.

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

Byron Clark, for plaintiffs in error.

A. N. Sullivan, contra.

RAGAN, C.

James B. Filbert, as relator, instituted in the district court of Cass county *habeas corpus* proceedings against Emma Schroeder and Frederick Schroeder, her husband, as respondents, for the purpose of having the custody of Florence A. Filbert and Angela G. Filbert, relator's minor children, taken from the respondents and awarded to him, the relator. From the order of the district court denying the application Filbert prosecuted a proceeding in error to this court, where the judgment of the district court was affirmed. (See *State v. Schroeder*, 37 Neb., 571.) The present is a supplemental proceeding in the same case, between the same parties, and for the same purpose as the original proceeding. The learned judge of the district court, on the hearing of the supplemental proceeding, made an order awarding the custody of the children to the relator, and from that order the respondents prosecute error to this court. Many of the facts in the case will be found in the case reported in 37 Neb., 571. These children are two girls, five and seven years of age, respectively. The relator is their father. Their mother is dead. The respondents are the step-grandfather and step-grandmother of the children.

The doctrine of this court is that in a controversy for the custody of an infant of tender years the court will consider the best interests of the child and will make such order for its custody as will be for its welfare, without any reference to the wishes of the parties. This was the rule announced in *Sturtevant v. State*, 15 Neb., 459. This case

was cited with approval and followed in *Giles v. Giles*, 30 Neb., 624, and again in *State v. Schroeder*, 37 Neb., 571. This is the doctrine of the American courts without any exception, so far as I am aware. It has also been the doctrine of the English courts since 1840. We have then the question, does it appear from the evidence in the record that it would be for the best interests of these minors that they should be given into the custody of the relator? A study of the evidence in the record leads us to the conclusion that it would not. The relator married the mother of these children in May, 1885. The children's mother was at that time living in Cass county, Nebraska, with the respondents, who had reared her. Soon after the relator's marriage he removed with his wife to Hastings, Nebraska, where he resided until the spring of 1886. He and his wife then took up their residence in the village of Kenesaw, Nebraska, where they remained until about December, 1890. In April, 1890, while the relator and his wife were residing in Kenesaw, trouble arose between them. The relator charged his wife with being criminally intimate with one E. N. Crane, a citizen of Kenesaw. The relator brought suit against his wife in the district court of Adams county for a divorce on the ground of adultery, and at the same time instituted a suit for damages against Crane. These suits, however, were never prosecuted, but in September, 1890, were dismissed for want of prosecution. The relator and his wife then effected a reconciliation, and about December of that year removed to Custer City in South Dakota, and there resumed their marital relations. Soon after the relator took up his residence in Custer City he converted into money a printing press and its paraphernalia, the property of his wife, and told her that he was going to Deadwood for the purpose of going into business. Instead of this, however, he went at once to Bloomington, Indiana, and entered the law school of the state university in that city,

and there remained until after the death of his wife, which occurred some time in July, 1891. From the time relator left Custer City he concealed his whereabouts from his wife, and did not know of her death until some time in 1892. It also appears from a letter in the record, written by the wife to her step-mother, respondent, bearing date December 20, 1890, that at that time the relator had been gone from his wife and children for four weeks; that she did not know of his whereabouts; and that he had left her only five dollars for the care of herself and children. From the time the relator left his family in Custer City until the time of the mother's death, in July, 1891, the relator not only kept his whereabouts concealed from his wife and children, but contributed nothing to their support. In July, 1891, the mother died among strangers at Ottawa, Kansas, and a banker of that city took possession of the little children. It also appears from the record that the relator's wife, during her last sickness, expressed a desire that her sister, a Mrs. Dewey, should have the custody of the children in controversy in this action. Soon after the death of the relator's wife this Mrs. Dewey and the respondent, Mrs. Schroeder, went to Kansas, and there Mrs. Dewey gave possession of the children to Mrs. Schroeder,—the reason for this being that Mrs. Dewey was not in good health and had a family of her own, and that Mrs. Schroeder had no family and was anxious for the children, and was abundantly able financially to maintain, educate, and rear them as they should be. Mrs. Schroeder thereupon took the children to her home, where they have since resided, and in all respects been treated as though they were her own children. It also appears that when the relator first learned of the death of his wife,—early in the year of 1892,—the first thing he did was to write to the county judge of Adams county, Nebraska, inquiring as to whether an administrator had been appointed for the property of his wife. Mrs. Filbert died the owner of certain

real estate in that county. The relator made no inquiry about his children. In August, 1892, he first visited his children at the home of the respondents. This was the first time that he had seen them since he abandoned them in Custer City in December, 1890.

We have no concern here with the merits or demerits of the trouble between relator and his wife. Whether she was faithful or unfaithful is wholly immaterial in this controversy. The relator has not hesitated in this record to charge her with unchastity. Indeed, he has gone so far at one time as to doubt whether he is the father of the younger of the children whose custody he now seeks to obtain; but we cannot say upon our oaths and consciences that we believe that it is for the best interests of these little children that they should be given into the custody of the relator. The evidence constrains our judgments to the conclusion that it would not be for the best interests of the children that they should be taken from the custody of the respondents and given to the relator, notwithstanding the fact that he is their father. These respondents are exemplary people, somewhat advanced in years, possessed of considerable property, without children of their own, anxious, ready, and willing, not only to maintain, educate, and rear these children, but to adopt them as their own and make them their heirs at law. Between the respondents and these little children the closest and strongest ties of affection have grown up. These children call the respondents "father and mother." They look upon and regard the relator simply as "Mr. Filbert." They do not love him. A child is not a chattel; nor is there any such law as invests the father with an inalienable right to the custody of his child. A child is a human being. It has rights and interests of its own. How came these little children into the custody of respondents? Whose fault was it that when their mother died they found themselves not only motherless but homeless, without food, without shel-

ter, without clothing,—waifs among strangers? The evidence in this record points to the relator and says, "It is yours."

We desire in this case to do no more and say no more than is our duty. We desire only to be governed by the rule of law announced above, and make such order as will be for the best interests of the children; but we cannot escape the conviction that the solicitude of the relator for their custody at this time is prompted by his desire to control the property which was inherited by their deceased mother. Perhaps this is only an inference from the evidence, and unjust, but nevertheless it is our conviction. Not only does the evidence prevent us from saying and deciding that the best interests of the children will be subserved by transferring their custody to the relator, but the evidence affirmatively shows that the relator has relinquished all claims on these children by his abandonment of them. The right to the custody of an infant child which the law confers upon the father is not for the benefit of the father, but for the benefit of the child. This right of custody is conferred upon the father because the law presumes that the father will avail himself of the custody of the child for the child's benefit; but he may lose this right if he abandons the child. (*Nugent v. Powell*, 33 Pac. Rep. [Wyo.], 23; *Green v. Campbell*, 14 S. E. Rep. [W. Va.], 212; *Clark v. Bayer*, 32 O. St., 299.)

It is but just to the learned district judge who heard this case to state that he had not before him all the evidence on which this opinion is predicated, and had such evidence been before him he would doubtless have reached the same conclusion we have.

The judgment of the district court is reversed, and the *habeas corpus* proceedings dismissed.

REVERSED AND DISMISSED.

GEORGE E. BARKER, APPELLANT, V. ADOLPH C. LICHTENBERGER ET AL., APPELLEES.

FILED SEPTEMBER 18, 1894. No. 5140.

1. **Negotiable Instruments**: PURCHASERS AFTER MATURITY. When negotiable paper is purchased after maturity from an innocent holder for value before maturity, the purchaser takes it free from all equities and defenses which existed between the original parties to the paper. *Koehler v. Dodge*, 31 Neb., 328, followed.
2. ———: BONA FIDE HOLDERS. It seems that one who takes the negotiable paper of a third person in payment of a pre-existing debt is a holder for value.
3. ———: ———. This is certainly true where by taking the note the creditor loses or postpones his right to proceed upon the original indebtedness.

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

Cornish & Robertson, for appellant, cited: *Koehler v. Dodge*, 31 Neb., 328; *Bassett v. Avery*, 15 O. St., 299; *Simon v. Merritt*, 33 Ia., 537; *Schawacker*, 50 Ind., 592; *Kimey v. Kruse*, 28 Wis., 183; *Hogan v. Moore*, 48 Ga., 156; *Peabody v. Rees*, 18 Ia., 571; *Bank of Sonoma County v. Gove*, 63 Cal., 355.

Edward W. Simeral and *William Simeral, contra*, cited: *Davis v. Neligh*, 7 Neb., 78.

IRVINE, C.

The appellant Barker brought this action to foreclose two mortgages on the same property. One of these mortgages was made by Alvadus H. Mayne to Barker to secure certain notes. The property thereafter by *mesne* conveyances passed to Lichtenberger. The decree foreclosed this mortgage, and

as to that part of it there is no controversy. The other mortgage was given by Lichtenberger to Clifton E. Mayne to secure three notes made by Lichtenberger to Mayne, each dated February 7, 1888, each for $231.50, with interest at eight per cent from date, and payable, respectively, one, two, and three years after date. The petition alleges that these notes were transferred to the plaintiff for value before maturity. The answer alleges that the notes were transferred to plaintiff by C. E. Mayne after they had become due, and then pleads a set-off against Mayne of $440.99. The decree, after awarding foreclosure of the first mortgage, finds that prior to the maturity of any of the notes secured by the second mortgage, Clifton E. Mayne sold, transferred, and delivered said notes to one Charles Corbett and that Corbett was a *bona fide* holder for value; that thereafter, and after the maturity of the first note and prior to the maturity of the other two notes, Barker purchased all of said notes from Corbett for a valuable consideration, and without any notice of any defense which Lichtenberger had on said notes in the hands of Mayne. The decree then finds in favor of Lichtenberger on his counter-claim against Mayne, ascertains the amount due on the second and third notes, awards a foreclosure of the second mortgage to the extent of those notes, and cancels the first note.

The district court seems to have proceeded upon the theory that one who receives negotiable paper after maturity takes it subject to any set-off existing against the original holder whether or not the paper was acquired from one who was a *bona fide* holder before maturity. In support of the decree of the district court counsel cite us to the case of *Davis v. Neligh*, 7 Neb., 78, where it was held that any set-off to a promissory note which would have been good between the original parties may be pleaded against an indorsee who acquires it after maturity, that such indorsee takes it subject to any right of set-off which the

maker had against any prior holder. The court was, however, then considering a case where the paper had never been in the hands of an innocent holder for value before maturity, and the language referred to states the general rule as applicable to the facts of the case under consideration without referring to or deciding upon the rights of one who purchases after maturity from one who became a *bona fide* holder before maturity. In *Koehler v. Dodge*, 31 Neb. 328, it was said: "It has become the settled law of this country that where a negotiable note is purchased after due from an innocent holder, the purchaser takes the title of and is entitled to the same protection as his indorser." The rule so stated is in accordance with the established principles of the law merchant, and is adhered to. The district court, therefore, erred in holding that Barker, having purchased the first note after its maturity from one who was an innocent holder before maturity, could not recover because of the set-off against the payee. The uncontradicted evidence discloses that Corbett took the notes from Mayne in payment of an indebtedness from Mayne to Corbett, and that Barker took the notes from Corbett in payment of an indebtedness from Corbett to Barker. Counsel now urge that a pre-existing debt is not sufficient consideration to protect the purchaser of notes against outstanding equities. Upon this general question there has been a marked conflict in the authorities and courts have indulged in most refined distinctions. We shall not attempt a review of the numerous cases. It is sufficient to say that since the case of *Swift v. Tyson*, 16 Pet. [U. S.], 1, we think the decided tendency of the cases has been in the direction of protecting such holders against equities where their situation has been in any manner altered to their disadvantage. The necessity for greater uniformity in the law relating to negotiable instruments has become so evident that systematic efforts by the organized bar of the country have, for some years, been made towards

accomplishing that object. The mere numerical preponderance of recent authorities is, therefore, entitled to great weight in considering cases relating to commercial paper. Certainly, in this case, where Corbett accepted these notes before their maturity in payment of the former holder's indebtedness, he was entitled to protection. The notes were held by him not as security merely but in payment, and at least until the notes matured his remedy against his indorser on the original indebtedness was suspended. According to any reasonable view he must be considered a holder for value.

The decree of the district court is reversed and a decree entered here similar to the former decree, but omitting that portion canceling the first note, and adding to the amount found due upon the second mortgage the amount of such first note, together with interest to May 11, 1891, the date to which interest was computed in the decree. This amount we compute to be $291.89.

DECREE ACCORDINGLY.

ANDREW HAAS V. BANK OF COMMERCE.

FILED SEPTEMBER 18, 1894. No. 5406.

1. **Corporations:** COLLATERAL ATTACK UPON LEGAL EXISTENCE. Where the law authorizes a corporation, and there has been an attempt in good faith to organize, and corporate functions are thereafter exercised, such an organization is a corporation *de facto*, the legal existence of which cannot ordinarily be called in question collaterally.

2. ———: PROOF OF CORPORATE EXISTENCE. Therefore, where a bank brought an action upon a note indorsed to it and the answer denied the corporate existence of the bank, proof showing the adoption and recording of articles of incorporation, and that the bank had acted thereunder for a period of years, was sufficient to establish its corporate existence.

3. **Negotiable Instruments:** COLLATERAL SECURITY: LIABILITY OF PLEDGEE. The Bank of O. indorsed to the Bank of C. certain promissory notes as collateral security for an indebtedness incurred in favor of the Bank of C. Among these was a note of H., upon which suit was brought. H. claimed that the note had been procured from him by the Bank of O. by fraud, and the evidence tended to prove that fact. *Held*, (*a*) That in the action upon the note H. could not require the Bank of C. to first exhaust its other collateral; (*b*) That the fraud being established, the Bank of C. was only entitled to recover to the extent of the unpaid portion of the indebtedness for which the note was pledged; (*c*) the Bank of C. having surrendered one of the col ateral notes and taken in exchange other notes, secured by mortgage, drawn to the order of itself, it was bound to account as if the original note had been paid in full.

4. **Certain rulings on the evidence** examined, and *held* not erroneous.

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

Bartlett, Crane & Baldrige, for plaintiff in error, cited: *Collins v. Collins*, 46 Ia., 60; *Gaston v. Austin*, 52 Ia., 35; *Wilson Sewing Machine Co. v. Bull*, 52 Ia., 554; *Sandwich Mfg. Co. v. Shiley*, 15 Neb., 109; *Galoway v. Hicks*, 26 Neb., 531; *Fitzgerald v. McCarty*, 55 Ia., 702; *Potter v. Chicago, R. I. & P. R. Co.*, 46 Ia., 399; *McKinney v. Hartman*, 4 Ia., 153; *Klosterman v. Olcott*, 27 Neb., 685; *Missouri Coal & Oil Co. v. Hannibal & St. J. R. Co.*, 35 Mo., 84.

E. J. Cornish, contra, cited: *Pape v. Capitol Bank of Topeka*, 20 Kan., 440; *Society Perun v. City of Cleveland*, 43 O. St., 481; *Williamson v. Kokomo Building & Loan Fund Association*, 89 Ind., 389; *Merchants Nat. Bank v. Glendon Co.*, 120 Mass., 97; *Commercial Bank of New Orleans v. Martin*, 1 La. Ann., 344; *Murphy v. Bartsch*, 23 Pac. Rep. [Idaho], 82; *Kennedy v. Rosier*, 33 N. W. Rep. [Ia.], 226; *Donnell v. Wyckoff*, 7 Atl. Rep. [N. J.], 673; *Foltz v. Hardin*, 28 N. E. Rep. [Ill.], 786; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578; *Republican V. R.*

Co. v. Fellers, 16 Neb., 169; *Sioux City & P. R. Co. v. Brown*, 13 Neb., 317.

IRVINE, C.

The Bank of Commerce sued Andrew Haas on a note made by Haas to the order of the Bank of Omaha for $2,500, with interest at ten per cent from April 25, 1889, and payable ninety days after date. The Bank of Commerce averred it had become owner of said note by a general indorsement thereof. Haas answered, denying the incorporation of the Bank of Commerce; admitting the execution of the note, but denying that the plaintiff was the owner thereof, and alleging that the plaintiff held the note as collateral security to a loan made by the plaintiff to the Bank of Omaha. Haas further averred that the note was given for stock in the Bank of Omaha subscribed for by Haas, upon the faith of certain representations made to him by the officers of the bank, which representations were false. It is unnecessary to state these representations. It is sufficient to say that there was evidence fairly tending to establish the facts that they were made, that they were material, that they were justifiably relied on, and that they were false. Haas also averred that the stock in the Bank of Omaha, for which the note sued on was given, was never issued to him, and that the plaintiff received the note with knowledge of the facts constituting the defense. Finally, it was alleged that the plaintiff, at the time of taking such note and at other times, took from the Bank of Omaha other securities sufficient to secure the loan to the Bank of Omaha, upon which it had realized sufficient to pay said loan, and that the Bank of Commerce retains in its possession a large amount of such securities. The defenses thus set up may be analyzed as follows: First, a plea of fraud in the inception of the note, coupled with a plea of failure of consideration; second, a plea of payment; third, an allegation that other securities held were sufficient

to pay the debt. The reply puts in issue the material averments of the answer, and alleges that the Bank of Commerce took the note before maturity and without notice of any defense thereto. There was a trial to a jury, resulting in a verdict and judgment in favor of the bank for $3,003.29.

The first question discussed in the briefs relates to the corporate existence of the plaintiff bank. The assignments of error which directly refer to those issues relate to the admission in evidence of the articles of incorporation of the bank and the admission of certain parol testimony in regard thereto. From the argument made in the brief we are somewhat in doubt as to whether Haas is complaining of the admission of this evidence, of the legal sufficiency of the evidence, or of the failure of the court to submit the issue to the jury. Perhaps the most satisfactory method of considering the case will be to treat it as if all three questions were presented. As to the admission in evidence of the articles of incorporation, the only objection made was that the document was incompetent. The document in evidence appears to be signed by the incorporators in the presence of an attesting witness, to have been regularly acknowledged, and to bear a regular certificate of acknowledgment by a competent officer. The document also bears the certificate of the county clerk of Douglas county to the effect that it was received for record and was recorded. No specific objections appear either in the record or in the brief. We cannot perceive any reason why this document should have been excluded as incompetent, and none is suggested in argument. As to the sufficiency of the evidence of the corporate existence of the bank it may be well to declare now that where the law authorizes a corporation, and there has been an attempt in good faith to organize, and corporate functions are thereafter exercised, there exists a corporation *de facto*, the legal existence of which cannot ordinarily be

called in question collaterally. It would be intolerable to permit in any civil action, to which such a body was a party, an inquiry into the legal right to exercise corporate functions—a right which it is for the state alone to question in appropriate proceedings for that purpose. On this there is a substantial unanimity in the authorities. Among other cases may be cited, *Williamson v. Kokomo Building & Loan Fund Association*, 89 Ind., 389; *Pape v. Capitol Bank*, 20 Kan., 440; *Lessee of Frost v. Frostburg Coal Co.*, 24 How. [U. S.], 278; *Society Perun v. City of Cleveland*, 43 O. St., 481. The evidence here shows that articles of incorporation were adopted, acknowledged, and filed for record in the office of the county clerk, and that the bank acted under such articles and conducted business thereunder for some years. This was sufficient evidence of a corporate existence. (*Abbott v. Omaha Smelting & Refining Co.*, 4 Neb., 416; *Merchants Nat. Bank v. Glendon Co.*, 120 Mass., 97.)

We may here advert to the assignment of error in regard to the admission of parol evidence in respect to the incorporation. The petition in error refers to the general subject of this assignment, but does not point out the particular ruling complained of. It might be dismissed for that reason. The plaintiff in error had brought out in cross-examination from one witness the fact that after the adoption of the articles of incorporation in evidence the capital stock had been increased and new articles adopted. In redirect examination the defendant in error asked whether the new articles were more than an amendment of the original articles. An answer was admitted to this question, but struck out on motion of the plaintiff in error. Several other questions were then asked, either without an answer or without an objection, and finally the witness was asked whether or not the bank acted under the articles in evidence, except that by an amendment the capital stock was changed. There was an objection to this question, which was overruled, and we here have the only exception relat-

ing to the subject. The question asked related not to the contents of the articles, but to whether the bank was acting under these articles. This was a proper subject for parol evidence and the objection was properly overruled.

The court did not submit the issue we have been discussing to the jury for its determination, but the plaintiff in error took no exception to the instructions in which the court stated the issues; and furthermore, the uncontradicted evidence established a corporation *de facto* and left nothing for the determination of the jury upon the question.

What we have just said in regard to the failure of the plaintiff in error to except to that portion of the instructions stating the issues to the jury also disposes of the argument made that the court erred in stating that the reply denied the allegations of the fifth, sixth, and seventh paragraphs of the answer without stating to the jury what the allegations were in those paragraphs. The pleadings, it will be remembered, admit that the note sued on was held by the defendant in error as collateral security to a loan made to the payee of the note, the Bank of Omaha. On the trial it developed that the Bank of Omaha was indebted upon an overdraft to the Bank of Commerce in the sum of $4,000; that several notes of third persons were held by the Bank of Commerce as a continuing collateral to any indebtedness existing; that on May 27, 1889, $4,000 additional was lent to the Bank of Omaha and other notes transferred as additional collateral, the Bank of Omaha at that time making its note to the Bank of Commerce for $8,000 covering both the overdraft and the new loan. The note of Haas, it would seem from the evidence, was pledged at the time of this transaction, although this point is left in some doubt, and the note in question may have been pledged theretofore. Between the 27th of May and the 6th of June certain other indebtedness, amounting to several hundred dollars, was created from the Bank of Omaha to the Bank of Commerce. On the 6th of June the Bank

of Omaha failed. Mr. Johnson, who was then cashier of the Bank of Commerce, was a witness for that bank, and had testified that the note of Haas was taken without any knowledge of any defense thereto. On cross-examination this question was asked, "Isn't it a fact, Mr. Johnson, that after your bank had received this note of Andrew Haas for $2,500 and before the Bank of Omaha failed, it came to your knowledge that this note had been given conditionally, and that it was a conditional note?" This question was objected to, as incompetent, immaterial, and improper cross-examination, and the objection was sustained. The theory of the plaintiff in error is that if it came to the knowledge of the Bank of Commerce that there was a defense to the Haas note, it could not enforce that note as against any indebtedness created after the acquisition of such knowledge, and that the question was, therefore, proper, as tending to disclose notice received before the last advances. Without inquiring as to the legal correctness of this theory we have concluded that there was no error in sustaining the objection. If the question had been asked a witness on direct examination, it would, in any view of the law, have been erroneous to permit an answer, for the reason that the question was not confined to notice acquired prior to the making of the last advances to the Bank of Omaha. Being asked on cross-examination, if admissible at all, it must have been upon the theory of the greater latitude allowed in cross-examination, and because the materiality of a question on cross-examination need not always plainly appear when the question is asked. Therefore, it is probable that if the objection had been overruled, there would have been no error. But concurrently with the rule allowing such latitude in cross-examination there runs the other rule that the extent of such a cross-examination rests largely in the discretion of the trial court. In order that a cross-examination may be effective, it cannot and should not always require the ma-

teriality of a question to be made evident, but on the other hand it is its duty to prevent the time of the court from being wasted and the attention of the jury from being misled by inquiries into immaterial facts. An affirmative answer to this question might have misled the jury by apparently charging the bank with notice at a time when notice to it was immaterial, and we do not think that the court abused its discretion in sustaining the objection.

It is difficult to treat the remaining assignments in the order in which they are presented or with any particular reference to the petition in error. The argument is general in its character and it is somewhat difficult to ascertain to what assignment in error it is directed. So far, however, as the argument calls any attention to the remaining assignments a discussion of two questions disposes of them all. The first arises from the contention of the plaintiff in error that the Bank of Commerce held other collateral, being notes of other persons, sufficient to satisfy the debt of the Bank of Omaha, and that it should be required to exhaust the other collateral before proceeding against the plaintiff in error. It is claimed that the case in this aspect is brought within the principle whereby the holder of a junior security upon a fund may compel the holder of the senior security upon that fund, who also holds other security, to exhaust such other security before proceeding against the fund which is held by both. We do not think that this doctrine of marshalling has ever been applied to any such case as that under consideration. It has been frequently decided that the doctrine referred to will never be applied except in the case of a common debtor to both creditors for the protection of the junior creditor, and then only where it may be done without injustice, and will not compel a resort to dubious securities. It is equally well established that a creditor holding two or more securities for the same debt may proceed to enforce either or all of them, and will not, as a general propo-

sition, be required to proceed in any particular order. In this case the makers of the other notes were not before the court, and for that reason alone the plaintiff in error was not entitled to the relief he sought. (*Dorr v. Shaw*, 4 Johns. Ch. [N. Y.], 17.) The makers of other notes may have had similar defenses or equal or even superior equities. But aside from this, the plaintiff in error had no right at this time or in this manner to seek such relief. There are cases where somewhat similar relief has been granted in favor of one who occupied the position of a surety, but we know of no case like the present. In *Prout v. Lomer*, 79 Ill., 331, a bill in equity charged that certain notes, the collection of which it was sought to enjoin, were given to the complainant for the accommodation of Lomer and procured by fraudulent statements made by Lomer, and that they were held by the respondents as collateral to a debt from Lomer. It was also alleged that the bank had other full and adequate security. The court said: "We are aware of no principle by which the bank can be compelled to any particular course in regard to such collateral as it may have. We fail to perceive any obligation on the bank to convert its securities or do any other act at the instance of this party, if he was a surety. In certain cases, and this is not one, a security to a negotiable note may notify the holder to proceed against the principal, on the maturity of the note. Independent of this, a surety cannot compel the holder to proceed against others before proceeding against himself, and exhaust such other remedies as he may have." The case of the *Third Nat. Bank v. Harrison*, 10 Fed. Rep., 243, was one presenting a somewhat similar state of facts. Alexander borrowed certain money from the bank and deposited certain notes of third persons as collateral security, among these a note of Harrison. It was alleged that this note was given on account of an illegal transaction. It was held that the transaction was not such as to defeat the note in the hands of a *bona fide* holder for

value, and it was further held that the fact that the principal debtor had on deposit in the bank sufficient funds to discharge the debt without recourse to the collateral, was no defense in an action on the note. If no such equity exists as against the principal debtor, certainly none can exist against the makers of other collateral notes.

The plaintiff in error on this branch of the case relies on the case of *Farwell v. Importers & Traders Nat. Bank*, 90 N. Y., 483. In that case Farwell & Co. made their note to certain brokers to be sold in the market on Farwell & Co.'s account. One Farnham, a clerk of the brokers, fraudulently pledged this note, together with a large number of others, to the bank as security for a call loan made to Farnham. When the Farwell note matured, Farwell & Co. paid it, notifying the bank that they would hold it to account for any surplus. Before Farnham's note was matured by demand the bank had collected on the collateral more than sufficient to pay it. Farwell & Co. then brought this action in equity to require a repayment to them of the surplus. The superior court granted the relief, and its judgment was affirmed by the court of appeals. This was upon the ground that the bank had no right to apply the payment received from Farwell & Co. upon Farnham's note until that note matured, that in the meantime it held the money on the same terms as it had before held the note, and that, having received from the security more than enough to satisfy the note before by demand it brought the principal note to maturity, the pledge was released as to the surplus, and the bank became liable therefor. The case would have been very different if Farwell & Co. had refused to pay their note and alleged these facts in defense. In the court of appeals the opinion says: "The defendant, as pledgee, had power to collect the notes as they respectively fell due, but the money thus collected would stand as a substitute for the notes upon which it had been received." This case, when examined, instead of supporting the con-

tention of the plaintiff in error, is clearly contrary thereto. For, if Farwell & Co. were not legally liable upon the note, or if they could have compelled a resort to other securities before paying it, their payment became voluntary, and we cannot see how they would have been in a position thereafter to invoke the aid of a court of equity. We are not here deciding that Mr. Haas may not, after paying this note, in appropriate proceedings with proper parties, have some remedy as against any surplus in the hands of the Bank of Commerce. We simply hold that in a suit upon his note he cannot in defense urge the holding of other security and compel a first resort thereto.

The remaining question relates to the measure of recovery. It appears that the Bank of Commerce intrusted the collateral received from the Bank of Omaha to certain attorneys for collection; that among these collaterals was a note for $1,000 made by one Baumeister. The bank's attorneys made an arrangement whereby this note was surrendered to Baumeister and new notes taken to the order of the Bank of Commerce signed by Baumeister and wife, and secured by a real estate mortgage. About $400 has been paid on this indebtedness. The court instructed the jury that in determining the amount due there must be deducted from the principal indebtedness the amount of collaterals collected by the bank, less the reasonable charges for collecting the same, but that renewal notes should not be credited until paid. This instruction clearly related to the Baumeister transaction, and thereby the jury was informed that only the amount paid on the Baumeister notes should be credited. There is very respectable authority to the effect that it is no defense to a note that it had been pledged with other securities equal in amount, which securities had been by the pledgee exchanged and ultimately found worthless, unless it were also shown that the exchange caused a loss to the owner of the collateral (*Girard Fire & Marine Ins. Co. v. Marr*, 46 Pa. St., 504); but

we think that the weight of authority is to the effect that if a pledgee, without the consent of the debtor, renews or extends a note pledged as collateral, or surrenders such note and takes new security, he must account to his debtor as if he had collected it in full. (*Gage v. Punchard*, 6 Daly [N. Y.], 229; *Nexsen v. Lyell*, 5 Hill [N. Y.], 466; *Southwick v. Sax*, 9 Wend. [N. Y.], 122; *Depuy v. Clark*, 12 Ind., 427.) It is quite well settled that where a note is valid as between the original parties, the pledgee may recover the whole amount of the note, retaining any surplus as trustee for the party beneficially entitled; but where the note is invalid as between the original parties, the pledgee may recover only the amount of his advances, provided there be no other party in interest. (*Wiffen v. Roberts*, 1 Esp. [Eng.], 261; *Allaire v. Hartshorne*, 21 N. J. Law, 665; *Chicopee Bank v. Chapin*, 49 Mass., 40; *Union Nat. Bank v. Roberts*, 45 Wis., 373.) The jury should, therefore, have been directed to treat the whole of the Baumeister note as paid. According to one view of the evidence, by treating this as a payment, there would still remain due of the principal debt the whole amount of this judgment; but the evidence was inconclusive as to some portions of the indebtedness of the Bank of Omaha to the Bank of Commerce, and upon this point, as well as upon a few other items of the account, we cannot say that the jury was bound to take the view presented by the aspect of the evidence referred to. The judgment may be excessive to the amount of the unpaid renewal notes of Baumeister, which, with interest to May 11, 1891, the date to which interest was calculated in the judgment, we compute to be $702.50. The defendant in error may remit this amount as of the date of the judgment, and if it do so within thirty days, the judgment will be affirmed for the remainder; otherwise the judgment must be reversed and a new trial awarded.

JUDGMENT ACCORDINGLY.

HENRY T. CLARKE, APPELLANT, V. CHARLES R. KELSEY, APPELLEE.

FILED SEPTEMBER 19, 1894. No. 5638.

1. **Merger of Agreements.** All verbal negotiations or understandings of parties had prior to the execution of the written contract are merged in the written agreement.
2. **Contract of Employment:** CONSTRUCTION: INDEPENDENT ENTERPRISES OF AGENT: PROFITS: ACCOUNTING: PARTNERSHIP. The contract of employment, set out in the opinion, construed, and *held* that the employe was obliged to bestow all of his time and attention, if the same were required for the successful prosecution of the business of his employer, and that such employe was prohibited, during the term of his employment, from engaging in any enterprise or business on his own account of the same character as that of his employer, or which conflicts with the interests of the latter.
3. **Trial:** ISSUES. A cause should be tried upon the issues formed by the pleadings.
4. **An account stated** does not bar a recovery for items not within the contemplation of the parties when the settlement was made.

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

See opinion for statement of facts.

Charles B. Keller, for appellant:

The appellee did not have the right under the contract to engage in the several enterprises undertaken by him and appropriate to his own use the profits derived therefrom. (Wood, Master & Servant, sec. 111; *Thompson v. Havelock*, 1 Campbell [Eng.], 527; *Gardner v. McCutcheon*, 4 Bev. [Eng.], 534; 1 Am. & Eng. Ency. Law, 363; *Adams Express Co. v. Trego*, 35 Md., 64; *Gillenwaters v. Miller*, 49 Miss., 150; vol. 1, pt. 1, White & Taylor, Lead-

ing Cases in Equity, 62; 1 Wait, Actions & Defenses, sec. 12; Story, Agency, secs. 210-214.)

The independent enterprises having been carried on by the appellee for his own profit in violation of the contract, he must account. (2 Lindley, Partnership, sec. 572; *McDonald v. Lord*, 2 Rob. [N. Y.], 11; Wood, Master & Servant, sec. 101.)

Hall, McCulloch & English, contra:

The profits made by appellee in outside matters are his own. (*Wallace v. DeYoung*, 98 Ill., 638; *Geiger v. Harris*, 19 Mich., 209.)

NORVAL, C. J.

This was an action brought by the appellant against the appellee for an accounting. The petition upon which the case was tried being brief, and a question being raised as to the sufficiency thereof as regards one item in plaintiff's account, we set out the pleading in full, as follows:

"Henry T. Clarke, plaintiff, complains of the said Charles R. Kelsey, defendant, and says on or about the —— day of May, 1883, the said plaintiff employed the said defendant to go to Camp Clarke, in Cheyenne county, in this state, to take charge of the business of the said plaintiff at said point, consisting, in part, of a toll bridge across the north fork of the Platte river, which belonged to the said plaintiff, also a hotel and a stock of general merchandise which the said plaintiff for a long time had established at said point; that the said defendant undertook and agreed, in consideration of a certain salary then agreed to be paid by the said plaintiff to him therefor, to give his whole time, skill, and attention to the said business of the said plaintiff at the said point, and to receive and account to the said plaintiff for all the proceeds of said business.

"The said plaintiff also says that on or about the 1st

day of June, 1883, the said defendant entered upon the said duties as the agent and general manager for the said plaintiff of the said business at said point and had exclusive management thereof, and so continued up to about the 1st day of March, 1885; that in the course of the said business the said defendant received large sums of money from time to time belonging to the said plaintiff, amounting, in the aggregate, as nearly as plaintiff can estimate the same, to not less than $50,000; that in addition thereto the said defendant, while so employed and acting as agent and general manager of said plaintiff as aforesaid, bought and sold large quantities of furs, hides, and pelts, upon which large profits were derived, to-wit, not less than $——, and also took a contract for putting up hay, from which a large profit was derived, to-wit, not less than $2,000, and engaged in other enterprises which yielded profits; that some of the said enterprises were carried on without the knowledge of the said plaintiff at the time, and the property and means of the said plaintiff were used by the said defendant in conducting all of the said enterprises. Yet the said plaintiff says that the said defendant has failed and refuses to account fully for the amounts so received by him as such agent and general manager of said business of the said plaintiff as aforesaid; that he has received large sums of money in the course of said business which he refuses to account for and pay over to the said plaintiff, and that he refuses to render any account to the said plaintiff of his said transactions connected with his said dealings in furs, hides, and pelts, or with his said contract for putting up hay, or with any of his said enterprises which he carried on without the knowledge, at the time, of the said plaintiff, and refuses to pay over to the said plaintiff any of the proceeds of any of the said enterprises or contracts, to the damage of the said plaintiff $3,000.

"Wherefore the said plaintiff prays that the said de-

fendant may be required to render an account of all his said transactions while so acting as agent and general manager of the business of said plaintiff at Camp Clarke aforesaid, including all that he collected and received for tolls on said bridge, for sales of merchandise, postage stamps, etc., for receipts at the hotel, and including also the proceeds derived from his said dealings in furs, hides, and pelts, and from the said contract for putting up hay, and for all other enterprises engaged in while so employed as agent and general manager of the business of the said plaintiff as aforesaid, and that the said plaintiff may have judgment for the amount which may be found due him upon said accounting, which the said plaintiff believes and avers is not less than the sum of $3,000."

The defendant, for answer to the above petition, admits that he was employed by plaintiff to take charge of his store and bridge, but denies that the contract was as alleged by plaintiff; denies that he agreed to give his whole time, skill, and attention to plaintiff's business; denies that the contract was made at the time stated in the petition, but avers that the same was made about April 1, 1883, and that on the 10th day of the same month he entered upon his employment. Defendant admits that while he was in the employ of the plaintiff he received moneys as agent for said plaintiff, and avers that he has duly accounted for all sums so received, and that a full and complete settlement and accounting was had between plaintiff and defendant for all moneys so received and paid, and all moneys due the defendant, and on such accounting there was found due the defendant the sum of $469. The defendant further answering denies that he made the contracts for hay or purchased and sold furs as agent for plaintiff, but avers that he made said contracts and purchased and sold said furs for himself and on his own account, and that all profits made by virtue thereof were made with his own means, and not with funds belonging to the plaintiff. The answer

also denies each and every allegation in the petition contained not expressly admitted. The reply is in effect a general denial of the averments in the answer. The cause was referred to Arthur C. Wakeley, Esq., to take the testimony and report the same to the court with his findings of fact and conclusions of law. On the coming in of the report of the referee, on motion of the parties, the court referred the same back to the referee for additional findings. Upon the filing of the supplemental findings, each party filed exceptions to the report of the referee, upon consideration whereof the court, over the plaintiff's exceptions, sustained those filed by the defendant, modified the referee's report, and entered a decree dismissing the action for want of equity in the bill of complaint.

It appears that for some time prior to, and since, the year 1883 the appellant Henry T. Clarke was the owner of a store-house or hotel, stables, toll bridge, and other interests at Camp Clarke, which is located about fifty miles northwest of Sidney. The appellant was a resident of the city of Omaha, and his interests at Camp Clarke, prior to April, 1883, had been under the supervision and control of one Gustin. He employed the appellee Charles R. Kelsey as such agent or manager, and on the 6th day of April, 1883, the appellant and appellee entered into the following contract:

"This agreement, made this 6th day of April, 1883, by and between Henry T. Clarke, of the first part, and Chas. R. Kelsey, of the second part, all of Omaha, Nebraska, by which said Kelsey and his wife agree to proceed to Camp Clarke, Nebraska, and take charge of all of said Clarke's interests and property at said place and perform the labor connected therewith, said Kelsey to take charge of store, bridge, and stables, etc., and Mrs. Kelsey to take charge of house, and to do for the best interest of said Clarke for the term of one year. Said Clarke to pay said Kelsey and wife the sum of six hundred dollars for the year's services,—

that is, fifty dollars a month, payable monthly, when said services are performed,—and to furnish said parties with their living and transportation free of charge to said Kelsey and wife, time to commence when at bridge.

"H. T. CLARKE.

"CHAS. R. KELSEY."

In pursuance of said agreement the said Kelsey and his wife proceeded from Omaha to Camp Clarke, and upon reaching that place appellee took entire charge of Mr. Clarke's business, and managed the same with considerable success for the period of two years, at the end of which time Kelsey ceased to be appellant's manager. At the end of the first year's employment Mr. Clarke increased the appellee's compensation from $50 to $75 per month.

At the time said contract of employment was entered into the dealing in hay, furs, and pelts was not a part of the business carried on by appellant at Camp Clarke, nor did he have the agency of the Wyoming Stage Company. Some time afterwards appellee was appointed agent for the stage company, for which services he received a salary of $20 per month, or $362.69. Appellee also caused to be put up a large quantity of hay and bought and sold furs and pelts, all of which he claimed were on his own account and with his own means. On the hay transactions Kelsey realized a net profit of $1,675.76. He also realized a profit of $200 in the purchase and sale of furs and pelts. Appellee received from the Wyoming Stage Company, for meals furnished at Clarke's Hotel, $6.50. It is conceded that Kelsey has not accounted to appellant for any of the foregoing moneys. It is likewise undisputed that appellant furnished appellee with postage stamps and stamped envelopes to the amount of $450.60, and that the defendant has accounted to the plaintiff therefor to the amount of $152.05, and no more. The purpose of this action is to require the defendant to account, and pay over, to the plaintiff these several sums of money, as well as to account

for certain moneys which the defendant had deposited in banks in his own name during the time he was in the employ of Mr. Clarke. There is no controversy as to the amount of the profits realized by the defendant in said undertakings, the only dispute being as to his liability to account to the plaintiff therefor.

The first point argued in the briefs of counsel, as well as the first question to be considered by us, is whether the appellee had the right, under the contract above set out, to engage in the several enterprises already mentioned, and to appropriate the profits derived therefrom to his own use. From a perusal of the contract it will be observed that it contains no express stipulation, nor language from which the inference must necessarily be drawn, that the appellee was to devote his entire time to the business of the plaintiff, and that he was not to engage in any enterprise or undertaking on his own account. He agreed to take the charge and control of plaintiff's interests and property at Camp Clarke and to perform the labor connected therewith. If all his time was necessary for the successful prosecution of the business, it was his duty to bestow it; otherwise not. While it is true that an agent has a perfect right to engage in an enterprise or business for his own benefit, when not in conflict with the interest of his principal, unless the business of the agency is such that it requires the agent's whole time and attention, he may not, however, engage in an enterprise on his own account of the same as that of his principal, nor will he be permitted to neglect his employer's business for his own. (*Adams Express Co. v. Trego*, 35 Md., 64.) Appellee contends, and the bill of exceptions contains evidence tending to support it, and the referee so found, that prior to the execution of the contract of employment, and for the purpose of inducing the defendant to sign the same and accept the position of manager at Camp Clarke, the plaintiff represented and stated that there would be opportunities there for the defendant to make some money

for himself in speculations and ventures outside of plaintiff's business, and that at the same time defendant informed plaintiff that he would not accept the position, nor sign the contract for the salary stated, unless he were permitted to speculate upon his own account, where the same did not conflict with the business or interests of the plaintiff. The evidence bearing upon the question of the negotiations of the parties prior to the making of the written agreement is conflicting, but if we accept as a fact that there was a verbal understanding such as appellee claimed, it, according to the familiar and salutary rule of law, merged in the written contract. (*Hamilton v. Thrall*, 7 Neb., 210; *Dodge v. Kiene*, 28 Neb., 216.) But we do not think that the verbal understanding was any more favorable to the appellee than the written agreement. Under neither was he authorized or entitled to engage in, or carry on, any enterprise for himself which would come in conflict with the interests of Mr. Clarke which were under his charge.

We will next proceed to an examination of the different items which appellant contends the defendant should be required to account to him for. Kelsey was engaged in, or connected with, three separate and distinct hay deals, from each of which he has derived profits, and for which he has not accounted. One, the larger and the more profitable, is what is known as the "Sheidy hay contract." The facts connected therewith, briefly stated, are these: Early in August, 1884, Kelsey contracted with one Sheidy to put up for the latter a quantity of prairie hay near Camp Clarke, and during the fall of that year this contract was filled by appellee, for which he received from Sheidy $3,141.25, and after deducting all expenses connected with the transaction, a net profit of $1,383.76 was derived from the contract, which went into Kelsey's pocket. Kelsey was away from Camp Clarke during the putting up of this hay, and for the sole purpose of looking after the same, on two different occasions,—once for two days, and the other time the evi-

dence leaves us in doubt as to the precise length of time he was absent from his post of duty. It also appears that appellant and appellee at the time owned jointly a number of teams of horses which they used in carrying on the business of freighting as partners. These teams were taken to the hay field, and were used in putting up the hay under consideration, no other teams being used for that purpose. On the 4th day of August, 1884, after the Sheidy contract was entered into, and work thereunder commenced, Kelsey wrote Clarke that one Hank Odenreider, a freighter and teamster, had taken Sheidy's hay contract, and that "I have let him take the horses up there for a portion of the profits, which I thought better than to let the horses remain idle." Kelsey at that time knew that this statement was untrue, and we are fully persuaded that it was written for the purpose of deceiving Mr. Clarke, so that he might not participate in the profits of the hay contract. Instead of Mr. Clarke receiving the profits derived from the use of the teams owned jointly by Clarke and Kelsey, the latter gave the former credit on the books with $100 for their use. While the putting up of the hay was no part of the business carried on by Clarke, yet, as Kelsey devoted some time and attention, while manager for plaintiff, to the carrying out of the Sheidy contract, and as the profits derived from the transaction are traceable to the use of the teams owned by appellant and appellee jointly, and as Kelsey did not invest a dollar of his own money in the undertaking, we are constrained to hold that Clarke is entitled to share in the net profits of the venture, or receive one-half of $1,385.76, less the $100 credited to him on the books for the use of the teams. This is the same conclusion reached by the referee; but the trial court set aside his findings in that respect, holding, as a matter of law, that defendant should not be required to account for the profits realized from the Sheidy hay contract. As pertinent to the question we have been considering, we quote from Mr.

Lindley's valuable treatise on Partnerships [2d ed.], vol. 1, p. 62, the following: "When one co-owner of a chattel derives gain from its use, and those gains are attributable, mainly, or in part, to his own industry and exertions, justice to the other owners and to him requires either that the gains made by him shall be shared by all, they making him a proper allowance for his trouble and reimbursing him his expenses, or that he shall be allowed to keep the whole profits, paying the other owners a proper sum for the use of their property. Of these two modes of adjusting the rights of the parties, the first seems to be most in accordance with the course usually adopted in analogous cases. Notwithstanding, therefore, the little direct authority upon the point, the writer ventures to submit that as a general rule where one owner of a chattel derives gain from its use, he is, independently of any contract, bound to account to the other owners for their respective shares, he being allowed all proper charges and expenses." The appellee caused to be put up for the Wyoming Stage Company forty tons of hay, upon which he realized a net profit of $160. He likewise had put up thirty-two and one-half tons of hay, which he sold to himself for plaintiff Clarke at $7 per ton, upon which appellee received a profit of $130. Neither of these two items has Kelsey accounted to Clarke for, nor do we think he is required to do so. These two transactions are not similar to the Sheidy venture, for it does not appear that in either did Kelsey devote personally his time and attention to the putting up of the hay, nor were the teams, owned by Clarke and Kelsey jointly, used for that purpose. The hay purchased by Kelsey from himself for Mr. Clarke was at the price of $7 per ton, which at that time was the fair market value of such hay at Camp Clarke. The district court did not err in disallowing the $160 and $130 items mentioned above.

We will next consider the item of postage. Plaintiff furnished defendant $455.60 in postage stamps and stamped

envelopes while he was the manager at Camp Clarke, and Kelsey has only accounted for, and paid over, to his principal the sum of $152.05. He claims that he wrote daily several letters in connection with plaintiff's business, and in prepaying the postage thereon he used stamps which Clarke had sent him, and further he had given away postage stamps from time to time during the entire period of his employment to the customers of his principal and for the benefit of the business. In this manner the defendant explains the shortage in the stamp account and insists that he should not be required to account therefor. This item should be rejected, for the reason that the petition contains no allegation, as a reference to the pleading will disclose, which requires the defendant to account in this action for the shortage in the postage account. The only mention of the matter is in the prayer of the petition, and this alone is insufficient to entitle the plaintiff to an accounting. As we understand the record, this was the view adopted by the trial court, and in which conclusion we concur. The only safe rule is to require litigants to try their cases upon the issues presented by the pleadings.

We now inquire whether Kelsey should account for the $322.69, which he received from the Wyoming Stage Company as salary while he was agent for said company. The record shows that prior to the time appellee entered the employ of appellant, Mr. Clarke had been agent for this stage company, and was such agent after Kelsey left Camp Clarke, but that Mr. Clarke ceased to act as agent for the company a short time prior to Kelsey's taking charge of appellant's interests. Some three months after Kelsey arrived at Camp Clarke the stage company re-established an agency on that side of the river, and appellee was appointed agent at a salary of $20 per month. There is no dispute as to the total amount of compensation received from the company by Kelsey, nor that he has not accounted to plaintiff for any portion of the sum so paid him. The

business of the agency was transacted in Mr. Clarke's store by Kelsey, and during business hours, and he was thereby prevented from devoting a considerable portion of his time to the management of Mr. Clarke's business. Nothing was paid Clarke as rent for the use of his store for the transaction of the business of the stage company, nor has any deduction been made from the salary Clarke was to pay Kelsey on account of the time the latter devoted to the business of the stage company. Under this state of facts it seems clear, according to the principles of equity, that defendant should account to plaintiff for the amount of the salary paid him by the stage company. He should likewise account for the $6.50 received from the same company for the twenty-six meal tickets. These tickets were issued for meals at Clarke's Hotel. Kelsey received the money, and has never accounted for the same.

As to the $200 profits made by the defendant by dealing in hides and furs, we do not think he should be required to account, since such transaction was entirely distinct from and outside of the plaintiff's business, nor did the same in any manner conflict, or come in competition, with Mr. Clarke's interests. Appellant had never theretofore, or since, dealt in furs and hides, while each of his managers at Camp Clarke, both prior, also subsequent, to appellee's employment, had done so on his own account, with plaintiff's knowledge. Mr. Clarke's business was benefited, instead of injured, by Kelsey's purchasing furs and pelts, and the profits arising therefrom the appellee should be permitted to retain.

There is but one other matter upon which plaintiff claims an accounting. It appears that during the two years Kelsey was acting as manager he deposited money in three different banks, in his own name, said deposits aggregating over $30,000. Appellant insists that all, or, at least, a part of these funds so deposited belonged to him, and that appellee should account therefor. There is in the record

no evidence upon which to base the charge that appellee had appropriated funds belonging to his employer and deposited the same in the banks to his own credit. The balance to Kelsey's credit in neither of the banks was large at any one time. Kelsey was required to, and he did, remit to plaintiff at frequent intervals the money received by him as manager, so that no large sum was in his hands at any time belonging to Mr. Clarke. No bank account was kept in plaintiff's name. The testimony on behalf of the defendant goes to show, and the referee so finds as a fact, that during the period the defendant was at Camp Clarke he frequently received from customers at the store checks of large amounts; that in such case he would give to the customer therefor his individual checks on one of the banks where he made deposits, in various amounts, together with some money for the purpose of enabling the party to make a purchase from the store; that the checks so received by defendant were deposited by him in bank to his own credit to meet the several checks so signed by him; that the defendant received money and checks upon deposit in his individual name from cowboys and others, which he also deposited in bank in his own name, and that when the person so depositing called for his money, the defendant paid him by giving his individual check. His bank accounts were kept for the purpose of handling the checks alone referred to, and it required no funds of his own to carry on the business, since the amount of the check deposited by the customer equaled, if not exceeded, the amount of his own check drawn in payment. Plaintiff has been unable to trace a dollar of his own moneys into defendant's bank account. Plaintiff has sought to establish this branch of the case solely by attempting to show that Kelsey had no means when he went to Camp Clarke, and that about the time he left he purchased an interest in a business, paying down $2,000, and a like sum in one year thereafter. Defendant, at the time of his em-

ployment, was engaged in the grocery business in Omaha with one Williams, and from the winding up of the firm's affairs Kesley realized about $1,000; and his salary for the two years amounted to $1,500. These two sums, together with his profits realized from the fur venture and the hay deals, and his salary as agent from the stage company, amount, in the aggregate, to nearly $4,700, so that the defendant had sufficient funds with which to make the two payments of $2,000 each. The Kelseys were at no outlay for their living, as under the contract with Clarke he was to pay the expense thereof. The defendant has, in a satisfactory manner, explained where the money came from which he deposited in the banks in his own name. The proofs fail to show that he took the same, or any portion of it, from his employer, and plaintiff is not entitled to have the defendant account for said moneys.

We next consider the contention of the appellee that, by the settlement had between himself and the appellant at the time the former left the employ of the latter, Mr. Clarke is now precluded from maintaining an action for an accounting. It is in evidence that about March 1, 1884,—just prior to the time Kelsey left Camp Clarke,—he sold certain property to plaintiff and at the same time plaintiff settled for the same, as well as the balance due defendant for salary. The several items of debit and credit included in this settlement are shown by the cash book, and are undisputed. None of the matters for which plaintiff claims an accounting therein were included in, or mentioned at the time of, the settlement. They were not disclosed by the books kept by the defendant for the plaintiff, nor was the latter aware at the time of the settlement of any of the transactions upon which the suit is predicated. It is well settled that an account stated does not bar a recovery for items not within the contemplation of the parties when the settlement was made. (*Kennedy v. Goodman*, 14 Neb., 585; *Savage v. Aiken*, 21 Neb., 605.)

It follows that the plaintiff is entitled to recover from the defendant the sum of $922.07, the same being the aggregate of the three items approved and allowed by this opinion. Plaintiff should be allowed interest on said sum at the rate of seven per cent per annum from March 11, 1885, the date of the commencement of this action. The decree is reversed and the cause remanded to the district court with instructions to render a decree in favor of the plaintiff for said sum with interest.

REVERSED AND REMANDED.

MARVIN A. CLARK V. LIZZIE J. CAREY.

FILED SEPTEMBER 19, 1894. NO. 5834.

1. **Prosecution for Bastardy:** VENUE. A prosecution for bastardy may be had in the county of the complainant's actual residence and in which the child in question is liable to become a public charge, notwithstanding the complainant may have a legal settlement in another county or state.
2. **Continuance:** RULING ON MOTIONS: REVIEW. Motions for continuance are addressed to the discretion of the trial court, and its orders in the allowing or refusing thereof will not be disturbed unless there appears to have been a clear abuse of discretion.
3. **Bastardy:** JUDGMENT FOR SUPPORT AND EDUCATION OF CHILD. It is not error in a prosecution for bastardy to order the accused, on conviction, to pay to the complainant a specific amount of money for the support and education of the illegitimate child.
4. ———: ———: DISCRETION OF COURT IN FIXING AMOUNT: REVIEW. Some discretion is allowed the trial court in fixing the amount in which the accused, upon conviction for bastardy, shall stand charged, and a judgment in such case will not on appeal be held to be excessive in the absence of a manifest abuse of discretion.

5. **Assignments of Error in Petition.** Errors of law, to be available in this court to the complaining party, must be specifically assigned in the petition in error.

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

The facts are stated in the opinion.

Schomp & Corson, for plaintiff in error:

The justice of the peace had no jurisdiction to issue the warrant of arrest, and bind the defendant over to the district court. The proceedings before the justice were void. The complainant was not a resident of Douglas county. (Constitution of Nebraska, sec. 18, art. 6; Criminal Code, sec. 260; Code of Civil Procedure, secs. 904, 1103; Compiled Statutes, ch. 37, ch. 67, sec. 15; *Ingram v. State*, 24 Neb., 37; *Cottrell v. State*, 9 Neb., 125; *Forbes v. Forbes*, Kay [Eng.], 341; *White v. Tennant*, 12 Am. St. Rep. [W. Va.], 896; *Long v. Ryan*, 30 Gratt. [Va.], 718; *Charter Oak Bank v. Reed*, 45 Conn., 391.)

A minor cannot obtain a residence or domicile of her own. The complainant could not change her residence from the residence of her father in Thurston county, where it had been for seven years. (*Hiestand v. Kuns*, 46 Am. Dec. [Ind.], 481; *Warren v. Hofer*, 13 Ind., 169; *Allen v. Thomason*, 54 Am. Dec. [Tenn.], 56; *Blumenthal v. Tannenholz*, 31 N. J. Eq., 194; *De Jarnet v. Harper*, 45 Mo. App., 415; *Sharpe v. Crispin*, 1 L. R., P. & D. Div. [Eng.], 611.)

The court erred in overruling the motion for a continuance. (*Miller v. State*, 29 Neb., 437; *Gandy v. State*, 27 Neb., 707; *Johnson v. Dinsmore*, 11 Neb., 394, 395; *Singer Mfg. Co. v. McAllister*, 22 Neb., 359; *Ingalls v. Noble*, 14 Neb., 273; *Burrell v. State*, 25 Neb., 581; *Stevenson v. Sherwood*, 22 Ill., 238.)

The judgment is void, because it orders the money paid to a minor. (*Kleffel v. Bullock*, 8 Neb., 343.)

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

The justice of the peace before whom the complaint was made had jurisdiction of the subject-matter, and of the person of the plaintiff in error. (Consolidated Statutes, secs. 1977, 1979, 1984.) The statute is explicit on this point, and *Ingram v. State*, 24 Neb., 37, does not support plaintiff in error's contention, though the writer of the opinion in that case inadvertently used the word "county" instead of "state." But even conceding that the Douglas county justice of the peace had no jurisdiction, plaintiff in error waived that objection by making four motions for continuances, appearing and cross-examining witnesses, and otherwise invoking the powers of the court, than on the single question of jurisdiction. (*Porter v. Chicago & N. W. R. Co.*, 1 Neb., 14; *Cropsey v. Wiggenhorn*, 3 Neb., 108; *Crowell v. Galloway*, 3 Neb., 215.)

Even if complainant had been required to have been a resident of Douglas county, she fulfilled that requirement, since the testimony shows that her intention as to change of residence was fully within the rule of *Swaney v. Hutchins*, 13 Neb., 268. In plaintiff in error's argument on this point he confuses "residence" with "domicile;" the former is much the more temporary in its character. (*Mayor v. Genet*, 4 Hun [N. Y.], 487; *Foster v. Hall*, 4 Humph. [Tenn.], 346; *Long v. Ryan*, 30 Gratt. [Va.], 718; *In re Wrigley*, 8 Wend. [N. Y.], 140; *Briggs v. Inhabitants of Rochester*, 16 Gray [Mass.], 337; *Warren v. Thomaston*, 43 Me., 406; *Alston v. Newcomer*, 42 Miss., 187; *Risewick v. Davis*, 19 Md., 82; *Frost v. Brisbin*, 19 Wend. [N. Y.], 11; 5 Am. & Eng. Ency. Law, 858.)

Rulings on motions for continuances are discretionary with the trial court. (*McDonald v. McAllister*, 32 Neb., 517; *Singer Mfg. Co. v. McAllister*, 22 Neb., 359; *Ingalls*

v. Noble, 14 Neb., 273; *Burrell v. State*, 25 Neb., 581.) Plaintiff in error had already been allowed three continuances, and it was no abuse of discretion to deny the fourth. The rule that counter-affidavits should not be considered on a motion for continuance applies only to criminal cases and to matters which it is alleged will be proved by an absent witness. (*Williams v. State*, 6 Neb., 334.) It is well settled that the bastardy action is a civil one. (*Ingram v. State*, 24 Neb., 35.)

The statute (Con. Stats., sec. 1982) authorizes a judgment "in such a sum or sums as the court may order or direct," and the authorities give the trial court a wide discretion in fixing the amount. (*Jerdee v. State*, 36 Wis., 170; *County of Mills v. Hamaker*, 11 Ia., 209; *Goodwine v. State*, 31 N. E. Rep. [Ind.], 554; *State v. Zeitler*, 35 Minn., 238.) The action is designed not simply "to preserve harmless the county," but also for the protection and benefit of the mother. (*Hoffman v. State*, 17 Wis., 615; *Baker v. State*, 65 Wis., 50.) So, lying-in expenses are proper items of allowance (*Judson v. Blanchard*, 4 Conn., 566), even where the child dies early and the public has incurred no expense. (*Jerdee v. State*, 36 Wis., 170; *State v. Zeitler*, 35 Minn., 238; *State v. Eichmiller*, 35 Minn., 240.)

A judgment is not defective because rendered "in favor of a minor" (*Smith v. Redus*, 9 Ala., 99); and even if it were, the point was not raised either in the motion for a new trial or petition in error. The same is true of the objection that plaintiff in error was not required to renew his bonds. Moreover, this fact does not appear from the record, and it will be presumed that the proceedings were regular. (*Deroin v. Jennings*, 4 Neb., 100; *Buchanan v. Mallalieu*, 25 Neb., 201; *Becker v. Simonds*, 33 Neb., 685; *Garneau Cracker Co. v. Palmer*, 28 Neb., 307; *Hastings School District v. Caldwell*, 16 Neb., 68.) Even if there had been a failure to make such renewal, it would have been, at most, an irregularity, not only without prejudice to the plaintiff in

error, but actually to his advantage, and hence not ground for reversal. (*Dillon v. Russell*, 5 Neb., 484; *Pollard v. Turner*, 22 Neb., 366; *Western Horse & Cattle Ins. Co. v. Putnam*, 20 Neb., 331; *Hutchinson v. State*, 19 Neb., 262; *Village of Ponca v. Crawford*, 18 Neb., 557; *Deitrichs v. Lincoln & N. W. R. Co.*, 13 Neb., 361; *Gibson v. Sullivan*, 18 Neb., 558; *Chamberlain v. Brown*, 25 Neb., 434.)

POST, J.

This was a bastardy proceeding in the district court for Douglas county, in which the plaintiff in error was adjudged guilty, and which judgment he has brought into this court for review by petition in error.

The first error alleged is the overruling of his motion to dismiss for want of jurisdiction. The complainant, a minor seventeen years of age, resided in Thurston county with her parents at the time the child in question was begotten. About three weeks previous to the filing of the complaint she left her home without the knowledge or consent of her parents, and went to the city of Omaha, in Douglas county. On the 20th day of November, 1891, she lodged a complaint with John S. Morrison, a justice of the peace for Douglas county, upon which the plaintiff in error was arrested. On the 24th day of the same month a hearing was had before said justice, which resulted in an order requiring the accused to give bond for his appearance at the next term of the district court. Soon thereafter the complainant was taken by her father to his home in Thurston county, where she remained until January 14, 1892. On the day last named she returned to Omaha and took up her abode at the institution mentioned as the "Open Door," where she remained until the trial, on the 27th day of June following, and where her child was born on the 11th day of March. Her expenses at the "Open Door" were paid by her father; but on cross-examination she was asked, "Where do you

expect to go when the trial is over?" to which she answered, "I do not know where I shall go."

Upon this record it is contended that she was not a resident of Douglas county within the meaning of chapter 37, Compiled Statutes, entitled "Illegitimate Children," wherefore the action of the justice of the peace of said county was without jurisdiction and void. In that view we cannot concur. By section 1 of the chapter above named it is provided: "That on complaint made to any justice of the peace in this state by any unmarried woman resident therein, who shall hereafter be delivered of a bastard child, or being pregnant with a child which, if born alive, may be a bastard, accusing * * * any person of being the father of such child, the justice shall * * * issue his warrant, directed to the sheriff, coroner, or constable of any county of this state, commanding him forthwith to bring such accused person before said justice," etc. It will be observed that the jurisdiction thus conferred is not by any express provision restricted to justices of the peace for the county where the complainant resides, although it was intimated in *Ingram v. State*, 24 Neb., 37, that such limitation is to be implied from the language of the act. It has been frequently said by this court that this proceeding is in the nature of a civil action. By that is meant that many of the rules applicable to actions under the Code will be applied in prosecutions for bastardy. However, strictly speaking, it is a proceeding *sui generis;* that is, neither a civil action nor a criminal prosecution, within the statutory meaning of the terms. (*State v. Mushied*, 12 Wis., 561; *State v. Jager*, 19 Wis., 235; *Baker v. State*, 65 Wis., 50.) One of the principal objects of the proceeding is to secure the public against liability for the support of a child which is, or is liable to become, a public charge. It is clear that the term "resident" or "residence," as applied to the complainant, is not used in the sense in which it is employed in the Civil Code, but applies as well to the county in which

the mother of the child may actually reside, and which is liable to be charged with its support, although she may in fact have a home in another county or state; and while it is not doubted that this proceeding may be prosecuted in the county where the mother has a legal settlement, it may also be brought and prosecuted to judgment in the county of her actual residence.

2. It is next argued that the court erred in overruling the motion of the accused for a continuance. The case was noticed for trial at the May, 1891, term, being the second term of the district court at which it stood for trial. On the 14th day of May it was set for trial on the 25th day of the same month. On the last named day the accused asked for a continuance on account of the absence of material witnesses, which was granted, and the cause continued until June 14th, on which day it was again continued on his motion until the 27th day of June; the ground of the last continuance being his own illness. On the day last named counsel for the accused moved for a further continuance on the ground that he was unable to attend on account of sickness, and that his presence and direction during the trial was necessary to a successful defense, which motion was overruled and the trial proceeded over their objection. In the last motion no mention was made of absent witnesses, and, according to his admission on a previous day, he had failed to secure the evidence named in his first application for continuance; nor was there any showing that the accused was a necessary witness in his own behalf. It is the settled rule in this state that applications for a continuance are addressed to the discretion of the trial court, and its action in respect thereto will not be disturbed in the absence of a clear abuse of discretion. It cannot in this instance be said that the court erred in denying the application. The facts disclosed by the record tend to cast suspicion upon the good faith of the accused and his sincerity in seeking a further continuance of the cause. Again, on the

hearing of the motion for a new trial affidavits were introduced tending to prove that he was not confined to his room on the day of the trial, as claimed by him, but was seen riding on horseback in apparent good health. The question of his ability to attend and participate in his defense was thus submitted to the district court and evidently resolved against him, a finding which we are not at liberty to disturb.

3. It is contended that the court erred in adjudging the accused to stand charged with the support of the child in a specified sum, to-wit, $2,112, payable to the complainant in installments of $12 on the first day of each month. It is argued in support of this assignment that the object of this proceeding is simply to keep harmless the county upon which the illegitimate child may become a charge; but our statute will not admit of such a construction. The language of section 6 of the act under consideration is "That in case the jury find the defendant guilty, or such accused person, before the trial, shall confess in court that the accusation is true, he shall be judged the reputed father of said child, and shall stand charged with the maintenance thereof in such a sum or sums as the court shall direct, * * * and the court shall require the reputed father to give security to perform the aforesaid order," etc.

4. It is argued also that the judgment is excessive, and therefore erroneous. The construction uniformly given to similar statutes is, that the trial court, in fixing the amount in which the accused shall be charged, may take into consideration such facts as the health of the child and mother, the ability of the latter to care for the child, and the physical and financial ability of the accused; and in no reported case has a judgment been reversed on account of the amount of the judgment unless there appeared to be an abuse of discretion. (See *Mills County v. Hamaker*, 11 Ia., 209; *Jerdee v. State*, 30 Wis., 170; *Goodwine v. State*, 31 N. E. Rep. [Ind.], 554; *State v. Zeitler*, 35 Minn., 238.)

As said in the last named case, no evidence seems to have been introduced bearing especially upon the subject of the amount of the judgment. We must presume the court acted according to its best information, from the facts proved at the trial and from all the circumstances surrounding the case. There being no apparent abuse of discretion, the amount fixed by the trial court is presumed to be reasonable and to present no ground for interference by us.

5. The judgment is assailed in the brief of counsel for the plaintiff in error on the ground that it directs payment to a minor. That is, in effect, an objection to the judgment on the ground that the plaintiff has not the legal capacity to sue, which in actions under the Code must be by demurrer or special plea in the nature of a plea in abatement. (Chitty, Pleading, 448, and note; *National Life Ins. Co. v. Robinson*, 8 Neb., 452.) It is not necessary to determine in this connection whether the strict rule of the Code is applicable to this proceeding. It is a sufficient answer to the present objection that it was not made in the trial court, nor even in the petition in error, but is presented for the first time in the argument of counsel. The objection is therefore without merit.

6. Exception was taken to the refusal of several instructions bearing upon the question of the complainant's residence. While some of them correctly state the law, they were refused, evidently on the ground that the prosecution was rightly commenced in Douglas county. As already stated, we concur in that view.

There is no error in the record and the judgment is

AFFIRMED.

FRANK CARRUTH v. EVA L. HARRIS ET AL.

FILED SEPTEMBER 19, 1894. No. 5698.

1. **False Representations in Sale of Stock: VALUE: INQUIRY: INSTRUCTIONS.** The action of the district judge, in refusing to give an instruction requested by plaintiff in error, examined, and *held* not erroneous.
2. **Instructions.** Where an instruction is requested in which it is attempted to include all the issues under the pleadings and evidence in the case, but it omits one of such material elements, it is not error to refuse to give the instruction.
3. **False Representations: SALE: DAMAGES.** False statements in regard to the affairs of a corporation, by one of its officers who possesses full knowledge of its condition, made for the purpose of inducing parties to purchase of him shares of stock of the corporation owned by him, who purchased the stock relying on such statements, having no knowledge of the truth or falsity of the statements and no full means of ascertaining the facts constituting such knowledge, are sufficient to raise a cause of action, in favor of the purchaser, for damages.
4. **Damages for False Representations.** The evidence *held* sufficient to sustain the verdict.

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

The facts are stated in the opinion.

Byron Clark, for plaintiff in error:

The alleged representations were not intended for or made to Mrs. Harris. She cannot, therefore, recover. (Bigelow, Fraud, 545; *Long v. West*, 31 Kan., 298.)

All of the representations testified to by Mrs. Harris were promissory in their nature, and in law are not sufficient to base an action upon for fraud and deceit. The statements involved mere questions of opinion, both as to present value and future increase. (*Perkins v. Lougee*, 6

Neb., 220; *Markell v. Moudy*, 11 Neb., 214; *Abbott v. Abbott*, 18 Neb., 505; *Columbia Electric Co. v. Dixon*, 49 N. W. Rep. [Minn.], 244.)

The purchaser by ordinary care and prudence could have been protected by making inquiry, and it was his duty to do so. (*Mamlock v. Fairbanks*, 1 N. W. Rep. [Wis.], 167; *Ætna Ins. Co. v. Reed*, 33 O. St., 283; *Hanscom v. Drullard*, 21 Pac. Rep. [Cal.], 736; *Deming v. Darling*, 20 N. E. Rep. [Mass.], 107; *Poland v. Brownell*, 41 Am. Rep. [Mass.], 215; *Graffenstein v. Epstein*, 33 Am. Rep. [Kan.], 173.)

Carruth's knowledge of the falsity of the representations claimed to have been made by him was not proved. Knowledge was a necessary element. (*Holmes v. Clark*, 10 Ia., 423; *Avery v. Chapman*, 62 Ia., 145; *Allison v. Jack*, 76 Ia., 205.)

Matthew Gering and *Beeson & Root, contra:*

The second instruction asked by plaintiff in error was properly refused. (*City of Plattsmouth v. Boeck*, 32 Neb., 297; *Runge v. Brown*, 23 Neb., 826.)

Carruth's statements and those of his agent concerning the financial condition of the corporations amounted to a fraud. (*Redding v. Wright*, 51 N. W. Rep. [Minn.], 1056; *Adamson v. Jarvis*, 12 Moore [Eng.], 241.)

Carruth cannot be heard to say that defendants in error should not have relied on what he told them. (*Runge v. Brown*, 23 Neb., 817.)

After judgment it is immaterial that Carruth's *scienter* was not proved. (*Adamson v. Jarvis*, 12 Moore [Eng.], 241.)

Under the facts found by the jury the plaintiff in error would be charged with knowledge and fraud. (*Lobdell v. Baker*, 35 Am. Dec. [Mass.], 358; *Munroe v. Pritchett*, 50 Am. Dec. [Ala.], 203; *Mitchell v. Zimmerman*, 51 Am. Dec. [Tex.], 717; *Frenzel v. Miller*, 10 Am. Rep. [Ind.], 62.)

HARRISON, J.

This is an action instituted by the defendants in error in the district court of Cass county to recover damages for alleged false and fraudulent representations stated to have been made by plaintiff in error to induce defendants in error to purchase certain shares of stock in a street railway company and an electric lamp company. The petition filed in the district court states, in substance, that Frank Carruth, on August 27, 1889, was the owner of five shares of the stock of the Plattsmouth Street Railway Company, and also five shares of the stock of the Opperman Electric Lamp Manufacturing Company, and was a director of each of the companies and president of the street railway company, and knew the financial condition of each company and the value of the stock. Eva L. Harris and Frank Harris were husband and wife and owned and lived upon a tract of land in Cass county, the title to which was of record in the name of the wife. On the date before mentioned they executed and delivered to Carruth a promissory note in the sum of $1,000, conditioned for payment September 1, 1892, with interest at ten per cent per annum from date until paid, and to secure the payment of the note executed and delivered to Carruth a mortgage covering said tract of land; that at the time of the execution and delivery of the note and mortgage they had no knowledge of the financial condition of the companies, or the actual or market value of the shares of stock, and in making the purchase of the stock relied wholly upon the statements and representations of Carruth, who stated and represented to them, in order to induce them to purchase the shares of stock then owned by him, that the companies were solvent and in good condition and the shares of stock worth their par or face value, when it was known to him that the companies were then insolvent and the stock valueless; that he further stated or promised that he would do all in his

power to obtain employment for Harris on the street railway, and to place Harris or Mrs. Harris in the position which he then occupied as an officer of the companies, which promises were not kept or performed, and which statements, in reference to the condition of the companies and the value of the shares of stock, were untrue and known by Carruth at the time he made them to be false, and were without the knowledge of Mr. or Mrs. Harris and could not be and were not known to them; that the note and mortgage had been sold and transferred before maturity by Carruth to one C. B. Hungerford. The petition contained a further allegation that the shares of stock were never transferred or delivered to Mrs. Harris, and ended with a prayer for damages in the sum of $1,200. The answer of Carruth to the petition admitted the existence of the companies or corporations, the ownership by Carruth of the shares of stock as stated in the petition, his connection with the companies as director of both and president of one, and the sale of the shares of stock to Harris and the execution and delivery of the note and mortgage to him as a consideration for such sale and the transfer of the note and mortgage to Hungerford, and denied, either generally or specifically, each and every other allegation of the petition, and contained some affirmative allegations which it will not be necessary to further notice, as they will not enter actively into the consideration of the case as elements or facts affecting the point raised for decision. The reply was, in effect, a denial of any new matter contained in the answer. There was a trial of the issues before the court and a jury, and a verdict against Carruth for $500. A motion for a new trial filed by Carruth was overruled and judgment rendered on the verdict, and the case was removed to this court by petition in error on behalf of Carruth.

One alleged error which is insisted upon in the brief filed by counsel for plaintiff in error is that the following instruction, numbered 2, was requested to be given in behalf

of Carruth and refused, viz.: "If the jury believe from the evidence that the plaintiff Eva L. Harris, by herself or agent, had any opportunity to ascertain or know the financial condition of the Plattsmouth Street Railway Company or the Opperman Electric Lamp Manufacturing Company, and by the exercise of reasonable and ordinary care and diligence could have informed themselves of the true value of the stock of each of said companies, and that such failure was without fault on the part of the defendant, your verdict should be for the defendant." It is contended that the proposition contained in this instruction, by which the jury were to be informed that it was the duty of Mr. and Mrs. Harris to exercise ordinary care and diligence to become acquainted with the truth in regard to the condition of the companies and the value of the shares of stock, regardless of any statement of Carruth, and if they failed so to do it would bar any recovery on their part in this action, was correct and one upon which the jury should have been instructed. There were instructions given to the jury by the court on its own motion which contained some reference to the point to which it was sought to call their attention by the instruction requested, but not calling their attention to this portion of the issues as directly and specifically as did the one prepared by counsel and now under consideration, or as they should have done if an instruction on this point was proper or necessary; but whatever view we might take or conclusion we might reach as to the correctness of the instruction asked in its statement of the law, or the propriety or necessity for its being given, it attempted to state under what findings as to facts developed in the evidence adduced during the trial the jury would be warranted in returning a verdict for Carruth, and in so doing entirely ignored one material branch of the issues in the case, viz., it did not require them to make any investigation of, or reach any conclusion upon, the question of whether Carruth had ever transferred

or delivered the shares of stock to Mr. and Mrs. Harris. Before the jury could find for Carruth, they must have been convinced that such transfer and delivery had been effected. The instruction was defective, in that it omitted one of the essential elements of the case, and there was no error in the refusal to give it. (*City of Plattsmouth v. Boeck*, 32 Neb., 297.)

The only other question raised and argued in the brief is that there was not sufficient evidence to sustain the verdict. The argument made under this assignment is mainly directed to the proposition that there were no such representations made by Carruth, even conceding that he made them and they were untrue, and he knew them to be, so as would render him liable for damages, if any, suffered by plaintiffs; that anything he may have said was a mere expression of opinion, or referred to matters regarding the present value of the stock or the future prospects of the companies and the value of the stock in the future; but an examination of the evidence convinces us that he made statements during the course of the transaction of the sale of the stock to the plaintiffs and to induce them to make the trade, and which were relied upon by them, in which he represented that the financial condition of the companies was then good; that they were solvent and were being well managed; that these things were untrue, and that he knew they were, as the evidence discloses that he knew the condition of the companies at the time of the sale of the stock to the plaintiffs, and as an officer of the companies possessed superior means and facilities for obtaining such information to those within the power or reach of the plaintiffs. While some portions of the testimony in regard to the above matters is somewhat indefinite and in some particulars not entirely satisfactory, yet we believe it to be sufficient to support the verdict of the jury, hence we will not disturb it. It follows that the judgment is

AFFIRMED.

RICHARD HOGEBOOM, APPELLANT, V. ELIZABETH ROBERTSON ET AL., APPELLEES.

FILED SEPTEMBER 19, 1894. No. 5711.

Sufficiency of Evidence to Support a Finding that a Child's Title to Land Was Not Held in Trust for Her Father: ESTOPPEL. The evidence in the case examined, and *held* sufficient to sustain the findings and judgment of the court below.

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

A. S. Churchill and *George A. Magney*, for appellant.

Gregory, Day & Day, contra.

HARRISON, J.

On the 20th day of February, A. D. 1890, the plaintiff and appellant herein filed in the district court of Douglas county the following petition:

"The plaintiff presents this his petition against the defendants and shows to this court: That on or about the 1st day of June, 1857, the plaintiff purchased from one Louis Waldo, the pre-emptor, patentee, and owner thereof, the northeast quarter of the northeast quarter of section 5, township 15, range 13 east of the 6th principal meridian, the same being situate in the county of Douglas and state of Nebraska; that solely as a matter of convenience the plaintiff procured the title of said land to be placed in the name of his daughter, Harriette Hogeboom; that said Harriette Hogeboom afterwards intermarried with one Theodore Robertson, and afterwards, to-wit, in the year 1875, departed this life, leaving her surviving the above named defendants as her children and sole heirs at law; that the said Harriette Hogeboom never paid any consid-

eration whatever for the said premises, and during their lifetime neither she nor her husband ever assumed, exercised, or claimed any ownership, title, interest, or right in or to said premises, but always claimed and admitted that the plaintiff was the rightful owner of the same; that the entire consideration therefor was paid by this plaintiff, and no part thereof in any way was paid or advanced by the said Harriette Robertson, or any person on her behalf; that since the death of the said Harriette Robertson, born Hogeboom, her children and heirs at law have not, nor has either of them, assumed or exercised any ownership whatever over said land or any part thereof; that during the sixteen years after the purchase, and before the death of the said Harriette Robertson, born Hogeboom, and during the fifteen years since her death, as aforesaid, and ever since the purchase of said property, the plaintiff has had open, notorious, peaceable, undisputed, actual, and continuous possession of the said premises, and has exercised acts of ownership over the same, and has paid the taxes thereon, except that in the year 1871 the county treasurer of Douglas county sold to Wilson Reynolds said premises for the unpaid taxes, as alleged, of 18—, and the said Wilson Reynolds thereafter, to-wit, on the 14th day of November, 1883, quitclaimed said premises to the defendants; but the plaintiff claims and avers that the said deed of said county treasurer was utterly void, worthless, and of no effect, and conveyed no title whatever to said premises and gave said Reynolds no title whatever which would be the subject of conveyance.

"Wherefore the plaintiff asks for a decree of this court whereby it may be ascertained that the said defendants hold the legal title to the said property in trust for this plaintiff, and the said defendants in and by said decree may be ordered and required to convey said premises, or such portion thereof as the court shall direct, to the plaintiff by a proper deed, or that in default the sheriff be required to

make such conveyance, or that the decree stand therefor, or for such other or further order or decree, or both, as to this court shall seem meet and as good conscience and equity may require."

To which the defendants filed an answer, in which they admitted the entry of the land described in the petition by Louis Waldo and its conveyance afterwards to Harriette Hogeboom, her marriage with Theodore Robertson, the death of their father and mother, Theodore and Harriette Robertson, during the year 1875, and the fact of the defendants being the children and heirs at law. The further matters of defense are stated as follows:

"But these defendants most expressly deny that this plaintiff was the real owner of said premises, or that it was so admitted or acknowledged at any time by their said mother, the deceased, or that she held the title in trust for plaintiff, or that plaintiff had any right, interest, or claim in or to said premises, or that plaintiff had been in peaceable and uninterrupted possession of the same, in his own right or for himself, at any time within the last ten years, or at any other time.

"3. But defendants allege the fact to be that shortly after the death of their said mother, Harriette Robertson, as aforesaid, to-wit, in 1879, the plaintiff caused himself to be appointed guardian of these defendants by the county court of Sarpy county, Nebraska, and by virtue of such guardianship and under the powers so conferred the said plaintiff, for and in behalf of these defendants as his said wards, entered into possession of said premises as for and as the property of these defendants, and in no other way, manner, or right whatever; and these defendants therefore say that their possession has been open, exclusive, and adverse to any and all claim of plaintiff, as set forth in his petition, for more than ten years prior to the instituting of this cause of action, and that any and all right has been long since barred by the statute of limitations.

"4. These defendants confess that they are not at this time advised as to who furnished the means for the purchase of the aforesaid lands from said Waldo; but defendants say that if it is in any way made to appear that the money was furnished by plaintiff, which for the purpose of putting him, the plaintiff, upon full proof, is hereby expressly denied. The same was so furnished and paid as a gift and advancement to their said mother, and that said gift and advancement, if so made, has been at divers times and was ratified and confirmed unto said Harriette Robertson and to these defendants.

"5. And for other and further answer the defendants say that plaintiff ought not to be permitted to further prosecute this action, in this: The said plaintiff, while acting for these defendants as their guardian, has, at sundry times and divers ways, represented the property to be the property of these defendants, both in court and under oath, and by virtue of which he, the said plaintiff, has obtained both order and decree of court; and more especially the said plaintiff, as guardian aforesaid, did present his petition to this court upon the 30th day of June, 1883, stating, under oath, that the land in question was the property of these defendants, that they were minors, and that it was for their interest that the same be sold; that permission was given plaintiff, as guardian, to mortgage said lands for the benefit of his said wards, these defendants, in the sum of $1,000; and that afterwards, to-wit, in October of said year, he, the plaintiff, as such guardian, caused the same to be mortgaged as the property of these defendants for the sum of $1,000, whereby the plaintiff is wholly estopped from asserting any right or interest in and to said lands.

"6. And for other and further matters of defense these defendants allege that the said lands, for all the years since the death of their said mother up to the present time, were under improvements, susceptible of yielding large rents and

profits, and was so rented by the plaintiff as guardian of these defendants, the exact amount of which these defendants are not able to state, but the said rents, issues, and profits so obtained by plaintiff were more than sufficient to meet the expenses, burdens, and taxations imposed upon said estate, and for which plaintiff has in no manner accounted to these defendants.

"7. But notwithstanding all and singular the matters aforesaid the said plaintiff did cause these lands, under and by order and license obtained from this court, and by virtue of his powers as guardian of these defendants, to be mortgaged, in fact or in pretense, to one Jane Pritchard for the sum of $1,000, which said mortgage was executed as of the date of October 20, 1883; and as to whether the said plaintiff obtained any money for the said pretended mortgage these defendants are not able to state, but most positively allege that plaintiff in no manner ever accounted for same, or in any manner used it for the benefit of these defendants.

"8. That afterwards, to-wit, the year 1886, the said Jane Pritchard brought her action to foreclose said mortgage in this court, and did obtain decree of foreclosure and an order for sale of the lands in question to satisfy said mortgage claim; and defendants charge the fact to be that the plaintiff, all the time holding the moneys of these defendants, caused and permitted the said lands to go to sale, and, as these defendants charge, for the purpose of obtaining possession of the same in his own right, he, the said plaintiff, entered into collusion with one Egbert E. French and induced and caused the said French to become the purchaser of the west one-fourth of said premises at said foreclosure sale, bidding and ostensibly paying therefor the sum of $3,000, and thereupon the sheriff caused a deed to be made to the said Egbert E. French for the west one-fourth of said land; and defendants say that though the title is still in the name of the said Egbert E. French, the said plaintiff asserts ownership and control of the same,

and these defendants charge the facts to be that while the said French was the nominal purchaser, the same was done for, and in collusion with, and at the instigation of, plaintiff, and for the purpose of enabling plaintiff to acquire an interest in and to the same adverse to these defendants in and to the west one-fourth of said premises, and the said plaintiff is now asserting ownership thereto by reason thereof; but defendants charge that the said sale is fraudulent and void as to these defendants by reason of the facts aforesaid.

"9. And defendants allege that as a part of and carrying out the scheme, as aforesaid, the said French, at the instance of the plaintiff, caused to be paid into the clerk of this court the sum of $3,000, the price of which the west one-fourth of the land in controversy was sold, and, after satisfying the amount for which the said mortgage sale ordered and all costs, there remained the sum of $1,771.51, which the said plaintiff receipted for and obtained from the clerk of said court under and by virtue of his guardianship of these defendants, and defendants say that the moneys so received by this plaintiff from the estate of these defendants, and for which he has in no manner accounted for, exceeds the sum of $3,500.

"Wherefore the defendants pray that this answer may be treated, allowed, and considered as also a cross-bill of these defendants; that they have leave to make the said Egbert E. French a party hereto, and that he be required to answer to all the things and matters herein alleged against him; that the said deed of the west one-fourth of N. E. of N. E. of section 5, township 15, range 13, so made by the sheriff of Douglas county to the said French be held for naught, and that the title and right of these defendants be confirmed to the whole of said forty acres as aforesaid; but in the event the court shall find the said French to be a good-faith purchaser of said west one-fourth of said land, then defendants pray that the said plaintiff

may be required to account for all and singular the moneys obtained by mortgage and sale of the said land aforesaid, as well as all rents, issues, and profits arising therefrom while he was so acting as the guardian of these defendants; and such other and further relief as shall to the court seem just and equitable."

To this answer there was evidently a reply, which is not in the record, but there appears the following statements in reference to it: "Afterwards, on the 22d day of December, 1890, a reply was filed herein, which said reply was, at the time of making the transcript, missing from the files." At the time the case was taken up for trial the following order was made, as appears from the record: "This cause now coming on for trial, on motion of defendants, it is by the court ordered that the counter-claim of the said defendants filed herein be, and the same is hereby, dismissed without prejudice."

A trial of the issues thus completed and presented resulted in the following decree in favor of defendants, viz.:

"This cause coming on this day for final determination before this court, the same having been heretofore fully submitted upon all the proofs and arguments of counsel, and the court, being fully advised in the premises, finds that the plaintiff's bill is without equity, and for that reason his cause ought and should be dismissed from this court; and the court further finds that the defendants dismissed their counter-claim without prejudice in this cause and stood wholly upon the answer and defense as defense herein. It is therefore, ordered, adjudged, and decreed that the plaintiff's bill be dismissed for want of equity and that defendants recover from the plaintiff their costs taxed in the sum of $——, and that execution issue therefor; to all of which order, finding, and decree the plaintiff excepts, and has forty days from the rising of this court to prepare and present his bill of exceptions, and the amount of bond in case of appeal is fixed at $1,000."

From this disposition of the case the plaintiff has perfected an appeal to this court. By the voluntary dismissal or withdrawal of the portion of the answer which contained matter upon which defendants based a claim for affirmative relief, and the admissions of the answer, all, or practically all, questions were eliminated from the case except the one in reference to the position in which Harriette Robertson, or Hogeboom, was placed relatively to the plaintiff by the transaction which resulted in a deed to her from Louis Waldo, whether the conveyance was made to her of the title for him, or was there sufficient evidence to show that the conveyance was one to her in trust for him? The rules of law applicable to exceptions to certain portions of the testimony which were admitted subject to objections, and also such as are pertinent to the other points raised by the evidence, are well presented and argued in the briefs filed by counsel for the respective parties; but in a decision of the case, agreeably to our views, a discussion of the law points will not be necessary, as we are satisfied that a true determination of the controversy may be reached from a consideration of the facts developed. The plaintiff testified in regard to what were his intentions at the time he purchased the land and had the conveyance made to his daughter, all of which testimony was objected to by defendants as incompetent, and admitted subject to the objections. Granting that it was competent, which we do not decide, we have the following:

Q. To whom was the land deeded? Who was the grantee named in the deed?

A. I had it deeded to my younger daughter.

Q. What is her name?

A. Harriette.

Q. How old was she at that time?

A. I think fifteen or sixteen.

Q. Did she afterwards marry; and if so, who?

A. Yes, sir.

Q. Now, Mr. Hogeboom, you may state what your object was in having it deeded to your daughter.

A. Now it is a good while ago, and it is almost impossible for me to state what my object was. I suppose, I guess at that time we had some object in it. Maybe a matter of convenience or something of that kind; but positively I could not go back and say just what my object was. I took it as a matter of convenience more than anything else.

Q. You may state what your intentions were at the time in having it deeded to her.

A. I cannot say what the intention was, unless it was to keep me from trading it off, or making general dealing with it in other matters. It is property I expected to keep and hold onto without making any sale, or entering it into any other trade I was then making. I do not know any other object I could have had. It might be a barrier with me on that point.

It was also shown that the plaintiff occupied the land during one or two years after the purchase and improved it to some extent; that thereafter for a number of years he had apparent control of it and leased it to different persons and collected the rent. On the other hand, the evidence discloses that his daughter Harriette, to whom the deed was made, was, at the time of such conveyance to her, a minor; that she remained with him until her marriage to Robertson; that in 1879, after her death, which occurred in 1875, plaintiff was appointed guardian for the defendants, the children of his daughter, who were then minors, and on June 30 filed a petition, as such guardian, in the district court of Douglas county, which was as follows:

"Now comes Richard Hogeboom, guardian of the above named persons, and represents unto said court that said Richard H. Robertson is a minor under the age of twenty-one years; that said Elizabeth Robertson is also a minor under the age of eighteen and unmarried; that John Rob-

ertson is a minor under the age of twenty-one years, and that said Bertha Robertson is also a minor under the age of eighteen and unmarried; that the father and mother of said minor persons are dead; that on or about the 16th day of September, A. D. 1879, your petitioner was duly appointed guardian of the persons and property of said minors, and is still such guardian; that the only estate, real or personal, belonging to said minors consists of forty acres of land, or thereabouts, situated in Douglas county, and state of Nebraska, described as follows, to-wit: The northeast quarter of the northeast quarter of section 5, in township 15 north, of range 13 east of the 6th principal meridian; that there are no improvements or buildings on said land, but nearly the entire land is under cultivation and yields an annual income of about $100; that said minors have no other means of support, except as furnished by your petitioner, who is the grandfather of said minors; that there is a large sum against said land for taxes assessed thereon for several years, for which said land has been sold by the county treasurer of said Douglas county and which is subject to redemption; that the annual taxes of levy against said land is about the sum of $50; that the value of said land is about the sum of $1,600; that said minors have no other means with which to redeem said land from sale for said delinquent taxes, nor pay such annual taxes; that the whole amount required to satisfy said delinquent and other taxes is about the sum of $850. Your petitioner therefore asks the court to grant your petitioner a license to sell such land, or such portion thereof as may be sold separately without injury, to pay said delinquent and other taxes, and for the support and education of said children, or that said court make an order authorizing your petitioner to raise said money by a mortgage on said land, as shall to said court appear for the best interest of all persons interested in said land.

"RICHARD HOGEBOOM."

"I, Richard Hogeboom, depose and say I am the guardian named in the forgeoing petition, and know all the facts set forth therein personally, and that the same are true. RICHARD HOGEBOOM.

"Signed in my presence and sworn to before me this 30th day of June, A. D. 1883. WM. H. IJAMS, *Clerk.*"

It will be noticed that this petition is verified positively. Pursuant to this application, notice of its pendency was given by publication, and at the hearing he was licensed to mortgage the land, which he did, securing a loan for $1,000. The mortgage recites the proceedings of the court, the granting of the license, and is signed by plaintiff in his capacity as guardian of the defendants. The mortgage was afterwards foreclosed, but only one-fourth of the land sold under the decree, the amount realized from such sale being $3,000, of which sum there remained, after the satisfaction of the decree in the foreclosure suit, the sum of $1,771.51, which was ordered by the court to be paid to plaintiff as the guardian of defendants, and which he received and receipted for as such guardian. The $1,000, the proceeds of the loan the payment of which this mortgage was given to secure, were expended in satisfying the claim of one Wilson Reynolds in the sum of $925, delinquent taxes and interest, Reynolds having received a tax deed for the land. On payment of the above consideration he and his wife executed a quitclaim deed of the land to these defendants as grantees. There is further evidence detailing conversations had with the plaintiff by witnesses in which he made statements regarding the ownership of the land, recognizing the defendants' interest as claimed in their answer. This is a summary of the salient points in the testimony. There are other and further facts and minor details of the evidence which we will not quote, but a careful perusal, analysis, and consideration of all the facts and circumstances disclosed in the testimony, attaching and allowing due weight to all the acts and statements of all

the parties involved or concerned in the transaction respecting this land from its inception to its close, as set forth in the record before us, satisfies us that the conclusion arrived at by the trial judge and judgment based thereon were true and just and supported by the weight of the evidence; and, although the evidence may be truly said to be conflicting, we can discover no valid reason for disturbing them.

AFFIRMED.

E. A. WONDERLICK ET AL. V. FANNIE C. WALKER.

FILED SEPTEMBER 19, 1894. No. 5597.

1. **Executions**: LIABILITY OF PLAINTIFF FOR DIRECTING WRONGFUL LEVY: SHERIFFS AND CONSTABLES: BONDS: SURETIES. Where the goods of B are wrongfully levied upon and sold on an execution and attachment against A, and the plaintiffs in those actions directed the levy and sale and indemnified the officer, they are jointly liable with him and his sureties for the wrong. Former decision of this branch of the case followed and adhered to. (See *Walker v. Wonderlick*, 33 Neb., 504.)
2. **Rulings on Evidence**: REVIEW: ASSIGNMENTS OF ERROR. In order to obtain a review in this court of the action of a trial court in the admission or rejection of testimony, the portion of the testimony in which it is claimed the error occurred must be specifically and definitely described or pointed out in the assignment in the petition in error.
3. **Instructions**: REVIEW: ASSIGNMENTS OF ERROR. Where the errors claimed to have been committed by the trial court, either in the giving or refusing certain instructions, are grouped in one assignment in the petition in error, they will be examined no further than to determine that one of the instructions given was proper and unobjectionable, or one of those refused was rightly refused.
4. **Review**: SUFFICIENCY OF EVIDENCE. Where there is sufficient evidence to sustain the finding of a jury, such finding will not be disturbed unless it is clearly wrong.

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

S. Rinaker, *R. S. Bibb* and *Rickards & Prout*, for plaintiffs in error.

A. Hardy, contra.

HARRISON, J.

Fannie C. Walker, plaintiff in the district court of Gage county and defendant in error here, commenced her action in that court against plaintiffs in error, alleging in her petition that E. A. Wonderlick was a constable in and for Blue Springs township, in Gage county, and Lewis Borngasser, George Poffenbarger, and George B. Johnson were his bondsmen on his official bond as such constable, and that the Blue Springs Bank caused an attachment to be issued in an action commenced by it against one S. T. Walker, and placed the writ so issued in the hands of E. A. Wonderlick for service; that Black Bros. had theretofore obtained a judgment againt S. T. Walker and caused an execution to be issued thereon and delivered to E. A. Wonderlick for levy; that the plaintiff Fannie Walker was then the owner and in possession of a stock of groceries and some fixtures necessary and appropriate for carrying on a grocery business; that on February 18, 1890, the stock and fixtures were in a store-room in Blue Springs, in Gage county, then occupied by her, and in which she was engaged in and carrying on the business of a retail grocer with the goods, and had a fair trade; that the constable, E. A. Wonderlick, under and following directions given him by the Blue Springs Bank and Black Bros., and having been indemnified by them, levied the writ of attachment and of execution against S. T. Walker on her stock of groceries and sold them, or what remained in his hands after returning to her a quantity of goods of the value of

$250, and at the time of the levy closed her store and ruined her business, all to her damage in the sum of $511.33, for which sum with interest she demanded judgment. The Blue Springs Bank answered the petition, denying the ownership of Fannie Walker in the stock of goods and fixtures, and alleging that they belonged to S. T. Walker, the defendant in the attachment suit and judgment debtor against whom the execution levied by the defendant Wonderlick issued; that S. T. Walker was the husband of Fannie Walker, and he had attempted to convey the goods to her for the purpose of cheating and defrauding his creditors, and among them the Blue Springs Bank and Black Bros., and further generally denying each and every other allegation not expressly admitted or denied. There were some further statements in the answer, but it will not be necessary to notice or quote them here. The answer of Black Bros. was substantially the same as that of the bank, or its effect was to raise the same issues. The answer of the parties who were declared against as signers of the official bond of Wonderlick was that they had signed the bond with the express promise and agreement that two other persons, whose names were found written in the body of the bond, should also sign, and that it was not to be binding and not to be delivered to the clerk until the signatures of such persons were attached to it. That the promised signatures were never obtained. There was also a denial of each and every statement of the petition. Wonderlick's answer admitted that he was constable at the time stated in the petition, and in its further statements and substance raised practically the same issues as the answers of the bank and Black Bros. The reply of Fannie C. Walker was a general denial of all new matter contained in the answers. Of the issues presented by the pleadings there was a trial to the court and a jury, a verdict for Fannie C. Walker in the sum of $773.03, from which she filed a remittitur of $189.24, and after separate motions

for new trial, filed in behalf of the respective defendants, had been heard and overruled, the court entered judgment for Fannie C. Walker in the sum of $583.79. The defendants in the district court have brought the case to this court on petition in error for review.

The first assignment of error argued in the brief of plaintiff which we will notice is that "there was a misjoinder of parties defendant in this case, as appears by the pleadings and the evidence." When this case was instituted by Fannie C. Walker the defendants filed separate demurrers to the petition, stating, as grounds for the demurrers, first, that several causes of action were improperly joined; second, that the petition does not state facts sufficient to constitute a cause of action. Wonderlick's demurrer was overruled and the demurrer of the others sustained, and the suit dismissed in so far as it related to them. A review of the decision of the district court in a proceeding in error in this court from such action resulted in the judgment of the lower court as to all but Wonderlick being reversed and the case remanded for further proceedings. It was then held: "Where an officer with process against the property of A seizes, by virtue thereof, the property of B, he is guilty of official misconduct, for which he and his sureties are liable on his official bond. Where the goods of B are wrongfully levied upon and sold on an execution and attachment against A, and the plaintiffs in those actions directed the levy and sale and indemnified the officer, they are jointly liable with him and his sureties for the wrong." This branch of the case is reported in 33 Neb., 504. We are satisfied with the conclusions therein reached and the doctrine announced, and that the proof, as developed during the subsequent trial of the case, substantiated the allegations of the petition in reference to the part taken by the creditors, who were defendants in this suit, in causing the levy to be made, and consequently that there was no misjoinder of parties. (See, also, *Murray v. Mace*, 41 Neb., 60.)

The next assignment which claims our attention is that "the court erred in allowing the witnesses S. T. Walker and G. R. Turner to testify to conversations had with the defendant Wonderlick, plaintiff herein, out of the hearing of the plaintiffs herein and to their prejudice." It has been repeatedly held by this court that in order to obtain a review of alleged errors of a district court, in the admission or rejection of testimony, the errors complained of must be specifically pointed out or designated in the petition in error. The above assignment fails to fulfill the requirements of this rule, in that it refers to conversations testified to in some portion of the testimony of the two witnesses named in the assignment, without stating in what portion of the evidence of either it will be found, or giving the subject of the conversation, or giving the page of the bill of exceptions where it appears or the numbers of the questions objected to, or in any manner making more than a general allusion to the evidence, the court's admission of which it is sought to review. This is not sufficient. The same rule will apply to and govern the other errors which it is argued the court committed in the admission of certain portions of the testimony, as the only reference made to them in the petition in error is the general one that "the court erred in overruling the objection of these plaintiffs, and each of them, to incompetent, irrelevant, and immaterial evidence offered by the defendant herein." This is insufficient to call for a review of the points presented in the brief.

The eighth and ninth assignments of error referred to the giving and refusing certain instructions, quoting them by number and grouping those given, to which exceptions were taken and preserved together in one paragraph, and also those refused in another paragraph of the assignments in the petition in error. We have carefully examined the instructions given which are described by numbers in the eighth assignment and also those referred to in the ninth

assignment as refused, and feel fully convinced that some of the instructions given named in the eighth assignment were directly in point, pertinent to the issues, and proper to be given, and at least one of the list of refused was correctly so discarded and not given, and in accordance with the settled rule of this court the objection to the instructions need not be further considered.

The only other assignment of error which is insisted upon in the argument of counsel for plaintiffs in error in the briefs filed is that "the verdict in said case was contrary to the law and the evidence and not supported thereby." The evidence adduced bearing upon the sale of the property in controversy from S. T. Walker, the husband, to Fannie C. Walker, the wife, whether *bona fide* or fraudulent, the main issue in the case to be determined by the jury, was conflicting, and the question raised was for the jury to answer, which they did by a finding on this point in favor of the plaintiff Fannie C. Walker, that the sale to her was made in good faith and was in all particulars an honest and actual transaction, and the evidence was sufficient to support such a finding on this branch of the case, and hence it will not be disturbed.

The verdict of the jury was for the sum of $773.03, from which, before judgment was rendered, there was remitted by the plaintiff Fannie C. Walker the sum of $189.24, which we presume was meant to include either the value of the goods returned by the constable to Mrs. Walker or the amount allowed by the jury as damages to her business caused by closing the store and depriving her of the use of the goods. There was a total lack of evidence upon which to predicate any calculation of damages on the claim for loss occasioned by the shutting up of the store and stopping the business. Mrs. Walker did not show that she had lost anything from this source; hence, whatever sum was contained in the verdict of the jury as an estimate of the damages for the loss of business was not sustained by

the evidence and erroneous. Mrs. Walker, in her petition, stated that the property seized by the constable was of the value of $511.33; that there was returned to her, by him, goods worth $250. According to this the value of the stock and fixtures retained by the constable and sold was $261.33, for which sum and interest the evidence was sufficient to sustain a verdict in favor of Mrs. Walker. The judgment rendered in the sum of $583.79 contains, as one of its elements, an item of $250 with interest at seven per cent per annum from February 18, 1890, to February, 1892, or $285. This $250, whether looked upon as damages for closing the store and stopping the business, or as the value of goods returned, was not, according to the pleadings and evidence, a proper item to include in the verdict or judgment for Mrs. Walker, hence we conclude that it must be deducted from the amount of the judgment or the plaintiffs in error awarded a new trial. The plaintiff in the district court, Mrs. Walker, may file within forty days a remittitur of the sum of $285, of the date of the judgment in this case, March 23, 1892, and the judgment will then stand affirmed. If such remittitur is not filed within the time stated, the judgment is reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

SOPHIA LOWE, APPELLEE, V. JOHN RILEY ET AL., APPELLANTS, IMPLEADED WITH GEORGE A. HOAGLAND ET AL., APPELLEES.

FILED SEPTEMBER 19, 1894. No. 5401.

1. **Bill of Exceptions: REVIEW.** A bill of exceptions must contain all the evidence upon which questions of fact are to be determined, a reference in such bill to evidence to be found by refer-

ence to another bill filed in an independent case not being sufficient.

2. **Appeal from Order Appointing Receiver: REVIEW: BILL OF EXCEPTIONS.** Where there is not such a bill of exceptions as will permit of a consideration of the facts upon the evidence, and where the averments of the petition for a receiver were in no way denied except by affidavits used as evidence, the rights of the parties must be determined solely upon the allegations of the petition accepted as true.

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

A. C. Read, for appellants.

Chas. E. Clapp, *Clinton N. Powell*, *James B. Meikle*, *Gregory, Day & Day*, *Cornish & Robertson*, and *Switzler & McIntosh*, for appellees.

RYAN, C.

This is an appeal from an order appointing a receiver after a decree of foreclosure of certain mortgages and mechanics' liens. On appeal the decree just referred to was affirmed. (*Vide Hoagland v. Lowe*, 39 Neb., 397.) The application for receiver was by petition. There appears to have been no answer or other adverse pleading filed, and the trial was upon affidavits and other evidence in writing. For this other evidence reference is made in the bill of exceptions herein contained to a bill of exceptions used in *Hoagland v. Lowe*, *supra*. If there was in another case evidence material and relevant to the matters presented by appeal in this, such evidence should have been embodied in the bill of exceptions settled herein. We are aware of no rule which in effect authorizes a district judge for certain purposes in this court to consolidate entirely different actions or bills of exceptions in cases docketed independently of each other. As it is evident that to a consideration of all the evidence introduced reference must

be had to the bill of exceptions in another case already determined, we must decline to consider this appeal upon the evidence. The petition, upon which alone this appeal must be determined, presented sufficient grounds for the appointment of a receiver in an ordinary action wherein a decree had already been entered from which an appeal had been taken. The judgment of the district court is

AFFIRMED.

IRVINE, C., not sitting.

MERRILL H. COMSTOCK V. JAMES S. CAMERON ET AL.

FILED SEPTEMBER 19, 1894. No. 5317.

Action on Builder's Bond: ADMISSIBILITY OF RECORDS OF LIEN AND DECREE OVER OBJECTION OF SURETY. Where the undertaking of a surety was that buildings should be erected by his principal upon certain real property and the same turned over free from incumbrance, proper records showing the filing of claims for mechanics' liens, and a decree establishing the same as claimed, are admissible as proof of the existence of liens against said property in a suit against the surety on his undertaking, notwithstanding the fact that such surety was neither named in, nor made a party to, the proceedings evidenced by such records.

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

The opinion contains a statement of the case.

Kennedy & Learned, for plaintiff in error:

The court erred in admitting in evidence the record of the foreclosure proceeding. (*Dorsey v. McGee*, 30 Neb., 670; 1 Greenleaf, Evidence [14th ed.], sec. 522.)

A surety is bound in the manner and to the extent provided in the obligation executed by him, and no further.

(*Brennan v. Clark*, 29 Neb., 385; *Simonson v. Thori*, 31 N. W. Rep. [Minn.], 861; *Miller v. Stewart*, 9 Wheat. [U. S.], 703; *Judah v. Zimmerman*, 22 Ind., 392; *Ryan v. Trustees of Shawneetown*, 14 Ill., 24; *Wheeler & Wilson Mfg. Co. v. Brown*, 25 N. W. Rep. [Wis.], 427, 26 N. W. Rep. [Wis.], 564; *Bowers v. Cobb*, 31 Fed. Rep., 678; *Crescent Brewing Co. v. Handley*, 7 So. Rep. [Ala.], 912.)

Breckenridge, Breckenridge & Crofoot and *John Q. Burgner*, *contra.*

RYAN, C.

The plaintiff in error complains of a judgment against him rendered by the district court of Douglas county upon the verdict of a jury. The cause of action was that on June 29, 1887, the firm of Norling & Reynolds, contractors and builders, as principal, and M. H. Comstock, as surety, made their bond to J. S. Cameron in the penal sum of $700. The conditions of this bond were that the said firm of builders should furnish all the materials and perform all the labor in connection with the erection of two buildings on a lot therein described, and turn over said buildings free from liens for labor or material furnished through said Norling & Reynolds. The breach alleged was that the said firm of builders incurred divers obligations for material used in the construction of said buildings, for which mechanics' liens had been filed against the property improved, which were afterward established and ordered enforced as liens, notwithstanding all the defenses which plaintiff could and did interpose.

The first question presented is that the court erred in admitting in evidence the records showing the filing of liens just referred to in connection with the decree establishing the same, supplemented with an order of sale issued upon said decree for the collection of the amounts thereby established as liens, by a sale of the property improved.

These records and the order of sale were not admissible, because the plaintiff in error was thereby bound on account of privity between himself and his principals. He could not properly be made a party to the proceedings for the foreclosure of the liens prayed for, and hence was properly omitted therefrom; but his undertaking was that the property should be turned over free from liens on account of labor or material furnished through his principals. The substantive fact to be established was the existence of liens against the property improved, and there was no competent proof of this fact possible except by the introduction of the records themselves, or the substitute therefor by copy authorized by statute. The plaintiff in error contracted that no such lien against the property should be permitted to exist. These records showed that they did exist, and at the time of the trial had been duly established by proper proceedings *in rem*. The rule applicable is thus stated in section 527 of Greenleaf on Evidence: "A judgment, when used by way of inducement or to establish a collateral fact, may be admitted, though the parties are not the same. Thus, the record of a conviction may be shown in order to prove the legal infamy of a witness. So it may be shown in order to let in the proof of what was sworn at the trial or to justify proceedings in execution of the judgment. So it may be used to show that the suit was determined; or, in proper cases, to prove the amount which a principal has been compelled to pay for the default of his agent; or the amount which a surety has been compelled to pay for the principal debtor; and, in general, to show the fact that the judgment was actually rendered at such a time and for such an amount." In sections 538 and 539 of the same text-work will be found still further illustrations of the admissibility of evidence of this character for the purposes indicated. There was, therefore, no error in admitting in evidence the record of the mechanic's lien filed, and the decree for its enforcement. The order of sale

founded upon the decree for the enforcement of the several liens established was also admissible, coupled as it was with the sheriff's return thereon, and oral evidence showing payment and satisfaction thereof by the obligee named in the bond upon which the plaintiff in error was surety. The bond misdescribed the premises upon which the buildings were to be erected. It was pleaded and proved that the principals named in the bond had undertaken to erect no other buildings for the obligee than those situated upon the property described, and that said last named buildings were those of necessity contemplated in the bond, though the lot was misdescribed. The petition contained not only proper averments, but as well it contained an apposite prayer for the amendment and enforcement of the bond sued upon according to the true intent of the parties. In this respect there was, therefore, no error in the proceedings of the trial court.

In respect to other contentions of the plaintiff in error, it is deemed sufficient to observe that the fact that the title of the property improved was held by Isadore Cameron rather than her husband, the obligee in the bond, is not material, for the ownership of the lot to be improved is in no way referred to in the bond. In a like general way it may be observed that if the alleged failure to render judgment against his principal, for whom plaintiff in error was surety, had, by the motion for a new trial or otherwise, been presented to the trial court, a proper order or judgment, if any was necessary, would have resulted. We cannot seriously consider this objection, urged as it is for the first time in this court. No error is discovered in a careful examination of the entire record, and the judgment of the district court is

AFFIRMED.

IRVINE, C., took no part in the consideration or determination of this case.

RICHARD C. PATTERSON v. JOHN D. MURPHY.

FILED SEPTEMBER 19, 1894. No. 5200.

1. **A party whose cause of action is founded upon a written contract** is limited as to his rights by the terms of such contract, and a recovery contrary thereto cannot be sustained.
2. **Contracts to Purchase Real Estate: DEFAULT IN PAYMENTS: RESCISSION BY VENDOR: ACTION BY VENDEE TO RECOVER PAYMENTS.** Where a vendee had failed to perform according to the terms of a written executory contract for the purchase of real property, and the vendor, as was his contract right, has rescinded such contract, the vendee cannot maintain an action against the vendor for payments already made, on the ground that such contract must, by reason of such rescission, be considered as never having existed, for upon this last assumption the payments must be treated as purely voluntary.

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

The opinion contains a statement of the case.

J. L. Kaley, for plaintiff in error:

When a vendee enters upon the performance of a contract to purchase, pays part of the consideration, and makes inexcusable default, he cannot maintain an action to recover the money so paid. (*McManus v. Blackmarr*, 50 N. W. Rep. [Minn.], 230.)

If time is of the essence of the contract and there is default in payment without just excuse, and without a waiver made on sufficient consideration, the court will not afford relief to the party in default. (*Morgan v. Bergen*, 3 Neb., 214; *Horacek v. Keebler*, 5 Neb., 355; *Higbie v. Farr*, 10 N. W. Rep. [Minn.], 592; *Schumann v. Mark*, 28 N. W. Rep. [Minn.], 928; *Austin v. Wacks*, 15 N. W. Rep. [Minn.], 409; *Hanschild v. Stafford*, 25 Ia., 428; *Reynolds v. Burlington & M. R. R. Co.*, 11 Neb., 186.)

J. J. O'Connor, contra:

Where there is no contract subsisting between the parties, the same having been put an end to by the election or refusal of the defendant to perform, the other party may recover back any money paid on part performance, with interest from the date of the rescission of the contract. (*Eaton v. Redick*, 1 Neb., 305; *Raymond v. Bearnard*, 12 Johns. [N. Y.], 274; *Green v. Green*, 9 Cow. [N. Y.], 46; Chitty, Contracts, 741; *Harris v. Bradley*, 9 Ind., 168.)

RYAN, C.

The petition filed in the district court of Douglas county on behalf of John D. Murphy against Richard C. Patterson was in the following language: "Now comes the said plaintiff, and for his cause of action against said defendant says that on or about the 16th day of January, 1885, he purchased from said defendant lot 3, in block K, of Saunders & Heimbaugh's addition, as surveyed, platted, and recorded, for the sum of $200; that at the time of the purchase of said lot said plaintiff paid said defendant the sum of $80 as part payment on said lot 3, and said plaintiff entered into an agreement in writing for the purchase of said lot; that on September 25, 1885, said plaintiff paid said defendant on the purchase price of said lot $8 more; that on or about the 13th day of May, 1886, said plaintiff tendered to said defendant the sum of $131.60, being the amount in full due on said lot, interest, and taxes, and asked him for a deed to said property, which he refused to accept or to make a deed as he agreed to do, but sold and disposed of said lot to other parties, whereby said plaintiff has been injured in the sum of $88, with interest thereon from May 13, 1886." The prayer of the petition was for judgment for the above sum of $88, and interest from the date last named. Issues were duly joined between the parties, trial had to a jury, on whose verdict judgment was

rendered in favor of the defendant in error for the sum of $117.19.

The contract, referred to in the petition, was between Patterson, as party of the first part, and Murphy, as party of the second part, and provided that the sum of $200 should be paid to entitle the second party to a conveyance, of which $200, $80 should be due upon delivery of said written contract, and the balance should be paid in monthly payments of $10 each. After a provision in the contract requiring strict payment to be made as provided, time being of the essence of the contract, there followed this language: "But in case the said second party shall fail to make the said payments aforesaid, or any of them, punctually and on the strict terms and times above limited; and likewise to perform and complete all and each of his agreements and stipulations aforesaid, strictly and literally, without any failure or default, the times of payment being of the essence of this contract, then the party of the first part shall have the right to declare this contract null and void, and all rights and interest thereby created or then existing in favor of said second party or derived under this contract shall utterly cease and determine, and the premises hereby contracted for shall revert and revest in said first party without any declaration of forfeiture or act of re-entry, or without any other act of said first party to be performed, and without any right of said second party of reclamation or compensation for money paid or improvements made." The theory of the defendant in error is thus stated in the brief submitted on his behalf: "The failure of Murphy to comply with his contract and make the payments at the time agreed did not terminate the special contract, but left it optional with Patterson to do so. He exercised this option by the sale of the lot to another party at an advanced price, putting it beyond his power to fulfill his contract with Murphy. Then, on the failure of Murphy to pay, Patterson chose to rescind the contract and put an end

to the same, so that when this action was brought there was no subsisting contract between the parties on which the money sought to be recovered was paid. When Murphy tendered the amount due to Patterson and demanded a deed to the property, Patterson had already canceled the contract, sold the property, and put it beyond his power to fulfill his contract with Murphy. Where there is no contract subsisting between parties, but the same has been put an end to by the election or refusal of the defendant to perform, the other party may recover back any money paid on part performance, with interest from the date of the contract."

The case of *Eaton v. Redick*, 1 Neb., 305, would seem to sustain to some extent the proposition above advanced, but we cannot believe that the opinion in the case just referred to is a correct statement of the law applicable to all cases embraced within the language employed. For instance, in the case at bar, as has already been shown by quotation therefrom, the written contract provided that the right of rescission by Patterson, on account of the failure of Murphy to perform his undertakings, could be exercised by Patterson without any right of reclamation or compensation for money paid thereby accruing to Murphy. From the petition itself it is not clear whether the pleader bases his rights upon the written contract or not. This is immaterial, however, for in any event the same result must follow, though for different reasons. If the plaintiff's petition was framed in reliance upon the written contract, he should be bound by all its terms, one of which cut off the right to maintain this action. If it was intended to utterly ignore the written contract and treat it as though it never had existed, it would follow that the payments which plaintiff sought to recover were mere voluntary payments, and that, therefore, this action could not be maintained. (*Herman v. Edson*, 9 Neb., 152; *Renfrew v. Willis*, 33 Neb., 98.)

It results, in any view of the case, that the judgment of the district court must be, and it therefore is,

REVERSED.

IRVINE, C., not sitting.

STORZ & ILER V. ANDREW RILEY ET AL.

FILED SEPTEMBER 19, 1894. NO. 5120.

Conflicting Evidence: REVIEW. Where there is evidence upon which the jury might have found for either litigant, the verdict of a jury will not be disturbed because of a doubt as to a mere preponderance of the evidence.

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

Lake, Hamilton & Maxwell, for plaintiffs in error.

Cornish & Robertson, contra.

RYAN, C.

In the year 1887, Storz & Iler were engaged in manufacturing and selling beer in Omaha. The firm of Murphy & Woodmansee, retail liquor dealers, bought largely of the first named firm, so that there was due a balance of $2,253. The firm first mentioned advanced to Mr. Woodmansee the sum of $2,800, with which to buy out the interest of Mr. Murphy. Thus Mr. Woodmansee on November 12, 1887, became indebted to Storz & Iler in the sum of $5,053. The lease of the building, wherein was the stock of goods managed thenceforth by Woodmansee, was transferred to Storz & Iler, and a license was applied for and obtained authorizing said Storz & Iler to carry on the liquor busi-

ness therein for one year. Mr. Woodmansee had charge of this business and so managed it that there was finally a balance due the defendants in error of $1,400, for which amount a verdict was returned and judgment thereon rendered in the district court of Douglas county against the plaintiffs in error. The pivotal question in the trial was whether or not Storz & Iler were principals for whom Woodmansee was acting simply as agent in purchasing liquors from the defendants in error. In his testimony Mr. Woodmansee testified to the condition last named being a correct statement of the relation which Storz & Iler sustained to said purchase. This was denied by Mr. Storz and Mr. Iler respectively, and both these statements were reinforced by collateral evidence. It would subserve no useful purpose to detail the evidence adduced, for the result would be but to show that the jury might have found for either plaintiff or defendant. In this condition of the proofs the verdict will not be disturbed as unsustained by the evidence.

The testimony of Mr. Woodmansee was given by deposition, and it is insisted that many interrogatories were leading. This objection is well taken, and yet we cannot see that prejudice therefrom resulted to the plaintiffs in error. Of necessity the form of questions, as well as the order in which testimony is introduced, must be left to the sound discretion of the trial judge. A careful examination of the record fails to show that in either of these respects this discretion has been improperly exercised.

The criticism of instructions is because of technical use of language in referring to matters to which the proofs were directed. It is true, as suggested in argument, that the pleadings were not strictly followed in these matters, and yet the jury could not have been misled, for in each such case the reference was to questions of fact in dispute in the same language as had been employed by witnesses in giving evidence.

We find no error in the record and the judgment of the district court is

AFFIRMED.

CHARLES BEINDORFF, APPELLANT, V. DAVID KAUFMAN ET AL., APPELLEES.

FILED SEPTEMBER 19, 1894. No. 5134.

Duress: EXECUTION OF MORTGAGE BY PARENTS UNDER THREATS TO PROSECUTE SON: GUILT OF SON: COMPOUNDING FELONY. As bearing upon the defense of duress *per minas* interposed against the foreclosure of a mortgage, the actual guilt of a son is not material where his parents have been compelled to make such mortgage to secure his debt by alternative threats to begin, and promises to forbear, a prosecution against him solely conditioned upon the consent or refusal of his parents to make the mortgage demanded.

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

The opinion contains a statement of the case.

Cowin & McHugh and *C. W. Haller*, for appellant:

The facts and circumstances of the case as disclosed by the record do not in law constitute duress or undue influence. (*Sanford v. Sornborger*, 26 Neb., 295; *Hilborn v. Bucknam*, 78 Me., 482; *Mundy v. Whittemore*, 15 Neb., 647; *Sornborger v. Sanford*, 34 Neb., 498; *Compton v. Bunker Hill Bank*, 96 Ill., 301; *Greene v. Scranage*, 19 Ia., 461; *Landa v. Obert*, 45 Tex., 539; *Weber v. Barrett*, 25 N. E. Rep. [N. Y.], 1068; *Harmon v. Harmon*, 61 Me., 227; *Bodine v. Morgan*, 37 N. J. Eq., 426; *Fulton v. Hood*, 34 Pa. St., 365.)

The execution and acknowledgment of the mortgage in

question was an act of the will and the judgment of the grantors,—a deliberate conviction, after consultation with counsel and interchange of views between themselves and relatives, of what was best to be done under the circumstances. (*Weber v. Barrett*, 25 N. E. Rep. [N. Y.], 1068; *Greene v. Scranage*, 19 Ia., 466; *Harmon v. Harmon*, 61 Me., 227; *York v. Hinkle*, 50 N. W. Rep. [Wis.], 895; *Prichard v. Sharp*, 51 Mich., 432; *Gates v. Shutts*, 7 Mich., 127.)

After the execution of the mortgage, the same was ratified by the grantors and acted upon by the grantee, and defendants cannot now insist upon a rescission of the contract. (Lawson, Property Rights, sec. 2367; Leake, Contracts, 425; *Bodine v. Morgan*, 37 N. J. Eq., 426; *Sanford v. Sornborger*, 26 Neb., 295; Maxwell, Code Pleading, pp. 433–436.)

L. D. Holmes, contra:

The grantors were induced to make, execute, and deliver the mortgage in controversy through fear and by threats of appellant to prosecute and imprison their son, and by the fraud and imposition practiced by appellant's agents in securing the same. The mortgage was also made to stifle prosecution, and is illegal and void. (*Munson v. Carter*, 19 Neb, 293; *Hansen v. Berthelsen*, 19 Neb., 433; *Whelan v. Whelen*, 3 Cow. [N. Y.], 537; *Hugnenin v. Baseley*, 14 Ves. [Eng], 273; *Sands v. Sands*, 112 Ill., 225; *Smith v. Kay*, 7 H. L. Cases [Eng.], 779; *Harris v. Carmody*, 131 Mass., 51; *Williams v. Bayley*, 14 L. T. Rep. [Eng.], 802; *Coffman v. Lookout Bank*, 40 Am. Rep. [Tenn.], 35; *Eadie v. Slimmon*, 82 Am. Dec. [N. Y.], 396; *Greene v. Scranage*, 19 Ia., 461; *Gohegan v. Leach*, 24 Ia., 509; *Singer Mfg. Co. v. Rawson*, 50 Ia., 634; *Line v. Blizzard*, 70 Ind., 23; *Foley v. Greene*, 51 Am. Rep. [R. I.], 419; *Adams v. Irving Nat. Bank*, 116 N. Y., 606; Story, Equity Jurisprudence, secs. 239–251, 294; 2 Pomeroy, Equity Juris-

prudence, secs. 942, 943; *Lomreson v. Johnston*, 44 N. J. Eq., 93; *Ingersoll v. Roe*, 65 Barb. [N. Y.], 346; *Hullhorst v. Scharner*, 15 Neb., 57; *Fisher v. Bishop*, 108 N. Y., 25; *Barry v. Equitable Life Ins. Co.*, 59 N. Y., 587; *Shaw v. Reed*, 30 Me., 105; *Roll v. Roguet*, 4 O., 419; *James v. Roberts*, 18 O., 548.)

The appellees are not estopped to make their defense. An action for relief on the ground of fraud may be commenced at any time within four years after discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery. (*Parker v. Kuhn*, 21 Neb., 413; *Hellman v. Davis*, 24 Neb., 793; *Wright v. Davis*, 28 Neb., 479.)

RYAN, C.

This action was for the foreclosure of a mortgage securing the payment of three promissory notes given by David Kaufman and Kaufman Bros. to Charles Beindorff. The mortgage was made by Levi Kaufman and his wife, the parents of the makers of said notes. The defenses interposed by the mortgagors were duress, and that the mortgage was given to compound a felony, alleged to have been committed by David Kaufman. From a decree canceling the aforesaid mortgage an appeal has been taken to this court.

On the trial there was introduced evidence, and in this court argument is directed to the consideration that Levi Kaufman, with his associates, had, previous to the execution of the mortgage, received transfers of all the property of which David Kaufman and Kaufman Bros. were owners. No averments of the petition, however, warrant an inquiry as to whether or not Levi Kaufman held this property as trustee, and whether or not there were circumstances which rendered it but equitable that he should secure the claim of appellant. The action was one simply

for a foreclosure, in which, after several amendments, there were, beside the usual averments in such cases, statements as to an extension of time and the surrender of collaterals obtained by giving the mortgage in question. The finding of the trial court was that there was a sufficient consideration to sustain the mortgage, so that it is unnecessary to consider circumstances other than those tending to prove or disprove that the mortgage was procured by duress, or was given in consideration of compounding a felony.

On the 24th day of December, 1887, appellant sold his cigar and tobacco store in Omaha to Kaufman Bros., a firm composed of David Kaufman and Isaac Kaufman. As part payment the notes hereinbefore referred to were executed, each for the sum of $1,000. As security for the payment of these notes David Kaufman assigned and delivered to appellant certain executory contracts and notes. These contracts had been made by David Kaufman to George M. Winkleman and Thomas Bethel, and provided that upon payment of the entire sum of $2,600, evidenced by the notes of Winkleman and Bethel to David Kaufman, the said Kaufman would convey the property, which was the subject-matter of the contracts, to Winkleman and Bethel. These executory contracts and these notes were those assigned as collateral by David Kaufman to appellant. These executory contracts were never recorded, neither was the assignment of them, and David Kaufman, taking advantage of this want of notice, was able to, and did, mortgage the land described in the executory contracts aforesaid to John L. Miles on December 29, 1887. When this was discovered by appellant's attorney he prepared a complaint against David Kaufman upon a criminal charge under section 28, chapter 32, Compiled Statutes, and under section 127 of the Criminal Code. This complaint was sworn to by Otto Beindorff, son of appellant. With this complaint in his possession, and two deeds necessary to cure defects in title to the land upon which a mort-

gage was desired, appellant's attorney and Otto Beindorff called on David Kaufman. Mr. Haller, the aforesaid attorney, then told David Kaufman that he had come on behalf of appellant with respect to the notes in controversy and to secure which said Kaufman had given certain real estate contracts and notes, and charged that since transferring said contracts he, the said David Kaufman, had mortgaged the property in said contracts described to John L. Miles without disclosing to Miles the prior sale of said land contracts; that the mortgage itself showed that it had been taken with warranties of title in the said David Kaufman against the existence of any incumbrances. David Kaufman admitted that these charges were true, but said he had no other security which he could pledge. Mr. Haller then told him that he had brought a mortgage (describing it), ready for execution; that he had found the title first in David Kaufman, by whom it had been transferred to David's father by quitclaim deed in which David's wife had not joined, and he urged that David's father and mother should sign the above mortgage, and said that if there was not executed a proper quitclaim deed by David and his wife, and the proposed mortgage by David's father and mother, that on behalf of appellant he would begin a prosecution against David upon the information which he then read to David. Upon the suggestion of Mr. Rosenfield, a brother-in-law of David, all parties present went to the office of Mr. Ervin, an attorney at law, to whom was stated the charges against David, in substance as above set forth. Mr. Ervin thereupon inquired of David whether or not these charges were true, to which inquiry David replied that he guessed the charges were true. To Ervin's inquiry whether or not David's father would sign the mortgage, David said he would, that his father would do anything for him. A messenger was sent for David's father, Levi Kaufman, who at once came to Ervin's office.

As the finding of the trial court sustained the plea of

duress, it is necessary only to inquire whether or not there was sufficient evidence to sustain that finding. The trial took place in June, 1891, at which time Levi Kaufman testified that he would be seventy-five years of age in the winter following; that when he went into Mr. Ervin's office Mr. Haller said, "I want you to sign a mortgage;" that witness said, "I will sign no mortgage;" that Mr. Haller said, "If you do not sign that mortgage I will send your son to Lincoln to-night in prison;" that witness still refused to sign the mortgage; that witness then left the room and met his son David, who asked him to sign it, which witness refused to do, saying, "I will not sign my property,—my home;" that David began to cry and said to witness, "For mercy sake, for my children and me, sign it;" that witness thereupon signed it. It is rendered quite probable by the testimony of other witnesses that there was no threat to commit David to prison in Lincoln on the evening referred to, but the testimony is uncontradicted that Levi Kaufman was given to understand by Mr. Haller that unless the mortgage was signed there would be commenced a prosecution against David that same night, though the conversation referred to was between the hours of 6 and 7 o'clock in the evening. After Levi signed the mortgage it was the same evening taken to David's mother, who also signed it. She was at that time about sixty-three years of age. The testimony of both these parents was that the mortgage was signed solely to prevent a criminal prosecution of their son David. It is urged, however, in argument that the fact that the proposed prosecution was for an admitted crime relieved the transaction of the imputation of duress, and in support of this contention the case of *Sanford v. Sornborger*, 26 Neb., 295, is cited. If the mortgage in question had been given by David Kaufman, this case would be in point, for David could not be heard to complain of the logical effect of his own confessed misconduct. As against David's

parents, however, no such consideration has force. By threats of a prosecution of their son if they did not incumber their home, and the promise that no prosecution would be commenced if they did, this mortgage was obtained to secure a debt for which the mortgagors were in no way liable. This result was attained by appealing to their fears and the love of their offspring. The motive, therefore, can hardly be classed with that of a felon seeking to avoid the punishment of his crime. As an original proposition, it might be that we should not have reached the same conclusion of fact as that reached by the trial court upon conflicting evidence. This result is, however, not without sufficient support, and we therefore accept as proved the results necessarily implied in the finding of the trial court.

It is argued that there was a ratification of the mortgage by payments having been made on the notes by Levi Kaufman and his wife. There were payments made, but there was no direct evidence whether these payments were made by Levi Kaufman or not. Certainly they were not made by his wife. Levi Kaufman, in direct terms, testified that he in no way made or was a party to such payments. At any rate, we cannot see that these payments, if made by Levi, were of any great controlling force, for neither Levi nor his wife had ever agreed to make payments. They only gave security that David would pay; hence, such payments as were made were only in discharge of David's undertaking. There appears no change in the status of appellant superinduced by these payments, neither does the failure of Levi and his wife to insist that the mortgage was void *ab initio* seem in any way to have prejudiced his rights. The judgment of the district court is

AFFIRMED.

W. L. BEARD v. EZRA F. RINGER.

FILED SEPTEMBER 19, 1894. No. 5290.

1. **Review of Ruling on Motion:** AFFIDAVITS: BILL OF EXCEPTIONS. Affidavits used in the district court in support of a motion to set aside a default and judgment must be embodied in a bill of exceptions if it is desired that this court shall pass upon their sufficiency for the purposes for which they were used in the court below.
2. **Appeal from Inferior Courts:** TIME TO FILE PETITION IN APPELLATE COURTS. The plaintiff, in an action appealed from a justice of the peace or county court, has fifty days from the rendition of the judgment appealed from in which to file his petition in the appellate court.
3. ———: TIME TO FILE ANSWER IN APPELLATE COURTS. The time for a defendant to answer in an action appealed from a justice of the peace or county court does not begin to run until fifty days from the rendition of the judgment appealed from, excluding the day on which such judgment was rendered. (Code of Civil Procedure, secs. 1008 and 1010*a*.)

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

J. J. O'Connor, for plaintiff in error.

Brown & Talbott, contra.

RAGAN, C.

E. F. Ringer sued William L. Beard before a justice of the peace in Douglas county. On October 18, 1890, the justice rendered a judgment dismissing Ringer's action. October 28, 1890, Ringer filed with and had approved by the justice an appeal bond. On the 8th day of November, 1890, Ringer filed in the office of the clerk of the district court a certified transcript of the proceedings had before said justice, as provided by section 1008 of the Code of

Civil Procedure. On December 6, 1890, Ringer filed with the clerk of the district court a petition in the case, setting up his cause of action against Beard. No answer or other pleading was ever filed to this petition, and on December 7, 1891, Ringer took a judgment by default against Beard. December 10, 1891, Beard filed a motion to set aside the default and judgment. December 22, 1891, the district court overruled this motion, and from this ruling of the district court Beard prosecutes a petition in error to this court.

1. The reasons relied upon by Beard in the district court for setting aside the default and judgment are not set out in his motion, but he says they will appear from the affidavits attached thereto. We cannot say whether the district court abused its discretion in refusing to set aside this default and judgment or not, as the affidavits filed by Beard in support of the motion, and which contain the facts relied upon by him for setting aside the default, though incorporated in the record here, are not embodied in any bill of exceptions, and therefore we cannot consider them. Affidavits used in the district court in support of a motion to set aside a judgment must be embodied in a bill of exceptions if it is desired that this court should pass upon their sufficiency for the purposes for which they were used in the court below. (*McMurtry v. State*, 19 Neb., 147.)

2. Another argument of counsel for plaintiff in error here is that it appears from the record that at the time the judgment by default was entered against Beard, Ringer was himself in default in filing his petition, and that a party in default cannot default his adversary. If it be true that Ringer's petition in the district court was filed out of time and without leave of the court and without any notice to Beard, then Ringer was not entitled to a judgment by default against Beard. By section 1008 of the Code of Civil Procedure it is provided that a party appealing from a judgment of a justice of the peace shall,

within thirty days next following the rendition of the judgment, deliver to the clerk of the appellate court a certified transcript of the proceedings had before the court from which the appeal was taken; and by section 1010*a* it is provided that when an appeal from a justice of the peace or county court is perfected by filing in the appellate court a certified transcript of the proceedings, the plaintiff in the action shall, within twenty days after the filing of the transcript in the appellate court, as required by section 1008, file his petition, and that the answer shall be filed and issues joined the same as in cases originally commenced in such appellate court. In the case at bar the judgment of the justice of the peace was rendered against the plaintiff in the action on the 18th day of October, 1890. Thirty days from that date would be the last day which the law gave Ringer to file his transcript in the district court, and twenty days from this date would be December 7, 1890; this would be the last day given by the statute for Ringer to file in the district court his petition. As already seen, he filed his petition on the 6th day of December, 1890, and it was, therefore, not filed out of time. The theory of counsel for Beard seems to be that inasmuch as Ringer, on the 8th day of November, 1890, filed with the clerk of the district court a certified transcript of the proceedings had before the justice, therefore Ringer was compelled to file in the district court his petition in the action twenty days thereafter, or on November 28, 1890, and that as Ringer did not file his petition by that date, it was therefore filed out of time, and that Beard was not compelled to take notice of its filing. But counsel misconstrues sections 1008 and 1010*a* of the Code. In this case, if the judgment of the justice of the peace had been rendered against Beard, the defendant in the case, he would have had thirty days from the rendition of that judgment in which to file in the district court a certified transcript of the proceedings had before the justice of the peace. The

time of filing Ringer's petition then would have been twenty days from the expiration of the thirty days, and Beard's time for filing an answer would not have begun to run until fifty days from the rendition of the judgment of the justice of the peace. (*Rich v. Stretch*, 4 Neb., 186; *Monell v. Terwilliger*, 8 Neb., 360; *Smith v. Borden*, 22 Neb., 487.) There is no error in the record, and the judgment of the district court is

AFFIRMED.

IRVINE, C., not sitting.

PHENIX INSURANCE COMPANY OF BROOKLYN V. OMAHA LOAN & TRUST COMPANY.

FILED SEPTEMBER 19, 1894. NO. 5459.

1. **Fire Insurance:** MORTGAGE CLAUSE: RIGHTS OF MORTGAGEE: EFFECTS OF TRANSFER OF PROPERTY WITHOUT CONSENT OF INSURER OR NOTICE: ASSIGNMENT OF MORTGAGE: ACTION ON POLICY. One Crew borrowed of a trust company $4,000, agreeing to repay it in five years with semi-annual interest. To secure the payment of this debt Crew executed to the trust company a mortgage upon his real estate. This mortgage provided that Crew should insure the mortgaged property against loss by fire for five years for the benefit of the trust company. About the date of the mortgage an insurance company issued to Crew a policy insuring the property against loss by fire for five years. This policy contained the following provisions: (*a.*) "If the property be sold or transferred in whole or in part without written permission in this policy, then, and in every such case, this policy is void." (*b.*) "When the property shall be sold or incumbered, or otherwise disposed of, written notice shall be given the company of such sale or incumbrance or disposal; otherwise this insurance on said property shall immediately terminate." Attached to this policy and made part thereof was a "mortgage slip," as follows: "It is hereby agreed that this insurance, as to the interest of the mortgagee only therein, shall

not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy. It is further agreed that the mortgagee shall notify said company of any change of ownership or increase of hazard which shall come to the knowledge of the said mortgagee, and that every increase of hazard not permitted by this policy to the mortgagor or owner shall be paid for by the mortgagee on reasonable demand, according to the established scale of rates, for the whole term of use of such increased hazard. It is also agreed that whenever the company shall pay the mortgagee any sum for loss under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, it shall at once be legally subrogated to all the rights of the mortgagee under all the securities held as collateral to the mortgage debt, to the extent of such payment; or, at its option, may pay to the mortgagee the whole principal due, or to grow due, on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage and all other securities held as collateral to the mortgage debt; but no such subrogation shall impair the right of the mortgagee to recover the full amount of its claim." The policy, on its issuance, was delivered to the trust company, which retained the possession and title thereof. Crew sold and conveyed the mortgaged property without the written permission of the insurance company, and of which sale the latter had no notice of any kind until after the insured property was destroyed by fire. The trust company learned of the conveyance of the property soon after it occurred, but neglected to notify the insurance company thereof until after the fire. Prior to the destruction of the insured property by fire the trust company sold and assigned the mortgage debt, guarantying the collection and payment thereof, but did not assign the insurance policy nor part with its possession. The mortgage debt was unpaid and not due at the time of the destruction of the insured property. The trust company brought suit against the insurance company to recover the amount of the loss. While this action was pending the mortgage debt matured, and the trust company, in pursuance of its contract of guaranty, paid it off. *Held*, (1) That neither the sale and conveyance of the mortgaged property by Crew without the permission of the insurance company, nor his failure to give the insurance company notice thereof, voided the policy as to the trust company; (2) that the status of the trust company was not that of a mere assignee of the insurance policy issued to Crew, nor that of a person appointed to collect the loss for him; that the policy con-

tained a contract between the insurance company and the trust company separate and independent from the contract between Crew and the insurance company, and that the rights of the trust company could not be made to depend upon Crew's observance of his agreements with the insurance company; (3) that the neglect of the trust company to notify the insurance company of the sale of the mortgaged property did not void the policy as to the trust company.

2. ———: ———: ———: ———: PARTIES PLAINTIFF IN ACTION ON POLICY. That as by the terms of the insurance policy the loss was made payable to the trust company, and as it owned and held possession of the policy and had guarantied the payment of the mortgage debt, the suit was properly brought in its name, although the assignee of the mortgage debt was also a proper party plaintiff.

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

The facts are stated by the commissioner.

Jacob Fawcett and *F. M. Sturdevant*, for plaintiff in error:

The alienation of the property by Crew avoided the policy. (*Hale v. Mechanics Mutual Fire Ins. Co.*, 6 Gray [Mass.], 169; *Loring v. Manufacturers Ins. Co.*, 8 Gray [Mass.], 28; *Grosvenor v. Atlantic Ins. Co.*, 17 N. Y., 391; *State Mutual Fire Ins. Co. v. Roberts*, 31 Pa. St., 438; *Buffalo Steam Engine Works v. Sun Mutual Ins. Co.*, 17 N. Y., 401; *Pupke v. Resolute Fire Ins. Co.*, 17 Wis., 389; *Lawrence v. Holyoke Ins. Co.*, 11 Allen [Mass.], 387; *Gasner v. Metropolitan Ins. Co.*, 13 Minn., 447; *Chishom v. Provincial Ins. Co.*, 20 U. C. C. P., 11; *Illinois Mutual Fire Ins. Co. v. Fix*, 53 Ill., 151; *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. [U. S.], 495.)

Howard B. Smith, contra:

The relations between the defendant in error and the plaintiff in error are determined by virtue of the mortgage

slip. A contractual relation exists between the insurer and the mortgagee separate and distinct from the contractual relation between the insurer and the mortgagor. (*Hartford Fire Ins. Co. v. Olcott*, 97 Ill., 449; *City Five Cents Savings Bank v. Pennsylvania Fire Ins. Co.*, 122 Mass., 165; *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y., 141.)

The defendant in errer had an insurable interest at the time of the fire. (*New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill., 221; *Warren v. Davenport Fire Ins. Co.*, 31 Ia., 464; *State v. Farmers Benevolent Association*, 18 Neb., 276; *Cone v. Niagara Fire Ins. Co.*, 60 N. Y., 619; *Power v. Ocean Ins. Co.*, 19 La., 28; *Strong v. Manufacturers Ins. Co.*, 10 Pick. [Mass.], 40; *Morrison v. Tennessee Marine & Fire Ins. Co.*, 18 Mo., 262; 1 May, Insurance [3d ed.], sec. 76; Wood, Fire Insurance [2d ed.], p. 613; Richards, Insurance, sec. 26; *Grable v. German Ins. Co.*, 32 Neb., 645.)

The action was properly brought by the defendant in error. (*Waring v. Indemnity Fire Ins. Co.*, 45 N. Y., 606*; *New York Life Ins. Co. v. Bonner*, 11 Neb., 169; *Hunt v. Mercantile Ins. Co.*, 22 Fed. Rep., 503; *Gardinier v. Kellogg*, 14 Wis., 605; *Scantlin v. Allison*, 12 Kan., 85; *Stoll v. Sheldon*, 13 Neb., 207; *Roberts v. Snow*, 27 Neb., 425.)

RAGAN, C.

The Omaha Loan & Trust Company (hereinafter called the "Trust Company") sued the Phenix Insurance Company of Brooklyn, New York (hereinafter called the "Insurance Company"), in the district court of Douglas county to recover the value of certain property destroyed by fire and insured by the Insurance Company. The Trust Company had judgment and the Insurance Company brings the case here for review. The material facts in the case are: In February, 1886, One Nathaniel S. Crew was the owner of a tract of land in Buffalo county, Nebraska, on which were situate a barn and some other buildings. In

said month of February, Crew and his wife borrowed of the Trust Company $4,000, and as an evidence thereof executed and delivered to the Trust Company their coupon bond, payable to the order of the Trust Company five years after February 1, with interest payable semi-annually, and secured the same by a first mortgage on their said real estate. By the terms of this mortgage Crew and his wife agreed to insure, and keep insured for five years, the buildings on their real estate for the benefit of the Trust Company. On the 3d day of March, 1886, the Insurance Company issued the policy sued on, insuring the buildings of Crew on his real estate against loss or damage by fire for a period of five years. The policy contained the following clauses: (*a.*) "If the property be sold or transferred in whole or in part without written permission in this policy, then, and in every such case, this policy is void." (*b.*) "When the property shall be sold or incumbered or otherwise disposed of, written notice shall be given the company of such sale or incumbrance or disposal; otherwise this insurance on said property shall immediately terminate." Attached to this policy and made a part thereof was also what is known and called among insurance men a "mortgage slip," which contained the following:

"PHENIX INSURANCE CO. OF BROOKLYN, N. Y.

"Loss, if any, payable to Omaha Loan & Trust Company, of Omaha, Neb., mortgagee, or its assigns, as its interests may appear.

"It is hereby agreed that this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy.

"It is further agreed that the mortgagee shall notify said company of any change of ownership or increase of hazard which shall come to the knowledge of the said mortgagee,

and that every increase of hazard not permitted by this policy to the mortgagor or owner shall be paid for by the mortgagee on reasonable demand, according to the established scale of rates, for the whole term of use of such increased hazard.

"It is also agreed that whenever the company shall pay the mortgagee any sum for loss under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, it shall at once be legally subrogated to all the rights of the mortgagee under all the securities held as collateral to the mortgage debt, to the extent of such payment; or at its option may pay to the mortgagee the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage and all other securities held as collateral to the mortgage debt; but no such subrogation shall impair the right of the mortgagee to recover the full amount of its claim.

"Date, March 3, 1886.

"JOHN H. ROE, *Agent.*"

The policy with the "mortgage slip" attached, upon its issuance, was delivered to the Trust Company, and has ever since been owned and held by it. The bond and mortgage executed by Crew to the Trust Company was in April, 1886, by it sold and assigned to one Huey, the Trust Company guarantying the collection of the principal and the prompt payment of the coupons of said mortgage loan. On the first day of April, 1886, Crew and wife sold and conveyed their real estate to one Platter. For the purposes of this case we take it as established by the evidence that no notice, written or otherwise, of this conveyance was given to the Insurance Company, either by Crew or Platter or the Trust Company, though the latter knew thereof soon after it occurred, until after the property insured had been destroyed, which occurred on the 27th day of April, 1889. On the 12th day of October, 1889, the Insurance

Company having refused to pay the loss, the Trust Company brought this suit, and on the 1st day of February, 1891, in pursuance of its contract of guaranty with Huey, the mortgage loan being due on that date, paid off and took up the mortgage loan, and owned and held it at the date of the trial of this case, December 30, 1891. The amount at that date due and unpaid on the loan being about $3,000, such amount being largely in excess of the value of the insured property destroyed by fire.

To reverse the judgment rendered in this case counsel for the Insurance Company make three arguments in this court:

1. It is contended that as Crew sold and conveyed the premises on which was the insured property without the written consent of the Insurance Company to such sale being indorsed on the policy, and as neither Crew nor Platter furnished the Insurance Company any written notice of such conveyance, the policy had become void and was not in force even as to the Trust Company at the time of the loss sued for. This agument is based upon the theory that the right of the Trust Company depends upon the observance of the stipulations of the policy by Crew; that the Trust Company cannot enforce the policy if Crew could not. We do not agree with this contention. The Trust Company is not here as the mere assignee of the insurance policy issued to Crew, nor is it here simply as the person appointed to collect the loss for Crew. We are not concerned in this case with the question as to whether Crew has forfeited his rights to enforce the policy. It may be that by reason of his sale of the property without the written permission of the Insurance Company thereto indorsed on the policy, so far as he is concerned, the policy from that moment ceased to be of any effect. It may be by reason of the failure of Crew and Platter to give written notice to the Insurance Company of the conveyance of the property to Platter, that neither of them

can enforce the policy. However this may be, it does not follow that because Crew, by his conduct, has precluded himself from enforcing the policy, that therefore the Trust Company has. As we view it, the Insurance Company, by its policy, agreed with Crew to insure his property on certain terms and conditions, and in case it was destroyed by fire, to make good the loss and damage. This is not all the Insurance Company agreed to do in this policy. It also in this policy contracted and agreed with the Trust Company that it would pay to it, or its assigns, whatever loss or damage the insured property might suffer from fire within the life of the policy. This contract with the Trust Company was a separate and independent contract from the one entered into between Crew and the Insurance Company; and the right of the Trust Company to enforce it does not depend upon whether Crew has kept his engagements with the Insurance Company.

In *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y., 141, the facts were: Stout and husband executed a mortgage to Hastings for $14,000, and on the same day the insurance company issued to Mrs. Stout a policy of insurance on the mortgaged property, insuring it for three years in the sum of $10,000. This policy contained a provision that in case any other insurance should be taken out on the insured property, the assured should be entitled to recover of the Westchester company no greater proportion of the loss sustained than the sum insured by it bore to the whole amount of insurance effected on such property. The policy also contained a provision that the loss, if any, should be payable to Hastings, the mortgagee; and the policy also contained a provision almost identical with the one contained in the "mortgage slip" attached to the policy in suit. After this policy was issued Mrs. Stout procured $4,000 additional insurance on the property. The insured property was destroyed by fire, the loss amounting to $9,832.52. Hastings, the mortgagee, and to whom the

loss under the Westchester policy was payable, claimed the entire amount of this loss from that company. The Westchester company resisted this, claiming that by reason of the additional insurance procured on the property by Mrs. Stout, it was only liable for ten-fourteenths of the total loss. Miller, justice, delivering the opinion of the court of appeals of New York, said: "It is claimed, however, by the appellant's counsel that the policy was an insurance of the interest of the owner of the property solely; that such owner was the assured, and the defendant only agreed to make good the loss of such owner, and inasmuch as another policy existed at the time in favor of such owner, although entirely unknown to both the plaintiffs and the defendant, the latter was entitled to the benefit of the condition contained in its policy, which declares that in case of any other insurance, * * * the assured is entitled to recover no greater proportion of the loss sustained than the sum insured bears to the whole amount insured thereon. This position cannot, I think, be maintained. Prior to the time when the mortgage clause was entered upon the policy, the word 'assured' referred to the owner, and it is hardly to be assumed that the mortgagees would have accepted such a provision if there was any reason to suppose that they would be affected by any prior insurance. They would, no doubt, have demanded a separate policy as mortgagees, instead of trusting to the hazard and uncertainty of pursuing a remedy upon a policy of which they had no knowledge, and against a company to which they were strangers, and in regard to whose responsibility they had no information whatever. The legal effect of the mortgage clause was that the defendant agreed that in case of loss it would pay the money directly to the mortgagees; and they were thus recognized as a distinct party in interest. It created a new contract from that time with the mortgagees, the terms of which most clearly indicate that it had no relation to the application of the condition referred to. The insurance had

been to the owner, and the additional provisions, which were incorporated in the policy by the mortgage clause, created a distinct contract with the mortgagees. It was an independent agreement partaking in no sense of the character of an assignment of a policy of insurance, but one in which the mortgagees were recognized as a separate party, having distinct rights, and entitled to receive the full amount of insurance money, without any regard whatever to the owner of the property. The meaning of the word 'assured' has not been changed by the addition of the mortgage clause, the object of which evidently was to protect the mortgagees against the effect of the provision in which that word is employed. The interest of the latter was distinct and separate when this change in the policy was made, and the intention of the parties was, beyond question, to insure the plaintiffs under a new contract. Any different interpretation would lead to great injustice, and place the mortgagees under the control and at the mercy of the owner, by changing the character of the defendant's liability, which might operate to prevent the indemnity which the defendant intended to provide. If the condition referred to was in force either before or after the arrangement, the owner might effect other insurance, and thus jeopard the rights, if not entirely control the security, of the plaintiffs."

All that is said by Miller, justice, in the Westchester case is applicable to the case at bar. In this case the Insurance Company by the "mortgage slip" stipulated that the rights of the Trust Company should not be invalidated by any act or neglect of the mortgagor or owner of the insured property. Reading the entire policy together, the only reasonable construction that can be placed upon it is that it was never the intention of the Insurance Company or of the Trust Company that the rights of the latter should be made in any manner to depend upon any act or omission of Crew, the mortgagor and original owner of the insured property.

In *Westchester Fire Ins. Co. v. Coverdale*, 29 Pac. Rep. [Kan.], 682, a policy substantially like the one in controversy here, was considered by the supreme court of Kansas, and in deciding the rights of a mortgagee to whom, by a "mortgage slip" attached to the policy, the loss was made payable, that court said: "The mortgage clause [slip] * * * created an independent and a new contract, which removes the mortgagees beyond the control or the effect of any act or neglect of the owner of the property, and renders such mortgagees parties who have a distinct interest, separate from the owner, embraced in another and a different contract. The tendency of the recent cases is to recognize these distinctions, and thus protect the rights of the mortgagee, when named in the policy; and the interest of the owner and of the mortgagee are regarded as distinct subjects of insurance."

In *City Five Cents Savings Bank v. Pennsylvania Fire Ins. Co.*, 122 Mass., 165, the supreme court had under consideration a policy substantially like the one in suit, and in discussing the rights of a mortgagee to recover on the policy notwithstanding the violation of its terms by the owner, said: "The [insurance] company has made a special contract with the plaintiff, by the fair construction of which we think it is entitled to recover the whole loss proved in this case, it being less than its debt. The [insurance] company has agreed that 'no sale or transfer of the property hereby insured shall vitiate the right of the mortgagee to recover in case of loss.' A necessary consequence of a sale and transfer of the property is that the purchaser has a right to insure his interest. Such right is an incident of his ownership. The object of the special stipulation, which the mortgagee took care to procure, was to secure the insurance of its interest as mortgagee and to avoid its defeat by any sale or transfer of the property; and by a fair interpretation of the contract it means that its right to recover shall not be vitiated by any of the natural conse-

quences or incidents of a sale or transfer. Otherwise the stipulation is of very slight value to the mortgagee."

In *Hartford Fire Ins. Co. v. Olcott*, 97 Ill., 439, the facts were: The owner of property procured a policy of insurance on the buildings thereof in his own name, for his own benefit, and for the benefit of a bank to which he owed a debt secured by a mortgage on the insured property. This mortgage required the owner to insure the property for the benefit of the bank. The policy provided that in case of loss the insurance company should pay the amount of it to a trustee named in the mortgage, for the benefit of the bank or the holder of the note. The policy also provided that the owner might procure additional insurance, but that in case he did so, and loss occurred, he should not be entitled to recover of the Hartford Insurance Company any greater proportion of the loss than the amount insured by its policy bore to the whole sum insured. The policy also provided that in case of loss and a failure of the insurance company and the insured to agree upon the amount thereof, the controversy should be submitted to arbitration. There was a mortgage clause or "mortgage slip" attached to the policy containing substantially the provisions of the "mortgage slip" made a part of the policy in controversy here. The owner of the property procured additional insurance thereon. A loss occurred, and the owner and the insurance company arbitrated the amount thereof. The insurance company having refused to pay the amount of loss to Olcott, the trustee in the mortgage held by the bank, this suit resulted. The supreme court of Illinois decided that the owner and the bank held distinct interests under the policy, it being in substance two contracts; that the owner in a suit on the policy for a loss would be limited to a recovery of a *pro rata* share of the company, when prorated with the amounts of the subsequent policies, and would be bound by his act of submitting the amount of damages to appraisal;

but the bank, in a suit by it or its trustee, would not be limited to a recovery of the insurance company's prorated share, with the other companies issuing the subsequent policies, nor would it be bound by the selection of appraisers in which it did not join, and that it had no control over the acts of the mortgagor and was not bound by his acts or neglect. In the case at bar, if the Trust Company was suing simply as the assignee of Crew, then its right to recover would depend upon whether Crew could recover; or if, by the insurance policy, the Trust Company had been named as a party to whom the loss should be paid, as the agent or trustee of Crew, then its right to recover would depend upon whether Crew could enforce the policy; but the Trust Company does not stand in either of these relations in this case. It had an interest in the assured property, in that it had a lien upon it and stands here to enforce rights of its own under the contract between it and the Insurance Company.

2. As already stated, one of the terms of the policy, or the "mortgage slip" made a part thereof, was that the Trust Company would notify the Insurance Company of any change of ownership of the insured property or increase of hazard thereto which should come to the knowledge of the Trust Company. The Trust Company learned of the conveyance of the property by Crew to Platter soon after it occurred, but neglected to notify the Insurance Company thereof. The second argument of counsel for the Insurance Company is that because of the failure of the Trust Company to notify the Insurance Company of the change of ownership of the insured property, the Trust Company has lost its right to enforce the policy. It is not claimed that the transfer of the property in any manner increased the hazard of the risk. So we have the question as to whether the neglect of the Trust Company to notify the Insurance Company that Crew had conveyed the property worked a forfeiture of the rights of the Trust

Company to enforce the policy. The policy does not provide when the mortgagee shall give this notice, nor is there any provision in the policy or "mortgage slip" to the effect that in case the mortgagee comes into possession of knowledge that the hazard of the risk has been increased or that the property has been conveyed, and neglects to notify the Insurance Company thereof, that the policy shall therefore be void. We are not prepared to say that such a provision could be enforced if it was contained in the policy. There is no claim here on the part of the Insurance Company that it has suffered any injury or damage by reason of the neglect of the Trust Company in this respect. The Insurance Company has received a premium for carrying this risk for five years, and we do not think that it should be allowed to escape compliance with its contract because the Trust Company has neglected to perform an immaterial promise on its part, and which neglect of the Trust Company has worked no injury whatever to the Insurance Company. (*Hastings v. Westchester Fire Ins. Co.*, 73 N. Y., 141.)

3. The third point relied upon by counsel for the Insurance Company for reversing this case is that this suit was not brought in the name of the real party in interest. We have already seen that the policy contained a separate and independent contract between the Insurance Company and the Trust Company, and that the Trust Company had an interest in the insured property. By the terms of this contract the policy, when issued, was delivered to the Trust Company and it has never parted with its possession or the title to it since. "Where, by a policy of fire insurance, a portion of the loss is made payable to a third person as his interest may appear, the language imparts an interest in the property in such third person to the extent of his interest; the insurance is for his benefit, and he or his assignee may maintain an action upon the policy in case of loss." (*Pitney v. Glens Falls Ins. Co.*, 65 N. Y., 6.) In this case

Crew, had he never conveyed the insured property, could not have maintained an action against the Insurance Company to recover this loss, at least, without showing that he had paid and discharged the mortgage debt. (*Westchester Fire Ins. Co. v. Coverdale, supra.*) At the time the suit was brought Huey, the owner of the mortgage debt, may have been a proper party plaintiff; but that question was not raised in the court below and is not raised here. Furthermore, Huey, by assigning the mortgage debt to the Trust Company during the pendency of the action, parted with all his interest, if he had any, in the subject-matter of this action and disqualified himself from being a party thereto. The Trust Company, by assigning the mortgage debt to Huey, did not thereby assign him the insurance policy, nor part with their interest in it, nor their right to enforce it. As the Trust Company guarantied the collection and payment of the mortgage debt, it still had such an interest in the insured property as entitled it in case of a loss to sue for a recovery; and at the time the judgment was rendered, the only party that could have maintained this action was the Trust Company. (*Blackwell v. Insurance Co.*, 48 O. St., 533; *Cone v. Niagara Ins. Co.*, 60 N. Y., 619; *Weed v. Hamburg-Bremen Fire Ins. Co.*, 31 N. E. Rep. [N. Y.], 231; *Westchester Ins. Co. v. Coverdale*, 29 Pac. Rep. [Kan.], 682.)

There is no error in the record and the judgment of the district court is

AFFIRMED.

GEORGE F. MUNRO V. DELIA A. CALLAHAN.

FILED SEPTEMBER 19, 1894. No. 5505.

1. **Bastardy:** JURISDICTION OF JUSTICE OF THE PEACE. A justice of the peace has no jurisdiction to try and determine the guilt or innocence of a party charged with being the father of a bastard child.
2. **A bastardy proceeding** is essentially a civil proceeding, and can only be tried on its merits in the district court.
3. **Bastardy:** EXAMINATION BEFORE JUSTICE OF THE PEACE: EVIDENCE. The examination by a justice of the peace of a person charged with being the father of a bastard child is in no sense a trial of the merits of the controversy; and the statute does not contemplate the taking of any testimony in such proceeding on behalf of the party accused. *Daly v. Melendy*, 32 Neb., 852, followed and reaffirmed.
4. **The deposition of a witness, who resides in the county** where an action originated and is being tried, cannot be read in evidence until it is made to appear that such witness is absent from the county, or by reason of age, infirmity, imprisonment, or death is unable to attend in person at the trial. *Everett v. Tidball*, 34 Neb., 803, followed and reaffirmed.

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

Saunders & Macfarland, for plaintiff in error.

John F. Cromelien and *Gurley & Marple, contra.*

RAGAN, C.

On the 26th day of October, 1891, Miss Delia A. Callahan swore out a complaint before A. J. Hart, a justice of the peace in and for Douglas county, against George F. Munro, charging him with being the father of her unborn bastard child. The justice of the peace in due time proceeded to a hearing of the complaint against Munro, found

him not guilty, and discharged him. Subsequently Miss Callahan swore out another complaint before another justice of the peace against Munro, charging him with being the father of her unborn bastard child. A change of venue was taken from this latter justice to another, where an examination of Munro on said charge was had, which resulted in the justice binding Munro in a recognizance to appear at the next term of the district court to answer the charge preferred by Miss Callahan. On the examination of Munro by this last named justice he offered to testify on his own behalf, but the testimony was refused by the justice. In May, 1892, Munro was tried in the district court on the charge of being the father of Miss Callahan's bastard child, found guilty of the charge by the jury, and from the judgment pronounced against him in that action he prosecutes a petition in error to this court.

1. The errors assigned and argued in the brief are as follows: On the trial in the district court Munro pleaded, in bar to the action, the proceedings had before Justice Hart, resulting in his discharge. The refusal of the district court to sustain this plea is the first error assigned here. The contention of counsel for Munro is that the proceeding had before the justice of the peace was a trial of Munro for the offense of which he was convicted in the district court, and as he was acquitted by the justice of the peace, that he could not be tried again. A justice of the peace has no jurisdiction to try and determine the guilt or innocence of a party charged with being the father of a bastard child; and the judgment of a justice of the peace that a person charged with being the father of a bastard child is guilty or innocent of the offense is a nullity. The duties of a justice of the peace in such cases are prescribed by chapter 37 of the Compiled Statutes, 1893, entitled "Illegitimate Children," and are, for the most part, ministerial. He may receive the complaint, docket the case, issue his warrant, and cause the arrest of the party accused,

and take in writing the examination of the complainant; and then, unless the party charged shall pay or secure to the complainant such sum of money or property as she may agree to receive in full satisfaction, and give bond to the county commissioners of the county in which such complainant resides, to save such county free from all charges towards the maintenance of such child, the justice must bind such accused party in a recognizance to the district court. A bastardy proceeding is essentially a civil proceeding and can only be tried on its merits in the district court.

2. In the district court Munro filed a motion to dismiss the proceeding for the reason that in the examination had before the justice of the peace, who recognized him to appear in the district court, such justice refused to allow him, Munro, to testify in his own behalf. The overruling of this motion by the district court is the second error assigned here. The examination by a justice of the peace of a person charged with being the father of a bastard child is in no sense a trial of the merits of the controversy. The statute on the subject does not contemplate the taking of any testimony on behalf of the party accused. (*Daly v. Melendy*, 32 Neb., 852; Compiled Statutes, 1893, sec. 1, ch. 37.)

3. On the trial in the district court Munro offered to read in evidence in his own behalf, the deposition of one Stockman. Stockman was a resident of Douglas county. The refusal of the district court to permit this deposition to be read is the third error assigned here. Section 372 of the Code of Civil Procedure provides: "The deposition of any witness may be used only in the following cases: First—When the witness does not reside in the county where the action or proceeding is pending, or is sent for trial by change of venue, or is absent therefrom. Second—When, from age, infirmity, or imprisonment, the witness is unable to attend the court, or is dead. Third—When

the testimony is required upon a motion, or in any other case where the oral examination of a witness is not required." The witness Stockman resided in Douglas county, where this case was on trial. Munro made no proof, at the time he offered this deposition, that Stockman was absent from said Douglas county, or that by reason of age, infirmity, imprisonment, or death Stockman was unable to attend in person at the trial. The court, then, committed no error in excluding this deposition. (*Everett v. Tidball*, 34 Neb., 803.)

4. The fourth error alleged is that the court erred in giving paragraph No. 4 of its charge to the jury. We cannot review this error, if error it was, because not assigned as an error in the petition in error filed in this court.

5. The fifth error assigned is that the court erred in refusing to give instructions 2 and 3 asked for by the plaintiff in error. We cannot review this assignment, because no exception was taken by Munro to the refusal of the district court to give these instructions.

6. The sixth assignment is that the district court erred in overruling Munro's motion for a continuance of the case. We cannot review this ruling of the district court, because it is not assigned as error in the petition in error filed here.

7. The seventh assignment of error alleged in the brief of counsel is that the verdict is unsustained by the evidence. The evidence is very conflicting, and without quoting it or any of it here, it must suffice to say that it supports the finding of the jury.

The judgment of the district court must be, and is,

AFFIRMED.

SAMUEL N. BELL, APPELLANT, V. AUGUSTUS F. BOSCHE ET AL., APPELLEES.

FILED SEPTEMBER 19, 1894. No. 5345.

1. **Mechanics' Liens:** STATEMENT: DESCRIPTION OF PROPERTY. One who claims the benefits of the mechanics' lien law must show a substantial compliance with each essential requirement thereof, one of which is that the sworn statement to be filed shall contain a description of the land upon which the labor was done or material was furnished for the purpose contemplated by such law. A description of property in such statement which is entirely inapplicable to the land actually benefited cannot be made effective to any extent for the purpose of subjecting the land actually built upon to the operation of the lien claimed. *Holmes v. Hutchins*, 38 Neb., 601, followed.
2. ———: ———: ———: SUBSEQUENT PURCHASERS OF LAND. This rule holds good as well in favor of one who was the owner of the land at the time the improvements were erected as in favor of a subsequent purchaser.
3. **Estoppel.** Whether under certain states of facts the owner might not be estopped from urging the error in the statement as a defense to the lien, *quære*.

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

Howard B. Smith, for appellant.

Hall & McCulloch and *Kennedy & Learned, contra.*

IRVINE, C.

This is an appeal by Bell from a decree denying a mechanic's lien which he sought to foreclose against property alleged to belong to the defendant Bosche. The conclusion reached upon one of the questions presented renders a statement or decision of the others unnecessary.

The petition alleged that the building, out of the erec-

tion of which plaintiff's claim accrued, was situated on lot 12, block 1, Poppleton Park, an addition to Omaha, but by mistake the premises were described in the claim of lien as the north half of lot 13, block 11, Poppleton Park; that this mistake was caused by a misdescription of the property given to plaintiff by Bosche, willfully and for the purpose and intention of misleading the plaintiff in filing his lien. The answer placed these allegations in issue. We are satisfied from an examination of the evidence that the plaintiff wholly failed to establish the allegations by which he sought to relieve himself from the effect of the erroneous description and procure a reformation of the lien. The plaintiff testifies that he remembers distinctly that he asked Bosche for a description of the lot before any work was done, and this for the purpose of obtaining a permit to erect the building. Further, "I recollect distinctly that Mr. Bosche told me the building was to be erected on the north half of lot 13, in block 1, in Poppleton Park." But the lien as filed described the north half of lot 13, in block 11, in Poppleton Park; so that if all Mr. Bell says be true, he did not rely upon the description given him by Bosche and did not follow it. Mr. Bosche asserts that he never gave Bell any description of the property. Bell testifies that the claim of lien was prepared under the instructions of Mr. Walz, his foreman, during Bell's absence, and that on his return Bell, supposing Walz had used the description in the permit and that it was correct, signed his name and made oath to the claim. If the mistake occurred in this way, it evinces a high degree of negligence on the part of Bell in making oath to a paper without examining it; but Walz also contradicts Bell. The evidence was clearly insufficient to establish the facts pleaded as estopping Bosche from asserting the error in description, and it is, therefore, unnecessary to consider whether or not such facts, if established, would be legally sufficient for that purpose.

We are, therefore, brought to a consideration of the

question whether, in the absence of circumstances operating by way of estoppel, a lien can be enforced on a claim which does not describe the property sought to be charged, or whether a court of equity can reform an erroneous description, it not appearing that the rights of third persons have intervened. In *Holmes v. Hutchins*, 38 Neb., 601, a similar question was considered, and it was there held that if the required statement be so defective as not to impart notice of the property sought to be charged, there survives, after four months, no right to the lien as against purchasers. In that case an effort was made to reform the description as against a purchaser after the expiration of the statutory period for filing liens, and the language of the court is confined to the question presented; but the authorities there cited in support of the conclusion reached, that there can be no such reformation, draw no distinction between cases where new rights have accrued and others. Indeed, so far as the facts appear, in none of these cases were there intervening rights. To the cases referred to in *Holmes v. Hutchins* may be added *Goss v. Strelitz*, 54 Cal., 640; *Vreeland v. Boyle*, 37 N. J. Law, 346; *Dearie v. Martin*, 78 Pa. St., 55; *Drake v. Green*, 48 Kan., 534. All were cases against the original owner, at least so far as the reports show. In *Goss v. Strelitz, supra*, the reason which prevents a reformation is stated to be that the instrument is not in the nature of a contract to be reformed in appropriate cases, but a prerequisite to the maintenance of a proceeding giving an extraordinary remedy, to secure the benefit of which the plaintiff must comply with the terms on which the statute affords him relief. In *Vreeland v. Boyle, supra*, this reason is supplemented by showing that the claim is not a pleading or proceeding which may be amended under statutes relating to procedure. We hold, therefore, that a substantial compliance with those provisions of the statute relating to the filing of a sworn statement is a prerequisite to the enforcement of a mechanic's lien, and that where the state-

ment filed is so defective as not by its terms to impart notice as to the property sought to be charged, such defective statement cannot be reformed, after the expiration of the period allowed for filing such claims, and that no lien attaches, even as against the owner at the time the labor was performed or the material furnished. This is true at least when no facts exist sufficient upon general principles to constitute an estoppel against the owner. The claim of lien being radically defective, the decree of the district court was right and is

AFFIRMED.

MAMIE LICHTENBERGER ET AL. V. ERNEST WORM.

FILED SEPTEMBER 19, 1894. No. 5411.

1. **Review of Ruling on Motion to Set Aside Default.** Where a default has been regularly entered against a defendant, personally served with summons, it is largely within the discretion of the court to say whether he shall be permitted to come in afterwards and make defense; and unless it be made to appear that there has been an abuse of discretion by the court below, in this particular, this court will not interfere. *Mulhollan v. Scoggin*, 8 Neb., 202, and *Bernstien v. Brown*, 23 Neb., 64, followed.

2. **Practice:** ORDER TO FILE ANSWER: DEFAULT: REVIEW. The defendants appeared after answer day and filed a demurrer without leave. The plaintiff moved for a default. The court did not enter a default, but gave defendants leave to answer in two days. *Held*, That the condition imposed of filing an answer within a short time was a reasonable exercise of discretion on the part of the trial court, at least in the absence of evidence of any of the circumstances surrounding the case.

3. **Trial:** PROCEDURE IN TRIAL COURT: PRESUMPTIONS OF REGULARITY: REVIEW. It is the duty of the district court to afford to defendants a full opportunity to present their defense, but it is also its duty to prevent unnecessary delays and discour-

age frivolous proceedings. In reviewing orders affecting the procedure in a case this court will presume, in the absence of evidence to the contrary, that the district courts have acted with due regard to both principles.

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

John P. Davis and *Phil S. Winter*, for plaintiffs in error.

V. O. Strickler, contra.

IRVINE, C.

The judgment sought to be reversed was entered upon the default of the plaintiffs in error, and the errors assigned relate to the action of the court in entering the default, and in refusing thereafter to set it aside and permit the plaintiffs in error to defend.

The record discloses the following facts: The action was begun in an inferior court, and was appealed to the district court by the plaintiffs in error. The date of filing the transcript in the district court does not appear, but on January 7, 1892, the defendant in error filed his petition. February 5, plaintiffs in error filed a demurrer. February 6, the case came before the court on a motion for default and the plaintiffs in error were given, on their own application, leave to answer in two days. February 13, their default was entered. February 25, a motion to set aside the default was filed. February 27, an order appears sustaining the demurrer and giving leave to the defendant in error to amend his petition in ten days. April 9, the defendant in error filed his motion to set aside the order of February 27, because the demurrer had been filed after the motion for default; because of the order requiring an answer to be filed, the failure to comply with that order and the entry of default before the demurrer was heard; and for the further reason that the order sustaining the demurrer was procured

by bringing the case before another judge and concealing from him the fact of the default. The motion also asked that the demurrer be stricken from the files. This motion was sustained. April 27, the motion of plaintiffs in error to set aside the default was overruled, and the following day judgment was entered. Thereafter a motion was filed, styled "a motion to reconsider," but which was in effect a motion for a new trial. This motion was overruled. It would appear that affidavits were filed in support of these various motions, but they are not incorporated in a bill of exceptions and for that reason cannot be considered. We must, therefore, assume throughout that where the motions depended upon facts not appearing by the record, the trial court was justified by the proof presented in the finding arrived at.

It has been said in several cases that it is the duty of the trial court to permit defendants to answer upon proper terms at any time before judgment where it is made to appear that they have a meritorious defense. (*Blair v. West Point Mfg. Co.*, 7 Neb., 146; *Haggerty v. Walker*, 21 Neb., 596.) As said by Judge COBB in *Clutz v. Carter*, 12 Neb., 113, "it is the spirit and policy of the law to give every party an opportunity to prosecute or defend his case in court, and courts will never deny such right except for the fault or gross laches of such party or his authorized attorney." In this case, however, no answer was tendered or showing of meritorious defense presented, and the refusal of the court before judgment to set aside the default was, therefore, not erroneous within the rule stated in the cases cited. Indeed, the statement made in those cases must be regarded rather as a rule to guide the exercise of discretion by district courts than an absolute rule of law governing the review of cases by this court, because it has been distinctly decided that where a default has been regularly entered it is largely within the discretion of the trial court to say whether the defendant shall be permitted to come in afterwards and make his defense, and unless an abuse of discretion be made

to appear this court will not interfere. (*Mulhollan v. Scoggin*, 8 Neb., 202; *Bernstien v. Brown*, 23 Neb., 64.) Certainly no abuse of discretion appears in this case, where no defense to the merits is shown and where we have not before us the evidence, if any, offered to exculpate plaintiffs in error from the inference of laches.

It would seem that the demurrer filed out of time remained undisposed of when the plaintiff's application for a default was made. It is argued that the court erred in making any order in support of this application under such circumstances. In this aspect the case closely resembles that of *Dewey v. Lewis*, 12 Neb., 306, where it was held that it must be presumed that the attention of the court was never called to the application pending upon the files at the time of the later action; but aside from this presumption, the order made amounted to a refusal to enter a default, with a condition imposed that the plaintiffs in error answer within two days. The condition is the only part of the order of which plaintiffs in error can complain, and the demurrer not having been filed until after rule day, it does not appear that the court abused its discretion in requiring an answer within a short time as a condition for refusing to strike the demurrer and enter a default. While it is the policy of our practice to afford a full opportunity for making a defense, and for this purpose to give full relief against slight or technical omissions, it is, on the other hand, the duty of the courts to prevent unnecessary delays in the prosecution of actions and to guard against dilatory and frivolous proceedings. In the absence at least of a showing to the contrary it will always be presumed that the trial judge, in disposing of such matters, has acted with a due regard to both of these principles.

JUDGMENT AFFIRMED.

NEWMAN ERB, RECEIVER, v. FRANK G. EGGLESTON.

FILED SEPTEMBER 19, 1894. No. 5221.

1. **Negligence:** RAILROAD COMPANIES: PERSONAL INJURIES. Negligence on the part of a railroad company cannot be inferred merely from the fact that the act complained of was unnecessary, nor from the fact that a necessary act was performed in an unnecessary manner. In order to justify the inference of negligence the commission of the act in the manner in which it was committed must, under all the circumstances, have implied a failure to exercise that degree of care which a prudent person would exercise under similar circumstances.

2. ———: EVIDENCE. The evidence in this case examined, and *held* insufficient to establish negligence on the part of the defendant.

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

M. Summerfield and *Griggs, Rinaker & Bibb*, for plaintiff in error.

Alfred Hazlett and *W. C. Le Hane, contra.*

IRVINE, C.

Eggleston, a brakeman employed on the Kansas City, Wyandotte & Northwestern railroad, brought this action against the plaintiff in error, a receiver operating said road, for personal injuries by Eggleston sustained while engaged in his work. There was a verdict and judgment in favor of Eggleston for $16,000, which the receiver by these proceedings seeks to reverse. The only assignment which we shall consider is that the evidence was insufficient to support the verdict.

There is no conflict in the evidence, so far as it relates to the principal facts surrounding the accident, and there is no great conflict in regard to the details. Eggleston had

been employed by the receiver as a brakeman for about three weeks. He had had about two years' experience on other roads in the same line of duty. A freight train, designated as "No. 104," left Beatrice at 6:40 P. M. for Kansas City. The crew of this train consisted of a conductor, engineer, fireman, and two brakemen, Eggleston being the "rear brakeman," by which we understand the brakeman posted at or near the rear of the train. The Wyandotte road was operated from Virginia to Beatrice on the tracks of the Chicago, Rock Island & Pacific, but it had in Beatrice certain side tracks of its own connected by switches with the Rock Island tracks. On the afternoon of October 8, 1890, the engineer, fireman, and two brakemen were engaged in making up train 104, some time prior to the hour of its departure. When the operation begun, the conductor was not present. There is evidence tending to show that he arrived on the scene immediately before the accident, but he took no part in the operations of the crew and gave no orders. In making up this train it was customary, after moving the engine from the roundhouse, to pull out from a side track the caboose which was to go with the train, throw the caboose back along another track, and then proceed to pick up the other cars and move them back and attach them to the caboose. On the day in question caboose No. 408, which was to go with the train, stood upon the storage track behind another caboose, No. 409; both cabooses were, therefore, hauled from the storage track upon the main line. Caboose 408 was then shoved back along the main line beyond the switch. It next became necessary to replace caboose 409 on the storage track. It is shown to be a common proceeding in order to accomplish such a movement to "kick" the car back upon the siding. This operation of "kicking" is described in the evidence as follows: The car to be kicked standing between the engine and the switch, the switch is thrown to the proper position, the car uncoupled from the

engine and the engine started, shoving the uncoupled car as it moves. When sufficient momentum has been given the car to move it to the desired point, the movement of the engine is stopped and the car allowed to move on, some one riding upon the car for the purpose of applying the brakes at the proper place for stopping. By this process caboose 408 had been kicked back upon the main line, Eggleston riding upon it and applying the brakes. Having brought caboose 408 to a stop, Eggleston alighted and, proceeding towards where the engine and caboose 409 then were, he gave the signal to the other brakeman to pull the pin which connected caboose 409 with the engine. This signal is described in the testimony as a signal to kick and also as a signal indicating that Eggleston was ready to leap upon caboose 409 for the purpose of stopping it. The pin was accordingly pulled, the caboose thus disconnected with the engine, and the kicking process begun. As the car and engine approached Eggleston he gave a signal to "stop kicking." He testifies that the engine was at that time one hundred feet east of him and was moving at the rate of twelve to fifteen miles per hour. As the caboose passed him he seized the hand-holds and endeavored to mount. According to his testimony the speed of the engine had then been checked to such an extent that there was a space of from eight to ten feet between the caboose and the engine. Eggleston's hands were wrenched loose from the hand-holds and he fell upon the track behind the caboose and in front of the moving engine, which passed over him, mangling both arms so that amputation was necessary, and inflicted other severe injuries. Eggleston, when he gave the signal to stop, was so situated that the side of the locomotive cab nearest him was that occupied by the fireman. The signal to stop was, therefore, received by the fireman and communicated by him to the engineer.

The foregoing are the main facts disclosed by the evidence. These are brought out, however, with great elab-

oration and detail, and there is much testimony relating to directions, distances, time, and speed. This evidence has all been carefully examined, but in the view we take of the case it will not be necessary in this opinion to refer to it to any great extent. It is at first somewhat difficult to perceive wherein the defendant in error claims there was negligence on the part of the plaintiff in error. In order to consider the question upon the theory of the defendant in error, we shall refer to his petition and then to a summary from his brief in which he has undertaken to collect and state the facts which he claims to support his case. The petition, after a great deal mostly in the nature of inducement stating the facts not very differently from the manner in which we have stated them, proceeds as follows: "The said defendant did, then and there, so negligently and unskillfully control and manage said engine No. 10, and the brake thereto attached, that said locomotive suddenly and violently, and without notice or warning to plaintiff, was kept moving, and came rushing down upon and over this plaintiff at an unusual and unreasonable rate of speed, where this plaintiff had fallen as aforesaid, and who had not the time to throw himself therefrom and out of the danger in which he was then." This is the only allegation of negligence in the petition. An analysis of this language leads to these observations: First, the only negligence charged lies in the management of the engine and its brake; secondly, while the language is cast in an affirmative form it amounts to a charge that the negligence consisted in failing to stop the engine and in moving at an unusual rate of speed. If the plaintiff was entitled to recover at all it must be upon proof tending to establish these allegations. Passing now to the summary in the brief already referred to, we will examine it with reference to these allegations of the petition.

The defendant in error says: "First—That the plaintiff below, Frank G. Eggleston, was a brakeman in the em-

ployment of Newman Erb, receiver, and was injured through the negligence of his servants or employes." It must be observed in passing that this statement, if supported by the evidence, would in itself convey no charge of legal liability as long as the doctrine of fellow-servants retains any place in our jurisprudence. Such a state of affairs, standing alone, would rather imply freedom from liability than the contrary. But what were the facts? There is evidence tending to show that by the immediate application of all the means for bringing the engine to a stop instantly upon the giving of the signal by Eggleston the engine might have been brought to a stop before it reached the point where Eggleston fell upon the track; but some short period was required to render Eggleston's signal effective. From the position he took, this signal could not be seen by the engineer, but was necessarily communicated to the engineer by the fireman. This occupied some time, during which the engine was approaching. In the next place it is fair to presume there was some necessary movement of the engine before it was possible for the engineer to act in response to the signal. Further, the uncontradicted evidence is that the engineer did act promptly. Eggleston does not pretend to know what action was taken, but his testimony that he gave the signal immediately before starting to board the car, and that at the time he boarded it he observed an interval of eight or ten feet between the car and the engine, shows that prompt action was taken. Finally, and this is the important consideration, it appears from the uncontradicted evidence that it is not customary, and for the sake of the machinery it is not desirable, on such occasions to bring the engine to a stop by the shortest means possible. Such means are used only in the case of emergency, and it is not pretended that there was any knowledge on the part of the engine crew of the existence of such an emergency at the time of Eggleston's fall as would imply negligence in not making an emergency

stop at that time or when his fall became known. On the contrary, it is perfectly clear that at the time he fell upon the track it was too late to prevent his injury. A railroad company is not responsible for every action taken by it which was not absolutely necessary. In such cases as this it is liable only because of negligence. In order to recover it was necessary for the plaintiff to show, not that the movement of the engine was unnecessary, but that it was done under such circumstances as to imply a failure to exercise that care which a prudent man would exercise under similar circumstances. (*Omaha & R. V. R. Co. v. Brady*, 39 Neb., 27; *Omaha & R. V. R. Co. v. Clarke*, 39 Neb., 65.) So here, while the evidence is sufficient to ground an inference that there was a physical possibility of stopping the engine before it reached the spot where Eggleston fell, still we find nowhere any evidence to show that any danger was to be apprehended in failing to do so or that the action of the engineer was not that to be expected of a prudent man under like circumstances. It might be claimed in this connection that this operation of kicking a car is in itself unnecessarily hazardous, and is evidence of negligence. To this it may be answered, in the first place, that the petition charges nothing of the kind, and, in the second place, that since all the evidence, including Eggleston's, is to the effect that the maneuver was made solely in response to signals given by Eggleston himself for that purpose, therefore, if the movement of the train in that manner was in itself negligence, it was the negligence of Eggleston and not that of other employes.

The brief then proceeds: "Second—That Eggleston was working under the direction and authority of Tom Irwin, the conductor of 104, who had the right to command the movements of said freight train, and to control Eggleston and the other servants employed upon it. Third—That under the evidence and our law, Tom Irwin, the conductor, being in control and having the management of this train,

was a vice-principal to the engineer and other employes of said train." The evidence does show that Irwin was the conductor, but it also shows that this train was not being made up under his supervision. The only evidence placing Irwin in the neighborhood before the accident happened is that of Eggleston, who first says that he does not remember whether he saw him until after he was hurt, and afterwards states that Irwin boarded one end of caboose 408 as he, Eggleston, left the other end. No one pretends that Irwin was exercising any supervision over the proceedings of the other employes. From instructions given by the court it would seem that the plaintiff's precise theory upon this branch of the case was that in the absence of the conductor his duties were delegated to the engineer, and that the latter, therefore, occupied with relation to Eggleston the position of a vice-principal; but there is not one word in the record tending to show any such delegation of authority. On the contrary, the only evidence as to the relations of the different members of the crew is that of Eggleston, who says that the engineer and fireman had nothing to do with employing him or paying him, had no power to discharge him, had no power to direct him in the performance of his work, and that they never did so. His testimony shows that he, the fireman, the engineer, and the other brakeman, in making up the train, were acting in association, none as superior to any other, and that they were fellow-servants within any of the definitions of the term.

"Fourth—That the accident was not caused by the carelessness or any negligence on the part of Eggleston." This must be assumed to be true subject to the hypothesis above presented. The defect in Eggleston's case is that he failed to prove negligence on the part of the plaintiff in error. Therefore, contributory negligence is immaterial. This is true unless, as before noticed, the manner of moving the cars was in itself negligence, and in that case the move-

ment being directed by the plaintiff there was contributory negligence.

"Fifth—That Newman Erb, the receiver, did not exercise due and reasonable care in the selection of careful, responsible, and trustworthy co-employes, and that the same rule applies to Conductor Irwin." Negligence in the selection of employes is not mentioned in the petition, and should not have been submitted to the jury for that reason. Eggleston was undoubtedly very severely injured, and his condition appeals to our sympathy as it evidently appealed to that of the jury, but, so far as this record discloses, his injuries were not due to any negligence on the part of the receiver or his servants. The judgment must, therefore, be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

JOHN C. MORROW ET UX. V. NORA A. JONES.

FILED OCTOBER 2, 1894. No. 5577.

1. **Contracts:** CONSIDERATION. Mutual promises constitute a sufficient consideration to support a contract.

2. **Statute of Frauds:** DEEDS AS MORTGAGES: REDEMPTION. J. gave a real estate mortgage to M. to secure a loan of money, and, after the debt matured, M. brought an action to foreclose the mortgage. A decree was entered, and the property sold to R. for a sum considerably less than the debt, interest, and costs. Before confirmation, M.'s attorney in the foreclosure proceedings, on behalf of M., but without his written authority so to do, wrote a letter to J., inclosing a deed for the property, in which M. was named as grantee, and an assignment of the equity of redemption, making a proposition that if J. would execute and return the deed and assignment, she could redeem the property

at any time by paying the amount of the mortgage, costs, and interest. J. accepted the proposition, executed the deed and assignment, and returned the same to the attorney, who immediately delivered them to M., who placed the same upon record. In an action to redeem, *held*, that the proposition to J. to redeem was not within the statute of frauds, notwithstanding the attorney had not been authorized in writing by M. to make the same.

3. **Principal and Agent.** A principal must adopt the acts of his agent as a whole, and will not be permitted to retain that part which is beneficial, and reject that which is not.

4. **Parol Evidence:** DEEDS AS MORTGAGES. A deed of real estate, absolute in form, may be shown by parol to have been intended by the parties to it as a security for a debt or loan, and as between such parties, at least, the instrument will be construed to be a mortgage merely.

5. **Mortgages:** DEEDS AS SECURITY. *Held*, That the relation of mortgagor and mortgagee was not changed or destroyed by the delivery of the deed on the terms upon which it was obtained, and that the deed was taken as further security for, and not in payment of, the mortgage debt.

6. **Deeds as Mortgages:** RIGHT OF REDEMPTION. A court of equity, after ascertaining that a conveyance by absolute deed is a mortgage, will allow a mortgagor, or the person who has acquired his interest in the premises, to redeem.

7. **Limitation of Actions:** MORTGAGES: REDEMPTION. The right to redeem and the right to foreclose are reciprocal, and an action to redeem may be brought at any time before the statutory bar of ten years is complete.

8. **Mortgages:** REVIEW. When a mortgagor dies, an action to redeem from a mortgage may be maintained by the person who succeeded by the mortgagor's death to his interest in the mortgaged premises.

9. ———: RENTS BEFORE FORECLOSURE. A mortgagee in possession of, and occupying, mortgaged real estate before foreclosure is liable to account for the net rental value thereof, and this even though the instrument securing the debt is, on its face, an absolute conveyance.

10. **Review:** BILL OF EXCEPTIONS: OMISSION OF EVIDENCE. The finding of the amount due the mortgagee for repairs cannot be reviewed, since the evidence upon which the same was based is not contained in the bill of exceptions.

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

The facts are stated in the opinion.

James F. Morton and *E. R. Duffie*, for plaintiffs in error, cited: *Morgan v. Bergen*, 3 Neb., 213; Parsons, Contracts, secs. 21, 535; Fry, Specific Performance, sec. 119; *Higginbottom v. Benson*, 24 Neb., 461.

James W. Carr, contra:

A conveyance of the equity of redemption, absolute in form, may be shown by parol to have been intended as security. (*Trull v. Skinner*, 17 Pick. [Mass.], 213; *Mills v. Mills*, 26 Conn., 213; *Ryan v. Dox*, 34 N. Y., 307; *Villa v. Rodriguez*, 12 Wall. [U. S.], 323; *Brown v. Gaffney*, 28 Ill., 149; *West v. Reed*, 55 Ill., 242; *Brinkman v. Jones*, 44 Wis., 498.)

An absolute deed, accompanied by a stipulation that the estate shall be reconveyed on payment of money, is a mortgage, and the grantor has a right to redeem. (*Erskine v. Townsend*, 2 Mass., 493; *Taylor v. Weld*, 5 Mass., 109; *Carey v. Rawson*, 8 Mass., 159; *Harrison v. Trustees of Phillips Academy*, 12 Mass., 456; *Scott v. McFarland*, 13 Mass., 309; *Tower v. Fetz*, 26 Neb., 713; *Russell v. Southard*, 12 How. [U. S.], 139; *Morris v. Nixon*, 1 How. [U. S.], 118; *Boyd v. McLean*, 1 Johns. Ch. [N. Y.], 582; *Ryan v. Dox*, 34 N. Y., 307; *McLaughlin v. Shepherd*, 52 Am. Dec. [Me.], 646; *Flagg v. Mann*, 2 Sumner [U. S. C. C.], 487; *Barton v. May*, 3 Sandf. Ch. [N. Y.], 492; *Lane v. Shears*, 1 Wend. [N. Y.], 433; *Walton v. Cronly*, 14 Wend. [N. Y.], 63; *Rice v. Rice*, 4 Pick. [Mass.], 349.)

Mr. Morrow, in accepting the deed from his attorney, was bound to inquire about the terms upon which it was procured. The knowledge of the attorney was the knowledge of the principal. (*First Nat. Bank of Cedar Rapids*

v. Erickson, 20 Neb., 580; *Coakley v. Christy*, 20 Neb., 509.)

In making the agreement for redemption the attorney acted within his apparent power, and his principal is bound, though no express authority had been conferred upon his agent. (*Webster v. Wray*, 17 Neb., 579; *Howell v. Graff*, 25 Neb., 130; *Westerfield Bank v. Cornen*, 93 Am. Dec. [N. Y.], 573; *Joyce v. Duplessis*, 77 Am. Dec. [La.], 185; *Oberne v. Burke*, 30 Neb., 581.)

A principal must adopt the agreements of the agent as a whole, or reject them as a whole. (*McKeighan v. Hopkins*, 19 Neb., 33; *Rogers v. Empkie Hardware Co.*, 24 Neb., 653; *Taylor v. Conner*, 97 Am. Dec. [Miss.], 419; *Stadleman v. Fitzgerald*, 14 Neb., 290.)

The contract to redeem was not within the statute of frauds. (*Vindquest v. Perkey*, 16 Neb., 288; *Robinson v. Cheney*, 17 Neb., 679; *McWilliams v. Lawless*, 15 Neb., 132; *Ives v. Hazard*, 67 Am. Dec. [R. I.], 500.)

NORVAL, C. J.

On or about the 6th day of December, 1877, one Harriet Jones, now deceased, being the owner in fee-simple of lot 1, in block 4, in Shull's addition to the city of Omaha, gave her promissory note for the sum of $500 to John C. Morrow, one of the plaintiffs in error, and to secure the payment of said note she, together with her husband, William D. Jones, executed and delivered to said Morrow a mortgage upon said lot. On the 12th day of October, 1880, Morrow commenced an action in the district court of Douglas county to foreclose said mortgage, service of summons being made by publication, and on the 6th day of December, 1880, a decree was entered in said cause for the sum of $625.25 and costs, and the premises were ordered sold for the payment thereof. An order of sale was thereafter issued, and on the 12th day of February, 1881, said real estate was sold to one Lewis S. Reed for $611, that

being about $125 less than the amount of the decree, interest, and costs. On February 16, 1881, Morrow, by his attorney, James F. Morton, filed a motion in the said cause to set aside the sale, and on the 19th day of the same month said motion was overruled by the court. Subsequently, on the 21st day of February, 1881, said Morton, who was then, and from the commencement of the suit had been, the attorney of record for the plaintiff therein, without any authority from said Morrow, wrote and transmitted by mail to said Harriet Jones a letter, inclosing therein for execution by her a quitclaim deed for said lot and a written assignment of the equity of redemption from said Harriet Jones to said Morrow. The following is a copy of said letter:

"OMAHA, NEB., February 21, 1881.

"*Harriet Jones*—DEAR MADAM: I am instructed by my client, J. C. Morrow, to write and inform you that on sale in foreclosure of mortgages of your property, the same was sold for $611 (the appraisement was $530), leaving a deficit on the mortgage and cost of $125, for which we will still have a judgment against you. Since the sale we have concluded to take the property and cancel the judgment if you desire to do so by signing to Mr. Morrow your equity of redemption, and thus enable him to redeem from the purchaser. He also instructs me to say to you that at any time in the future you desire to redeem your property from him you can do so by paying amount of mortgage and costs with interest. If you desire to avail yourself of this offer, you can do so by signing and ack. the inclosed assignment of your equity of redemption and quitclaim deed to Morrow. You will acknowledge the same before the clerk of a court of record and return the same to my address, and I will send you the certificate of cancellation of mortgage. If this is done, it must be done at once, for the sale comes up for confirmation on March 5, 1881, and after the confirmation of sale, under our stat-

utes, the property can no longer be redeemed, and your equity of redemption is lost to you, or any one else. If you so instruct me, I will have Judge Redick, as your attorney, appear for you in the redemption matter, and we will pay him for his services without expense to you. Be kind enough to answer at once so we can deposit the money with Judge Redick to redeem the property. I am, with much respect,

"Your ob't serv't, JAMES F. MORTON,
"Att. for J. C. Morrow."

This letter, together with the deed and the assignment of the equity of redemption, was in due time received by Harriet Jones, who accepted the proposition, and on the 28th day of February, 1881, executed and acknowledged the quitclaim deed sent to her for that purpose, returned the same to said Morton, who, upon receipt thereof, delivered the same to said Morrow, who accepted and placed the deed upon record. On February 26, 1881, the purchaser of said lot procured an order to show cause why said sale should not be confirmed, and on March 5, 1881, Morrow filed with the clerk of the district court exceptions to the confirmation, also a receipt, signed by himself, acknowledging full satisfaction of the decree of foreclosure. On the 9th day of said month said Morton, as the attorney for Morrow, wrote and transmitted by mail to said Harriet Jones another letter, acknowledging the receipt of the quitclaim deed, and urging her to execute and return the assignment sent to her with the deed. Upon the receipt of this letter Mrs. Jones executed the assignment of the equity redemption which had been previously sent her as aforesaid and returned the same to Morton, who, immediately upon the receipt thereof, delivered the assignment to Morrow, who filed the same in said cause. Subsequently the motion to confirm the sale was overruled and the sale set aside, and Morrow, in pursuance of said agreement, redeemed said lot, and claims to be the owner thereof. Im-

mediately upon receiving the deed and assignment Morrow took possession of the premises, and from thence has exercised control over the same, collecting the rents arising therefrom and applying the same to his own use. He has also paid for the making of repairs on the premises.

It further appears that said Harriet Jones obtained a divorce from said William D. Jones, and subsequently married one Harry Merriam; that on the 30th day of October, 1888, and prior to the commencement of this suit, Harriet Merriam, formerly Harriet Jones, tendered to said Morrow, and offered to pay him, the full amount due him on said mortgage, after deducting the amount of rents and profits collected by him in excess of taxes by him paid, and demanded of said Morrow a deed for said lot, who refused to receive the money or execute a deed as requested. Harriet Merriam, *née* Jones, thereupon brought this action against John C. Morrow and F. M. Morrow, his wife, to have the deed declared a mortgage and to redeem the property and compel said Morrow to execute and deliver to her a deed to said lot. After the beginning of the action, the plaintiff died, leaving Nora A. Jones, her daughter, sole and only heir at law, who was a minor over the age of fourteen years. Mary A. Elliott is the duly appointed guardian of said minor, and this action was revived in the name of said Nora A. Jones.

The trial court, upon the issues joined, made a finding that the plaintiff was entitled, and has the right, to redeem the real estate in dispute from the mortgage, on payment of such sum or sums as are due on account of the principal and interest of said mortgage, and the costs of foreclosure proceedings, and all repairs and valuable improvements made by said John C. Morrow upon said premises, after deducting all sums received or collected by him as rents for the use of the premises. The court also appointed a referee to state the account between the parties. On the coming in of the report of the referee a decree

was entered confirming said report and his finding that there was due from the plaintiff to the said defendant the sum of $859.43, and ordering, upon the payment of the said sum within sixty days by the plaintiff, together with the sum of $100 as compen-ation to the defendant for collecting rents and caring for the premises, that the defendants be required to make, execute, and deliver a deed conveying said premises to said plaintiff, and the clerk of the district court was appointed a special master commissioner for the purpose of executing and delivering said deed in case the defendants should fail so to do. To reverse this decree the defendants prosecute a petition in error to this court.

It is claimed, in the first place, that no consideration passed to the plaintiff in error, John C. Morrow, for the making of the proposition or agreement, and, therefore, the promise is not binding in law. It is elementary that mutual promises constitute a good consideration for a contract. By the written proposition submitted to Mrs. Jones she was promised the right to redeem the property at any time by paying the amount of the mortgage and costs, with interest, in case she would execute a quitclaim deed to the premises and an assignment of her equity of redemption. The deed and assignment were duly executed and delivered, and they certainly constitute a valid and binding consideration for the promise and agreement made by Morrow. Without the deed and assignment he could not have redeemed the premises from the foreclosure sale, but would, in all probability, have been forced to lose $125 of his debt. By the new arrangement he was to receive the full amount of his debt, interest, and costs, in case Mrs. Jones should redeem from the mortgage.

The second point, and the one most relied upon for a reversal, is that the promise is void under the 3d, 8th, and 25th sections of the statute of frauds, inasmuch as the proposition to redeem was made without Morrow's knowl-

edge or consent and without his written authority for so doing. The sections referred to read as follows:

"Sec. 3. No estate or interest in land, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, or surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same."

"Sec. 8. In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith: First—Every agreement that by its terms is not to be performed within one year from the making thereof. Second—Every special promise to answer for the debt, default, or misdoings of another person. Third—Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry. Fourth—Every special promise by an executor or administrator to answer damages out of his own estate."

"Sec. 25. Every instrument required by any of the provisions of this chapter to be subscribed by any party may be subscribed by his agent, thereunto authorized by writing."

It is true that Mr. Morrow gave no written authority to his attorney to make, on his behalf, the proposition he did; yet we are unwilling to yield assent to the doctrine that the agreement is for that reason void and unenforceable. By the statute of frauds, a binding contract for the sale of lands cannot be executed by an agent of the land owner, unless he be authorized by writing. (*Morgan v. Bergen*, 3 Neb., 209.) The statute does not require that a contract for the sale of lands must be signed by the purchaser or by his agent authorized in writing. An agent may contract for his principal for the purchase of land, even though his authority to do so is not in writing. In

this case Morrow was the vendee, or mortgagee, and there was no necessity that his agent, Morton, should have been empowered in writing to enter into the contract for him. It is said that Morton had no authority to make the agreement, and the record so discloses; but that is unimportant, since it is undisputed that Mr. Morrow accepted the deed and assignment and placed the same upon record, thereby accepting the benefits of the proposition submitted by Mr. Morton, and ratifying his acts. A principal will not be permitted to adopt that part of a contract made by an agent which is beneficial and reject that which is not. He must adopt the acts of his agent as an entirety, or not at all. It is conceded that Mr. Morton, on behalf of his client, agreed, in unequivocal terms, that if Mrs. Jones would deed the mortgaged premises to Mr. Morrow and assign the equity of redemption to him, she could redeem the property at any time by paying the mortgage debt, with interest and costs. The proposition was immediately accepted, and, through this agreement, Mr. Morrow obtained the conveyance and assignment, and by retaining them he is bound by the terms and conditions upon which they were obtained. (*McKeighan v. Hopkins*, 19 Neb., 33; *Rogers v. Empkie Hardware Co.*, 24 Neb., 653.) It is clear that the conveyance made by Mrs. Jones, although absolute on its face, was intended and understood by the parties to be a mortgage to take the place of the one which had therefor been given, and which had already gone to a decree of foreclosure. The assignment of the equity of redemption was for the purpose of authorizing Morrow to redeem from the sale in the foreclosure suit. We entertain no doubt, and this and other courts have so declared, that a deed of real estate, absolute in its terms, may be shown by parol to have been intended by the parties as a mortgage, and as between the parties, at least, it will be construed to be a mortgage merely. (*Tower v. Fetz*, 26 Neb., 706, and cases there cited.) It therefore follows that the proposition of Morton to allow Mrs. Jones to re-

deem is not within the statute of frauds, because Morton had no written authority from his principal to make the same. A verbal agreement to reconvey upon his payment of the debt would have been binding. The relation of mortgagor and mortgagee was not changed, or destroyed, by the execution of the deed, upon the terms upon which it was obtained, it being clear that the conveyance was intended merely as a new form of security for the original debt. (*Tower v. Fetz*, 26 Neb., 706; *Brinkman v. Jones*, 44 Wis., 498; *Alexander v. Rodriguez*, 12 Wall. [U. S.], 323; *Kirchoff v. Union Mutual Life Ins. Co.*, 33 Ill. App., 607.) *Tower v. Fetz, supra*, is quite similar in its facts to the case before us. There the defendant in error Fetz executed a mortgage on his farm to one Fay to secure a loan of money, the loan being negotiated through the plaintiff in error Tower, who attended to the collecting of the interest. Fetz made default in the payment of his interest, and Tower being absent, wrote to one Dent, his agent, that he would assume the mortgage in consideration of a warranty deed of the farm. Thereupon Dent called upon Fetz and demanded the interest, and informed him unless some arrangement was made the mortgage would be foreclosed; that if Fetz would convey the farm to Tower, the latter would sell the same, and whatever was realized above the mortgage taxes and expenses Fetz should receive. Relying upon said promise, Fetz executed a warranty deed of the farm to Tower, who subsequently sold the land for $1,200 over and above the mortgage. In an action by Fetz against Tower to recover said sum the deed, as between the parties, was held to be a mortgage.

It is next argued that the right of redemption should have been exercised within a reasonable time after the execution of the deed, and this action cannot be maintained, inasmuch as no offer to redeem the premises from the equitable mortgage was made until eight years had elapsed. No adjudicated case has been cited by the able and astute

counsel for plaintiffs in error to sustain the proposition, nor, after diligent search, have we been able to find such authority. We are familiar with the general rule laid down by Mr. Parsons and other writers on the law of contracts, quoted in the brief of counsel, "that when no time is specified it is a presumption of law the parties intended and agreed the thing should be done in a reasonable time;" but this doctrine cannot be invoked here. Suppose a mortgage, in express terms, as is usually the case, specifies the time within which the debt secured thereby shall be paid, would the date thus stated fix the period in which the mortgagor would have the right to redeem? Certainly not. This court has held that a mortgagor may redeem at any time before there has been a confirmation of the sale. (*Tootle v. White*, 4 Neb., 401.) Doubtless, where, as in the case at bar, a deed, absolute on its face, was given and intended as a security for a debt, an action to have the deed declared as a mortgage and to redeem will not lie after the right to foreclose is barred by the ten years statute of limitation. The rule is the right to foreclose and the right to redeem are reciprocal. Therefore, an action to redeem may be brought at any time before the statutory bar of ten years is complete. (*Seawright v. Parmer*, 7 So. Rep. [Ala.], 201; *Green v. Capps*, 31 N. E. Rep. [Ill.], 597; *Rogers v. Benton*, 38 N. W. Rep. [Minn.], 765, and cases there cited.) It follows that the plaintiff was not precluded from maintaining this action by the lapse of time.

We will next consider the objection that this action was improperly revived in the name of Nora A. Jones. As elsewhere stated, the suit was originally brought by Harriet Jones, afterwards Merriam, the grantor in the deed, and that during the pendency thereof she died intestate, leaving her surviving one child, the said Nora A., who was the deceased's sole and only heir at law, and in whose name these proceedings were revived. In the first place we remarked that neither the order of revivor, nor the pe-

tition upon which the same was based, is in the record before us. The stipulation of the parties, which is incorporated in the bill of exceptions in the case, does, however, state, *inter alia*, "that this cause of action was duly revived in the name of the said Nora A. Jones by Mary A. Elliott, her guardian." This stipulation of the parties fully meets the contention of the plaintiffs in error, and by this admission of record they are estopped to assert that the cause was not revived in the name of the proper person. But it is not necessary to, nor do we, place our decision on such technical ground alone. The right of Mrs. Merriam to redeem was not a mere personal right, running to herself alone, but was such a right as descended on her death to her heirs. When a mortgagor dies, an action to redeem from a mortgage may be maintained by any person who succeeded by his death to his interest in the mortgaged premises, whether it be heir or devisee. (*Zaegel v. Kuster*, 7 N. W. Rep. [Wis.], 781; *Barr v. Van Alstine*, 22 N. E. Rep. [Ind.], 965; *Squire v. Wright*, 48 N. W. Rep. [Mich.], 286.) Nora A. Jones, the plaintiff below, being the sole heir of the vendor and mortgagor, has such an interest in the real estate in dispute as entitles her to maintain a suit to have the deed declared a mortgage and to redeem; hence, this action was rightly revived in her name.

It is also insisted that the referee and court both erred in charging the plaintiffs in error with the rents and profits received from the real estate subsequent to the execution of the quitclaim deed. In argument it is said that from the time the deed was executed Morrow was the holder of the legal title, and entitled to the legal possession and use of the property, and at most he was only chargeable for the rents and profits for a reasonable time after the making of the conveyance. As we have already seen that, although the deed was absolute in its terms, nevertheless the relation of mortgagor and mortgagee existed between the parties to the instrument; and it is the settled law of this state, pro-

mulgated in more than one decision of this court, that a mortgagee in possession of, and occupying, mortgaged premises before foreclosure is liable to account for the net rental value thereof (*Comstock v. Michael*, 17 Neb., 288), and this though the instrument securing the debt is, on its face, an absolute conveyance. (*Kemp v. Small*, 32 Neb., 318.) There was no error, therefore, in charging Morrow with the net rents and profits derived by him from the property up to the entry of the decree in the case. The court awarded him $100 for his services in the collection of the rents, which, we think, was a very liberal allowance. We are familiar with the decision in *Higginbottom v. Benson*, 24 Neb., 461, cited by plaintiffs in error, having tried the cause in the district court. That case is clearly distinguishable from the one before us. That was an action to foreclose several junior mortgages. The senior mortgage had already been foreclosed and the property sold under the decree to one Benson, but the holders of the junior mortgages had not been made parties to the suit. Benson purchased in good faith, believing that he was acquiring a perfect title, and subsequently he took possession of the property and made valuable and lasting improvements thereon. It was held in the second foreclosure case that while Benson was entitled to credit for such improvements, he was not chargeable with the rental value of the real estate during his possession. Benson was not a mortgagee; but having become the owner of the legal title held by the mortgagor at the date the first mortgage was executed, he was not liable to account to the junior mortgagees for the value of the rents while he was in possession.

Lastly, it is urged that the referee did not allow Mr. Morrow the full amount of money expended by him for repairs on the property. The referee allowed him $94.50 for repairs. Whether this sum is insufficient or not we are unable to decide, since the evidence upon which the referee based such finding is not incorporated in the bill of excep-

tions before us. We must presume, therefore, that the evidence adduced supported the finding.

There being no reversible error in the record, the decree is

AFFIRMED.

ELIZABETH ELLSWORTH V. CITY OF FAIRBURY.

FILED OCTOBER 2, 1894. NO. 5341.

1. **Damages:** PERSONAL INJURIES: EVIDENCE: ORDER FOR PERSONAL EXAMINATION. In an action for a personal injury a judge of the district court has no jurisdiction at chambers, outside of the county in which the cause is pending, to make an order requiring plaintiff to submit his body to a personal examination by a board of physicians appointed by the judge for such purpose.

2. ———: ———: ———: ———: ACQUIESCENCE: WAIVER. The making of such an order is not sufficient ground for reversing a judgment where the plaintiff has acquiesced therein by selecting a physician to act as a member of such board of examiners, by submitting to an examination without objecting thereto, and by permitting the testimony of said physicians to be given without raising the want of power of the judge to make the order.

3. ———: ———: INADEQUACY OF VERDICT: REVERSAL. The evidence examined, and *held* that the damages assessed by the jury are grossly inadequate.

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

See opinion for statement of the case.

Charles B. Rice, for plaintiff in error:

While at chambers, outside of the county where the action was pending, the district judge had no authority to

order the examination by the physicians. (Consolidated Statutes, secs. 1057–1059.)

A court has no authority to make an order requiring a person to submit to a personal examination. (*Union P. R. Co. v. Botsford*, 141 U. S., 250, and cases cited.)

The following case was cited to show the rule as to the measure of damages: *City of Lincoln v. Smith*, 28 Neb., 762.

W. H. Barnes and *C. B. Letton, contra:*

The plaintiff, by selecting a member of the board of physicians, waived any error the trial judge may have committed in ordering an examination.

A judgment will not be reversed nor a verdict set aside for an error committed without prejudice to the party complaining. (*Gibson v. Sullivan*, 18 Neb., 558; *Dillon v. Russell*, 5 Neb., 489; *Eiseley v. Malchow*, 9 Neb., 181; *Village of Ponca v. Crawford*, 18 Neb., 541; *Pollard v. Turner*, 22 Neb., 366; *Brooks v. Dutcher*, 22 Neb., 644; *Wise v. Newatney*, 26 Neb., 89; *Cowles v. Thompson*, 31 Neb., 479.)

A court has authority to appoint an examining board and require a party to submit to a personal examination. (*Chicago & E. R. Co. v. Holland*, 122 Ill., 461; *Devenbagh v. Devenbagh*, 5 Paige Ch. [N. Y.], 554*; *Le Barron v. Le Barron*, 35 Vt., 365; *Parker v. Enslow*, 102 Ill., 272; *Hatfield v. St. Paul & D. R. Co.*, 33 Minn., 130; *Owens v. Kansas City, St. J. & C. B. R. Co.*, 95 Mo., 169; *Sidekum v. Wabash, St. L. & P. R. Co.*, 93 Mo., 400; *Shepard v. Missouri P. R. Co.*, 85 Mo., 629; *Miami & Montgomery Turnpike Co. v. Baily*, 37 O. St., 104; *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan., 466; *Sibley v. Smith*, 46 Ark., 275; *Richmond & D. R. Co. v. Childress*, 82 Ga., 719; *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Ia., 375; *White v. Milwaukee C. R. Co.*, 61 Wis., 536; *Stuart v. Havens*, 17 Neb., 211; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb.,

578; *Missouri P. R. Co. v. Johnson*, 72 Tex., 95; *Alabama G. S. R. Co. v. Hill*, 90 Ala., 71.)

E. H. Hinshaw, also for defendant in error.

NORVAL, C. J.

This was an action brought by plaintiff in error in the court below to recover damages for personal injuries sustained by her by falling through a defective sidewalk on Second street, in the city of Fairbury. From a verdict and judgment against the city for the sum of $100 the plaintiff prosecutes error to this court.

Prior to the trial the attorney for the city, upon notice to the plaintiff, presented to Judge Morris at chambers in the court house, in Saline county, a motion asking him to appoint a board of physicians to make an examination of the person of the plaintiff, for the purpose of ascertaining the extent of her alleged injuries and the cause thereof. Plaintiff filed an objection to the hearing of said motion outside of the county in which the cause was pending. The judge, however, made the following order, which was entered upon the journal of the district court of Jefferson county:

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

"In the District Court thereof of the Fifth Judicial District.

"ELIZABETH ELLSWORTH, PLAINTIFF, }
v. }
THE CITY OF FAIRBURY, DEFENDANT. }

"And now on this 25th day of March, 1891, this motion coming on for hearing before me, W. H. Morris, judge of the fifth judicial district of the state of Nebraska, and it appearing that due notice has been given of the application and filing of this motion, and having read the affidavit of E. H. Hinshaw filed herewith,

"It is ordered by me that Dr. G. W. Johnson, of Fairmont, Dr. E. L. Mitchell, of Lincoln, Dr. A. Conrad, of Crete, and one physician to be selected by each party hereto, be, and they are hereby, appointed a board of surgeons and physicians to proceed to the residence of plaintiff in this case, in Fairbury, Nebraska, and to thoroughly examine said plaintiff, and to ascertain, if possible, what disease or injury she is now suffering from, if any, and the cause thereof.

"It is further ordered that the costs and expenses attending such examination shall be paid in the first instance by the defendant in the case, and the same reported to the clerk of the district court of Jefferson county, Nebraska, to be charged up as costs in this case, and to abide the result thereof. WM. H. MORRIS,

"Judge."

It is insisted that the district judge was without jurisdiction or authority to make the foregoing order at chambers, and especially outside of the county where the suit was pending. We think the objection is well taken. We are not aware of any statute in this state which confers power upon a district court to require the plaintiff in an action to recover damages for personal injuries to submit his body to a personal examination by a board of physicians appointed for that purpose. Whether such authority exists independent of a statutory provision upon the subject there is a wide conflict in the decisions of the courts of our sister states. It is unnecessary to express an opinion upon the question in the case under consideration, but in passing it is not improper to state that the weight of authority in this country fully sustains the power of a court, in a proper case, on application made therefor, to make an order requiring the plaintiff to submit his person to personal examination by experts selected by the court. Many of the cases so holding are cited in the brief filed by the city. Assuming, then, for the purposes of this case, that such power exists,

the question is presented whether the same can be exercised by a judge at chambers. Section 23 of article 6 of the constitution declares that "the several judges of the courts of record shall have such jurisdiction at chambers as may be provided by law." In compliance with the foregoing provision the legislature enacted sections 39 and 57 of chapter 19 of the Compiled Statutes, conferring upon the several judges of the district court certain enumerated powers when sitting at chambers; but in neither of these sections, nor in any other statutory provisions, is jurisdiction conferred upon a judge at chambers to hear and pass upon a motion like the one in the case before us. We are persuaded that the learned district judge exceeded his powers in the appointing of a board of physicians to examine plaintiff. But it is equally clear that this error does not call for a reversal of the judgment. The record discloses that no exception was taken to the order when made, but on the other hand that plaintiff acquiesced therein by selecting a physician to act as a member of the board, by submitting to an examination without objection, and permitting the physicians constituting such board to give their testimony, without seeking to take advantage of the want of power or authority of the judge to make the order. Plaintiff having voluntarily obeyed the order, and having failed to raise the question in the trial court before verdict, it is too late now to do so.

The third, fourth, and fifth assignments of error relate to the rulings of the court on the introduction of testimony; but inasmuch as they are expressly waived in the brief of plaintiff in error, they require no consideration at our hands.

The four remaining assignments in the petition in error are grouped together in the brief and argument filed by plaintiff. They all seek to raise a single proposition, namely, the damages assessed by the jury are grossly inadequate to compensate plaintiff for the pecuniary damages

sustained by her and proved on the trial. There is a sharp conflict in the evidence as to the extent of plaintiff's injuries. The testimony on the part of the city tends to show that they were only of a temporary character, while the plaintiff's witnesses testified that she was injured for life. We must regard the verdict as having settled that question in favor of the city, since the evidence adduced on the trial would have justified a finding either way upon that issue. It is undisputed that the average weekly earnings of plaintiff prior to the accident were from $8 to $10, and that since receiving the injuries up to the time of the trial, or for thirty-eight weeks, she has been wholly unable to do any work. Therefore, under the uncontradicted testimony, the verdict should have been at least $304. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HENSON WISEMAN V. JAMES C. ZIEGLER.

FILED OCTOBER 2, 1894. No. 6012.

1. **Verdict:** FORM: SUFFICIENCY. In an action to recover money the jury returned a verdict in these words: "We, the jury, duly impaneled in the above entitled cause, do find for the plaintiff, James C. Ziegler, and assess his damages in the sum of $38.59, and interest at seven per cent," *held* sufficiently certain to sustain a judgment thereon for plaintiff for $38.59.
2. **Instructions:** EXCEPTIONS: REVIEW. An exception is necessary to the review of alleged errors in giving and refusing instructions.
3. **Transcript for Review:** OMISSION OF INSTRUCTION. Error cannot be predicated for the refusing a request to charge, where such instruction is not contained in the record brought to this court.

4. **Review:** SUFFICIENCY OF EVIDENCE: ASSIGNMENTS OF ERROR. This court will not review the evidence for the purpose of ascertaining whether it sustains the verdict, where the question is not specifically raised by the petition in error.

5. **Rulings on Evidence:** REVIEW: ASSIGNMENTS OF ERROR. An objection to the ruling of the trial court on the admission and exclusion of evidence will not be considered, unless the particular ruling complained of is pointed out in the assignments of error.

6. **Assignments of Error:** RULING ON MOTION FOR NEW TRIAL. An assignment of error for the denial of a motion for a new trial is bad if it fails to specify to which of the several points made by the motion the assignment applies.

7. **Petitions in Error:** FAILURE TO MAKE ASSIGNMENTS SPECIFIC. In order to a review of the proceedings of the trial court, the petition in error must assign alleged errors with such particularity as to enable the supreme court to determine the precise ruling of which complaint is made.

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

Wilbur F. Bryant, for plaintiff in error.

Addison M. Gooding, contra.

NORVAL, C. J.

This was an action on an account brought by James C. Ziegler to recover the sum of $63.59, with interest thereon from March 30, 1889, for goods, wares, and merchandise alleged to have been sold and delivered to the plaintiff in error. Upon the trial there was a verdict and judgment for the plaintiff. The defendant brings the record here for review by petition in error.

The first complaint in the brief of counsel is as to the form of the verdict. It is contended that it is uncertain in amount. The verdict, omitting title, reads as follows:

"We, the jury, duly impaneled in the above entitled cause, do find for the plaintiff, James C. Ziegler, and assess

his damages in the sum of $38.59, and interest at seven per cent. H. J. HUENNEKENS,
"*Foreman.*"

The defendant excepted to the form of the verdict before the discharge of the jury, whereupon the court instructed the jury that they should have computed the interest, and the foreman replied that they desired the clerk of the court to do that. To this the defendant objected. The plaintiff then waived the computation of interest and accepted the verdict as returned, and, upon the overruling of defendant's motion for a new trial, the court rendered judgment against the defendant for the sum of $38.59, without adding interest. The trial court, when its attention was challenged to the form of the verdict, should, and had the plaintiff not waived a computation of the interest, it doubtless would, have instructed the jury to return to their room and cast up the interest. It was their duty to have done so in the first instance; but this omission is, at most, a harmless irregularity, and is not a ground for reversing the judgment, as the defendant was in no manner prejudiced. The verdict was sufficiently certain and specific as to amount to sustain a judgment thereon for the plaintiff for the sum of $38.59.

It is insisted that "the court erred in instructing the jury as requested in paragraph 1 of the requests of the defendant in error." The record does not affirmatively show that the plaintiff below submitted to the court any requests to charge. There are copied into the transcript eight instructions presented by the defendant and another request for a charge. By whom the latter was submitted does not appear. Whether any or all of these requests were either refused by the court or were given to the jury, the record does not inform us; nor does it appear that either party took an exception either to the giving or refusing of any instruction; hence the same cannot be reviewed. (*Rector v. Canfield*, 40 Neb., 595.)

The next assignment is that the court erred in refusing the defendant's ninth instruction. We are unable to consider this assignment, inasmuch as no such request is to be found in the record under consideration.

It is argued that the verdict is not supported by sufficient evidence, and is contrary to the law of the case. This point not having been made in the petition in error, we cannot review the evidence in the bill of exceptions for the purpose of ascertaining whether it is sufficient to sustain the verdict, or not.

Complaint is made in the brief that the entire testimony of the witness Locke was erroneously admitted, and that there was also error in admitting plaintiff's books of account in evidence. The only assignments in the petition in error relating to this branch of the case are the sixth, seventh, and eighth, which are as follows:

"6. That the court erred in admitting evidence of the defendant in error over the plaintiff in error's objection.

"7. That there were other errors of law occurring at the trial duly excepted to by defendant below.

"8. That there were other errors appearing of record."

These assignments are too indefinite to present for review the rulings of the court below on admission of testimony. The petition in error should have clearly and definitely pointed out the particular piece of testimony which it is claimed was wrongfully admitted. (*Cortelyou v. Maben*, 40 Neb., 512.)

It is finally insisted that the judgment should be reversed because one of the jurors was asleep during a portion of the time the plaintiff in error was testifying. The misconduct of the juror is not alleged as a ground of reversal in the petition in error, unless covered by the seventh and the eighth assignments quoted above, or the ninth, which alleges "that the court erred in overruling the motion of the plaintiff in error for a new trial." Clearly the seventh and eighth assignments, under the holdings of this court,

are bad. The motion for a new trial contains thirteen assignments of error. The thirteenth, or last, alone relates to the misconduct of the juror. The ninth assignment of the petition in error for the denial of the motion for a new trial is bad, because it fails to specify to which of the several points made by the motion the assignment applies. A petition in error must assign alleged errors with such particularity as to enable the court to ascertain the precise ruling intended to be reviewed. (*Hanlon v. Union P. R. Co.*, 40 Neb., 52.) The judgment is

AFFIRMED.

A. L. BAKER V. L. KLOSTER.

FILED OCTOBER 2, 1894. NO. 5535.

Review: DEFECTIVE TRANSCRIPT: DISMISSAL. Where the transcript filed in this court does not contain the judgment, or final order, of the district court sought to be reviewed, the petition in error will be dismissed.

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

Jay & Beck, for plaintiff in error.

Robert B. Daley, contra.

NORVAL, C. J.

The petition in error must be dismissed, for the reason that the judgment sought to be reviewed is not before us. The transcript filed in this court consists alone of the petition, answer, instructions to the jury, and motion for a new trial. No journal entries are in the record, nor does

it appear that a verdict has ever been returned by the jury, or that the motion for a new trial has been passed upon, or that a final judgment has been entered in the case. It is only a judgment, or final order, rendered by the district court that can be reviewed by the supreme court, and unless the transcript brought to this court contains such judgment, or final order, the proceeding will be dismissed. The petition in error is

DISMISSED.

AMBROSE M. LORD v. GEORGE F. PEAKS.

FILED OCTOBER 2, 1894. NO. 5212.

Partnership: ACTIONS BETWEEN PARTNERS. An action at law cannot be maintained by one partner against his copartner, to recover moneys alleged to be due him on account of partnership transactions, where no settlement of the partnership accounts and business has been had.

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

A statement of the case appears in the opinion.

John R. Hays, for plaintiff in error:

Where the dealings between two partners embrace but few transactions which do not make a settlement difficult, one partner may maintain an action at law against the other to recover money. (*Wheeler v. Arnold*, 30 Mich., 304; *Musier v. Trumpbour*, 5 Wend. [N. Y.], 274; *Currier v. Rowe*, 46 N. H., 72; *Pettingill v. Jones*, 28 Kan., 749; *Wells v. Carpenter*, 65 Ill., 447; *Clarke v. Mills*, 13 Pac. Rep. [Kan.], 569.)

N. D. Jackson and *S. O. Campbell, contra:*

During the existence of a partnership, or even after its dissolution, but before the business is wound up and the final balance ascertained, no action at law will lie between partners. (*Winchester v. Galzier*, 152 Mass., 316; *Haskell v. Adams*, 7 Pick. [Mass.], 59; *Williams v. Henshaw*, 12 Pick. [Mass.], 378; *Capen v. Barrows*, 1 Gray [Mass.], 376; *Chase v. Garvin*, 19 Me., 211; *Murray v. Bogert*, 14 Johns. [N. Y.], 318; *Davenport v. Gear*, 2 Scam. [Ill.], 495; *Roberts v. Fitler*, 13 Pa. St., 265; *Gridley v. Dole*, 4 Comst. [N. Y.], 486.)

NORVAL, C. J.

Plaintiff in error was plaintiff in the court below. The action is one at law, by one partner against his copartner, to recover moneys alleged to be due him on account of partnership business. The petition filed in the court below alleges:

"1. That on or about February 15, 1885, plaintiff and defendant entered into partnership for the purpose of dealing in lumber at retail, which partnership continued until dissolved by mutual consent on or about October 31, 1889.

"2. That it was mutually understood and agreed by and between plaintiff and defendant that each was to devote his whole time to the prosecution of the partnership business, and to the best interest of the firm, the labor of each to be offset by, and the equivalent of, the other, and the profits and proceeds of the business to be divided in proportion to the amount contributed by each. Plaintiff says that he has no knowledge, or information, of the amount contributed by the defendant, but says that whatever the amount the same was less than was contributed by this plaintiff; that plaintiff did devote his whole time during the existence of the partnership to the business of the firm, but that defendant, unmindful of his agreements, and without

plaintiff's consent, devoted a large part of his time and energies to other pursuits and business, to the neglect and detriment of partnership business. Plaintiff says that on or about December 25, 1888, defendant, to the neglect of the firm business and to plaintiff's injury and damage, was tendered and accepted the position of receiver or accountant and salesman in a general merchandise store in Battle Creek, Nebraska, in which store neither plaintiff nor said firm was interested, which said position said defendant took and retained for the period of eight months, to-wit, from about December 25, 1888, to about August 25, 1889, for which defendant exacted and received the sum of $65 per month, amounting, in the aggregate, to the sum of $520, one-half of which said amount, under and by virtue of the mutual agreements by and between plaintiff and defendant, belonged to plaintiff, but which has not been paid to plaintiff, nor accounted for in any manner whatever. The amount of $260 is now due and owing plaintiff from defendant on account thereof, with interest thereon from August 25, 1889.

"Plaintiff for a further and second cause of action says:

"1. Plaintiff and defendant, on or about the month of February, 1885, entered into a partnership for the purpose of dealing in lumber at retail at Battle Creek, Nebraska, and at Burnett, Nebraska, the defendant taking and keeping charge of the yard at Battle Creek, and the plaintiff at Burnett.

"2. That the partnership business thus began continued until October 1, 1889, when the same was dissolved by mutual consent.

"3. That at the time of the organization of the partnership aforesaid the defendant represented to plaintiff that defendant had had large experience as a book-keeper, and that he thoroughly understood the same. Because of defendant's representations of his skillfulness as a book-keeper, it was further agreed by and between plaintiff and

defendant that all the accounts at both lumber yards should be kept by defendant at Battle Creek.

"4. Plaintiff says that defendant was not a skillful and correct book-keeper, and that he failed and neglected to properly, accurately, skillfully, or correctly keep the books and accounts of the aforesaid partnership business, as he had theretofore represented to plaintiff that he could and would do.

"5. That during the last two years of the existence of the partnership aforesaid plaintiff frequently asked and demanded of defendant to make a statement from the books of the partnership of the firm affairs, but defendant wholly failed, neglected, and refused so to do, but informed plaintiff that plaintiff could examine the said books of account for himself, well knowing that plaintiff was not an expert accountant and book-keeper, and at the same time well knowing that plaintiff could not tell by the said books so as aforesaid kept by defendant how the partnership business stood.

"6. That by reason of defendant's failure and inability to make any statement of account showing the condition of the partnership matters, and because of the unskillful, improper, and incorrect manner in which the partnership books of account were kept by defendant, and because of the long time the partnership had continued without plaintiff's knowing or being able to ascertain how said partnership matters stood, plaintiff was compelled to, and did, employ an expert book-keeper and accountant to examine the books of account of the said firm and render a statement of the affairs of the firm, and of the members thereof.

"7. To this end plaintiff employed H. C. Burr, of Omaha, Nebraska, at and for the agreed price of $8 per day, and who, because of the unskillful, incorrect, and improper manner in which the books of partnership accounts by defendant had been kept, and because of the time the accounts had been running, was compelled to, and did, oc-

cupy thirty days, to-wit, on or about the month of October, 1889, amounting in the aggregate to the sum of $240, which amount was and is the reasonable price of the said services, and which amount was paid by plaintiff to said expert, and which amount, therefore, is due from defendant to plaintiff, for said amount of $240, so as aforesaid paid by plaintiff, with interest thereon, no part of which has been paid."

The prayer is for judgment for the sum of $500, with interest and costs.

A general demurrer was interposed by the defendant to the petition, which was sustained by the court, and the plaintiff not desiring to amend his petition, the action was dismissed at plaintiff's costs.

The sole inquiry is whether the petition states sufficient facts to entitle the plaintiff to recover in this form of action. We entertain no doubt, under the decisions, that where a partnership has been dissolved, or has ceased to exist, and an account has been stated between the partners, an action at law will lie by one member of the firm against the other to recover the balance found to be due on the settlement; but that is not the case made by this record, since it is patent from a reading of the petition that in neither count thereof is it alleged that any account or settlement has been had between the parties to this litigation of their partnership business. It not appearing that the partners have ever had a settlement of their accounts, the question is squarely presented whether the petition is not for that reason fatally defective. We have long entertained the opinion that a suit like the one at bar is not maintainable until there has been an accounting, and an examination of the question, and the authorities bearing thereon, since this record came into our hands has strengthened us in our belief. The law will not permit a party to select an isolated partnership transaction and predicate a liability on that alone, when, perhaps, if a full and complete accounting be-

tween the partners was had, the balance might be found in favor of the other partner. Again, there may be firm debts unpaid. It is impossible in this form of action to adjust and settle the accounts between the members of a partnership. (2 Bates, Partnership, sec. 910; *Younglove v. Liebhardt*, 13 Neb., 557; *Stanberry v. Cattell*, 55 Ia., 617; *Devore v. Woodruff*, 45 N. W. Rep. [N. Dak.], 701; *Kruschke v. Stefan*, 83 Wis., 373; *Elmer v. Hall*, 23 Atl. Rep. [Pa.], 971; *Stone v. Mattingly*, 19 S. W. Rep. [Ky.], 402. See, also, cases cited in the brief of defendant in error.)

Younglove v. Liebhardt, supra, was a suit at law between partners to recover for work performed and money expended by one partner on the account of the firm business. It was held that the action would not lie. The court in the opinion say: "As a general rule no action at law can be maintained between partners for work and labor or money expended on account of the partnership (*Holmes v. Higgins*, 1 Barn. & Cres. [Eng.], 74; *Milburn v. Codd*, 7 Barn & Cres. [Eng.], 419; *Fromont v. Coupland*, 2 Bing. [Eng.], 170); and, as a general rule, a partner is not entitled to compensation for his services as partner; but for advances and outlays on behalf of the firm he is entitled to a proper credit. But he cannot recover for the same in an action at law against the firm, because he cannot be both plaintiff and defendant; nor against his copartner, because until an account is taken it is impossible to determine what amount is due." The decision from which the foregoing quotation is taken is decisive of the case as to both counts of the petition.

It is argued that the rule requiring that an accounting between partners must be first had before an action at law can be maintained does not apply where there is but a single partnership transaction which is fully closed, or there is but a single item to liquidate. Some of the cases so hold; but the plaintiff has not, by proper allegations,

brought his case within the rule announced in such adjudications. The petition contains no averment from which the inference can be drawn that there remains unsettled no other items growing out of the partnership venture, except the two which are made the basis of this suit, nor does it appear that there are no partnership debts. In any view, therefore, we feel constrained to hold that the demurrer to the petition was properly sustained. The judgment is

AFFIRMED.

ANHEUSER-BUSCH BREWING ASSOCIATION ET AL. V. JOHN C. PETERSON.

FILED OCTOBER 2, 1894. No. 5746.

1. **Pleading:** WANT OF JURISDICTION. Under the provisions of our Code it is proper to plead as a distinct defense any facts not disclosed by the petition from which it appears that the court has not acquired jurisdiction of the person of the defendant or the subject of the action. (*Hurlburt v. Palmer*, 39 Neb., 158.)

2. **Summons:** SERVICE OUT OF STATE. The provision of section 81 of the Code, for personal service of summons out of the state, is designed as a substitute for constructive service by publication, in actions such as those enumerated in section 77.

3. ———: PUBLICATION: SERVICE. Service by publication, or in any other manner authorized by statute, is sufficient in actions which are substantially proceedings *in rem;* but when the purpose of the action is to determine the personal rights of the parties, and enforce a personal obligation against the defendant, service within the state is essential to confer jurisdiction upon the court.

4. **Landlord and Tenant:** NEGLIGENCE: LIABILITY OF TENANT. As a rule, the tenant and not the landlord is liable to strangers for injuries resulting from a negligent or improper use of the demised premises during the continuance of the lease.

5. **Surface Water:** NEGLIGENCE: DAMAGES. Every proprietor

may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless guilty of some act of negligence in the manner of its execution will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow onto the premises of the latter to his damage.

6. ———: ———. But if in the execution of such enterprise he is guilty of negligence, which is the natural and proximate cause of injury to his neighbor, he is accountable therefor.

7. **Nuisance.** Where filthy and noxious matter is permitted to percolate through the adjacent soil and befoul a neighbor's well or cellar, such fact amounts to a nuisance, and is actionable at common law.

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

John C. Watson and *A. N. Sullivan*, for plaintiffs in error:

If property is so constructed as to be a nuisance, the tenant is not liable. (*Gillilan v. Chicago & A. R. Co.*, 19 Mo. App., 411; *Swords v. Edgar*, 59 N. Y., 28.)

The public should pay damages resulting from public acts. (*City of Aurora v. Reed*, 57 Ill., 29; Wood, Law of Nuisance, secs. 144, 749; *City of Jacksonville v. Lambert*, 62 Ill., 521.)

The motion to quash the service made upon Busch outside the state was erroneously overruled. (Code, secs. 77, 81; *Blair v. West Point Mfg. Co.*, 7 Neb., 150; 1 Story, Constitutional Law, sec. 539; *Murphy v. Lyons*, 19 Neb., 689; *Atkins v. Atkins*, 9 Neb., 191; *Fulton v. Levy*, 21 Neb., 478; *Holmes v. Holmes*, 15 Neb., 615; *McGavock v. Pollock*, 13 Neb., 535.)

Surface water is a common enemy which a lot-owner may fight by raising his lot to grade or in any other proper manner. (*Freberg v. City of Davenport*, 18 N. W. Rep. [Ia.], 705; 2 Dillon, Municipal Corporations, secs. 1041–1044.)

The owner has a right to obstruct and hinder the flow of mere surface water upon his land from the land of another. (*O'Connor v. Fond du Lac, A. & P. R. Co.*, 52 Wis., 526;

Kansas City & E. R. Co. v. Riley, 33 Kan., 374; *Abbot v. Kansas City, St. J. & C. B. R. Co.*, 83 Mo., 271.)

The lot-owner is not bound to provide drains or water ways to prevent the accumulation of surface-water upon adjacent lands, the natural flow of which is interrupted by changes in the surface of his own lands, caused by improvements thereon. (*Pye v. City of Mankato*, 36 Minn., 373; *Alden v. City of Minneapolis*, 24 Minn., 262; *Rowe v. St. Paul, M. & M. R. Co.*, 41 Minn., 384; *Jordan v. St. Paul, M. & M. R. Co.*, 43 N. W. Rep. [Minn.], 849.)

S. P. Vanatta, contra:

The owner of land has no right to collect surface water thereon and discharge it so as to injure the land of his neighbor. (*Livingston v. McDonald*, 21 Ia., 160; 1 Thompson, Negligence, pp. 19, 77.)

An action will lie for the recovery of damages caused by the accumulation of surface water into a pool where it percolates through the earth into a cellar on an adjoining lot. (*Crommelin v. Cox*, 30 Ala., 318; 6 Wait, Actions & Defenses, p. 277.)

When a man is in possession of fixed property, he must so manage it as not to injure others. (Taylor, Landlord & Tenant [6th ed.], sec. 178; 1 Thompson, Negligence, p. 80, sec. 2.)

POST, J.

This was an action by the defendant in error in the district court for Cass county. From the allegations of the petition it seems that on the 14th day of March, 1887, Adolphus Busch, who was then and still is president of the Anheuser-Busch Brewing Association, a corporation (hereafter called the "Brewing Association"), purchased lot 9, in block 33, in the city of Plattsmouth. On the date above named said Busch leased said premises to the Brewing Association, and that said corporation immediately took

possession thereof and continued to occupy the same until after the accruing of the plaintiff's cause of action; that during the year 1889 the plaintiff below and one Rasmus Peterson were the owners of lot 10 immediately adjoining the premises above described, upon which was situated a large ice house, and which, including a cellar or basement thereunder five feet deep, was, at the time of the wrongs complained of, filled with ice. During the year 1889 the defendants undertook to fill up lot 9 so as to correspond to the surrounding lots, and that in the execution of said enterprise "hauled and dumped into and onto said lot 9 large quantities of earth and partially filled up said lot, and that they so carelessly and negligently filled up said lot as to draw and throw the surface water collecting thereon up to and against the west side of the plaintiff's ice house." It is further alleged that on said lot 9, and within two feet of the plaintiff's ice house, is situated a privy and privy vault, and that in filling up said lot the defendant left large "sag holes," into which the surface water on said lot and surrounding premises accumulated and from which, by the natural percolation thereof, it entered the plaintiff's ice house by way of said privy vault, thereby destroying and rendering worthless a large quantity of ice. It is also alleged that the plaintiff has by assignment acquired whatever right of action existed in favor of the said Rasmus Peterson. Personal service of summons was made upon the defendant Busch in the city of St. Louis, in the state of Missouri, who entered a special appearance and moved to quash the service of summons against him on the ground that it was unauthorized by statute and void. Said motion having been overruled, he answered, first, challenging the jurisdiction of the district court, by proper averments alleging that the service of the summons in the state of Missouri was without authority of law and conferred upon the court no jurisdiction of his person; second, a plea to the merits, which need not be noticed in this connection. The Brew-

ing Association filed an answer, which, after admitting its possession of lot 9 by virtue of a lease from its co-defendant, Busch, is in effect a general denial. Upon the issues thus formed a trial was had, resulting in a verdict against both defendants; whereupon separate motions were made for a new trial, which were overruled, and judgment entered in accordance with the verdict, and which is the judgment complained of in the proceeding.

We will first consider the question of the jurisdiction of the district court over the defendant below, Busch. It is said by counsel for the defendant in error that that question is not presented by this record, for the reason that Busch submitted to the jurisdiction of the court by his answer to the merits of the case. There is to be found some support for that contention in the earlier cases in this court, but in *Hurlburt v. Palmer*, 39 Neb., 158, the cases were subjected to a careful examination, and the conclusion announced that under the provisions of the Civil Code it is proper to plead as a distinct defense any facts not appearing from the petition whereby it is made known that the court has no jurisdiction of the person of the defendant or the subject-matter of the action. That case we must regard as decisive of the question under consideration. It was the right and duty of the defendant Busch to direct the attention of the court to the fact that it had failed to acquire jurisdiction of his person by means of its process. That such facts constitute a defense within the meaning of section 99 of the Code is clear from the reasoning in *Hurlburt v. Palmer, supra.* The plaintiff below did not by his reply controvert the allegations of the answer showing that service of summons was made upon the defendant in Missouri. That such service is unauthorized by law and insufficient to confer upon the court jurisdiction of the defendant's person, seems clear from a careful reading of the Code. The only provision for service of summons outside of the state is found in section 81 and reads as follows:

"In all cases where service may be made by publication, and in all other cases where the defendants are non-residents, and the cause of action arose in the state, suit may be brought in the county where the cause of action arose, and personal service of summons may be made out of the state by the sheriff or some person appointed by him for that purpose." Reference to the decisions interpreting the above, or like provisions, is unnecessary in this opinion. It is sufficient for our present purpose that it has uniformly been held to be a mere substitute for constructive service in actions such as those enumerated in section 77 of our Code. Service by publication, or in any other manner authorized by statute, is sufficient to advise non-residents of proceedings against their property which is brought under the control of the court by seizure or some act equivalent thereto. As said by Mr. Justice Field in *Pennoyer v. Neff*, 95 U. S., 714: "The law assumes that property is always in possession of its owner, in person or by agent, and it proceeds upon the theory that its seizure will inform him not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. * * * In other words, such service may answer in all actions which are substantially proceedings *in rem*." Where, however, the purpose of an action is to determine the personal right of the parties and to enforce against the defendant a personal liability merely, according to a fundamental principle of our jurisprudence, personal service within the state where the action is pending is essential to confer jurisdiction upon the court. (See *Pennoyer v. Neff, supra;* Hawes, Jurisdiction, sec. 53; Story, Conflict of Laws [8th ed.], paragraph 539.) It follows that in entertaining the action as against the defendant Busch the court erred, for which the judgment as against him should be reversed.

2. The contention of the Brewing Association is that the relation of landlord and tenant only existed between it and

its co-defendant, and that it is, therefore, not liable to strangers for the negligent or wrongful acts of the latter in the filling of the lot in question. In this connection it should be remarked that there is nothing in the record to indicate that the proprietorship of the Brewing Association was confined to any particular portion of the premises, the inference being rather that its actual possession was co-extensive with the boundaries of the lot. Again, it is disclosed by the evidence in the record that the filling complained of was done by one Poisell under a contract with Mr. Ritchey, the agent in charge of the business of the Brewing Association in Plattsmouth, and was paid for by draft drawn upon the latter. The general rule is stated to be that the tenant and not the landlord is responsible for injuries resulting from a failure to keep the demised premises in repair. (2 Taylor, Landlord & Tenant, sec. 539; *City of Chicago v. O'Brennan*, 65 Ill., 160; *Gridley v. City of Bloomington*, 68 Ill., 47; *City of Peoria v. Simpson*, 110 Ill., 294; *City of Lowell v. Spaulding*, 4 Cush. [Mass.], 277; *Brunswick-Balke-Collender Co. v. Rees*, 69 Wis., 442; *Edwards v. New York & H. R. Co.*, 98 N. Y., 245; 1 Addison, Torts, pp. 197, 198.) There are, it is true, recognized exceptions to this rule, which, however, do not call for notice, since, as we have seen, the question of the liability of Busch, the landlord, is not presented by this record. The reason upon which the above rule rests is that the right of the landlord to possession is suspended during the term of the lease, and he has, therefore, no authority to re-enter for the purpose of making repairs or abating a nuisance created by the tenant. It follows that the defendant corporation is liable in this case, provided the wrongs alleged constitute a cause of action in the plaintiff's favor, a question we will now examine.

3. Some time previous to the filling of the lots by the defendant, the city of Plattsmouth caused to be filled up the bed of a small stream or water-course in such manner

as to divert the water which flowed therein at certain seasons of the year, onto said lots 9 and 10. Plaintiff below and the defendant corporation then attempted to fill their lots up to a level with the lot adjoining the latter on the east, but in the execution of said work the defendant's lot was left several feet lower in the center and on the east side thereof than was the plaintiff's lot, which adjoined it on that side, leaving a hole or basin in which the water, which would otherwise have run off in another direction, accumulated and entered the plaintiff's ice house through the privy vault above mentioned. The question whether the acts charged amount to actionable negligence or were a proper exercise of the rights of the defendant as proprietor of the dominant estate was resolved in favor of the plaintiff, and with that finding we can perceive no sufficient ground for interference. This question was carefully considered in the case of *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb., 406, and the conclusion therein announced that the rule of the common law prevails in this country. Subject to that rule every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless he is guilty of some act of negligence in the manner of its execution, he will not be answerable to his neighbor, although he may thereby cause the surface water to flow upon or from the premises of the latter to his damage. The injury in such case is but a mere incident to the proper use of the owner's property; but if in the execution of the enterprise in hand he is guilty of negligence, which is the natural and proximate cause of injury to the adjoining proprietor, the law holds him accountable therefor. Such is the essence of the authorities cited in *Morrissey v. Chicago, B. & Q. R. Co., supra*, and undoubtedly the law of this case.

4. But defendant's liability in this action may be sustained upon other and independent grounds. It is said in an early case that "where one has filth deposited on his

premises, he whose dirt it is must keep it that it may not trespass." (See *Tenant v. Goldwin*, 1 Salk. [Eng.], 360.) If filthy matter from a privy, or the like, is permitted to percolate through the soil of the adjacent premises, and befouls a neighbor's well or cellar, such facts amount to a nuisance, and is actionable at common law. (See Cooley, Torts, 567, and cases cited; *Beatrice Gas Co. v. Thomas*, 41 Neb., 662.) It follows that the judgment should be reversed as to Adolphus Busch and affirmed as to Anheuser-Busch Brewing Association.

JUDGMENT ACCORDINGLY.

McDONALD & PENFIELD V. DODGE COUNTY.

FILED OCTOBER 2, 1894. No. 5512.

1. **Drainage Contracts:** DAMAGES FOR BREACH. The provision of section 20, chapter 89, Compiled Statutes, for the reletting of contracts where contractors for drainage ditches have failed to complete their work within the time specified, is designed for the benefit of the persons whose property is chargeable with such improvements, and is not the exclusive method of determining the amount of damage on account of such failure.
2. **Evidence:** DRAINAGE CONTRACTS: DAMAGES FOR BREACH. An engineer, who examined the work two months after it was abandoned by the contractors and found the original stakes showing the depth of the ditch and was able to verify his estimate from such stakes, *held* competent to testify to the cost of completing such work in accordance with the contract.
3. **Review:** HARMLESS ERROR. Error not prejudicial to the complaining party is no ground for the reversal of a judgment.
4. **Evidence** *held* to sustain the judgment of the trial court.

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

Frick, Dolezal & Stinson and *Munger & Courtright*, for plaintiffs in error, cited: *Mercer v. Harris*, 4 Neb., 77.

C. Hollenbeck and *Gray & Carey, contra*, cited: *Burlington & M. R. R. Co. v. Schluntz*, 14 Neb., 421; *Sioux City R. Co. v. Brown*, 13 Neb., 317.

POST, J.

This is a petition in error from the district court for Dodge county. It appears from the record that plaintiffs in error presented to the board of supervisors of the defendant county a claim for an alleged balance on a contract for the construction of a ditch for said county under the provisions of chapter 89, Compiled Statutes. Said claim having been rejected by the county board, an appeal was taken to the district court, where a trial was had, resulting in a verdict and judgment for the plaintiffs, who, being dissatisfied with the award, moved for a new trial, which was refused, and the cause removed to this court upon allegations of error.

Among the provisions of the contract, plaintiffs were required to "complete the work embraced in the contract, plans, and specifications of the engineer, and subject to the approval of the board of supervisors before final acceptance is made by the engineer. * * * All excavated material shall be placed on the easterly side of the proposed ditch. * * * The berm between the road and the ditch shall not be less than six feet in width. * * * The ditch will be eight feet in width on the bottom, and of such slope as the engineer may direct and stake out. * * * No extras of any kind will be allowed * * * except the rate of one cent per cubic yard for each yard hauled in excess of one thousand feet, for each one hundred feet so hauled in excess of one thousand feet, but the actual measurement of the solid contents shall only be considered, as measured in the embankment on the completion of the

work. * * * The engineer, first having the consent of the board of supervisors, shall be at the liberty, from time to time, to order in writing any alteration in the coustruction of the embankments, or other points in the work, or any change not affecting the general direction of the work, or diminishing the capacity of the proposed ditch. * * * This contract shall be completed by the 15th day of June, 1891. * * * The engineer in charge shall in all cases determine the amount of the several kinds of work done which are to be paid for under this contract, and he shall decide all questions which may arise relating to the execution of this contract, on the part of the contractor, and his estimates and decisions shall be final and conclusive, subject to the approval of the board of supervisors; but this provision shall not be construed to prevent the second party herein from appealing from such decision or seeking redress in the courts. * * * The contractor will place all earth excavated in an embankment on the easterly side of the proposed ditch; said embankment to be of uniform grade and width; such grade and width to be shown by stakes set by the engineer."

The cause was tried without pleadings in the district court; but it is apparent from the record that the plaintiffs in error had failed to complete the work undertaken by them to the satisfaction of the county board.

The first error assigned is the rejection of evidence tending to prove that the board did not cause the contract to be completed by the lowest bidder therefor in accordance with the provisions of section 20 of the act above named, viz.: "Any contract not completed within the time specified shall be re-estimated and relet to the lowest responsible bidder, but not for a sum greater than the estimate, nor a second time to the same party; *Provided*, The board of commissioners may, for a good cause, extend the time of any contractor not to exceed two years." It is claimed by plaintiffs that the means thus provided for the ascertainment

of damage resulting from the failure to complete the work in accordance with the undertaking of the contractor is exclusive. In that view we are unable to concur. In construing that as well as other provisions involved in this controversy, it should be remembered that the county executing the contract for a drainage ditch cannot be said to be the party in interest, but acts rather in the nature of a trustee for the persons whose property is chargeable with the cost of work in hand. Viewing it in that light, we cannot say that the provision of the statute is exclusive. We prefer rather to regard it as a direction to the county board for the benefit of the property owners interested.

2. Another contention of the plaintiffs which the district court declined to sustain was that under the statute and the contract made in pursuance thereof, all controversies between the board and the contractor must be referred to the engineer in charge of the work, whose estimates shall be conclusive upon both parties. The provision of statute relied upon to sustain that claim is section 19, which reads as follows: "The work shall be done under the supervision of the surveyor or engineer appointed by the commissioners, and when a part, not less than one-fourth of the portion included in any contract, is completed according to the specifications, he shall give the contractor a certificate thereof, showing the proportional amount which the contractor is entitled to be paid according to the terms of the contract, and the county clerk shall, upon presentation of such certificate, draw his warrant upon the treasurer for seventy-five per cent of said amount, and the treasurer will pay the same out of any funds in the treasury applicable to such purposes." The contract offered in evidence contains the following provision: "To prevent disputes and litigation, it is further agreed by the parties hereto that the engineer in charge shall in all cases determine the amount of the several kinds of work done which are to be paid for under this contract, and he shall decide all ques-

tions which may arise relating to the execution of this contract on the part of the contractor, and his estimates and decisions shall be final and conclusive, subject to the approval of the board of supervisors; but this provision shall not be construed to prevent the second party herein from appealing from such decision or seeking redress in the courts." The language of the contract, although ambiguous in some respects, is certainly explicit so far as the effect of the engineer's finding is concerned. The stipulation that the contract "shall not be construed to prevent the second party from appealing from such decisions or seeking redress in the courts" appears to us too plain for construction. We do not hesitate, therefore, to hold that the amount due under the contract was a proper subject of inquiry. We find in the record what purports to be a final estimate by Mr. Burrell, the engineer, under date of July 3, 1891, from which it appears that there was then due plaintiffs the sum of $3,334.22. This estimate the county board refused to confirm, although it seems that payments were made on account from time to time, until the 24th day of September, 1891, when the plaintiffs' final claim for $1,111.40 was presented and disallowed, and from which order the appeal was prosecuted. We are left in doubt by the record whether the plaintiffs' action is founded upon that estimate; but assuming it to be in effect an action on an award of the engineer, the plaintiffs' claim cannot be sustained, for the reason that by the contract such finding or estimate is not made *prima facie* evidence of the amount due.

3. It is claimed that the trial court erred in permitting engineers Tillson and Patterson to testify to the condition of the work and the cost of completing the same, on the ground that the conditions, at the time of their examination, were materially different from those existing at the time the work is claimed to have been completed. Tillson's survey was made about six weeks after the plaintiffs

left the work, and he testifies to finding the original stakes showing its depth, and that in case of doubt about the bottom of the ditch he was able to verify his estimate by the original stakes. Patterson's survey was made about two months after the plaintiffs left, and he testified, in substance, to finding the sides and bottom of the ditch in the condition in which they were left by the contractor. On that record we cannot say that the admission of the testimony was error, although the argument employed is entitled to consideration as bearing upon the question of the weight of the evidence.

4. In one paragraph of the charge the jury were told to ascertain the amount of lumber used by plaintiffs in the construction of the ditch and to allow them therefor at the rate of "$25 per thousand feet, or $1.25 per hundred feet." This instruction is assigned as error, the criticism thereof being the use of the figures "$1.25," which is evidently a clerical error on the part of the court; but we cannot say that the plaintiffs have been prejudiced by that error, since the jury were plainly directed to compute for the lumber at the rate of $25 per thousand, which is admitted to be correct. Again, the contract, which in explicit terms prescribes the rate to be allowed for lumber used, was set out in full in another paragraph of the charge.

5. The other assignments relate to the sufficiency of the evidence. From an examination of the entire record we are unable to find that there is such a failure of proof as will warrant interference by this court. The judgment of the district court is therefore

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5. A deed absolute in form may be shown by parol to be a mortgage. *Morrow v. Jones*..... 868
6. Where a subscribing witness is absent, the execution of the instrument may be established by other evidence. *Jewell v. Chamberlain*..... 254
7. An engineer who examined the work after a drainage contract had been abandoned may testify to the cost of completing the ditch. *McDonald v. Dodge County*..... 905
8. A receipt is incompetent evidence of payment as against strangers. *Ellison v. Albright*..... 93
9. Admissibility of statements of account made by plaintiff's agent in an action on account stated. *Sterling Lumber Co. v. Stinson*..... 368
10. A judicial record may be proved by producing the original or a copy thereof, properly authenticated by the proper officer. *Burge v. Gandy*..... 149
11. A written contract for the construction of a line of railroad only does not preclude the introduction of parol evidence of a subsequent contract for supply of cattle yards, telegraph line, and other extras necessary to equipment and operation of the road, and not within the terms of the written contract. *Fitzgerald v. Fitzgerald & Mallory Construction Co*..... 376

Executions. See TRESPASS.

1. Where defendants have complied with the requirements necessary to obtain homestead rights no valid sale of the premises levied upon can be made until the property has been appraised as provided by statute. *Quigley v. McEvony*..... 74
2. Where the liability of sureties is equal a court of equity should not control the sheriff in executing the writ. He may levy upon the property of all the sureties or satisfy the judgment out of the property of one of them. *Minick v. Brock*..... 515
3. Plaintiffs who indemnify and direct the sheriff in a wrongful levy upon, and sale of, the goods of one person under execution and attachment against another, are jointly liable with the officer and his sureties. *Wonderlick v. Walker*, 806

Factors and Brokers. See REAL ESTATE AGENTS.

False Representations.

One who relied upon the willful and fraudulent representations of an officer of a corporation, and was thereby induced to buy its worthless stock, without means of knowing the statements were false, may maintain an action against the officer for damages. *Carruth v. Harris* 789

Fees. See COUNTIES, 1, 2. COSTS.

Fellow-Servants. See MASTER AND SERVANT, 1, 4.

Findings. See JUDGMENTS, 2. REPLEVIN, 3.

Fire Insurance. See INSURANCE.

Foreclosure. See TAXATION, 4.

Foreign Laws. See INTEREST.

Forgery. See TRIAL, 8.

Fraud. See ESTOPPEL, 5. FALSE REPRESENTATIONS. STATUTE OF FRAUDS.

1. Where the issue is fraud evidence may be received of collateral facts, including subsequent events, provided they shed light upon the transaction involved and tend to explain the motives of the parties. *Sonnenschein v. Bartels* 703
2. Test in determining relevancy of collateral facts in such cases. *Id.*

Fraudulent Conveyances. See CHATTEL MORTGAGES, 1–3.

1. Judgment canceling conveyance as fraudulent will not be disturbed when supported by sufficient evidence. *Vandecar v. Johnson* 577
2. Sufficiency of evidence to support finding for defendant in creditor's bill to cancel certain conveyances. *Hunt v. Huffman* 244
3. A debtor in failing circumstances may prefer one creditor to the exclusion of others. Whether the creditor acts with a fraudulent intent is a question for the jury. *Meyer v. Union Bag & Paper Co* 67
   Hunt v. Huffman 249
4. Where the existence of fraud is to be determined by evidence collateral to the writing, whereby the alleged fraudulent transfer was effected, the question is for the jury. *Grimes Dry Goods Co. v. Shaffer* 112
5. Verdict sustained in a case where the jury found a bill of sale of a stock of goods was fraudulently executed by a

Fraudulent Conveyances—*concluded.*

debtor and accepted by one of his creditors under an agreement that the latter should make sales, pay certain claims, and return the goods remaining unsold. *Id.*

6. In a suit between a wife and her husband's creditors the burden is upon her to establish the *bona fides* of his conveyances to her where they were executed after he contracted the debts. *Melick v. Varney* 105

Fraudulent Representations. See ESTOPPEL, 4.

Gas Companies. See NUISANCE.

Grand Jury.

1. No grand jury can be lawfully organized unless its selection and impaneling has been previously ordered by a judge of the district court in which it is to act. *State v. Lauer*..... 226
2. The judge in his order may require that the jurors be summoned to appear at the first day or at any other specified day of the term at which they are to appear. *Id*..... 227
3. In counties having seventy thousand inhabitants or more an order for a grand jury must be in writing and filed with the clerk of the district court more than twenty days before the first day of the term. *Id.*
4. The county board must select the persons from whom the jury is to be impaneled at least twenty days before the term. *Id.*

Habeas Corpus. See PARENT AND CHILD.

Harmless Error. See NEW TRIAL, 1.

Hearsay Evidence. See EVIDENCE, 8.

Homestead.

1. Intention to abandon and actual abandonment must concur to show an abandonment of a homestead. *Quigley v. McEvony*..... 74
2. Evidence that claimants took legal advice on the law of abandonment before going away from the premises is competent in proving there was no intention to abandon their homestead. *Id*..... 84
3. The homestead character of real estate is not a proper question to be determined upon a motion to discharge an attachment. *Id*..... 73
4. Procedure in selecting property, and duty of creditor to apply for appraisal before sale. *Id.*
5. Sufficiency of compliance with statutory requirements in

Homestead—*concluded.*

selection of homestead where wife's land had been levied upon for her individual debt, she having signed notice and caused it to be served upon the sheriff while her husband was absent from the state. *Id.*

Homicide. See DESCENT.

Husband and Wife. See FRAUDULENT CONVEYANCES, 6. HOMESTEAD.

1. The married woman's act does not deprive the husband of his right of action for the loss of services or companionship of his wife. *Omaha & R. V. R. Co. v. Chollette*..... 580
2. A married woman may contract as surety for her husband. *Briggs v. First Nat. Bank of Beatrice*..... 17
3. A contemporaneous loan of money to the husband is a sufficient consideration for the wife's signature to a note to secure the debt. *Id.*

Impeachment. See WITNESSES.

Incorporation. See CORPORATIONS.

Indemnity. See EXECUTIONS, 3.

Indictment and Information.

Different criminal acts which constitute parts of the same transaction, such as burglary with intent to steal particular property, and larceny of the property described, may be charged in the same indictment or count thereof. *Aiken v. State*..... 264

Infants. See PARENT AND CHILD.

Information. See INDICTMENT AND INFORMATION.

Inheritance. See DESCENT.

Injunction.

1. In a proper case an officer may be restrained from selling a surety's property under execution until that of the principal debtor has been exhausted. *Minick v. Brock*..... 512
2. Dismissal of petition to restrain defendant from moving a house by virtue of a writ of replevin was properly entered under evidence in a case where the parties regarded the building as personalty. *McDaniel v. Lipp*..... 713

Insanity.

The defense of insanity may be interposed in an action upon a contract without restoring what the insane person received thereunder, in cases where the ability does not remain of restoring what was received in specie. *Rea v. Bishop*..... 202

Instructions. See CRIMINAL LAW, 3. REVIEW, 23-26, 29-31.

1. An instruction not excepted to will not be reviewed. *Wiseman v. Ziegler* 886
2. Instructions should be considered as a whole, and not by detached paragraphs. *Love v. Putnam* 86
3. It is not error to refuse correct instructions, the substance of which have already been given. *Id.* 92
4. A charge not warranted by the evidence and misleading should not be given. *Roberts v. Drehmer* 306
   Bloedel v. Zimmerman 696
5. On preponderance of evidence and credibility of witnesses where testimony is conflicting. *Johnson v. Guss* 20
6. Whether such facts are shown as, in view of conflicting evidence, will sustain or defeat a recovery, is not within the province of a trial judge to instruct the jury. *Union P. R. Co. v. Cobb* 120
7. An instruction in which it is intended to include all the issues under the pleadings and evidence, should not be given when it omits one of the material elements. *Carruth v. Harris* 789

Insurance.

1. A relief department in the nature of a mutual insurance association in connection with a railroad company, by deducting from the wages of an employe assessments on the basis of membership, with knowledge that he made no formal application and had not been examined as required by the rules of the department, is estopped from disputing his membership. *Burlington Voluntary Relief Department v. White* 547, 548, 562
2. The tender of a time check for the purpose of refunding the assessment to the employe after injury did not release the department from liability. It was not a legal tender and liabilities had already accrued. *Id.*
3. Where all of the transactions between the applicant and insurer in such a case are known to the superintendent of the department, no question arises as to the authority of subordinate employes to waive requirements. *Id.*
4. The department was not released in such a case under a rule providing that where an employe had made a proper application and passed a physical examination the department should only be liable during a delay in the approval of his application for injuries or death caused by accident. *Id.*

Insurance—*continued.*

5. A rule of the department, requiring all controversies arising between it and a member to be submitted to the superintendent for final determination subject to appeal to an advisory committee, does not prevent the widow of an employe from maintaining an action to enforce a liability accruing to her after membership ceased. She could not be bound by a decision of the officers of the association. *Id.*

6. A decision by the superintendent, without a hearing, that an employe is not a member, does not prevent the widow of an employe from maintaining an action against the department where assessments were deducted from her husband's earnings on the basis of membership. *Id.*

7. Under the rules of the department the widow of the employe was held to be his beneficiary, no one having been designated. *Id.* 549, 561

8. A clause in a policy prohibiting agents from waiving its terms does not prevent the insured from showing that the insurer, through its agents, accepted acts of the insured as a sufficient compliance with the terms of the policy. *Phenix Ins. Co. of Brooklyn v. Rad Bila Hora Lodge* 21

9. Under the provisions of the policy sued on, notice of loss in writing sent to the office designated by the policy was sufficient when not objected to and no other proof was demanded. *Id.*

10. Case in which notice of loss was sufficient where the insured orally notified the company's local agent and the latter forwarded written notice to the company's office. *Id.*

11. Where agents induce the insured to withhold suit under a belief that the loss will be paid, the company is estopped from claiming that an action was not commenced within the time limited by the policy. *Id.*

12. The insurer is estopped after loss to insist that it is not liable, because consent to concurrent insurance was not given in writing, where its agent issued the policy knowing of the existence of other insurance. *Phenix Ins. Co. v. Covey* 724
German-American Ins Co. v. Covey 728

13. Where a mortgage slip is attached to a policy at date of issuance, the rights of the mortgagee thereunder are not affected by failure of the owner of the fee to give the insurer notice of a conveyance of the insured premises or to obtain consent of the company to execute it, and the neg-

Insurance—*concluded.*

lect of mortgagee to give such notice does not invalidate the policy as to him. *Phenix Ins. Co. of Brooklyn v. Omaha Loan & Trust Co*..... 835

14. The mortgagee under a mortgage slip has a direct contractual relation with the insurer not dependent on the observance by the mortgagor of the conditions of the policy. *Id.*

15. The mortgagee under a mortgage slip attached to a policy may maintain an action for a loss after assignment of the mortgage with guaranty of payment of the debt where he does not transfer, but retains possession of, the policy. *Id.*

Interest.

In absence of proof the rate of interest in another state is presumed to be the same as it is in Nebraska. *Fitzgerald v. Fitzgerald & Mallory Construction Co*..... 376

Interstate Commerce.

The Interstate Commerce Act, when it took effect, abrogated all existing contracts with common carriers for special interstate rates, and vested in the federal tribunals exclusive jurisdiction to adjust interstate rates. *Fitzgerald v. Fitzgerald & Mallory Construction Co*..... 376

Intoxicating Liquors.

1. Minor children, whose father has been incapacitated by intoxication for providing for his family, may maintain an action for loss of support against the persons who sold him the liquor and their bondsmen. *Bloedel v. Zimmerman* 696

2. An instruction making reference to refusal of the children to occupy a home with their father was *held* to be erroneous. *Id.*

3. Case where a verdict for defendants was against the evidence. *Id.*

Judgments. See REPLEVIN, 3. RES ADJUDICATA. REVIEW, 1.

1. The pendency of a motion for a new trial does not supersede a judgment or stay execution thereof. *Von Dorn v. Mengedoht*..... 526

2. A judgment without a finding to support it is not void, but erroneous. *Gordon v. Little*..... 250

3. A ruling on a motion to vacate default and let defendant into a defense will not be set aside except for an abuse of discretion by the trial court. *Lichtenberger v. Worm*... 856

4. Copy of docket entries set out in opinion *held* insufficient to show a judgment. *Burge v. Gandy*..... 149

Judgments—*concluded.*

5. Upon review approved journal entry is indisputable evidence of what the judgment is. *Brown v. Ritner*..... 53

6. Judgment ordering money paid to a minor in a bastardy case affirmed where the validity of the order was not properly raised. *Clark v. Carey* 788

7. The lien of a judgment attaches merely to the interest of the judgment debtor in his land, and is subordinate to every equity existing against him at the time it attached. *Pearson v. Davis*..... 608

Judicial Records.

A judicial record is a precise history of a suit from its commencement to its termination, including the conclusion of law thereon, drawn by the proper officer for the purpose of perpetuating the exact state of facts. *Burge v. Gandy*, 149

Judicial Sales. See EXECUTIONS.

1. Notice of sale was held sufficient where it was first published March 21, and the sale occurred April 25, thirty days having intervened between first publication and sale. *Von Dorn v. Mengedoht*..... 526

2. Persons desiring to purchase, jointly, property at sheriff's sale may make a valid agreement authorizing a joint bid by an individual for the benefit of all where there is no purpose to avoid competition. *Gulick v. Webb* 706

Jurisdiction. See DAMAGES, 3. INTERSTATE COMMERCE. PLEADING, 5.

Jury. See CRIMINAL LAW, 6. GRAND JURY. TRIAL, 8.

Justice of the Peace. See APPEAL, 5.

The guilt or innocence of one charged with bastardy cannot be determined before a justice of the peace. *Munro v. Callahan* 849

Landlord and Tenant. See MECHANICS' LIENS, 5, 6. REPLEVIN, 4. TENANCY IN COMMON.

1. As a rule the tenant is liable to strangers for injuries resulting from a negligent or improper use of demised premises. *Anheuser-Busch Brewing Association v. Peterson* 897

2. In an action against a tenant for injury to leased premises the burden is upon him to prove his defense where he answers that the acts causing the alleged injuries were directed by the landlord. *Olson v. Webb*..... 147

Larceny.

1. Sufficiency of evidence to justify conviction. *Lamb v. State*..... 356

Larceny—*concluded.*

2. Judgment reversed because the evidence was insufficient to justify conviction. *Clarke v. State* 370

Levy. See EXECUTIONS, 3.

Lex Rei Sitæ. See CONFLICT OF LAWS, 1.

Liens. See COUNTIES, 1, 2. JUDGMENTS. TAXATION, 1.
Esterly Harvesting Machine Co. v. Pringle..... 265

Limitation of Actions. See TAXATION, 3.

1. An action to redeem real estate may be brought at any time within ten years. *Morrow v. Jones*..... 868
2. The defense of the statute of limitations, if not raised by demurrer or answer, is waived. *Scroggin v. National Lumber Co.*..... 196
3. An answer in a case to foreclose a mechanic's lien alleging merely that the action was not brought within the time required by law, or until after the lien had expired by lapse of time, states conclusions merely and is insufficient. *Id.*

Liquidated Damages. See PENALTY.

Liquors. See INTOXICATING LIQUORS.

Mandamus. See COUNTIES, 4.

Married Women. See HUSBAND AND WIFE.

Married women may bargain for and purchase personal property, sell the same, and do all acts in relation to such property as though single. *Melick v. Varney*..... 105

Master and Servant. See INSURANCE, 1–7.

1. Employment in the service of a common master is not alone sufficient to constitute two men fellow-servants so as to exempt the master from liability to one for injuries caused by the other's negligence. *Union P. R. Co. v. Erickson* 2
2. One repairing a railroad track is not a fellow-servant of a fireman who passes on an engine. *Id.*
3. Where coal falls from the tender of a passing engine and injures a section hand the question of the railroad company's negligence in loading the coal is for the jury in an action for damages. *Id.*..... 1
4. In such a case the injured section man may prove that it was practicable to place railings on tenders to safely increase their capacity and that the tender from which the coal had fallen was without a railing. *Id.*..... 2

Master and Servant—*concluded.*

5. Insufficiency of evidence to sustain verdict in favor of a brakeman on a railroad for damages for injuries resulting from alleged negligence. *Erb v. Eggleston* 860
6. In an action by an employe for damages for personal injuries the evidence discussed in the opinion *held* sufficient to support a finding that the injuries resulted from negligence of defendant's employes and not from contributory negligence of plaintiff. *Fremont, E. & M. V. R. Co. v. Leslie,* 159
7. Parol evidence is competent to show that services rendered after expiration of a term of hiring were not rendered under the terms of the original contract of employment. *Hale v. Sheehan* 102
8. Right of master to all of the time and attention of superintendent in charge of bridge, store, and stables under the contract of employment set out in opinion. *Clarke v. Kelsey* 766

Measure of Damages. See DAMAGES.

Mechanics' Liens. See BUILDERS' BONDS. JUDICIAL SALES, 2.

1. *Cain v. Boller* 723
2. An architect who performs his contract is entitled to a lien. The law makes no distinction between skilled and unskilled labor. *Von Dorn v. Mengedoht* 526
3. A description in a sworn statement which is inapplicable to the land benefited is not sufficient to subject the property to the operation of the lien claimed. *Bell v. Bosche,* 853
4. The owner at the time buildings were erected, or a subsequent purchaser, may raise an objection to the description in the sworn statement for a lien. *Id.*
5. Acknowledgment by landlord that expenses, incurred by his tenant without authority in erecting buildings on leased premises, are proper charges against him in settlement with the tenant, is such a ratification of the tenant's acts as will subject the premises to a lien for the improvements. *Scroggin v. National Lumber Co.* 196
6. Payment by landlord to the tenant of cost of improvements on the leased premises does not defeat a lien. *Id.*
7. A person who has taken notes for the purchase price of materials may secure a lien by filing in the office of the register of deeds either a proper account of the materials furnished or copies of the notes with a sworn statement, but it is unnecessary to do both. *Jarrett v. Hoover* 231

Merger.

All verbal negotiations or understandings of parties prior to the execution of the written contract are merged therein. *Clarke v. Kelsey* 766

Mortgages. See DURESS. INSURANCE, 15. JUDICIAL SALES, 2.

1. A real estate mortgage is a mere incident of the debt which passes to the assignee when the debt is transferred. *Whipple v. Fowler* 676
2. In Iowa the proceeds arising from sale of mortgaged property are applied to payment of notes in the order they fall due. In Nebraska the several holders of the notes are entitled to share *pro rata* in the proceeds. *Id.*
3. Neither a mortgagor nor a purchaser with notice can acquire rights or advantage by the unauthorized registration of a release in escrow. *Id.* 675
4. Satisfaction of record by a mortgagee after he transferred the notes secured by the mortgage will protect a subsequent *bona fide* mortgagee or purchaser. *Id.* 676
5. Where a mortgagor executes to the mortgagee a deed to mortgaged land with the right to redeem, the relation of the parties is not thereby changed. *Morrow v. Jones* 868
6. When a court ascertains that a deed was intended as a mortgage it should allow the mortgagor to redeem. *Id.*
7. When a mortgagor dies, an action to redeem may be maintained by the person who succeeded to his interest in the land mortgaged. *Id.*
8. A mortgagee in possession before foreclosure is liable to account for the net rental value of the property, though the instrument securing the debt is in form a deed. *Id.*

Motion for New Trial. See NEW TRIAL.

Municipal Corporations. See SCHOOL DISTRICTS.

1. Where the existence of a municipal corporation is not questioned by the state, it cannot be put in issue by a private individual in a collateral proceeding. *State v. Whitney* 613
2. Sec. 2, art. 9, of the constitution, exempting certain property from taxation, does not apply to special assessments for local improvements. *City of Beatrice v. Brethren Church*, 358
3. A contractor may be required by a city, without express authority from charter or ordinance, to give bond to pay for all labor and material furnished to him in the execution of his contract with the city. *Doll v. Crume* 655

Municipal Corporations—*concluded.*

4. A charter provision, requiring statement of claim against the city for unliquidated damages to be filed with the city clerk within three months, is valid and a condition precedent to suit. *City of Lincoln v. Finkle*..... 575
5. Filing of the statement for unliquidated damages against the city within the time limited by the charter must be alleged and proved in order to recover. *Id.*
6. A city is liable for an injury resulting from the negligence of its contractor in constructing a public improvement. *City of Beatrice v. Reid*..... 214
7. A municipal corporation is charged by law at all times with the duty of keeping its streets and sidewalks in a reasonably safe condition for travel by the public. *Id.*
8. A municipal corporation cannot, by an act of its own, devolve upon another the duty of keeping its streets and sidewalks in a safe condition, so as to relieve itself from liability resulting from its failure to perform such duty. *Id.*
9. Basis of liability of city for injuries resulting from negligence of contractor in constructing an improvement. *Id.*, 215

Murder. See DESCENT.

Mutual Insurance. See INSURANCE, 1–7.

Negligence.

1. A land owner who is negligent in making improvements which cause surface water to flow upon the land of an adjoining proprietor is liable for damages. *Anheuser-Busch Brewing Association v. Peterson*..... 898
2. The law only requires a person in passing over a place of danger to exercise ordinary care, the danger and his knowledge thereof considered. *City of Beatrice v. Reid*..... 214
3. Where plaintiff sues for damages for injuries to his wife, negligence on his part cannot be inquired into under an allegation of defendant that the wife was guilty of contributory negligence. *Omaha & R. V. R. Co. v. Chollette*... 589
4. Where plaintiff proves his case without disclosing contributory negligence it will be presumed he was free therefrom. The burden of proving contributory negligence is on defendant. *Union Stock Yards Co. v. Conoyer*..... 617
5. Instructions on question of negligence where evidence is conflicting. *Union P. R. Co. v. Cobb*..... 120
6. Facts which prove an accident may be circumstances from

Negligence—*concluded.*

which facts justifying an inference of negligence may be found to exist. *Union P. R. Co. v. Erickson*..... 2

7. Questions of negligence and contributory negligence are for the jury where from the facts proved different minds may reasonably draw different conclusions. *Id.*..... 8

8. Where a motion for judgment on special findings involves an inference as to whether the facts constitute contributory negligence it should be overruled, that question being for the jury. *Omaha & R. V. R. Co. v. Chollette*..... 579

9. An award of a jury for damages for personal injuries will not be reduced by supreme court where it is supported by sufficient competent evidence. *Fremont, E. & M. V. R. Co. v. Leslie*..... 159

10. Instructions on question of negligence. *Id.*..... 162

11. Judgment of two thousand dollars, for personal injuries resulting from collision in street through negligence of defendant's driver, was sustained as supported by sufficient evidence. *Stephenson v. Flagg*..... 371

12. Evidence in a case where a brakeman on a freight train was injured *held* insufficient to establish negligence on part of the railroad company. *Erb v. Eggleston*..... 860

13. Sufficiency of evidence to show that the proximate cause of plaintiff's personal injuries was his own negligence, in an action against a railroad company, where it appeared that while plaintiff was driving near a crossing his horse was frightened by the noise of a moving car and ran away. *Stephens v. Omaha & R. V. R. Co.*..... 167

Negotiable Instruments. See EVIDENCE, 6. HUSBAND AND WIFE, 3. MECHANICS' LIENS, 7. MORTGAGES, 1–4. PLEDGES.

1. In an action by the transferee of a negotiable note properly indorsed before maturity, the production of the note shows *prima facie* that he is a *bona fide* holder. *McDonald v. Aufdengarten*..... 40

2. In an action by the indorsee of a negotiable note before maturity, proof that the note is tainted with usury shifts to the plaintiff the burden of showing that he is a *bona fide* holder for value without notice. *Id.*

3. When negotiable paper is purchased after maturity from an innocent holder for value before maturity, the purchaser takes it free from all equities and defenses which existed between the original parties. *Barker v. Lichtenberger*..... 751

Negotiable Instruments—*concluded.*

4. One who takes negotiable paper of a third person in payment of a pre-existing debt is a holder for value, where by taking it he loses or postpones his right to proceed upon the original indebtedness. *Id.*

New Trial. See CRIMINAL LAW, 6. REVIEW, 12, 13, 21.

1. A new trial will not be granted on account of an erroneous instruction which did not prejudice the party complaining. *Roberts v. Drehmer* 306
2. Where a joint motion for a new trial by two or more parties cannot be sustained as to all it must be overruled as to all. *Minick v. Huff* 516
3. Where a motion for a new trial is not based upon newly-discovered evidence it must be filed within three days unless the party making it is unavoidably prevented from doing so. *Brown v. Ritner* 52
4. A new trial should not be granted on account of newly-discovered evidence by a witness who testified in the case, where no effort was made during his examination to elicit the facts claimed to be newly-discovered evidence. *Von Dorn v. Mengedoht* 526

Newly-Discovered Evidence. See NEW TRIAL, 4.

Notary Public.

1. A woman may hold the office of notary public. *Von Dorn v. Mengedoht* 526
2. The right of a woman to hold the office of notary public, when she has been appointed and commissioned, can only be inquired into in a suit for that purpose. *Id.*

Notes. See NEGOTIABLE INSTRUMENTS.

Notice. See INSURANCE. JUDICIAL SALES, 1.

Nuisance.

1. One who collects upon his premises matter which pollutes his neighbor's well is liable for damages. *Beatrice Gas Co. v. Thomas* 662
   Anheuser-Busch Brewing Association v. Peterson 898
2. Knowledge of defendant that plaintiff's well was contaminated is not necessary to recovery in an action for damages. *Beatrice Gas Co. v. Thomas* 662
3. Where the injury from polluting a well is permanent the plaintiff should recover for all damages, present or prospective. For a temporary injury the recovery should be for damages to commencement of suit. *Id.*

Nuisance—*concluded.*

4. The fact that the injury could be avoided by digging a new well is admissible in mitigation of damages. *Id.*
5. When plaintiff proves that other wells in the neighborhood are polluted, evidence by defendant that wells further from the source of pollution are also likewise affected is admissible. *Id.*

Objections. See DAMAGES, 4.

Office and Officers. See COUNTIES. NOTARY PUBLIC. STATE TREASURER.

Overruled Cases. See TABLE, *ante*, p. xxi.

Parent and Child. See INTOXICATING LIQUORS, 1. SPECIFIC PERFORMANCE.

1. In a case involving the custody of an infant of tender years the court should make such an order as will be for the best interests of the child regardless of the wishes of the parties. *Schroeder v. State*..... 745
2. A father may, by abandonment, forfeit his right to the custody of his child. *Id.*

Parol Contracts. See WILLS.

Part Performance. See DAMAGES, 13.

Parties. See EXECUTIONS, 3. INSURANCE, 15. RECEIVERS. REVIEW, 33.

Two corporations may be impleaded as defendants, at the suit of a stockholder of one to obtain an accounting between them, where the officers of one have abused their trust in the interest of the other. *Fitzgerald v. Fitzgerald & Mallory Construction Co*..... 374

Partnership.

One cannot maintain an action at law against his partner to recover partnership money where there has been no settlement of accounts. *Lord v. Peaks*..... 891

Passengers. See RAILROAD COMPANIES.

Payment. See MECHANICS' LIENS, 6. VENDOR AND VENDEE.

As against strangers thereto, a receipt is incompetent evidence of the payment thereby acknowledged. *Ellison v. Albright*..... 93
Merrill v. Wright..... 355

Penal Statutes. See STATUTES, 4.

Penalty.

Where the sum stipulated in a contract as the measure of damages for a breach thereof will more than compensate the party not in default, the court will regard such sum as a penalty. *Gillilan v. Rollins*..... 540

Permanent School Fund. See SCHOOL FUNDS.

Personal Examination. See DAMAGES, 3.

Personal Injuries. See DAMAGES, 2. NEGLIGENCE, 11, 12.

Petition in Error. See REVIEW, 32.

Physicians. See ASSAULT. DAMAGES, 3, 4.

Pleading. See CONVERSION, 1. LIMITATION OF ACTIONS, 2, 3. MUNICIPAL CORPORATIONS, 5. NEGLIGENCE, 3. PRACTICE. REVIEW, 14. TAXATION, 4. TRIAL, 2.

1. The proof must be confined to the issues as made by the pleadings. *Thompson v. Wertz*..... 31
2. A party is estopped from denying the truth of averments in his own pleadings. *Foley v. Holtry*..... 563
3. The court may permit pleadings to be amended to conform to proof admitted without objection. *Whipple v. Fowler*..... 675
4. A ruling, not prejudical, upon a motion for a more specific statement affords no ground of error. *Phenix Ins. Co. v. Covey*..... 724
   German-American Ins. Co. v. Covey..... 728
5. Facts showing want of jurisdiction not disclosed by the petition may be pleaded as a distinct defense. *Anheuser-Busch Brewing Association v. Peterson*..... 897
6. An objection that plaintiff has not legal capacity to sue must be made by demurrer or special plea. *Clark v. Carey*.. 788
7. All material allegations of new matter in an answer must be taken as true where there is no reply. *National Lumber Co. v. Ashby*..... 292

Pledges.

1. The maker of notes which were procured by fraud of the payee, in an action against the former by one who holds the notes as collateral security, cannot require plaintiff to first exhaust other collateral. *Haas v. Bank of Commerce*..... 755
2. A pledgee of collateral notes who surrenders one of them and takes in exchange other security drawn to his own order is bound to account as if the note surrendered had been paid in full. *Id.*

Pledges—*concluded.*

3. A plaintiff who is pledgee of notes which were procured by fraud of the pledgor can only recover of the maker the unpaid portion of the debt the notes were given to secure. *Id.*

Practice. See DISMISSAL. HOMESTEAD, 3.

1. The lower court was sustained on review in a case where it appeared that defendants after answer day filed a demurrer without leave; that plaintiff moved for default; and that the court did not enter default but gave defendants leave to answer in two days. *Lichtenberger v. Worm,* 856
2. In reversing a decree in favor of plaintiff in an action to rescind a contract, where it is decided upon review that plaintiff is estopped to rescind, the cause may be remanded with leave to him to amend his petition and pray for damages. *Foley v. Holtry* 567

Principal and Agent. See INSURANCE 3, 8–11. MASTER AND SERVANT. REAL ESTATE AGENTS.

1. Under a contract for the erection of an improvement for a city, the contractor is the agent of the corporation. *City of Beatrice v. Reid* 214
2. A principal must adopt the acts of his agent as a whole, and will not be permitted to ratify that part of a contract which is beneficial and reject that which is not. *Morrow v. Jones* 868
3. An agent having the exclusive right to sell manufactured articles within a specific territory may maintain an action against his principal for loss of profits on goods sold by the latter in such territory in violation of the contract. *Russell v. Horn, Brannen & Forsyth Mfg. Co* 567

Principal and Surety. See BONDS. BUILDERS' BONDS. EXECUTIONS, 3.

1. A surety cannot recover of his principal on account of suretyship until he has paid some part of the latter's debt. *Minick v. Huff* 516
2. A court may restrain by injunction the sale, under execution, of a surety's property until that of a co-surety has been exhausted, where the latter agreed to save the former harmless. *Minick v. Brock* 512

Promises. See ACTIONS, 1.

Promissory Notes. See NEGOTIABLE INSTRUMENTS. PLEDGES.

Public Policy.

Expenses incurred by a construction company in making preliminary surveys, to induce municipal donations to a railway, are not recoverable as part of the cost of construction of the railway. *Fitzgerald v. Fitzgerald & Mallory Construction Co.* 376

Publication. See JUDICIAL SALES, 1.

Quieting Title.

1. A person claiming title may maintain an action to quiet it against any one claiming adversely. *Foree v. Stubbs.* 271
2. Purpose of act to quiet title (secs. 57–59, ch. 73, Comp. Stats.). *Id.*

Quo Warranto. See NOTARY PUBLIC, 2.

Railroad Companies. See CONTRACTS, 1, 3. DEATH BY WRONGFUL ACT. INSTRUCTIONS, 6. INSURANCE, 1–7. MASTER AND SERVANT, 1, 4–6. NEGLIGENCE, 12.

1. Sec. 3, art. 1, ch. 72, Comp. Stats., making railroad companies liable for injuries to passengers, applies to an action by a third person for damages sustained in consequence of an injury to a passenger. *Omaha & R. V. R. Co. v. Chollette,* 579
2. Construction of sec. 110, ch. 16, Comp. Stats., exempting railroad companies from liability for injuries to passengers on platforms of moving cars in violation of printed regulations of the company. *Id.* 580

Rape. See ASSAULT.

Ratification. See ESTOPPEL, 4. MECHANICS' LIENS, 5.

Real Estate Agents.

1. An agent who represents both parties in exchanging property cannot recover compensation from either unless his double employment was consented to by both. *Campbell v. Baxter* 729
2. One who pays an agent for making a sale may recover back the commission where the agent acted for and was to receive compensation from the vendee without the knowledge of the vendor. *Id.*
3. An agent employed to sell land so as to net the owner a fixed sum and receive for his services all purchase money in excess thereof, cannot recover commission where he offers to sell at the sum fixed and introduces to the owner one who accepts the offer. *Beatty v. Russell.* 321

Receipts. See PAYMENT.

Receivers. See REVIEW, 22.

A receiver of a corporation appointed in another state is not a necessary party in Nebraska to a suit brought by or against the corporation. *Fitzgerald v. Fitzgerald & Mallory Construction Co* 375

Records. See BUILDERS' BONDS. JUDICIAL RECORDS.

Registration. See MORTGAGES, 3.

Release. See MORTGAGES, 3.

Relief Departments. See INSURANCE, 1-7.

Religious Societies. See MUNICIPAL CORPORATIONS, 2.

Remittitur.

1. *Gordon v. Little* 253
2. Where the amount of excess of a verdict appears from the record of a judgment, permission may be given to file a remittitur as a condition of affirmance. *Haas v. Bank of Commerce* 765
   Wonderlick v. Walker 812
3. Where part of an award by a jury for damages for personal injuries is not supported by evidence, judgment rendered thereon will be reversed where defendant in error fails to remit the excess. *Fremont, E. & M. V. R. Co. v. Leslie* 159

Rents and Profits. See MORTGAGES, 8.

Repeal of Statute. See ABATEMENT.

Replevin. See ESTOPPEL, 5.

1. *Esterly Harvesting Machine Co. v. Pringle* 265
2. A house may be replevied where it is regarded by the parties as personalty. *McDaniel v. Lipp* 713
3. Where the finding is for plaintiff he is entitled to have his damages for the unlawful detention assessed. Judgment for damages cannot properly be rendered in absence of an assessment. *Gordon v. Little* 250
4. Right of a servant to possession of share of crop raised by him on a farm other than that of his employer during a term of employment under which the latter was entitled to services of the former. *Hale v. Sheehan* 104

Res Adjudicata.

An order overruling a motion to dissolve an attachment on the ground, *inter alia*, that the attached property is the homestead of defendants, is not conclusive as to the homestead right. *Quigley v. McEvony* 73

Rescission. See ESTOPPEL, 4. VENDOR AND VENDEE.

Res Gestæ. See CONSPIRACY. EVIDENCE, 4.

Revenue. See TAXATION.

Review. See APPEAL. BILL OF EXCEPTIONS. COSTS. CRIMINAL LAW, 4, 6. NEGLIGENCE, 9. NEW TRIAL. PRACTICE, 2. REMITTITUR.

1. A judgment will not be reversed unless error affirmatively appears from the record. *Weeks v. Wheeler*..... 200
2. The discretion of trial judges in setting aside verdicts as not sustained by evidence is greater than that of the appellate court. *Davis v. Hilbourn*..... 35
3. A ruling on a motion to submit questions for special findings will not be reviewed except for abuse of discretion. *Reed v. McRill*..... 206
4. The judgment will be reversed where the verdict was grossly inadequate. *McDonald v. Aufdengarten*..... 40
   Ellsworth v. City of Fairbury..... 881
5. Supreme court will not consider trial docket entries of the district judge to ascertain what was decided below. *Brown v. Ritner*..... 53
6. Where the transcript for review does not contain a copy of the judgment complained of, the petition in error will be dismissed. *Baker v. Kloster*..... 890
7. A transcript properly authenticated is conclusive evidence of the contents of the pleadings upon which the case was tried. *Phenix Ins. Co. of Brooklyn v. Rad Bila Hora Lodge*, 21
8. Harmless error is not ground for reversal. *McDonald v. Dodge County*..... 905
   Phenix Ins. Co. of Brooklyn v. Covey..... 724
   German-American Ins. Co. v. Covey..... 728
9. Admission of incompetent testimony in a trial without a jury is not reversible error. *Whipple v. Fowler*..... 675
10. Admission of irrelevant testimony in a case tried to a jury is prejudicial error where it may have influenced the verdict. *Thompson v. Wertz*..... 31
11. The supreme court, in absence of evidence to the contrary, will presume that the trial court acted with due regard for its duty to prevent dilatory and frivolous proceedings and to give defendants an opportunity to make their defense. *Lichtenberger v. Worm*..... 856
12. It will be presumed that a new trial was properly granted where error in the ruling is not pointed out and reference

Review—*continued.*

is made in assignments of the motion to matter not in the record. *Omaha & R. V. R. Co. v. Chollette* 579

13. Allegations of error as to rulings of trial court and verdict of jury will not be reviewed where the party aggrieved failed to present the questions below by a motion for a new trial. *Brown v. Ritner* 52
Scroggin v. National Lumber Co 195
Appelget v. Mc Whinney 253
Crooker v. Stover 693

14. Where an appeal from the county board has been tried in the district court without pleadings the supreme court will not examine the evidence on error to ascertain what issues were litigated. *Haskell v. Valley County* 235

15. Where parties do not file briefs or make oral arguments the judgment will be affirmed. *Miller v. Lewis* 692
Kilpatrick v. Cook 737

16. Points not argued will be deemed waived. *Gulick v. Webb*, 706

17. Attorneys in their briefs should not cast reflections upon the integrity of a district judge. *Foley v. Holtry* 563

18. Allegations of error in admitting and refusing evidence will not be considered in absence of a bill of exceptions. *Haskell v. Valley County* 234

19. An assignment of error that the verdict of the jury, or the finding of the court, is not supported by the evidence will not be considered unless the evidence is before the court by a proper bill of exceptions. *Appelget v. Mc Whinney* 253
Morrow v. Jones 868

20. Affidavits used on the hearing of a motion will not be considered on review unless preserved by a bill of exceptions. *National Lumber Co. v. Ashby* 292

21. An order denying a new trial asked on the ground of newly-discovered evidence will not be reviewed where the evidence on the hearing of the motion has not been preserved by a bill of exceptions. *Id.*

22. In absence of a bill of exceptions the averments of a petition for a receiver must be taken as true where they have not been denied except by affidavits used as evidence. *Lowe v. Riley* 813

23. Instructions will not be reviewed unless the record shows they were excepted to. *Rea v. Bishop* 202
Bloedel v. Zimmerman 695

24. An allegation of error as to refusing an instruction

Review—*continued.*

omitted from the transcript for review will not be considered. *Wiseman v. Ziegler* 886

25. The objection that the court failed to instruct the jury upon the law of the case is not raised by an assignment that there was error in giving instructions, the instructions being correct. *Davis v. Hilbourn* 36

26. Instructions should be considered as a whole and not by detached paragraphs. If found correct when thus considered, no error can be predicated upon the action of the court in giving them. *Love v. Putnam* 86

27. Judgments based on findings of fact will not be disturbed unless clearly wrong or against the weight of evidence.
Davis v. Hilbourn 35
Thomas v. Long 55
Quigley v. McEvony 74
Hunt v. Huffman 244
Vandecar v. Johnson 577
Wonderlick v. Walker 806

28. Where the evidence is conflicting, and the verdict is sufficiently supported, the judgment will not be set aside.
Johnson v. Guss 19
Union P. R. Co. v. Cobb 120
Kirkendall v. Davis 286
Crooker v. Stover 693
Storz v. Riley 822

29. When the existence of a fraudulent motive was the question of fact submitted to a jury, its verdict will not be disturbed if sustained by competent evidence. *Melick v. Varney* 105

30. An assignment of error as to giving *en masse* certain instructions will not be considered further than to ascertain one of them was properly given. *Meyer v. Union Bag & Paper Co* 67
Havens v. Grand Island Light & Fuel Co 157
City of Beatrice v. Reid 214
Haskell v. Valley County 237
Gillilan v. Rollins 543
Wonderlick v. Walker 806

31. An assignment that the trial court erred in refusing to give a group of instructions asked will be considered no further than to ascertain one of them was properly refused. *Rea v. Bishop* 202
Stephenson v. Flagg 371
Minick v. Huff 519

Review—*concluded.*

32. A plaintiff in error should state specifically in his petition what action of the district court he claims was erroneous. Rulings on evidence will not be reviewed unless pointed out by an assignment of error. *Haskell v. Valley County*... 236
Kirkendall v. Davis... 285
Minick v. Huff... 516
Gillilan v. Rollins... 543
Burlington Voluntary Relief Department v. White... 554
Russell v. Horn, Brannen & Forsyth Mfg. Co... 570
Bloedel v. Zimmerman... 697
Clark v. Carey... 781
Wonderlick v. Walker... 806
Wiseman v. Ziegler... 887

33. A joint assignment not good as to all plaintiffs in error will be overruled as to all. *Gordon v. Little*... 250

34. An assignment alleging error in overruling a motion for a new trial is insufficient if it fails to specify the ground of the motion to which it applies. *Wiseman v. Ziegler*..... 887

35. The evidence will not be reviewed to ascertain whether it sustains the verdict where the question has not been specifically raised by the petition in error. *Id.*

36. Assignments of error not presented to the district court on error from a justice of the peace will not be considered in the supreme court in reviewing a judgment of affirmance. *Weeks v. Wheeler*... 200

Revivor. See MORTGAGES, 7.

Sales. See DAMAGES, 9, 10. ESTOPPEL, 5. FALSE REPRESENTATIONS.

1. Whether the rule, that delivery of goods to a carrier consigned to purchaser is a delivery to the latter, is applicable in any case depends upon the facts and circumstances and contract of sale. *Havens v. Grand Island Light & Fuel Co*... 153

2. Case where the purchaser accepted a consignment and was not estopped from alleging the inferior quality of the goods as a defense in a suit for the purchase price. *Id.*

School Districts.

1. A district school board, under the law in force prior to April 5, 1893, had no power to call a bond election until a petition signed by at least one-third of the voters of the district had first been presented. *Fullerton v. School District*... 593

2. Where the law requires a petition of a certain character

School Districts—*concluded.*

in order to confer power on a board to call a bond election, the determination by the board of the sufficiency of the petition is not conclusive, but its sufficiency is open to judicial inquiry. *Id.* 594

School Funds.

1. By the provision of sec. 9, art. 8, of the constitution, the state is made the trustee of the permanent school fund. *State v. Bartley* 278
2. If, as trustee for the permanent school fund, the state desires to invest the same in state warrants, it must do so on terms of equality with other investors. *Id.*
3. A holder of general fund warrants is not required to receive in payment thereof money known to belong to the permanent school fund. *Id.*

Set-Off. See NEGOTIABLE INSTRUMENTS, 3, 4.

1. A set-off in an action on contract must be a cause of action arising upon contract or ascertained by decision of a court. *Burge v. Gandy* 149
2. A set-off by defendant must be for such a claim as he could have maintained in an action against plaintiff at the time the latter commenced his suit. *Id.*
3. The owner of a domestic judgment may make it the basis of a set-off in a suit brought against him to foreclose a mortgage owned by a party liable on such judgment. *Id.*

Sheriffs and Constables. See EXECUTIONS, 2, 3. TRESPASS.

Signatures. See TRIAL, 8.

Special Findings. See NEGLIGENCE, 8. TRIAL, 6, 7.

Special Legislation. See CONSTITUTIONAL LAW, 1, 2.

Specific Performance.

An adopted child who performed her part of an oral contract under which she was entitled to all the property of her adopted parents at their death was decreed by specific performance to be the owner of real estate they failed to convey to her by deed or will. *Kofka v. Rosicky* 328

State and State Officers. See STATE TREASURER.

State Treasurer.

1. A legislative act for the transfer of the permanent school fund to the general fund is no protection to the treasurer, and he is liable to the school fund for all money disbursed in pursuance of such an act. *State v. Bartley* 278

State Treasurer—*concluded.*

2. It is the duty of the treasurer, on demand of the holder, to register state warrants in the order presented, when not paid for want of funds. *Id.*

Statute of Frauds. See ACTIONS, 1. CHATTEL MORTGAGES, 2, 3. WILLS.

1. The verbal promise of A to B to indemnify him if he will become surety for C for a debt of the latter to D is not a promise on the part of A to answer for the debt of C, and is not within the statute. *Minick v. Huff*..... 516
2. A proposition by a mortgagee's attorney, to allow the mortgagor to redeem at any time upon making his client a deed for the premises, is not within the statute even where the proposition was made without authority from the mortgagee. *Morrow v. Jones*..... 867

Statute of Limitations. See LIMITATION OF ACTIONS. TAXATION, 3.

Statutes. See CONSTITUTIONAL LAW, 1, 2. MUNICIPAL CORPORATIONS, 2. RAILROAD COMPANIES. STATE TREASURER. TABLE, *ante*, p. xlv.

1. Courts will not hesitate to declare acts of the legislature invalid when they are found to be in conflict with the constitution. *State v. Bartley*..... 277
2. The fact that a statute is within the letter of the constitution is not sufficient. It must also be in substantial compliance with the spirit and purpose thereof. *Id.*
3. An act which violates the true meaning and intent of the constitution, and is an evasion of its general, express, or plainly implied purpose, is as clearly void as if in express terms prohibited. *Id.*
4. Where the object of a statute is clearly to inflict punishment on a person for doing what is prohibited, or failing to do what is commanded, it is penal in its character. *Globe Publishing Co. v. State Bank of Nebraska*..... 175
5. Statutes should be so construed as to give effect to the intention of the legislature. There is no room for construction where the statute is plain and unambiguous. *Shellenberger v. Ransom*..... 631

Stay. See JUDGMENTS, 1.

Stockholders. See CORPORATIONS.

Streets. See MUNICIPAL CORPORATIONS, 7, 8.

Summons.

1. The provision of sec. 81 of the Code, for personal service out of the state, is designed as a substitute for constructive service by publication in actions such as those enumerated in sec. 77. *Anheuser-Busch Brewing Association v. Peterson*.. 897
2. Where the purpose of an action is to determine the personal rights of the parties, service within the state is essential to jurisdiction. *Id.*

Supersedeas. See JUDGMENTS, 1.

Suretyship. See BONDS. HUSBAND AND WIFE, 2, 3. PRINCIPAL AND SURETY.

Surface Waters.

1. A proprietor may not collect surface waters on his estate into a ditch or drain and discharge them in a volume on the lands of his neighbor. *Lincoln Street R. Co. v. Adams*, 737
2. A land owner, who is free from negligence, in making upon his premises necessary and lawful improvements which cause surface water to flow upon the land of an adjoining proprietor, is not answerable to the latter for damages. *Anheuser-Busch Brewing Association v. Peterson* 898

Taxation. See MUNICIPAL CORPORATIONS, 2.

1. The provision of the revenue law, by which taxes are declared to be a perpetual lien, is designed for the benefit of the state and municipalities. *Foree v. Stubbs*..... 271
2. Purchasers of property at tax sales must look to the remedy prescribed by statute. *Id.*
3. The limitation of the revenue law with respect to the period within which an action must be brought to enforce a lien does not relate to the remedy merely, but to the cause of action. *Id.*
4. In foreclosure neither a levy nor assessment will be presumed from the introduction in evidence of a receipt of the treasurer for the taxes or his certificate of purchase at tax sale, where the existence of the assessment and levy is in issue. *Merrill v. Wright*..... 351

Tenancy in Common.

A land owner and cropper are tenants in common of crops cultivated by the latter for a share thereof where the contract between them does not create the relation of landlord and tenant. *Reed v. McRill* 206

Tender. See INSURANCE, 2.

Time. See NEW TRIAL, 3.

Torts. See CORPORATIONS, 12. EXECUTIONS, 3. INTOXICATING LIQUORS, 1. TRESPASS.

A corporation is liable for torts of its officers. *Fitzgerald v. Fitzgerald & Mallory Construction Co.* 375

Transcripts. See REVIEW, 6, 7, 24.

Treasurer. See COUNTIES, 4.

Trespass.

1. One who delivers to an officer a valid writ, without directions as to the manner of its service, will not be liable for torts committed by the latter while engaged in the execution thereof. *Murray v. Mace* 60
2. One who, with knowledge of the facts, advises an abuse of a process of court by an officer, such as a trespass against the person or property of another, or subsequently ratifies such unlawful act, will be deemed a wrong-doer from the beginning. *Id.*

Trial. See CRIMINAL LAW. DEPOSITIONS. NEGLIGENCE, 3. NEW TRIAL. PLEADING, 3. PRACTICE. REPLEVIN, 3. REVIEW, 9, 10, 23, 25. VERDICT. WITNESSES.

1. Review of rulings on evidence. *Phenix Ins. Co. of Brooklyn v. Rad Bila Hora Lodge* 21
2. A cause should be tried upon the issues formed by the pleadings. *Clarke v. Kelsey* 766
3. Discussion of alleged misconduct of attorneys in opening case and examining witness. *Union P. R. Co. v. Cobb* 124
4. Defendant is entitled to open and close where the defense is insanity in an action on contract. *Rea v. Bishop* 202
5. Upon motion to direct verdict for defendant every allegation of the petition, in support of which there is testimony, should be considered as proved. *Union Stock Yards Co. v. Conoyer* 617
6. Submission of questions for special findings is discretionary with trial court. *Reed v. McRill* 206
7. The requirement that special findings be made by the jury is a matter of discretion with the trial court, and the refusal to require a special finding requested does not ordinarily afford a sufficient reason for reversal. *Union P. R. Co. v. Cobb* 120
8. In ejectment, where the genuineness of a signature to a deed is in issue, it is error for the jury to take and keep in their room during the consideration of the case a note signed by the alleged forger, the note not having been introduced in evidence. *La Bonty v. Lundgren* 312

Trover and Conversion. See CONVERSION.

Trusts. See SCHOOL FUNDS, 1.

Sufficiency of evidence to support a finding that a child's title to land was not held in trust for her father. *Hogeboom v. Robertson* 795

Usury.

1. Evidence *held* insufficient to sustain a verdict finding usury in the transaction. *Minneapolis Harvester Works v. Kaessner* 716
2. Every renewal of a note given for a usurious loan of money is subject to the defense of usury between the original parties and purchasers with notice. *McDonald v. Aufdengarten* 40
3. Evidence *held* sufficient to sustain plea of usury, and that plaintiff was not an innocent purchaser without notice. *Id.*
4. In an action by the indorsee of a note, where the defense is usury, evidence that he knew the payee usually loaned money at usurious rates is competent as tending to prove that the note was purchased with notice of its infirmities. *Id.*

Vendor and Vendee. See DEEDS. ESTOPPEL, 4. MORTGAGES, 4.

A vendee, who failed to perform, cannot maintain an action to recover payments already made where the vendor rescinded the contract according to its terms. *Patterson v. Murphy* 818

Venue. See BASTARDY, 3.

Verdict. See CRIMINAL LAW, 2.

A verdict for a specific sum and interest will sustain a judgment for the sum named. *Wiseman v. Ziegler* 886

Voluntary Assignments. See CHATTEL MORTGAGES, 4.

A bill of sale executed in good faith to secure a *bona fide* debt is not void as constituting a voluntary assignment. *Meyer v. Union Bag & Paper Co.* 67

Waiver. See CRIMINAL LAW, 5. DAMAGES, 4. INSURANCE, 3.

Under facts recited in opinion the question whether parties to a written contract waived its terms is one of fact to be determined by the jury. *Russell v. Horn, Brannen & Forsyth Mfg. Co.* 567

Warrants. See SCHOOL FUNDS.

Warranty. See CONFLICT OF LAWS, 2.

Water and Water-Courses. See SURFACE WATERS.

Wells. See NUISANCE.

Wills.

An adopted child who has performed her part of the contract may enforce by specific performance her rights under an oral agreement of her adopted parents to will her their property. *Kofka v. Rosicky* 328

Witnesses. See DEPOSITIONS. EVIDENCE. NEW TRIAL, 4. NUISANCE, 5.

Written or oral statements of a witness must be called to his attention before they can be used to impeach him. *Thompson v. Wertz*..... 31

Words and Phrases.

"Ascertained." *Globe Publishing Co. v. State Bank of Nebraska.* 176

Writs. See EXECUTIONS. SUMMONS. TRESPASS.