Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub/
11/08/2026 02:20 PM CST

E. O. KRETSINGER V. DANIEL WEBER ET AL.

FILED JANUARY 15, 1895. No. 6013.

Attorney and Client: DISMISSAL: REVIEW. An attorney commenced an action for his client in the district court, and on the day set for the trial of the case his client did not appear, and the court, on motion of defendants, dismissed the action. Afterwards the attorney filed a motion, the object of which was to secure a reinstatement of the cause and to be allowed to intervene and prosecute the action for the purpose of obtaining his fees on the ground that the defendants had effected a secret settlement with the plaintiff and paid her a considerable sum of money to dismiss the case or remain away at the time of trial, and thus procure the dismissal. The motion was supported by affidavits, to which the defendants were allowed to, and did, file counter-affidavits. The court, on hearing, overruled the motion. *Held*, Upon examination of the showings made in favor of and against the allowance of the motion, that the ruling of the district court was not erroneous.

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

E. O. Kretsinger, pro se, cited: *Smith v. Chicago, R. I. & P. R. Co.*, 56 Ia., 720; *Kansas P. R. Co. v. Thatcher*, 17 Kan., 92; *Griggs v. White*, 5 Neb., 467; *Oliver v. Sheeley*, 11 Neb., 521; *Reynolds v. Reynolds*, 10 Neb., 574; *Aspinwall v. Sabin*, 22 Neb., 73; *Elliott v. Atkins*, 26 Neb., 403; *Justice v. Justice*, 115 Ind., 208; *Andrews v. Morse*, 12 Conn., 444; *Boyle v. Boyle*, 106 N. Y., 654.

Alfred Hazlett, contra.

HARRISON, J.

April 23, 1892, an action was commenced in the district court of Gage county by one Armilda Dean, for herself and her minor children, against Daniel Weber as principal, and other parties named in the petition as defendants, his

sureties on a bond given by him on obtaining license to sell intoxicating liquors in the village of Barnston, to recover damages for the breach of the condition of the bond, by reason of the alleged sales, giving, or furnishing liquor to her husband, Warren W. Dean, at divers and many times. It will not be necessary to further set out the cause for complaint, as the above sufficiently shows the nature of the action. E. O. Kretsinger, plaintiff in error, was attorney for plaintiff in the district court, and at the time the action was instituted filed, with other papers, the following notice:

"In the District Court of Gage County.

"ARMILDA DEAN, PLAINTIFF, v. DANIEL WEBER, C. WEBER, W. F. KAISER, HENRY W. BERTRANDS, AND JOHN STROMER, DEFENDANTS.	Notice of Attorney's Lien.

"The above defendants and other interested parties will take notice that I claim an attorney's lien in this cause in the sum of $300, and that this cause cannot be settled or dismissed without my rights being protected.

"E. O. KRETSINGER,
"*Attorney for Plaintiff.*

"Filed April 23, 1892. R. W. LAFLIN,
"*Clerk District Court.*"

An answer was filed by Daniel Weber, and it appears from the record that on November 11, 1892, the cause was set for trial on November 15, 1892, at which date it was called for trial and the plaintiff did not appear, except as we gather from the briefs she was represented by her attorney, Mr. Kretsinger. The defendants were ready for and demanded a trial and the case was on their motion dismissed for want of prosecution, without prejudice to a new action, at cost of plaintiff. On November 19 following, the attorney, Mr. Kretsinger, filed a motion, the object of which was to have the judgment of dismissal set aside and

allow him to become a party to the case and prosecute for the purpose of enforcing his lien for fees.

The motion was supported by an affidavit in which it was stated, among other things, that the affiant had received no fees or compensation for his services in the case, and further stated, upon information and belief, that the defendants had, secretly, and for the purpose of defeating affiant's right to his fee, compromised and settled with plaintiff and paid her a large sum of money, a part of the agreement for such settlement being that plaintiff should dismiss the cause or not attend the trial. The defendants were allowed to file counter affidavits, and the court, after an examination of all the affidavits filed by either party, overruled the motion, and to review this ruling the case has been brought to this court by petition in error on the part of the attorney, E. O. Kretsinger.

The right of plaintiff in error to have the judgment of dismissal vacated and the action reinstated was based upon the facts that the defendants, by a secret settlement and compromise with Mrs. Dean, had procured her non-attendance at the trial. The trial judge determined that the showing made was insufficient to warrant him in setting the judgment aside; and after an examination of all the evidence adduced on the hearing of the application, we do not think that he was wrong, and his disposition of the case is therefore

AFFIRMED.

E. A. CUTTING ET AL. V. J. K. BAKER.

FILED JANUARY 15, 1895. No. 5199.

Trial: ADMISSION OF EVIDENCE. Upon an offer to prove certain facts if a pending question is permitted to be answered, such question should be so clearly pertinent that a favorable relevant

answer thereto must obviously tend to establish the existence of some fact material to the issues being tried. If these essentials are lacking in the question propounded they cannot be supplied by mere offers to make proofs foreign to the scope of such question.

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

Hamer, Sinclair & Brown, for plaintiffs in error, cited: *White v. Woodruff*, 25 Neb., 797; *Smith v. Boyer*, 29 Neb., 76; *Newlean v. Olson*, 22 Neb., 717; *Hodgkins v. Hook*, 23 Cal., 581; *Warner v. Carlton*, 22 Ill., 415; *Pyle v. Warren*, 2 Neb., 241; *Marsh v. Burley*, 13 Neb., 262; *Brunswick v. McClay*, 7 Neb., 138; *Severence v. Leavitt*, 16 Neb., 439; *Lorton v. Fowler*, 18 Neb., 224; *Densmore v. Tomer*, 11 Neb., 118; *City of Lincoln v. Holmes*, 20 Neb., 39; *Campbell v. Holland*, 22 Neb., 588.

Greene & Hostetler, *contra*, cited: *Ticknor v. McLelland*, 84 Ill., 471; *Bull v. Griswold*, 19 Ill., 631; *Thompson v. Wilhite*, 81 Ill., 356; *Johnson v. Walker*, 23 Neb., 736; *Bartling v. Behrends*, 20 Neb., 211; *Tootle v. Dunn*, 6 Neb., 93; *Western Ins. Co. v. Putnam*, 20 Neb., 331; *Brown v. Herr*, 21 Neb., 113; *Clemens v. Brillhart*, 17 Neb., 335; *Bradford v. Bradford*, 60 Ia., 201; *Lavassar v. Washburne*, 50 Wis., 200; *Jack v. Brown*, 60 Ia., 271; *Collins v. Jackson*, 19 N. W. Rep. [Mich.], 947.

RYAN, C.

The personal property mortgaged to the defendant in error was levied upon by E. A. Cutting by virtue of an execution issued for the satisfaction of a judgment in favor Leroy Drake against Joseph M. and Fannie M. Taylor. For the possession of this personal property the mortgagee commenced this action in the district court of Buffalo county, wherein he obtained judgment as prayed.

On error the only assignments made will now receive consideration in the order in which they occur in the petition in error. Mr. Henninger testified that the oats included in the mortgage were threshed by him; that Mr. Taylor paid him for doing this threshing, and asked for a receipt showing payment by Baker through him, because as, he said, Drake and those fellows had got him and his wife kind of fixed up and they would have to watch them fellows a little. On motion this testimony was stricken out on the ground that it was immaterial, irrelevant, and incompetent. This motion was properly sustained, for the reason that the mortgagee was not bound by statements of which there is no pretense that he had any knowledge. The Taylors had been advanced money by Mr. Baker and for that money had given the chattel mortgage which in this proceeding plaintiffs in error were seeking to have treated as invalid. After the giving of the mortgage to Baker the horses of the Taylor family were taken under another chattel mortgage and Mr. Baker was compelled to furnish horses necessary to do the threshing in question, and was also under the necessity of making payment of the bill for threshing. The evidence excluded, therefore, had no tendency even to show fraud on the part of the Taylors, much less did it reflect upon the motives of Mr. Baker in making the payment in question.

Again, it is urged that there was error in excluding the proposed evidence of James Stevens. He had testified that in the spring or summer of 1888 he had a conversation with Joseph M. Taylor in relation to the crop in controversy. He was then asked to state what that conversation was. An objection to this question as immaterial, irrelevant, and incompetent, was sustained. Thereupon counsel for plaintiffs in error made an offer to prove by this witness that Joseph M. Taylor came to witness and asked him to take a mortgage upon his crop to protect it from the creditors of said Taylor. This offer was rejected, to which

an exception was taken. There was pending no question when this offer was denied, consequently the offer stood by itself. The mortgage of Mr. and Mrs. Taylor to Mr. Baker was made August 1, 1888, so that if the offer was at all governed by the question propounded, a conversation might have been described which had taken place between Stevens and Mr. Taylor as early as in March preceding. This would have been entirely too liberal a method of impeaching the mortgage to Mr. Baker. If a conversation did take place of the nature indicated, the time of its occurrence could certainly have been located nearer August first than was proposed. If not, the evidence itself was immaterial, and this defect in the question could not be cured by a mere offer of proof of material facts.

There are complaints of instructions given, but no reason exists why they should be examined in detail, for they correctly embody principles applicable and usually elucidated in this class of cases. The evidence was amply sufficient to sustain the verdict of the jury. The judgment of the district court is

AFFIRMED.

OMAHA FIRE INSURANCE COMPANY V. DIERKS & WHITE.

FILED JANUARY 15, 1895. No. 5853.

1. **Review:** ASSIGNMENTS OF ERROR: NEW TRIAL. An assignment in a petition in error, that the district court erred in not granting a litigant a new trial on account of "accident or surprise," must be sustained by affidavits showing the truth of the assignment. (Sec. 317, Code of Civil Procedure.)

2. ——: ——: ——. And such affidavits must be filed in, and called to the attention of, the court below and incorporated

in the bill of exceptions brought here in order to enable this court to review the ruling of the district court on the motion for a new trial.

3. ———: QUESTIONS NOT PRESENTED BELOW. The supreme court as an appellate tribunal is authorized by law to review the action of the district courts, but in doing so it can pass upon no question which was not presented to and passed on by said courts; nor will this court, for the purpose of determining whether a district court came to a correct conclusion, examine any evidence which was not presented to that court.

4. **Instructions:** EXCEPTIONS: REVIEW. The rule of this court announced by CROUNSE, J., in *McReady v. Rogers*, 1 Neb., 124, "When the charge of a court involves more than one single proposition, a general exception to it will be unavailing; and if any portion of it be correct, the whole will stand. Each specific portion of it which is claimed to be erroneous must be distinctly pointed out, and specifically excepted to," re-examined and reaffirmed.

5. **Insurance:** MORTGAGES: DISCHARGE OF LIEN BEFORE LOSS. Where an insured incumbers his personal property by a chattel mortgage after such property has been insured, and contrary to the provisions of the insurance policy, he may nevertheless recover the value of the insured property destroyed if at the time of its destruction it was free from the lien of the mortgage. *State Ins. Co. v. Schreck*, 27 Neb., 527, reaffirmed.

6. ———: NOTICE OF LOSS: ACTION ON POLICY: PLEADING AND PROOF. A fire insurance policy provided that in case of loss the insured should forthwith give the insurance company written notice thereof. The insured did not himself give such notice; but the insurer soon after the destruction of the insured property by fire received notice in writing thereof from one of its agents residing in the vicinity where the loss occurred, and through whom the insurance was placed, and refused to pay the loss on the ground that the policy at the date of the fire was not in force. *Held*, (1) That the insurance contract should not be so technically construed as to compel the insured to furnish information to the insurer which it already possessed; (2) that the verdict of the jury did not lack evidence to support it because the allegation of the insured in his petition that he had notified the insurance company of the loss was not proved. *Edwards v. Travelers' Life Ins. Co.*, 20 Fed. Rep., 661; *State Ins. Co. v. Schreck*, 27 Neb., 527, and *Sandwich Mfg. Co. v. Leary*, 40 Neb., 226, followed.

7. ———: ———: WAIVER. The right of an insurance company to notice of loss is a right which the company may waive; and when the insurer denies all liability for the loss and refuses to pay the same, and places such denial and refusal upon grounds other than the failure of the insured to give notice of the loss, such denial and refusal avoid the necessity of such notice. *Cobb v. Ins. Co. of North America*, 11 Kan., 93, followed.

8. ———: ———: ———: PLEADING AND PROOF. An insured in a suit on an insurance policy alleged in his petition that, as provided by the terms of the policy, he gave notice of the loss in writing to the insurer and gave notice of said loss to the agent of the insurer nearest to where the loss occurred. The insurance company by its answer expressly denied this averment of the petition and pleaded as an affirmative defense to the action that the insured, contrary to the provisions of the insurance contract, and without the knowledge and consent of the insurer, incumbered the insured property by a chattel mortgage, and that said mortgage was a lien on the insured property at the time it was destroyed by fire; and that by reason of such conduct of the insured the policy was not in force at the date of the destruction of the insured property. *Held*, (1) That the defense that the policy was not in force at the time the loss occurred was inconsistent with the defense of want of notice of the loss; (2) that the insurance company, by placing its defense to the action on the ground that the policy sued upon was not in force at the time of the destruction of the property, waived the provision in the policy which required the insured to give notice of the loss and made that issue wholly immaterial.

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

The opinion contains a statement of the case.

Jacob Fawcett, for plaintiff in error

Where the policy requires written notice of the loss to be furnished, and also requires the furnishing of proofs of loss, both are conditions precedent to the plaintiff's right to recover. (*Cornell v. Milwaukee Mutual Ins. Co.*, 18 Wis., 407; *American Central Ins. Co. v. Hathaway*, 23 Pac. Rep. [Kan.], 428; *Farmers Ins. Co. v. Frick*, 29 O. St., 466;

Home Ins. Co. v. Lindsey, 26 O. St., 348; *Forest City Ins. Co. v. School District*, 4 Brad. [Ill.], 145; *Blossom v. Lycoming Fire Ins. Co.*, 64 N. Y., 162; *German Ins. Co. v. Fairbank*, 32 Neb., 757.)

M. F. Harrington, contra, cited: *State Ins. Co. v. Schreck*, 27 Neb., 527; *McReady v. Rogers*, 1 Neb., 124; *Strader v. White*, 2 Neb., 362; *Brooks v. Dutcher*, 22 Neb., 644; *Harden v. Atchison & N. R. Co.*, 4 Neb., 521; *Baker v. Bailey*, 16 Barb. [N. Y.], 54; *Fish v. Redington*, 31 Cal., 194; *Robbins v. Lincoln*, 12 Wis., 8; *Dillon v. Russell*, 5 Neb., 484; *Williams v. Evans*, 6 Neb., 216; *Payne v. Briggs*, 8 Neb., 75; *Hansen v. Lehman*, 18 Neb., 564; *Lynch v. State*, 30 Neb., 740; *Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb., 542; *Cobb v. Ins. Co. of North America*, 11 Kan., 97; *Phenix Ins. Co. v. Bachelder*, 32 Neb., 490; *California Ins. Co. v. Gracey*, 24 Pac. Rep. [Col.], 577; *Taylor v. Merchants Fire Ins. Co.*, 9 How. [U. S.], 390.

RAGAN, C.

Dierks & White brought this suit in the district court of Holt county, against the Omaha Fire Insurance Company, to recover the value of certain live stock which they alleged they owned, which had been insured against loss or damage by fire by the insurance company, and which live stock had been destroyed by fire. Dierks & White had a verdict and judgment, and the insurance company brings the case here for review.

1. The first error assigned is "irregularity in the proceedings of the court and abuse of discretion, by which the defendant was prevented from having a fair trial." This assignment is too indefinite for consideration and indeed is not referred to in the briefs of counsel for the insurance company.

2. The second error is assigned in the following lan-

guage: "Irregularity in the proceedings of the jury." This assignment is also too indefinite for review.

3. The third assignment is "accident and surprise which ordinary prudence could not have guarded against in the evidence of the witness Dierks in testifying to a verbal release of a part of the property from the mortgage." This is one of the causes for a new trial permitted by the third subdivision of section 314 of the Code of Civil Procedure; but section 317 of the same Code provides that such a ground for a new trial must be sustained by affidavits showing the truth of the ground alleged. This means that the affidavits showing the truth of the facts alleged for a new trial on the grounds of accident or surprise must be filed in and brought to the attention of the court below. The record contains no affidavit filed by the insurance company in the district court in support of a new trial on the grounds of accident or surprise. Affidavits which tend to show that the insurance company was taken by surprise in the trial of the case below have been filed in this court, but we cannot consider them. This as an appellate court is authorized by law to review the action of the district courts, but in doing so this court can pass upon no question which was not presented to and passed upon by the district court; nor will this court, for the purpose of determining whether the district court came to a correct conclusion, examine any evidence which was not presented to that court.

4. The fourth assignment of error is "excessive damages, appearing to have been given under the influence of passion or prejudice;" and the fifth assignment is "error in the assessment of the amount of recovery, it being in excess of the amount the plaintiffs were entitled to under the evidence." Neither of these assignments are referred to in the briefs of counsel for the insurance company and are therefore considered waived.

5. The eighth assignment is "errors of law occurring at the trial and excepted to at the time by the defendant."

This assignment is too indefinite and uncertain for review.

6. The ninth assignment is "the court erred in each of the instructions given upon its own motion, and in each of the instructions given at the request of the plaintiffs, to which exception was taken at the time." The charge of the district court contains twelve paragraphs or instructions, and the exception noted to these instructions by counsel for the insurance company is in the following language: "Comes now the defendant and excepts to the instructions numbered from one to seven inclusive given to the jury by the court on the trial of said cause." In *McReady v. Rogers*, 1 Neb., 124, the exception taken to the charge of the court was in the following language: "To all [of which charge,] and each and every part thereof," the defendant, by his counsel, then and there excepted. CROUNSE, J., speaking for the court of this exception, said: "This firing at the flock will not do. It is a well established point of practice that when the charge of the court involves more than one single proposition a general exception to it will be unavailing, and if any portion of it be correct the whole will stand. Each specific portion of it which is claimed to be erroneous must be distinctly pointed out and specifically excepted to." The rule as announced in that case has, so far as we know, never been consciously deviated from by this court, but has been time and again reaffirmed. Here the assignment of error is that the court erred in giving each—every one—of the instructions given by it on its own motion, but no attempt was made to except to more than seven of them, and since the assignment is in effect that the court erred in giving all the instructions which it did give, and all the intructions were not excepted to, the assignment of error cannot be considered for that reason.

7. The tenth assignment is "the court erred in giving each of the instructions given at the request of the plaintiff below." If the district court gave any instructions at the

request of Dierks & White they do not appear in the record. The only instructions in the record are those given by the court upon its own motion.

8. The sixth, seventh, and eleventh assignments of error are that the verdict is not sustained by the evidence, that the verdict is contrary to law, and that the court erred in overruling the motion of the insurance company for a new trial. The verdict of the jury is not contrary to the law, and the court did not err in overruling the motion for a new trial, if the verdict is sustained by sufficient evidence.

Dierks & White pleaded in their petition that about the 5th of February, 1891, as provided by the policy, they gave notice of the loss in writing to the insurance company, and gave notice of said loss to one Wallace, the agent of the defendant nearest to where the loss occurred. This allegation of the petition was expressly denied by the insurance company. The insurance company, as an affirmative defense to the action, pleaded that the insurance policy provided that if the insured property should be sold or incumbered without the consent of the insurance company indorsed on the policy, that the policy should thereupon become void; and that before the fire Dierks & White, without the knowledge or consent of the insurance company, executed a chattel mortgage upon the property; and that "said mortgage was a valid and subsisting lien upon said property so insured and upon the property claimed to have been destroyed by said fire at the time of the fire on February 2, 1891." The reply of Dierks & White to this defense of the insurance company was as follows: "Denies the plaintiff mortgaged the property destroyed by fire, * * * and say that the policy sued upon covered personal property only and no particular property was insured by the policy sued on, * * * and denies that there was a valid or subsisting lien upon said property or any portion thereof at the time the same was destroyed by fire."

The issues of facts made by the pleadings were: (*a*)

The value of the property destroyed; (*b*) whether Dierks & White gave notice of the fire to the insurance company; (*c*) whether Dierks & White mortgaged the insured property without the consent of the insurance company prior to the fire; (*d*) whether the mortgage was a lien upon the insured property at the time it was destroyed by fire.

The evidence sustains the value placed on the property by the jury; and the evidence in the record shows beyond dispute that the insured property or a part of it which was destroyed by fire was previous to its destruction incumbered by a chattel mortgage; and the evidence in the record is sufficient to support the finding of the jury that such insured property at the time of its destruction by fire had been released from the lien created by the mortgage.

In *State Ins. Co. v. Schreck*, 27 Neb., 527, it was held that where personal property was incumbered by a chattel mortgage after such property had been insured, and contrary to the provisions of the insurance policy, the insured could nevertheless recover for the value of the property destroyed if at the time of the property's destruction it was free from the incumbrance. We adhere to and reaffirm the doctrine of that case.

The eminent counsel for the insurance company does not controvert, as we understand him, the correctness of the decision in *State Ins. Co. v. Schreck, supra*, but his contention is that it was incompetent for Dierks & White under the issues made by the pleadings to prove that the mortgage made upon the insured property had been released. Counsel says that Dierks & White, instead of denying the execution of the mortgage and denying that the mortgage was a lien upon the insured property at the time of its destruction, should have pleaded by way of confession and avoidance that the mortgage was executed as alleged by the insurance company, but that prior to the destruction of the property by fire the mortgage had been

released. Assuming for the purposes of this case the correctness of the argument of counsel, the answer to it is that he has not assigned in his petition in error here that the court erred in admitting the evidence offered by Dierks & White to show that the destroyed property was unincumbered at the time of its destruction. If such evidence was incompetent under the pleadings, counsel for the insurance company should have objected to its introduction on that ground, and then specifically assigned the ruling of the district court in admitting such evidence in his petition in error.

We have now to deal with the issue made by the pleadings, whether Dierks & White notified the insurance company of the destruction of the property by fire. The record does not disclose that Dierks & White themselves notified the insurance company, or its agent, that the property had been destroyed by fire. But one Josselyn, the secretary and manager of the insurance company, testified on the trial that the sole and only reason that the insurance company declined to pay the loss of Dierks & White was that the insurance company claimed that the insured property was incumbered by a mortgage at the time it was destroyed; that the company was advised of the destruction of the property by fire within ten days after it happened; that he, Josselyn, received letters regarding the fire after it occurred; that Wallace and Mastic were the special or soliciting agents of the company through whom the insurance was negotiated; that they resided at Ewing, Nebraska; and that he had received information through Wallace by letter of the destruction of the property. The argument of counsel for the insurance company is that the verdict of the jury lacks evidence to support it because Dierks & White pleaded that they notified the company of the fire and failed to prove it. It appears from the evidence quoted above that the insurance company actually received notice of this fire and acted on that notice; that is,

they refused to pay the loss on the ground that the property at the time it was destroyed was incumbered. We are unable to see how the fact that Dierks & White failed to prove that they themselves gave the insurance company notice of the loss is, under the circumstances of this case, material, since it appears that the company had actual knowledge of the loss through its agents and acted on that knowledge, and we are by no means prepared to say that the verdict of the jury lacks evidence to support it on the ground that the allegation of Dierks & White that they notified the insurance company of the loss was not proved. It seems that if the insurance company actually knew of the fire at the time it occurred through one of its agents who was at the fire, or if it received through its agents within a reasonable time after the fire notice of its occurrence and acted on such notice, it would be sufficient. In other words, it does not seem that the insurance contract should be so technically construed as to compel the insured to furnish information to the insurer which the insurer already had. (*Edwards v. Travelers' Life Ins. Co.*, 20 Fed. Rep., 661; *State Ins. Co. v. Schreck*, 27 Neb., 527; *Sandwich Mfg. Co. v. Feary*, 40 Neb., 226.) But in the view we take of this case the issue made by the pleadings, whether Dierks & White notified the insurance company of the fire, was, at the time of the trial of this case, an immaterial one, because the insurance company resisted the payment of this loss, both by its pleading and evidence, on the ground that the insured property at the time of its destruction by fire was incumbered by a mortgage, and that therefore the policy at the time of the fire was not in force. This defense set up in the answer of the insurance company was, in effect, a plea of confession and avoidance. It in effect admitted the execution and delivery of the policy, the receipt of the premium, the destruction of the insured property by fire, and the receipt by it of notice of the fire. This defense that the policy was not in force at the

time the loss occurred is utterly inconsistent with the defense of want of notice of the loss. All the authorities agree that the provisions of an insurance policy requiring the insured to give notice of the destruction of the insured property and to furnish the insurer proofs of loss, may be waived by the conduct of the insurer; and in this case we think the insurance company, by placing its defense to this action on the ground that the policy sued upon was not in force at the time of the destruction of the property, waived the provision in the policy which required the insured to give it notice of the loss, and made that issue in this case wholly immaterial.

In *Cobb v. Ins. Co. of North America*, 11 Kan., 93, it is said that the right of an insurance company to notice of loss is a right which the company may waive, and that when the company denies all liability for the loss and refuses to pay the same and places that denial and refusal upon grounds other than the failure to give notice, such denial and refusal avoid the necessity of notice. We think this is the correct rule.

In *California Ins. Co. v. Gracey*, 15 Col., 70, the court in speaking of the point under consideration said: "Insurance policies uniformly contain the provision that the assured shall, in accordance with certain prescribed regulations, give notice and make proof of loss. It is universally held, we believe, that the absolute refusal of a company to pay the loss in any event constitutes a waiver of the right to insist upon compliance with such provisions." The same rule is announced in Missouri in *Phillips v. Protection Ins. Co.*, 14 Mo., 221, where it was held that if the insurer refuse to pay because the insured failed to submit to an examination under oath, that the insurer could not afterwards insist on the failure of the insured to comply with other requirements of the policy.

In *Hartford Protection Ins. Co. v. Harmer*, 2 O. St., 452, it is said: "Objections to the preliminary proofs will

be considered as waived, if, after they are rendered, no specific objections are pointed out, and the assured is informed that his claim will be considered on the merits, and the claim is rejected finally, upon the ground that the company is not in any event liable to pay the loss." (See, also, *Globe Ins. Co. v. Boyle*, 21 O. St., 119.)

In Illinois the rule is: "When an insurance company refuses to pay a loss, placing its refusal upon its non-liability in any event, it cannot insist, in defense of an action, that the preliminary proof was insufficient." (*Williamsburg City Fire Ins. Co. v. Cary*, 83 Ill., 453; *Peoria Marine & Fire Ins. Co. v. Whitehill*, 25 Ill., 466; *Ætna Ins. Co. v. Maguire*, 51 Ill., 342; *Lycoming Fire Ins. Co. v. Dunmore*, 75 Ill., 14; *Phœnix Ins. Co. v. Tucker*, 92 Ill., 64.)

In *Blake v. Exchange Mutual Ins. Co. of Philadelphia*, 78 Mass., 265, it was held: "If, after the preliminary proofs of a loss by fire under a policy of insurance, the officers of an insurance company visit the premises and converse with the insured and make no reference to the preliminary proofs, or raise any objection to them, while any defect therein may be remedied, and refuse to pay on other and distinct grounds, the insurance company will be estopped to set up any defect in the preliminary proof, although the conditions made part of the policy give explicit directions about proofs of loss, and the policy provides that no condition, stipulation, covenant or clause in the policy shall be altered, annulled or waived, except by writing indorsed on or annexed to the policy and signed by the president or secretary."

The rule in Minnesota is stated as follows: "Where an insurance company puts its refusal to pay a loss on another ground it is a waiver of objections to insufficiency in the proofs of loss required by the policy." (*Phœnix Ins. Co. v. Taylor*, 5 Minn., 393; *Newman v. Springfield Fire & Marine Ins. Co.*, 17 Minn., 98; *Hand v. National Live Stock Ins. Co.*, 59 N. W. Rep. [Minn.], 538.)

In *Parker v. Amazon Ins. Co.*, 34 Wis., 363, it was held: "Where an insurer against fire, after a loss and before the time for furnishing proofs thereof has expired, denies all liability entirely upon other grounds than the want of such proofs, this is a waiver of the condition requiring proofs of loss to be made." (*Harriman v. Queen Ins. Co.*, 49 Wis., 71; *McBride v. Republic Fire Ins. Co.* 30 Wis., 562.)

The supreme court of New Jersey, in *State Ins. Co. v. Maackens*, 38 N. J. Law, 564, states the rule as follows: "Receiving preliminary proofs without objection, and failure to object after a reasonable time, or refusal to pay on other grounds, is evidence of a waiver of the time of furnishing the preliminary proofs, and of defects therein."

The doctrine under consideration is also that of the supreme court of the United States. In *Tayloe v. Merchants Fire Ins. Co. of Baltimore*, 50 U. S., 390, the court, speaking to the point under consideration, said: "Another objection taken to the recovery is, that the usual preliminary proofs were not furnished according to the requirement of the seventh article of the conditions annexed to the policies of the company. These are required to be furnished within a reasonable time after the happening of the loss. The fire occurred on the 22d of December, 1844, and the preliminary proofs were not furnished till the 24th of November, 1845. This was doubtless too late, and the objection would have been fatal to the right of the complainant if the production of these proofs were essential to the recovery. But the answer is, that the ground upon which the company originally placed their resistance to the payment of the loss, and which is still mainly relied on as fatal to the proceedings, operated as a waiver of the necessity for the production of the preliminary proofs." (See, also, *Aurora Fire & Marine Ins. Co. v. Kranich*, 36 Mich., 289; *Batchelor v. People's Fire Ins. Co.*, 40 Conn., 56; *Carson v. German Ins. Co.*, 62 Ia., 433.)

In *Phenix Ins. Co. v. Bachelder*, 32 Neb., 490, NORVAL, J., speaking to a point analogous to the one under consideration, said: "The company has at all times insisted, and now insists, that it was not liable for the loss, on the ground that the policy was not then in force by reason of the failure of the insured to pay his premium note. The plaintiff in error by denying all liability dispensed with the necessity of furnishing proofs of loss," and cites, with approval, *Carson v. German Ins. Co.*, 62 Ia., 433; *Kansas Protective Union v. Whitt*, 36 Kan., 760; *King v. Hekla Ins. Co.*, 58 Wis., 508; *Tayloe v. Merchants Fire Ins. Co. of Baltimore*, 50 U. S., 390; *Continental Ins. Co. v. Lippold*, 3 Neb., 391. And the third point in the syllabus in *Phenix Ins. Co. v. Bachelder, supra*, declares: "The absolute denial by the insurer of all liability on the ground that the policy was not in force at the time of the loss, is a waiver of the preliminary proofs of loss required by the policy." This case, while not directly in point, is analogous in principle to the one under consideration, and is supported by the overwhelming weight of authority. We do not mean to say, nor do we decide, that if a person insured shall neglect or refuse to give notice of a loss to the company in accordance with the requirements of the policy, that the insurance company can never urge the failure of the insured to give it notice of the loss, or his failure to furnish proofs of loss as a defense to a suit upon the policy; but what we do decide is that when an insurance company is sued for a loss on a policy issued by it and places its defense to such suit on the ground that by reason of some act of the insured the policy was not in force at the date of the loss, that then in such action all issues made by the pleadings as to whether the insured gave notice of the loss, and whether he furnished the insurance company proofs of the loss, become immaterial.

Counsel for the insurance company, in opposition to the rule here stated, cite us to *Connell v. Milwaukee Mutual*

Fire Ins. Co., 18 Wis., 407. But that case is not in point here, because the defense of the insurance company was not based upon a contention that the policy was not in force at the time the loss occurred; but the defense made was a technical one that the written notice of the loss was not furnished to the insurance company as provided by the policy.

American Central Ins. Co. v. Hathaway, 23 Pac. Rep. [Kan.], 428, is another case cited by counsel for the insurance company; but that case is not in point. There the defense pleaded by the insurance company was a general denial, and the whole defense was that the insured did not notify the company of the loss nor furnish proofs of loss as required by the policy.

Home Ins. Co. v. Lindsey, 26 O. St., 348, is another case relied upon here by counsel for the insurance company; but this case is not in point. It merely holds that in an action upon a policy of insurance, which policy contains a condition that in case of loss proof thereof shall be made and delivered to the insurer within thirty days after the loss occurred, the petition must allege a performance of such condition, or a waiver thereof on the part of the insurer, or the petition would be bad on demurrer. A petition on a promissory note which failed to allege that the maker of the note executed and delivered it would doubtless be bad on demurrer; but if the maker of the note answer, denying the execution and delivery of the note, and allege as a defense to the action that he had paid the note, then its execution and delivery would become immaterial issues in the case.

Another case relied on by counsel is *Farmers Ins. Co. v. Frick*, 29 O. St., 466; but in that case the only point decided was: "In an action against an insurance company to recover the amount of a fire policy, a defense on the ground that the insured failed to make and furnish the insurer with the preliminary proofs of loss in the manner and within the time required by the policy, is not waived by setting

up and relying upon other defenses not inconsistent therewith." It does not appear from the decision just what particular defenses the insurance company did interpose. The only two mentioned in the opinion are that the insured failed to give notice of the loss and cause of the fire, and failed to furnish the insurance company proofs of loss in the time and manner required by the policy. So that case is not in point here.

Another case relied on by counsel is *Blossom v. Lycoming Fire Ins. Co.*, 64 N. Y., 162; but the defense of the insurance company in that case was that the proof of loss had been furnished it too late, and the court held that proof of loss within the time prescribed by the policy was necessary to enable the insured to recover unless the insurance company had waived the proof of loss, and that there was no evidence of such waiver.

Finally, it is insisted by counsel that *German Ins. Co. v. Fairbank*, 32 Neb., 750, is an authority against the rule announced above. It is said in that case: "In an action upon a policy which provides that the insured should furnish proofs of loss within a specified time after the loss occurred, it is necessary for the plaintiff to prove upon the trial that the proofs were made, or that the same were waived by the company." The same doctrine was announced in the third point of the syllabus in *German Ins. Co. v. Davis*, 40 Neb., 700.

But these cases are distinguishable from the one at bar. The question here is not whether it was necessary for the insured to plead and prove that he had furnished the necessary proofs of loss sustained in order to recover, but the question under consideration here is limited solely to the inquiry as to whether the issue made by the pleadings that the insured notified the insurance company that a loss had occurred, was a material one in view of the defense interposed to the action by the insurance company. The judgment of the district court is

AFFIRMED.

E. J. WADDLE v. THOMAS P. OWEN.

FILED JANUARY 15, 1895. No. 5510.

1. **Pledges:** TRANSFER OF COLLATERAL SECURITIES: CONVERSION. The payee of a negotiable instrument, to secure the payment of which the negotiable notes of third persons have been pledged, may in the regular course of business negotiate said instrument and transfer with it the securities, and such action will not amount to a conversion of the securities.
2. ——: TROVER AND CONVERSION. The payee of such an instrument who negotiates it in the usual course of business and transfers the securities to the endorsee before payment or tender of the amount due thereon, is not liable in trover for the securities, even though the endorsee convert them.
3. **Evidence:** NEGOTIABLE INSTRUMENTS. Parol evidence is inadmissible to establish an oral agreement contemporaneous with the making of a negotiable instrument whereby said instrument was not to be negotiated.

ERROR from the district court of York county. Tried below before MILLER, J.

The facts are stated by the commissioner.

Jerome H. Smith, for plaintiff in error:

The sight draft was negotiable. (Compiled Statutes, sec. 1, ch. 41; *Green v. Raymond*, 9 Neb., 295.)

Plaintiff in error had a lawful right to assign the sight draft to a third person and give the latter the benefit of the collateral security. (*Chapman v. Brooks*, 31 N. Y., 75; *Henry v. Eddy*, 34 Ill., 508; *Stearns v. Bates*, 46 Conn., 306; *Jones v. Quinnipiack*, 29 Conn., 25; *Belcher v. Hartford Bank*, 15 Conn., 383; *Hawks v. Hinchcliff*, 17 Barb. [N. Y.], 492; *Merchants Nat. Bank v. State Nat. Bank*, 10 Wall. [U. S.], 604; *Jarvis v. Rogers*, 13 Mass., 105; *Bank of New York v. Vanderhorst*, 32 N. Y., 553; *City Bank v. Taylor*, 60 Ia., 66.)

The transfer of a note secured by mortgage carries mortgage security, and the same rule applies to notes held as collateral security. (*Hutchinson v. Crane*, 100 Ill., 269; *Wright v. Troutman*, 81 Ill., 374.)

To make a tender valid there must be an actual production of the money or something to excuse a failure to produce it. (*Camp v. Simon*, 34 Ala., 126; *Hunter v. Warner*, 1 Wis., 144; *Eastman v. Township of Rapids*, 21 Ia., 590; *Jones v. Mullinix*, 25 Ia., 198.)

A tender of money in payment of a debt, to be valid, must be without qualification. (*Tompkins v. Batie*, 11 Neb., 147; *Sanford v. Bulkley*, 30 Conn., 344; *Wood v. Hitchcock*, 20 Wend. [N. Y.], 47.)

The pledgee is not liable in trover for conversion of his transferee. (Colebrooke, Collateral Securities, sec. 96; *Goss v. Emerson*, 23 N. H., 38.)

Harlan & Harlan, contra, cited: *Jarvis v. Rogers*, 15 Mass., 389; *Boughton v. United States*, 12 Court of Claims, 331; 7 Wait, Actions & Defenses, 179; Colebrooke, Collateral Securities, secs. 102, 129; 1 Daniel, Negotiable Instruments, sec. 833; Boone, Code Pleading, sec. 148.

IRVINE, C.

Owen brought this action against Waddle to recover for the conversion of two promissory notes of third persons, payable to the order of Owen, and which the petition alleged had been pledged to Waddle as security for a bill of exchange drawn by Owen to Waddle's order on W. T. Scott, of York. The defendant's answer alleged that he had sold and transferred the draft to E. J. Hainer for value and had delivered to him the notes pledged to secure it in the ordinary course of business, and prior to any demand or tender of the amount due on such draft.

The case was tried to the court without the intervention of a jury and there was a finding and judgment for Owen

for $230.54. This judgment Waddle seeks to reverse. The assignments of error reduce themselves to the single question of the sufficiency of the evidence.

There is not much dispute as to the facts. Waddle resided in Aurora. His business consisted in part at least of lending money. On Saturday, May 18th, 1889, Owen endeavored to sell to Waddle a number of notes of third persons. For some reason Waddle and Owen did not reach an agreement as to the sale, but Owen stating that he needed $50 that day, Waddle agreed to advance him that amount on the notes, and by agreement between them Owen drew a demand bill as follows:

"$51.00. HAMPTON, NEB., May 18th, 1891.

"On demand, pay to the order of E. J. Waddle, fifty-one dollars, value received, and charge to the account of

"T. P. OWEN.

"To W. T. Scott, York, Neb."

The one dollar, in addition to the fifty dollars advanced, was to compensate Waddle. Several notes payable to Owen's order, and including the two notes in question, were attached to the draft, and, as both parties testified, were intended to secure the same and were to be delivered to Scott on payment of the draft. These notes, as they appear in evidence, are indorsed generally by Owen. Owen claims that there was a special agreement whereby this draft with the notes attached was to be forwarded by Waddle to York for collection. The legal effect of this evidence will call for notice in the course of the opinion. Waddle did not forward the draft to York, but retained it until the morning of the following Tuesday, when he entered the Farmers & Merchants Bank of Aurora, of which Mr. Hainer was president, for the purpose of committing the papers to the bank for collection. Mr. Hainer suggested that he would buy the draft from Waddle and give him immediate credit for the amount. This offer was accepted and the draft was indorsed, "Pay to the order of E. J.

Hainer, without recourse on E. J. Waddle." It was then delivered to Hainer with the collateral notes. The day previous, the drawee, Mr. Scott, had sent a clerk to Aurora to take up the draft. Waddle swears that this clerk made no tender of any money, but on the contrary, learning that there was a question as to Owen's good faith in the transaction, disclaimed the intention of having anything to do with the business. The clerk testifies that he tendered $50 on that day to Waddle and that Waddle refused it for the reason that the county attorney had instructed him to hold the notes in his possession. There is no testimony to contradict that of Waddle and Hainer as to the transfer from the former to the latter, unless it be the testimony of Owen as to conversations with Waddle and Hainer, in which he says Waddle said he had not sent the draft because the county attorney had ordered him to hold the notes and Hainer told him he would have to see Waddle about them. This is entirely insufficient to overcome the positive and circumstantial testimony of Waddle and Hainer. Some days after the transfer Owen tendered Waddle the amount of the draft and demanded the notes and Waddle said he did not have them. This evidence was insufficient to support the finding for Owen. The bill of exchange in evidence was clearly negotiable, and parol evidence was inadmissible for the purpose of showing an oral agreement contemporaneous with the drawing of the bill that it should not be negotiated. To permit such evidence would infringe upon one of the best settled rules of evidence. If there had been such agreement, it could have been given effect by omitting from the bill the words of negotiability. Having deliberately inserted words importing negotiability, the drawer cannot be heard to urge a contemporaneous oral agreement contrary to the plain terms of the bill. (*McSherry v. Brooks*, 46 Md., 103.) The notes pledged as collateral were merely a security for the payment of the bill. The debt was the principal thing, and the pledge

merely incidental to it. The debt being transferred, the pledge passed with it. (*Webb v. Hoselton*, 4 Neb., 308; *Moses v. Comstock*, 4 Neb., 516; *Harman v. Barhydt*, 20 Neb., 625; *Daniels v. Densmore*, 32 Neb., 40; *Todd v. Cremer*, 36 Neb., 430.)

The foregoing were all cases of real or chattel mortgages, but if there is any difference in principle, the reason is stronger for holding that a pledge of negotiable instruments follows the debt than that a mortgage does so. That notes so pledged may be passed to the assignee of the debt, see *Chapman v. Brooks*, 31 N. Y., 75; *Goss v. Emerson*, 23 N. H., 38; and that the pledge must accompany the debt, see *Van Eman v. Stanchfield*, 13 Minn., 70; *Green v. Graham*, 46 N. H., 169. It is true that in *Johnson v. Smith*, 11 Humph. [Tenn.], 398, it was held that the assignment of a debt secured by a pledge of personal property did not, without delivery of the pawn, carry with it and vest in the assignee a lien upon the property. But it was there suggested that in such case the pawnee might be regarded as holding possession as agent of the assignee. But this decision, based upon the necessity of the delivery of personal property to effectuate a pledge thereof, has no effect upon this case where the notes were delivered with the bill. The bill being negotiable, Waddle had a right to transfer it by indorsement to Hainer and to transfer with it the accompanying securities. There is a vast difference between the position of a pledgee who retains the principal debt and wrongfully parts with the securities pledged thereto, and that of one who in the regular course of business transfers the debt and with it the securities, without diverting the latter from the purpose for which they were pledged. The first act constitutes a conversion, the latter does not. If before Waddle parted with the draft he had been paid or tendered the amount due by any one authorized to accept or pay the same, and had refused to deliver the securities, we have no doubt an action would lie against

him; but such was not the case. The only tender made before the transfer to Hainer was that made on behalf of Scott. We need not determine whether the tender by the drawee Scott would have created a cause of action in favor of the drawer because there was no sufficient tender by the drawee even. According to the clerk referred to, the tender made was $50, while the draft was for $51. Nor need we consider whether the transaction between Waddle and Owen was usurious. If it was, this was no affair of Scott's, and in order to pay the draft and be entitled to the securities he would have been required to pay or tender the face of the draft. This was not done. Waddle having a right to negotiate the bill and to transfer the securities with it, and having done so before payment or tender of the amount due thereon, he is not liable in trover for the securities. On this proposition the case of *Goss v. Emerson, supra*, is precisely in point, and states we think the correct doctrine.

REVERSED AND REMANDED.

ART ELIZA ALEXANDER, APPELLANT, V. D. T. THACKER, APPELLEE.

FILED JANUARY 16, 1895. No. 6354.

1. **Tax Deeds: VALIDITY: TREASURER'S SEAL.** A valid tax deed cannot be executed under the present revenue law, since the legislature has made no provision for an official seal for county treasurers. *Larson v. Dickey*, 39 Neb., 463, followed.
2. **Foreclosure of Tax Liens: STATUTE OF LIMITATIONS.** An action to foreclose a tax lien is barred within five years after the time to redeem from the tax sale has expired. *Alexander v. Wilcox*, 30 Neb., 793; *Warren v. Demary*, 33 Neb., 327; *Black v. Leonard*, 33 Neb., 745; *Alexander v. Shaffer*, 38 Neb., 812, and *Foree v. Stubbs*, 41 Neb., 271, followed.

3. ———: AMOUNT OF RECOVERY: INTEREST. Under the revenue law of 1879, on the foreclosure of a valid tax sale certificate, the plaintiff is entitled to recover the amount bid at the tax sale, and the several sums paid for prior and subsequent taxes, together with interest on said several amounts from the date of payment, at the rate of twenty per cent per annum until the expiration of two years from the date of purchase, and ten per cent per annum thereafter.

4. ———: ATTORNEYS' FEES: COSTS. On the foreclosure of a tax lien, based on a valid tax sale, the court should award the plaintiff an attorney's fee equal to ten per cent of the amount of the decree.

APPEAL from the district court of Cass county. Heard below before CHAPMAN, J.

C. W. Seymour, for appellant.

Beeson & Root, contra.

See opinion for authorities upon the propositions discussed.

NORVAL, C. J.

This cause was before this court at the September term, 1890, the opinion being reported in 30 Neb., 614. After the judgment of reversal, the plaintiff filed in the district court an amended petition containing three counts, and additional parties defendant were brought in. Plaintiff in her petition claims to be the owner in fee of the premises in controversy, under and by virtue of three tax deeds, and prays that she may be decreed to be the owner of said real estate, and recover possession thereof from the defendants, or, in case the court found her title had failed, that she be decreed a lien for taxes paid, with interest and attorneys' fee. For an understanding of the case it will not be necessary to set out the pleadings, or give a synopsis thereof, in this opinion. After the issues were made up, the appellee, D. T. Thacker, filed a motion to require the plaint-

iff to elect whether she will try the cause as one for title and possession of the premises, or for the foreclosure of her tax deeds, which motion was sustained by the court. The plaintiff excepted to the ruling and elected to proceed to the trial of the cause as one to foreclose the tax liens. At the hearing the court found that the first and second causes of action set up in the petition were barred by the five years statute of limitations, and that the tax deeds described in said counts of the petition were void for the reason that no treasurer's seal is attached to said instruments and that said deeds fail to recite the place where the lands were sold. The court further found that the deed described in the third count of the petition is void, but rendered a decree foreclosing said tax deed for the amount of taxes paid and interest thereon and an attorney's fee of ten per cent of the amount found due. Plaintiff appeals.

The first contention of appellant is that the court erred in sustaining the motion requiring her to elect whether she would proceed at law to establish her legal title to said premises, and to recover possession thereof, or for the foreclosure of the liens for taxes. Plaintiff's claim of title was based solely upon three tax deeds issued by the county treasurer. They could confer no title, since in *Larson v. Dickey*, 39 Neb., 463, it was expressly declared to be the law that a valid tax deed cannot be executed under the present revenue law of the state, because the legislature has made no provision for an official seal for county treasurers. It is obvious, therefore, that plaintiff was in no manner prejudiced by the ruling mentioned above. Had she not been required to elect, but had gone to trial without abandoning her claim of title to the land, the result could not have been different.

Were the tax deeds described in the first and second counts of the petition barred by the statute of limitations? The first cause of action is based upon a tax deed bearing date September 5, 1873, and the second count is founded

upon a tax deed executed on the 10th day of November, 1881. This action was not instituted until August 9, 1888, or nearly fifteen years after the date of the first deed and almost seven years subsequent to the making of the other deed. Through an unbroken line of decisions this court has said that an action to foreclose a tax lien is barred, unless brought within five years of the date the cause of action accrued. (*D'Gette v. Sheldon*, 27 Neb., 829; *Alexander v. Wilcox*, 30 Neb., 793; *Warren v. Demary*, 33 Neb., 327; *Fuller v. Colfax County*, 33 Neb., 716; *Black v. Leonard*, 33 Neb., 745; *Alexander v. Shaffer*, 38 Neb., 812; *Foree v. Stubbs*, 41 Neb., 271.)

It is argued that the five-years limitation begins to run from the time when the title acquired by the tax deeds had failed. *Otoe County v. Brown*, 16 Neb., 397, *Schoenheit v. Nelson*, 16 Neb., 235, *Bryant v. Estabrook*, 16 Neb., 217, *Holmes v. Andrews*, 16 Neb., 296, *McClure v. Warren*, 16 Neb., 447, and several other earlier cases decided by this court, sustain the doctrine contended for by counsel for appellant. These cases have been, in effect, although not in direct terms, overruled by the later adjudications in this state upon the subject. Thus in *D'Gette v. Sheldon, supra*, in an opinion by MAXWELL, J., it was ruled that under the revenue law of 1879 an action to foreclose a tax lien is barred if not brought within five years after the expiration of the time to redeem.

In *Alexander v. Wilcox, supra*, it is said: "The first cause of action is barred by the special limitation fixed by the statute for the foreclosure of tax liens. The plaintiff never acquired any title under the tax deed, but the same was void on account of the omission of the treasurer's seal therefrom. He acquired a lien on the land for the amount of the taxes paid, but the cause of action to foreclose such lien accrued at the date of the deed. He could have brought his suit for that purpose immediately on the delivery of the deed."

In the opinion in *Warren v. Demary, supra*, we find this language: "It is manifest that under the above statutory provisions the plaintiff's action was barred when he instituted the suit. An action to foreclose a tax lien must be brought within five years from the time the cause of action accrued. This suit was brought nearly ten years after the tax deed was issued, and more than twelve years from the date of the tax sale. The deed was void on its face, and an action could have been maintained thereon to foreclose the lien as soon as the deed was issued. The plea of the statute of limitation is well taken." To the same effect are *Black v. Leonard, supra*, *Alexander v. Shaffer, supra*, and *Foree v. Stubbs, supra*. These later decisions announce the correct rule, and will be adhered to. It follows that plaintiff's first and second causes of action are barred.

Objection is made because the court only allowed interest at twenty per cent per annum for the first two years after the date of the tax sale, and ten per cent thereafter. Appellant insists, the tax sale being valid, that she was entitled to forty per cent per annum for the first two years and twelve per cent thereafter. *Merriam v. Rauen*, 23 Neb., 217, is relied upon to sustain this contention. This decision was based upon the revenue law of this state which was in force prior to the adoption of the present statute. Under the old law the purchaser of real estate at a tax sale acquired a lien on the land for taxes, with interest at forty per cent per annum, from the date of the sale, or payment of prior or subsequent taxes, for two years from the date of the tax certificate, and interest at the rate of twelve per cent per annum after the expiration of two years, or until the time for redemption has expired. Under the present revenue law, and by virtue of which the taxes were levied and the tax deed mentioned in the third count of the petition was issued, a tax purchaser is allowed interest at the rate of twenty per cent per annum from the date of each

payment up to the expiration of two years from the date of the tax sale, and ten per cent per annum on each of said amounts thereafter. (Comp. Stats., ch. 77, sec. 181.) The decree, as to interest, was in strict compliance with the statute. Plaintiff was allowed an attorney's fee of ten per cent on the amount found due her as provided by statute. (*Towle v. Shelly*, 19 Neb., 632.)

Several other questions are argued in the brief, which, in view of the conclusions already stated, it will be unnecessary to notice. The decree is

AFFIRMED.

WESTERN UNION TELEGRAPH COMPANY V. CITY OF FREMONT.

FILED JANUARY 16, 1895. No. 6208.

Municipal Corporations: OCCUPATION TAX: TELEGRAPH COMPANIES: INTERSTATE COMMERCE. Regardless of any doubt respecting the soundness of the conclusion heretofore announced in this cause, the court is bound to adhere thereto by reason of of the decision subsequently rendered in *Postal Telegraph Cable Co. v. City of Charleston*, 14 Sup. Ct. Rep., 1094.

MOTION for rehearing of case reported in 39 Neb., 693.

Estabrook & Davis, for the motion.

POST, J.

Although the writer was absent when this case was under consideration and expressed no opinion at that time, he was disposed to concur in the views expressed by Commissioner IRVINE. It seemed that the ordinance involved was a mere device whereby the city under the pretense of a license tax was in reality asserting the right to tax state

business of the plaintiff company. But subsequent to the decision of this case the precise question involved has been determined by the supreme court of the United States in all respects in accordance with the views of the chief justice, speaking for the majority of the court. (See *Postal Telegraph Cable Co. v. City of Charleston*, 14 Sup. Ct. Rep., 1094.) It had been definitely settled by decisions of that court that taxation of the business of telegraph and express companies and other corporations exclusively within the several states is not violative of the interstate commerce provision of the national constitution, although that principle had not previously been applied to municipal bodies so as to authorize the imposition of taxes like those here involved. But the question is no longer an open one so far as the courts of the United States are concerned. Indeed, the case cited appears to be conclusive of every phase of the present controversy, although the opinion therein adds nothing to the reasoning of Judge NORVAL in this. While the rule which permits the imposition of a license tax upon a corporation, whose only business is the receiving and transmitting of messages between a city and distant points, appears to conflict with numerous constructions of the interstate commerce law, it is our duty to accept the settled rule of the federal tribunals as decisive of the question. Concerning a subject of such general importance, and presenting a question cognizable by the courts of the United States, there can properly be no local rule; and it having been definitely settled by those courts, a state court would hardly be justified in adopting if indeed in adhering to a different rule. The motion for a rehearing is accordingly

OVERRULED.

GEORGE BOTSCH ET AL. V. STATE OF NEBRASKA.

FILED JANUARY 16, 1895. No. 6192.

1. **Criminal Law**: ASSAULT WITH INTENT TO MURDER: PROOF. An essential element of the crime of assault with intent to commit murder is the actual intent to take life, and when an offense is constituted by statute of an act combined with a particular and specific intent, proof of the intent is just as indispensable as proof of the act.

2. ——: ——: INFORMATION: INSTRUCTIONS. Where an information contained two counts, one of assault with intent to commit murder and the second of an assault with intent to do great bodily injury, and there was no evidence to support the charge set forth in the first count, it was error which was calculated to confuse and mislead the jurors, and prejudicial to the parties on trial under the complaint, to submit to the jury the question of the guilt or innocence of such parties of the crime charged in the first count, although they were not convicted of such crime.

ERROR to the district court for Colfax county. Tried below before MARSHALL, J.

Phelps & Sabin, for plaintiffs in error, cited: *Chrisman v. State*, 54 Ark., 282; Bishop, Criminal Law, secs. 729, 731, 735; *Patterson v. State*, 85 Ga. 131; *Weaver v. People*, 132 Ill., 536; *State v. Child*, 42 Kan., 611; *People v. Chin Bing Quong*, 79 Cal., 553; *People v. Ross*, 33 N. W. Rep. [Mich.], 30; *People v. Comstock*, 13 N. W. Rep. [Mich.], 617; *People v. Sweeney*, 22 N. W. Rep. [Mich.], 50; *People v. Troy*, 56 N. W. Rep. [Mich.], 102; *Turner v. Muskegon Circuit Judge*, 50 N. W. Rep. [Mich.], 310; *Carter v. State*, 28 Am. St. Rep. [Tex.], 944; *Bedford v. State*, 36 Neb., 702; *State v. Kyne*, 53 N. W. Rep. [Ia.], 420; *Moore v. State*, 26 Tex. App., 322.

Geo. H. Hastings, Attorney General, for the state, cited:

Powell v. State, 22 S. W. Rep. [Tex.], 677; *People v. Miller*, 52 N. W. Rep. [Mich.], 65; *Smith v. State*, 7 So. Rep. [Ala.], 103; *McCune v. Thomas*, 6 Neb., 488; *McCann v. McDonald*, 7 Neb., 305; *Johnson v. Parrotte*, 23 Neb., 233; *Lea v. McLennan*, 7 Neb., 143; *Gibson v. Sullivan*, 18 Neb., 558; *Angle v. Bilby*, 25 Neb., 595; *Parrish v. State*, 14 Neb., 61; *Seling v. State*, 18 Neb., 548; *Schlencker v. State*, 9 Neb., 242.

HARRISON, J.

The plaintiffs in error were arrested, and with others, jointly informed against in the district court of Colfax county. The information contained two counts, in one of which the parties were charged with an assault with intent to kill and murder one Bernard C. Zitting, and in another with an assault upon said Zitting with intent to do great bodily injury. The parties were duly tried, and adjudged by the jury, in their verdict, not guilty of the charge in the first count of the information and guilty as charged in the second. After overruling their motions for a new trial, the court sentenced plaintiffs in error to a term in the penitentiary and they have prosecuted error proceedings to this court. The trial court gave to the jury a very full and complete charge and one which, in many respects, might serve as a model. It contained an exposition of the rules of law deemed by the court applicable to the crime charged in the first count of the information, *i. e.*, assault with intent to commit murder, further as to the crime of assault with intent to do great bodily injury, and also as to assault and battery, the lesser crime included in the charge of the greater ones set forth in the information.

One assignment of error is as follows: "The court erred in submitting to the jury the guilt or innocence of the defendants, upon the first count in the information." In support of this assignment, counsel for plaintiffs in error contend that the evidence was insufficient to sustain a con-

viction on the first count of the information, principally for the reason that there was no evidence of an intent to commit murder, arguing that to support a charge of an assault with intent to commit murder, the specific purpose or intent to commit the crime of murder must be shown to have existed and have been frustrated by some act not of the will of the parties charged; that in a criminal case the court should not submit to the jury, for their consideration, a charge for a crime contained in one count of an information of which the evidence would not sustain a conviction; and if that is done, the fact that no conviction ensued on such count does not sufficiently excuse such action and does not cure the error, or make it without prejudice. The two main elements of the crime charged in the first count of the information, an assault with intent to commit murder, are the assault and the intent to kill or murder. Of these the intent is a mental process and as such generally remains hidden within the mind wherein it was conceived, and is rarely, if ever, susceptible of proof by direct evidence, but must be inferred or gathered from the outward manifestations shown by the words or acts of the party entertaining it, and the facts or circumstances surrounding or attendant upon the commission of the assault with which it is charged to be connected, and, as the particular intent accompanying the act in this class of crimes fixes the grade of the crime and governs the punishment which the guilty party must be adjudged to suffer, it is necessary that it be as clearly and satisfactorily proved as any other fact or constituent of the crime charged. That an actual intent to take life is an essential element of the crime of assault with intent to commit murder, is the well established, if not uniform, rule. (*Hooper v. State*, 16 S. W. Rep. [Tex.], 655; *Walls v. State*, 90 Ala., 618, 8 So. Rep., 680; *Patterson v. State*, 11 S. E. Rep. [Ga.], 620; Warren, Criminal Code, 270; *Barcus v. State*, 1 Am. Crim. Rep. [Miss.], 249; *Trevinio v. State*, 11 S. W. Rep. [Tex.], 417; *People v. Lennon*, 38 N. W.

Rep. [Mich.], 871; Maxwell, Criminal Procedure, 259, note 1; Clark's Hand-Book of Criminal Law, 103-111.) The rule that every sane person is presumed to intend the natural, probable, and reasonable consequences of his acts, is applicable to this class of cases, but this presumption, when based upon the acts alone, must be confined to the intent shown by such acts and not extended further, nor the jury allowed to speculate upon a greater intent. (*People v. Ross*, 9 West. Rep. [Mich.], 555; *Patterson v. State, supra*, and authorities therein cited.)

We do not deem it necessary to quote at large from the evidence upon which plaintiffs in error were convicted, nor to give a summary of it here. We have read it all carefully, and while the evidence shows that an assault was committed which was reprehensible in the highest degree, and for which the guilty parties, whoever they may be, deserved and deserve to be punished speedily and with an unsparing hand, we also feel thoroughly convinced of its insufficiency to sustain a conviction of an assault with the intent to commit murder, in that the particular intent does not appear. It may be fairly said to negative the existence of such an intent, or the crime charged in the first count of the information was not made out. This being true, it follows that the trial court erred in submitting to the jury, by its instructions, the question of the innocence or guilt of the parties being tried, of the crime charged in the first count. Notwithstanding the fact that there was no conviction of such charge, we do not feel warranted in saying that the submission to the jury, for its consideration during its deliberations, of the question of the guilt or innocence of the parties of this charge by full instructions in relation to the law governing and applicable to it, when there was a lack of evidence to sustain it, was not calculated to confuse or mislead the jurors, or was not prejudicial to the rights of those who were on trial. The parties on trial were also being tried for an assault with intent to do great

bodily injury, the charge contained in the second count of the information, and for an assault and battery, a lesser crime than was stated in either charge, and they were entitled to have the questions of whether they had committed either of these lesser crimes, of the committal of which there was testimony, presented to the jury for determination, free from the greater and graver crime, of which the evidence was insufficient to show the committal, being also included in their deliberations. (*State v. Kyne*, 53 N. W. Rep. [Ia.], 420; *State v. Myer*, 69 Ia., 148; *People v. Ross*, 33 N. W. Rep. [Mich.], 30; *Moore v. State*, 9 S. W. Rep. [Tex.], 610; *Carter v. State*, 13 S. W. Rep. [Tex.], 147; 2 Thompson, Trials, sec. 2315; *Caw v. People*, 3 Neb., 357.)

There are some further points argued in the briefs, but as the conclusion we have reached, in so far as we have considered the case, will necessitate its reversal as to the parties plaintiffs in these error proceedings, we will not now discuss them. Judgment reversed to the extent it affects plaintiffs in error herein, and case remanded.

REVERSED AND REMANDED.

J. L. PAUL & COMPANY, APPELLEES, V. WILLIAM D. DAVIDSON ET AL., APPELLANTS.

FILED JANUARY 16, 1895. NO. 5625.

1. **Judgments:** COLLATERAL ATTACK: INJUNCTION. The fact that a judgment has been rendered without jurisdiction by an inferior court does not in an independent proceeding in the district court justify a perpetual injunction against the prosecution of any action or remedy in respect to the cause of action upon which the judgment without jurisdiction was rendered.

2. ———: ———: ———. The evidence examined, and found not to justify the decree entered in the district court.

APPEAL from the district court of Dawes county. Heard below before BARTOW, J.

E. S. Ricker, for appellants.

Spargur & Fisher, contra.

RYAN, C.

This action was brought in the district court of Dawes county by J. L. Paul & Co. against William D. Davidson, to enjoin the enforcement of a judgment rendered for sixty-seven dollars and costs in the county court of the same county in favor of Davidson against J. L. Paul & Co. The relief sought was granted and not only the enforcement of the judgment of the county court perpetually enjoined, but in addition Davidson was for all time prohibited from asserting in any way the cause of action which had been set out in his bill of particulars filed in the county court upon which judgment had been rendered. The cause of action was that Davidson's exempt wages had been seized and appropriated to the payment of a judgment in favor of J. L. Paul & Co. against Davidson in proceedings before a justice of the peace. Davidson was a brakeman in the employ of the Fremont, Elkhorn & Missouri Valley Railroad Company when his wages were appropriated by garnishment proceedings. It may be that chapter 25, Laws, 1889, was not broad enough to entitle him to the judgment rendered against J. L. Paul & Co. in the county court. That question was one which could not be determined upon a collateral inquiry in an action to enjoin proceedings regularly pending in the county court. The court had jurisdiction, for the suit was in no sense an action to recover for malicious prosecution contemplated by section 907 of the Code of Civil Procedure. Whether the remedy given by chapter 25, Laws, 1889, was applicable was a question which should have been pre-

sented in the county court, and if there was error in the judgment of that court, the judgment of the district court could have been had on appeal. It could not properly be had by a collateral attack on the judgment of the county court.

In the petition for an injunction there was an averment that the judgment of the county court had not been rendered within four days of the trial had in that court. This question was in no way presented in the action wherein the judgment was rendered. The record made in the county court shows that its judgment was in fact rendered on February 5, 1892,—the day on which the trial was had. The affidavit of the county judge was to the effect that the trial concluded on February 5, 1892, and that the judgment was entered on the 8th as of date the 5th of February aforesaid. Opposed to this showing was the affidavit of Allen G. Fisher, one of the attorneys for J. L. Paul & Co., that "a trial of the said cause was had on February 4, 1892, but was not decided, and the court took it under advisement until Friday, February 5, at 3 o'clock P. M., at which time the arguments of counsel were had and the court then stated that he would take it under advisement, and without making any entries of judgment, and that on Wednesday forenoon, February 10, the court had made no record in said cause, and has not yet [February 16, 1892] rendered any decision in said cause, and that by reason of these facts and circumstances the jurisdiction of the court was gone to take any action in said cause, having failed to enter judgment within four days after trial." The trial in the district court seems to have been had solely on the above described affidavits, submitted as evidence, together with a transcript of the docket entries made in the county court. Under these circumstances, the entire evidence is presented in this court with all the means of estimating its probability possessed by the district court. It seems to us that there was by this evidence no such showing made of want of jurisdiction in

the county court to render the judgment complained of that such judgment should be treated as an absolute nullity, as must be the case to justify a perpetual injunction against its enforcement in a purely collateral proceeding. The judgment of the district court is

REVERSED.

CASPER RAASCH V. DODGE COUNTY.

FILED JANUARY 16, 1895. No. 5103.

Bridges: UNSAFE CONDITION: DAMAGES: LIABILITY OF COUNTY. For an injury caused by an unsafe condition of a county bridge a county is liable in damages notwithstanding the fact that no notice of such condition had, previous to the occurrence of the accident, been given to any officer of the county concerned.

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

Frick & Dolezal, for plaintiff in error.

C. Hollenbeck, *contra*.

RYAN, C.

Plaintiff in error brought this action in the district court of Dodge county against said county for the recovery of damages, caused by the loss of certain described property, occasioned by the unsafe condition of a bridge which the county was by law under obligation to keep in repair. A demurrer on the ground that the petition failed to state facts sufficient to constitute a cause of action was sustained. This ruling was on December 2, 1890. On the 18th of January, 1893, there was filed in this court an opinion holding a petition good, which was as vulnerable to the

objection urged in argument as that of which the sufficiency is questioned by defendant's argument in this case. (*Hollingsworth v. Saunders County*, 36 Neb., 141.) Distinctly stated, this criticism is that no notice was alleged to have been given as to the defective condition of the bridge, as under certain conditions is required by sections 1 and 2, chapter 7, Laws, 1889, wherefore it is argued no accident resulting from the condition of that bridge could become the foundation of an action for damages. The provisions of section 4 of the act referred to expressly confer a right of action independently of whether or not the county authorities had been previously notified of the unsafe condition of the bridge which caused the accident. This view finds support in the case above cited. The judgment of the district court is

REVERSED.

JOSEPH SHARMER, APPELLEE, V. JAMES J. MCINTOSH, APPELLANT, ET AL.

FILED JANUARY 16, 1895. NO. 5420.

1. **Pledges:** PLEADING. A petition alleging an indebtedness from A to B, and that it had been the custom of A to pledge notes as security for such indebtedness, and that at a certain time there were in B's hands in pledge as collateral security certain notes, is, after answer, a sufficient averment of the pledge of such notes.
2. **Jury Trial:** EQUITABLE RELIEF. Where a petition states a cause of action for equitable relief and prays for equitable relief, a jury cannot be demanded as a matter of right for the trial of any issue arising in the case.
3. **Trial to Court:** ADMISSION OF IMPROPER EVIDENCE: REVIEW. In a case tried to the court without a jury, the admission of improper evidence is not in itself a ground for reversal.

4. **Witnesses:** CONVERSATIONS WITH DECEASED PERSONS. Since the amendment of 1883, section 329 of the Code does not render a party adversely interested to the representative of a deceased person incompetent as a witness in the action, but only renders his testimony as to transactions and conversations with the deceased incompetent.

5. **Pledges:** PROOF. Proof that A was indebted to B and that B had in his possession notes payable to the order of A and not indorsed, without other evidence is insufficient to show that such notes were pledged to secure such debt.

6. **Ownership of Property:** EVIDENCE. Possession of instruments which pass by delivery alone is *prima facie* evidence of ownership and therefore is *prima facie* proof in support of a claim of any lesser interest.

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

George W. Heist and *Henry St. Rayner*, for appellant:

One who has a direct legal interest in the result of a cause in which the adverse party is administrator of a deceased person is not a competent witness therein. (Code Civil Procedure, sec. 329; *Ransom v. Schmela*, 13 Neb., 74; *Wamsley v. Crook*, 3 Neb., 344; *Magenau v. Bell*, 13 Neb., 248; *Housel v. Cremer*, 13 Neb., 298; *Martin v. Scott*, 12 Neb., 42; *Rakes v. Brown*, 34 Neb., 304; *Kimball v. Kimball*, 16 Mich., 211; *Cook v. Stevenson*, 30 Mich., 242; *Mundy v. Foster*, 31 Mich., 313; *Van Wert v. Chidester*, 31 Mich., 209; *Hart v. Carpenter*, 36 Mich., 402; *Harmon v. Dart*, 37 Mich., 53; *Downey v. Andrus*, 43 Mich., 65; *Rayburn v. Mason Lumber Co.*, 57 Mich., 273; *McCutcheon v. Loud*, 71 Mich., 433; *McHugh v. Dowd*, 86 Mich., 412; *Penny v. Croul*, 87 Mich., 31; *Van Alstyne v. Van Alstyne*, 28 N. Y., 378; *Card v. Card*, 39 N. Y., 317; *Green v. Edick*, 56 N. Y., 613; *Comins v. Hetfield*, 80 N. Y., 265; *Holcomb v. Holcomb*, 95 N. Y., 316; *Rogers v. Brightman*, 10 Wis., 50; *Lawrence v. Vilas*, 20 Wis., 406; *Koenig v. Katz*, 37 Wis., 156.)

The evidence of W. C. Reilly, the legal adviser and attorney of Morgan, as a witness for Sharmer, against the objections of appellant, is clearly within the prohibition of section 333 of the Civil Code, and should have been excluded as privileged. (*Romberg v. Hughes*, 18 Neb., 579; *Loveridge v. Hill*, 96 N. Y., 222; 1 Greenleaf, Evidence, secs. 236–243.)

Webster, Rose & Fisherdick and *W. C. Reilly, contra.*

IRVINE, C.

Sharmer brought his action in the district court of Cheyenne county, alleging that the defendant Frank B. Johnson and Samuel C. Morgan had been copartners, doing business as bankers under the name of the State Bank of Sidney, in the town of Sidney, and continued to conduct said business until June 27, 1889, when Morgan died intestate; that the defendant McIntosh was his administrator; that Johnson, since the death of Morgan, had refused to administer the affairs of the partnership and had at all times since Morgan's death denied the existence of the partnership; that the plaintiff had deposited divers sums with the bank and had performed labor for the bank, and that the indebtedness from the bank to the plaintiff at the time of Morgan's death was $4,477.71; that the bank had from time to time given to plaintiff security for the indebtedness to him, usually notes and other evidences of indebtedness belonging to the bank, and that at the time of Morgan's death the plaintiff held as security for the balance due him certain securities named in the petition. Among these were two county warrants, and the remainder thereof were notes made or indorsed to the bank; that McIntosh claimed that Morgan was the owner of said instruments and was threatening to collect the same from the debtors, and that because of the controversy as to the ownership of said instruments the debtors refused to pay the same, and there was great dan-

ger of loss unless they could be collected before the question as to their ownership should be decided. The petition further alleged that Johnson and the estate of Morgan were both insolvent. The prayer was for an injunction restraining the defendants from intermeddling with the notes or warrants or taking any proceedings in relation thereto, for a receiver to take possession thereof, to collect them and to retain the proceeds to abide the final order of the court, for judgment against Johnson and the administrator of Morgan for the amount of the debt, and for a decree establishing the plaintiff's lien upon the notes and warrants, and that the proceeds thereof be applied to the payment of plaintiff. A receiver was appointed as prayed. After the commencement of the suit, McIntosh was in another action appointed receiver of the bank upon the ground that Johnson denied the partnership and refused to exercise the duties of a surviving partner. These facts were set up by supplemental pleadings. Johnson made default; McIntosh, as Morgan's administrator and as receiver of the bank, answered, denying the allegations of plaintiff's petition and averring that all the notes and warrants referred to in the petition were at the time of Morgan's death the property of and in the possession of the bank; that plaintiff was employed by the bank and subsequently to the death of Morgan unlawfully took into his possession the notes and warrants and appropriated them to his own use. There was a trial to the court and finding for the plaintiff and a decree according to the prayer of the petition. From this decree McIntosh appeals.

Before answering McIntosh had demurred to the petition, and the first reason urged by appellants against the decree is that the court erred in overruling this demurrer. The appellant, by answering over, waived the right to have the demurrer considered as such, but, of course, if the petition did not state a cause of action the decree was erroneous and should be reversed for that reason. The only

defect in the petition suggested is that it does not allege that the bank or Morgan delivered the notes to plaintiff in pursuance of any agreement. The petition alleges that an indebtedness had existed for a long time from the bank to plaintiff, and that it was the custom and manner of business between plaintiff and the bank for the bank to give plaintiff security from time to time, usually in the form of notes and other evidences of indebtedness; that the custom had been for plaintiff to permit the bank from time to time to withdraw from pledge such notes, substituting others therefor; that it had formerly been the custom to endorse such notes to the plaintiff, but that latterly, for fear that such indorsements might impair the financial standing of the bank, it had become the custom to deliver such notes as security without indorsement; that at the time of the death of Morgan, "there were in the hands of this plaintiff in pledge as collateral security upon the same indebtedness the following evidences of indebtedness," etc. These averments were not very specific and the petition was probably open to a motion to make them more so, but no such motion having been made we think they were sufficient allegations, coupled with the other averments, to state a cause of action. The fair and ordinary interpretation of the language would be that the notes were in plaintiff's hands as collateral security to his debt in pursuance of a contract with the bank to that effect.

The next objection made to the proceedings is that the court refused the appellants' request to impanel a jury and try the issues thereto. There is no merit in this objection. The constitutional provision is that the right of trial by jury shall remain inviolate. (Constitution, art. 1, sec. 6.) But this does not mean that in all cases a party has a right to have the facts determined by a jury. The provision preserves the right to jury trial as it existed when it was adopted, but it does not create or extend such right. There never was, and there is not now, any constitutional or statutory

right to a jury trial in an equitable action. (*Dohle v. Omaha Foundry & Machine Co.*, 15 Neb., 436. Section 280 of the Code provides that issues of fact arising in actions for the recovery of money or of specific real or personal property shall be tried by a jury, unless a jury trial is waived, or a reference made as elsewhere in the Code provided; and section 281 provides that all other issues of fact shall be tried by the court subject to its power to order any issue or issues to to be tried by a jury or referred. This action was not for the recovery of any specific real or personal property, nor was it in the technical sense an action for the recovery of money. The petition stated a case for equitable relief, and when a cause of action for equitable relief is stated and equitable relief is prayed a jury cannot be demanded as a matter of right for the trial of any issue in the case.

All the other arguments are directed against the admission of certain testimony. It has been frequently said that where a case is tried to the court without the intervention of a jury, the admission of improper testimony is not in itself ground for reversal. A judgment in such a case must be affirmed notwithstanding the admission of such improper evidence, unless upon the evidence properly admitted and the law applicable to the facts established thereby, the judgment was wrong. Our inquiry should, therefore, be not simply whether the evidence complained of was improperly admitted, but whether the evidence properly admitted sustained the finding of the court. From the circumstances of the case, probably, the evidence is very meager. The bank was managed by Morgan; Sharmer was employed therein. These two men transacted all the business and no one except them was familiar with the transactions in controversy. The appellant argues with much earnestness that under the circumstances Sharmer was not a competent witness. This was formerly the law. (Gen. Stats., p. 582, sec. 329; *Wamsley v. Crook*, 3 Neb.,

344.) But this section was amended (Session Laws, 1883, ch. 83,) so as not to render the person interested adversely to the representative of the deceased person incompetent as a witness, but to render merely his testimony as to transactions and conversations with the deceased incompetent as evidence, with the exceptions provided in the act. There was no evidence admitted which would be incompetent under section 329 of the Code as it now stands. Under this limitation as to the evidence, Sharmer testified that the bank was indebted to him, and supported this evidence from books kept by Morgan. He also testified that the papers in controversy were at the time of Morgan's death in Sharmer's possession in this way, that Sharmer had a box which he kept in the bank's safe and which contained nothing but his private papers, and that the notes and warrants were in an envelope in this box. The day after Morgan's death the defendant Johnson arrived in Sidney, and he, with Sharmer and several others, went to the bank and made an examination of its condition. During this examination Sharmer exhibited to Johnson the notes and warrants, and remarked to him that these were the collateral notes and warrants that Sharmer held unindorsed, and Johnson said, "That is all right, keep them." While the parties appearing admitted of record that Johnson was a partner, it is clear that Johnson did not pretend to any knowledge of the arrangement between Morgan and Sharmer, and that this remark of Johnson's cannot be taken as creating a contract of pledge, and was an admission of a past contract based solely on Sharmer's declaration to Johnson, so that to give it any weight would be to permit Sharmer to make evidence in his own favor by his own declarations. Mr. Reilly testified that he had been the attorney for the bank, and that he had acted for the bank at one time in transferring some real estate to Sharmer, and that thereafter Morgan consulted him as to whether notes could be pledged by delivery without indorsement, saying

that Sharmer and others held such security and he wanted to know its legal effect. This testimony was objected to as incompetent, and we think it was clearly so. It was a professional communication, and was incompetent under section 333 of the Code. The appellant was the representative of the client by whom the communication was made and was entitled to insist upon this privilege. All the competent evidence in favor of Sharmer, then, consists in proof of an indebtedness from the bank to him and proof that he was in possession of the notes and warrants. On the other hand, it was shown that the books of the bank disclosed no pledge or transfer of the paper, and that Sharmer's occupation was such that he had access to the safe and the papers of the bank, and that his work had consisted largely in collecting notes belonging to the bank.

In order to constitute a pledge of personal property or evidences of indebtedness, two things must concur: First, a contract whereby such property is to be held as security to a debt; and second, delivery, actual or constructive, of the pledge to the pledgee. In this case the debt was proved, possession by the pledgee was shown, but the manner in which possession was obtained was not shown, nor was there the slightest evidence of any contract of pledge. So far as the unindorsed notes are concerned, we think that there was no evidence to sustain a finding for the plaintiff. The two warrants were indorsed generally by the payee and also by Morgan as cashier, and one note made by E. V. S. Pomroy to George W. Jenner bore Jenner's general indorsement. While the warrants were not in the sense of the law merchant negotiable instruments, still, so indorsed, property in them passed by delivery. Sharmer's possession of these warrants and of the Jenner note was, therefore, *prima facie* evidence of ownership; *a fortiori*, evidence of a lesser claim. The evidence afforded by this possession was not rebutted, and we think, so far as these three instruments were concerned, the finding of the court

is sustained. It may be said that in all probability Sharmer's interest was the same in all the securities in his possession. This may be true, but the knowledge of the facts had been confined to Sharmer and Morgan. If Sharmer's claim was ill-founded, death had sealed the lips of the only person who could show that fact and rebut any presumption in Sharmer's favor. On the other hand, the statute sealed Sharmer's lips and probably prevented his establishing a claim to the other papers where he was not aided by any legal presumption. The statute is largely founded in public policy. It was designed to place the parties on an equal footing as to proof. It was not intended to relieve either party from the necessity of making proof, and as the law of nature in the case of death may deprive one party of the ability of proving facts which could otherwise be established, so the statute in such cases may deprive the other party of the same ability. The decree of the district court must be modified so as give Sharmer a lien on the proceeds of the two warrants and of the Jenner note alone, and to order the receiver in this case to deliver to the receiver of the bank the other notes or the proceeds thereof.

DECREE ACCORDINGLY.

J. L. MOORE, TRUSTEE, APPELLEE, V. JAMES B. KIME ET AL., APPELLANTS, IMPLEADED WITH ALEXANDER STEWART ET AL., APPELLEES.

FILED JANUARY 16, 1895. No. 5430.

1. **Pleading:** JUDGMENTS. Where a defendant files no pleading except a demurrer to the petition on the ground that it does not state a cause of action, other defendants answering and presenting issues, a decree reciting that the case was heard on the pleadings and evidence, then finding the facts as alleged in the peti-

tion and granting to plaintiff the relief prayed, will be treated as an order overruling the demurrer and entering judgment thereon.

2. **Tender Before Maturity of Debt.** When a debt is payable on a day certain, the creditor is not required to accept payment before that day, and he loses no rights nor does the debtor gain any because of a tender made before the debt matured.

3. **Mortgages.** A mortgaged land to B; he subsequently borrowed money of C and mortgaged the same land to secure the debt. It was the intention of A and C to discharge B's mortgage out of C's loan, but B's mortgage had not matured and B refused to accept payment. Whereupon, by agreement between A and C's agent, the latter withheld from the loan the amount of B's debt to secure C against B's mortgage. Default was made on both mortgages. *Held*, That the withholding of the money on such terms did not excuse A from his obligation to pay C his debt as it matured; that, at the suit of the mortgagees, B was entitled to foreclose for the amount of his debt, C for the amount actually paid to A,—that is, the face of his note less the amount withheld as security against B,—and that the district court did not abuse its discretion in awarding costs against the mortgagor.

APPEAL from the district court of Dawes county. Heard below before CRITES, J.

Spargur & Fisher, for appellants.

W. W. Wood, Stewart & Munger, and *Alfred Bartow*, *contra*.

IRVINE, C.

March 19, 1888, Mordecai C. Maxwell and wife made a mortgage to the Dakota Mortgage Loan Corporation upon a tract of land in Dawes county to secure a note for $200, payable April 1, 1893, with interest at seven per cent, payable semi-annually. On the 4th day of September, 1889, the same persons made another mortgage upon this land in favor of William Stewart and Alexander W. Stewart to secure the payment of a note for $800, payable September 1, 1894, with ten per cent interest, payable semi-annually.

On the same day Maxwell and wife conveyed the land to James B. Kime and Simon J. Rice, the latter afterwards conveying to Kime. January 2, 1891, Moore, who had succeeded to the ownership of the note in favor of the Dakota Mortgage Loan Corporation, brought this action to foreclose that mortgage alleging a default in several interest payments which, by the terms of the note and mortgage, permitted the holder to declare the whole debt due. He made defendants Kime, the Maxwells, and the Stewarts.

The Stewarts answered, setting up their mortgage and alleging a default in the payment of several installments of interest then due as well as a further default because of the breach of the covenant against incumbrances contained in the mortgage; the incumbrance constituting the breach being the plaintiff's mortgage.

Kime demurred, the language of his demurrer being as follows: "Come now the defendant, James B. Kime, by Spargur & Fisher, his attorneys, and enters herein his demurrer to the petition and cross-petition, and for the following reason: Because it appears upon the face of said cross-petition that it does not state facts sufficient to constitute a cause of action, or to entitle them to relief against this defendant." This demurrer purports to be directed against both the petition and cross-petition, but states no ground of demurrer against the petition. Therefore, by virtue of section 95 of the Code of Civil Procedure it must be taken as a demurrer to the petition on the ground that it does not state facts sufficient to constitute a cause of action.

Mordecai Maxwell answered, admitting the execution of the plaintiff's mortgage and denying all other allegations of the petition. He also asked that Alfred Bartow be made a party He then averred that he had put into the hands of Bartow $250, and constituted Bartow his agent for the purpose of paying such sum in satisfaction of plaintiff's mortgage; that Bartow did not pay the same, but converted said

sum to his own use. He prayed that Bartow be required to pay plaintiff's mortgage, and the costs of the suit. No order appears making Bartow a party, but he answered the cross-petition, setting up facts in accordance with what the evidence established on the trial.

The evidence showed beyond all controversy that Bartow was the agent of the Stewarts; that Maxwell applied to him for a loan; that Bartow informed him that the incumbrance caused by plaintiff's mortgage must be cleared away in order to procure the loan, and that Maxwell assured him that it could be discharged at any time. Maxwell and Bartow then entered into correspondence with the agent of the Dakota company with a view of procuring a release of its mortgage. Bartow offered six months' interest in advance as an inducement for the release. He afterwards offered to pay the debt with interest in full until its maturity. All this was with the knowledge of Maxwell. Pending the negotiations the mortgage to the Stewarts was executed. On September 9, 1889, Bartow and Maxwell were met with a point blank refusal on the part of the Dakota company to accept payment of its mortgage before maturity. It was then agreed between Maxwell and Bartow that Bartow should withhold from the $800, $256 as security for the Stewarts against the plaintiff's mortgage. A statement was then prepared on this basis and the remainder of the money resulting from the Stewart loan paid over to Maxwell. On these facts the court established the lien of plaintiff as a first lien and decreed foreclosure. It then found that Bartow, on behalf of the Stewarts, had withheld $256 to apply in payment of the plaintiff's mortgage, and that three months from the date of the mortgage to the Stewarts would have been a reasonable time for making such payment and procuring a release. The court then established the mortgage of the Stewarts as a second lien, allowing interest on $800 for three months and interest on $544 for the remainder of the time—so ascertain-

ing the amount due on the Stewart mortgage as $678.43, and decreed a foreclosure. Kime and Maxwell appeal. Kime filed no pleading except the demurrer. There is no distinct order overruling this demurrer, but we think the decree reciting that the case had been submitted to the court upon the pleadings and evidence and then proceeding to award foreclosure, this was equivalent to overruling Kime's demurrer. No defect in either petition or cross-petition is pointed out in the briefs. We have perceived no defect therein, and Kime having, by resting on his demurrer, confessed the averments of the petition and cross-petition, the decree was not erroneous as against him.

On behalf of Maxwell the argument is that the plaintiff's assignor, having refused to receive payment of its mortgage, should not be permitted to foreclose before its maturity according to its terms; that, if this be not true, then the default was brought about by the failure of the Stewarts to apply the money withheld by them in making interest payments; that the Stewarts should not be permitted to foreclose on account of default in interest while withholding a portion of the loan greater than the interest due; that in any event under the facts the burden of the costs should be cast upon the mortgagees. The plaintiff certainly had a right to foreclose. The note, to secure which his mortgage was given, was payable at a day certain. The payee was not under any obligation to accept payment before maturity, and Maxwell acquired no rights as against him by offering to pay before; under his contract he had no right to do so. The duty of the debtor was to pay the interest installments when they matured, and the principal debt when it matured. The right of the creditor was to receive payment at such times and not before. The appellants have, therefore, shown no defense against the plaintiff's foreclosure, nor any equity whereby to subject the plaintiff to costs. As to the Stewarts, the case might be different if the appellants had not made default on their mortgage.

The $256 was withheld as security against the first mortgage, and it is probable that the appellees had a right to expect this money to be applied to the payment of interest thereon as the interest fell due and that they might have required the Stewarts to answer for all loss or expense caused by their failure to so apply this fund. But the appellants did not pay the interest on the Stewart mortgage, and if the $256 was, as we are inclined to think and as the appellants claim, a fund for the payment of the first mortgage, then the Stewarts could not be required, and in fact they had no right, to apply it to the payment of interest on their own mortgage. It was the duty of the appellants to pay this interest, and having broken the contract upon their part they cannot defend against the foreclosure because the Stewarts failed to protect them against the first mortgage.

In one respect we think the court erred. Under the evidence we can see no foundation for allowing interest on the $256 withheld for three months or any other time. When the agreement was made it was known the first mortgagee would not accept payment, and there was no occasion for the Stewarts to keep this money for any time at the disposal of Maxwell. It was simply withheld to meet the first mortgage when it matured, and neither Maxwell nor Kime had the use thereof. The amount found due on the mortgage should, therefore, be reduced by $6.40—the interest at the rate the mortgage bore on $256 for three months. So modified the decree will be affirmed, as under the circumstances we see no reason for not sustaining the discretionary act of the trial judge in taxing the costs against the appellants.

DECREE ACCORDINGLY

SARAH MCGECHIE, APPELLEE, V. S. A. MCGECHIE, APPELLANT.

FILED JANUARY 17, 1895. No. 6131.

1. **Alimony** should not be awarded a wife in installments during her life.
2. **The decree** in this case is modified by eliminating therefrom the provision for $10 per month as continuing alimony.

APPEAL from the district court of Richardson county. Heard below before BUSH, J.

Frank Martin, for appellant, cited: *Boyd v. Boyd*, 1 Harp. Eq. [S. Car.], 144; *Atkins v. Atkins*, 13 Neb., 272; *Smith v. Smith*, 19 Neb., 706; *McConahey v. McConahey*, 21 Neb., 463; *Small v. Small*, 28 Neb., 843.

E. W. Thomas and *J. S. Stull, contra*, cited: *Vert v. Vert*, 54 N. W. Rep. [S. Dak.], 655.

NORVAL, C. J.

This is an action for divorce and alimony. A decree of divorce was granted the plaintiff. She was awarded the custody of the minor children and the defendant was ordered to pay the plaintiff alimony in the sum of $500 within thirty days from the entry of the decree and, in addition thereto, the further sum of $10 per month continuing alimony, payable monthly, commencing on the 1st day of January, 1893. The defendant appeals from that portion of decree relating to the wife's allowance.

The evidence shows that the defendant is a farmer, and at the time of the trial owned a two-thirds interest in three lots in the town of Auburn, worth $600 or $700, three horses, two colts, a cow and calf, about 800 bushels of corn, one wagon, and some farming implements. The value of

his property, real as well as personal, does not exceed $1,000. RAGAN, C., in his opinion in the case of *Cochran v. Cochran*, 42 Neb., 612, observes: "There is no fixed rule for determining what portion of a husband's estate should be decreed to his wife for alimony. The amount should be just and equitable, due regard being had for the rights of each party, the ability of the husband, the estate of the wife, and the character and situation of the parties." (See *Smith v. Smith*, 19 Neb., 706.) Testing the facts in the case before us by the foregoing rule we are fully persuaded that the allowance of $10 per month indefinitely for the support of the plaintiff, in addition to the sum of $500 awarded her, is excessive. We do not approve of allowing alimony in the form of an annuity, or requiring the husband to pay a fixed sum each month during the life of the other party, or for an indefinite period of time. (*Small v. Small*, 28 Neb., 843; *Cochran v. Cochran*, 42 Neb., 612.) The decree of the court below is modified by striking therefrom the provision for $10 per month as continuing alimony. In all other respects the decree is affirmed.

JUDGMENT ACCORDINGLY.

SCHOOL DISTRICT NUMBER SIX, CASS COUNTY, V. BLANCHE TRAVER.

FILED JANUARY 17, 1895. No. 6193.

1. **School Districts**: APPEAL BONDS. When a school district appeals to the district court from a judgment rendered by a justice of the peace, it must enter into an appeal bond as required by section 1007 of the Code of Civil Procedure.
2. ——: ——: ——. The giving of such bond, within the time prescribed by statute, is necessary to confer jurisdiction of the appeal upon the appellate court.

3. Constitutional Law: RIGHT OF APPEAL. The constitutional provision which declares that "the right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied," does not prohibit the legislature from prescribing reasonable rules and regulations for the review of a cause by appeal, such as requiring a bond to be given.

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

H. D. Travis, for plaintiff in error, cited: *People v. Supervisors of Marin County*, 10 Cal., 344; *Dollar Savings Bank v. United States*, 19 Wall. [U. S.], 227; *People v. Gilbert*, 18 Johns. [N. Y.], 227; *Commonwealth v. Brice*, 22 Pa. St., 211; *Cole v. White County*, 32 Ark., 45; Angell & Ames, Corporations, sec. 24; *Commissioners of Hamilton County v. Mighels*, 7 O. St., 109; *State v. Brewer*, 64 Ala., 287; *People v. Clingan*, 5 Cal., 391; *McClay v. City of Lincoln*, 32 Neb., 421.

Beeson & Root, contra, cited: *Townsend v. Smith*, 72 Am. Dec. [N. J.], 403; *Haight v. Gay*, 68 Am. Dec. [Cal.], 323; *Fitzgerald v. Brandt*, 36 Neb., 683; *May v. School District*, 22 Neb., 205; *Western Lunatic Asylum v. Miller*, 29 W. Va., 326; *Logan County v. City of Lincoln*, 81 Ill., 156; *People v. Stephens*, 71 N. Y., 549; *Nebraska R. Co. v. Van Dusen*, 6 Neb., 160.

NORVAL, C. J.

This action was commenced before a justice of the peace, by Blanche Traver against school district No. 6, in Cass county, to recover damages for a breach of contract of employment as school teacher. Judgment was rendered against the school district for the sum of $105, on July 9, 1892. A transcript of the proceedings was filed by the defendant in the district court for the purpose of taking an appeal, but no appeal undertaking was given. On

motion of the plaintiff the district court dismissed the appeal, for the reason no appeal bond had been executed and filed. To reverse this judgment the defendant brings the cause here by petition in error.

The only question presented for determination is whether the plaintiff in error was required to enter into an appeal bond in order to entitle it to prosecute an appeal from the judgment of the justice of the peace to the district court?

Section 1006 of the Code of Civil Procedure, relating to appeals from justice courts to district courts, provides: "In all cases, not otherwise specially provided for by law, either party may appeal from the final judgment of any justice of the peace, to the district court of the county where the judgment is rendered."

Section 1007 declares: "The party appealing shall, within ten days from the rendition of judgment, enter into an undertaking to the adverse party, with at least one good and sufficient surety to be approved by such justice, in a sum not less than fifty dollars in any case, nor less than double the amount of judgment and costs, conditioned: First—That the appellant will prosecute his appeal to effect and without unnecessary delay. Second—That if judgment be adjudged against him on the appeal, he will satisfy such judgment and costs. Such undertaking need not be signed by the appellant."

By the section first above quoted an appeal is authorized to be taken in every case unless otherwise expressly provided by statute, and by the last section the appellant, in order to perfect an appeal, is required to give an appeal bond or undertaking within a specified time after the rendition of judgment. Appeals are regulated entirely by statute. Section 1007 of the Code is peremptory in its language, and does not allow an appeal from a justice of the peace to the district court in any case unless the prescribed requisites be complied with by the appellant,—one of which is that he shall enter into an undertaking. The statute is

mandatory. The giving of the appeal bond is essential to confer jurisdiction of the cause upon the appellate tribunal. Counsel for plaintiff in error concedes this to be the general rule, but it is insisted that the state, counties, and school districts are not subject to the provisions of said section, and, therefore, the plaintiff in error was not required to give bond in order to take an appeal. Decisions are to be found to the effect that a state cannot be denied a hearing in its own courts by appeal because no appeal undertaking was given, unless it is prohibited from so doing by legislative enactment. In other words, statutes general in their purpose and scope do not restrict the state, because of its sovereignty, unless such intention is clearly expressed therein. Whether the state is required to give a bond in order to have a cause reviewed in a higher court we will not stop to consider, since the question does not arise in the case before us. If such rule exists, it has no application to school districts. They may sue and be sued, and are governed by the same law regulating appeals as the citizen. In *May v. School District*, 22 Neb., 205, this court held that while the lapse of time does not bar the right of the state, the statute of limitations runs against school districts in the same manner as it does against individuals. By parity of reasoning the law applicable to appeals governs school districts and citizens alike. The statute relating thereto makes no exceptions in favor of school districts, and the courts have no right to ingraft one by judicial interpretation. That would be legislation which belongs exclusively to another department of the state government.

Attention is called by counsel to section 24, article 1, of the constitution, which provides that "the right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied." While the legislature is powerless to take away the right guarantied by the constitution to a party to have his cause reviewed in the court of last resort by appeal or error, yet it is not prohibited

from prescribing reasonable rules and regulations for such review, such as requiring the appellant to give a bond. The district court did not err in dismissing the appeal, and the judgment is therefore

AFFIRMED.

DWELLING HOUSE INSURANCE COMPANY OF BOSTON v. GEORGE W. BREWSTER.

FILED JANUARY 17, 1895. No. 5718.

1. **Pleading.** In a reply certain matters were alleged which, it was claimed, constituted either waivers, estoppel, or avoidance of the effect of matters of defense contained in the allegations of an answer to which they were respectively directed and applied. The reply also contained a general denial of each and every allegation of the answer. *Held*, That any allegation of the answer to which the reply pleaded a waiver, an estoppel, or matter to avoid its effect must be treated as admitted.
2. **Instructions.** In stating the case to the jury in its instructions the court should clearly outline the issues as presented by the pleadings and should not inform them that facts, which are admitted, are denied.
3. ———: BURDEN OF PROOF: REVIEW. An instruction which, as to certain of the issues in the case on trial, placed the burden of proof upon the wrong party, or one upon whom, under the conditions of the questions to be tried as presented by the pleadings, such burden did not rest, and where the evidence adduced, relating to such issues, was conflicting, *held* to be erroneous and misleading, and prejudicial to the rights of such party, and not to fairly submit the issues to the jury, and to call for a reversal of the judgment.
4. **Insurance:** WAIVER OF PROOF OF LOSS. Proofs of loss required by a condition of an insurance policy are waived when the insurance company denies any liability for the loss on the ground that the policy was not in force at the date of the loss.

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

See opinion for statement of the case.

Cornish & Lamb, for plaintiff in error:

The court erred in its presentation of the issues to the jury, and in instructing the jury that the burden was upon the plaintiff only to prove the value of the building insured. (*School District v. Holmes*, 16 Neb., 486; *Chicago, St. P., M. & O. R. Co. v. Lindstrom*, 16 Neb., 254; *Dinsmore v. Stimbert*, 12 Neb., 433; *Phenix Ins. Co. v. Bachelder*, 32 Neb., 490; *German Ins. Co. v. Fairbank*, 32 Neb., 750; *Kelsey v. McLaughlin*, 10 Neb., 6.)

It was the duty of the plaintiff to show a compliance with the terms of the policy in furnishing proofs of loss, or to show that such proofs were waived by the company. (*German Ins. Co. v. Heiduk*, 30 Neb., 288; *Hankins v. Rockford Ins. Co.*, 70 Wis., 1; *Knudson v. Hekla Fire Ins. Co.*, 75 Wis., 198; *Cleaver v. Traders Ins. Co.*, 65 Mich., 527; *Gould v. Dwelling House Ins. Co.*, 51 N. W. Rep., [Mich.], 455; *Enos v. Sun Ins. Co.*, 8 Pac. Rep. [Cal.], 379; *Kyte v. Commercial Union Assurance Co.*, 144 Mass., 46; *Zimmerman v. Home Ins. Co.*, 77 Ia., 685; *Continental Ins. Co. v. Ruckman*, 127 Ill., 364; *Quinlan v. Providence Washington Ins. Co.*, 133 N. Y., 356; Richardson, Insurance, sec. 82, and cases cited.)

A. Norman, contra, cited: *Russell v. Cedar Rapids Ins. Co.*, 32 N. W. Rep. [Ia.], 95; *Oshkosh Gas Light Co. v. Germania Fire Ins. Co.*, 37 N.W. Rep. [Wis.], 819; *Jones v. Howard Ins. Co.*, 22 N. E. Rep. [N. Y.], 578.

Marquett, Deweese & Hall, also for defendant in error.

HARRISON, J.

The defendant in error commenced this action in the district court of Lancaster county, alleging, in substance, in his petition, that on August 9, 1886, he was the owner

of a dwelling house in Brewster, Blaine county, and the insurance company, plaintiff in error, in consideration of the sum of $40, issued and delivered to him, of the above date, a policy of insurance insuring the above building against loss or damage by fire, in the sum of $1,000, during a term of five years; that on the 2d day of December, 1887, the building so insured was wholly destroyed by fire, and on or about the 6th day of December, 1887, he gave the insurance company due notice and proof of the fire and loss, "and has duly performed on his part all the conditions of said policy of insurance;" that the building was of the value of $1,000 at the time of its destruction by fire; that payment of the loss has been demanded by the insured of the company, but such payment has never been made. The company filed an answer which was as follows:

"For answer to the plaintiff's petition the defendant herein denies each and every allegation therein contained not herein specifically admitted.

"Second—The defendant admits that on the 9th day of August, 1886, they made and delivered their policy of insurance on the property described in plaintiff's petition, and that the building therein insured was destroyed by fire on the 2d day of December, 1887, and that the defendants have not paid the loss occasioned thereby.

"Third—The defendants further answer and allege that the said insurance policy contains, among other things, a provision as follows: 'By acceptance of this policy the assured covenants that the application therefor shall be and form a part thereof, and a warranty by the insured.'

"Fourth—The plaintiff made his written application for the said policy of insurance, wherein he stated that there were no stove-pipes running through the roof of the said building. The said statement was untrue, and there was at said time a stove-pipe running through the roof of said building, as the plaintiff then well knew, and said

statement was made to deceive this defendant. The plaintiff further warranted to the defendant as follows: 'Warranted by the insured that all stove-pipes will enter stone or brick chimneys on and after October 9, 1886. Geo. W. Brewster.' Defendant alleges that plaintiff failed and neglected to comply with term of said warranty made by him, and that stove-pipes in said building not entering stone or brick chimneys were allowed to remain in the same until the time of its destruction. This defendant company has no agency or person representing them in the county where said building was located, but this contract was made at the office of their agent in Ainsworth, Brown county, Nebraska, and this defendant, in issuing said policy, relied on the statements made by the plaintiff. The said building was represented by the plaintiff to be, and was insured as, a private dwelling, but was then, and at the time of its destruction, used as a hotel or boarding house, as the plaintiff at all times well knew. The said insurance policy provides, among other things, that in case of the destruction of the property insured, the assured shall forthwith give notice of the loss to the defendant company, and within thirty days from the time of its destruction furnish proof thereof, signed and verified by the claimant, stating the origin and circumstances of the fire, title and cash value of incumbrances upon, and interests of the claimant in the insured property, amount of the loss, other insurance, if any, the changes of title, use or occupation or possession of the building, what incumbrances, if any, were made during the time of insurance, and how and for what purpose the building was occupied at the time of the fire, the same to have attached a certificate of a magistrate nearest the place of the fire, certifying that he believes the claim to be just and honest. The defendant alleges that plaintiff failed and neglected to furnish proofs of loss, as required by said provision, either in whole or in part. The said policy contained, among other provisions,

one as follows: 'It is mutually agreed that no suit or action against this company upon this policy shall be sustained in any court of law or equity, unless commenced within six months after the loss or damage shall occur, and if any suit or action shall be commenced after the expiration of six months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.' The defendant alleges that no action was commenced by the plaintiff within the time required by said provision, nor until the time of the commencement of this action, when more than one year had elapsed after the said fire had occurred. The defendant, within sixty days after the time of said loss, notified plaintiff that it was not liable on said policy, and that the same was void. The said policy provided that in case the interest of the insured was or should become any other than a perfect legal and equitable title, free from all liens whatever, except indorsed in writing thereon, the policy should be void. The defendant alleges that on the 6th day of December, 1887, the plaintiff incumbered the property by mortgage to the Lincoln Land Company in the sum of $1,100. The same was done without the knowledge and consent of this defendant, and without the same being indorsed in writing on said policy. By reason of the facts above alleged the said policy is void."

To this answer there seems to have been a reply filed, and, by leave of the court, an amended reply, which reads as follows:

"The plaintiff alleges that the defendant has waived the agreement to build brick and stone flues and chimneys in the building insured within sixty days; that defendant has waived that part of the application which warranted that all stove-pipes will enter brick or stone chimneys on and after October 9, 1886. Plaintiff further replying says that the character and nature of said building was known

to the company's agent at the time he issued said policy, and has therefore waived any objection to the said building being used as a boarding house. Plaintiff further replying says that the defendant has waived that provision in said policy requiring that formal proofs of loss be made within thirty days from the time of its destruction by the acts and conduct of the defendant, its agents and adjusters. Plaintiff further replying says that the defendant is estopped from setting up the defense that the property was mortgaged by the plaintiff after the date of said policy, without the knowledge and consent of the defendant by the reason of said insurance company having possession of said policy and never having delivered the same to the plaintiff until after the making of the mortgage to the Lincoln Land Company; that defendant has, by its conduct and acts, waived that provision in said policy which renders the policy void, if the said plaintiff should mortgage or incumber said property without the knowledge and consent of said defendant. This plaintiff alleges that the mortgage to the Lincoln Land Company was duly filed for record in Blaine county, Nebraska, on the 7th day of September, 1887, and that the said defendant had knowledge and knew that said mortgage had been given, and that out of its proceeds the mortgage upon said Ormsby, trustee, which was on said property at the time it was insured, had been paid off and canceled, and that the plaintiff herein had been subrogated to all the rights of said mortgagee. Further replying, plaintiff denies each and every allegation in said answer contained."

As a result of the trial of the case before the court and a jury there was judgment rendered against the answering company for the amount stated in the policy and interest, the reversal of which is the object and purpose of its error proceeding in this court.

One assignment of error refers to the first and second instructions given by the court on its own motion, and com-

plaint is made that in view of the condition of the issues joined by the pleadings, such instructions were erroneous and calculated to mislead the jury. The first instruction was intended by the court to inform the jury of the questions for their consideration as presented in the pleadings, and the particular portion of it which is claimed as objectionable is contained in the following words: "Plaintiff replying denies all these allegations of the answer." Immediately preceding this, in the instruction, was a statement of what was contained in the anwer. The second instruction is as follows:

"Second—The defendant company having admitted the issuance of the poliey sued on, the loss alleged by fire and its having not paid said loss, the burden of proof upon plaintiff goes only to proving that the building insured was worth $1,000, the sum for which it was insured; and the jury are instructed that if they believe from the evidence that the building insured was worth at least $1,000 at the time of said fire and loss, then that the burden of proof in this case is shifted from the plaintiff to the defendant, and it devolves upon the defendant to show by a preponderance of the evidence such facts as in law are sufficient to relieve the defendant from its obligation under the said policy to pay said loss; and you are instructed that unless defendant shows facts sufficient in law to relieve it from its obligations to pay for said loss, then your verdict should be for plaintiff in such sum, not exceeding $1,000, as you shall find from the evidence to have been the value of said building on the 2d day of December, 1887, with interest at seven per cent per annum from the date of proof of loss thereunto added, if such proof you find made."

The plaintiff in error claims that the court erred in instructing the jury, first, that the reply was a denial of the allegations of the answer; and, second, in stating to them that the issuance of the policy, the loss and its non-payment being admitted, it only devolved upon the insured to prove

the value of the property, to shift the burden of proof and throw upon the company the necessity of showing by a preponderance of the evidence any matters relied upon to relieve it from its obligation to pay the loss. In order to determine whether or not the foregoing contention of plaintiff in error is correct, and the effect of the instructions quoted prejudicial to the substantial rights of the company, it will be necessary to examine into the condition of the issues in the case as established by the pleadings and the rules of law applicable thereto.

The insured, in his petition, alleged the performance of all the conditions of the policy on his part to be performed. The answer contained statements of a number of failures to perform conditions of the policy, or the doing of acts which, under its provisions, it was claimed avoided it and released the company from liability. The reply to the defenses set up in the answer stated matters which it was claimed constituted waivers, by the company, of the breaches of the conditions claimed in some of the alleged defenses, an avoidance of the effect of what was pleaded in others, and an estoppel as to others of such defenses. The reply also contained a general denial of each and every allegation contained in the answer. As to each allegation or defense of the answer to which the reply alleged matter by way of waiver, avoidance, or estoppel, it must be held to have virtually admitted the performance or non-performance of the conditions or acts therein stated as the foundation of such defense. (*Kelsey v. McLaughlin*, 10 Neb., 6; *Dinsmore v. Stimbert*, 12 Neb., 433; *School District v. Holmes*, 16 Neb., 486.) One of the defenses stated in the answer, and relied upon by the company, was the fact that the insured had not furnished the proofs of the loss required by the terms of the policy of insurance. Whether this was true or not was immaterial, as the company denied that it was bound to pay the loss, claiming that the policy was not in force at the time of the destruction of the prop-

erty. . This was a waiver of the requirements of proofs of loss. (See *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 473, and cases cited, and *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 569.) It is apparent that under the issues as presented by the pleadings it devolved upon the insured to prove certain of the waivers, if any, by the company, of the conditions of the policy, the matters in avoidance of the effects of his acts, and anything which he claimed estopped the company from asserting some of its alleged defenses; and as the testimony in regard to some of these subjects was conflicting, it was error for the court to charge the jury as it did in the first and second instructions hereinbefore quoted, and such error was prejudicial to the rights of plaintiff in error. It was clearly wrong to inform the jury that all the allegations of the answer were denied by the reply, when, in fact, a number of them were admitted by it, and as clearly wrong to inform them that when the insured made proof of value, the burden of proof shifted to the company, and they must, as to admitted facts, produce a preponderance of the evidence, for this was the true import of the portion of the second instruction of which the plaintiff in error complains, and we are satisfied that the instructions under consideration were such as had a strong tendency to mislead the jury and they should not have been given; that they were so inapplicable to the issues, as formed in the case, and the evidence adduced during the trial, as to prejudice the interests of plaintiff in error and to require a reversal of the judgment.

REVERSED AND REMANDED.

PAUL J. BONWIT, APPELLEE, V. ELIAS HEYMAN ET AL., APPELLEES, IMPLEADED WITH AMY HOFFMAN, APPELLANT.

FILED JANUARY 17, 1895. No. 5805.

1. **Fraudulent Conveyances:** PARTNERSHIP: TRUSTS: EVIDENCE: TRANSACTIONS BETWEEN RELATIVES. Members of a partnership cannot create in favor of another firm, of which they are the sole members, a preference as against creditors, by making a mortgage on the property of the first mentioned firm in its name to that last named, unless affirmatively it is clearly shown that the transaction was free from fraud, and the assignment afterwards of an account secured by such a mortgage entitles the assignee to no exemption from the operation of this requirement.
2. ———: EVIDENCE. Evidence examined, and *held* neither to meet the above requirement nor to show with requisite clearness the *bona fides* of the transaction among relatives.

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

There is a statement of the case in the opinion.

Chas. O. Whedon for appellant:

Each partner, *virtute officii*, possesses an equal and general power and authority in behalf of the firm to transfer, pledge, exchange, or apply, or otherwise dispose of, the partnership property or effects for any and all purposes within the scope and objects of the partnership, and in the scope of its trade and business. The power extends also to assignments of property of the firm, as a security for an antecedent debt, as well as to debts thereafter to be contracted by members of the firm. (Story, Partnership, sec. 101; *Cullum v. Bloodgood*, 15 Ala., 42.)

One partner has authority to transfer or convey by mort-

gage any or all the partnership property, in payment of, or to secure, a firm debt. (*Patch v. Wheatland*, 8 Allen [Mass.], 102; *Nelson v. Wheelock*, 46 Ill., 25; Jones, Chattel Mortgages, secs. 46, 47; *Letts-Fletcher Co. v. McMaster*, 49 N. W. Rep. [Ia.], 1035; *Ullman v. Myrick*, 8 So. Rep. [Ala.], 410; *Phillips v. Trobridge Furniture Co.*, 86 Ga., 699; *Hagen v. Campbell*, 47 N. W. Rep. [Wis.], 179; *Hembree v. Blackburn*, 19 Pac. Rep. [Ore.], 73; *Graser v. Stellwagen*, 25 N. Y., 315; *Van Brunt v. Applegate*, 44 N. Y., 544.)

The mortgage to Amy Hoffman, introduced in evidence, was executed in the firm name, and the presumption is that it was given to secure a firm debt, and the burden is on the firm to show that the partner who executed it had no authority so to do. (*Schwanck v. Davis*, 25 Neb., 196.)

The law is well settled that a debtor, even if in failing circumstances, has the right to prefer one *bona fide* creditor to the exclusion of other creditors. (*Lininger v. Raymond*, 12 Neb., 19; *Nelson v. Garey*, 15 Neb., 533; *Grimes v. Farrington*, 19 Neb., 44; *Davis v. Scott*, 22 Neb., 154; *Britton v. Boyer*, 27 Neb., 522; *Davis v. Scott*, 27 Neb., 642; *Kemp v. Small*, 32 Neb., 318.)

A partnership is considered in law as an artificial person or being, distinct from the individuals composing it. It is treated as such in law and equity. (*Curtis v. Hollingshead*, 14 N. J. Law, 402.)

The acts of one member of the firm in reference to the partnership business binds all. (*Converse v. Shambaugh*, 4 Neb., 376.)

Partnership property will be applied in payment of partnership debts, but while the firm property remains under the control of the partners they may give a lien upon it to secure individual debts and when this is done the court will enforce the security. (*Fletcher v. Sharpe*, 1 L. R. A. [Ind.], 179; *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq., 30.)

Harwood, Ames & Pettis, contra, contending that the rights of Amy Hoffman under her chattel mortgage are inferior to those of the firm creditors, and that Bonwit's action was properly dismissed, cited: *Bowen v. Crow,* 16 Neb., 556; *Cutting v. Daigneau,* 151 Mass., 297; *Stoddard v. Wood,* 9 Gray [Mass.], 90; *Portland Bank v. Hyde,* 11 Me., 196; *De Tastet v. Shaw,* 1 Barn. & Ald. [Eng.], 664; *Nicoll v. Mumford,* 4 Johns. Ch. [N. Y.], 523; *Ex parte Reeve,* 9 Ves. Jr. [Eng.], 589; *Ex parte Harris,* 2 Ves. & B. [Eng.], 210; *Ex parte Taylor,* 2 Rose [Eng.], 175; *Lyndon v. Gorham,* 1 Gall. [U. S.], 367; *Lord v. Baldwin,* 6 Pick. [Mass.], 348; *Denny v. Metcalf,* 28 Me., 389; *Thompson v. Lowe,* 111 Ind., 272; *Pio Pico v. Cuyas,* 47 Cal., 174; *Roop v. Herron,* 15 Neb., 73; *Hankey v. Garratt,* 1 Ves. [Eng.], 239; *Muir v. Leitch,* 7 Barb. [N. Y.], 341; *Deal v. Bogue,* 20 Pa. St., 228; *Smith v. Jones,* 18 Neb., 483; *Morehead v. Adams,* 18 Neb., 573; *Rothell v. Grimes,* 22 Neb., 530; *Loeb v. Pierpoint,* 58 Ia., 469; *Hunter v. Waynick,* 67 Ia., 555; *Bergland v. Frawley,* 72 Wis., 559; *Brooks v. Sullivan,* 32 Wis., 444; *Rumery v. McCulloch,* 54 Wis., 565; *Coleman v. Darling,* 66 Wis., 158; *Farwell v. Webster,* 71 Wis., 485; *Osborne v Barge,* 29 Fed. Rep., 725; *Roots v. Mason City Salt & Mining Co.,* 27 W. Va., 483; *Newcomb v. Brooks,* 16 W. Va., 32; *Reilly v. Oglebay,* 25 W. Va., 36.

Stevens, Love & Cochran, Jacob Fawcett, and *Montgomery & Hall,* also for appellees.

RYAN, C.

In September of the year 1890, Elias Heyman, Augustus Deiches, and Paul J. Bonwit entered into a copartnership under the firm name of E. Heyman & Co., for the purpose of carrying on a retail mercantile business at Lincoln, Nebraska. At the time the above firm was formed, and

afterwards, Elias Heyman and Augustus Deiches were partners at Omaha, carrying on a like business under the firm name of Heyman & Deiches. In the course of the business of the firms aforesaid that of Heyman & Deiches supplied to the firm of E. Heyman & Co. merchandise to the amount in value of about $8,200. The firm of Heyman & Deiches, from the time of its formation in the year 1887, had been in receipt of various sums at different times advanced as loans by Amy Hoffman, until February 14, 1891, when the aggregate sum owing her was in excess of $21,000. On the date last mentioned there was executed in her favor the following instrument:

"Whereas Heyman & Deiches, a firm consisting of Elias Heyman and August Deiches, and doing business in the city of Omaha, Nebraska, are indebted to Amy Hoffman, of the city of New York, in the sum of twenty-one thousand three hundred and forty-nine and $\frac{88}{100}$ dollars ($21,349.88), with six per cent interest thereon from the 31st day of December, 1890, for money borrowed by the said Heyman & Deiches and interest thereon, and which said borrowed money has been used in the partnership business of said Heyman & Deiches at Omaha, Nebraska; and whereas the firm of E. Heyman & Co., a partnership doing business at 1023 on O street in the city of Lincoln, and composed of Elias Heyman, August Deiches, and Paul J. Bonwit, is indebted to the said firm of Heyman & Deiches on book account for goods, wares, and merchandise purchased by the said firm of E. Heyman & Co. from the firm of Heyman & Deiches: now therefore, in consideration of the above mentioned indebtedness due the said Amy Hoffman from the said Heyman & Deiches, said Heyman & Deiches does by these presents assign, set over and transfer to the said Amy Hoffman any and all indebtedness due the said Heyman & Deiches from the said E. Heyman & Co., to hold the same as collateral security for the payment of said indebtedness due her from the said Heyman

& Deiches, and hereby authorizes her, the said Amy Hoffman, to collect the same by suit or otherwise in our name, or in her own name, as she may elect, and to apply the amount or any amount collected on said account on the indebtedness due her from the said firm of Heyman & Deiches. The account hereby assigned as collateral amounts to $8,205.31 (about) after satisfying said indebtedness, the balance, if any, to be returned to said Heyman & Deiches.

"HEYMAN & DEICHES.
"ELIAS HEYMAN.
"AUGUST DEICHES."

On the 15th day of February, 1891, in Omaha, there was executed by Elias Heyman for E. Heyman & Co. a chattel mortgage on the entire stock of E. Heyman & Co. in Lincoln, Nebraska, to secure to Amy Hoffman the payment of the claim assigned to her by the instrument above set out. Immediately after the execution of the above mortgage it was placed in the hands of a deputy sheriff of Lancaster county by Amy Hoffman's attorney, and these two parties as her agents attempted to secure possession of the mortgaged stock. In this attempt they were baffled by Paul J. Bonwit, the member of the firm of E. Heyman & Co. who had up to that time been in charge of the stock of goods of E. Heyman & Co., and who, until possession was sought, had been unaware of the assignment of the claim of Heyman & Deiches to Amy Hoffman and of the execution of a chattel mortgage for her security in respect thereto. This action was begun by Bonwit in the district court of Lancaster county for the protection of his own alleged rights as a partner and for the enforcement of the collection of debts due creditors of the firm of E. Heyman & Co. by a sale of the merchandise of said last named firm, and a distribution of the proceeds of such sale among the creditors aforesaid. In this action a temporary receiver was appointed, who took possession of the stock of E. Heyman & Co., thereby precluding the taking of possession

under the chattel mortgage to Amy Hoffman. The original defendants were Elias Heyman and Augustus Deiches. Subsequently, however, on her own application, Amy Hoffman was made a party defendant, as were also numerous creditors of the firm of E. Heyman & Co., who applied for leave to intervene that they might present their claims. The district court very properly dismissed Paul J. Bonwit's action, in so far as he claimed relief for himself individually, hence the sole contentions now to be determined are, as to the right of priority over other creditors claimed by Amy Hoffman by virtue of the chattel mortgage made to her. The district court, upon consideration of all the evidence, held that the rights of Amy Hoffman should be postponed to those of the general creditors of the firm of E. Heyman & Co., because the creditors of that firm were entitled to be paid before payment should be made to a firm standing in the relation in which the Omaha firm stood to the one at Lincoln, and because the court found the mortgage made to Amy Hoffman fraudulent and void as against the aforesaid creditors. From this decree Amy Hoffman alone has appealed.

It is not necessary to consider what would have been the effect if the firm of Heyman & Deiches, as such, had been a member of the firm of E. Heyman & Co., for no such state of facts existed. Two individual members constituted one firm and at the same time were members of the other firm. This did not constitute one firm a member of the other. The proposition that the creditors of E. Heyman & Co. should first be paid is not important if the theory of appellant is correct as to the standing of Amy Hoffman, for by assignment she was subrogated to the rights of the firm of Heyman & Deiches as a creditor of E. Heyman & Co., and, if there existed no other controlling consideration, would be entitled to protection as a creditor of the firm last named, even to the extent of the enforcement of her chattel mortgage by foreclosure. The evidence shows

that Amy Hoffman is the niece of Augustus Deiches and the step-daughter of Elias Heyman, with whose family in New York she had her home at the time the assignment of the claim of Heyman & Deiches against E. Heyman & Co. was made to her. Elias Heyman came to Omaha just previous to the execution of the assignment, and at that place he and Augustus Deiches, without the knowledge of Mr. Bonwit, the managing partner at Lincoln, having transferred their claim against E. Heyman & Co. to Amy Hoffman, the next day secured the claim assigned by a mortgage on the entire stock of the Lincoln firm. At the same time it appears that Heyman & Deiches made a mortgage on the east half of the stock of goods they possessed in Omaha to secure the claim of over $21,000 due from Heyman & Deiches to Amy Hoffman. This security was given in addition to the assignment of the claim which was assigned to Amy Hoffman. In all these transactions Amy Hoffman was represented by Dr. Hoffman, of Omaha, who was described as her attorney-in-fact, but whose relationship to her Mr. Deiches was unable to describe, and Mr. Heyman was not examined as to this relationship. Part or perhaps all the money advanced was sent from San Francisco, California, having been there paid to Amy through the orphans' court. At the time of making these loans Amy was seventeen, eighteen, or nineteen years of age, according to the testimony of Mr. Deiches, and no one else gave testimony on that point. S. Hoffman, Amy's uncle in San Francisco, managed her business at the time the loans were made, but she herself approved them. Amy Hoffman was not sworn in this case, neither was her uncle, nor Dr. Hoffman. The validity of her claim was dependent entirely upon the admissions of notes or other written instruments signed by Elias Heyman and Augustus Deiches and upon their testimony. As against the firm of which these two individuals were members this proof was undoubtedly sufficient.

Entirely without question is the right of a debtor in failing circumstances to prefer one of his creditors to another if such preference is without fraud. In the case of *Gorder v. Plattsmouth Canning Co.*, 36 Neb., 548, there was considered the right of the directors of a corporation to take security for advances by them made for the benefit of such corporation. The relation of directors to the corporation, of which they are officers, was held to be of a fiduciary character, and that, therefore, their contracts and dealings with reference to the corporate property should be carefully scrutinized by the courts, and, upon a slight showing of fraud, set aside. As Amy Hoffman, by the assignment of the claim of Heyman & Deiches to her, became possessed of no greater right of protection than would have been afforded the assignor, the principles just stated are not without applicability. Elias Heyman and Augustus Deiches, while they were members of the firm of E. Heyman & Co., stood in the relation of trustees toward the firm of E. Heyman & Co. as much as they should as directors of a corporation have been held to have sustained that relation towards such corporation. On the same principle, the burden of showing affirmatively the *bona fides* of their claim against their *cestui que trust* existed in one case with like force as in the other. The evidence fell short of showing that as to the claim of over eight thousand dollars assigned to Amy Hoffman there never existed a right to be treated as preferred creditors, and certainly their attempt practically to make a preference in their own favor did not operate to create such right. Even if in this case we should assume that Amy Hoffman was entitled to the same rights as though she had directly extended credit to the firm of E. Heyman & Co. we should not be able to see our way clear to reverse the decree of the district court, for the proofs of the *bona fides* of the giving and taking of the mortgage were not with requisite clearness established in view of the relationship between the parties therein actu-

ally concerned to meet the requirements of *Fisher v. Herron*, 22 Neb., 183; *Bartlett v. Cheesbrough*, 23 Neb., 767; *Plummer v. Rummel*, 26 Neb., 142. The judgment of the district court is therefore

AFFIRMED.

ANDREW BUNDERSON V. BURLINGTON & MISSOURI RIVER RAILROAD COMPANY.

FILED JANUARY 17, 1895. No. 5634.

1. **Surface Water.** A party has no right to gather up surface water and discharge it on the land of another to his damage. Subject to this limitation he has the right to drain and dispose of such water as he sees fit. Following *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 138.

2. ——: RAILROAD COMPANIES: DAMAGES. The term "surface water" includes such as is carried off by surface drainage,—that is, by drainage independently of a water-course; and for the construction of an embankment proper for railroad purposes, which deflects such surface water from its normal course, a railroad company is not liable in damages to the proprietor, or lessee, of neighboring lands thereby incidentally overflowed and injured.

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

The case is stated by the commissioner.

C. P. Halligan, for plaintiff in error:

It was the duty of the company to provide reasonable means for the passage of surface water. It could not with impunity treat all surface water coming naturally upon the right of way as a "common enemy," and erect artificial barriers against it without regard to the rights of others. (*Gormley v. Sanford*, 52 Ill., 158; *Livingston v. McDonald*,

21 Ia., 172; *Martin v. Riddle*, 26 Pa. St., 415; *Crabtree v. Baker*, 75 Ala., 91; *Nininger v. Norwood*, 72 Ala.,277; *Hughes v. Anderson*, 68 Ala., 280; *Little Rock & F. S. R. Co. v. Chapman*, 39 Ark., 463; *Ogburn v. Connor*, 46 Cal., 346; *Goldsmith v. Elsas*, 53 Ga, 186; *Totel v. Bonnefoy*, 123 Ill., 653; *Peck v. Herrington*, 109 Ill., 611; *Gillham v. Madison County R. Co.*, 49 Ill., 484; *Anderson v. Henderson*, 16 N. E. Rep. [Ill.], 232; *Minor v. Wright*, 16 La. Ann., 151; *Hooper v. Wilkinson*, 15 La. Ann., 497; *Adams v. Harrison*, 4 La. Ann., 165; *Hays v. Hays*, 19 La., 351; *Lattimore v. Davis*, 14 La., 161; *Martin v. Jett*, 12 La., 501; *Orleans Navigation Co. v. City of New Orleans*, 1 Mart. [La.], 13; *Philadelphia, W. & B. R. Co. v. Davis*, 10 Cent. Rep. [Md.], 551; *Boyd v. Conklin*, 54 Mich., 583; *Gregory v. Bush*, 31 N. W. Rep. [Mich.], 90; *Boynton v. Longley*, 19 Nev., 69; *Porter v. Durham*, 74 N. Car., 767; *Overton v. Sawyer*, 1 Jones' Law [N. Car.], 308; *Tootle v. Clifton*, 22 O. St., 247; *Butler v. Peck*, 16 O. St., 335; *Crawford v. Rambo*, 4 West. Rep. [O.], 445; *Kauffman v. Griesemer*, 26 Pa. St., 407; *Hays v. Hinkleman*, 68 Pa. St., 324; *Waldrop v. Greenwood L. & S. R. Co.*, 28 S. Car., 157; *Louisville & N. R. Co. v. Hays*, 11 Lea [Tenn.], 382; *Gulf C. & S. F. R. Co. v. Helsley*, 62 Tex., 593; *Gillison v. Charleston*, 16 W.Va., 282; *Rex v. Commissioners of Sewers for the Levels of Pagham*, 8 Barn. & Cress. [Eng.], 355; *Cairo & V. R. Co. v. Stevens*, 73 Ind., 278; *West Orange v. Field*, 37 N. J. Eq., 600; *Benton v. Chicago & A. R. Co.*, 78 Mo., 504; *Chasemore v. Richards*, 7 H. L. Cas. [Eng.], 349; *Acton v. Blundell*, 12 M. & W. [Eng.], 352; *Rawstron v. Taylor*, 11 Exch. [Eng.], 369*; *Smith v. Kenrick*, 7 C. B. [Eng.], 515.)

Charles J. Greene, contra:

The proprietor of an inferior or lower estate, may if he chooses, elevate, obstruct, or hinder the natural flow of surface water thereon, and, in so doing, may turn it back, upon,

or over the lands of other proprietors, without liability for injuries resulting from such obstruction or diversion. This proposition is universally sustained by the courts of England and of the United States, where the common law rule prevails. (Gould, Waters, secs. 263, 265, 267, 268. *Hoyt v. City of Hudson*, 27 Wis., 656; *Swett v. Cutts*, 50 N. H., 439; *Wagner v. Long Island R. Co.*, 5 N. Y. Sup. Ct., 163; *Trustees of Delhi v. Youmans*, 50 Barb. [N. Y.], 316; *Waffle v. New York C. R. Co.*, 58 Barb. [N. Y.], 413; *City of Bangor v. Lansil*, 51 Me., 521; *Bowlsby v. Speer*, 31 N. J. Law, 351; *Dickinson v. City of Worcester*, 7 Allen [Mass.], 19; *Parks v. City of Newburyport*, 10 Gray [Mass.], 28; *Chatfield v. Wilson*, 28 Vt., 49; Addison, Torts [4th ed.], ch. 2, sec. 1; *Brodbent v. Ramsbotham*, 11 Exch. [Eng.], 617; *Luther v. Winnisimmet Co.*, 9 Cush. [Mass.], 174; *Ashley v. Wolcott*, 11 Cush. [Mass.], 192; *Frazier v. Brown*, 12 O. St., 294.)

A railroad corporation, duly authorized by law, has no other or different rights regarding surface water than other citizens, and if its road-bed obstructs or diverts the natural flow of such water, no right of action at the common law arises to the owner of the lands thereby damaged. (Gould, Waters, sec. 273; *Greeley v. Maine C. R. Co.*, 53 Me., 200; *Morrison v. Bucksport & B. R. Co.*, 67 Me., 353; *Walker v. Old Colony & N. R. Co.*, 103 Mass., 10; *Wagner v. Long Island R. Co.*, 2 Hun [N. Y.], 633; *Conhocton Stone Road Co. v. Buffalo, N. Y. & E. R. Co.*, 3 Hun [N. Y.], 523; *Raleigh & A. A. L. R. Co. v. Wicker*, 74 N. Car., 220; *O'Connor v. Fond du Lac, A. & P. R. Co.*, 52 Wis., 526; *Louisville, N. A. & C. R. Co. v. McAfee*, 30 Ind., 291; *Clark v. Hannibal & St. J. R. Co.*, 36 Mo., 202; *Hosher v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo., 329; *Munkers v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo., 334; *Atchison, T. & S. F. R. Co., v. Hammer*, 22 Kan., 763; *Waterman v. Connecticut & P. R. Co.*, 30 Vt., 610; *Bagnall v. London & N. W. R. Co.*, 31 L. J. Exch. [Eng.], 480; *Gillham v.*

Madison County R. Co., 49 Ill., 484; *Alton & U. A. H. R. Co. v. Deitz*, 50 Ill., 210; *Toledo, W. & W. R. Co. v. Hunter*, 50 Ill., 325; *Shane v. Kansas City, St. J. & C. B. R. Co.*, 71 Mo., 237; *Indianapolis, B. & W. R. Co. v. Smith*, 52 Ind., 428; *Carriger v. East Tennessee, V. & G. R. Co.*, 7 Lea [Tenn.], 388.)

RYAN, C.

In the district court of Douglas county plaintiff in error claimed damages of the defendant because of an embankment which, by reason of its alleged negligent construction and the omission to provide for an outlet for the overflow waters of Big Papillion and Little Papillion creeks, had caused lands, of which plaintiff was tenant, to be overflowed, and his growing crops thereon to be destroyed. The nature of the overflow complained of was described by a son of plaintiff as that which occasionally came down through a depression between the two streams, which was somewhat obstructed by the embankment built by the defendant; that this overflow was not attributable to the existence of the railroad embankment, but the embankment interfered with it. The other witnesses of plaintiff did not with the same clearness describe the overflow complained of and its real cause, as was done by the witness just referred to, but their testimony was to the same effect. When plaintiff rested his case the court instructed the jury to find for the defendant, which was done and judgment was accordingly rendered. There was evidence that a proper construction of the embankment required that through it there should have been left an opening by means of which the surface water could escape when its natural flowage was interrupted by this railroad grade. It was not claimed that there should have been no embankment, neither was there attempted proof that plaintiff's cause of complaint could have been met in any way, other than by an opening as above indicated. In *Fremont, E. & M. V. R.*

Co. v. Marley, 25 Neb., 138, MAXWELL, J., in delivering the opinion of this court, said: "A party has no right to gather up surface water and discharge it on the land of another, to his damage. (*Davis v. Londgreen*, 8 Neb., 43; *Pyle v. Richards*, 17 Neb., 181; *Stewart v. Schneider*, 22 Neb., 286.) The question was before the supreme court of Michigan in *Gregory v. Bush*, 31 N. W. Rep., 94, where it was said that 'one has a right to ditch and drain, and dispose of the surface water upon his land as he sees fit; but he is not authorized to injure, by so doing, the heritage of his neighbor. He cannot collect and concentrate such waters and pour them through an artificial ditch in unusual quantities upon his adjacent proprietors. (*Kauffman v. Griesemer*, 26 Pa. St., 407; *Barkley v. Wilcox*, 86 N. Y., 148; *Noonan v. City of Albany*, 79 N. Y., 475; *Adams v. Walker*, 34 Conn., 466.)' This, we think, is a correct statement of the law." This case was approved in *Lincoln S. R. Co. v. Adams*, 41 Neb., 737. The only improvement upon the plan adopted and made use of by the construction of a solid embankment was forbidden by law, so that we are bound to accept the manner of construction shown as that which was least objectionable under the circumstances of this case. In *Morrisey v. Chicago, B. & Q. R. Co.*, 38 Neb., 406, one judge dissenting, it was held by this court that the term "surface water" includes such as is carried off by surface drainage,—that is, drainage independently of a water-course; and for the construction of an embankment proper for railroad purposes, which deflects such water from its normal course, a railroad company is not liable in damage to the proprietor of neighboring lands thereby incidentally overflowed and injured. This was approved in *Anheuser-Busch Brewing Association v. Peterson*, 41 Neb., 897. This statement of law is applicable to the rights of a lessee as well as to the proprietor of real property overflowed and injured; as applied to rights of either, it is, therefore, approved as correct. The results above at-

tained are such as completely justify the instruction given by the district court. Its judgment is, therefore,

AFFIRMED.

ORD NATIONAL BANK V. HENRY J. WELLS.

FILED JANUARY 17, 1895. No. 5311.

Usury: ACTION TO RECOVER PENALTY: PLEADING. A petition for the recovery of double the amount of interest, in which was included usury paid to a national bank, is sufficiently definite in its statement of facts when therein is shown the dates and amounts of the several loans, the usurious rate of interest stipulated for, and the date and amount of interest actually paid upon the closing up of the series of transactions described.

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

A. M. Robbins, for plaintiff in error, cited: *Schuyler Nat. Bank v. Bollong*, 24 Neb., 822; *Brown v. Second Nat. Bank of Erie*, 72 Pa. St., 209; Tyler, Usury, 456; *New England Mortgage Security Co. v. Sandford*, 16 Neb., 690; *Manning v. Tyler*, 21 N. Y., 567; *Anglo-American Land, Mortgage & Agency Co. v. Brohman*, 33 Neb., 409.

A. Norman, contra, cited: *Hall v. First Nat. Bank of Fairfield*, 30 Neb., 99; *Wycoff v. Longhead*, 2 Dall. [U. S.], 92; *Turner v. Calvert*, 12 S. & R. [Pa.], 46; *Musgrove v. Gibbs*, 1 Dall. [U. S.], 216; *Kirkpatrick v. Houston*, 4 W. & S. [Pa.], 115; *Lamb v. Lindsey*, 4 W. & S. [Pa.], 449; *Thomas v. Shoemaker*, 6 W. & S. [Pa.], 179; *Oyster v. Longnecker*, 4 Harris [Pa.], 269; *Craig v. Pleiss*, 2 Casey [Pa.], 271; Bliss, Code Pleading, sec. 118.

RYAN, C.

This action was brought by the defendant in error in the district court of Valley county for the recovery of double the amount of interest paid to plaintiff in error. There was a verdict and judgment for the amount prayed, less certain notes allowed by way of counter-claim.

The plaintiff in error insists that the petition in the district court was not sufficiently specific in this, that the several renewals were not fully described as to the amount of interest to be paid and for what periods. As we understand the petition, there was sought only a recovery of double the amount of interest, inclusive of usury, actually paid. The date and amount of this payment were with exactness alleged and proved. The several antecedent renewals were merely stated by way of inducement. The date of the actual payment of interest, including usury, and the amount thereof were the essential matters to be established. When it appeared from the averments of the petition what loans were made, when they were made, and at what rate of interest, as it did in this case, there were sufficient preliminary averments.

It is urged that the petition described the first transaction as a loan, while the proof showed it was but a renewal. It is sufficient to say in regard to this that a loan is none. the less a loan because it happens to be a renewal loan. The assignment of error as to instructions cannot be considered, because one of these is as to seven instructions, the other as to eight. On examination of these two groups we find in each that some, and we might in this case say all these instructions are invulnerable to criticism. Under these circumstances these assignments can secure no consideration. There was sufficient evidence to sustain the verdict, and as we find no error in the record the judgment of the district court is

AFFIRMED.

HARRISON, J., having presided at the trial of this case in the district court, took no part in its consideration in this court.

LUCIUS BUCKLEY ET AL. V. LEWIS HOOK.

FILED JANUARY 17, 1895. No. 5465.

Justice of the Peace: DISMISSAL: PARTNERSHIP: TRIAL. When the pleadings in the court of a justice of the peace failed to indicate that between the parties litigant there ever existed a partnership relation, or that the action was in relation to a partnership matter, *held*, that such justice of the peace erred in dismissing the action during the trial of the issues joined, because, by motion of defendants, it was suggested that such partnership relation had been disclosed by the plaintiff's testimony.

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

C. W. McNamar, for plaintiffs in error.

G. W. Fox, contra.

RYAN, C.

This action was brought before a justice of the peace of Dawson county and was on trial to a jury, when a motion of the defendants to dismiss the action for the reason that by the testimony of plaintiff it had been shown that the parties were in a partnership relation, unsettled, and still in existence, and because said court had no jurisdiction to try the action, as it was about partnership business, was sustained. The district court of said county, on proceedings in error, reversed the judgment rendered by the justice of the peace for the costs incurred and ordered that the

cause should be retained for trial. The correctness of this action of the district court is now called in question by a petition in error filed in this court by the parties who were defendants before the justice of the peace. Without a bill of exceptions it is impossible to determine what testimony had been given by the plaintiff when the motion to dismiss upon consideration of his evidence was sustained. The plaintiffs in error rely upon the presumption which obtains as to the correctness of the ruling of a court in the absence of an affirmative showing that such ruling was wrong. Whether or not this result might, under certain circumstances, follow from the rule invoked we need not determine, for there is another presumption of controlling force in this case, and that is that the testimony was relevant to the issues being tried. In neither the bill of particulars filed by plaintiff before the justice of the peace nor the answer thereto was there an averment from which a partnership relation between the parties litigant could be inferred. Tested by the pleadings as recorded in the docket of the justice of the peace, the action was one which was properly triable before that magistrate. The jury alone could determine from the evidence whether or not there existed a partnership, for this was a question of fact. (*Habig v. Layne*, 38 Neb., 743.) Whether or not the justice of the peace had jurisdiction of the subject-matter of the action was determinable by him on the pleadings. If the motion to dismiss was sustained because, to him, the evidence appeared to justify a certain conclusion, he was invading the province of the jury and therefore erred. If the dismissal was because of a want of jurisdiction of the subject-matter of the suit, he misconstrued the averments of the pleadings and was equally in error. In any event the judgment of the district court was right and is

AFFIRMED.

J. B. EHRSAM MACHINE COMPANY V. PHENIX INSURANCE COMPANY OF BROOKLYN.

FILED JANUARY 17, 1895. No. 5831.

1. **Insurance: FALSE REPRESENTATIONS BY APPLICANT AS TO TITLE.** Where an applicant for insurance falsely represented that he had title to the property in respect to which said insurance was sought, a provision in the policy that such false representation would avoid the policy should be enforced in the absence of a showing to the contrary.
2. **———: TRANSFER OF TITLE TO INSURED PROPERTY.** Where a policy provided that the alienation of the title of the insured without the knowledge or assent of the insurer would avoid the policy, this provision will be enforced when no reason to the contrary is shown to exist.

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

F. I. Foss, for plaintiff in error.

Jacob Fawcett, contra.

RYAN, C.

On the 11th day of April, 1889, the J. B. Ehrsam Machine Company agreed to sell to the Eagle Milling Company, of Franklin county, Nebraska, certain machinery for use in its grist mill. Payments were to be made as follows: $150 in cash, of which the receipt was acknowledged; $200 on receipt of machinery; $218.58 three months from shipment; $218.58 six months from shipment; $218.59 nine months from shipment. For the deferred payments promissory notes were given by the Eagle Milling Company, in each of which was this provision immediately following a description of the property: "And delivery of said personal property is made to the maker hereof upon the express condition that the title to the said personal property shall

remain in the payee hereof, his assigns and his legal representatives, until this note is paid in full, together with all costs of collection." These notes have not yet been paid. After the delivery of the aforesaid personal property to the Eagle Milling Company that company insured it with defendant in error, loss, if any, being made payable to the J. B. Ehrsam Machine Company, as its interest might appear. During the time covered by the policy of insurance the Eagle Milling Company transferred its interest in the insured property to Louise S. Schwarz, who was the holder thereof at the time the property was destroyed. Notwithstanding a provision in the policy that the transfer of the interest of the assured in the property would operate to avoid the policy itself, unless assented to by the defendant in error, the transfer just referred to was made without such knowledge or assent. There was no attempt to explain how this happened, neither was there evidence of any fact which would operate to suspend or avoid the provisions of forfeiture resulting from the terms of the policy. So far as the rights of plaintiff in error were concerned in this case, it is deemed sufficient to remark that by its own showing the title of the property insured was retained by it, and that the interest of the Eagle Milling Company was only that of one in the possession of personal property with the right to acquire title when payment therefor should be fully made. This right of plaintiff in error, if measured by the provisions above quoted, would bar its right of recovery, for the representation of the Eagle Milling Company that it was the owner of the property, was false when made for the purpose of procuring the issuance of the policy herein sued upon. The plaintiff in error has made no showing of any reason why the forefeiture of the policy above referred to did not extend to and involve its rights thereunder. The district court properly instructed the jury to find for the defendant, and the judgment rendered on that verdict is

AFFIRMED.

JAMES W. THOMPSON ET AL. V. JAMES E. CAMPBELL.

FILED JANUARY 17, 1895. No. 5715.

Appeal From County Court: RULINGS ON PLEADINGS: REVIEW. Where a petition was filed in the district court in a cause appealed from the county court, it was erroneous to overrule a demurrer to such petition for the sole reason that the question presented by the demurrer had not been urged or relied upon in the inferior court.

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

George A. Magney and *James Hassett*, for plaintiffs in error.

C. L. Hover, contra.

RYAN, C.

This action was begun in the county court of Sarpy county. In the bill of particulars it was alleged that defendant Thompson had been elected county clerk of said county, and thereupon had given a bond conditioned as required by law, with the defendants S. B. Knapp and G. Swayze as his sureties; that, as such clerk, Thompson afterwards collected and received fees belonging to plaintiff in the sum of $74.47, which he had failed and refused to pay. There was a prayer in the bill of particulars for a judgment in the sum above named. By motion the defendants asked that plaintiff should be required to make more definite and certain his bill of particulars by showing therein when the defendant received the fees for the recovery of which this suit has been brought. This motion was overruled, and an exception was duly taken. There was a judgment for the amount of plaintiff's claim in the county court, from which an appeal was duly taken.

On the 4th day of April, 1892, there was filed in the district court of Sarpy county, in this cause, a petition which differed from the originally filed bill of particulars chiefly in the statements that the fees sought to be recovered were collected in thirteen distinct amounts, described as having been paid at stated times on and between the 4th day of March, 1880, and the 3d day of October, 1881. There was a prayer for judgment for the sum of $69.42, the aggregate amount of the above mentioned payments, with interest thereon at the rate of seven per cent per annum from January, 1882. To this petition there was a demurrer, "for the reason that the petition does not state facts sufficient to constitute a cause of action." The record before us contains the following language: "This cause came on to be heard upon the demurrer of defendants, and it appearing to the court that the defendants were present at the trial of this cause in the court below, and trial was had on the merits of the case, and that defendants did not claim relief under the statute of limitations, and that limitation was not at issue in the lower court, and the court being advised in the premises, overruled said demurrer, to which ruling of the court the defendant excepts, and the defendant in open court having elected to stand on his demurrer, and refusing to prosecute his appeal, the judgment of the lower court is affirmed." Following the above recitations there was rendered a judgment against the defendants for the sum of $119.38 and costs.

The petition in error raises but one question, and that is as to the ruling upon the demurrer above recited. It is difficult to imagine what particular facts were relied upon by the district court as proper to be considered in connection with the pleading assailed by the demurrer. It could not have been that by failing to demur in the county court the defendants were deemed to have waived the right to demur in the district court, for in the practice governing justices of the peace a demurrer has no place. (*Miller v.*

Mesick, 15 Neb., 646.) No inference could properly arise against the defendants by reason of their failure to answer in the county court, for in cases triable as by a justice of the peace there is no requirement that the defendant answer, except where there is claimed a set-off and plaintiff demands that descriptive of such set-off a bill of particulars be filed by defendant. (Code, sec. 951.) As has already been made to appear, the defendants' motion to require plaintiff to state in his bill of particulars at what time Thompson received the fees sued for was overruled. We do not undertake to say that in this there was error, for we have not that question presented. If this motion had been sustained, the bill of particulars presumably would have shown when each cause of action arose. In that event the question whether or not the statute of limitations had barred plaintiff's right of action when this suit was begun could properly have been raised. From the record of the proceedings in the county court it does not appear that the right to insist upon the bar of the statute was waived; indeed, a contrary intent might possibly be inferred from the motion just mentioned. There was no showing in the district court as to the evidence introduced in the county court, and even if proof of such evidence had been tendered, it could not have been received or considered on a demurrer to the petition. There are doubtless cases in which, by reason of departure from the issues tried in the inferior court, a motion for proper relief should be sustained. (*First Nat. Bank v. Carson*, 30 Neb., 104; *O'Leary v. Iskey*, 12 Neb., 137; *Fuller v. Schroeder*, 20 Neb., 636.) It is not desirable, however, to extend the operation of this rule beyond cases in which it is made clearly to appear that the issues tendered in the district court differ from those originally presented and determined. In the case at bar there appears to have been made no motion with a view to conforming issues in the district court to those which, before the appeal, had been tried. The demurrer did not

perform this office; indeed, by its very nature this was impossible, for a demurrer lies only when certain defects appear on the face of the pleading attacked. It is very evident from these considerations that the district court erred in overruling the demurrer of the defendants on the grounds assigned in the record. Its judgment is therefore

REVERSED.

ABNER A. BUCHANAN, RECEIVER, APPELLANT, V. PERRY SELDEN ET AL., APPELLEES, IMPLEADED WITH PARKER L. MUNROE, APPELLANT.

FILED JANUARY 17, 1895. No. 5445.

1. **Mechanics' Liens:** ITEMIZED ACCOUNT: DATE OF FURNISHING MATERIALS. Where, in the itemized account attached to a sworn statement filed by a subcontractor for the purpose of establishing a lien for labor or material which he has furnished a contractor for an improvement on real estate, more than sixty days intervene between two items of the account, the presumption is that all the items following the hiatus were furnished under a separate contract from those preceding it.

2. ———: ———: ———. The Omaha Building Company contracted to furnish material and erect for Selden a building in Blair, Nebraska. McGreer & Co., of Omaha, agreed with the building company to furnish it certain material for said building. The last items of material furnished by McGreer & Co. under their contract were shipped from Omaha December 1, 1890, and consigned to the building company at Blair, Nebraska. This material reached Blair on the 5th of said December, and the building company on that date received the materials and paid the freight thereon, but at its request the materials were left at the depot until December 10. *Held*, That the materials were furnished for the improvement on December 5.

3. ———: ———: ———: EVIDENCE. The evidence examined, and *held* to support the finding of the district court that the appel-

lants, subcontractors, did not file a sworn statement of the amount due them from the contractors within sixty days of the date they furnished the last item of material under their contract with such contractors.

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

See opinion for statement of the case.

Montgomery, Charlton & Hall, for appellants:

Plaintiff is entitled to a lien. (*Great Western Mfg. Co. v. Hunter*, 15 Neb., 37; *Ballou v. Black*, 17 Neb., 397; *Gaty v. Casey*, 15 Ill., 192; *Williams v. Chapman*, 17 Ill., 425; Phillips, Mechanics' Liens, secs. 16, 17, 215, 344, 345; *Manley v. Downing*, 15 Neb., 637; *Murray v. Rapley*, 30 Ark., 573; *Williams v. Webb*, 2 Dis. [O.], 430; *Hugg v. Hintrager*, 45 N. W. Rep. [Ia.], 1035; *Reed v. Bagley*, 24 Neb., 332; *Missouri Valley Lumber Co. v. Weber*, 43 Mo. App., 179; *Pierce v. Osborn*, 19 Pac. Rep. [Kan.], 656; *Lamb v. Hanneman*, 40 Ia., 41; *Miller v. Faulk*, 47 Mo., 264; *Rogers v. Omaha Hotel Co.*, 4 Neb., 54; *White Lake Lumber Co. v. Russell*, 22 Neb., 129; *Hays v. Mercier*, 22 Neb., 660; *Bohn Mfg. Co. v. Kountze*, 30 Neb., 719; *Collins Granite Co. v. Devereux*, 72 Me., 422.)

Munroe is entitled to a lien. (*Gray v. Elbling*, 35 Neb., 278; *Hazard Powder Co. v. Loomis*, 2 Dis. [O.], 551; *Albright v. Smith*, 51 N. W. Rep. [S. Dak.], 592; *Millsap v. Ball*, 30 Neb., 734; *Cook v. Murphy*, 24 Atl. Rep. [Pa.], 630; *State Mfg. Co. v. Norwegian Seminary*, 47 N. W. Rep. [Minn.], 796; *St. Paul & Minneapolis Pressed Brick Co. v. Stout*, 47 N. W. Rep. [Minn.], 974; *Lamb v. Hanneman*, 40 Ia., 41; *Skyrme v. Occidental Mill & Mining Co.*, 8 Nev., 235; *Capron v. Strout*, 11 Nev., 304; *Page v. Bettes*, 17 Mo. App., 366; *Livermore v. Wright*, 33 Mo., 31.)

Jesse T. Davis, contra.

RAGAN, C.

Some time in August, 1890, one Perry Selden was the owner of lot 15, in block 47, in the city of Blair, Nebraska, and on said date entered into a contract in writing with the Omaha Building Company, by the terms of which the latter agreed to furnish the material and construct a brick building for Selden on said lot. One L. McGreer & Co. and one P. L. Munroe, both of Omaha, furnished materials to the contractor, the Omaha Building Company, towards the erection of said building for Selden. McGreer & Co. failed, and one Abner A. Buchanan was appointed receiver for the firm. The contracts with McGreer & Co. and with Munroe for the materials which they furnished the contractor, the Omaha Building Company, were made with one H. B. Mayo, the agent of the building company. On the 5th of February, 1891, McGreer & Co. and Munroe, for the purpose of securing a lien on said premises of Selden for materials which they had furnished the Omaha Building Company towards the erection of Selden's building, filed a sworn statement of the amount due them from the building company for such material, together with a description of Selden's property, with the register of deeds of Washington county; and attached to said sworn statements were itemized accounts of the materials which McGreer & Co. and Munroe alleged they had furnished to the Omaha Building Company. The receiver of McGreer & Co. brought this action in the district court of Washington county to have established and to foreclose a lien on the above described property for the materials which McGreer & Co. had furnished said Omaha Building Company towards the erection of said building. Perry Selden, the Omaha Building Company, and Munroe were made defendants to this action. The Omaha Building Company

made no appearance in the case. Munroe filed an answer in the nature of a cross-petition, and asked to have established and foreclosed a lien in his own favor against the Selden property for material furnished the Omaha Building Company in the erection of Selden's building. Selden filed answers to the petition of the receiver and the cross-petition of Munroe denying the validity of their liens. The court rendered a decree dismissing the petition of the receiver and the cross-petition of Munroe, and from that decree they appeal to this court.

We will first dispose of the appeal of the receiver of McGreer & Co. The sworn statement of the amount due McGreer & Co. from the Omaha Building Company, the contractor, was filed in the office of the register of deeds of Washington county on the 5th day of February, 1891. Was this sworn statement filed within sixty days from the date that the last item of material was furnished by McGreer & Co. to the Omaha Building Company? There is attached to the sworn statement of McGreer & Co. an itemized account of the material which they allege they furnished the Omaha Building Company. The first date of this itemized bill is "1890, Oct. 13," and the first item is "one flight stairs;" then follow twenty-four items without a date, and then occurs on the bill:

"Dec. 12. 400 ft. casing.
4½ cir. casing.
55 ft. apron.
25 ft. thres.
275 ft. win. stops.
1 flagstaff.
6658 ft. ½.
Cartage."

McGreer & Co., to establish their lien, called as a witness one Ferguson, who testified that he worked for McGreer & Co. about October 13, 1890; that he was foreman and manager and running their mill for them; that while

he was working for McGreer & Co. he made a contract with one H. B. Mayo—this Mayo was the agent of the Omaha Building Company—on behalf of McGreer & Co., in and by which they were to furnish material towards the erection of Selden's building; that the account of items attached to the sworn statement of McGreer & Co. was correct; that the last material furnished under the contract was shipped from Omaha on the 1st day of December, 1890; that there was no written agreement between the parties, and the witness did not remember where the material was to be delivered. The witness identified a shipping bill or receipt signed by the agent of the St. Paul & Omaha Railroad Company at Omaha, December 1, 1890. This shipping bill recited that the railroad company had received from McGreer & Co., to be transported to Blair, Nebraska, and there delivered to H. A. Mayo, "22 bdls. lumber."

H. B. Mayo also testified in behalf of McGreer & Co. that he, as agent for the Omaha Building Company, made a contract with McGreer & Co. by which the latter were to furnish the Omaha Building Company material for Selden's building; that the material which McGreer & Co. was to furnish the building company consisted of mill work, such as doors, windows, and interior finish; that he had examined the sworn statement filed by McGreer & Co. for the purpose of obtaining a lien, and that it appeared to be correct; that the material mentioned in said sworn statement was furnished to said building company, or to Mayo for it; that he superintended the construction of the building up to December 1; that the last material was furnished by McGreer & Co. on the 10th day of December, 1890; that he, Mayo, paid the freight at Blair on the 5th of December on the material shipped to the building company on the 1st of December, but he allowed the material to lie in the depot until the 10th of December, at which time it was removed to the building; that the material was allowed to remain in the depot from the 5th to the 10th, at

his, Mayo's, request; that in this last shipment were twenty-two bundles of stair railing and some trimming, and some interior stairs for the basement; that the flagstaff mentioned in the itemized account attached to McGreer & Co.'s sworn statement was not in the last shipment; that the contract between McGreer & Co. and himself on behalf of the building company was that the former should deliver the material at the building in Blair; that the flight of stairs furnished by McGreer & Co. was an inside flight; that the stairs were not furnished on October 13, 1890, but were in the last shipment.

As traversing or tending to traverse this evidence Selden testified that he was about the building nearly every day while it was in process of construction, and that to the best of his knowledge no material whatever was delivered at the building after the 1st of December; that Mayo abandoned the work on the 28th or 29th of November, and was not there after that date; that the flagstaff furnished by McGreer & Co. was put on the building prior to the 28th of November; that he remembers when Mayo abandoned the building, because he left on the afternoon of the 28th or 29th of November without paying his men and never came back to do any more business.

One Vaughn, the architect, also testified in behalf of Selden that he was at the building once every day, and sometimes two or three times; that the casings for the windows were not delivered at the building prior to the 1st of December, but were in a storehouse across the alley from the building prior to the first of December; that the four and one-half circular casing charged on the sworn statement of McGreer & Co. as having been delivered after December 1 was prior to that time in said store-house; and that some window stops were also in the store-house at the time prior to December 1; that the flagstaff was on the building before the roof was put on.

From this evidence the district court may have concluded

that the materials which McGreer & Co. shipped on the 1st of December, 1890, to the Omaha Building Company, or to their agent, Mayo, were furnished for the improvement on the 5th of December, 1890, at which time Mayo paid the freight on the material; and if the court did so conclude, the evidence supports the finding; and as the lien was not filed until the 5th of February, 1891, it was not filed within sixty days of the date on which McGreer & Co. furnished the Omaha Building Company the last item of material furnished under the contract. Again, the district court may have concluded from this evidence that the material which McGreer & Co. claimed to have furnished the Omaha Building Company on December 1st or 5th, 1890, was in fact not furnished; and if the court did so find, we cannot say that such finding is unsupported. There are several things which tend to discredit the evidence in this case in behalf of McGreer & Co. It is not pretended by them that they furnished any material to the Omaha Building Company on December 12, 1890, although they so allege in their itemized account of material attached to their sworn statement filed for the purpose of obtaining this lien; and the very first item on their account of items under date of October 13 is "flight stairs," and yet Mayo testifies that these stairs were delivered to the Building Company in December; and in the itemized account attached to the sworn statement is a flagstaff charged up with the items which McGreer & Co. claim to have delivered or shipped on the 1st of December, and yet Mayo says that this flagstaff was not in that shipment, and other witnesses testified that it was on the building prior to November 28. We certainly cannot say that the finding of the district court against McGreer & Co. was wrong.

We next direct our attention to the appeal of Munroe. The account of items attached to Munroe's sworn state-

ment filed by him for the purpose of obtaining a lien against Selden's property is as follows:

"1890.

August 29. To 6,500 pressed brick.
Sept. 27. " " " "
Dec. 10. " ½ gal. white gloss paint."

Munroe's sworn statement of the amount due him from the building company for material which he had furnished it towards the erection of Selden's building was filed on February 5, 1891. Was it filed within sixty days of the date on which he furnished the last item of material to the building company under the contract made with it to furnish material? On the trial Munroe testified on his own behalf as follows:

That some time in 1890 he entered into a contract with the Omaha Building Company to furnish material for the construction of Selden's building.

Q. What material were you to furnish under the contract?

A. Any material that I could furnish for the completion of the building.

Q. Enumerate such material as you handled.

A. I handled crushed stone, dimension stone, terra cotta fire-proofing, parlor door hangings, etc.

Q. State what you did furnish under the contract.

A. I furnished pressed brick and so on.

Q. State when you furnished said material.

A. One car load of brick September 1.

Q. State when you furnished the next material under said contract.

A. On the 22d of September.

Q. What was that?

A. That was a car load of brick.

Q. State whether or not you furnished anything else under the contract.

A. Some white gloss paint.

Q. When was that?

A. I furnished it on the 10th of December.

Q. Did you make out this bill?

A. No sir.

Q. Who made the bill out?

A. My attorney.

Q. Who ordered this half gallon of white gloss paint?

A. Mr. Mayo.

Mr. Mayo also testified in behalf of Munroe as follows:

Q. State whether or not you furnished this paint as detailed by Mr. Munroe on December 10, 1890.

A. I did.

Q. Took it out on that day?

A. Yes, sir.

Q. Had you contracted with Mr. Munroe to furnish the hardware for the building?

A. Yes.

Q. State what the facts are connected with this paint that you speak of.

A. It was paint that I could not get in Blair and I got it through Mr. Munroe.

Q. Where was that paint used?

A. I presume it was used in the building. I turned it over to Mr. Sane, who had the job of painting it.

Q. Did he do any painting after that time?

A. I presume he did.

As against the contention of Munroe, Selden testified:

Q. There is a charge of December 10, one-half gallon of white gloss paint, sixty-five cents, in Mr. Munroe's bill. State whether or not any of that kind of paint was delivered at that time.

A. Not to my knowledge.

Q. Do you know of any of that kind of paint being used upon it (the building)?

A. No, sir.

Q. Was any of that kind of paint required in the construction of that building?

A. Not to my knowledge.

Vaughn, the architect who superintended the construction of the building, testified for Selden as follows:

Q. Do you know what kind of material was used there in painting,—what was called for by the contract or specifications in relation to the painting of that building?

A. I cannot recollect the actual numbers that were used. It was Sherwood & Williams' paint specified, but the numbers of the paint I do not know. They are in the specifications.

Q. Was that already mixed paint?

A. Sherwood & Williams' are ready mixed paints.

Q. There is a charge of one-half gallon of white gloss paint in Mr. Munroe's bill. I will ask you whether or not that was required as a part of the contract?

A. There was nothing in the specifications, I am sure, nothing in the paint for the building that called directly for white gloss paint.

Q. Where could that have been used in and about the building according to the plans and specifications, or was it called for?

A. I could not tell of any place.

The district court may have concluded from this evidence that the one-half gallon of white gloss paint was never furnished by Munroe to be used, nor used, in the painting of the Selden building, and if he did so conclude, the evidence supports its finding. One thing is certain, that this item of paint was not furnished by Munroe in pursuance of the original contract made by him with the building company to furnish material for the Selden building. He was to furnish such materials as he "handled," and he "handled" crushed stone, dimension stone, terra cotta fire-proofing, parlor door hangings, etc. The evidence does not disclose that Munroe even dealt in paints, or, to use his expression, "handled" them. His sworn statement, which he filed for the purpose of obtaining a lien against this

building was not filed within sixty days from the date he furnished the last item of material to the building company which he agreed to furnish it under his contract. For Munroe to establish a lien against this property for the brick which he furnished on the 29th of August and the 22d of September he should have filed with the register of deeds "his sworn statement within sixty days of September 22d." Where, in the itemized account attached to a sworn statement filed by a subcontractor for the purpose of establishing a lien for materials which he has furnished a contractor for an improvement on real estate, more than sixty days intervene between two items of the account, the presumption is that all the items of material furnished after the hiatus were furnished under a separate contract from those preceding the hiatus (*Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207); and in the case at bar the evidence on behalf of Munroe has not overthrown that presumption. The item of paint claimed to have been furnished by him on December 10, 1890, and the items of brick furnished on August 29 and September 22, are not items of one account and were not furnished under the same contract. The item of December 10, if furnished at all, was furnished under a separate and independent contract from that under which the bricks were furnished. The judgment of the district court is in all things

AFFIRMED.

OMAHA FIRE INSURANCE COMPANY V. JOHN H. DIERKS.

FILED JANUARY 17, 1895. No. 5852.

1. **Insurance: WAIVER OF NOTICE OF LOSS.** The right of an insurance company to notice of loss is a right which the company may waive; and when the insurer denies all liability for the

loss and refuses to pay the same, and places such denial and refusal upon grounds other than the failure of the insured to give notice of the loss, such denial and refusal avoid the necessity of such notice. *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 473, and cases there cited, followed.

2. ———: ———. An insured in a suit on an insurance policy alleged in his petition that, as provided by the terms of the policy, he gave notice of the loss in writing to the insurer and gave notice of said loss to the agent of the insurer nearest to where the loss occurred. The insurance company, by its answer, expressly denied this averment of the petition, and pleaded as an affirmative defense that the policy sued upon was never in force, because its issuance and delivery were procured by the representation of the insured made at the time that the property mentioned therein was unincumbered; that the insurer believed and acted upon said representation and issued the policy in consequence thereof; that such representation at the time was false and known by the insured to be false; that the property at the time the policy was issued was incumbered by a mortgage which was a valid lien thereon at the date of its destruction by fire. *Held*, (1) That the defense that the policy was not in force at the time the loss occurred was inconsistent with the defense of want of notice of the loss; (2) that the insurer, by placing its defense to the action on the ground that the policy sued on was never in force, waived the provision in the policy which required the insured to give notice of the loss, and made that issue wholly immaterial.

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

Jacob Fawcett, for plaintiff in error.

M. F. Harrington, contra.

RAGAN, C.

John H. Dierks brought this suit in the district court of Holt county against the Omaha Fire Insurance Company to recover the value of certain live stock which he alleged he owned, which had been insured against loss or damage by fire by the insurance company, and which live stock

had been destroyed by fire. Dierks had a verdict and judgment, and the insurance company brings the case here for review.

Of the thirteen assignments of error in the petition in error only one is argued. White, in his petition, alleged: "About the 5th day of February, 1891, the plaintiff gave notice of said loss to O. Wallace, the agent of the defendant nearest to where the loss occurred, and also gave notice of said loss to the defendant; and about February 5, 1891, plaintiff gave notice of said loss verbally to one Hicks, an adjuster of the defendant at the place where said loss occurred, and furnished said adjuster all evidence of said loss by him required, and defendant has requested no further proofs of said loss." This allegation of the petition the insurance company by its answer expressly denied. On the trial of the case Dierks offered no evidence in support of the allegation of his petition quoted above, and the argument of the insurance company now is that because of such failure of Dierks the verdict of the jury is unsupported by the evidence and the judgment of the district court contrary to the law of the case.

The insurance company, in its answer, in addition to the denial already mentioned, pleaded as an affirmative defense that it had not paid Dierks any sum whatever for any loss he had sustained by reason of the fire of the 2d of February, 1891,—this is the date Dierks alleged the fire occurred which destroyed the insured property,—and denied that any sum was due Dierks from it, or that it was liable for any loss that he had sustained by reason of said fire, because the insurance contract sued upon was procured by the representations in writing made by Dierks at the time he made application for the insurance; that the representation made by Dierks was that the insured property was then unincumbered; that the insurance company believed said representation, relied and acted upon such representation, and insured the property; and that said representation, at

the time it was made, was false and known by Dierks to be false; and that the property at the time the policy was issued was incumbered by a mortgage, and that at the date the fire occurred said mortgage was a valid and subsisting lien upon the property insured; that said contract of insurance, by reason of the fraud of Dierks in procuring it, was not in force at the date of the loss, and had never been in force. This affirmative defense set up by the company was, in substance, a plea of confession and avoidance. It in effect admitted the execution and delivery of the policy, the destruction of the insured property by fire, and the receipt by it of notice of the fire.

The defense that the policy was not in force at the time of the loss and had never been in force, was utterly inconsistent with the defense of want of notice of the fire. (*Tayloe v. Merchants Fire Ins. Co. of Baltimore*, 50 U. S., 390.) We had occasion to examine this question in *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 473, decided at this term. It was there held that the right of an insurance company to notice of loss is a right which the company may waive, and when the insurer denies all liability for the loss and refuses to pay the same, and places such denial and refusal upon grounds other than the failure of the insured to give notice of the loss, such denial and refusal avoid the necessity of such notice. The issue in this case as to whether Dierks furnished the insurance company notice of the loss, in view of the defense interposed by the insurance company, became, and was, wholly immaterial. The object of pleadings is to inform the court and adverse parties of the facts which the pleader relies upon as a cause of action or a ground of defense, and in the case at bar the insurance company by its answer gave notice that it would defend against the claim of Dierks on the ground that the policy made the basis of his suit was, as a matter of fact and of law, never in force. The material issue then in the case was not whether the company had issued the policy sued on, whether the pre-

mium had been paid, whether the insured property had been destroyed or damaged, nor whether the insurance company had been notified of the fire; but whether the policy made the basis of Dierks' action was procured from the insurance company by false and fraudulent representations; and it was not a condition precedent to Dierks' right of recovery in this case that he should prove that he notified the insurance company that the insured property had been destroyed by fire. The defense argued here is technical in the last degree. It is devoid of merit and lacks the spirit of common fairness in ordinary business transactions. The insurance company in the court below did not prove, nor attempt to prove, the defense set up by it in its answer. It put no witness on the stand; nor did it even cross-examine the witnesses called in behalf of the plaintiff. It is nowhere suggested in the pleadings nor in the arguments of the insurance company that it was prejudiced in any manner by the failure of Dierks to notify it that the insured property had been destroyed. The insurance contract itself does not make the right of the insured to recover for a loss in any manner dependent upon his notifying the insurer that a loss has occurred. The judgment of the district court is

AFFIRMED.

ADIN A. GOLDSMITH V. WILLIAM H. WIX.

FILED JANUARY 17, 1895. No. 5741.

Transcript for Review. Goldsmith sued Wix in the county court and procured the issuance of an attachment. The county court on motion of Wix dissolved the attachment, and Goldsmith prosecuted a proceeding in error to the district court to reverse the action of the county court. The district court sustained the judgment of the county court and Goldsmith brought

the ruling of the district court here on error. The record brought here did not contain the petition, nor the affidavit for attachment, nor the motion made to discharge the same, filed in the county court, nor the judgment of the county court discharging such attachment. *Held*, This court could not review the ruling of the district court. (*Garneau v. Omaha Printing Co.*, 42 Neb., 847.)

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

Fowler & McNamara and *H. W. Pennock*, for plaintiff in error.

S. R. Rush and *I. C. Bachelor, contra.*

RAGAN, C.

From the briefs filed here in this case it appears that one Adin A. Goldsmith brought a suit against William H. Wix before a justice of the peace in Douglas county and procured an attachment to be issued at the same time by said justice in said action; that the justice afterwards discharged the attachment on motion of Wix, and that thereupon Goldsmith dismissed his suit without prejudice; that Goldsmith subsequent to that time brought another suit in the county court of Douglas county against Wix, and procured an order of attachment in that suit; that this attachment was by the county court discharged on the motion of Wix; and thereupon Goldsmith prosecuted error proceedings to the district court from the order of the county court discharging the attachment. The district court sustained the rulings of the county court in discharging the attachment of Goldsmith, and he has attempted to bring the ruling of the district court here by a proceeding in error.

We do not know what was before the district court, but the record brought here does not contain the petition filed by Goldsmith against Wix in the county court, nor the affidavit for an attachment filed in the county court by

Goldsmith, the motion to discharge such attachment, nor the judgment of the county court discharging the attachment. In order to enable the district court to review, on error, the rulings of the county court, it was necessary that there should be before the district court the judgment pronounced by the county court, and the petition, affidavit for attachment, and the motion to discharge the same, filed in the case in the county court (*Garneau v. Omaha Printing Co.*, 42 Neb., 847); and the plaintiff in error must bring here a transcript of the record reviewed by the district court to enable this court to review its action. It follows that the judgment of the district court must be and is

AFFIRMED.

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

FILED JANUARY 17, 1895. No. 4666.

1. **Counties: ALLOWANCE OF CLAIMS: COUNTY BOARD.** All claims against a county must be filed with the county clerk thereof and presented to the county board, and it alone has power and authority to audit and allow such claims. (Compiled Statutes, sec. 37, art. 1, ch. 18.)
2. **Mandamus to County Board.** This court has no authority under the constitution and the laws of the state to compel by *mandamus* the county board of a county to allow a claim against such county, although the court may be of opinion that such claim is a valid obligation against the county and that it has no defense thereto.
3. **County Boards: ALLOWANCE OF CLAIMS: MANDAMUS.** A county board in the adjustment of claims against a county acts judicially, and this court cannot, by *mandamus*, control the judicial discretion of such board. *State v. Churchill*, 37 Neb., 702, reaffirmed.

4. Mandamus. *Mandamus* is the last resort of a litigant and the courts will not employ this remedy when such litigant has a plain and adequate remedy at law; nor in the absence of such remedy unless the relator has a clear right to have the officer to whom he wishes the writ directed perform the identical ministerial act prayed for.

ORIGINAL application for *mandamus* to compel the county clerk of Burt county to draw in favor of relator a warrant on the county treasurer in payment of a balance claimed for the construction of a ditch, and to require the county commissioners to meet and levy a special tax against the property benefited by the improvement. *Dismissed.*

Charles T. Dickinson, for relator.

N. J. Sheckell, contra.

RAGAN, C.

From the record before us it appears that the material facts in this case are: On the 2d day of October, 1888, Burt county entered into a written contract with A. E. Wyckoff, in and by the terms of which Wyckoff agreed to dig and construct a ditch, previously located by the county, known as the Peterson ditch. The work was to be performed in accordance with certain plans and specifications prepared by an engineer in the employ of the county and to the satisfaction of such engineer. For this work Wyckoff was to be paid fifteen cents per cubic yard as follows: When one-fourth the work was completed the county clerk was to draw his warrant on the county treasurer in favor of Wyckoff for seventy-five per cent of the amount of the cost of the part of the work completed; and when one-half the work was done the clerk was to draw another warrant in favor of Wyckoff for seventy-five per cent of the cost of the second one-fourth of the ditch, and so on until the completion of the ditch and its acceptance by the engineer, when the clerk was to draw his warrant in favor of

Wyckoff for the cost of the ditch at fifteen cents per cubic yard less the payments already made. The estimate made by the county's engineer was that to build the ditch according to the plans and specifications would require the removal of 32,464 cubic yards of dirt. Wyckoff, in pursuance of his contract, completed the ditch under the supervision of the engineer of the county and to his satisfaction; and the engineer accepted the ditch and made a report of such acceptance to the county authorities of Burt county; but it appears that Wyckoff, in constructing the ditch according to the terms of his contract and the plans and specifications, was required to remove, and did remove, 38,421 cubic yards of dirt. The county authorities have paid Wyckoff the cost of removing 32,464 cubic yards of dirt at fifteen cents per cubic yard, but they have refused to pay for the 5,957 cubic yards of dirt removed by Wyckoff in constructing the ditch in excess of the number of cubic yards estimated by the engineer.

Wyckoff has filed in this court an application for a peremptory writ of *mandamus* to compel the clerk to draw his warrant on the treasurer in his, Wyckoff's, favor for $893.55, the cost of removing the 5,957 cubic yards of dirt at fifteen cents a cubic yard; and to compel the county commissioners to meet and levy a special tax or assessment against the property benefited by the construction of said ditch. This ditch was constructed by authority of chapter 89, Compiled Statutes, 1893, entitled "Swamp Lands." We do not wish to prejudge this case in any particular, but we are at a loss to understand on what theory the county authorities of Burt county refuse to pay the relator's claim. Wyckoff by his contract with the county did not agree to construct this ditch for a gross sum, but at fifteen cents per cubic yard. Nor is there anything in the contract which limited the compensation of Wyckoff for constructing the ditch to fifteen cents per cubic yard on 32,464 cubic yards of earth only. The county board did not guaranty that

there should be that number of cubic yards of earth removed in constructing the ditch, and had there been less dirt removed than that, Wyckoff would have had no claim against the county for a single cubic yard of dirt not actually removed by him. It is true that the engineer of the county estimated that to construct the ditch would require the removal of only 32,464 cubic yards of dirt, but this was only an estimate, and the contract did not bind the county to pay for removing that number of yards of dirt unless they were moved, nor bind Wyckoff to construct the entire ditch and receive as full compensation for the work what the removal of that number of cubic yards of dirt would amount to at fifteen cents per cubic yard. As we read the statute just referred to, this ditch, when constructed, became and was the property of Burt county, and for the cost of its construction the county is liable. The county, however, under the law may reimburse itself for the cost of the construction of the ditch by levying assessments upon the property benefited thereby. Wyckoff, then, on the face of this record, has a claim against Burt county growing out of his contract with it for constructing the ditch. All claims against a county must be filed with the county clerk and presented to the county board, and it alone has power and authority under the statute to audit and allow such claims. (Comp. Stats., sec. 37, art. 1, ch. 18.)

This court has no authority under the constitution and the laws of this state to compel by *mandamus* the county board of Burt county to allow the relator's claim, although we may be of opinion that the claim is a valid obligation against the county and that it has no defense thereto. Section 645 of the Code of Civil Procedure provides that the writ of *mandamus* may be issued to a board to compel the performance by it of an act which the law specially enjoins as a duty resulting from an office, trust, or station. But this court cannot by *mandamus* control the judicial discre-

tion of a county board; and a county board, in the adjustment of claims against the county, acts judicially. (*State v. Churchill*, 37 Neb., 702.) Section 646 of the Code of Civil Procedure provides that the writ of *mandamus* shall not be issued in any case where there is a plain and adequate remedy in the ordinary course of law. Here, then, it may be conceded that the relator has a valid claim against Burt county; but the law has committed to the county board of that county the authority to examine, adjust, to allow or disallow, such claim, and if the relator shall be dissatisfied with the action of the county board in the premises, he has a plain and adequate remedy at law by an appeal to the district court.

We know of no proceeding that has been so much abused as the remedy by *mandamus*. It is everywhere said that this remedy is the last resort of a litigant; that the courts will not employ it where the litigant has a plain and adequate remedy at law; nor in the absence of such remedy, unless the relator has a clear right to have the officer to whom he wishes the writ directed perform the identical ministerial act prayed for. The writ must therefore be, and is, denied and the application

DISMISSED.

EXETER NATIONAL BANK V. WILLIAM J. ORCHARD.

FILED JANUARY 17, 1895. NO. 5825.

1. **Usury**: ACTION TO RECOVER PENALTY. The payment of a usurious loan made by a national bank is not a condition precedent to the right of the borrower to maintain an action against such bank to recover double the amount of usurious interest paid by such borrower to such bank on such loan. *First Nat. Bank of Dorchester v. Smith*, 36 Neb., 199, reaffirmed.

2. **Venue:** WAIVER OF OBJECTION TO SUIT IN WRONG COUNTY. That a corporation has been sued in a county in which it could not be lawfully sued under the statute is a defense which such corporation may waive; and if a corporation is wrongfully sued in a county and answers generally to the merits of the action without either specially appearing and challenging the jurisdiction of the court or without alleging as a defense to the action that such suit was wrongfully brought in said county, then the corporation will be conclusively presumed to have waived such defense.

3. **The evidence in this case** examined, and *held* to support the finding of the district court.

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

E. A. Gilbert, for plaintiff in error.

Sedgwick & Power, contra.

RAGAN, C.

William J. Orchard sued the Exeter National Bank of Exeter in the district court of Fillmore county to recover double the amount of certain payments of interest which he alleged he had made to said bank within two years prior to the date of the bringing of said suit for the use of certain moneys loaned to him by the bank. Orchard had a verdict and judgment and the bank prosecutes to this court a petition in error.

1. To the first petition filed by Orchard the bank interposed a demurrer which was sustained by the court, and thereupon Orchard, by permission of the court, filed an amended petition. After the amended petition was filed, counsel for the bank then objected to the jurisdiction of the court over the bank, alleging as the grounds for such objection that the amended petition was not in fact an amendment of the original petition, but that the causes of action stated in the amended petition were not in fact the same

causes of action stated in the original petition. The district court overruled this objection, and this is the first error assigned here. This assignment cannot be sustained. An inspection of the record brought here shows that the amended petition declares upon the same causes of action which the original petition did, though in a somewhat different form.

2. The second error assigned is that the district court erred in not requiring Orchard to allege in his amended petition that the causes of action therein stated were identical with the causes of action alleged in his first petition. It must suffice to say that the district court did not err in refusing to compel Orchard to put such an allegation in his amended petition.

3. The third assignment is that the court erred in receiving evidence offered by Orchard in support of each of the causes of action set out in his amended petition on which the action was tried, because the facts stated in each of said alleged causes of action did not constitute a cause of action in favor of Orchard and against the bank. This assignment of error cannot be sustained. There are, in the petition on which the action was tried, something over thirty different causes of action, but they are not separately stated and numbered as required by section 93 of the Code of Civil Procedure. Counsel for the bank, if he desired it done, should have made application to the district court for an order compelling Orchard to separately state and number the several causes of action in his petition. This being done, counsel for the bank would then have been in a position to demur to or strike at any alleged cause of action in the petition on the ground that the facts therein stated were insufficient to constitute a cause of action, or to object on the trial to the introduction of any evidence in support of such cause of action on the ground of the insufficiency of the facts therein stated; and, if dissatisfied with the ruling of the court on such motion, demurrer

or objection, could have specially assigned the ruling as an error here; but the assignment under consideration amounts to nothing more than saying that the court erred in the admission of evidence offered on behalf of Orchard, and such assignment of error is too indefinite for consideration.

4. It is argued that the judgment of the district court is contrary to the law of the case because Orchard neither pleaded nor proved that he had paid and discharged the loans made to him by the bank, and on which loans he had paid the usurious interest, to recover double which he brings this suit. The act of congress on which this action is based provides, in substance, that in case a national bank shall charge a person for the use of a loan of money made by the bank to such person a greater rate of interest than that allowed by the law of the state of the bank's domicile, and such person shall pay to the bank such usurious interest, that he may recover from the bank twice the amount of the unlawful interest so paid at any time within two years after paying such interest. The object of this act was to deter national banking associations from violating the interest laws of the state of their domicile, and to punish them for a violation of such law. We know of nothing in the act of congress which, by any reasonable construction, could be held to imply that a party's right of action against a national bank to recover twice the amount of usurious interest paid the bank for the use of a loan of money made to him by the bank depended on his first paying the principal of the usurious loan; nor have we been cited to, or been able to find, any decision of any court which so holds. We therefore conclude that the payment of a usurious loan made by a national bank to a person is not a condition precedent to the right of such person to maintain an action against such bank to recover double the amount of usurious interest paid to the bank by him on such loan. (*First Nat. Bank of Dorchester v. Smith*, 36 Neb., 199.)

5. The final assignment of error is that the evidence does not show that the plaintiff in error was a resident of, or situated in, the county in which the action was tried. That a corporation has been sued in any county in which it could not be lawfully sued under the statute is a defense which such corporation may waive; and if a corporation is wrongfully sued in a county, or sued in a county where it could not lawfully be sued, and such corporation answers generally to the merits of such action without either specially appearing and challenging the jurisdiction of the court, or without alleging as a defense to the action that such suit cannot lawfully be brought against it in the county where brought, then such defense cannot be made for the first time in this court, but the corporation will be conclusively presumed to have waived such defense.

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

AFFIRMED.

FIRST NATIONAL BANK OF EXETER V. WILLIAM J. ORCHARD.

FILED JANUARY 17, 1895. NO. 5826.

Usury: ACTION TO RECOVER PENALTY: VENUE: WAIVER OF OBJECTION TO SUIT IN WRONG COUNTY. The facts and questions of law involved in this case are substantially the same as in *Exeter Nat. Bank v. Orchard*, 43 Neb., 579, and on the authority of that case the judgment of the district court in this is affirmed.

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

E. A. Gilbert, for plaintiff in error.

Sedgwick & Power, contra.

RAGAN, C.

The facts in this case, and the questions involved therein, are substantially the same as in *Exeter Nat. Bank v. Orchard*, 43 Neb., 579, and the conclusion reached in that case is decisive of the questions involved in this. The judgment of the district court is

AFFIRMED.

MAX UHLIG V. EDWIN BARNUM.

FILED JANUARY 17, 1895. No. 5728.

1. **Contracts:** CONSTRUCTION. A agreed to put into the hotel of B a hot air furnace, and contracted that all work should be done in a workmanlike manner. *Held*, That this contract required that the furnace should be so constructed as not to expose the building to danger from fire when the furnace was used by a person of ordinary prudence in the usual manner.
2. ———: EVIDENCE. One cold air box took fire and there was evidence tending to show that this was because the valves were so arranged that air forced into the other box drove the hot air back into the one which ignited. The evidence tended to show that in so arranging the valves the owner followed the instructions given by those who sold the furnace and placed it in the building. *Held*, That the jury was justified in finding that the owner had used the furnace in a reasonably prudent manner.
3. ———: SUPPLEMENTARY CONTRACTS. A new contract with reference to the subject-matter of a former one does not supersede the former and destroy its obligations, except in so far as the new one is inconsistent therewith, when it is evident from an inspection of the contracts and from an examination of the circumstances that the parties did not intend the new contract to supersede the old, but intended it as supplementary thereto.
4. **Damages:** BREACH OF CONTRACT. Where two parties have made a contract which one of them has broken, the other must

make reasonable exertions to render his injury as light as possible, and he cannot recover from the party breaking the contract damages which would have been avoided had he performed such duty.

5. ——: ——. Therefore, in the case stated, where the owner knew that the furnace was so constructed as to imperil the building and continued to use the furnace without having it repaired in such a manner as to obviate the danger, *held*, that he could not recover from the person constructing the furnace the value of the property destroyed by a resulting fire.

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

Rhea Bros., for plaintiff in error, cited: 2 Rapalje, Law Dictionary, p. 854; *Aultman v. Stout*, 15 Neb., 586; *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb., 210; *Herring v. Skaggs*, 62 Ala., 180; *Sanborn v. Herring*, 6 Am. Law Reg., n. s. [N. Y.], 457; *Walker v. Milner*, 4 F. & F. [Eng.], 745; *Passinger v. Thorburn*, 34 N. Y., 634; *White v. Miller*, 71 N. Y., 118; *Milburn v. Belloni*, 39 N. Y. 53; *Wolcott v. Mount*, 36 N. J. Law, 262; *Flick v. Wetherbee*, 20 Wis., 392; *Barradarle v. Brunton*, 8 Taunt. [Eng.], 535; *Maynard v. Maynard*, 49 Vt., 297; *Brown v. Edgington*, 2 M. & G. [Eng.], 279; *Haysler v. Owen*, 61 Mo., 270; *Smith v. Tunno*, 1 McCord [S. Car.], 443*; *Thurston v. Ludwig*, 6 O. St., 1; *Grimson v. Russell*, 11 Neb., 469.

McPheely & St. Clair, contra.

IRVINE, C.

The defendant in error, who was plaintiff in the district court, alleged in his petition that from the 13th of November, 1889, he had been the owner of certain land in the town of Loomis, in Phelps county, and that up to the 25th of March, 1891, he had on said premises a frame hotel building then worth $2,000, and personal property within

said building worth $1,200; that in December, 1889, he entered into a written contract with the defendants in the district court, Grable & Uhlig, whereby the defendants, in consideration of $162, undertook to construct and put into said hotel building a furnace for the purpose of heating said building, and that all work connected with said furnace should be done in a good and workmanlike manner, safe and suitable for the purpose intended; that the defendants did not construct said furnace in a safe or workmanlike manner, but negligently, and that the cold air boxes were carelessly constructed and placed so as to be dangerously exposed to the heat generated by the furnace, said boxes being constructed of wood, and that by reason of the negligent and unworkmanlike construction of said furnace and cold air box said box took fire, which fire was communicated to the hotel building, whereby it was burned, to plaintiff's damage in the sum of $3,200, for which sum the plaintiff prayed judgment. Grable answered setting up a dissolution between him and Uhlig before the transaction complained of took place, and denying all connection therewith; whereupon the plaintiff dismissed as to Grable. Uhlig answered by a general denial. There was a trial to a jury, and a verdict and judgment for the plaintiff for $500. The defendant prosecutes error.

It appears from the record that a single instruction was given by the court at the plaintiff's request. This instruction does not appear in the transcript, but by the clerk's certificate it would seem that the instruction was never returned by the jury, and has not been, since the jury retired, in the custody of the clerk, or with the record. One of the assignments of error is that the court erred in rendering judgment after the loss of the instruction. *Grimson v. Russell*, 11 Neb., 469, is cited in support of that assignment. In *Grimson v. Russell* judgment was entered against the objection of the defendant after all the pleadings were lost and without the record containing substituted pleadings.

Except where judgment is rendered by consent it was said that the record must always disclose at least the petition upon which the judgment is based, and that even in the case of a judgment by consent the judgment or something in the nature of a petition must disclose the cause of action, in order to protect the defendant against further litigation upon the same cause. Attention was called to the defect in the record before the judgment was entered, no substitution was made of copies for the lost pleadings, and the entry of judgment against defendant's objection deprived him of all opportunity to have the case reviewed upon its merits. In this case no objection was made in the motion for a new trial, or otherwise, to the entry of judgment, on account of the loss of the instruction. The defendant seeks to excuse this by saying that the loss was not known to him at that time. But he had the means of knowledge, and was certainly as much bound to know of the loss as either the court or the adverse party. This is a court of review, and the question raised not having been presented to the district court will not be here considered.

The most serious assignment of error relates to the sufficiency of evidence to sustain the verdict rendered. It appears that in November, 1889, a written contract was made, as follows:

"FURNACE CONTRACT.

"Grable & Uhlig, of Holdrege, Neb., hereby guaranty to put into the new hotel in Loomis, Neb., now under erection and owned by E. Barnum, of Loomis, Neb., one No. 140 Crusader portable furnace for the net sum of one hundred and sixty-two dollars ($162). Said furnace to be put in with four hot air registers down-stairs and one hot air register upstairs in the hall. Said furnace and registers to be put in complete, with all necessary pipes and connections, and completed ready for fire. Grable & Uhlig guaranty said furnace to heat said hotel to 70° F. in winter weather. And all work to be done in a workmanlike man-

ner. Terms as follows: $65 June 1, 1890, and $97 November 1, 1890. These payments to be settled by note, drawing ten per cent interest, and to be given when building is enclosed. GRABLE & UHLIG,

"Per G. W. JOHNSON, *Their Agt.*

"EDWIN BARNUM."

On the trial no question was made as to Johnson's authority or as to the fact that while the contract was made in the name of Grable & Uhlig it was in fact made on behalf of Uhlig alone. The furnace was put in under the supervision of Johnson. Barnum, who was a brick-mason, made the excavation and laid the foundation, but he acted under Johnson's direction. Men employed by Barnum about the construction of the hotel built the cold air boxes, but in so doing they too acted entirely under the direction of Johnson. A cold air box was constructed from the outer wall about on a level with the top of the furnace to a point near the furnace where an elbow was placed and the box continued downwards parallel with the furnace to its base. The upright portion of the box was within a very few inches of the furnace. Barnum complained that this construction might be dangerous, whereupon Johnson said that he would put asbestos paper over the box and that it would then be safe. The exposed portion of the box was covered with asbestos paper and some tin was used. The furnace was completed in February, 1890, and used to a certain extent that spring. It was also used during the winter of 1890 and 1891. During this time complaints were made to Uhlig that it did not properly heat the building. On March 13, 1891, the cold air box referred to was discovered to be on fire inside. It was broken open, the fire extinguished, the boards partly replaced and some galvanized iron also used; in what manner does not appear. Barnum continued to use the furnace, but immediately wrote Uhlig, and Uhlig came to Loomis and another contract was entered into as follows:

"LOOMIS, NEB., March 20th, 1891.

"It is hereby agreed to move and change the furnace of the Monitor hotel, and furnish all the necessary labor and materials which are necessary and needed to move said furnace further north, and furnish additional cold air boxes, so as to make same work in a satisfactory manner during winter weather; all this to be done free of expense to E. Barnum, with exceptions of hotel bill while here.

"E. Barnum agrees to do all the needed excavating without expense to Max Uhlig, and agrees to take up his two notes of $97 and $130 at maturity.

"Max Uhlig agrees to do the work aforesaid, any time during the summer of 1891, whenever Mr. Barnum informs him that the excavating has been done.

"MAX UHLIG.
"E. BARNUM."

On the morning of March 25th Barnum arose about 6 o'clock, went to the cellar, found a low fire in the furnace, shook out the ashes, put on coal and returned upstairs. A snow storm was then prevailing accompanied by a strong northeast wind. In about an hour smoke was discovered coming through a register. Barnum attempted to go down cellar, but found it so filled with smoke that it was impossible to enter. From the stairs, however, he could see a blaze at the base of the cold air box. The house with a portion of its contents was destroyed.

The plaintiff in error contends that in order to make out a cause of action it was necessary for Barnum to prove that the furnace was not constructed in a skillful and workmanlike manner; that the fire broke out and was communicated by reason of such improper construction and resulted from some latent defect in the apparatus itself and not to improper use thereof by Barnum. There can be no doubt of the general application of these propositions, but we think the evidence was such as to justify the jury in finding that such conditions existed. It is true that all the

expert testimony was to the effect that the mode of construction adopted was proper. But on the other hand it must strike any person of ordinary observation that the placing of wooden boxes within a few inches of a furnace intended to be kept hot is a hazardous proceeding. Whether the use of asbestos paper was a sufficient safeguard against communication of fire was debatable and a proper question for the jury. The evidence showed that this material would be destroyed by long exposure to intense heat; that when heat was applied to it to a sufficient degree it became incandescent. A witness for the defendant testified that if he had in his possession a piece of asbestos paper he could heat it to incandescence in the presence of the jury by applying a match. There was no safeguard adopted to prevent fire on the inside of the box. We do not think the jury was bound by the opinions of expert witnesses that the mode of construction adopted was usual and proper, as against their own judgment upon proof of the actual manner of construction, and the fact that fires occurred not once but twice in this particular cold air box.

As to the second proposition, we think it appears beyond question that the conflagration did originate at or near the base of this cold air box. The theory of the plaintiff was that the asbestos paper became overheated from radiation from the furnace and communicated to the wood. The theory of the defendant was that the other cold air box had been left open and the strong northeast wind blew the air into that in such a way as to force the hot air back into the box which ignited. But if the latter theory be accepted, we still think the jury was justified in finding that the mode of construction was dangerous and that the fire occurred because of the manner of construction.

As to the last part of this proposition, to-wit, that it should be made to appear that the fire resulted from some latent defect in the apparatus itself, and not to improper use by Barnum, we think as a matter of law there should

be a qualification in its statement. We regard the contract to construct the furnace in a workmanlike manner as requiring, so far as the element of safety is concerned, not that it should be safe however used, but that it should be so constructed as not to expose the building to danger from fire when the furnace was used by a person of ordinary prudence in the usual manner. There is some evidence tending to show that with the wind in the quarter in which it was on the morning of the fire, the openings into the cold air box, their valves, so to speak, were so arranged as to cause the air to take a reverse direction and after being heated to enter the box which took fire, and that a different arrangement of these valves would have obviated the danger. But there is also evidence that Barnum had arranged the valves in substantial accordance with instructions given by Johnson, and that Johnson had once for Barnum's benefit arranged these valves in the same manner when the wind was in the same quarter. It certainly cannot be said that Barnum did not act as a person of ordinary prudence in the management of the furnace if he managed it according to the directions of the persons who sold and constructed the furnace for him and instructed him in its use. We think, therefore, that the jury was justified in finding that whether the fire originated from radiation from the outside or by hot air inside the air box, the air box had not been constructed in a workmanlike manner and that the fire originated because of such defect in construction and not from an improper and careless use of the furnace, so far as the manner of use was concerned. It is hardly contended that the agreement to construct the furnace in a workmanlike manner did not require a reasonably safe construction as against the danger from fire. We certainly have no doubt on that point.

It is argued that the contract of March 20, hereinbefore set out, operated to terminate all obligations under the former contract, superseded the same, and became the final

and complete expression of the obligations of the parties. But the evidence was that this contract was made because of Barnum's complaining that the furnace did not properly heat the building; and it is evident, from a consideration of the circumstances and from inspection of the contracts, that that of March 20th was intended not to supersede the former contract, which had been largely executed, but that it was supplementary thereto, and, except as expressly stated, was not intended to alter the terms of the old contract. So far as the direction of the verdict is concerned, we think it was sustained by the evidence.

The defendant contends that the damages alleged and recovered were too remote. The general rule in such cases has been, perhaps, best stated by Baron Alderson in *Hadley v. Baxendale*, 9 Exch. [Eng.], 341. The familiar language of that case is as follows: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." The principle of this case has been approved several times in this state. (*Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb., 210; *Aultman v. Stout*, 15 Neb., 586; *Deering v. Miller*, 33 Neb., 654; *Omaha Coal, Coke & Lime Co. v. Fay*, 37 Neb., 68.) Certainly a natural and probable consequence of constructing a hot air furnace in an unworkmanlike manner, where the defective construction consists in placing wood without proper protection in such a position as to become greatly heated, is the destruction by fire of the building in which the furnace is placed, and on this bare state of the case we would have no doubt that the jury was justified in finding that

the damage complained of arose naturally from the breach of contract and that it was in the contemplation of both parties as a probable result of the breach. But an element comes into this case which rendered the broad application of the rule impossible. It will be remembered that two weeks before the fire destroying the building this cold air box had taken fire about at the point and very probably in the same manner as on the second occasion. Barnum knew of this fire, and in fact he himself extinguished it. He knew, therefore, that the furnace as then constructed was a source of danger. He made no repairs for the purpose of obviating the danger and continued to use the furnace practically in the condition in which the first fire left it.

In *Haysler v. Owen*, 61 Mo., 270, suit was brought for a portion of the price of a roof upon a livery stable. The defendant pleaded that the roof was constructed in an unskillful and unworkmanlike manner, in consequence whereof it leaked and defendant's hay was wet and his wall damaged. The court said: "If the defendant had no knowledge of any defect in the roof at the time of the rains and the consequent injury, he would undoubtedly be entitled to recover to the extent of that damage; but if he did know that the roof was defective and not impervious to water, and he failed to protect himself when he might have done so at a trifling expense or by any reasonable exertions, he can recover nothing for the damages suffered in consequence of such failure."

In *Oliver v. Hawley*, 5 Neb., 439, defendant received from plaintiff certain flaxseed. The seed was not as contracted for, but contained a large proportion of mustard seed. The defendant discovered this fact before sowing, but nevertheless sowed the seed, and when the crop came up largely mustard, sought to recover from the plaintiff as damages the injury to his land on account of the foul seed and the damage to his crop thereby. The court said: "But I think no case can be found in which consequential dam-

ages have been recovered where a party, as in this case, had knowledge of the inferior character of the seed before sowing the same. In such case the party furnishing the seed is not liable for damages resulting to either crop or the land in consequence of the use of such inferior seed."

In *Long v. Clapp*, 15 Neb., 417, the action was for breach of warranty in the sale of sheep which, contrary to the warranty, were diseased. It was there held that in such case the party injured must make reasonable exertions to render the injury as light as possible, and the opinion gives this as the reason for permitting him to recover the expense of performing such duty. The following language from Sutherland on Damages is there quoted with approval: "The law imposes upon a party injured from another's breach of contract or tort the active duty of making reasonable exertions to render the injury as light as possible. If, by his negligence or willfulness, he allows the damages to be unnecessarily enhanced, the increased loss, that which was avoidable by the performance of his duty, falls upon him. This is a practical duty under a great variety of circumstances, and as the damages which are suffered by a failure to perform it are not recoverable, it is a duty of great importance. Where it exists, the labor or expense which its performance involves is chargeable to the party liable for the injury thus mitigated; in other words, the reasonable cost of the measures which the injured party is bound to take to lessen the damages, whether adopted or not, will measure the compensation the party injured can recover for the injury, or the part of the injury, that such measures had or would have prevented."

In *Omaha Coal, Coke & Lime Co. v. Fay, supra*, where it was claimed that the lime sold for plastering a building was unfit for the purpose, it was held that the cost of replastering the building could not be recovered unless it was shown that the defect in the lime could not, by a person

accustomed to use such materials, be discovered before it was used in the building.

In *Loomer v. Thomas*, 38 Neb., 277, it was held that if the party injured by another's breach of contract by negligence or willfulness allow his damages to be unnecessarily enhanced the consequent loss which was avoidable by the performance of his duty, fall upon him.

Indeed, the foregoing citation of authorities may be unnecessary. The rule stated is applied every day in the case of sales of articles purchasable upon the market. It is because of this rule that in such a case the damages for breach of contract to deliver are confined generally to the difference between the contract price and the market price. Because of the vendor's failure to deliver, the vendee must not, if the article is readily purchasable upon the market, go without it and suffer the consequential damages; on the contrary, he must purchase the article upon the market and so avoid such consequences. In this case it was, therefore, the duty of Barnum, when he was apprised by the first fire of the existing danger, to cause the furnace to be repaired in such a manner as to obviate the danger. Because this was his duty he could have recovered from Uhlig the expense involved. If the repairs involved the temporary closing of the hotel he would probably have been entitled to have that fact considered in estimating his damages; but when with a knowledge of the danger he continued to use the furnace without repairs, or without the repairs necessary to obviate the danger, he took the risk of fire and Uhlig is not responsible for the damages caused thereby. The only foundation in the evidence for substantial damages is the destruction of the building and its contents, but we have held that there was sufficient evidence to establish a breach of contract and the plaintiff was therefore entitled to nominal damages against the defendant. (*Mollyneaux v. Wittenberg*, 39 Neb., 547.) The judgment will, therefore, be reversed unless, within twenty days, the defendant in

error file in this court a remittitur of all the judgment except five cents, in which case the judgment will be affirmed for that amount.

JUDGMENT ACCORDINGLY.

BARNEY MULLEN ET AL. V. CREIGHTON MORRIS, TRUSTEE.

FILED FEBRUARY 5, 1895. No. 6059.

1. **Action on Bond: PLEADING.** *Held*, That the petition states a cause of action.
2. **Principal and Surety.** Where one signs as surety a bond, which in form is a joint obligation, upon condition that others are to sign the same with him, and it is delivered without the condition having been complied with, the instrument is invalid as to the one so signing as surety, unless the obligee, prior to the delivery, had no notice of such condition, or the surety, after signing, waived the condition.
3. **Bonds.** Where such a bond is delivered to the obligee without being executed by all the persons named in the body thereof as obligors it is sufficient to put the obligee upon inquiry, whether those who signed consented to its being delivered without the signatures of the others.
4. **Principal and Surety.** Where a bond not signed by all the persons named in the body as obligors is delivered to the obligee, there is no presumption that the instrument was not to be considered binding upon those signing until executed by all the obligors named in the body thereof. It is for those who executed it to show that they were not to be bound unless it was executed by the others.
5. **Contracts.** An agreement by the creditors of an insolvent bank with the stockholders and officers thereof to discount their claims against the bank ten per cent, to throw off all interest after a certain date, and to extend the time of payment of the claims for a definite period, is a sufficient consideration for a bond given to a trustee of such creditors by such stockholders and officers to secure the payment of the indebtedness of the bank.

6. **Review:** ASSIGNMENTS OF ERROR. An assignment in a petition in error, "Errors of law occurring at the trial, excepted to at the time," is too indefinite to secure a review of the rulings of the trial court on the admission or exclusion of testimony. *Murphy v. Gould*, 40 Neb., 728, followed.

7. **Bonds.** In an action on a penal bond judgment may be recovered for the actual damages sustained, not exceeding the penalty of the bond and interest from the date of the breach of the conditions, less all the payments made by the obligors.

8. **Payment:** PLEADING. Payment, to be available as a defense, must be pleaded. Where payments are alleged in the petition and proved at the trial without objection, although denied by the answer, the defendant will be entitled to credit for such payments.

9. **Action on Bond:** DAMAGES. *Held*, That the damages assessed by the jury are excessive.

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

The facts are stated in the opinion.

E. W. Thomas, *R. S. Molony*, and *J. H. Broady*, for plaintiffs in error:

The demurrer to the petition should have been sustained. (*Cutler v. Roberts*, 7 Neb., 4; *Sharp v. United States*, 4 Watts [Pa.], 21; *Fletcher v. Austin*, 34 Am. Dec. [Vt.], 698; 1 Wait, Actions & Defenses, 677.)

The obligors are in the attitude of sureties with all rights of the latter. (*Cady v. Smith*, 12 Neb., 630; *Patterson v. Wyomissing Mfg. Co.*, 40 Pa. St., 117; *Hanson v. Donkersley*, 37 Mich., 184; *Drinkwine v. City of Eau Clare*, 53 N. W. Rep. [Wis.], 673; Brandt, Sureties, sec. 79.)

The penal sum of twenty-five thousand dollars, named in the bond sued on, less the payments, was the maximum limit of liability of plaintiffs in error. (*Fraser v. Little*, 13 Mich., 195; *Spencer v. Perry*, 18 Mich., 393; *Copeland v. Cunningham*, 63 Ala., 394; *Freeman v. People*, 54 Ill.,

153; *Carter v. Carter*, 4 Am. Dec. [Conn.], 177; *Warner v. Thurlo*, 15 Mass., 154.)

Isham Reavis and *C. F. Reavis*, also for plaintiffs in error:

The bond, in legal effect, is the creation of a fund for the common benefit of all the creditors; and as no special mode is provided by statute for the enforcement of statutory and constitutional liability of stockholders of a broken bank for the debts of the same, the remedy is in equity and not at law, and no other remedy obtains in a suit on a bond like this, as it is an agreed liquidation of the aggregate liability of all the stockholders for the debts of the bank named. (*Pollard v. Bailey*, 20 Wall. [U. S.], 520; *Terry v. Little*, 101 U. S., 216; *Mills v. Scott*, 99 U. S., 25; *Smith v. Huckabee*, 53 Ala., 191; *Jones v. Jarman*, 34 Ark., 323; *Peck v. Miller*, 39 Mich., 594; *Harris v. First Parish in Dorchester*, 23 Pick. [Mass.], 112; *Wetherbee v. Baker*, 35 N. J. Eq., 501; *Wright v. McCormack*, 17 O. St., 86; *Umsted v. Buskirk*, 17 O. St., 113; *Brown v. Hitchcock*, 36 O. St., 667; *Coleman v. White*, 14 Wis., 700*; *Eames v. Doris*, 102 Ill., 350; *Junesma v. Schuttler*, 114 Ill., 156.)

Frank Martin and *C. Gillespie, contra:*

The agreement to compromise was binding upon all creditors who signed it. (*Lambert v. Shetler*, 32 N. W. Rep. [Ia.], 425.)

The stockholders who signed the bond are liable in this action for ninety per cent of the claims of the creditors, less the amount paid. The penalty fixed by the bond is not the limit of liability. (*Clark v. Bush*, 3 Cow. [N. Y.], 151; Field, Damages, sec. 546; *Foley v. McKeegan*, 4 Ia., 10; *Sween v. Steele*, 5 Ia., 352; *Graham v. Bickham*, 4 Dall. [U. S.], 149; *Stewart v. Carter*, 4 Neb., 564; *Scofield v. Quinn*, 55 N. W. Rep. [Minn.], 745; *Waynick v.*

Richmond, 11 Kan., 488; *Dooley v. Watson*, 1 Gray [Mass.], 414.)

NORVAL, C. J.

The Farmers & Merchants Bank of Humboldt was incorporated under the laws of this state in July, 1879, and thereafter was engaged in the business of banking at Humboldt until in June or July, 1889, when the bank closed and made an assignment for the benefit of its creditors. Creighton Morris was appointed assignee, who qualified as such. Negotiations were soon thereafter had between the officers and stockholders of the bank and the creditors for the purpose of effecting a settlement or compromise of the claims of the creditors. A proposition was finally made to the creditors to pay them 90 cents on the dollar of their claim within two years, the creditors to throw off all interest accruing after September 19, 1889. This proposition was favorably received by nearly all the persons who held claims against the bank. The following paper was prepared and presented to the creditors for their signature:

"The undersigned, creditors of the Farmers & Merchants Bank of Humboldt, Nebraska, being desirous of effecting a compromise and settlement of all differences touching the liability of the several stockholders of said bank, hereby severally agree to discount the sum of ten (10) per cent from the face of each of our respective claims, as the same may be filed, proven, and allowed before the county court of Richardson county, Nebraska, and to forbear the collection of interest accruing thereon after September 19, 1889; provided the stockholders of said bank shall, on or before said 19th day of September, 1889, convey and assign unto Creigton Morris, receiver for said bank, all of the property held by them, or either of them, as trustees of said bank, and shall file with said county court a good and sufficient bond, conditioned that said stockholders shall, on or before October 1, 1889, pay unto

the receiver appointed by the court for said bank the sum of twelve thousand two hundred ($12,200) dollars, and soon thereafter as all the assets in the hands of the receiver shall have been converted and disbursed, and within two (2) years thereafter, at farthest, shall pay unto the said receiver such further sum of money as shall suffice to liquidate, in full, all of the claims allowed by the court against such bank, without interest after September 19, and after deducting from the face of such claims a discount of ten (10) per cent as above provided. Dated this 13th day of August, 1889."

The foregoing instrument, after being signed by all the creditors of the bank excepting three or four, who refused to sign, was delivered to Creighton Morris, the assignee, and the following bond was also executed and delivered to said Morris:

"Know all men by these presents, that we, W. W. Turk, Barney Mullen, J. C. Furgus, Wm. N. Nims, A. L. Fry, R. A. Stewart, T. J. Frazier, A. R. Nims, and R. C. Lamberton are held and firmly bound, jointly and severally, unto Creighton Morris, receiver for the Farmers & Merchants Bank, of Humboldt, Nebraska, in the penal sum of twenty-five thousand dollars ($25,000), good and lawful money, for the payment of which, well and truly to be made unto the said Creighton Morris, receiver, and to his successors, we jointly and severally bind ourselves, our heirs, executors, and administrators.

"Witness our hand and seals this twenty-fourth day of August, A. D. 1889.

"The conditions of this obligation are such, that whereas certain differences have existed between the creditors of the said Farmers & Merchants Bank and the stockholders of said bank touching the liability of such stockholders toward such creditors; and whereas one of the conditions of such compromise is that the stockholders of said Farmers & Merchants Bank shall, on or before the first day of

October, 1889, pay unto the receiver appointed by the court for said bank the sum of twelve thousand two hundred dollars ($12,200), and, within ninety days after all the assets in the hands of the receiver or assignee shall have been converted and disbursed, shall pay unto said receiver such further sum of money as shall suffice to liquidate in full all of the claims proven and allowed by the court against such bank without interest after the 19th day of September, 1889, deducting from the face of each said claim a discount of ten per cent, said amount of ninety per cent to be paid creditors net over and above the expenses of the assignee and the court proceedings. The entire amount of ninety per cent to be paid within two years from October 1, 1889:

"Now, therefore, if said stockholders of the Farmers & Merchants Bank aforesaid shall well and truly pay, or cause to be paid, unto said receiver the said several sums of money at the times and in the manner herein above recited, these presents shall become null and void, otherwise to remain in full force and effect.

"Done in the county of Richardson and state of Nebraska.

"W. W. TURK.	[SEAL.]
"BARNEY MULLEN.	[SEAL.]
"J. C. FERGUS.	[SEAL.]
"WM. N. NIMS.	[SEAL.]
"——— ———.	[SEAL.]
"——— ———.	[SEAL.]
"T. J. FRAZIER.	[SEAL.]
"A. R. NIMS.	[SEAL.]
"R. C. LAMBERTON.	[SEAL.]"

On the 12th day of January, 1892, this action was brought by the defendant in error for the use and benefit of, and as trustee for, the creditors of the bank upon the foregoing bond against each of the signers thereof. The return on the summons discloses that W. W. Turk, A. R.

Nims, and R. C. Lamberton were not served, and the first two named made no appearance in the cause. It is stated in the briefs filed that Lamberton appeared and filed a general demurrer; that the same was overruled, and he stood upon the demurrer. The record fails to show that he appeared in the action for any purpose, nor has he joined in the petition in error, although his counsel have filed for him a brief in this court. A brief statement of the issues made by the pleading will be necessary to an understanding of the questions presented for our consideration.

The petition alleges, substantially, the incorporation of the bank; that it made an assignment for the benefit of its creditors; that the defendants were incorporators and stockholders of said bank; and that it, for more than a year prior to the incurring of the indebtedness from the bank to its creditors, had wholly failed to give the notice required by section 136 of chapter 16 of the Compiled Statutes; that by reason thereof the stockholders were individually liable for the debts of the bank; that on the 24th day of August, 1889, a settlement and compromise was made between the defendants and certain creditors of the bank, whose names are set forth in the petition, by which the latter should receive ninety cents on the dollar of their claims and the defendants were to have two years in which to pay the same. The petition sets out a copy of the paper signed by the creditors heretofore mentioned, together with the names and amount due each of the persons signing the same; alleges that the proposition contained in said paper was accepted by the defendants, and, in consideration of said extension of time and the discount of ten per cent and interest said defendants executed and delivered to the plaintiff the bond set out above, and which is copied into, and made a part of, the petition. The petition further avers that the persons who signed said bond have paid the sum of $12,200 therein mentioned, and delivered to the plaintiff the property held by them in trust as therein stip-

ulated; that the total amount of the indebtedness of the bank to the parties for whom plaintiff brings this suit, as proved and allowed by the county court, was $45,470, and deducting therefrom ten per cent, left the sum of $40,923.09 due on said bond; that plaintiff has received from all sources the sum of $21,370.94, including said sum of $12,200; that the assignee of said bank has converted all the assets of said bank into money and the proceeds arising therefrom are included in the above sum credited to the defendants; that there is still due said creditors, after deducting said ten per cent and allowing all credits, the sum of $19,552.15; that the defendants, stockholders and officers of the bank, have failed and neglected to publish the notice of the incorporation of the bank as provided by sections 130 and 131 of chapter 16 of the Compiled Statutes, but during the entire existence of the bank they omitted to publish the annual notice of the bank's indebtedness as required by section 136 of said chapter; that the parties for whom this action was instituted have faithfully kept all the stipulations in said bond which they were required to keep and perform.

A motion to strike out of the petition, as redundant and irrelevant, the averments therein relating to the failure to give the notices of the indebtedness of the bank and of its incorporation was filed, which motion was overruled by the court, and an exception was entered upon the record.

A demurrer to the petition was interposed on the following grounds: (1) That the petition does not state facts sufficient to constitute a cause of action; (2) that it does not appear there was a sufficient consideration for the bond sued upon; that said bond shows upon its face that it was never signed by the obligors therein named and that it was never completed or became a valid and binding obligation. The demurrer was overruled, and thereupon the defendant answered, denying all the averments of the petition not expressly admitted; admitted the incorporation of the bank;

that it made an assignment; that the defendants owned stock in the bank, and that negotiations for a settlement were had between the stockholders and the creditors of the bank. The defendants further answering aver that they never received any dividends on their stock, nor did they take any part in the management or control of the business of the bank; that the defendant R. C. Lamberton was the cashier and sole manager; that the bond was executed by the defendants with the understanding of all the parties, and upon the express condition that it should be signed by all the stockholders whose names are set out in the body of the instrument as obligors, and also that the paper signed by the creditors should be executed by all the creditors of the bank, and that the bond was not to be delivered to the obligee therein named until it should be so signed and executed; that said bond was never signed by R. A. Stewart and A. L. Fry, two of the stockholders mentioned in the body thereof, nor was the same ever delivered; that all the creditors of the bank did not sign the paper set out in the petition; that four of them whose claims aggregate $13,000 refused so to do, but have brought separate actions to collect the amount of their claims from the defendants as stockholders merely; that the defendants, believing that all the stockholders had executed the bond, and that all the creditors had signed the other writing, paid to Creighton Morris, the assignee selected by the creditors, to be used by him in paying *pro rata* the claims against the bank, the sum of $——, and that two of the defendants whose names were given have paid said Morris for the same purpose the sum of $2,500 each.

The reply denies every allegation in the answers not expressly admitted; admits that two stockholders did not execute the bond, and that four creditors did not sign the other paper nor accept the terms of the compromise, and that they have brought suits against the stockholders as stated in the petition; alleges that the defendants, with

knowledge that two of the stockholders and four of the creditors had not signed, and would not sign, and refused to be bound by the terms of the compromise, delivered the instrument sued on to the plaintiff, and then and there informed him they accepted the said proposition for a settlement and compromise, and that the bond should stand as the binding obligation of the defendants to all the creditors who had agreed to the terms of said compromise.

A trial was had at the June term, 1892, which resulted in a verdict for the plaintiff for the sum of $19,552.15. This verdict the court set aside on motion of the defendants, and at the November term following there was a second trial with a verdict and judgment for the plaintiff in the sum of $21,148.75. The defendants have brought the same to this court for review.

The first assignment of error relates to the overruling of the demurrer to the petition. The contention of counsel is that the petition is insufficient and fatally defective, in that the bond on which suit was brought shows on its face that it was intended to be executed by the nine persons named in the body thereof as principals, but that it was only executed by seven of them. It is argued by counsel for defendants that for this reason the bond was incomplete and invalid, and there can be no recovery against those who signed it. It is firmly established by the decisions that when one signs a joint bond as surety upon conditions that others are to sign the same with him, and it is delivered without such condition being complied with, the bond cannot be enforced against the one so signing as surety, unless the obligee had no notice of the condition, or it be established that the surety, after signing, waived the condition. (*Cutler v. Roberts*, 7 Neb., 4; *Sharp v. United States*, 4 Watts [Pa.], 21; *Fletcher v. Austin*, 11 Vt., 447; *Hall v. Parker*, 37 Mich., 590; *Lovett v. Adams*, 3 Wend. [N. Y.], 380; *State v. Peper*, 31 Ind., 76; *People v. Bostwick*, 32 N. Y., 445.) It is equally well settled that when such

a bond is delivered to the obligee without being signed by all the persons named in the body thereof as obligors, it is sufficient to put the obligee upon inquiry whether those who signed consented to its being delivered without the signatures of the others, and to charge the obligee with notice, if such be the fact, that the person signing did so upon the condition that the others named should also sign. (*Cutler v. Roberts, supra; State Bank v. Evans,* 3 Greene [N. J.], 155; *Sharp v. United States,* 4 Watts [Pa.], 21; *Clements v. Cassilly,* 4 La. Ann., 380; *City of Sacramento v. Dunlap,* 14 Cal., 421; *People v. Hartley,* 21 Cal., 585; *Wood v. Washburn,* 2 Pick. [Mass.], 24; *Bean v. Parker,* 17 Mass., 591.)

Is there any presumption that such a bond is incomplete and unfinished, until executed by all the parties whose names appear in it as obligors? Upon this point the authorities are not harmonious. The following cases hold that no presumption arises that such a bond was not considered as binding until the signatures of all the obligors named in the body have been obtained, but on the contrary its execution is deemed *prima facie* complete, and it is for the defendants to establish that they signed on the express condition that they were not to be bound until all the obligors named in the instrument should sign: *Dillon v. Anderson,* 43 N. Y., 231; *Parker v. Bradley,* 2 Hill [N. Y.], 584; *Haskins v. Lombard,* 4 Shep. [Me.], 140; *Cutler v. Whittemore,* 10 Mass., 442; *Johnson v. Weatherwax,* 9 Kan., 75; *Johnson v. Baker,* 4 Barn. & Ald. [Eng.], 440. Some of the authorities which hold that the presumption is such instrument was not to be delivered until all had signed are: *Sharp v. United States, supra; Clements v. Cassilly, supra.* We are inclined to the doctrine that the instrument is *prima facie* binding. This presumption may be overcome by proof that such bond was not to be binding upon the one who signed until the signatures of all have been attached. The bond under consideration in this

case is joint and several; all obligors are principals, there being no sureties. Each obligor is separately liable, without the signatures of the others named in the instrument as obligors, unless at the time of the signing it was understood the signatures of all therein named should be obtained, and that the obligee had notice of the conditions imposed at the time of the delivery of the instrument. It appears from the allegations of the petition that the bond in suit was actually delivered to the obligee by the persons executing the same, and that they afterwards recognized the validity of the instrument by paying to the defendant in error $12,200, and by turning over to him the trust property in accordance with the stipulations of the obligation. This is sufficient to show that the bond was delivered unconditionally, without the additional signatures, by the plaintiffs in error, and they are bound by the terms of the undertaking. This principle is recognized by the authorities cited. (See, also, *State v. Peck*, 53 Me., 284.) True it is that the paper signed by the creditors was not executed by all the creditors of the bank, and that four of them never signed the proposition of compromise; but that is not important, since it appears that it was delivered to and accepted by the plaintiffs in error. The language of the instrument is that "the undersigned, creditors of the Farmers & Merchants Bank of Humboldt, being desirous of effecting a compromise and settlement of all differences touching the liability of the several stockholders of said bank, hereby severally agree," etc. It is obvious that the offer of compromise was binding on the creditors who affixed their names thereto, notwithstanding all the creditors did not sign it. (*Lambert v. Shetler*, 32 N. W. Rep. [Ia.], 424.)

The objection to the petition that it does not appear that there was any consideration for the giving of the bond is without merit. It is alleged in the pleading, and recited in the bond, in effect, that the creditors of the bank discounted their claims to the extent of ten per cent, threw

off a portion of the interest, and extended the time of payment of the indebtedness of the bank as an inducement to the stockholders to give the instrument declared upon. It requires no argument to show that this was a sufficient consideration for the undertaking of the plaintiffs in error. The petition stated a cause of action, and the demurrer was properly overruled.

The overruling of the motion to strike out certain allegations of the petition as redundant is made the basis of the second assignment in the petition in error, but as it is not relied upon in the briefs, this assignment will be deemed waived. (*Gill v. Lydick*, 40 Neb., 508; *Glaze v. Parcel*, 40 Neb., 732.)

Complaint is made in the brief filed of numerous decisions of the trial court on the admission of the testimony of several witnesses whose names are given. We cannot consider any of these rulings, because they are not sufficiently raised by the petition in error. The only assignment therein which could be construed as relating to the rulings just mentioned is the sixth, which is in the following language: "Because of errors of law occurring at the trial, excepted to at the time by the defendants below." In *Murphy v. Gould*, 40 Neb., 728, an assignment in a petition in error, in substantially the same language, was held insufficient to secure a review of the rulings of the court below on the admission of testimony. We adhere to that decision.

The next, and the most important question presented by the record for consideration is whether the penal sum of $25,000, named in the bond, is the maximum limit of the liability which the obligors assumed. The general rule deducible from the authorities in this country is that on the breach of a penal bond the obligee may recover his actual damages sustained, not exceeding the penalty named in the bond, or the penalty and interest, there being some conflict in the cases whether interest is allowable or not. (*Fraser v. Little*, 13 Mich., 195; *Spencer v. Perry*, 18 Mich., 393;

Freeman v. State, 54 Ill., 153; *Copeland v. Cunningham*, 63 Ala., 394; *Carter v. Carter*, 4 Day [Conn.], 30; *Warner v. Thurlo*, 15 Mass., 153; *Windham v. Coats*, 8 Ala., 285; *Seamans v. White*, 8 Ala., 656; *Tyson v. Sanderson*, 45 Ala., 364; *Woods v. Commonwealth for Pennington's Heirs*, 8 B. Mon. [Ky.], 112; *New Haven Bank v. Miles*, 5 Conn., 587; *King v. Brewer*, 19 Ind., 267; *Balsley v. Hoffman*, 13 Pa. St., 603; *Farrar v. United States*, 5 Pet. [U. S.], 373.) Some decisions are to the effect that an action may be maintained on the covenants or stipulation in a bond between private parties, and that in such case the recovery is not limited to the penalty named, but the measure of damages is the full amount of loss sustained. (*Sweem v. Steele*, 5 Ia., 352; *Graham v. Bickham*, 4 Dall. [U. S.], 149; *Waynick v. Richmond*, 11 Kan., 488; *Stewart v. Noble*, 1 Greene [Ia.], 26; *Buckmaster v. Grundy*, 1 Scam. [Ill.], 310.) In most of the cases where damages exceeding the penalty have been given there was an express covenant in the condition of the bond that the obligor must do or omit to do some particular act. While the writer is not entirely satisfied that the rule last stated should not obtain in this case, since there are no sureties upon the bond, but the obligors are all principals, yet I yield to the rule supported by the weight of the authorities upon the question, and to the judgment of my associates.

The case of *Spencer v. Perry, supra*, is much like the one at bar. That was an action upon a bond in the penal sum of $6,000, conditioned for the payment by the defendant of all the debts of the firm of Spencer & Newcombe, and to indemnify the plaintiff, one of the firm, against such debts. Subsequent to the execution of the bond the defendant paid the debts of the firm to an amount exceeding the penalty of the bond. The court held there could be no recovery, since the voluntary payment by the defendant of the debts of the firm equal to the penalty was the satisfaction of the bond. Christiancy, J., in de-

livering the opinion of the court, uses the following language: "We need express no opinion here upon official bonds, or those of executors, administrators, guardians, etc., which are regulated by special provisions of statute; but it is easy to see that these all stand upon grounds very different from the bond in this case, or ordinary bonds *inter partes*. The obligation of officers, executors, etc., to pay over and account for money coming into their hands by virtue of their office is not created by the bond, but is imposed by the law, and the bond is but a collateral security for the performance of a legal obligation not dependent upon the bond. In paying over and accounting for moneys, therefore, as required by law, the officer, executor, etc., is only performing a duty imposed upon him by the law, independent of the bond. No amount of payments, therefore, will prevent a recovery to the full extent of the penalty in case of a default to that amount. In other words, the bond applies only to the sum or sums for which the party is in default, and not to sums which may have been paid over in the performance of official or legal obligation, not created by the bond. The present bond was a contract between private parties, and one chief object of putting it in the form of a bond with a penalty must, according to the general understanding in such cases, be supposed to have been to fix the limit beyond which the liability of the defendant should not extend. Another object may have been to enable the obligee to enforce it by action of debt, instead of covenant. The legal effect of the bond, as to the extent of liability, does not differ from that of a covenant, without a penalty, to pay the debts of the firm to an amount not exceeding six thousand dollars. If the parties had intended to provide for a liability to an indefinite extent, to be limited only by the amount of the debts of the firm, whatever they might be, the obvious mode of creating such a liability was by a covenant to that effect without a penalty, or by making the penalty of the bond so large as, in

any event, to exceed the debts, as the parties probably supposed they had done here."

Our conclusion is, not considering the question of interest, that the penalty is the limit of liability of the obligors for a breach of the conditions of the bond. As already stated, the decisions are not harmonious upon the proposition of allowing interest beyond the penalty. The decided weight of authority sustains the doctrine that where the damages sustained exceed the penalty, interest may be recovered from the time the condition of the bond was broken, or the damages became due. (2 Sedgwick, Damages, sec. 678, and cases there cited; Sutherland, Damages, sec. 478, and note 2.) The true principle—one supported by the better authorities, and which we adopt—is that interest is recoverable in this kind of an action.

We will not review the instructions given and refused, because the assignment in the motion for a new trial relating thereto is insufficient, the assignment of error being substantially the same as in *Hiatt v. Kinkaid*, 40 Neb., 178. Objection is likewise made to certain instructions on the ground that they are not numbered. The point is properly raised in the motion for a new trial and in the petition in error, but no exceptions were taken to the instructions on the ground that they were not numbered when read to the jury, hence the objection is waived. (*Gibson v. Sullivan*, 18 Neb., 558.)

It remains to be considered whether the damages assessed by the jury are excessive. The record shows that the amount of the claims of the creditors, as allowed by the county court, aggregated more than $45,000, without the discount of ten per cent stipulated in the bond, or over $40,000, after deducting the ten per cent. It further appears, without conflict, that the defendants have made cash payments, after the bond was signed, and prior to the bringing of the suit, aggregating the sum of $13,200, less the amounts given as credit on account of the two claims we are

about to mention. There were transferred to the defendant in error the claim of William Nims against the bank of $2,533.42, and the claim of A. R. Nims of $3,607.22. There is a dispute in the testimony as to the amount of credit the plaintiffs in error were entitled to receive on account of the assigning and turning over of these two claims. Evidence was introduced by the defendant below conducing to show that they were to be allowed ninety per cent of the claims. On the other hand, the testimony of Mr. Morris is to the effect that he was to give credit for enough above the sum of $9,500 in cash paid on October 1, 1889, to make up the $12,200 payment mentioned in the bond. As a reviewing court, we cannot do otherwise than to regard the fact to be as testified to by Mr. Morris, although there is in the record ample evidence to have warranted the jury in finding that the plaintiffs in error were entitled to be allowed ninety per cent of these two claims. It also appears, without any dispute, that the sum of $800 was realized from Mr. Turk's store property which was turned over by him to Mr. Morris to apply on the indebtedness of the bank, which, added to the $13,200, makes a total of $14,000. Considerable money was realized by the plaintiff below from the assets which came into his hands belonging to the bank, but the amount thus received is not important, since the obligors are not entitled to have the same applied as a payment on the penalty. They obligated themselves in the sum of $25,000 to pay the trustee of the creditors $12,200 by a specified date and to discharge the indebtedness of the bank remaining after the assets in the hands of Mr. Morris were converted into money and disbursed.

Objection has been made that payment is not an issue presented by the pleadings. There is no room to doubt that payment, to be available as a defense, must be pleaded, and, if denied, must be proved. (*Clark v. Mullen*, 16 Neb., 481; *Van Buskirk v. Chandler*, 18 Neb., 584.) It will be

observed that the pleadings in this case regarding payment are in this condition: The petition avers, in effect, that the defendants have paid on the bond the sum of $12,200. This allegation is put in issue by the general denial in the answer. The answer avers that the defendants have paid $——, and that two certain of the defendants have each paid $2,500. These allegations are denied by the reply. The answer sufficiently pleads payment to the extent of $5,000 and no more; but as payment to the amount of $12,200 is set out in the petition, although denied by the answer, and as the evidence sustaining such averment was received without objection, the defendants should be permitted to avail themselves of the defense of payment to the extent of $12,200 only. The difference between this sum and $25,000, the penalty of the bond, is $12,800, for which sum, with seven per cent interest thereon from October 1, 1891, the date of the breach of the conditions, until December 13, 1892, the date of the verdict, or $13,875.18, is the measure of damages. The verdict is therefore excessive to the amount of $7,273.57. In case the defendant in error files with the clerk of this court, within forty days, a remittitur in the last named sum, the judgment will be affirmed for the sum of $13,875.18, with interest thereon from date of the verdict; otherwise it will be reversed, and the cause remanded for further proceedings in accordance with this opinion.

JUDGMENT ACCORDINGLY.

JOHN H. ERCK V. OMAHA NATIONAL BANK.

FILED FEBRUARY 5, 1895. No. 7111.

1. **Error Proceedings**: QUESTIONS NOT RAISED BY RECORD: AFFIRMANCE. Although the mere failure to file a motion for a new trial in the court below is not alone sufficient ground for

dismissing a petition in error, yet, where no such motion has been filed and no bill of exceptions has been settled and allowed, and it appears from an inspection of the record that the petition in error presents no question for review, on a motion to dismiss, the cause will be considered as submitted on the merits, and the judgment affirmed.

2. Review: EXCEPTION TO JUDGMENT. An exception to a final judgment is unnecessary to a review of the cause.

3. ———: PETITION IN ERROR. Alleged errors not assigned in the petition in error will be disregarded.

4. ———: ———: An assignment in the petition in error not relied upon in the briefs filed will be deemed waived.

5. Summons: AMOUNT OF JUDGMENT: WAIVER. The fact that a judgment exceeds the sum indorsed on the summons is unimportant where the defendant has appeared and answered to the merits.

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

MOTION to dismiss proceeding in error. *Judgment below affirmed.*

George O. Calder, for the motion.

Wharton & Baird, contra.

NORVAL, C. J.

This action was instituted in the court below by the Omaha National Bank against John H. Erck, Christian Specht, and George E. Specht, to recover the amount alleged to be due upon a promissory note executed by the defendants. Upon the trial the plaintiff below had judgment for the sum of $172.66, and the defendant Erck prosecuted a petition in error to this court, alleging the following grounds for reversal of the judgment:

1. The court erred in admitting the evidence.

2. The judgment is not sustained by sufficient evidence, for that it should have been rendered against said plaintiff

in error, if rendered at all, as surety on said note, and not as principal.

3. The judgment is not supported by the pleadings.

4. The court erred in refusing to grant a continuance to plaintiff in error when the cause was reached for trial.

The defendant in error has filed a motion to dismiss the petition in error on the following grounds:

1. No motion for a new trial was filed in the district court.

2. No exception was taken to the judgment.

3. The alleged errors assigned in the petition in error occurred during the trial of the cause, and should have been called to the attention of the court below by a motion for a new trial.

4. The record discloses no error, and it is apparent that the cause was removed to this court for delay merely.

5. No bill of exceptions has been settled and allowed, although more than five months have elapsed since the rising of the court at the term at which the trial was had.

The case has been submitted upon said motion to dismiss. None of the alleged errors assigned in the petition in error for a reversal were called to the attention of the trial court by a motion for a new trial. In fact no such motion was filed in the case, or presented to the district court, nor has any bill of exceptions been settled and allowed, hence no review of any of the assignments in the petition in error, except the third, could be had. (*Hosford v. Stone*, 6 Neb., 380; *Cruts v. Wray*, 19 Neb., 581; *Cheney v. Wagner*, 30 Neb., 262; *Gaughran v. Crosby*, 33 Neb., 33; *Jones v. Hayes*, 36 Neb., 526; *Upton v. Cady*, 38 Neb., 209; *Shrimpton v. Kinn*, 39 Neb., 779.) It has been held, in at least three of the cases cited above, that the mere failure to file a motion for a new trial is not of itself sufficient ground for dismissing the petition in error; and so, too, error proceedings will not be dismissed alone because there is no bill of exceptions in the case. The

second point in the motion to dismiss is insufficient, for the reason no exception is necessary to a final judgment. (*Cheney v. Wagner, supra,* and cases there cited.)

It is obvious from an examination of the petition in error, record, and a brief filed by the plaintiff on the merits that the proceeding was instituted in this court solely for delay. The cause will be regarded submitted on the merits. (*Upton v. Cady, supra.*)

There being no motion for a new trial, or bill of exceptions, the only assignment which can be considered is the third, namely, the judgment is not supported by the pleadings. This point not being relied upon or discussed in the brief filed, must be deemed waived. (*Glaze v. Parcel,* 40 Neb., 732.)

But one question is argued in the brief, and that is, the judgment was rendered for a larger sum than was indorsed on the summons. This point is not raised by the petition in error or by the record. A copy of the summons is not before us. Besides, the plaintiff in error made a general appearance in the court below and filed an answer. Therefore, the fact, if it be a fact, that the judgment exceeded the indorsement on the summons is of no importance. It is only where a defendant fails to appear that judgment cannot be rendered against him for a larger sum than the amount indorsed on the summons. (Code, sec. 64; *Crowell v. Galloway,* 3 Neb., 215; *McKay v. Hinman,* 13 Neb., 33.) The judgment is

AFFIRMED.

FLORENCE L. MOORE V. EARL E. MCCOLLUM ET AL.

FILED FEBRUARY 5, 1895. No. 5952.

1. **A motion to dismiss** a cause out of this court for want of prosecution, in order to be of any avail, must be presented before the final submission of the case upon the merits.
2. **Where no brief has been filed** by either party, and the cause is submitted without oral argument, the judgment, if it conforms to the pleadings and evidence, will be affirmed. (*Phenix Ins. Co. v. Reams*, 37 Neb., 423; *Brown v. Dunn*, 38 Neb., 52; *Langdon v. Campbell*, 43 Neb., 67.)

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

A. S. Churchill, for plaintiff in error.

De France & Richardson, *Winfield S. Strawn*, and *Curtis & Shields*, *contra*.

NORVAL, C. J.

At the present term a motion was submitted by the defendants in error to dismiss the petition in error for want of prosecution. This cause was submitted for decision upon its merits at the September term, 1893, without briefs or oral argument. The motion to dismiss, therefore, comes too late. Such a motion, to be of any avail, must be presented before the final submission of the cause upon the merits.

No brief having been filed by either party, and the judgment conforming to the pleadings and evidence, it is accordingly affirmed. (*Phenix Ins. Co. v. Reams*, 37 Neb., 423; *Brown v. Dunn*, 38 Neb., 52; *Damon v. City of Omaha*, 38 Neb., 583; *Langdon v. Campbell*, 43 Neb., 67.)

JUDGMENT AFFIRMED.

ARCHIE A. SCOTT, APPELLANT, V. CHARLES H. ROHMAN ET AL., APPELLEES.

FILED FEBRUARY 5, 1895. No. 7178.

1. **Docket Entry of Judgment in County Court.** It is not essential to the validity of a judgment rendered by a county court that it be entered upon the docket in the judge's own handwriting, or that it be attested by his signature. If the judgment actually rendered is spread upon the county court records under the direction and supervision of the judge it is sufficient.
2. **Garnishment: JUDGMENT.** A judgment debtor is liable to the process of garnishment, when the two actions are brought in the same court, but not otherwise.
3. ———: ———. A judgment of the district court of this state cannot be reached by garnishment proceedings before the county court.

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

See opinion for statement of the case.

A. G. Greenlee, for appellant:

A judgment debtor can be held as garnishee. (*Skipper v. Foster*, 29 Ala., 330; *Osborn v. Cloud*, 23 Ia., 104; *Gamble v. Central Railroad & Banking Co.*, 80 Ga., 595; *McBride v. Fallon*, 65 Cal., 301; *Wehle v. Conner*, 83 N. Y., 231; *Oppenheimer v. Marr*, 31 Neb., 811.)

All reasons for a rule that the garnishment of a judgment in a different court cannot be permitted, as laid down in some of the older authorities, vanish when applied to this case or to any similar case under our procedure, and the policy of the law which demands that all the property of a debtor not exempt shall be applied to the payment of his debts should be permitted to decide this case. (*Luton v. Hoehn*, 72 Ill., 81; Drake, Attachment & Garnishment, sec. 623; *Wood v. Lake*, 13 Wis., 94; Waples, Attachment, 597.)

Not only are all the reasons in favor of the validity of this garnishment, but the weight of authority, and especially of the more recent authority, is upon the side of the appellant. (*Jones v. New York & Erie R. Co.*, 1 Grant [Pa.], 457; *Fithian v. New York & Erie R. Co.*, 31 Pa. St., 114; *Spicer v. Spicer*, 23 Vt., 678; *Luton v. Hoehn*, 72 Ill., 81; *Allen v. Watt*, 79 Ill., 284; *Blake v. Adams*, 64 N. H., 86; *Trombly v. Clark*, 13 Vt., 118.)

The signature of the judge is not necessary to the validity of a judgment. (Black, Judgments, sec. 109; *Fontaine v. Hudson*, 93 Mo., 62; *Crim v. Kessing*, 26 Pac. Rep. [Cal.], 1074; *Platte County v. Marshall*, 10 Mo., 345; *California S. R. Co. v. Southern P. R. Co.*, 7 Pac. Rep. [Cal.], 123; *French v. Pease*, 10 Kan., 51; *Rollins v. Henry*, 78 N. Car., 342; *Keener v. Goodson*, 89 N. Car., 273; *Osburn v. State*, 7 O., 212; *Childs v. McChesney*, 20 Ia., 431; *Lockhart v. State*, 22 S. W. Rep. [Tex.], 413; *Sullivan Savings Institution v. Clark*, 12 Neb., 579.)

The garnishment cannot be cut off by a subsequent assignment of the judgment. (*Downer v. South Royalton Bank*, 39 Vt., 25; *De La Vergne v. Evertson*, 1 Paige Ch. [N. Y.], 181; *Thompson v. Jones*, 53 Hun [N. Y.], 268; *Cox v. Palmer*, 60 Miss., 793; *Wright v. Levy*, 12 Cal., 257; *Mitchell v. Hockett*, 25 Cal., 538; *Clarke v. Hogeman*, 13 W. Va., 718; *Ives v. Addison*, 39 Kan., 172.)

Webster, Rose & Fisherdick, Daniel F. Osgood, Abbott & Abbott, and *Thomas Ryan, contra.*

NORVAL, C. J.

This suit was instituted in the district court of Lancaster county by the appellant to determine the rights of the respective parties to certain moneys which had been paid by John Fitzgerald to the clerk of said court in satisfaction of a judgment which had theretofore been rendered therein in a cause wherein one John Lanham was plaintiff, and said

Fitzgerald was defendant. Issues were formed, and upon the trial, the court made the following findings of fact:

"1. That in an action then pending in this court, between John Lanham as plaintiff, and John Fitzgerald as defendant, for recovery of money alleged to be due the plaintiff Lanham from defendant Fitzgerald, on a contract in writing, the jury on the 25th day of February, 1893, returned a verdict in favor of Lanham, and assessing the amount of his recovery at the sum of $1,108.18. To which finding the defendants except.

"2. That Fitzgerald filed a motion for a new trial, which was on the 1st day of April, 1893, overruled, and on that day the court entered judgment on said verdict in favor of Lanham for amount therein stated.

"3. That on the 1st day of April, 1893, Webster, Rose & Fisherdick, defendants, filed in this court, notice of claim of lien on said judgment for $390, their fee as attorneys for Lanham in said suit.

"4. That on the 17th day of April, 1893, Abbott & Abbott, defendants, filed in this court their notice of claim of lien on said judgment for $250 their fees as attorneys for Lanham in said court.

"5. That on the 10th day of April, 1893, the defendant C. H. Rohman filed in this court an assignment of said judgment by Lanham to him, by its terms, however, subject to the liens of the above named attorneys in findings three and four.

"6. That on the 25th day of February, 1893, in the cases of Archie A. Scott v. John Lanham, and Perry S. Chapman v. John Lanham, in the county court of Lancaster county, wherein judgments had theretofore been had, and executions returned unsatisfied, affidavits in garnishment were therein filed, on which issued summonses against John Fitzgerald, garnishee, and same were served on him on the 27th day of February, 1893.

"7. That Fitzgerald, on March 14, 1893, made answer

in said cases as garnishee, setting up the said verdict in Lanham's favor against him; that no judgment had yet been rendered thereon; that if judgment thereon should be entered and not reversed or otherwise vacated, he would be indebted in some amount to Lanham, and asked that a hearing on his answer be continued until it is determined whether or not he, as garnishee, is indebted to Lanham; whereupon the county judge entered an order continuing the further answer of the garnishee until April 15, 1893.

"8. That on the 15th day of April, 1893, Fitzgerald made further answer in said causes in the county court, setting up that judgment in said district court had been rendered in favor of Lanham for $1,018.18 against him, that it was unpaid, still owed by him, and that it had been stayed for nine months from April 1, 1893; that subsequent to the service of notice of garnishment upon him, the said judgment had been assigned to said Rohman subject to said liens of Webster, Rose & Fisherdick and Abbott & Abbott, and that when said notice was so served, and at the time of his former answer, he had no notice of any attorney's lien on said judgment.

"9. That on the 25th day of April, 1893, orders issued on said answers of Fitzgerald from the county court, commanding him to pay into said court on January 1, 1894, to be applied on the judgment of Scott against Lanham, the sum of $314.30, with seven per cent interest thereon from the 6th day of December, 1890, and also $16.65 costs of suit; and commanding him to pay into said county court at the same time, to be applied on judgment of Chapman against Lanham, $86.50, with seven per cent interest from the 17th day of January, 1891, and $16 costs of suit.

"10. That plaintiff Scott is the owner and holder of the Chapman judgment.

"11. That on the 16th day of December, 1893, Fitzgerald paid into this court the sum of $1,060.10, being

said judgment, $1,018.18, with seven per cent interest thereon from April 1, 1893, where the same now remains in the hands of the clerk.

"12. That the assignment by Lanham to Rohman was for a valuable consideration. Plaintiff excepts to said twelfth finding of fact.

"13. The court further finds that there appears in docket 18, page 60, of the county judge's docket of Lancaster county, state of Nebraska, an entry bearing date November 5, 1890, in a case entitled 'Archie A. Scott v. John Lanham;' that the court finds that there is due the plaintiff, from the defendant, the sum of $314.30, and it is therefore considered and adjudged that the plaintiff recover from the defendant the sum of $314.30, and the costs of this action, taxed at $6.45; and the court finds that said entry is not in the handwriting of the then county judge, nor is it signed by the then county judge, or by any county judge, but the court finds it is in the handwriting of C. Y. Long, who was employed in the county judge's office for the purpose of writing up its records. The court further finds that the minutes of the court in the term calendar upon which said judgment purports to have been rendered, was in the handwriting of the then county judge. To the thirteenth finding of fact the plaintiff duly excepts."

The court found as conclusions of law:

"1. That there is no valid judgment in the county court in the case of Archie A. Scott v. John Lanham on which to base proceedings in garnishment. Plaintiff excepts to said first conclusion of law.

"2. That the judgment in the case of P. S. Chapman v. John Lanham in said county court is valid.

"3. That the proceedings in garnishment in the county court of Lancaster county, wherein the garnishee is a judgment debtor in an action in the district court of Lancaster county, and the order of the county court on said judgment debtor to pay into said county court a portion of the

debt due from said garnishee on said judgment in the district court, are wholly void and against law. Plaintiff excepts to said third conclusion of law.

"4. That of said $1,069.10 defendants Webster, Rose & Fisherdick are entitled to $390, to be first paid therefrom; that defendants Abbot & Abbot are entitled to be paid next from said fund the sum of $250, and the balance of $429.10 belongs to the defendant Chas. H. Rohman, as assignee of John Lanham, and the clerk is ordered to pay the same to him; that upon payment of said sums the said defendants shall release and the clerk of this court shall satisfy and discharge of record the said judgment in favor of John Lanham against John Fitzgerald. To so much of said fourth conclusion of law as gives said judgment fund to said defendants the plaintiff duly excepts.

"5. That plaintiff pay the costs of this action. Plaintiff excepts."

A decree was entered ordering the clerk of the district court to pay out of the funds in his hands, first, to the defendants Webster, Rose & Fisherdick, the sum of $390; second, to the defendants Abbot & Abbot, the sum of $250, and the balance of said funds, amounting to the sum of $429, to the defendant Chas. H. Rohman, as assignee of the defendant John Lanham; and upon the payment of the said several sums that said Webster, Rose & Fisherdick, Abbott & Abbott, and Chas. H. Rohman were ordered to release their respective liens upon the said judgment in favor of Lanham and against Fitzgerald, and the clerk of the district court was ordered to satisfy and release of record said judgment. The plaintiff appeals.

It is stipulated by the parties that the facts in the case are as found by the trial court, with the following exceptions:

"1. The assignment mentioned in the fifth finding was made for the purpose of indemnifying said Rohman against loss upon a contractor's bond, which he had theretofore,

to-wit, on the —— day of February, 1891, signed for the said Lanham, as contractor; that at the time said assignment of judgment was made said Rohman did not incur any additional liability, and did not surrender any security or indemnity of any kind whatsoever theretofore held by him. There were, however, claims of various parties made against the said Rohman, seeking to hold him liable upon said bond, and certain of said claims are now in suit in the district court of Lancaster county, pending there upon appeal from the county court of said county, judgment having been rendered against him in the court below.

"2. The judgment in favor of said Lanham and against Fitzgerald, mentioned in these findings, was paid in for Fitzgerald by Charles McGlave, a clerk in the office of the said Fitzgerald, without the knowledge of Fitzgerald. The said McGlave, at the time he paid said debt, did not know that said judgment had been garnished. The said McGlave, however, had authority by virtue of his employment to pay said money into court, and did so for the purpose of satisfying the said judgment and relieving the real estate of said Fitzgerald from the lien thereby created, in order that the said Fitzgerald might procure a loan which the said Fitzgerald was at that time negotiating.

"3. That defendant Lanham is insolvent."

It is urged that the judgment in the case of Archie A. Scott v. John Lanham is invalid, because the entry thereof in the county judge's docket is not in the handwriting of the then county judge of Lancaster county, and is not attested by his signature. The question raised by the record, so far as we are advised, is now for the first time presented to this court for decision, and we have given the subject such consideration as the time at our disposal will permit. Section 34, chapter 20, Compiled Statutes, provides: "Every record made in any probate court, excepting original orders, judgments, and decrees thereof, shall have attached thereto a certificate signed by the judge of such court, showing the

date of such record and the county in which the same is made, and it shall not be necessary to call such judge or his successor in office to prove such record so certified. And in any cause, matter, or proceeding in which the probate court or probate judge has jurisdiction, and is required to make a record not provided for in this chapter, such record shall be certified in the same way and with like effect as aforesaid." It certainly cannot be maintained, with any degree of success, that the quoted provision requires the county judge to sign judgments in his docket to make them valid. On the contrary, original orders, judgments, and decrees in said court are expressly excepted from the provisions of the statute quoted requiring that the signature or certificate of the county judge should be appended as a verification of every record made by him. Section 31 of said chapter 20 declares: "The probate judge shall keep a docket in which all his proceedings in civil actions shall be entered in like manner, as near as may be, as the proceedings before justices of the peace in civil actions; and the provisions of this code relating to justices' docket shall, as near as may be, apply to the docket of the probate judge." Section 1086 of the Code of Civil Procedure requires every justice to keep a docket, and directs what matters shall be entered therein, but it contains no provision, nor have we been able to find any statute, and none has been cited by counsel, which in express terms makes it necessary for either a county judge, or a justice of the peace, to sign judgments entered in his docket. The absence of the signature of the county judge to a judgment, or the record in which the same is entered, is not fatal. (*Daniels v. Thompson*, 48 Ill. App., 393; *Lythgoe v. Lythgoe*, 26 N. Y. Sup., 1063.)

Our attention has been called to section 447 of the Code of Civil Procedure, which reads as follows: "When the judicial acts or other proceedings of any court have not been regularly brought up and recorded by the clerk thereof, such court shall cause the same to be made up and

recorded within such time as it may direct. When they are made up and upon examination found to be correct, the presiding judge of such court shall subscribe the same." This statute relates to records of the several district courts of the state, and contemplates that judgments transcribed upon the journal of such court shall be signed by the presiding judge. Assuming for the purposes of this case, without deciding the point, that section 447 is applicable to the county and justices' courts, it does not follow that the judgment of Scott v. Lanham is void because it is not attested by the signature of the county judge. The provision of said section concerning the signing of the record by the judge is not mandatory, but directory merely, and a non-compliance with the statute does not invalidate a judgment pronounced by the court and duly entered upon the journal. Similar statutes have generally been held to be directory only, and that the omission of the judge's signature does not vitiate the judgment. (Freeman, Judgments, sec. 50*e*; Black, Judgments, sec. 109; *Vanfleet v. Phillips*, 11 Ia., 560; *Childs v. McChesney*, 20 Ia., 434; *Traer Brothers v. Whitman*, 56 Ia., 445; *Osburn v. State*, 7 O., 212; *Platte County v. Marshall*, 10 Mo., 346; *Rollins v. Henry*, 78 N. Car., 342; *Keener v. Goodson*, 89 N. Car., 273; *Fontaine v. Hudson*, 5 S. W. Rep. [Mo.], 692; *Lockhart v. State*, 22 S. W. Rep. [Tex.], 413; *French v. Pease*, 10 Kan., 51.) In *Foutz v. Mann*, 15 Neb., 172, it was held that the failure of the judge to sign a decree of foreclosure does not render it illegal or void. The entering of the judgment on the docket of the county court was not in the handwriting of the county judge, but of one Long, who was employed in the county judge's office for the purpose of writing up the records of the court. This fact does not render the judgment void. We have been unable to find any legislative enactment which requires that the records of the county court shall be in the handwriting of the judge of the court. If they are made up

by some other person, under the direction and supervision of the judge, it will be sufficient. The judgment in question appears on the docket of the county court. It was entered there in accordance with the minutes made by the county judge in his own handwriting in the term calendar. The presumption is that the judgment entered by Long was directed and authorized by the judge. This presumption is strengthened by the fact that subsequent to the transcribing of the judgment execution had been granted by the judge and summons in garnishment issued. In fact it is not contended that the judgment entered upon the docket was not the one actually pronounced by the court. It follows from the foregoing considerations that the objections made by the appellees to the judgment in favor of Scott against Lanham cannot be sustained, and that the district court erred in its first conclusion of law, in holding said judgment invalid.

We will next consider whether the proceedings in garnishment against Fitzgerald are valid and binding. The record discloses that the indebtedness of Fitzgerald to Lanham had been reduced to judgment. The first question therefore presented is whether a judgment debtor can be garnished. Section 212 of the Code provides: "An order of attachment binds the property attached from the time of service, and the garnishee shall be liable to the plaintiff in attachment for all property, moneys, and credits in his hands, or due from him to the defendant, from the time he is served with the written notice mentioned in section two hundred and seven." By section 221 of the Code the garnishee is required to "appear and answer under oath all the questions put to him touching the property of every description and credits of the defendants in his possession or under his control, and he shall disclose truly the amount owing by him to the defendant whether due or not, and in case of a corporation, any stock therein held by or for the benefit of the defendant, at or after the service of no-

tice." Section 224 reads as follows: "If the garnishee appear and answer, and it is discovered on his examination that at or after the service of the order of attachment and notice upon him he was possessed of any property of the defendant, or was indebted to him, the court may order the delivery of such property and the payment of the amount owing by the garnishee into the court; or the court may permit the garnishee to retain the property or the amount owing, upon the execution of an undertaking to the plaintiff by one or more sufficient sureties, to the effect that the amount shall be paid, or the property forthcoming, as the court may direct." It is very evident that the foregoing provisions are sufficiently broad to cover debts reduced to judgment, and that a judgment debtor is liable to the process of garnishment in a suit against the judgment creditor. The statute is susceptible of no other reasonable construction. It does not exempt any credit of any kind whatever. The decided weight of the decisions in this country lays down the broad doctrine that a judgment debtor may be garnished, and we so hold the law to be in this state. (*Osborne v. Cloud*, 23 Ia., 105; *Gamble v. Central R. & B. Co.*, 80 Ga., 595; *Wood v. Lake*, 13 Wis., 94; *Keith v. Harris*, 9 Kan., 387; *Skipper v. Foster*, 29 Ala., 330; 8 Am. & Eng. Ency. Law, 1169; Drake, Attachment [7th ed.], sec. 622.)

The question presented by the record to be determined is whether a judgment debtor in the district court of this state is liable to garnishment proceedings issued out of the county court. There is an irreconcilable conflict in the authorities bearing upon the subject. Some decisions are to be found in the books which assert that a judgment debtor in one court may be garnished on process issued out of another court. (*Luton v. Hoehn*, 72 Ill., 81; *Allen v. Watt*, 79 Ill., 284; *Jones v. New York & E. R. Co.*, 1 Grant's Cases [Pa.], 457; *Gager v. Watson*, 11 Conn., 168.) The majority of the cases, and the more recent decisions, sus-

tain the doctrine that a debt reduced to a judgment is liable to garnishment when the process of garnishment issues from the same court, but not otherwise. (Drake, Attachment, sec. 625; Waples, Attachment & Garnishment [1st ed.], 596; *Wallace v. McConnell*, 13 Pet. [U. S.], 136; *Thomas v. Wooldridge*, 2 Wood [U. S.], 667; *Henry v. Gold Park Mining Co.*, 5 McCreary [U. S.], 70; *Franklin v. Ward*, 3 Mason [U. S.], 136; *American Bank v. Snow*, 9 R. I., 11; *Burrill v. Letson*, 2 Spears [N. Car.], 318; *American Bank v. Rollins*, 99 Mass., 313; *Perkins v. Guy*, 2 Mont., 16.) In Drake, Attachment, section 625, it is said: "However strongly these reasons apply to the case of a garnishment of the judgment debtor in the same court in which the judgment was rendered, their force is lost when the judgment is in one court and the garnishment in another. There a new question springs up, growing out of the conflict of jurisdiction which at once takes place. Upon what ground can one court assume to nullify in this indirect manner the judgments of another? Clearly, the attempt would be absurd, especially where the two courts were of different jurisdictions or existed under different governments. Take, for example, the case of a court of law attempting to arrest the execution of a decree of a court of equity for the payment of money, by garnishing the defendant; or that of a state court so interfering with a judgment of a federal court, or *vice versa;* it is not to be supposed that, in either case, the court rendering the judgment or decree would or should tolerate so violent an encroachment on its prerogatives and jurisdiction." Waples, in his valuable work on Attachment & Garnishment [1st ed.], 596, says: "It has long been a mooted question whether a judgment debtor can be garnished. It may be considered under two aspects: First, in relation to the judgment debtor; and, secondly, in relation to the court rendering the judgment. So far as the former is concerned, there is no reason why he should not be garnished and the

judgment debt attached in his hands in the suit against the judgment creditor. He has no cause of complaint when he gets acquittance by paying to another under judicial order what he would otherwise be obliged to pay to his immediate creditor. He would have cause to complain should he be made to pay at a time when such payment would give him no acquittance, or under circumstances which would give him no relief from the judgment. If the judgment against him is in a foreign court or in any court other than that in which he is garnished, he should be discharged upon disclosing the existence of the judgment. This leads to the consideration of the question in relation to the court rendering the judgment. The court, being possessed of jurisdiction, has the exclusive right of effectuating its decree by execution. No other equal tribunal can step before it and say that the judgment debtor must pay to some other person other than the judgment creditor, without interfering with the jurisdictional power to execute the judgment rendered. If, however, the attachment suit is brought in the same court that rendered the judgment, there would be no clash of jurisdiction should the attaching creditor be subrogated to the right of the judgment creditor in a suit against the latter. * * * There has been some apparent conflict of opinion upon the question of liability, but nearly all, if not quite all, can be reconciled on the common ground that a judgment debt may be attached and the judgment debtor garnished in an attachment suit pending against the judgment creditor when it can be done without clash of jurisdiction and without subjecting or endangering the garnishee to double payment; and that such debt cannot be attached when such conflict or injustice would result." In Michigan it has been held that a judgment recovered before one justice of the peace is not subject to proceedings in garnishment before another justice. (*Sievers v. Woodburn Sarven Wheel Co.*, 43 Mich., 275; *Noyes v. Foster*, 48 Mich., 273; *Custer v. White*, 49 Mich., 262.) It

has likewise been decided that a judgment obtained in the circuit court of a state cannot be garnished before a justice of the peace. (*Clodfelter v. Cox*, 33 Tenn., 330.) To allow a judgment to be garnished in a court other than the one in which it was rendered would subject the debtor to a double judgment on a single liability, and thereby subject him to the danger of being compelled to pay the debt twice. Besides, it would permit one court to interfere with the due execution of process in another tribunal. We are unwilling to place a construction upon the statutes that is liable to lead to such results. Upon principle and authority we are constrained to hold that the garnishment proceedings in the county court, in the case of Scott v. Lanham, were void, and consequently created no lien upon the fund in controversy.

In the brief of appellant it is said: "All opportunity for conflict of jurisdiction, or for injustice has been avoided by the payment of the entire amount of the Lanham judgment into the district court, and the bringing of the equity proceedings in which all parties interested are made defendants, where all the parties can have their rights adjusted. The garnishee can be protected from double payment and his judgment creditor compelled to satisfy the judgment of record." This position might, and doubtless would, be tenable were it not for the fact that Lanham, plaintiff's debtor, assigned his judgment against Fitzgerald to the defendant C. H. Rohman, which assignment was filed in the district court of Lancaster county, according to the fifth finding of fact, on April 10, 1893, several months prior to the institution of this equitable action. Therefore, Lanham had no interest in the judgment or the money paid into court when this action was commenced, and, as we have already shown, the garnishment proceedings created no lien upon the money in dispute. There is no room to doubt that when a judgment has been assigned it is not liable thereafter to garnishment at the suit of the creditor of the assignor.

The conclusion reached makes it unnecessary to consider the rights of Webster, Rose & Fisherdick and Abbott & Abbott to liens for services as attorneys. Plaintiff is not prejudiced by the decision of the trial court upon that branch of the case, and Rohman took an assignment of the judgment from Lanham subject to the liens of the above named attorneys. The decree of the district court is

AFFIRMED.

HENRY COOMBS ET AL., APPELLEES, V. ALEXANDER MACDONALD ET AL., APPELLANTS.

FILED FEBRUARY 5, 1895. No. 7357.

1. **Review:** QUESTIONS NOT PRESENTED BELOW. It is a rule of universal application in appellate proceedings that the examination of the reviewing court, whether on appeal or writ of error, will be confined to questions determined by the trial court.
2. ——: ——. Where by a bill in equity relief is sought on two separate and distinct grounds, and it is affirmatively shown by the record that the decree for the plaintiff rests upon one ground only, and that the court expressly reserved its decision on the other, the examination of this court on appeal will be confined to the issue determined by the district court.
3. **Contracts:** MONOPOLIES. The doctrine of the common law that monopolies are odious and therefore illegal has reference to such franchises and agreements as tend to restrict trade, and has no application to mere police regulations in the interest of the public health or morality.
4. **Constitutional Law:** POLICE REGULATIONS: MUNICIPAL CORPORATIONS. The choice of sanitary measures is a legislative function, which has been entrusted to the various municipal bodies and which the courts will not assume to control.

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

Saunders, Macfarland & Dickey, for appellants.

Robert W. Patrick and *Brent K. Yates, contra.*

POST, J.

This is an appeal from a decree of the district court for Douglas county and involves the contract for the removal of the garbage of the city of Omaha, which was the subject of the controversy in *Smiley v. MacDonald*, 42 Neb., 5. By the decree appealed from, said contract, as well as the ordinance upon which it depends, was adjudged void, and the defendant MacDonald, as contractor, perpetually enjoined from interfering with the plaintiff, also engaged in the business of removing garbage from said city. The grounds upon which said contract is assailed in the petition of plaintiffs are: First, that it was procured through bribery and other unlawful and corrupt means by MacDonald and others interested with him; second, that, in so far as it purports to confer upon the contractor the exclusive right to remove the garbage of the city, it contravenes the settled rules of public policy, and is, therefore, void. The district court sustained the latter contention only, and in the language of the decree, "Expressly reserving any decision upon the allegations of the petition that the said contract was secured by fraud, procurement, and illegal inducements offered to and accepted by members of the city council."

It is a rule of universal application to appellate proceedings that the examination by the reviewing court, whether on appeal or by writ of error, will be confined to issues determined by the court of primary jurisdiction. A party desiring the judgment of this court upon a question raised by the pleadings should first present the subject for the determination of the district court and secure such a final judgment or decree as may be made the foundation for proceedings by error or appeal. (Civil Code, sec. 581.) Had the plaintiffs so requested, we have no doubt the de-

cree of the district court would have been made to respond to all of the issues presented. If they are on the evidence in the record entitled to relief on the ground of fraud, the finding upon that issue would have been in their favor; but however that may be, the original jurisdiction of the court is clearly defined by law, and does not include actions for relief on the ground of fraud, to which the state is not a party. (See sec. 2, art. 6, of the Constitution.)

2. Aside from the allegation of fraud, the pleadings herein present no question which was not considered in *Smiley v. MacDonald.* It is true that in the case named the contract was assailed on the ground that the right conferred thereby was an exclusive franchise and, therefore, within the inhibition contained in section 15, article 3, of the constitution; while in the case before us, as we have seen, the contention is that said contract is void as against public policy. Counsel for defendants have cited numerous cases which assert the common law doctrine that monopolies are odious and, therefore, illegal; but they refer without exception to franchises and agreements in restraint of trade, and can have no application to mere police regulations designed to promote the health or morality of the general public. Almost every phase of the subject was discussed in the celebrated *Slaughter House Cases,* 83 U. S., 36, and 111 U. S., 764, to which an extended reference is made in the brief of defendants, and the doctrine therein announced fully sustains our conclusion in *Smiley v. MacDonald.* Indeed there was in those cases no diversity of opinion among the judges with respect to the authority of a state in the exercise of its police power to confer upon an individual or corporation a privilege in its nature exclusive. On the other hand, the dissent of the non-concurring judges was placed upon the ground that the claim of a sanitary regulation was a mere pretense, under which the state of Louisiana had attempted to invade private rights, and to deny its citizens the privilege of engaging in a lawful business in

nowise affecting the public health or morals. As intimated in *Smiley v. MacDonald*, the choice between sanitary measures is a function of the legislative department of the government, which the courts will not assume to control. The test, as therein remarked, where a particular measure is called in question, is whether it has some relation to the public welfare, and whether such is in fact the end sought to be attained.

There are other questions discussed by counsel for plaintiffs which would be entitled to our serious consideration, but a reference to the record has satisfied us that they are not presented by the pleadings, and will not for that reason be noticed. The decree of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

DOUGLAS COUNTY V. CHARLES B. KELLER ET AL.

FILED FEBRUARY 5, 1895. No. 6888.

1. **Counties:** SALE OF PUBLIC GROUNDS: CONSTRUCTION OF STATUTES. The provision of section 24, chapter 18, Compiled Statutes, that county boards shall not sell the public grounds of any county without having first submitted the question to the electors thereof, is mandatory and an express limitation upon the powers of the several counties.
2. ——— : ———. A sale of the public property of a county made without the consent of a majority of the electors voting at an election authorized by law, is a nullity and passes no title to the purchaser.
3. **Proceedings of Public Bodies:** COUNTIES. There is no principle more firmly established or resting on sounder reasons than the rule which requires public bodies when acting under special powers to act strictly within the conditions prescribed.

4. **Counties**: OFFICERS: RATIFICATION OF UNAUTHORIZED ACTS. There is no authority in this state for the submission to the electors of a county of a proposition to ratify the unauthorized acts of its officers.

5. ———: INVALID SALE OF PUBLIC PROPERTY: ACTION TO RECOVER: PURCHASE PRICE: NOTICE. Where a county board offers for sale the public property of the county, claiming as authority for such action the consent of a majority of the electors expressed at a general election, a purchaser at such sale, in an action to recover the price paid (the sale having been adjudged void for want of authority), will not be chargeable with constructive notice of the fact that the proposition to sell was in fact defeated.

6. **Payment**: ACTION TO RECOVER: DEFENSE. In order to defeat an action for the recovery of money voluntarily paid under a mistake of fact, it is not sufficient that the plaintiff might have known the facts had he availed himself of all the means of knowledge at his command.

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

A statement of the case appears in the opinion.

J. L. Kaley, County Attorney, and *W. W. Slabaugh, Deputy County Attorney*, for plaintiff in error:

The county board, in determining that the proposition submitted at the election had carried, acted judicially. Their act in that respect became *res judicata*, and the county is thereby estopped from denying the title of the plaintiffs below to the land in question; and by reason of such estoppel the plaintiffs below, having acquired a perfect title, cannot recover back the purchase money. (*Lynde v. Winnebago County*, 16 Wall. [U. S.], 6; *Commissioners of Knox County, Indiana, v. Aspinwall*, 21 How. [U. S.], 539; *Bissell v. City of Jeffersonville*, 24 How. [U. S.], 287; *Van Hostrup v. Madison City*, 1 Wall. [U. S.], 291; *Woods v. Lawrence County*, 1 Black [U. S.], 386; *Moran v. Commissioners Miama County*, 2 Black [U. S.], 722;

Town of Coloma v. Eaves, 92 U. S., 484; *State v. Anderson*, 26 Neb., 517; *McCracken v. City of San Francisco*, 16 Cal., 591.)

If the acts of the commissioners in selling the land were illegal for want of authority, the county has since fully ratified their acts in such a way as to give a perfect title to the plaintiffs. (*Brown v. Town of Winterport*, 79 Me., 305; *Moore v. City of Albany*, 98 N. Y., 376; *Albany City Bank v. City of Albany*, 92 N. Y., 363; *Cory v. Freeholders of Somerset*, 44 N. J. Law, 445; *People v. Swift*, 31 Cal., 26; *Sullivan v. School District*, 39 Kan., 347; *Mills v. Gleason*, 11 Wis., 493; *Zottman v. City of San Francisco*, 20 Cal., 97; *Smith v. Stevens*, 10 Wall. [U. S.], 321; *Dill v. Wareham*, 7 Met. [Mass.], 438; *McCracken v. City of San Francisco*, 16 Cal., 591; *Grogan v. City of San Francisco*, 18 Cal., 590; *Pimental v. City of San Francisco*, 21 Cal., 363; *Herzo v. City of San Francisco*, 33 Cal., 134.)

A voluntary payment cannot be recovered back. A mistake of fact such as excuses voluntary payment must be pleaded. (*Renfrew v. Willis*, 33 Neb., 98; *Evans v. Hughes County*, 52 N. W. Rep. [S. Dak.], 1062; 1 Parsons, Contracts, 466; Bishop, Contracts, sec. 615; *Kraft v. City of Keokuk*, 14 Ia., 86; *Mays v. City of Cincinnati*, 1 O. St., 268; *Brumagim v. Tillinghast*, 18 Cal., 269; *Johnson v. McGinness*, 1 Ore., 293; *Painter v. Polk County*, 81 Ia., 242; *City of Houston v. Feeser*, 76 Tex., 365; *De Graff v. County of Ramsey*, 46 Minn., 319; *Valley R. Co. v. Lake Erie Iron Co.*, 46 O. St., 44; *Inhabitants of Livermore v. Inhabitants of Peru*, 55 Me., 469; *Clarke v. Dutcher*, 9 Cow. [N. Y.], 673; *Bank of United States v. Daniel*, 12 Pet. [U. S.], 32; *Real Estate Saving Institution v. Linder*, 74 Pa. St., 371; *Snelson v. State*, 16 Ind., 29; *Erkens v. Nicolin*, 39 Minn., 461; *Mosher v. School District*, 44 Ia., 122; *Murphy v. City of Louisville*, 9 Bush [Ky.], 189; *Johnson v. Common Council, City of Indian-*

apolis, 16 Ind., 227; *Bilbie v. Lumley*, 2 East [Eng.], 469; *Brisbane v. Dacres*, 5 Taunt. [Eng.], 144; *Hubbard v. Martin*, 8 Yerg. [Tenn.], 498; *Worley v. Moore*, 77 Ind., 567; *Boon v. Miller*, 16 Mo., 457; *Gregory v. Pilkington*, 39 Eng. L. & Eq., 316; *Hathaway v. Hagan*, 59 Vt., 75; *Renfrew v. Willis*, 33 Neb., 98.)

Money paid under mistake of law cannot be recovered back where both parties knew the facts and the transaction was unaffected by fraud, undue advantage, trust, or confidence. (*Erkens v. Nicolin*, 39 Minn., 461; *Evans v. Hughes County*, 52 N. W. Rep. [S. Dak.], 1062.)

Money paid under mistake of fact which payor had means of knowing cannot be recovered back. (*Union Savings Association v. Kehlor*, 7 Mo. App., 158; *Neal v. Read*, 7 Bax. [Tenn.], 333; *Gooding v. Morgan*, 37 Me., 419; *Wood v. Patterson*, 4 Md. Ch. Dec., 335; *Warner v. Daniels*, 1 Wood & M. [U. S.], 90; *Scott v. Frink*, 53 Barb. [N. Y.], 533; 18 Am. & Eng. Ency. Law, 214, 223, 229; *Regan v. Baldwin*, 126 Mass., 485; Kerr, Fraud & Mistake, 415; *Wallace v. Mayor of San Jose*, 29 Cal., 181; *Brady v. Mayor of New York*, 2 Bosw. [N. Y.], 173; *Swift v. City of Williamsburgh*, 24 Barb. [N. Y.], 427.)

Money paid under no mistake of fact, or where a party has no means of knowledge, cannot be recovered back. (*State v. Swift*, 69 Ind., 505; *Union Savings Association v. Kehlor*, 7 Mo. App., 158; *Neal v. Read*, 7 Bax. [Tenn.], 33; *Gooding v. Morgan*, 37 Mo., 419; *Wood v. Patterson*, 4 Md. Ch. Dec., 335; *Clark v. City of Des Moines*, 19 Ia., 200; *Brady v. Mayor of New York*, 2 Bosw. [N. Y.], 173; *Appleby v. Mayor of New York*, 15 How. Pr. [N. Y.], 428; *Clarke v. Dutcher*, 9 Cow. [N. Y.], 673; *Supervisors of Onondaga v. Briggs*, 2 Denio [N. Y.], 26; *Wilde v. Baker*, 14 Allen [Mass.], 349; *State v. Swift*, 69 Ind., 505; *Urmston v. State*, 73 Ind., 175; *Brown v. Piper*, 91 U. S., 37; 12 Am. & Eng. Ency. Law, 151.)

Money received by the county and expended by it can-

not be recovered back. (*Turner v. Cruzen*, 70 Ia., 205; *Hall v. County of Los Angeles*, 74 Cal., 502.)

H. H. Baldrige, also for plaintiff in error.

Charles B. Keller and *George W. Doane, contra*, cited, as to the validity of the sale and questions of title and estoppel: *State v. Anderson*, 26 Neb., 521; *State v. Lancaster County*, 6 Neb., 481; *State v. Babcock*, 17 Neb., 188, 25 Neb., 503; *State v. Bechel*, 22 Neb., 158; *State v. Benton*, 29 Neb., 460; *Zottman v. City of San Francisco*, 20 Cal., 102; *Mayor of Baltimore v. Porter*, 18 Md., 301; *Smith v. Stevens*, 10 Wall. [U. S.], 326; *Still v. Trustees of Lansingburgh*, 16 Barb. [N. Y.], 107; *Hurford v. City of Omaha*, 4 Neb., 350; *Ferry v. King County*, 26 Pac. Rep. [Wash.], 537; *Woods v. North*, 6 Humph. [Tenn.], 312; *Mulligan v. Smith*, 59 Cal., 208; Bigelow, Estoppel [4th ed.], p. 532; *Heidelberg v. St. Francois County*, 100 Mo., 70; *Leitensdorfer v. Delphy*, 15 Mo., 168; *Thomas v. Brownville, Fort K. & P. R. Co.*, 1 McCreary [U. S.], 392; *City of Charlestown v. County Commisoners of Middlesex*, 109 Mass., 270; *Brooke v. Haymes*, L. R., 6 Eq. [Eng.], 25; Pomeroy, Equity Jurisprudence, 803; *Candler v. Lunsford*, 4 Dev. & B. [N. Car.], 407; *Taylor v. Shufford*, 4 Hawks [N. Car.], 116; *People v. Brown*, 67 Ill., 435; *General Finance, Mortgage & Discount Co. v. Liberator Permanent Benefit Building Society*, 10 Ch. Div. [Eng.], 15; *Winlock v. Hardy*, 4 Litt. [Ky.], 272; *Gardner v. Greene*, 5 R. I., 104.

The attempted ratification was ineffectual. The election was without authority of statute. The sales and conveyances are void and incapable of ratification. (*State v. Musselman*, 20 Neb., 176; *Sawyer v. Haydon*, 1 Nev., 75; *State v. Collins*, 2 Nev., 351; *McKune v. Weller*, 11 Cal., 49; *People v. Martin*, 12 Cal., 409; McCrary, Elections, 112–118; *State v. Jenkins*, 43 Mo., 261; 6 Am. & Eng.

Ency. Law, p. 293; *State v. Sims*, 18 S. Car., 460; *Commonwealth v. Baxter*, 35 Pa. St., 263; *Satterlee v. City of San Francisco*, 23 Cal., 314; *Dickey v. Hurlbut*, 5 Cal., 343; *People v. Porter*, 6 Cal., 27; *People v. Church*, 6 Cal., 76; *People v. Johnston*, 6 Cal., 674; *Toney v. Harris*, 85 Ky., 479; 1 Dillon, Municipal Corporations, sec. 465; *Hallenbeck v. Hahn*, 2 Neb., 397; *State v. Lincoln County*, 18 Neb., 283; *Sioux City & P. R. Co. v. Washington County*, 3 Neb., 42; *Saxon v. Kelley*, 3 Neb., 107; *People v. Commissioners of Buffalo County*, 4 Neb., 157; *Mayor of Baltimore v. Porter*, 18 Md., 301; *Robinson v. Mathwick*, 5 Neb., 255; *McPherson v. Foster*, 43 Ia., 48; Kent's Commentaries, p. 126; *Reynish v. Martin*, 3 Atk. [Eng.], 330; *Nevius v. Gourley*, 95 Ill., 213; *Reilly v. City of Philadelphia*, 60 Pa. St., 467; *Selden v. Pringle*, 17 Barb. [N. Y.], 458; *Nash v. City of St. Paul*, 11 Minn., 110; 4 Wait, Actions & Defenses, p. 233; *Doughty v. Hope*, 3 Denio [N. Y.], 599; *Board of Supervisors of Jefferson County v. Arrighi*, 54 Miss., 668; *Paul v. City of Kenosha*, 22 Wis., 266; Cooley, Constitutional Limitations, p. 362; *Page v. Belvin*, 14 S. E. Rep. [Va.], 843; *Williar v. Baltimore Butchers Loan Annuity Association*, 45 Md., 560.)

Counsel for defendants in error, in reply to the contention of plaintiff in error that the plaintiffs below cannot recover for the reason the money was voluntarily paid under mistake of law and that the county has not received or appropriated the money of plaintiffs below, cited: *Claflin v. Godfrey*, 21 Pick. [Mass.], 6; Wait, Actions & Defenses, p. 466; *Whedon v. Olds*, 20 Wend. [N. Y.], 176; 15 Am. & Eng. Ency. Law, p. 677, note 1, and cases cited; *Northrop's Executors v. Graves*, 19 Conn., 547; *Gratz v. Redd*, 4 B. Mon. [Ky.], 190; *Ray v. Bank of Kentucky*, 3 B. Mon. [Ky.], 514; *Bize v. Dickason*, 1 Term Rep. [Eng.], 285; *Lansdown v. Lansdown*, Moseley's Rep. [Eng.], 364; *Lowndes v. Chisholm*, 2 McCord [S. Car.], 455; 1 Bishop, Criminal Law, 297; *Jones v.*

Randall, Cowp. [Eng.], 40; *Williams v. Bartholomew*, 1 B. & P. [Eng.], 326; *King v. Doolittle*, 1 Head [Tenn.], 85; *Hurd v. Hall*, 12 Wis., 112; *State v. Paup*, 13 Ark., 139; *Lawrence v. Beaubien*, 2 Bailey [S. Car. Law], 623; *Mayer v. Mayor of New York*, 63 N. Y., 455; *Goodnow v. Litchfield*, 63 Ia., 282; *Goodnow v. Moulton*, 51 Ia., 555; *Billings v. McCoy*, 5 Neb., 190; *Champlin v. Laytin*, 6 Paige [N. Y.], 203; *Parham v. Randolph*, 4 How. [Miss.], 435; *Evans v. Forstall*, 58 Miss., 30; *Kiefer v. Rogers*, 19 Minn., 32; *Mead v. Bunn*, 32 N. Y., 277; *Campbell v. Frankem.* 65 Ind., 591; *Barnard v. Campau*, 29 Mich., 162; *Tillman v. Cowand*, 12 Sm. & M. [Miss.], 262; *Wood v. Cochrane*, 39 Vt., 544; *Town of Cameron v. Stephenson*, 69 Mo., 373; *Mulligan v. Smith*, 59 Cal., 238; *Taylor v. Wilson*, 17 Neb., 88; *Kelly v. Solari*, 9 M. & W. [Eng.], 54*; *Lyle v. Shinnebarger*, 17 Mo. App., 74; *Dobson v. Winner*, 26 Mo. App., 329; *Waite v. Leggett*, 8 Cow. [N. Y.], 195; *Guild v. Baldridge*, 2 Swan [Tenn.], 295; *Fraker v. Little*, 24 Kan., 598; *Whedon v. Olds*, 20 Wend. [N. Y.], 174; *Lucas v. Worswick*, 1 Mo. & R. [Eng.], 293; *Rutherford v. McIvor*, 21 Ala., 750; *Devine v. Edwards*, 87 Ill., 177; *Alston v. Richardson*, 51 Tex., 1; Story, Contracts, sec. 422; *McCracken v. City of San Francisco*, 16 Cal., 591; *Chapman v. Douglas County*, 107 U. S., 348; *Clark v. Saline County*, 9 Neb., 516; *Pimental v. City of San Francisco*, 21 Cal., 351.

POST, J.

The defendants in error presented to the county board of Douglas county a claim for money alleged to be due them on the cause of action hereafter mentioned. Their claim having been rejected by the board, an appeal was taken by them to the district court, where judgment was entered in their favor and which has been removed into this court for review upon the petition in error of the county.

It is shown by the record that in the year 1886 Douglas county was the owner of the northeast quarter of section 29, township 15, range 13 east, in said county. On the 14th day of August of said year a resolution was adopted by the county board accompanied by a preamble in which it was recited that the county was at great expense in caring for its poor and insane, and resolving that the question should be submitted to the voters of the county at the next general election, whether a part of said real estate should be sold for the purpose of raising funds for the erection of a county hospital. In pursuance of said resolution a proposition was submitted to the voters of the county at the general election for 1886 for the sale of fifty acres of the tract of land above described, for the purpose named; and a record was subsequently made in which it was found and declared that said proposition had received the requisite number of votes and had been in due form adopted. The county board thereupon proceeded to subdivide said property into lots and blocks and to prepare a plat showing such divisions, as well as the streets and alleys therein, and which was designated on said plat as "Douglas Addition to the City of Omaha." On the 27th day of April, 1887, at a public auction of said property, defendants in error purchased three lots for the sum of $4,950 and paid one-third of the price thereof in cash. On the 16th day of May following the commissioners, in behalf of the county, executed to the defendants in error a warranty deed for said lots with the usual covenants of warranty, and on the same day defendants in error executed in favor of the county their three promissory notes for $1,100 each, secured by mortgage on said lots. Of said notes two have been paid in full by the makers, but payment of the third was refused for reasons which will hereafter appear.

It is alleged by the defendants in error that the sale of said lots to them was void, and that no title passed thereby, for the reason that the proposition to sell the property in

question did not receive the requisite number of votes and was in fact rejected by the electors of the county. The issues presented by the answer and reply will hereafter appear from a consideration of the questions discussed in the briefs of the respective parties. Numerous questions are presented by the assignments of errror, but which may be classified as follows: Those relating to the validity of the original sale. Those relating to the alleged subsequent ratification thereof. That the money claimed was voluntarily paid by the plaintiffs in error with a knowledge of all of the facts. For convenience the questions will be examined in the order named.

It is shown by the record that at the general election for the year 1886 there were cast in Douglas county 9,304 votes, of which 2,930 only were in favor of the proposition above mentioned. There were cast also 761 votes against said proposition. By the statute then in force, and which is to be regarded as the charter of the county as a body corporate, it was provided (sec. 23, ch. 18, Comp. Stats., 1893): "The county boards of the several counties shall have power. * * * Third—To make all orders respecting the property of the county, to keep the county buildings insured, to sell the public grounds or buildings of the county and purchase other property in lieu thereof. * * *

"Sec. 24. The county board shall not sell the public grounds, as provided in the third subdivision of the preceding section, without having first submitted the question of selling such public grounds to a vote of the electors of the county."

It is not clear from the language of the sections which follow whether the provision of section 30, requiring an affirmative vote of two-thirds of the electors voting at such election, applies to propositions for the sale of public property, or whether it relates exclusively to the authority for imposing such special taxes as are contemplated by law.

But that question is not necessarily involved in this controversy, since it is not seriously contended that less than a majority of the voters could authorize the sale by the county of its public property. In declaring the proposition carried, the county board apparently regarded a majority of those voting upon the proposition as sufficient; but that construction is in radical conflict with the settled doctrine of this court. (*State v. Lancaster County*, 6 Neb., 481; *State v. Babcock*, 17 Neb., 188; *State v. Bechel*, 22 Neb., 158; *State v. Anderson*, 26 Neb., 521.) There is in the entire range of judicial investigation no principle more firmly established or resting upon sounder reasons than the rule requiring public bodies like counties, when acting under a special power, to act strictly within the conditions prescribed for the exercise of such power. (See *Hurford v. City of Omaha*, 4 Neb., 350; *Zottman v. City of San Fransisco*, 20 Cal., 96; *Mayor v. Porter*, 18 Md., 301; *Still v. Trustees of Lansingburg*, 16 Barb. [N. Y.], 107; *Dill v. Inhabitants of Wareham*, 7 Met. [Mass.], 438; *Agawam Nat. Bank v. South Hadley*, 128 Mass., 503; *McDonald v. Mayor*, 68 N. Y., 23; *Parr v. Village of Greenbush*, 72 N. Y., 463; *Dickinson v. City of Poughkeepsie*, 75 N. Y., 74; *McBrian v. City of Grand Rapids*, 56 Mich., 103; *Smith v. Stevens*, 10 Wall. [U. S.], 326; *Clark v. United States*, 95 U. S., 539; *Camp v. United States*, 113 U. S., 648.) Pertinent in this connection is the following language used by Judge Field in *Zottman v. City of San Francisco, supra:* "The rule is general, and applies to the corporate authorities of all municipal bodies, where the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed. The mode in such cases constitutes the measure of power." That the condition prescribed by law, to-wit, the consent of a majority of the electors of the county, is essential to a valid conveyance of the public property cannot be doubted. The deed was therefore, in this case, wholly

unauthorized and ineffective for the purpose of passing title.

The next question presented is that of the alleged ratification. It is necessary to a proper understanding of the issues to set out the answer so far as it relates to the subject under consideration, viz.: "Defendant further answering says that until about the time of the beginning of this suit the defendant and its various officials honestly believed that the right, title, and interest of this defendant in said premises had passed to the plaintiff and never have questioned said title; but that as soon as the board of county commissioners of said county were made aware that there was a question as to the validity of the adoption of the proposition to sell said premises and as to the legality of said sale, said board of county commissioners, with a view to carrying out the intent and purpose of the warranty deed executed by this defendant to the plaintiff, caused to be submitted to the legal voters of said county, at a special election held in said county on the 16th day of June, A. D. 1892, a proposition to ratify, adopt, affirm, and approve each and every act of the said board of county commissioners of said county in platting said Douglas Addition and in selling said premises, and authorizing the said board of county commissioners to make, execute, and deliver good and sufficient quitclaim deeds of all the right, title, and interest of the defendant in and to said premises to the purchasers of said premises, and the defendant hereby and now offers to execute and deliver to the said plaintiffs a quitclaim deed releasing and forever quitclaiming unto the said plaintiffs all right, title, and interest in and to said premises; that the aforesaid proposition was duly adopted by the legal voters of said Douglas county at said election held upon the 16th day of June, A. D., 1892, more than two-thirds of all the persons voting at said election having voted in the affirmative to adopt the said proposition." To ratify, in its legal sense, is to sanction, to confirm, to make valid

(*vide* Webster's Dictionary), and implies the contractual relation of obligor and obligee. In short, it is quite as essential to a valid ratification, as to a valid contract in the first instance, that the obligations be mutual. Tested by that rule the plea in this case would seem to be insufficient, since it does not appear therefrom that the defendants in error were in any sense parties to the alleged ratification. But the plea must be held insufficient on other and more substantial grounds. It was held in *Gutta Percha Mfg. Co. v. Village of Ogallala*, 40 Neb., 775, that the contract of a municipal corporation which is invalid when made, as in violation of some mandatory requirement of its charter, can be ratified only by an observance of the conditions essential to a valid agreement in the first instance. But the difficulty in this instance is that the law makes no provisions for submitting to the electors of a county the question of ratifying the unauthorized acts of its officers. There is, even under representative governments, no inherent power to hold elections. As said in *State v. Kinzer*, 20 Neb., 176: "An election, to be valid, must be authorized by statute. If it is not, votes cast thereat are simply nullities;" and, in the language of the supreme court of Pennsylvania (*Commonwealth v. Baxter*, 35 Pa. St., 263), "Majorities go for nothing at an irregular election. They are not even regarded as majorities, for it is the right of orderly citizens to stay away from such elections;" and to the same effect are *Sawyer v. Haydon*, 1 Nev., 75; *State v. Collins*, 2 Nev., 351; *McKune v. Weller*, 11 Cal., 49; *State v. Jenkins*, 43 Mo., 261; *State v. Sims*, 18 S. Car., 460; *Toney v. Harris*, 85 Ky., 479. In the brief of counsel is found a valuable discussion of the law of ratification with particular reference to contracts of public corporations which may and those which may not be subsequently ratified; but a consideration of that subject would, in our judgment, be out of place in this opinion, for the reason, as we have seen, that the second election was without au-

thority of law and could of itself in no event amount to a ratification of the previous unauthorized sale of the county's property.

We come now to a consideration of the third and last assignment of error. The proposition therein asserted is that the price of the lots in question was voluntarily paid by defendants in error with a full knowledge of all of the facts, and that they are now without remedy therefor regardless of the character of the title acquired through their purchase from the county. With respect to the right to recover money paid under a mistake of law and with a knowledge of all of the essential facts, the authorities are, unfortunately, not harmonious; but in view of the conclusion we have reached with respect to the facts of the case before us, an examination of that question is rendered unnecessary. It is shown from the testimony of both of the defendants in error that they had never seen the record of the vote cast at the first election; that they had no actual knowledge that the proposition to sell had in fact been defeated, and that they purchased in the belief that the electors of the county had given their consent to the sale of the property mentioned. This evidence is practically uncontradicted, and upon which the district court apparently found against the county upon the issue of notice. There is certainly no presumption of notice in this case. On the contrary, the mere fact that defendants in error advanced their money under the circumstances is quite confirmatory of the claim that they relied upon the apparent authority of the county to sell the property in question.

It is claimed, however, that defendants in error are chargeable with constructive notice of the defeat of the proposition; but in that view we are unable to concur. The doctrine of constructive notice is an exception to the general rule, and has never been held to extend by implication to a case like that before us. Provision is made by law for notice in exceptional cases. For instance, mort-

gages and deeds of trust covering railroad property are required to be recorded in each county through which the road passes, and when so recorded shall be notice to the world. (Sec. 120, ch. 16, Comp. Stats.) By section 16, chapter 73, entitled "Real Estate," it is provided that instruments to be recorded shall take effect and be in force from the time of their delivery to the register of deeds for record, as to creditors and subsequent purchasers in good faith without notice; and by section 39 of the same chapter it is provided that the record of an assignment of a mortgage shall not of itself be deemed notice of such assignment, etc. True, provision is made for the canvass of the vote by the clerk and two disinterested freeholders, and the making of an abstract thereof which shall be preserved by the county clerk. (Sec. 46, ch. 26, Comp. Stats.) Such an abstract is, it will be conceded, evidence of the result of any election. It may also be conceded that parties directly interested—for example, candidates for office—are chargeable with notice of facts shown by the official abstract of votes; but the reason of such a rule is wanting when applied to an entire stranger.

It is suggested by counsel for the county that the defendants are chargeable with a knowledge of such facts as they had the means of knowing; but that contention is not in harmony with the weight of authority. To defeat an action for money voluntarily paid under a mistake of fact it is not sufficient that the plaintiff might have known the facts had he availed himself of the means of information possessed by him. (*Kelly v. Solair*, 9 M. & W. [Eng.], 54; *Bell v. Gardiner*, 4 M. & G. [Eng.], 11; *Fraker v. Little*, 24 Kan., 598; *Waite v. Leggett*, 8 Cow. [N. Y.], 195; *Wheadon v. Olds*, 20 Wend. [N. Y.], 174; *Devine v. Edwards*, 87 Ill., 177; *Alston v. Richardson*, 51 Tex., 1; *Lyle v. Shinnebarger*, 17 Mo. App., 74; *Dobson v. Winner*, 26 Mo. App., 329; *McCracken v. City of San Francisco*, 16 Cal., 591.)

We find in the record no reversible error, and the judgment of the district court is accordingly

AFFIRMED.

IRVINE, C., not sitting.

KORSMEYER PLUMBING & HEATING COMPANY V. J. H. MCCLAY ET AL.

FILED FEBRUARY 5, 1895. No. 6349.

Bonds and Contracts of Builders: BREACH: LIABILITY OF SURETIES. It was stipulated in a contract for the erection of a county court house that the contractor should receive eighty-five per cent of the money earned thereunder, payable on monthly estimates; also "that in each case of payment a certificate shall be obtained by the contractor from the clerk of the county that he has carefully examined the records and finds no liens or claims against said work or on account of said contractor. Neither shall there be any lawful claims against the contractor in any manner, from any source whatever, for work or material furnished on said work." *Held*, A promise by the contractor to satisfy the lawful claims of laborers and material-men, and that the sureties on his bond for the faithful performance of the contract are liable for a breach of such condition. (*Lyman v. City of Lincoln*, 38 Neb., 794.)

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

Leese & Starling, for plaintiff in error.

Atkinson & Doty, *Chas. O. Whedon*, and *Pound & Burr*, *contra*.

POST, J.

This was an action by the plaintiff in error in the district court for Lancaster county, against W. H. B. Stout,

as principal, and J. H. McClay, Louis Meyer, and J. H. Harley, as sureties, on a bond of the former to said county. Said bond is conditioned for the faithful performance by the principal of the provisions of a contract for the erection of a court house for the obligee thereof. A demurrer of the sureties to the petition was sustained by the district court, and the plaintiff refusing to plead further, the action was dismissed as to them, whereupon it was removed into this court for review upon allegations of error. The subject of the controversy is certain building material furnished by the plaintiff's assignors, F. A. Korsmeyer & Co., for use in the construction of said court house. The only question necessary to consider is whether there exists between the sureties in this case and the plaintiff's assignors such privity as would entitle the latter to recover against them on the bond.

It was stipulated in the contract that Stout should receive eighty-five per cent of the amount earned thereunder, payable on monthly estimates of the superintendent of construction; also, "that in each case of payment a certificate shall be obtained by the contractor from the clerk of the county, signed and sealed by said clerk, that he has carefully examined the records, and finds no liens or claims recorded against said work, or on account of said contractor. Neither shall there be any legal or lawful claims against the contractor in any manner from any source whatever for work or material furnished on said work." In *Lyman v. City of Lincoln*, 38 Neb., 794, the undertaking of the sureties was that "the contractors shall file with the board of public works receipts of claims from all parties furnishing materials and labor in the construction of said engine houses," and which was construed as a promise on the part of the obligors that the principal would satisfy the claims of laborers and material-men. In *Sample v. Hale*, 34 Neb., 220, it was said that the state, when engaged in the construction of public buildings, is chargeable with a

moral duty to protect persons furnishing labor and material therefor, and a recovery permitted against the sureties on a stipulation for the settlement in full of all claims for materials furnished or services rendered "so that each and all persons may receive his or their just dues in that behalf." This cause is clearly within the principle recognized in the cases cited, and must be governed thereby. It follows that the court erred in sustaining the demurrer to the petition, and in dismissing the action. The judgment will accordingly be reversed and the cause remanded for further proceedings in the district court.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL. P. D. STURDEVANT ET AL., V. JOHN C. ALLEN, SECRETARY OF STATE.

FILED FEBRUARY 5, 1895. NO. 7289.

1. **Construction of Statutes.** Where a provision is ambiguous the courts will adopt that interpretation which is most in harmony with the spirit of the act, and best adapted to the promotion of its general object.
2. **Australian Ballot Law: BALLOTS: NAMES OF CANDIDATES: PARTY DESIGNATIONS.** The act approved March 4, 1891, commonly called the "Australian Ballot Law," contemplates that the name of each candidate shall be printed once only on the official and sample ballot, accompanied by such political or other designations as correspond to the nomination papers on file with the officers charged with the duty of printing and distributing such ballots. *State v. Stein*, 35 Neb., 848, distinguished.
3. **Certificates of Nomination: DETERMINATION OF VALIDITY: HEARING.** It is provided by said act that all certificates of nomination which are in apparent conformity therewith shall be deemed valid unless objection is made thereto; that in case objections are made candidates shall be notified and the officer with whom the certificate is filed shall pass on such objections,

and his decision will be final unless a further order is made by the county court, a judge of the district court, or a justice of the supreme court. *Held*, That such officer, in the consideration of objections, is not confined to mere formal matters relating to the certificate of nomination, but may determine from extrinsic evidence whether the candidates therein named were in fact nominated by the convention or assemblage of voters or delegates claiming to represent a party which cast the requisite number of votes at the last election.

4. **Regularity of Nominating Conventions:** SECRETARY OF STATE. It is not the province of the secretary of state to determine which of two rival state conventions of the same party is entitled to recognition as the regular convention.

5. ———: ———: CERTIFICATES OF NOMINATION. Where two factions of a political party nominate candidates and certify such nominations to the secretary of state in due form of law, the latter will not inquire into the regularity of the convention held by either faction, but will certify to the several county clerks the names of the candidates nominated by each, such practice being in harmony with the rule which requires courts, in case of doubt, to adopt that construction which affords the citizen the greater liberty in casting his ballot.

ORIGINAL application for *mandamus* to compel the secretary of state to certify to the county clerks the names of relators as nominees of the democratic party for the several state offices. *Writ denied.*

John H. Ames and *A. J. Sawyer*, for relators.

George H. Hastings, Attorney General, contra.

J. H. Broady, amicus curiæ.

POST, J.

This cause was submitted at the September, 1894, term just preceding the general election, and during the excitement incident to a political campaign, and although a decision was then announced, the preparation of an opinion embodying the views of the court was, for sufficient reasons,

deferred until this time. The cause was submitted upon a stipulation, all parties interested entering their voluntary appearance. The material facts appear from the stipulation as follows:

"On the 5th day of October, 1894, there was filed in the office of the defendant, as secretary of this state, a certain certificate of nomination signed by one W. L. Greene, as chairman, and one John F. Mefferd, as secretary, of the state convention of the people's independent party, held at the city of Grand Island on the 24th day of August, 1894, by which it was certified that on said day the following named persons were duly nominated by said convention as candidates for the offices below named, to be voted for at the general election to be held in said state on the 6th day of November, 1894, to-wit: Silas A. Holcomb for governor; James N. Gaffin for lieutenant governor; H. W. McFaddin for secretary of state; John H. Powers, state treasurer; John W. Wilson, state auditor; Daniel B. Carey, attorney general; Sidney J. Kent for commissioner public lands and buildings; William A. Jones, superintendent public instruction; and on the 27th day of September, 1894, there was filed in said office a certificate signed by Euclid Martin, as chairman, and S. M. Smyser, as secretary, of a convention representing the democratic party of said state, and held in Omaha on the 26th day of September, 1894, certifying that the following named persons had been duly nominated by said convention as candidates for the offices below named, and representing the democratic party, to be voted for at said general election, the said being your relators, to-wit: Peter B. Sturdevant for governor; Rodney E. Dunphy, lieutenant governor; De Forrest P. Rolf, secretary of state; Otto Bauman, for auditor; Lake Bridenthal, superintendent of public instruction; John H. Ames, attorney general; Jacob Bigler, commissioner of public lands and buildings; and on the 29th day of September, 1894, there was also filed in said office a

certificate signed by Willis D. Oldham, as chairman, and Daniel B. Honin, as secretary, of a convention representing the democratic party of said state, held at Omaha on the 26th and 27th days of September, 1894, and certifying that the following named persons were duly named by said convention as candidates for the offices below named, representing the democratic party, to be voted for at said general election, to-wit: Silas A. Holcomb, governor; James N. Gaffin, lieutenant governor; Francis I. Ellick, secretary of state; James C. Dahlman, auditor of public accounts; Gottlieb A. Luikhart, treasurer; Daniel B. Carey, attorney general; Sidney J. Kent, commissioner public lands and buildings; William A. Jones, superintendent of public instruction; and on the 29th day of September, 1894, there was also filed in the office of the said secretary of state certain objections to said certificate of nomination signed by the said Martin as chairman and said Smyser as secretary of said democratic convention; and on the 2d day of October, 1894, there was also filed in said office certain objections to the said certificate of nomination signed by said Willis D. Oldham as chairman and Daniel B. Honin as secretary of said democratic convention, the extent and nature of which said several objections are sufficiently indicated and made known to your honors by the decisions and determinations made and arrived at thereon by the said defendant as secretary of state, which are hereinafter more fully adverted to and set forth. There are no formal defects in said certificates of nomination, and the democratic party cast more than one per cent of the total vote in this state at the last election.

"Upon these facts, and at the hearing upon said objections to said certificates of nomination, it was, and it still is, contended by the relators that the defendant was authorized and empowered to decide as to the sufficiency of said several certificates, such matters as pertain to their formal regularity only, in respect to which, if they should be found

defective, they would be capable of being made conformable to law by amendment, and also that in no event was any person whose name is found in two of said certificates entitled to have his name printed more than once upon the official ballots to be provided for the voters at the said ensuing general election. On the contrary, the defendant contended and decided, in opposition to the express objection and protest, oral and written, on behalf of the said relator, that he was authorized and empowered by law to decide whether either, and if either, which, of the last two mentioned certificates contained the names of persons who had been nominated for the offices named in said certificates or assemblages, regularly authorized according to the customary rules of the democratic party of this state to nominate persons to be voted for as candidates of said election by the adherents of said party; and the said defendant also contended and decided that he had the right and authority to exclude from the official ballot to be provided at such election either or both of said lists of candidates, if, in his opinion, either or both of them were not put in nomination by the convention or assemblage regularly authorized as aforesaid, by refusing and omitting to certify the names of such persons to the several county clerks of this state as provided by law in such cases, and thereupon the said defendant, as such secretary of state, did decide and announce that your relators, whose names appear in the said certificate of nomination signed by the said Euclid Martin as chairman, and the said S. M. Smyser as secretary, were not put in nomination by a convention or assemblage regularly authorized as aforesaid, and that their names should not and would not be by him certified by him to the said county clerks or be permitted to be printed upon the said official ballots, to which decision and determination said defendant still adheres. At the same time the said defendant further decided and announced that the said persons whose names were contained in said certificate signed by Willis G. Old-

ham as chairman and Daniel Honin as secretary were nominated for said offices by convention or assemblage duly authorized and empowered as aforesaid, and that he would and should certify their names to said county clerks as the nominees of the democratic party to be printed upon the said official ballots, to be voted at said general election, and would certify them in such way and manner that those of them who were also the nominees of the said people's independent party should have their names printed twice upon said ballots, once as being the nominees of the said last named party and once as being the nominees of the democratic party, to which decision and determination the said defendant still adheres. To both these decisions and determinations your relators object, claiming and insisting that by carrying them into action, the said defendant would deprive not only your relators, but the democratic voters of said state, and a large number of other persons, of the right of the elective franchise and of other important legal rights guarantied to them by the constitution and laws of this state, and will especially deprive your relators of the right to which they are entitled, as well under the rules and usages of the democratic party of this state, as under the constitution and laws of Nebraska, to have their names printed upon said official ballot as the nominees of the democratic party for the several offices for which they have been nominated, as appears by said certificate, and also further embarrass and defeat the rights and privileges of your relators as candidates at said election, by permitting the names of other persons to appear upon said ballots under two party designations, whereas such persons are entitled to have their names printed thereon only once.

"Your relators and the defendant therefore respectfully pray this honorable court to decide, for their guidance and for the determination of their rights in the premises, the following questions involved in said controversy:

"First—Is it the duty of the defendant, as secretary of

state, to certify to the several county clerks of this state, within the time provided by law, the names of your relators as nominees of the democratic party of this state for the several offices, as set forth in the said certificate of nomination, signed by the said Martin as chairman and Smyser as secretary, and to require said names to be printed as said nominees upon the official ballots to be provided for said election?

"Second—Shall the names of persons appearing in any two of said certificates of nomination be certified to said clerk so as to appear, or is it lawful for them to appear more than once upon said official ballots?"

For convenience we will first consider the second question presented, viz., Does the law contemplate that the names of candidates receiving more than one nomination shall appear twice or more on the official and sample ballots? It is not clear from the statute that the respondent, as secretary of state, is chargeable with the duty of prescribing the form of the ballot for the several ballots, but as that objection was not interposed by him, it will not be noticed further. In the several states which, like ours, have adopted a modified form of the Australian ballot law we find two radically different provisions respecting the form of the ballot. In New York, Illinois, Maryland, and Kansas, and perhaps others, candidates of the several political parties are grouped together, so that it is possible for an elector by a single mark to vote the ticket of his party. In other states, including this, the names of candidates are required to be arranged in alphabetical order under the designation of the several offices. In the states first mentioned it is clear that the name of each candidate should appear on the ballot with the ticket of every party by which he may have been nominated. Numerous constructions have been given those statutes uniformly in harmony with the view here expressed. (*Vide Simpson v. Osborn*, 52 Kan., 328; *Fisher v. Dudley*, 22 Atl. Rep. [Md.], 2.) The

provisions of section 14 of the act approved March 4, 1891, known as the "Australian Ballot Law," so far as material in this connection, are as follows: "All official ballots prepared under the provisions of this act shall be white in color and of good quality of news printing paper, and the names shall be printed thereon in black ink. Every ballot shall contain the name of every candidate whose nomination for any office specified in the ballot has been certified or filed according to the provisions of this act, and no other names. The names of candidates for each office shall be arranged under the designation of the office in alphabetical order according to surnames, except that the names of electors of president and vice-president of the United States presented in one certificate of nomination shall be arranged in a separate group. Every ballot shall also contain the name of the party or principle which the candidates represent, as contained in the certificates of nomination. At the end of the list of candidates for each office shall be left a blank space large enough to contain as many written names of candidates as there are offices to be filled. There shall be a margin on each side at least half an inch wide, and a reasonable space between the names to be printed thereon, so that the voter may clearly indicate, in the way hereinafter provided, the candidate or candidates for whom he wishes to cast his ballot." The foregoing, which is the only section relating to the form of the ballot, appears from a casual reading to throw but little light upon the intention of the legislature. Yet we are satisfied from a more careful study of its provisions that it contemplates the printing of the name of each candidate once only on the ballot, accompanied by such political or other designations as correspond to the nomination papers on file in the proper office. The grand design of the Australian ballot law was the purity of elections and to protect the voter and public at large from the effects of fraud and intimidation; and the construction given the act should, if possible,

be in harmony with its beneficent object. A cardinal rule for the construction of statutes is that in case of ambiguity in an act the courts will adopt that construction best adapted to promote the general object and most conformable to reason and justice. (See Endlich, Construction, 196.) The rights of no person or party can be prejudiced by the construction adopted which the rule contended for would be liable to abuse tending to defeat the object of the statute. In the smaller subdivisions of the state the evil resulting from the repetition of names on the official ballot would be reduced to the minimum, for the reason that the facts are, as a rule, well known, and voters would rarely, if ever, be deceived thereby; but such a practice, if applied to the state at large, or the larger subdivisions, as congressional districts, may be made the means of grave fraud and deception. For example:

"A. B., Democrat.
"A. B., Republican."

This appearing on the official ballot would to the average voter suggest that the candidate named had been nominated by two parties; but it may not to the ignorant and uninformed convey any such meaning. Nor can we conceive of any object to be attained by the printing of the name of a candidate twice or more on the ballot unless it be to thus secure the support of electors opposed to so-called fusion, and who, with a knowledge of the facts, might hesitate to cast their votes for such candidate or candidates. We must not, however, be understood as holding the provision of the ballot law under consideration to be mandatory. Generally speaking, provisions which are not essential to a fair election will be held to be directory merely unless the contrary clearly appears from the act itself. (*State v. Russell*, 34 Neb., 116, and authorities cited.) Nor have we overlooked the case of *State v. Stein*, 35 Neb., 848. It is to be regretted that the opinion in that case does not represent the views of the majority of the court. What

was decided therein was that on the record made, votes for Johnson, democrat; Johnson, people's independent, and Johnson without political designation, were all cast for the intervenor, and in the absence of fraud should be counted for him. What was there said about repetition of names on the ballot is mere *obiter* and was so understood by the author of the opinion.

What was the duty of the respondent in regard to the so-called "Sturdevant Ticket"? It is by section 9 of the Australian ballot law provided that the secretary of state shall immediately, upon the expiration of the time for filing certificates of nomination with him, certify such nominations to the several county clerks. By section 11 it is provided: "All certificates of nomination which are in apparent conformity with the provisions of this act shall be deemed valid unless objections thereto shall be duly made in writing within three days after the filing of the same. In case such objection is made, notice thereof shall forthwith be mailed to all candidates who may be affected thereby. * * * The officer with whom the original certificate was filed shall, in the first instance, pass upon the validity of such objection, and his decision shall be final unless an order shall be made in the matter by the county court, or by a judge of the district court, or by a justice of the supreme court." It is claimed on behalf of the respondent that he is, by the provision quoted, required to determine all objections which may be interposed to any certificate, both formal and substantial. On the other hand, it is contended that his jurisdiction extends to matters of form only, and that in no event can he look beyond the certificate itself for the purpose of inquiring into the regularity of the nomination. The reluctance of courts to decide between rival factions of political organizations is proverbial, and is illustrated by the following, among the many cases in point: *In re Appointment of Supervisors of Election*, 9 Fed. Rep., 14; *In re Woodworth*, 16 N. Y. Sup.,

147; *In re Redmond*, 25 N. Y. Sup., 381; *In re Pollard*, 25 N. Y. Sup., 385; *Shields v. Jacob*, 88 Mich., 164; *People v. District Court*, 31 Pac. Rep. [Col.], 339. It was held in the last case cited, under a statute identical with ours, that neither the secretary of state nor the courts are authorized to determine which of two rival political conventions is entitled to represent the party in whose name they assume to act. It was also held that where two sets of nominations are made by rival conventions of the same party, it is the duty of the secretary to certify both sets, if apparently conformable to law, to the clerks of the several counties, on the ground that the courts should, in case of doubt, adopt that construction which affords the citizen the greatest liberty in casting his ballot. It is also said that the power of a mere ministerial officer to determine questions of such vast importance, upon which may depend the political destinies of a state, should not be permitted to rest upon any doubtful interpretation; and the doctrine in that case is approved without reservation by the supreme court of Michigan in *Shields v. Jacob, supra.* The soundness of those decisions upon the facts stated will not be called in question. In each there were two conventions called or held by rival factions of a party, each faction having an organization and claiming recognition in behalf of the party. In brief, the rivals appear to have been *de facto* parties. In the case at bar the claim of the relators rests upon the certificate alone. If they were placed in nomination by a convention, or even by a faction of the democratic party, that fact does not appear from the record. We are fully in sympathy with the sentiment to which expression is given in the cases cited, and are not unmindful of the abuses liable to follow from the entrusting of such extraordinary power to a mere ministerial officer and usually political partisan. But are we not, according to the doctrine of those cases, merely "escaping the perils of Charybdis to perish in Scylla"? However strongly we

may condemn the doctrine that to the secretary of state, or other officer exercising similar functions, is intrusted the power to determine questions of the character under consideration, equally to be deplored is an interpretation which limits his inquiry to matters of form only and requires him to recognize every paper having the semblance of a certificate of nomination regardless of the source from which it emanates, or whether or not such nominations were in fact made in this manner or by the agencies authorized by law.

Briefly stated, our conclusion is that while it is not the province of the secretary of state under our system to decide between rival factions of a party where each faction has made nominations, he should, in case of objection, ascertain from the record, or from extrinsic evidence, whether such candidates or either of them were in fact placed in nomination by a convention or assemblage of voters or delegates claiming to represent such party. It will be observed that there is no mention made in the stipulation of a convention or nomination of the relators in any manner according to the usage of the democratic party, nor do we know, unless by inference, that they represent even a faction of said party; but those, as we have seen, are questions which the respondent was required to determine on the hearing to which reference is made in the stipulation, and his conclusion cannot be questioned in this proceeding. It follows that the writ of *mandamus*, so far as it is sought thereby to require the respondent to certify the names of relators as candidates for the several state offices, should be denied.

WRIT DENIED.

CHARLES PETERSON V. OTTO SKJELVER.

FILED FEBRUARY 5, 1895. No. 5570.

1. **Boundaries:** MONUMENTS. Where the original mounds or monuments established during a government survey can be identified and ascertained, they will control course and distance.

2. ———: ———: FIELD NOTES: EVIDENCE. Field notes and plats of the original government survey are competent evidence in ascertaining where monuments are located in case a government corner is destroyed, or the point where it was originally placed cannot be found, or the location of the original corner is in dispute; but when it is shown by uncontradicted evidence that a section corner was located by the government surveyors at a certain point, such location must control, even though it is at a place different from that given in the field notes and plat. *Woods v. West*, 40 Neb., 307, followed.

3. ———: ADMISSION OF EVIDENCE. The rulings of the trial court in admitting and excluding evidence examined, and *held* not erroneous or not prejudicial to the rights of the complaining party.

4. **New Trial:** NEWLY DISCOVERED EVIDENCE. The showing filed with motion for new trial in support of the grounds of newly discovered evidence and accident and surprise *held* insufficient.

5. ———: ———. Where it is sought to set aside a verdict for alleged misconduct of jurors, it must appear that the acts upon which the complaint is founded were not known to the party who seeks to take advantage of them, or his counsel, during the progress of the trial in time to have brought them to the attention of the trial court.

6. **Trial:** IMPEACHING VERDICT: STATEMENTS OF JURORS: AFFIDAVITS. Affidavits made by parties which purport to contain statements made by jurors during alleged conversations with them after the close of the trial of a case and their discharge therefrom, in reference to acts and discussions which occurred in the jury room while the jurors were deliberating upon their verdict, and in regard to which the affidavits of the jurors would not be received, are incompetent and insufficient to aid in impeaching the verdict.

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

J. R. Wilcox and *Chaney & McNitt*, for plaintiff in error.

J. S. Gilham and *James McNeny*, *contra*.

HARRISON, J.

On the 9th day of March, 1891, Otto Skjelver commenced an action of ejectment against Charles Peterson in the district court of Webster county, in which he filed the following petition:

"The plaintiff complains of the defendant for that said plaintiff has a legal estate in and is entitled to the possession of the following described premises, to-wit: The tract of land heretofore supposed to be the eastern side of the southeast quarter of section 28, town 3, range 12, Webster county, Nebraska, being the tract included within the north and south lines of said quarter section and bounded on the east by the center of the highway left between said quarter by plaintiff and the southwest quarter of section 27, in said town and range, by plaintiff and defendant,—said highway having been recognized by plaintiff and defendant, each of them plowing up to it and no further, for the past thirteen years,—and upon the west by the line of a pretended survey made by W. E. Thorne and — Folden during the summer of 1890. The said defendant unlawfully withholds possession of said land from plaintiff and has withheld the same since the 1st day of March, 1891. The defendant, while unlawfully in possession of said premises, has received the rents and profits therefrom from the 15th day of October, 1890, to the commencement of this action, amounting to the sum of one hundred dollars, and has applied the same to his own use to the plaintiff's damage in the sum of one hundred dollars. The plaintiff therefore prays judgment

for the delivery of the possession of said premises to him and also for said sum of one hundred dollars for said rents and profits and costs of suit."

The answer filed on behalf of Peterson was a general denial. A jury was waived and the first trial had to the court. There was a finding and judgment in favor of Peterson, which was set aside at his request and a new trial ordered. At a subsequent term of court the second trial occurred before the court and a jury and Skjelver was successful, the jury returning a verdict in his favor. A motion for new trial was filed by Peterson, argued and overruled, and judgment rendered on the verdict, and Peterson has prosecuted error proceedings to this court.

As will be gathered from the petition, the main dispute in this case is in regard to the boundary or division line between the southeast quarter of section 28, township 3, range 12, in Webster county, and the southwest quarter of section 27, in the same town and range. The first tract described is owned by Skjelver and the second by Peterson. The exact location of the southeast corner of the southeast quarter of section 28, or the corner common to sections 28, 27, 33, and 34, was, and now is, the main point to be determined in the controversy, for the ascertainment of its true position will settle the starting point of the division line between the two quarter sections and effect an adjustment of it and the dispute. Skjelver's right to the land, by virtue of adverse possession for the statutory period, was also put in issue and tried.

The second, third, and fifth assignments of the petition in error are first considered by counsel for Peterson in their brief, and it is there stated: "They present the question whether it was competent for plaintiff below to prove the existence of government corners by parol evidence, without first accounting for the absence of the official record of the survey," or, in other words, that the field notes or record of the government survey and the plat are primary,

original, controlling, and conclusive evidence when the location of government corners is in controversy, and must be introduced, and if not obtainable, then their contents. With this we cannot agree. The field notes and plats are competent testimony where the true position of such a corner is not known or is in doubt, and is sought to be established, but not controlling or conclusive as to such location; and when the original mounds or monuments established by the government survey can be identified or clearly shown, they will be accepted in preference to what is stated in the field notes, if at variance therewith. (*Woods v. West*, 40 Neb., 307; *Thompson v. Harris*, 40 Neb., 230, and cases cited.) It is further argued under the third assignment that George Hutton, a witness for Skjelver, should not have been permitted to answer a question propounded to him, as shown on page 28 of the bill of exceptions, being question 6 on said page. Reference to the page and question designated discloses that the objection to the question was overruled and no answer given by the witness, but the evidence which it is argued was objectionable was in answer to the next interrogatory, or number 7. It may be claimed, however, that question 7 was but a continuation of question 6, and that the objection should be considered as applicable to the question as a whole. If this view is allowed to prevail, it cannot avail plaintiff in error. The objection interposed to the interrogatory was as follows: "Objected to, as being hearsay testimony." Ignoring any criticism which might be made to the form or substance of this as an objection, we will say that the question was one to which the objection was properly overruled. It was not open to this objection. It was probably improper in that it was leading and called for a conclusion of the witness based upon certain facts and the acts of other parties, which if detailed in answer to competent interrogatories would have been competent.

The sixth assignment of error refers to a motion made

during the giving of testimony by the witness Nels Sorenson. The motion, as it appears in the record, was interposed after the fifteenth question put to this witness had been asked and answered, and was as follows: "The defense move to strike out the testimony of the witness as irrelevant, incompetent, and hearsay testimony." This was overruled by the court, and, we think, correctly. The motion was evidently intended to apply to all the testimony of the witness given up to that time and could not be sustained, as the evidence, while a great portion of it was introductory, was competent and necessary to a full understanding by the court and jury of the evidence of the witness which followed it.

One contention of counsel for plaintiff in error which we think best to notice here is that the verdict was not sustained by the evidence. The testimony develops that the southeast quarter of section 28, the Skjelver land, was first occupied by Hans Tullifson in 1872 or 1873, who abandoned it very soon, probably a month after settling upon it. It was then occupied by one Gunnard, who in 1876 surrendered his claim to Skjelver, who then entered into possession, and by whom it had been retained up to the time of the trial of this case. The adjoining, or southwest, quarter of section 27 was purchased by Peterson during the year 1878, and he then and has since occupied it. Tullifson testifies that when he took possession of the southest quarter he found the corners, including the southeast one, and in his search for this particular corner he found a stone which had apparently been placed there to mark the position of the corner; that he threw up a mound where he had found the stone, and put a stick in the mound. The field notes were introduced in evidence on the part of plaintiff in error, and one of the statements therein contained was as follows: "Set a limestone 18x16 x4 in. thick for a corner to sections 27, 28, 33, and 34." This was the disputed corner. When Skjelver entered into

possession of this land he found a mound and a stick at this corner. Tullifson, it will be remembered, stated that he found a stone monument at the corner, and made a mound and put the stick in it. Some other persons who had lived in the county testified that they had seen this corner. Peterson, when he occupied the adjoining quarter section, plowed along the line between him and Skjelver, but left a strip about two rods wide, measuring from the land he cultivated to the center of a road along the line between him and Skjelver, and in the center of which road stood the southeast corner, as claimed by Skjelver, who did the same on his side of the road. There were other facts and circumstances in the record which tended to show that the corner found by Tullifson and adopted by Skjelver was the government corner. On the other hand, a number of the old settlers of the township and the county testified that no corner had ever been discovered at that particular point in dispute, and some that there had apparently been no corners established in the interior of the township, or none had ever been discovered or discoverable by such search as had been made and assisted in by them, the particulars of such searches being detailed in some instances. There seem to have been two or three surveys made, and in at least two, one in 1884 and one in 1890, the corner on the southeast of section 28 was claimed to have been determined to be at a point about ten rods west of the "Skjelver corner," which would give Peterson the strip of land in controversy; but without further quoting from or giving a summary of the testimony we will say that a careful perusal and consideration of all of it convinces us that it was fully sufficient to sustain a verdict founded upon a finding that the corner claimed by defendant in error was fully identified by it as the government corner established during the survey made for the government.

The ninth assignment of error is as follows: "The court erred in giving instructions 2 and 3, given on its own mo-

tion." Instruction No. 2 is a copy of a portion of the syllabus to the case of *Coy v. Miller*, 31 Neb., 348, was entirely applicable to the facts in the case, and it was not error to give it; and under the rule where alleged error in giving instructions is stated, as it is in this assignment, we need not consider it further. (*Hewitt v. Commercial Banking Co.*, 40 Neb., 820.)

The assignment of error in relation to the refusal to give instructions offered by plaintiff in error and in modifying some before reading them, is too general, in that the instructions, the refusal to give or modification of which is complained of, are stated collectively, and an examination convinces us that at least one was properly refused, the grounds sought to be covered by it having been fully embodied in others which were given; and some were not applicable to the evidence, and having determined that any one of them was properly refused, under the established rule of this court we need not further consider them. (*Hewitt v. Commercial Banking Co.*, 40 Neb., 820.) As to those modified, we are unable to perceive wherein such modification was harmful to the rights of plaintiff in error.

Complaint is made, in the fourth and seventh assignments, of the action of the trial court in sustaining objections to questions propounded to Mr. Campbell, one of the witnesses for defendant in error, and to Skjelver during cross-examination, and excluding the testimony sought to be elicited by such questions. To some, if not all, of these interrogatories these objections were properly sustained, for the reason that they were without the province of a proper cross-examination. To others the answers would have been wholly immaterial, and the same facts had been, or were afterward, shown both on direct and cross-examination of other witnesses, and the complaining party was not prejudiced in any degree by the action of the court.

Two of the grounds of the motion for a new trial were as follows:

"3. Newly discovered evidence, material for the defendant, which he could not with reasonable diligence have discovered and produced at trial, as shown by affidavit attached hereto, filed herewith, and marked 'I.'

"5. Accident and surprise which could not have been prevented by ordinary diligence, as shown by affidavit filed herewith, marked 'H.'"

There were two affidavits filed in support of these grounds of the motion, in which it was stated that one Thorne was a material witness for Peterson, and that he, unexpectedly to Peterson and his counsel, left Webster county just prior to the time of trial of the case. It is further stated in one of the affidavits that the jury was impaneled for the trial of the case late on Friday, the 19th of February, 1892, and that some one on that day,—it does not appear who, whether an officer or not,—was sent to the home of the witness with a subpœna, and Peterson states in his affidavit that he could not with reasonable diligence have procured the evidence of this witness, Thorne, at said trial. This was not sufficient. It was not shown to be newly discovered evidence. On the contrary, the affidavits filed on behalf of the moving party discloses that both he and his counsel knew of this witness and to what he would testify, and fail to show any reasonable diligence in obtaining his presence during the trial. The district court was clearly right in its rulings on these grounds of the motion for a new trial.

Accompanying the motion for new trial were several affidavits tending to show misconduct of jurors during the trial, and also setting forth the influences and reasons, as given by jurors after the verdict was returned, which had operated on their minds and caused them to form the conclusions which were embodied in their verdict rendered. Motions were made by defendant in error to strike these affidavits from the files, and were sustained. This, we think, was error. The motions should have been overruled,

the affidavits retained and considered with the motion for a new trial. The next inquiry which arises is, if these affidavits had been considered, were the facts stated in them sufficient to call for the setting aside of the verdict and ordering a new trial? If so, the striking from the record was prejudicial error, and if not, the reverse. Such of them as complained of misconduct of jurors were based upon actions of the jury during the progress of the trial and before verdict was returned, but in none of them is it stated that the complaining party did not know of them before the return of the verdict. If in possession of such knowledge it should have been brought to the attention of the court, and if it was not so known, this fact should be shown by the affidavits, and, as it was not, they were insufficient. Two of the affidavits refer to and state the substance of conversations which the affiants claim they had with jurors after the verdict was returned and the jury discharged. In one of these affidavits it is set forth that a juror said certain matters were discussed in the jury room and were urged upon him to influence him in favor of the verdict returned, but it does not appear that he claimed to have been influenced by them to any extent. The other is more specific and direct in its statements, but they are both in regard to matters in which the affidavits of jurors themselves would have been incompetent and would not have been received for the purpose for which the ones under consideration were offered, and clearly not competent when presented as they were in the shape of statements of parties other than jurors of what was said by jurors during conversations with them after the trial had closed. (*Lamb v. State*, 41 Neb., 356.) The action of the court in striking the affidavits from the records was not prejudicial to the rights of plaintiff in error. The judgment of the district court is

AFFIRMED.

WILLIAM GRAY V. ALPHONSO S. GODFREY.

FILED FEBRUARY 5, 1895. No. 6207.

1. **Action on Account: EVIDENCE: REVIEW.** The evidence in this case examined, and *held* sufficient to sustain the findings of the trial court and judgment thereon.
2. **Review: BILL OF EXCEPTIONS.** This court will not review testimony in the form of affidavits used in the trial court on the hearing of a motion for a new trial unless such affidavits have been included in and presented by a bill of exceptions.

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

Talbot, Bryan & Allen and *Maule & Spencer*, for plaintiff in error.

Leese & Starling, contra.

HARRISON, J.

Defendant in error instituted this action to recover of plaintiff in error the sum of $52.91 and interest due thereon, balance due on account. Plaintiff in errror, in his answer, acknowledged the purchase of the articles and to the amount charged in the account, and that the charges were reasonable, but pleaded payment of a portion of the account, claiming that the true balance he owed defendant in error at the time of the commencement of the action was $23.10, of which sum he also alleged a tender. The reply was a general denial of each and every allegation of the answer. A jury was waived and trial had to the court, which resulted in a finding and judgment in favor of defendant in error for the sum claimed in his petition. Motion for new trial was filed and overruled and the case is presented here for review.

It is first assigned for error that the judgment was not

sustained by sufficient evidence. We have carefully examined and considered the evidence, and while, as to a number of questions, it is conflicting, we cannot say that the finding and judgment of the trial court, based thereon, are clearly or manifestly wrong; and as a whole we think it may be said to be amply sufficient to sustain such findings and judgment; hence, following the settled rule of this court, they will not be disturbed.

There is a further assignment that the court erred in not granting a new trial because of "newly discovered evidence material to the defendant as shown by the affidavits of James H. Cradduck and William Gray and K. K. Hayden submitted herewith." It is well established in this court, by a long line of decisions, that testimony of any kind used in a lower court, to be available in this court for any purpose, must be preserved by a bill of exceptions, and this applies with as much force to evidence in the form of affidavits as any other. The affidavits used in this case at the hearing of the motion for a new trial, to support the ground thereof, which is made the basis of the assignment of error now under consideration, were not preserved by the bill of exceptions and therefore cannot be considered here. The judgment of the district court is

AFFIRMED.

L. H. KENT ET AL V. WILLIAM H. GREEN ET AL.

FILED FEBRUARY 5, 1895. No. 6356.

1. **Review: CONFLICTING EVIDENCE.** The findings of a trial court as expressed by its rulings upon a motion for new trial, when based upon conflicting evidence contained in affidavits filed in support of the motion, will not be disturbed by this court unless clearly and manifestly wrong.

2. **Practice:** AGREEMENTS MADE OUT OF COURT. Agreements relating to a cause pending trial, made out of court by the parties thereto, and not brought to the attention of the court, are not looked upon with favor, and the courts are under no obligation to enforce such agreements.

3. **New Trial:** EVIDENCE. The evidence contained in the affidavits filed in support of the motion for new trial herein examined, and *held* sufficient to support the findings of the trial court as evidenced by its ruling thereon.

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

William E. Healy and *H. P. Stoddart*, for plaintiff in error.

M. D. Hyde, contra.

HARRISON, J.

The cause of action stated in the petition filed in this case in the district court was for an amount alleged to be due defendants in error from plaintiffs in error for services rendered to them by defendants in error, as real estate agents or brokers, in effecting the sale, or an exchange, of some real estate. The answers were general denials. The case was called for trial, a jury impaneled, and trial had in the absence of plaintiffs in error, and verdict returned against them. They filed a motion for new trial, which was overruled, and they have removed the case to this court for a review of the action of the trial court in refusing to set aside the judgment and grant them a new trial. The motion was as follows: "The defendants move the court to set aside the verdict and judgment in the above entitled cause, and in support thereof the affidavits of H. P. Stoddart, Wm. E. Healey, L. H. Kent, and Dennis Cunningham, filed herein this 27th of June, 1892, are herewith submitted." The motion is entirely insufficient, in that it fails to state or assign any ground for granting a new trial,

and we might stop here and not further consider the case. The affidavits referred to in the motion appear in the bill of exceptions, as do also some counter-affidavits, and are stated to have been used on the hearing of the motion for a new trial, and we will examine them and review the action of the trial court in denying the relief sought upon the showing made in them. From a perusal of them we gather that this case was placed for trial on what is designated in Douglas county as the call for May 31, 1892, and held its place until June 14 following, when it was stricken from the call for the reason that a deposition could not be found. Afterward the missing deposition was returned to the files of the case, or into court by attorneys for plaintiffs in error, and on June 15 the case was again placed on call, and, at request of one of the attorneys for plaintiffs in error, at the foot thereof. On the morning of June 23 it was known, apparently, by all the attorneys concerned, and some of the parties, that the case was almost, would be very soon, and probably during the day, reached for trial.

L. H. Kent, one of the plaintiffs in error, states, in substance, in his affidavit, that he was in the court room about 10 o'clock A. M. of June 23, and the case had not been reached for trial, and was not next on call; that he had a conversation with M. D. Hyde, attorney for defendants in error, in which it was agreed that the cause should not be tried during the absence of either, and if reached, and either one of them was present and the other not, the one present should inform the other. After making such agreement, as he had a very severe headache, he left the court room and went to his office and did not return to court until about 4 o'clock P. M. of the same day and there learned that the case had been tried without the appearance of any one on his side of the cause, or in his behalf. Here follows a statement of the defense which he claims to have, as to all matters of the action alleged in the petition.

Dennis Cunningham, one of the defendants in the dis-

trict court, sets forth in an affidavit that at the time this case was tried he was in attendance in another suit, wherein he was plaintiff in another court in Omaha, and relied upon his attorneys to inform him when this one would be called for trial, and makes a further statement of his defense which he desires to make to the cause of action set forth in the petition.

H. P. Stoddart, Esq., one of the attorneys for plaintiffs in error, states in his affidavit that immediately after the cause was reinstated in the call for trial he entered into an agreement with Mr. Hyde, attorney for the opposite parties, that the cause should not be tried when either of them was absent, and if either ascertained when the case would be reached for trial and the other did not know it, or was absent, the one obtaining such knowledge, or being present, should inform the other, and that in violation of said agreement, Hyde being present when the case was called, tried it on behalf of his clients; that the affiant was only about two blocks away from the court room where the trial was held, at the time of the trial, and could very readily have been notified if Hyde had desired to fulfill his agreement.

Mr. Wm. E. Healey, one of the attorneys for plaintiffs in error, states that he was, immediately prior to the time of the trial in this case, engaged in the trial of another case in another court in the city of Omaha, and did not reach the room where this case was being tried until the judge had almost closed his instructions to the jury, "and then and there his honor Judge Keysor informed deponent that any matters on the part of defendants might be presented on a motion to set aside the verdict. After deponent having informed said judge that although he, deponent, had no testimony in the court room at the moment, he could procure the same very shortly, said judge stating that the jury could not then be held for the same."

Neither Kent nor Stoddart claims that the agreement

made with him by Hyde in regard to the trial of the action was ever brought to the knowledge of the court. They were both alleged to have been made out of court.

In behalf of the other parties to the record, Mr. Hyde makes affidavit, and states therein, that this case was regularly reached and called for trial, and when called, the plaintiffs in it being present and ready, were directed by the court to proceed with the trial. That he called the attention of the judge to the fact that the opposite parties were not present, or represented by counsel, and the judge replied that he had told Mr. Kent, one of the defendants in that court, and an attorney, that morning that the case might be reached at any time, and they should watch it and be ready to try it when called, and further said that the trial might proceed; that on the day the case was reinstated on the call it was placed at the foot with a large number of cases before it; "that, as affiant and said Stoddart were leaving the court house, affiant remarked to him that he did not think said case would be reached for trial that week, but that if either learned that it was likely to be reached that week he might let the other know; that said Stoddart asked affiant if he had a telephone; affiant replied no, but that if he telephoned Williams, one of the plaintiffs, it would reach affiant, and affiant alleges that is the only conversation or agreement he had with said Stoddart in regard to said trial; and this affiant denies that he ever requested said Stoddart to enter into an agreement that they would let each other know as to the time when said cause would be reached for trial, or that said cause would not be tried in the absence of said Stoddart, and denies that said Stoddart relied upon affiant to inform him as to when said case would be reached, except as affiant might learn that it would be reached that week, contrary to their expectations. Affiant further says said case was not reached during said week, and was not called for trial till Thursday, June 23, of the following week; that dur-

ing the preceding days of the week in which said case was tried said Stoddart, Healey, and Kent were in attendance at his honor Judge Keysor's court, and had the same means of knowing the position of said case on the call and when the same would be reached that this affiant had, and did know all that affiant knew in regard thereto." Then follows a denial that affiant ever had any agreement with Kent that the case should not be tried when either was absent, or that either should inform the other when the case was reached for trial, and he avers that the statements in the affidavit of Kent in that regard are wholly untrue. "That the only conversation this affiant had with said Kent on said morning was in regard to passing said case, said Kent saying, if both parties agreed the case might be passed; affiant replied that such an agreement could not be made; that when the case was reached the court would dispose of it some way; that thereupon said Kent walked towards the desk where the court was sitting, and in a few moments affiant went into another room. Affiant further says that about 11 o'clock on said morning he met said Stoddart at the door of Judge Keysor's court room and then and there said to him that said case might be called almost any time, and that said Stoddart passed on into the court room. This affiant avers that he acted in the utmost good faith and proceeded to trial under the direction of the court, and if said defendants, or their attorneys, intended to be present at said trial it was only through their own gross negligence, and not any fault of this affiant that they were not."

Mr. Williams, one of the defendants in error, states as follows: "That about the first day of June, 1892, affiant was informed by his attorney, M. D. Hyde, that his case was placed on call; that he, the said Hyde, would probably want affiant to testify in said case at any time; that affiant was put to a great deal of inconvenience on account of time of said trial being unknown to him, and that for

a term of nearly three weeks affiant was forced to neglect important business matters, in order to be in reach of said call; that within one week after the trial of said case affiant met Dennis Cunningham, one of the defendants, and said Cunningham stated to affiant that he had not given the case any consideration; that he had never entered the court room at any time while the case was pending, and that he had not, and would never bother with it; that he had nothing to do with it; that it was Mr. Kent's business, alluding to the other defendant in said case. Affiant further says that the said Cunningham was in the city and did not appear at the trial of said case in the county court of Douglas county, and that within ten minutes after the trial of said case affiant met said Cunningham on the street, and that said Cunningham stated that he was not going to bother with the matter; that he had always been willing to pay his part. Affiant further says that on the 23d day of June, 1892, at about 2 o'clock, P. M., he was in the city treasurer's office when his attorney, Mr. M. D. Hyde, came to him and requested that he go at once and get the papers in said action and make an immediate appearance at the district court; that said case had been called for trial and that he did not wish to keep them waiting. Affiant then asked Hyde if the defendants were ready and the said Hyde replied that he had met them in the court room in the morning and that they knew that the case would be ready in a very short time, and that they were probably waiting at the time."

Referring to the alleged agreement between Kent and Hyde, and also the one between Stoddart and Hyde, as a general rule courts do not feel called upon to, and will not, enforce stipulations or agreements regarding cases made out of court; but however this may be, the evidence as to the existence of each of these agreements was conflicting, and the question of their existence or non-existence seems to have been resolved by the trial court in favor of the

contention of defendants in error, as must have been its findings, judging from the decision on the motion in regard to this and other matters upon which the testimony in the affidavits was conflicting, and we cannot say that these findings were clearly wrong or not sustained by the evidence, and, following the established rule, we will not disturb them. Bearing this in mind in our review of the action of the trial court in overruling the motion for a new trial, after a full examination and consideration of the contents of all the affidavits filed by either of the parties we cannot say that such action was erroneous or should be reversed. (*Felton v. Moffett*, 29 Neb., 582.) It is true that a case involving the question presented in this one contains a strong appeal in itself to the favorable consideration of a court or judge, in that by refusing a new trial parties are deprived of a trial upon the merits which their defenses may possibly possess; but, on the other hand, the rights of the opposing litigants must not be ignored; nor should we lose sight of the proper diligence and attention which parties should exercise in the prosecution and defense of cases in the courts; and we are satisfied that the ruling of the district judge was not erroneous upon the showing made. It follows that the judgment of the trial court is

AFFIRMED.

KENT K. HAYDEN, TRUSTEE, APPELLEE, V. LINCOLN CITY ELECTRIC RAILWAY COMPANY, APPELLEE, IMPLEADED WITH WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 5, 1895. NO. 5794.

1. **Collateral Security: BONA FIDE HOLDERS.** One who receives as collateral security to a loan contemporaneously made

negotiable bonds not yet mature, without knowledge of any defense to such bonds, is entitled to protection as a purchaser thereof to the extent of the amount of such loan.

2. **Corporations**: AUTHORITY TO EXECUTE MORTGAGE: EVIDENCE. Where there was contained in a mortgage a copy of resolutions described as having been adopted by the board of directors of the mortgagor, a corporation, from which resolutions it appeared that said board had, as required, authorized the making of such mortgage, no further proof was necessary to a *prima facie* showing of authorization by the board of directors.

3. **Decree Entered by Consent**: REVIEW. A party who has consented to a decree of foreclosure and a sale thereunder cannot be heard on appeal to question the correctness of the decree in so far as it was authorized by his own stipulation.

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

See opinion for statement of the case.

Ricketts & Wilson, C. O. Whedon, and *F. A. Boehmer,* for appellants:

The burden of showing the proper execution of the bonds is upon the plaintiff. (*Donovan v. Fowler*, 17 Neb., 247.)

The officers of the company had no power whatever to mortgage its property to secure its indebtedness in the way it was done, neither at the time of making the debt nor subsequently thereto, nor to deposit the bonds as collateral security. (*Tippetts v. Walker*, 4 Mass., 597*; *Emerson v. Providence Hat Mfg. Co.*, 12 Mass., 237; *Hallowell & Augusta Bank v. Hamlin*, 14 Mass., 180; *Hartford Bank v. Barry*, 17 Mass., 97; *Adriance v. Roome*, 52 Barb. [N. Y.], 399; *Harwood v. Humes*, 9 Ala., 659; *Crump v. United States Mining Co.*, 7 Gratt. [Va.] 352; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H., 205; *Whitwell v. Warner*, 20 Vt., 446; *People v. Commissioners of Buffalo County*, 4 Neb., 161; *Mills v. Murry*, 1 Neb., 327; *Hoagland v. Van Etten*, 22 Neb., 684; *Eng-*

land v. Dearborn, 141 Mass., 590; *Titus v. Cairo & F. R. Co.*, 37 N. J. Law, 98; *Stokes v. New Jersey Pottery Co.*, 46 N. J. Law, 237; *Walworth County Bank v. Farmers Loan & Trust Co.*, 14 Wis., 352.)

John H. Ames, contra:

There is nothing in the record to indicate that the bonds were issued in violation of the resolution adopted by the board of directors of the corporation. The presumption is to the contrary. The bonds cannot be impeached in the hands of a *bona fide* holder. (*Hackensack Water Co. v. De Kay*, 36 N. J. Eq., 558, and cases cited; Jones, Corporate Bonds & Mortgages, secs. 24, 174.)

RYAN, C.

This action was brought in the district court of Lancaster county by Kent K. Hayden, as trustee, against the Lincoln City Electric Railway Company alone, for the foreclosure of a mortgage made by said company on all its property to said trustee to secure payment of its 150 bonds of the denomination of $1,000 each. These bonds were payable to bearer, and by virtue of their own provisions were to pass by delivery, unless the ownership should be registered on the books of the trustee, in which case bonds so registered could only be transferred upon said books when there was a registration to bearer. As the trustee testified that there was no registration showing the ownership of any of the bonds, the provision as to registration is of no importance. While this cause was pending in the district court aforesaid several creditors of the original defendant, upon application made for that purpose, were permitted to be made parties defendant. The briefs submitted for appellants are for these intervenors alone, and we shall therefore confine our attention to the several propositions thus presented in argument. The decree rendered found due to certain holders of bonds the amounts thereby evi-

denced as due them respectively and ordered that payments should first be made of these out of the proceeds of the sale directed. The rights of the intervenors, who are appellants in this court, were decreed subject to the rights of the bondholders represented by the trustee, Mr. Hayden.

It is urged by appellants that the mortgage was never authorized by the board of directors. In the answer of the Lincoln City Electric Railway Company there was contained an admission that this mortgage was duly issued, and in the mortgage itself was contained a copy of resolutions of the railway company's board of directors which clearly show the authority questioned. This was sufficient to establish *prima facie* the authority required. Appellants contend that as the evidence showed without question that certain of the bonds were held merely as collateral security, the holders thereof could not be treated as purchasers and that therefore they had no right to recognition by the district court. In *Helmer v. Commercial Bank*, 28 Neb., 474, it was held that one to whom, without notice of a defense, was transferred a negotiable promissory note before due as collateral security for a loan then made was entitled to be treated as a purchaser, at least to the extent of the loan. In the decree the rights of holders of collaterals were limited to the amount for which the bonds in each instance stood as security. Each holder of collaterals was thus treated as a purchaser to the extent of the credit extended on the faith of the collaterals in accordance with the holding of this court in the case of *Helmer v. Commercial Bank, supra.*

As to those appellants who stipulated that a decree of foreclosure should be entered and the mortgaged property sold thereunder, it is proper to say that they cannot now be heard to question such foreclosure. Among these parties consenting were John Fotsch and the German National Bank, by the latter of whom the most persistent attacks have been made upon the entire relief granted. As the mortgage was made with full authority by the president

and secretary of the mortgagor and was filed for record before the rights of any of the appellants had their origin, the liens of the appellants were properly held inferior thereto. The judgment of the district court is

AFFIRMED.

B. F. JOHNSON, APPELLEE, V. N. A. MCLENNAN ET AL., APPELLANTS.

FILED FEBRUARY 5, 1895. No. 5761.

Review: CONFLICTING EVIDENCE: PLEADING. A decree of the district court will not be disturbed on appeal to this court when the sole question presented is as to findings of fact made by such district court upon consideration of merely conflicting evidence.

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

Reese & Gilkeson, for appellants.

B. F. Johnson, contra.

RYAN, C.

The appellee filed his petition in the district court of Lancaster county for the enforcement of a mechanic's lien against certain real property on which appellee had erected a dwelling house for appellants. The balance for which a lien was claimed was $204.80, with interest thereon from November 26, 1890. By way of answer and cross-petition the appellants, after a denial of certain averments of the petition and an admission of the correctness of others, alleged that the building erected by appellee was constructed so unskillfully that appellants had thereby sustained dam-

age in the sum of $500, for which amount there was a prayer for judgment. The reply was a mere denial of each and every allegation contained in the answer, "controvening petition of plaintiff." In *Herdman v. Marshall*, 17 Neb., 252, it was held that language very similar to that above used did not amount to a denial of affirmative matter pleaded in the answer. It was moreover held in the case just cited that by a failure to challenge such defect it would be deemed waived. In the case at bar it does not appear that the manner of pleading just criticised was brought to the attention of the district court. It may be that this failure to deny the averments of the answer to some extent influenced the district court to a recognition of the right of appellants to a recoupment of damages. The amount of the claim made in the petition was at any rate upon the pleadings and proofs reduced by the sum of about $75. Appellants insist that this amount should have been much greater, and there is a large amount of evidence which tends to sustain this contention. While this is true, there is also evidence contradictory of that, from which a greater amount of damages than was allowed, is inferable. The amount of the damages set off against the claim of the appellee was not the exact sum named by any particular witness on either side. It was, however, greater than that fixed by some witnesses. Under such circumstances the estimate made by the district court must stand, and its judgment is therefore

AFFIRMED.

ELIZABETH M. CHASE ET AL., APPELLEES, AND JOHN MCMANIGAL, APPELLANT, V. FRANK M. MILES ET AL., APPELLEES.

FILED FEBRUARY 5, 1895. NO. 5837.

Res Adjudicata. A judgment rendered by a court which had jurisdiction of the parties and of the subject-matter, as between such parties, conclusively settled all questions litigated, subject only to the contingency of a reversal or modification in the same proceeding.

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

Marquett, Deweese & Hall and *Sawyer & Snell*, for appellant.

Pound & Burr, contra.

RYAN, C.

This action was brought in the district court of Lancaster county by Elizabeth Chase and others against Frank M. Miles, L. C. Burr, and Hiland H. Wheeler, to enjoin the defendants from the commission of certain contemplated acts which, as was alleged, would tend to impair the rights to, and cloud the title of, plaintiffs as to the lot of which each plaintiff was described as the owner. L. C. Burr and Hiland H. Wheeler filed a disclaimer and thenceforward the rights of Frank M. Miles alone were involved. It is stated in the briefs submitted that a settlement has been made of all the rights of each plaintiff except John McManigal. This statement we therefore assume to be correct. Against McManigal's contentions as to the facts and prayer for relief the decree of the district court was adverse and he brings his case for review to this court by appeal.

There are presented for review several questions, but in the view we take of the matter but one can receive our consideration. Before this suit was instituted there was begun, in the circuit court of the United States for the district of Nebraska, an action of ejectment by Frank M. Miles against John McManigal for the possession of lot 7, block 30, in the city of Lincoln,—the identical property which is the subject-matter of this appeal. In this action in the federal court there was in favor of F. M. Miles a verdict and a judgment regularly entered prior to the commencement of this action. With this verdict there were special findings upon all the issues presented which involved the right of Miles to prosecute his action in the circuit court of the United States aforesaid. These findings negative the propositions of fact now urged by appellant. As there has been shown no reversal or modification of this judgment it must be conclusively assumed that before this action was begun there had been, in a court having jurisdiction both of the subject-matter and parties, a final determination of all the questions now presented. (*Bryant v. Estabrook*, 16 Neb., 217; *Hilton v. Bachman*, 24 Neb., 490; *Yeatman v. Yeatman*, 35 Neb., 422; *Taylor v. Coots*, 32 Neb., 30; *Smithson v. Smithson*, 37 Neb., 535.) The judgment of the district court is

AFFIRMED.

JUSTIN RIPLEY ET AL., APPELLEES, V. CHARLES P. LARSEN ET AL., APPELLANTS.

FILED FEBRUARY 5, 1895. No. 5862.

Review: CONFLICTING EVIDENCE. On appeal where there is such a contradiction and confusion in the evidence that it is uncertain how the issues should have been determined, the judgment of the district court will not be disturbed.

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

John S. Bishop, and *S. B. Pound*, for appellants.

F. A. Boehmer, *W. A. Williams*, and *Field & Holmes*, *contra*.

RYAN, C.

Originally there were commenced two actions in the district court of Lancaster county for the foreclosure of as many mortgages made by appellants. These actions were consolidated for the reason that a decree in each case was sought against the same property as in the other. The first mortgage in priority was one given to the Ballou State Banking Company to secure a note for $1,000. This note had been transferred to Justin Ripley by whom foreclosure proceedings were begun. The original payee having been made a party at first disclaimed any interest in the matter litigated, but subsequently answering sought a foreclosure in respect to certain coupons evidencing interest which had accrued on said $1,000 note, which coupons had been paid by said Ballou State Banking Company because payment thereof had been guarantied by such company. The right of foreclosure on behalf of Justin Ripley, before maturity, was asserted because of a failure to pay interest, a default which entitled the holder of the $1,000 note to treat the same as due and accordingly to ask a foreclosure of the mortgage securing the same. The answer of Mr. and Mrs. Larsen was a general denial, with a special denial of the right of Ripley to foreclose on the grounds alleged. The proofs fully sustained the right to a foreclosure as prayed, and the decree in favor of Ripley and the Ballou State Banking Company will not therefore be disturbed. The other foreclosure was sought by Arthur L. Shader, who held a mortgage prior to that above described. The note

which was secured by the mortgage held by Mr. Shader had originally been made to Herman H. Meyer. It was of date October 27, 1889, and the amount which Charles P. Larsen thereby had agreed to pay in one year from its date was $725 with interest thereon at the rate of ten per cent per annum.

By their answer Mr. and Mrs. Larsen set out various advancements of money which had been made by Meyer to Charles P. Larsen, amounting in the aggregate to the sum of $525; that afterward there had been made an advancement of $90, for which Meyer had taken C. P. Larsen's note in the sum of $100, with ten per cent interest per annum; that on or about October 20, 1889, Mr. Larson executed his note to Meyer for the sum of $725, whereas in fact said Larsen had received in all but the aggregate sum of $622.82, and that the sum of $102.18, the difference between $622.82 and $725, was put into the $725 note as interest and usury. In addition to the above defense of usury, Mr. and Mrs. Larsen pleaded payments of $40 in cash, and in labor to the amount of $203.59, wherefore, as they alleged, there was due but the sum of $379.23 on the aforesaid promissory note given for $725. There was in the answer averments that Shader was a purchaser of the above note after its maturity. The prayer of the answer was that credit should be allowed to the amounts of $102.18 and $243.59, and that judgment be rendered for the amount found due against said answering defendants and that said defendants recover costs. There was a decree for the full amount of the $725 note and interest. The district court found that Shader, by assignment after maturity, acquired the note and mortgage. It is, however, unnecessary to consider whether or not this result was correct in the view which we take of other matters. It is observable that the evidence as to transactions preceding the taking of the $725 note is of no importance under the averments and prayer of the answer, except such testimony as tended to establish

the facts of payments. A large part of the brief of appellants is devoted to the consideration of the several notes which preceded the note for $725, but of these only the one for $600 immediately preceding that for $725 has any significance under the averments of the answer. In respect to the particular usury charged there was such a conflict and confusion in the evidence that we cannot say that the district court was wrong in its conclusions. So, too, of the alleged payments in cash and by labor. There was as to these such a mingling of moneys loaned with wares sold, and credits proper to be made on each account, that we cannot say that the finding of the district court was unsupported by the evidence. We do not undertake to assert that the district court came to a conclusion which was absolutely correct. We however admit that, if wrong, we cannot discover wherein such wrong exists. The judgment of the district court is therefore

AFFIRMED.

HENRY GERNER V. EDWARD A. CHURCH ET AL.

FILED FEBRUARY 5, 1895. No. 6323.

1. **Contracts**: SUBSCRIPTION TO PRIVATE ENTERPRISE: SEATING CAPACITY OF THEATRE. Henry Gerner signed a contract or subscription paper, agreeing to pay Edward A. Church and Henry Oliver, or order, $200 on condition they should erect or cause to be erected on the southwest corner of P and Thirteenth streets, in the city of Lincoln, in a time specified, an opera house covering a space of ground 100 feet front on P and 142 feet deep on Thirteenth street. The audience room and galleries of such opera house were to have a seating capacity of seventeen hundred. The subscription was payable in installments, but all due when the opera house was completed and ready for occupancy. In a suit by Church & Oliver against Gerner on said subscription the court instructed the jury: "By 'seating capacity of seventeen hundred,' as used in said contract of subscription, is meant the

capacity of said opera house to seat seventeen hundred auditors on permanent or temporary seats so that they can both hear and see the exhibition given from the stage and still leave sufficient room in the passage-ways for the auditors to pass to and from their seats going in and out of the building." *Held*, (1) That the instruction was correct; (2) that in order for the opera house as constructed to comply with the subscription contract as to seating capacity, it was not necessary that the audience room and galleries should have seventeen hundred fixed and permanent seats.

2. ———: ———: CITY ORDINANCES. On such trial Gerner offered to prove that the opera house constructed by Church & Oliver was erected with a trussed roof; that the outside or inclosing walls were 65 feet high and 142 feet in length; that the building was constructed without any cross-walls of equal height with the inclosing walls, and that the outside walls were of an average thickness of not to exceed seventeen inches. This evidence the court excluded. Gerner also offered in evidence section 513 of the Municipal Code of the city of Lincoln, in force at the time the subscription contract was made and the opera house built, and which provided: "The outside walls of rooms having trussed roofs or ceilings, such as churches, public halls, theaters, * * * if more than fifteen and less than twenty-five feet high, shall average at least sixteen inches; if over twenty-five feet high, at least twenty inches; if over forty-five feet high, at least twenty-four inches in thickness. An increase of four inches in thickness shall be made in all cases where the walls are over 100 feet long, unless there are cross-walls of equal height." This evidence the court excluded. *Held*, (1) That the subject-matter of the ordinance was within the legislative jurisdiction of the city council; (2) that the ordinances were within the rule that the law of the place where a contract is made enters into and becomes a part of such contract; (3) that Gerner's contract was one of donation; and that the courts cannot presume that he agreed to make this donation upon any other terms than that Church & Oliver should construct a building in accordance with the ordinances of the city in which such building was erected; (4) that the court erred in excluding the evidence.

3. ———: ———: PAROL EVIDENCE TO CONTRADICT WRITING. On the trial Gerner offered to testify that at the time of signing the contract in suit that Church & Oliver promised him that the opera house should be constructed of stone in its first story; of pressed brick with cut stone trimmings above the first story,

and copper cornices. This evidence the court excluded. *Held*, (1) That the evidence offered did not tend to explain, but to contradict and alter the agreement between the parties; (2) that it did not tend to show that Gerner was induced by the fraud of Church & Oliver to execute the contract; (3) that there was no ambiguity in the contract; (4) that the court did not err in excluding the evidence.

4. ———: ———: ———. In a suit on a written contract for a subscription payable on certain conditions mentioned in such contract, parol evidence is not admissible, in the absence of fraud, to show that the subscriptions were not to be payable except upon certain other conditions not enumerated in the contract.

5. ———: ———: SHAM SUBSCRIBERS: FRAUDULENT MISREPRESENTATIONS. On the trial Gerner introduced in evidence a writing signed by Church & Oliver bearing the same date as the subscription paper in suit. This writing was delivered to one Marshall and recited that he had signed a subscription paper agreeing to pay Church & Oliver $1,000 for the building of the opera house. The writing was in effect a modification of Marshall's contract of subscription as it made the subscription payable when Marshall had sold certain described real estate. Gerner was then asked certain questions by his counsel, which tended to elicit evidence showing that at and before the time he signed the contract in suit Church & Oliver represented to him that Marshall had subscribed a similar contract for $1,000, which would be payable on the same conditions as would Gerner's subscription if he signed it. This evidence the court excluded. *Held*, (1) That the evidence tended to show a material misrepresentation made by Church & Oliver to Gerner which induced him to execute the contract in suit; (2) that the court erred in excluding the evidence.

6. ———: ———: ———: ———. It is competent for a party when sued upon a written contract to show by parol that he was induced to execute the contract by the fraud or material false representation of the party seeking to enforce it.

7. **Parties**: REAL PARTY IN INTEREST. After the opera house was completed, and before the bringing of this suit, Edward A. Church made in writing and delivered to Henry Oliver and one James F. Lansing a writing in and by which he assigned to said Oliver and Lansing "all his right and interest in and to said subscriptions and donations." The district court instructed the jury that Church & Oliver were the real parties in interest in this suit. *Held*, (1) That the real parties in interest in this suit are

the parties entitled to the donations and subscriptions; (2) that, so far as the record showed, such parties were Henry Oliver and James F. Lansing; (3) that the court erred in instructing the jury that Church & Oliver were the real parties.

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

The facts are stated by the commissioner.

Webster, Rose & Fisherdick, for plaintiff in error:

The law under which parties contract is part of the contract, and their obligations are determined with reference to it; and they are presumed to have intended the contract shall be construed, and obligations determined by it, as though written in it. The ordinances of the city of Lincoln relating to use and construction of theatre buildings, and proof of plaintiff's failure to comply therewith, were therefore erroneously excluded. (*Dorrington v. Myers*, 11 Neb., 389; *Sessions v. Irwin*, 8 Neb., 8; *Jones v. Nebraska City*, 1 Neb., 179; *Stewart v. Otoe County*, 2 Neb., 183.)

The court erred in excluding evidence of the representations of plaintiffs respecting the general character, appearance, cast, and fronting of the building. The subscription contract did not embody all that was promised by plaintiff, and oral evidence was admissible to prove the terms of the agreement on plaintiff's part, and to show that the subscription was fraudulently obtained. (*Fremont Ferry & Bridge Co. v. Fuhrman*, 8 Neb., 103; *Simpson v. Armstrong*, 20 Neb., 514; *Goodrich v. McClary*, 3 Neb., 130; *Nindle v. State Bank*, 13 Neb., 246; *New York Exchange Co. v. De Wolf*, 31 N. Y., 273; *Jones v. Milton & Rushville Turnpike Co.*, 7 Ind., 547; *Groff v. Pittsburgh & S. R. Co.*, 31 Pa. St., 489; *Perkins v. Bakron*, 45 Mo. App., 248.)

The colorable subscription of Marshall, used to puff and stimulate subscriptions by others, was a fraud on other sub-

scribers, and avoided subscriptions obtained by representation that Marshall was a *bona fide* subscriber. (*Melvin v. Lamar Ins. Co.*, 80 Ill., 446; *Cleveland Iron Co. v. Ennor*, 2 West. Rep. [Ill.], 831.)

Plaintiff Church had parted with his right prior to institution of the suit, and plaintiffs were therefore not the real parties in interest, and are not entitled to recover. (*Hoagland v. Van Etten*, 23 Neb., 463.)

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

Subscriptions made to a private person, to assist a private enterprise, on the faith of a prior subscription, absolute on its face, but which ambushes a secret agreement by which the subscriber is released, or his subscription avoided, are voidable at the option of the subscriber, where it appears that such sham subscription was used as a decoy to secure such subsequent subscription. (*Middlebury College v. Loomis*, 1 Vt., 208; *Memphis Branch R. Co. v. Sullivan*, 57 Ga., 240; *Salem Mill-Dam Corporation v. Ropes*, 6 Pick. [Mass.], 23; *Central Turnpike Corporation v. Valentine*, 10 Pick. [Mass.], 142; *Somerset & K. R. Co. v. Cushing*, 45 Me., 524; *Rutz v. Esler & Ropilquet Mfg. Co.*, 3 Brad. [Ill.], 83; *Chester v. Bank of Kingston*, 16 N. Y., 336; 1 Wharton, Contracts, sec. 529; 2 Addison, Contracts, p. 317; *New York Exchange Co. v. De Wolf*, 31 N. Y., 273; *Middlebury College v. Williamson*, 1 Vt., 225.)

Pound & Burr, contra:

Evidence as to whether the width and height of the walls conformed to the city ordinances was properly excluded. A mere police regulation of the city of Lincoln is not a statute or rule of law within the meaning of the rule that contracts are to be construed with reference to the law; nor are such regulations in the nature of statutes. The city authorities are the proper persons to enforce them. (*Markle v. Town Council of Akron*, 14 O., 586.)

The conditions are fully and unambiguously stated in the subscription in writing. The testimony regarding the character of the proposed building was properly excluded. Such evidence would not explain, but would contradict and alter the written agreement. (*Traver v. Schaefle*, 33 Neb., 531; *Nindle v. State Bank*, 13 Neb., 245; *Simpson v. Armstrong*, 20 Neb., 512.)

RAGAN, C.

On the 10th day of April, 1891, Henry Gerner and a number of other parties signed and delivered to Edward A. Church and Henry Oliver a writing or subscription paper in words and figures as follows:

"LINCOLN, NEB., April 10, 1891.

"Know all men by these presents, that we, the undersigned property owners in the city of Lincoln, Nebraska, hereby undertake, promise, and agree to pay to Edward A. Church and Henry Oliver, or order, the sums of money set opposite our respective names upon the condition only that said Church & Oliver shall erect and complete or cause to be completed ready for occupancy on or before January 1, 1892, an opera house building which shall cover a space of ground at least 100 feet front on P street and 142 feet deep on Thirteenth street, in the city of Lincoln, Neb., to be erected at the southwest corner of said P and Thirteenth streets. Said opera house to have an audience room on ground floor with a seating capacity of not less than seventeen hundred, including seating capacity of galleries, said opera house to have not less than two galleries, ladies' and gents' toilet rooms, and to be modern in all its appointments. Said building to have store-rooms around said audience room on ground floor.

"Said sums by us subscribed to be paid as follows, viz.: One-third when the walls of said building are completed to the top of third story and floor joists laid thereon; one-

third when the roof is on said building, and one-third when said building is completed and ready for occupancy.

"HENRY GERNER. $200.00."

This suit was brought in the district court of Lancaster county by said Edward A. Church and Henry Oliver against the said Henry Gerner to recover the amount of the latter's subscription. Gerner interposed to the action six defenses:

(1.) A general denial.

(2.) That the audience room, including the two galleries of the opera house erected by Church & Oliver, did not have a seating capacity of seventeen hundred.

(3.) That at the time Gerner signed said subscription, and at the time Church & Oliver erected the opera house mentioned therein, there was in force in the city of Lincoln an ordinance which provided: "The outside walls of rooms having trussed roofs or ceilings, such as public halls, theatres, * * * if more than fifteen and less than twenty-five feet high, shall average at least sixteen inches; if over twenty-five feet high, at least twenty inches; if over forty feet high, at least twenty-four inches in thickness. An increase of four inches in thickness shall be made in all cases where the walls are over one hundred feet long, unless there are cross-walls of equal height;" that the building mentioned in the premises and erected by Church & Oliver was a theatre with a trussed roof, and the ceiling of the audience room was over forty-five feet in height and the walls were more than one hundred feet long, and that the provisions of said ordinance were applicable to said theatre or opera house, and said ordinance entered into and became a part of the subscription contract of said Gerner; that the opera house erected by Church & Oliver had no cross-walls as provided by said ordinance; that the outside walls of the opera house were of an average thickness of not to exceed seventeen inches.

(4.) That Church & Oliver, to induce Gerner to execute said subscription contract, represented to him that one Whitney J. Marshall had signed a similar subscription paper donating to them $1,000, and that he, Gerner, by executing the subscription contract in suit would be making a contract identical with that made with Church & Oliver by Marshall, except as to the amount of the subscription; that Gerner, believing and relying on said representations made by Church & Oliver, executed the subscription contract in suit; that the representations made by Church & Oliver as to the character of Marshall's subscription were false and known by Church & Oliver to be false, and made with intent to, and did, deceive him, Gerner; that Church & Oliver, at the time Marshall signed the subscription paper, agreeing to donate $1,000 towards the erection of an opera house, made and delivered to him a separate agreement in writing, by which it was in effect provided that Marshall's subscription should not be enforced according to its terms. The existence of this last agreement between Marshall and Church & Oliver were by the latter fraudulently concealed from Gerner.

(5.) That Church & Oliver, to induce Gerner to execute said subscription paper, promised the latter that they would build a structure as fine, imposing, and sightly and as substantial as the building known as the Burr building and the Brace building; the first story to be of stone and the upper stories to be of pressed brick with stone trimmings and copper cornices and ornaments, and to cost from $125,000 to $150,000, and that the front and main entrance of said building should be on P street, on which the defendant owned property in the immediate vicinity of said proposed opera house; that these promises made by Church & Oliver induced Gerner to execute the subscription contract sued upon; that Oliver & Church did not construct said opera house with the front on P street, did not build the first story of stone, nor build a substantial, imposing,

and sightly structure with copper cornices and ornaments, and that the building constructed did not cost $125,000.

(6.) That the action was not brought in the names of the real parties in interest; that before the bringing of the suit Edward A. Church had assigned all his interest in the subscription contract to James F. Lansing and Henry Oliver.

Church & Oliver replied to this answer by a general denial of all the allegations therein. There was a trial to a jury, and a verdict and judgment in favor of Church & Oliver, and Gerner brings the case here on error.

In the course of this opinion we shall review all the errors assigned by Gerner in his petition in error, but without following the order in which such errors are assigned.

1. At the trial a very large part of the evidence was directed to the issue made by the pleadings, as to whether the audience room, including the galleries of the opera house as constructed, had a seating capacity of seventeen hundred; and it is strenuously and at length argued here by counsel who represent the plaintiff in error that the finding of the jury in favor of Church & Oliver on this issue lacks sufficient competent evidence to support it. In addition to the evidence introduced under this issue the jury, by consent of the parties, visited the opera house and examined it. The question at issue was capable of being determined by a man or men of ordinary intelligence from an actual examination and inspection of the audience room and galleries of the opera house. We think the evidence in the record is sufficient to sustain the finding made by the jury on this issue, even if the jury had not examined the premises; and since the finding of the jury is based not only upon the evidence of witnesses as to the capacity of the opera house, but upon knowledge obtained by them from an actual examination of it, their finding is conclusive. We cannot presume that the jury, in the examination of the premises, acted otherwise than impartially, nor

that in estimating the capacity of the opera house they adopted a wrong theory, as the district court charged the jury on the subject as follows: "By 'seating capacity of seventeen hundred,' as used in said contract of subscription, is meant the capacity of said opera house to seat seventeen hundred auditors on permanent or temporary seats, so that they can both hear and see the exhibition given from the stage and still leave sufficient room in the passage-ways for the auditors to pass to and from their seats going in and out of the building." This instruction was correct, and the presumption is that the jury followed it. In order for the opera house, as constructed, to comply with the subscription contract as to the seating capacity of the former it was not necessary that the audience room and galleries should have therein seventeen hundred fixed and permanent seats.

2. On the trial Gerner offered testimony tending to prove that the opera house constructed by Church & Oliver was erected with a trussed roof; that the outside, or inclosing walls were 65 feet high and 142 feet in length; and that the building was constructed without any cross-walls of equal height with the inclosing walls, and that said outside walls were of an average thickness of not to exceed seventeen inches. Gerner also offered in evidence section 513 of the Municipal Code of the city of Lincoln, which provides: "The outside walls of rooms having trussed roofs or ceilings, such as churches, public halls, theatres, dining rooms, and the like, if more than fifteen and less than twenty-five feet high, shall average at least sixteen inches; if over twenty-five feet high, at least twenty inches; if over forty-five [feet high], at least twenty-four inches in thickness. An increase of four inches in thickness shall be made in all cases where the walls are over one hundred feet long, unless there are cross-walls of equal height." The exclusion of this evidence is the second error assigned here. Whether the court erred in ex-

cluding this evidence depends upon whether the ordinances of the city of Lincoln were incorporated into and became a part of the contract between Gerner and Church & Oliver. It is a general rule that contracts are to be construed according to the law of the place of their execution, and that the law in force upon any subject which is made the subject-matter of a contract is incorporated into and becomes a part of such contract, as much so as if the law were actually made a part of the agreement between the contracting parties. (*Jones v. Nebraska City*, 1 Neb., 176; *Stewart v. Otoe County*, 2 Neb., 177; *Sessions v. Irwin*, 8 Neb., 5; *Dorrington v. Myers*, 11 Neb., 388.) The correctness of this rule is not controverted by counsel for Church & Oliver, but their contention is that the ordinances of the city of Lincoln are not within such rule.

In *Brady v. Northwestern Ins. Co.*, 11 Mich., 425, Brady owned a wooden building in the city of Detroit. It was insured by the insurance company against loss or damage by fire on the 1st of January, 1856, for one year. In accordance with the provisions of the policy, at the expiration of the year it was renewed for another, and from year to year until the 1st of January, 1861, when the policy was renewed for still another year. Some time in February, 1861, the building was partially destroyed by fire. The policy provided that the insurance company might pay the amount of the loss sustained in money or at its option rebuild or repair the building with the same kind of material of which it was constructed. At the time the policy was renewed, on January 1, 1861, there was in force in the city of Detroit an ordinance of that city which prohibited the rebuilding or repair of wooden buildings partially destroyed by fire in that part of the city in which was situate the building of Brady. Brady sued the insurance company on its contract of insurance. The property was insured for $2,000. The evidence showed that the undestroyed material of the insured building was worth about $100; but if

the insurance company was allowed to use wood and repair the building, it could do so at a cost of something over $800. The contention of the insurance company was that the ordinance of the city of Detroit was not a part of its contract of insurance, and since it was not allowed to repair the building it was only liable to Brady for what it would cost it to rebuild the building with wood if it was permitted to do so. Martin, C. J., delivering the opinion of the court, said: "The fair and reasonable interpretation of a policy of insurance against loss by fire will include within the obligation of the insurer every loss which necessarily follows from the occurrence of the fire, to the amount of the actual injury to the subject of the risk, whenever that injury arises directly and immediately from the peril, or necessarily from incidental and surrounding circumstances the operation and influence of which could not be avoided. Under this rule what was the plaintiff's loss in the present case? The property insured was situated within the fire limits of Detroit, within which the reconstruction or repair of any wood building injured by fire was prohibited, unless by leave of the common council. * * * This charter and these ordinances were in existence at the time of the last renewal of the policy. They were local laws affecting the property, and the risk which the defendant assumed, and of which the latter is presumed to have had knowledge and to have estimated in renewing the policy. * * * 'The risk was not taken upon a mere collection of beams, boards and other materials, thrown together without purpose or special adaptation. It was upon a building for trade, situated within a particular locality, within the jurisdiction of municipal authorities vested with legislative powers for special purposes, and subject to the exercise of those powers;' and the parties must be regarded as contracting with a full knowledge of all the facts and the law, and the risk to which the property was thereby subjected;" and the court held that Brady was entitled to recover the whole

insurance, and was not limited to such a sum as would cover the cost of repairing the building with wood, and that the insurance contract was governed by the local ordinance in force in the city of Detroit at the time of its issuance.

In *Cordes v. Miller*, 39 Mich., 581, a landlord covenanted in his lease with the tenant that in case the building on the leased premises should be destroyed by fire that he would rebuild it. The building on the leased premises was of wood and was destroyed by fire. After the execution of the lease between the parties the city council of Grand Rapids, in which said leased building was situate, passed an ordinance forbidding the erection of wooden buildings in that part of said city in which the landlord's premises were situate. The tenant sued the landlord on his covenant to rebuild, and the court held that the landlord was released from his contract to rebuild the wooden building by the passage of the ordinance forbidding it.

These authorities recognize the doctrine that the ordinances of a city are within the rule that the law of the place where the contract is made enters into and becomes a part of such contract when the subject-matter of the contract is within the legislative jurisdiction of the city council. If the ordinances of the city of Lincoln had prohibited the erection of a wooden building where the opera house is situate, and the contract between Gerner and Church & Oliver had expressly provided that the latter should erect a wooden theatre on the site now occupied by the opera house, it certainly cannot be questioned that neither of the parties to such contract could have enforced it against the other. The contract in suit between the parties does not by its terms require Church & Oliver to erect a building of the character prohibited by the ordinances of the city; but the ordinances of the city were as much a part of Gerner's contract with Church & Oliver as if they had been written therein. In other words, the

contract should be construed as though it read that Gerner would pay to Church & Oliver $200 when they erected an opera house covering a space of ground 100x142 feet on the site named, in accordance with the ordinances of the city of Lincoln regulating the construction of such buildings. The contract of Gerner is a donation pure and simple, but it is not voidable for that reason; but because it is a donation the contract must be strictly construed in his favor, and the courts will not presume that Gerner agreed to make this donation upon any other terms than that Church & Oliver should build a building of the dimensions and at the time and place stated in the contract, and construct such building in accordance with the ordinances of the city in which it was to be erected. We think therefore that the learned district judge erred in excluding the evidence offered.

It is suggested in the briefs of counsel for Church & Oliver that they were compelled to and did procure a permit from the city authorities of Lincoln for the construction of this building. We do not find this permit in the record; and if the record contained such evidence, we do not think that fact would render the ruling of the district court under consideration less erroneous. We cannot presume that this permit, if it was issued, authorized Church & Oliver to construct a building contrary to the ordinance on the subject; and if the permit did authorize the building to be constructed otherwise than in compliance with the ordinance, such permit itself would be a nullity.

3. On the trial Gerner offered to testify that at the time of signing the contract in suit that Church & Oliver represented and promised him that the opera house would be constructed of stone in its first story and of pressed brick with cut stone trimmings above the first story, with cornices of ornamental metal work of copper, and that the front of the building was to be on P street, and that it was not so constructed. The exclusion of this evidence by the

court is the third error assigned here. To support their argument that the court erred in excluding this evidence counsel cite us, among others, to the following authorities: *Goodrich v. McClary*, 3 Neb., 123; *Fremont Ferry & Bridge Co. v. Fuhrman*, 8 Neb., 99; *Nindle v. State Bank*, 13 Neb., 245. None of these cases, however, sustain the contention of plaintiff in error. The facts in the case in 3 Nebraska were that G. and M. had entered into an agreement by which G. agreed to deliver to M. his cutting of wool on a day named. The contract was silent as to the number and kind of sheep which G. owned at the time the contract was made, and it was held that parol testimony was admissible to show that fact. This decision rests upon the principle that parol evidence is admissible to supply an omission in a written contract which in case of disagreement between the parties would otherwise be ambiguous. The facts in the case in 8 Nebraska were that a bridge company had a toll bridge across the Platte river. This bridge was destroyed. The company then passed a resolution that it would not build another bridge —that is, rebuild the bridge—unless aided by donations from citizens. Under this resolution Fuhrman signed his name, agreeing to donate $100. The company built another bridge, but not in the place where the bridge destroyed stood. In a suit by the bridge company against Fuhrman the court held that a change of the location of the bridge having been made without his consent he was not liable upon the subscription; but the fair and legitimate construction of Fuhrman's contract in that case was that he would give the bridge company $100 to rebuild the bridge destroyed; and by rebuilding the bridge destroyed was clearly implied that it should be built on the *situs* occupied by the first bridge. The facts in 13 Nebraska were that K. and N. had leased certain premises for the term of six months from the 6th day of December, 1881. The lease then stated that "which term will end on the 6th day of

May, 1882," and the court held that there was no uncertainty or ambiguity in the terms of the lease, as the date, May 6, was an error of computation, and that the lease did not expire by its terms until June, 1882, and that the parol evidence was not admissible to show when the lease did terminate. The effect of this evidence excluded would be to modify and alter the terms of the agreement between the parties and to introduce additional conditions into the contract. The evidence offered does not tend to explain, but contradicts and alters the agreement between the parties. There is no ambiguity in the contract in suit. By the contract between the parties the building was to cover a space of ground at least 100 feet front on P street and 142 feet deep on Thirteenth street, and the evidence in the record shows that the building had two fronts, one on P and one on Thirteenth street. To permit Gerner to prove in this suit that Church & Oliver agreed that they would construct the first story of this opera house of stone and that part above the first story with pressed brick, with cut stone trimmings and copper cornices, would be to make a new contract for the parties, not to construe the one they have made. This evidence did not tend to show, nor was it offered upon the theory that the contract sued upon is not the contract made,—that is, the evidence is not offered by Gerner upon the theory that any of the agreements between him and Church & Oliver which were to be written in the contract were omitted therefrom; nor that any provision written in the contract is different from the one made; but the evidence offered by Gerner tends to establish another and a different contract between him and Church & Oliver than the one reduced to writing between the parties and made the subject of this suit. In other words, the evidence does not tend to show that Gerner was induced by the fraud of Church & Oliver, or either of them, to execute the contract in suit. In a suit on a written contract for subscription, payable on certain conditions mentioned in such contract,

parol evidence is not admissible, in the absence of fraud, to show that the subscriptions were not to be payable except upon certain other conditions not enumerated in the contract. (*Jones v. Milton & Rushville Turnpike Co.*, 7 Ind., 547.) The court did not err in excluding the evidence.

4. The next assignment of error relates to the ruling of the district court in excluding certain evidence offered on the trial by Gerner. Gerner, as already stated, pleaded in defense to this action that Church & Oliver represented to him at the time he signed the contract in suit that one Whitney J. Marshall had signed a similar contract, agreeing to donate $1,000; that if he, Gerner, would sign the contract his liability would be identical with that of Marshall, except as to the amount; that, relying upon and believing such representations, he executed the contract in suit; that such representations were false and known by Church & Oliver to be false, and made by them for the purpose of deceiving him, Gerner; that, though Marshall had signed a subscription or contract like the one sued on, Church & Oliver, at the time of such signing by Marshall, had made and delivered to him a separate agreement in writing, to the effect that the subscription contract signed by Marshall should not be enforced according to its terms. On the trial Gerner put in evidence a writing, bearing date April 10, 1891, signed by Church & Oliver and delivered to Marshall. This writing was as follows:

"LINCOLN, NEB., April 10, 1891.

"Whereas W. J. Marshall has subscribed on a subscription paper of even date the sum of one thousand (1,000) dollars, which sum he agrees to pay on the following condition, viz.: This amount he agrees to pay when he has sold his fifty-feet frontage on O street in Lincoln, Nebraska, commencing on Fifteenth street, same city. The subscription paper above referred to is one by Henry Oliver and Edward A. Church for the building of an opera house

on the southwest corner of P and Thirteenth streets, Lincoln, Nebraska.

HENRY OLIVER.

"ED. A. CHURCH."

Gerner was then called as a witness for himself and asked the following questions:

Q. Who presented to you the subscription paper, which has been introduced in evidence, that you signed?

A. Oliver & Church.

Q. State what, if anything, was said to you in respect to who else had subscribed, and how much they had subscribed.

Objected to and sustained.

Q. You may state whether or not you had any conversation with Marshall in regard to making this subscription.

A. None at all.

Q. Was his name mentioned by Oliver & Church when they came to solicit your subscription?

Objected to and sustained.

Q. You may state if Whitney J. Marshall's name was mentioned to you, in the same interview at the time you signed this subscription paper, by Church & Oliver.

A. Yes, sir.

Q. What did they say to you in respect to his subscription or his having subscribed?

Objected to and sustained.

Q. Now, at the time this subscription paper was presented to you, was W. J. Marshall's name mentioned by Church & Oliver?

A. Yes, sir.

Q. Now, you may state what was said in connection with his name.

Objected to and sustained.

Q. Was that at the time you did sign this paper?

A. Yes, sir.

Q. And was it before or after you had signed it?

A. Before I signed it.

Q. In the same interview?

A. Yes, sir.

Q. Now you may state what they said.

Objected to and objection sustained.

We think the court erred in excluding this evidence. If Church & Oliver had represented to Gerner that Marshall had subscribed $1,000 towards erecting the opera house and Gerner had believed and relied on such representation and made the subscription he did, and such representation had been false, can it be doubted that such representation would have been a material one? The evidence offered tended to show that Church & Oliver represented to Gerner that Marshall had subscribed $1,000 towards building the opera house and that such sum would become due and payable at the furthest when such opera house should be completed according to the terms of the written agreement signed by Gerner; and the evidence excluded tended to show that Marshall's liability was not the same as the liability incurred by Gerner; that the subscription made by Marshall was not to be paid when the building was completed but only when he should sell a certain piece of real estate. This might never happen. In any event it left it optional with Marshall whether he should ever become liable on his subscription. In other words, this evidence tended to show that Gerner's subscription contract was procured from him by fraud. It is always competent for a party when sued upon a written contract to show by parol that he was induced to execute the contract by the fraud or material false representations of the party seeking to enforce it.

5. The final assignment of error is that Church & Oliver are not the real parties in interest in this action. On the 5th day of May, 1891, an agreement in writing was entered into between Henry Oliver and one James F. Lansing as parties of the first part and Edward A. Church as party of the second part. This agreement had reference to the opera

house when constructed, and recited that certain parties had subscribed and agreed to donate to Henry Oliver and Edward A. Church certain sums of money, and among other things contained this provision: "In consideration of this agreement the said party of the second part [Ed. A. Church] hereby assigns to party of the first part [Henry Oliver and James F. Lansing] all his right and interest in and to said subscriptions and donations, and upon the signing of this agreement he will execute such assignment upon said subscription papers." This suit was brought on the 13th day of June, 1892. Section 29 of the Code of Civil Procedure provides, in effect, that all actions must be prosecuted in the name of the real party in interest. Are Ed. A. Church and Henry Oliver the real parties in interest in this suit? In *Hoagland v. Van Etten*, 22 Neb., 681, said section 29 of the Code was construed, and it was held: "The real party in interest, under section 29 of the Code, is the person entitled to the avails of the suit." (See, also, *Grimes v. Cannell*, 23 Neb., 187; *Hoagland v. Van Etten*, 23 Neb., 462.) At the time this suit was brought Edward A. Church had no interest whatever in the subscriptions made by Gerner and others to Church & Oliver, as he had assigned all his right and interest in said subscriptions and donations to Henry Oliver and James F. Lansing, and these gentlemen, so far as the evidence shows, were entitled to sue for such donations.

It is argued that Church & Oliver are the trustees of an express trust, within the meaning of section 32 of the Code; but these subscriptions were not made to Church & Oliver as trustees, nor were the promises of the signers of the subscription papers made to Church & Oliver for the benefit of any other person. The contract of subscription recites upon its face that the signers agreed to pay to Church & Oliver, or their order, the amount subscribed. This was a promise made to them jointly; and Church, prior to the bringing of this suit, for a valuable consideration, assigned

and sold all his interest in the subscriptions. We think, therefore, that the proper parties to bring this action, and the only parties who could bring it, were Henry Oliver and James F. Lansing, and the learned district judge was wrong in instructing the jury that Edward A. Church and Henry Oliver were the real parties in interest.

The judgment is reversed and the cause remanded to the district court with instructions to permit the petition to be amended and the suit to proceed in the name of Henry Oliver and James F. Lansing as plaintiffs, on such terms as the court may prescribe.

REVERSED AND REMANDED.

OLIVER P. DINGES V. ANNA RIGGS.

FILED FEBRUARY 5, 1895. No. 6111.

Actions: JOINDER: TORT. The causes of action, and each of them, stated in the petition in this case sounded in tort, and grew out of and were a part of the same transaction, and were therefore properly joined.

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

This was a suit by Anna Riggs against Oliver P. Dinges. The plaintiff in her petition set up three causes of action: First, malicious prosecution; second, damage to plaintiff's business by arresting occupants of her place of business; third, slander. Plaintiff recovered a verdict and judgment on the second cause of action for one hundred dollars. The defendant prosecuted a proceeding in error. *Affirmed.*

Adams & Scott, for plaintiff in error, cited: Maxwell,

Code Pleading, 351, 352; *Scarborough v. Smith*, 18 Kan., 399; *Secor v. Sturgis*, 16 N. Y., 548; Cooley, Torts, 193.

Wooley & Gibson and *A. L. Emberson, contra.*

RAGAN, C.

This is a proceeding in error from the district court of Lancaster county prosecuted by Oliver P. Dinges to reverse a judgment rendered against him in favor of Anna Riggs.

Dinges assigns here that the district court erred in overruling his motion to compel the plaintiff below to elect upon which one of the three causes of action stated in her petition she would rely. There was no error in this ruling of the court. The causes of action, and each of them, stated in the petition sounded in tort, and they all grew out of and were connected with the same transaction, and were therefore properly joined. (Code of Civil Procedure, sec. 87; *Freeman v. Webb*, 21 Neb., 160.)

The second assignment of error is that the verdict of the jury is not supported by sufficient competent evidence. We think it is. The judgment of the district court is

AFFIRMED.

SOPHIA M. EGGERT, APPELLEE, V. ADOLPH BEYER ET AL., IMPLEADED WITH JACOB FLURY, APPELLANT.

FILED FEBRUARY 5, 1895. No. 5682.

1. **Mortgages**: ASSIGNMENT: PAYMENT: PRINCIPAL AND AGENT. One Beyer made a mortgage on his real estate to one Tallant to secure the negotiable promissory note of the former. Tallant sold and assigned the mortgage debt to C. A. Eggert, and the latter recorded the assignment to him in the office of the register of deeds of the county where the mortgaged premises were situate. C. A. Eggert, before the maturity of the

mortgage debt, sold and assigned it to Sophia M. Eggert, and she neglected to record the assignment to her. Beyer then sold the mortgaged premises to one Flury, and he paid the mortgage debt to Tallant, the mortgagee. In a suit by Sophia M. Eggert to foreclose the mortgage, *held*, (1) that the evidence supported the finding of the district court that Tallant had neither real nor apparent authority as Sophia M. Eggert's agent to collect the mortgage debt; (2) that the record of the assignment of the mortgage from Tallant to C. A. Eggert was notice to Flury that Tallant had sold his interest in the mortgage debt; (3) that the mortgage and the note it was given to secure belonged to the legal holder of the note, and if Flury desired to pay it off and have the mortgage released he should have paid the money only upon surrender to him of the note.

2. ———: STATUTES: RECORD OF ASSIGNMENT. Section 39, chapter 73, entitled "Real Estate," Compiled Statutes, 1893, construed, and *held*, (1) that such statute should be strictly construed; (2) that the statute is a legislative command that the registry laws shall not be so construed as to make the record of the assignment of a mortgage notice to the mortgagor that the debt has been assigned.

3. ———: ASSIGNMENT: NOTICE TO MORTGAGOR: PAYMENT TO MORTGAGEE. In the absence of statutory enactments to the contrary, the general rule is if a mortgage be given to secure a debt not evidenced by negotiable paper, then the mortgagor, in the absence of actual knowledge that the mortgagee has assigned the debt which it secures, will be protected in making payment to the original mortgagee.

4. ———: ———: PAYMENT. Notwithstanding the statutes permit a mortgage assignment to be recorded, a mortgagor is not obliged, before making payment of his debt, to consult the record for the purpose of ascertaining if the mortgage has been assigned. He may still pay the mortgage debt and be protected in the same manner as he would prior to the enactment of the registry law allowing mortgage assignments to be recorded. If the mortgage secures a non-negotiable debt, in the absence of actual knowledge of its assignment he may pay it to the mortgagee. If the mortgage secures a debt evidenced by negotiable paper he must at his peril pay it to the legal owner and holder of such paper.

5. ———: ———: ———. Notwithstanding said statute, one who purchases negotiable paper, secured by a real estate mortgage, in the ordinary course of business, before the maturity of such

paper and for a valuable consideration, cannot be deprived of the security created by such mortgage by a payment of the mortgage debt made by the mortgagor to the mortgagee, whether or not the purchaser of such mortgage debt has caused the assignment of the mortgage to him to be recorded in the office of the register of deeds where the mortgaged premises are situate.

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

The facts are stated by the commissioner.

Greene & Hostetler, for appellant:

The payment to Tallant discharged the lien of the mortgage. (*Mason v. Beach*, 55 Wis., 607; *Mallory v. Mariner*, 15 Wis., 189; *Stewart v. McMahan*, 94 Ind., 389; *Mabie v. Hatinger*, 48 Mich., 341; *Coutant v. Servoss*, 3 Barb. [N. Y.], 128; *Evertson v. Ogden*, 8 Paige Ch. [N. Y.], 275; *Swartz v. Leist*, 13 O. St., 419.)

Ricketts & Wilson and *Dryden & Main*, *contra*, cited: *Baily v. Smith*, 14 O. St., 413; *Allen v. Everly*, 24 O. St., 97; *Webb v. Hoselton*, 4 Neb., 318; *Moses v. Comstock*, 4 Neb., 520; *Sedgwick v. Dixon*, 18 Neb., 545; *Cheney v. Janssen*, 20 Neb., 128; *Windle v. Bonebrake*, 23 Fed. Rep., 165; *Stiger v. Bent*, 111 Ill., 338; *Jones v. Smith*, 22 Mich., 360; *Burhans v. Hutcheson*, 25 Kan., 625; *Smith v. Kidd*, 68 N. Y., 130; *Bragley v. Ellis*, 32 N. W. Rep. [Ia.], 254; *Lee v. Clark*, 1 S. W. Rep. [Mo.], 142; *Daniels v. Densmore*, 32 Neb., 43.

RAGAN, C.

On the 10th day of March, 1886, one Adolph Beyer was the owner of a tract of land in Buffalo county, and on said date he borrowed of one Thomas B. Tallant $200. As an evidence of this loan Beyer and his wife, Christina, on said date made and delivered to Tallant a promissory note for said sum of $200, drawing interest at the rate of

ten per cent per annum, payable semi-annually, the interest evidenced by ten coupons of $10 each attached to said principal note. The principal note and coupons were payable to the order of Thomas B. Tallant at his office in Muscatine, Iowa, and the principal note was to mature on the 1st day of March, 1891. On said 10th day of March, 1886, Beyer and wife, to secure the payment of said note and the interest thereon according to its tenor, executed and delivered to said Tallant a mortgage upon their said land in Buffalo county, and the mortgage was duly recorded in the office of the register of deeds of said county. On the 30th day of June, 1886, there was filed in the office of the recorder of deeds of Buffalo county an assignment of said real estate mortgage from said Tallant to one C. A. Eggert. March, 1889, Adolph Beyer and wife sold and conveyed this real estate to one Jacob Flury, and he then paid to Tallant the principal and interest of said loan made by him to Beyer. This suit was brought in equity in the district court of Buffalo county by Sophia M. Eggert to foreclose the mortgage given by Beyer to Tallant. Beyer and his wife and one Paul Beyer were also made parties, but no one appeared for them, and their connection with this case need not be further noticed. Jacob Flury was also made a party to the foreclosure suit, and defended the action on the ground that he had in March, 1889, paid the mortgage debt. The district court rendered a decree in favor of Sophia M. Eggert, foreclosing the mortgage as prayed in her petition, and Flury has appealed.

The district court found, and the evidence supports its finding, that Sophia M. Eggert was an innocent purchaser before due for value, in the ordinary course of business, of the notes and coupons and mortgage in controversy in this suit, without any notice of the fact, either actual or constructive, that Flury, the purchaser of the land, had in 1889 paid to Tallant, the original mortgagee, said mortgage debt. It appears from the record that whatever interest Beyer paid

on this loan prior to his sale of the land to Flury he remitted, or caused to be remitted, to Tallant, the original mortgagee, and that Tallant returned the coupons to pay which the remittances were made by Beyer. It also appears that some of the remittances made by Beyer to pay interest coupons which matured after November 17, 1887, the date Sophia M. Eggert purchased the mortgage debt, were made to Tallant, the original mortgagee, and that he returned the coupons to pay which such remittances were made. It is argued here by appellant that these facts or circumstances are sufficient to show that Tallant had the authority, real or apparent, of Sophia M. Eggert for collecting interest on this mortgage loan after she became the owner of it; and that, therefore, Flury was justified in believing that Tallant, the original mortgagee, was the agent of the owner of the mortgage loan in March, 1889, when he remitted money to pay it; and that Flury's payment of the mortgage debt to Tallant should be held a payment to Sophia M. Eggert. The district court, however, has found this contention against the appellant, and it must suffice to say that such finding is not unsupported by the evidence.

In *Webb v. Hoselton*, 4 Neb., 308, it was held: "A *bona fide* purchaser, for value, of a negotiable promissory note, secured by a mortgage, before maturity and without notice, takes the mortgage as he does the note, discharged of all equities which may exist between the original parties;" and it was further held in this case that "the mortgage is a mere incident to the debt, and passes with it." (See, also, *Moses v. Comstock*, 4 Neb., 516; *Sedgwick v. Dixon*, 18 Neb., 545; *Cheney v. Janssen*, 20 Neb., 128; *Daniels v. Densmore*, 32 Neb., 40.) At the time Flury purchased the real estate of Beyer there was of record in the office of the register of deeds of the county where such real estate was situate not only the mortgage made by Beyer to Tallant, but an assignment by Tallant of all his interest in that mortgage to one C. A. Eggert, of Johnson county, Iowa,

and this assignment had been of record in Buffalo county since June 30, 1886. Here, then, was notice to Flury that Tallant did not own the Beyer mortgage, and Flury, by remitting the money to pay it to Tallant, did so at his peril. The mortgage followed the debt and the debt was evidenced by negotiable promissory notes, all of which the record showed, and Flury might have protected himself by the exercise of ordinary prudence. This mortgage and the note it was given to secure belonged to the legal holder of the note, and if Flury desired to pay it off and have the mortgage released he should have paid the money only upon surrender to him of the notes.

Counsel for appellant seem to think that the failure of Sophia M. Eggert to have recorded in Buffalo county the assignment made to her of the Beyer mortgage was such negligence on her part as should preclude her recovery in this case; that as one of two innocent parties must suffer, she should bear the loss rather than Flury, because her neglect to have her assignment recorded led Flury to pay the money to the original mortgagee. The facts in this record do not bring appellant within the protection of this rule. Flury himself is not an innocent purchaser. His loss is the result of his own negligence. He knew that Tallant, the original mortgagee, did not own this mortgage, and he made no effort whatever to ascertain who the owner of the mortgage was; nor did he remit to Tallant the amount of the mortgage debt in such a manner as to require him to surrender the notes, coupons, and mortgage upon his receipt of the remittance. (*Stiger v. Bent*, 111 Ill., 328; *Windle v. Bonebrake*, 23 Fed. Rep., 165.) In *Burhans v. Hutcheson*, 25 Kan., 625, it was held: "The *bona fide* holder of negotiable paper, transferred to him by indorsement thereon before maturity, and secured by a real estate mortgage, need not record the assignment of the mortgage, or bring home to the mortgagor actual notice of such assignment, in order to protect himself against pay-

ments made after the assignment without his knowledge or consent by the mortgagor to the mortgagee." (See also *Lee v. Clark*, 89 Mo., 553; *Reeves v. Hayes*, 95 Ind., 521.)

Section 39, chapter 73, entitled "Real Estate," Compiled Statutes, 1893, provides: "The recording of an assignment of a mortgage shall not in itself be deemed notice of such assignment to the mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them or either of them to the mortgagee." The argument of appellant is that by the provisions of this statute the fact that Tallant assigned the Beyer mortgage to C. A. Eggert and that such assignment was recorded in Buffalo county, yet, in the absence of actual knowledge of these facts, Beyer would have been justified in paying the mortgage debt to the original mortgagee and protected in such payment; and as appellant had succeeded to all the rights of Beyer and assumed the mortgage debt, he was justified in paying it to Tallant, the original mortgagee, and protected in so doing. But this statute must be strictly construed. It provides that the recording of an assignment of a mortgage shall not be deemed notice of such assignment to the mortgagor. Flury is not a mortgagor. He is a purchaser of this real estate and is not, therefore, within the statute. We do not certainly know where this law originated, nor the reason which led to its enactment. Such a statute is in force in California, Kansas, Minnesota, New York, Wisconsin, Wyoming, and perhaps other states of the Union. In *Burhans v. Hutcheson*, 25 Kan., 625, this statute, or one like it, was construed, and the court held that the statute should be interpreted as having application to mortgages standing alone or those securing debts or notes of a non-negotiable character only, and that it had no application whatever to mortgages securing negotiable paper. Without express statutory authority, an assignment of a mortgage is not entitled to be recorded, but by section 46, chapter 73, Compiled Statutes, 1893, a mortgage assign-

ment, duly executed, is entitled to record. In the absence of statutory enactments to the contrary the general rule undoubtedly is, if a mortgage be given to secure a debt not evidenced by negotiable paper, then the mortgagor, in the absence of actual knowledge that the mortgagee has assigned the debt which it secures, will be protected in making payment to the original mortgagee. The statute under consideration has not changed this rule. The true intent and meaning of this statute is that although by the provisions of the registry laws a mortgage assignment is entitled to be recorded, and after such record is notice to persons purchasing mortgaged premises or mortgage debt, yet the record of such assignment is not of itself notice to the mortgagor that the mortgage and the debt it secures have been assigned by the mortgagee. In other words, the statute is a legislative command that the registration law shall not be so construed as to make the record of the assignment of a mortgage notice to the mortgagor that the mortgage debt has been assigned. If a mortgage be given to secure a debt evidenced by negotiable paper, then the mortgagor does not owe the debt to the mortgagee personally, but to the legal holder of the negotiable paper, and will be protected in paying such debt only by paying it to the legal holder of such paper; and generally would make payment to the original mortgagee or creditor at his peril. The statute in question has not changed or attempted to change this rule. In other words, notwithstanding the statutes permit a mortgage assignment to be recorded, a mortgagor is not obliged, before making payment of his debt, to consult the record for the purpose of ascertaining if the mortgage has been assigned. He may still pay the mortgage debt and be protected in the same manner as he would prior to the enactment of the registry laws allowing mortgage assignments to be recorded. If the mortgage secures a non-negotiable debt, in the absence of actual knowledge of its assignment, he may pay it to the mort-

gagee; if the mortgage secures a debt evidenced by negotiable paper, he must at his peril pay it to the legal owner and holder of such paper. We accordingly hold that, notwithstanding this statute, one who purchases negotiable paper secured by a real estate mortgage, in the ordinary course of business before the maturity of such paper and for a valuable consideration, cannot be deprived of the security created by such mortgage nor of the debt by a payment thereof made by the mortgagor to the original mortgagee, whether or not the assignee of such mortgage debt has caused an assignment of his mortgage to be recorded in the office of the register of deeds where the mortgaged premises are situate. It must be borne in mind that in this case we hold that Flury is not an innocent purchaser of the premises, and what has been said above in reference to the rights of an innocent purchaser of negotiable paper secured by real estate mortgage is to be limited to the rights and liabilities of mortgagor, and mortgagee, and such purchaser of such paper. Flury does not come within the rule of *Whipple v. Fowler*, 41 Neb., 675, and the rule announced herein in reference to the rights of a *bona fide* purchaser of negotiable paper secured by real estate mortgage, when such debt has been paid by the original mortgagor, has no reference to the rights of such *bona fide* purchaser or innocent purchaser of the real estate when the mortgage thereon has been released by the original mortgagee. The decree of the district court is

AFFIRMED.

CHARLES W. SPEARS, ADMINISTRATOR, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED FEBRUARY 5, 1895. No. 6072.

1. **Review**: EVIDENCE. Because the jury has drawn one inference rather than another from the evidence, this court will not substitute the inference it might have drawn, had it been the triers, for the one made by the jury.
2. **Railroad Companies**: NEGLIGENCE. The mere fact that a man is found dead under a railroad car does not raise the presumption that he came to his death through the negligence of the railroad company.
3. **Negligence**: DEATH BY WRONGFUL ACT. In a suit by an administrator against a railroad company for negligently causing the death of his intestate, there is no presumption of law that either party was guilty of negligence.
4. ———: PROOF. Negligence is a cause of action or defense, and must be proved by the party alleging it.
5. ———: PRESUMPTION. If there is any presumption of law in such matters it is that all parties act with ordinary care, and such presumption continues until overthrown by evidence.
6. ———: EVIDENCE: QUESTIONS FOR COURT AND JURY. Whether a certain act or omission is or is not competent evidence of negligence is for the court, but whether such evidence convicts a party of negligence is for the jury. *Missouri P. R. Co. v. Baier*, 37 Neb., 235, *American Water-Works Co. v. Dougherty*, 37 Neb., 373, and *Omaha Street R. Co. v. Craig*, 39 Neb., 601, followed.

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

Davis & Hibner, for plaintiff in error.

T. M. Marquett and *J. W. Deweese, contra.*

RAGAN, C.

O street extends east and west through the city of Lincoln. The Chicago, Burlington & Quincy Railroad Com-

pany (hereinafter called the "Railroad Company") has two tracks which cross this street at right angles and at grade. One of these tracks will hereinafter be called the freight track, and the other the scale track. The scale track is some eight or ten feet west of the freight track. On and prior to October 10, 1890, the Railroad Company kept a watchman at the intersection of these tracks with the street aforesaid, and had erected at or near the intersection of these tracks with said street a gong for the purpose of giving notice to persons travelling on said street of the approach of trains to said street on said tracks; and just west of the scale track had two head-lights with reflectors erected in such a manner that one of said reflectors would throw the light toward the east on said O street and the other toward the west on said O street. On and prior to the date aforesaid one Edward Pasby resided in that portion of Lincoln lying west of said scale track. And between 7 and 9 o'clock in the evening of said day, Pasby went into a saloon, situate some considerable distance—perhaps one-half mile—east of the freight track and purchased a bottle of whiskey. About 9 o'clock of the same evening Pasby was found dead under a freight car on the freight track some twenty rods south of the point where such track crosses said O street. This action was brought by Charles W. Spears, Pasby's administrator, against the Railroad Company for damages on the alleged grounds that Pasby's death was caused by the negligence of the Railroad Company. The Railroad Company had a verdict and judgment and the administrator prosecutes to this court a proceeding in error.

1. One of the errors assigned is that the verdict is contrary to the evidence. The theory of the administrator was and is that about 8 o'clock in the evening of said day Pasby was proceeding towards his home, walking west on the sidewalk on the north side of O street, when he was struck by a freight train backing south on the freight

track. He imputes to the Railroad Company negligence in the premises as follows:

(*a.*) That at the time Pasby was struck by the freight car on the freight track there was a train of cars standing on the scale track, which train obstructed the light of the reflector and left the sidewalk where Pasby was in complete darkness. If the jury had made a special finding that the Railroad Company on the evening of October 10, 1890, at any time between the hours of 7 and 9 o'clock of said evening had by a train of cars on the scale track shut off the light of the reflector from O street east of said scale track, it is very doubtful if the evidence in this record would support such special finding, and as the finding of the jury is in effect that the Railroad Company did not obstruct such light by a train on said scale track at said time we certainly cannot say that such finding is wrong under the evidence. If it be conceded that there was some evidence which tended to show that the Railroad Company, on the date and between the hours aforesaid, by cars on the scale track shut off the light from the reflector which would otherwise have lighted O street east of the scale track, still there is no evidence in the record which shows or tends to show that Pasby's death resulted from, or was contributed to by, such action of the Railroad Company in obstructing said light; and beyond all question we cannot say that the jury drew the wrong inference from the testimony before them on the subject. Whether the Railroad Company shut off the light at the time and in the manner contended by the administrator was for the jury, and if the jury found that the light was not shut off as claimed by the administrator, we cannot say the finding was wrong. If the jury was of opinion that the light was during a portion of the time specified shut off by the Railroad Company, then we cannot say that the jury was wrong in inferring or finding that the shutting off of said light did not contribute to the death of Pasby.

(*b.*) That the gongs at the intersection of said street and said railroad tracks were at the time of Pasby's death out of repair, and (*c*) that the watchman was not on duty at the time Pasby was killed. There is no evidence in the record that these gongs were out of repair, nor that the watchman was not on duty at the time Pasby was killed.

(*d.*) That the freight car under which Pasby was found dead was backed south on the freight track across O street without any warning being given by the watchman or signal by the gongs of its approach to the crossing, and without any lookout being on the car. No one testified on the trial of this case to having seen Pasby after he purchased the bottle of whiskey in the saloon until he was found dead under the car. In other words, there is no direct evidence whatever in the record that Pasby was walking or standing on the sidewalk on the north side of O street at the time he was struck by the car which killed him. Two witnesses testified that they were standing between the scale and the freight track on the north sidewalk on O street, or just off that walk, at the time the car, under which Pasby was found dead, was backed south across the north sidewalk of O street; that they had lanterns in their hands, and that they neither saw nor heard anything of Pasby or any other person on the freight track immediately east of them, or on the sidewalk which the tracks crossed; that the street, tracks and sidewalk in the vicinity of where they were standing were lighted up by the reflector referred to above, and by the lanterns carried by the witnesses; that there were two railroad employes standing on the south end of the car, under which Pasby was found dead, at the time it approached the north sidewalk of O street; that these employes had lanterns in their hands, and as the car approached the sidewalk crossing the men on top of the car saw the witnesses and spoke to them. The two men identified as standing on the south end of the car testified on the trial to being on the south end of the car at the time

it reached the north sidewalk on O street; that they had lanterns in their hands; that they neither saw nor heard Pasby nor any one else on the track or the north sidewalk in the vicinity where it was approached by the car, except the two witnesses, who were standing between the scale and freight tracks. Another witness, who rode down on the car, testified to substantially the same things as the four witnesses last mentioned. The evidence also showed that about the middle of O street a belt and hat, worn by the deceased, and a part of a whiskey bottle, identified as his, were found, and from the middle of the street down to where the deceased was found dead were evidences of his having been dragged by the car. One or two witnesses testified that they thought they saw some marks on the ground, or the planking covering the ground between the middle of O street and the north sidewalk, which indicated they had been made by dragging the deceased after he was struck. But there is in the record not a syllable of direct evidence that the deceased was struck by the car while on the sidewalk. Assuming, then, that at the time this car, under which Pasby was found dead, approached the north side of the north sidewalk on O street, that the gongs were not rung and the watchman gave no signal, we are asked to say that the foregoing evidence was such that the jury was compelled to infer that the failure to ring the gongs or the failure of the watchman to give the signal contributed to the death of Pasby; and we are also asked in this connection to say that the testimony of the five witnesses mentioned above was either false, or that, if true, the two who were on the look-out on the south end of the car were guilty of negligence in not seeing Pasby as he approached the freight track while he was walking on the sidewalk. It may be that the jury, from the evidence before it, would have been justified in inferring that Pasby was struck by the car while walking on the sidewalk across the freight track; that the failure of the flagman to see

him and notify him that a train was approaching was negligence; that the failure of the two men on the south end of the car to see him was the result of negligence. But this evidence and the legitimate inferences to be drawn therefrom were for the jury; and because the jury has drawn one inference rather than another from the evidence before them, we have not the right to substitute the inference we might draw from such evidence, had we been the triers, for the one made by the jury.

2. The first, second, third and fourth assignments of error in the petition in error relate to the giving of certain instructions by the trial court on its own motion. The alleged errors in giving these instructions are separately and specifically assigned in the petition in error; but in the motion for a new trial the assignment is that the court erred in giving all these instructions from the first to the seventh inclusive. As some of the instructions given were correct the assignment must be overruled. (*Omaha Street R. Co. v. Cameron*, 43 Neb., 297; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 473.)

3. The fifth assignment of error is that the court erred in refusing to give instruction number one asked by the administrator. That instruction is as follows: "First—There is some evidence that Edward Pasby met his death while walking on the sidewalk, where he had a right to be, and if you find that to be true, that is sufficient for the plaintiff's case. Therefore it is necessary for the defendant to free it from liability to account for his being there, and if there is no proof of it, and it is all a matter of conjecture, it follows that the deceased is presumed to have placed himself where he was killed without any want of ordinary care, and the defendant is liable for his death." As already stated, there is no direct evidence in this record that Mr. Pasby met his death while walking on the sidewalk. This is one reason why the court did not err in refusing to give the instruction; but there is a more serious

objection to this instruction. By it the court was in effect requested to instruct the jury that the mere fact that Mr. Pasby was found dead under a car raised the presumption that he came to his death through the negligence of the Railroad Company. This is not the law. If the evidence had shown that Pasby was struck by the car of the Railroad Company while he was walking on the sidewalk on O street across its freight track, the law would not presume that the act of Pasby in walking across the track was negligence which caused or contributed to his death; nor would the law presume that the striking and killing of Pasby while walking on the sidewalk across the freight track was the result of the negligence of the Railroad Company. In other words, the law does not presume that either party was guilty of negligence. Negligence is a cause of action or defense and must be proved by the party alleging it. If there is any presumption of law in such matters it is that all parties act with ordinary care; and such presumption continues until overthrown by evidence. The court did not err in refusing to give the instruction.

4. The sixth assignment of error is that the court erred in refusing to give the following instruction: "Where a person is in the proper exercise of a right, and is injured by the action of another, the presumption arises that the party causing the injury was guilty of negligence." What has already been said disposes of this assignment.

5. The seventh, eighth, ninth, and tenth assignments relate to the refusal of the court to give certain other instructions requested by the administrator. The alleged errors are specifically assigned in the petition in error, but in the motion for a new trial the assignment is that the court erred in refusing to give the instructions from the third to the eighth, both inclusive. The court did not err in refusing to give the fourth instruction of those under consideration for the reason that by it the court was requested to tell the jury that if the employes of the Railroad Company omitted

to do certain specified things that such omission was negligence which rendered the company liable for the death of Pasby. Whether a certain act or omission is or is not competent evidence of negligence is for the court, but whether such evidence convicts a party of negligence is for the jury. (*Missouri P. R. Co. v. Baier*, 37 Neb., 235; *American Water-Works Co. v. Dougherty*, 37 Neb., 373; *Omaha Street R. Co. v. Craig*, 39 Neb., 601.) The trial court could say to the jury that a certain act or omission of the employes of the Railroad Company was evidence of negligence for their consideration, but it was for the jury to say from all the facts and circumstances in the case whether such act or omission rendered the Railroad Company guilty of negligence; and since the court did not err in refusing to give the fourth instruction, and the assignment is that he erred in not giving all of them, the assignment must be overruled. The judgment of the district court is

AFFIRMED.

CITY OF AURORA V. MARGARET COX.

FILED FEBRUARY 5, 1895. No. 5042.

1. **Municipal Corporations:** STREETS. A municipal corporation is bound to keep its streets in a reasonably safe condition for public travel.
2. ——: ——. Whether or not a city has failed to perform such duty is generally a question of fact.
3. ——: ——: NEGLIGENCE: PLEADING. A petition sufficiently charges negligence against a city when it alleges facts from which a person may reasonably infer that the street was not kept in a condition reasonably safe for public travel. It is not necessary to state a cause of action that such inference should be a necessary one from the facts alleged in the petition. It is sufficient if it be a reasonable inference.

4. ——: ——: ——: ——: EVIDENCE. Therefore, where a petition charged that a city having more than 1,000 and less than 5,000 inhabitants constructed a cross-walk at one of the principal and most frequently traveled intersections, that said cross-walk was constructed of brick and stone, and that some of the stones were placed so that they projected to a height of two inches above the general surface, *held*, that the petition in this respect stated a cause of action and that a verdict founded upon evidence sufficient to establish such allegations was supported by the evidence.

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

A statement of the case appears in the opinion.

A. W. Agee and *Kellogg & Graybill*, for plaintiff in error, cited: 2 Dillon, Municipal Corporations, sec. 1006; *City of Aurora v. Pulfer*, 56 Ill., 270; *Raymond v. City of Lowell*, 6 Cush. [Mass.], 524.

E. J. Hainer, contra:

Two things must occur to support the action: (1) An obstruction or defect in the crossing by fault of the city; (2) no want of ordinary care to avoid it on the part of plaintiff below. (Buswell, Personal Injuries, sec. 164.)

By ordinary care is meant ordinary prudence, and this does not require a traveler to look far ahead for obstructions or defects which ought not to be suffered to exist. (Buswell, Personal Injuries, sec. 164; *Fuller v. Inhabitants of Hyde Park*, 37 N. E. Rep. [Mass.], 783; *Thompson v. Bridgewater*, 7 Pick. [Mass.], 188; *Palmer v. Andover*, 2 Cush. [Mass.], 600.)

A traveler has a right to assume the safety of a public way or sidewalk, and is not bound to be on the lookout for expected danger therein. (*Jennings v. Van Schaick*, 108 N. Y., 530; *Osborne v. City of Detroit*, 32 Fed. Rep., 36; *Gordon v. City of Richmond*, 83 Va., 436.)

Anything in the condition of the crossing which makes it unsafe or inconvenient for ordinary travel is a defect or want of repair. (Buswell, Personal Injuries, sec. 174.)

A plank projecting above the level of the way at a crossing is an actionable defect. (*Winn v. City of Lowell*, 1 Allen [Mass.], 177.)

A person traveling in a public street in the exercise of ordinary care has a right to be absolutely safe against accidents arising from obstructions or imperfections in the street. (*City of Lincoln v. Walker*, 18 Neb., 244.)

The repair of the crossing shortly after the injury is evidence that it was improperly constructed or out of repair. (*Osborne v. City of Detroit*, 32 Fed. Rep., 360.)

Where a town officer to whom notice may be given created a defect, notice is unnecessary. (*City of Lincoln v. Calvert*, 39 Neb., 305; *Buck v. Biddeford*, 82 Me., 437; *Holmes v. Town of Paris*, 75 Me., 559.)

It is the duty of a city to keep its streets in a reasonably safe condition. (*Blyhl v. Village of Waterville*, 58 N. W. Rep. [Minn.], 817.)

The condition of the crossing, as alleged in the petition and shown by the testimony, was such as to render the city liable. (*Sawyer v. City of Newburyport*, 157 Mass., 430; *Chilton v. City of Carbondale*, 160 Pa. St., 463; *Lichtenberger v. Town of Meriden*, 58 N. W. Rep. [Ia.], 1058; *Pool v. City of Jackson*, 23 S. W. Rep. [Tenn.], 57; *Patterson v. City of Council Bluffs*, 59 N. W. Rep. [Ia.], 63.)

IRVINE, C.

The defendant in error sued the plaintiff in error to recover for injuries sustained by defendant in error by falling on a street crossing which it was claimed had been negligently constructed. She recovered a verdict of $500, whereon judgment was rendered. The plaintiff in error relies on only two points to reverse the judgment. First, that the petition does not state a cause of action; and, sec-

ondly, that the evidence is not sufficient to sustain the verdict. The point urged against the sufficiency of the petition is that the facts alleged as to the condition of the cross-walk are insufficient to show that the city had failed to perform its duty of keeping the streets in a reasonably safe condition for public travel. It is not claimed that the petition is defective in any other particular. On this feature the petition alleged that the city had constructed cross-walks at the intersections of its streets, among them at the intersection of Central avenue with Third street, which streets were among the principal and most frequently traveled in the city; that this cross-walk "was constructed of stones and bricks, but the same was defectively, faultily, and negligently constructed in that the surface of said cross-walk was left very rough and uneven and a large number of stones, of which said cross-walk was constructed, were left projecting to a great, unusual, and dangerous height, to-wit, two inches above the general level of said cross-walk; that afterwards, and before the happening of the grievances herein mentioned, the defendant undertook to repair said cross-walk, and in repairing said cross-walk said defendant city caused a large number of bricks to be left lying loose upon the stones and general surface of said cross-walk, and near the line thereof, which said construction and repairing made said cross-walk uneven, difficult, and highly dangerous for foot passengers and other persons passing along, over, and across said cross-walk." The petition further alleged that the defect was known to the city and that Mrs. Cox, in passing along said walk, struck her foot against one of the projecting stones and was thereby thrown down, sustaining the injury complained of. The rule is settled that the measure of the city's duty in such cases is to keep its streets in a reasonably safe condition for public travel. (*City of Lincoln v. Smith*, 28 Neb; 762; *City of Lincoln v. Calvert*, 39 Neb., 305.) This rule is not controverted by counsel on either side. The objection simply

is that the allegations above referred to are insufficient to charge a neglect of this duty. It must be remembered that the basis of this action is negligence. While the city's duty is measured by a less stringent rule than in many other cases of negligence, still the failure to perform the duty is negligence, and the law applicable to other cases of negligence is applicable to this. The rule is well settled that in negligence cases the question of negligence is one for the jury whenever, from the facts proved, different minds may reasonably draw different conclusions as to the existence of negligence. It is not necessary, therefore, that from the facts stated in the petition the inference of negligence should be irresistible. It is sufficient if facts are alleged which, if proved, would justify the jury in inferring negligence. Where the general rule in cases of negligence is as above stated, the question as to whether a city has been negligent in the maintenance of its streets is a question of fact. (*Nebraska City v. Rathbone*, 20 Neb., 288; *Foxworthy v. City of Hastings*, 25 Neb., 133; *Lichtenberger v. Town of Meriden*, 58 N. W. Rep. [Ia.], 1058.)

The petition here charged that the cross-walk in question was at one of the principal and most frequently traveled intersections of the city; that it was constructed of stone and brick, and that some of the stones were left projecting to a height of two inches above the general level. We think that reasonable men would be perfectly justified in concluding that a cross-walk intended for the use of pedestrians at a principal crossing of a city having more than 1,000 and less than 5,000 inhabitants is not reasonably safe when some of the stones of which it is constructed project two inches above the general level. We do not think that this inference is necessary, but merely that it is a reasonable inference; and this being true, the allegation of such facts in a petition is a sufficient allegation of negligence. Counsel cite us to several cases which it is claimed conflict with this conclusion. In the case of the *City of Aurora*

v. Pulfer, 56 Ill., 270, there is some general language to the effect that to charge a corporation, the defect must be of such a character that one exercising ordinary prudence cannot avoid danger or injury, and such as cannot be readily detected. This language was not, however, used in any such case as the present. That case was where a man had been injured in climbing a fence constructed in the outskirts of a city at a point where it was doubtful whether a highway existed, and where the city had never undertaken to open and improve the highway if one in fact existed. In *Raymond v. City of Lowell*, 6 Cush. [Mass.], 524, a person was injured by a sewer grating which projected above the general level between the side walk and the carriage way at a point twelve feet from a public crossing. In Massachusetts the courts have always undertaken to treat negligence as a question of law where the facts are undisputed, and under that doctrine it was there held that the condition of the grading at such a point did not render the street unreasonably dangerous.

On the question of the sufficiency of the evidence, little need be said. There was evidence not only tending to sustain the allegations of the petition as to the condition of the cross-walk, but evidence tending to show a worse state of affairs than was alleged.

JUDGMENT AFFIRMED.

CITY OF CHADRON V. ELIZA J. GLOVER.

FILED FEBRUARY 5, 1895. No. 5025.

1. **Review**: RULINGS ON EVIDENCE: ASSIGNMENTS OF ERROR. To obtain a review of the rulings of the trial court on the admission and rejection of evidence, the petition in error must specifically designate the rulings complained of.

2. **Instructions**: EXCEPTIONS: REVIEW. This court will not review the action of the trial court in giving and refusing instructions, unless the record discloses an exception to the ruling complained of.

3. ——: ——: ——. The failure of the trial court to mark instructions "given" or "refused" cannot be complained of here unless an exception was specially taken in the trial court on the ground that the instructions were not so marked.

4. **Depositions**: RULING ON MOTION TO SUPPRESS. In September a deposition of a witness residing in a distant state was taken on behalf of the plaintiff on due notice, the defendant serving cross-interrogatories as provided by the Code. The officer who took the deposition, instead of transmitting it to the clerk, transmitted it to the plaintiff's attorney and the deposition was never filed. On December 3 plaintiff served another notice of the taking of the deposition of the same witness on December 20. No cross-interrogatories were served, and the witness was not cross-examined. *Held*, That the court properly overruled a motion to suppress the deposition based on the failure of the notary to propound the cross-interrogatories served on the former occasion.

5. **Practice**: PERSONAL INJURIES: EXAMINATION BY PHYSICIANS. Whether it is proper in an action for personal injuries for the court to appoint, on the application of the defendant, a commission of physicians to make a physical examination of the plaintiff, *quære*. If such action is proper, the application must be made before the trial commences.

6. **Review**: ASSIGNMENTS OF ERROR: MOTION FOR NEW TRIAL. An assignment in the petition in error that the court erred in overruling the motion for a new trial is too indefinite for consideration where the motion for a new trial assigns several different grounds therefor.

7. **Husband and Wife**: ACTION FOR PERSONAL INJURIES. The disability of a married woman to maintain an action in her own name was removed by the married woman's act, and she may maintain an action for personal injuries, recovering therein the damages by her sustained as distinguished from any sustained by the husband.

8. ——: ——: ESTOPPEL. Such right of action being her own she is not estopped by her husband's acts in regard thereto.

9. **Municipal Corporations**: SIDEWALKS: REPAIR. Where a city permits a sidewalk to be maintained beyond the sidewalk line as fixed by ordinance, and exercises control thereover, its duty is to maintain the whole walk in repair.

10. ——: PRESENTATION OF CLAIM FOR PERSONAL INJURIES. Section 80, chapter 14, Compiled Statutes, does not require a claim for personal injuries to be presented to the city council of a city of the second class as a condition precedent to maintaining an action.

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

Spargur & Fisher, for plaintiff in error.

Albert W. Crites and *C. Dana Sayrs, contra.*

IRVINE, C.

The defendant in error recovered a judgment against the plaintiff in error for $500, on account of injuries sustained by the defendant in error in consequence of falling on a defective sidewalk. Counsel in the brief discuss many questions relating to the evidence and to the instructions. The assignments of error are, however, of such a character that but few of these questions can be considered. The fourth, fifth, and sixth assignments of error are as follows:

"4. The court erred in admitting in evidence and in overruling the motion of defendant to strike out the testimony of Dr. A. Lewis, witness for plaintiff.

"5. The court erred in the admission of evidence upon behalf of plaintiff over the objection of defendant.

"6. The court erred in excluding evidence and exhibits offered by defendant."

Each one of these assignments is too vague to permit a review of the rulings of the court upon the evidence. To obtain such review the precise ruling complained of should be specifically pointed out. (*Lyman v. McMillan*, 8 Neb., 135; *Graham v. Harnett*, 10 Neb., 517; *Birdsall v. Carter*, 11 Neb., 143; *Cook v. Pickerel*, 20 Neb., 433; *Lowe v. City of Omaha*, 33 Neb., 587; *Kroll v. Ernst*, 34 Neb., 482; *Gregory v. Kaar*, 36 Neb., 533; *Farwell v. Cramer*,

38 Neb., 61; *Hanlon v. Union P. R. Co.*, 40 Neb., 52; *Cortelyou v. Maben*, 40 Neb., 512.)

The assignments relating to the instructions are as follows:

"7. The court erred in refusing to give the instructions requested by defendant and in neglecting to mark such instructions 'refused.'

"8. The court erred in giving the instructions upon his own motion and in failing to mark such instructions 'given.'

"9. The court erred in giving instructions asked by plaintiff and in neglecting to mark them 'given.'"

Such language is too indefinite unless the ruling of the trial court was erroneous as to all the paragraphs in each group. (*Birdsall v. Carter, supra; Hiatt v. Kinkaid*, 40 Neb., 178; *McDonald v. Bowman*, 40 Neb., 270; *Jenkins v. Mitchell*, 40 Neb., 664; *Murphy v. Gould*, 40 Neb., 728; *Armann v. Buel*, 40 Neb., 803; *Berneker v. State*, 40 Neb., 810; *Hewitt v. Commercial Banking Co.*, 40 Neb., 820.) Moreover, the record discloses no exception to any instruction given or requested. The failure to except prevents a review. (*Scofield v. Brown*, 7 Neb., 221; *Heldt v. State*, 20 Neb., 492; *Billings v. Filley*, 21 Neb., 511; *Chicago, B. & Q. R. Co. v. Starmer*, 26 Neb., 630; *Darner v. Daggett*, 35 Neb., 695; *American Building & Loan Association v. Mordock*, 39 Neb., 413; *Rector v. Canfield*, 40 Neb., 595.) Other cases might be cited on all the foregoing points. As to that part of the assignments of error which relates to the failure of the court to mark the instructions "given" or "refused," it is sufficient to say that no request was made to the court to so mark them, and no exception was taken to the failure of the court to do so. In the absence of an exception specially taken on the ground that the instructions are not so marked, the failure of the court in that particular cannot be complained of here. (*Omaha & Florence Land & Trust Co. v. Hansen*, 32 Neb., 449.)

The first assignment of error relates to the overruling of a motion of the plaintiff in error to suppress the deposition of one D. F. Van Lehn, and the second assignment is directed against the admission of the deposition in evidence. It seems from the proof offered in support of the motion to suppress and of the objection to the admission in evidence of the deposition, that a deposition of the witness was taken in Fair Haven, Washington, September 18, 1890, in pursuance of proper notice. On that occasion the defendant city had served cross-interrogatories as provided by section 378 of the Code of Civil Procedure. The notary, instead of transmitting the deposition to the clerk, transmitted it to plaintiff's attorney and the deposition was never filed. On December 3, 1890, another notice was served by the plaintiff to take the deposition of the same witness at the same place on the 20th of December, 1890, no cross-interrogatories were served, and the deposition then taken was the one received in evidence. The trial took place in April, 1891. The ground on which it was sought to exclude the deposition was that the defendant was entitled to the benefit of its cross-examination and that counsel supposed that the object of the second notice was merely to procure a copy of the deposition which had been missent and that the cross-interrogatories would be propounded to the witness. Counsel had no right to so suppose. The notice was to take a new deposition. Ample time was allowed for the city to make the necessary preparations. The statute provided a method of having cross-interrogatories propounded. The fact that a deposition had once before been taken which failed of its effect because not transmitted as the law required, did not justify the defendant in neglecting to follow the proper method of cross-examination when the second deposition was taken.

The third assignment is directed against the action of the court in overruling the motion of the defendant for an order appointing a commission of physicians to examine

the plaintiff for the purpose of ascertaining the extent of her injury. It has been twice intimated that it is within the power of the court to make such an order. (*Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578; *Ellsworth v. City of Fairbury*, 41 Neb., 881.) In each case, however, the court disclaimed the intention of deciding the question. It was not necessary in either of those cases and it is not necessary here. The record shows that the application was made during the trial. If the court was not justified on other grounds in overruling the motion it was justified in doing so because of the time when the motion was made. If such an application is proper under any circumstances, it must be made before trial. (*Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578; *Stuart v. Havens*, 17 Neb., 211.)

The only remaining assignments of error are the tenth and eleventh. The tenth is that the court erred in overruling the motion for a new trial. The eleventh, a more specific assignment, that the court erred in overruling the motion for a new trial in so far as it was based on the ground that the verdict was not sustained by the evidence and that it was informal. No informality in the verdict is pointed out in the briefs and that assignment will, therefore, be deemed as waived. The motion for a new trial assigned ten grounds, therefore the tenth assignment of error is too indefinite for consideration. (*Glaze v. Parcel*, 40 Neb., 732.) We can only, therefore, consider the action of the court with reference to the eleventh assignment in so far as it relates to the sufficiency of the evidence. One point urged is that the pleadings admit and the evidence shows that the plaintiff was a married woman, whence it is argued that the action not concerning her separate estate or her occupation it will not lie in her behalf. It has, however, been distinctly held that the married woman's act removes entirely the disability of a married woman to sue, and that she may maintain an action for personal inju-

ries, recovering therein the damages by her sustained as distinguished from any sustained by the husband. (*Omaha Horse R. Co. v. Doolittle*, 7 Neb., 481; *Pope v. Hooper*, 6 Neb., 178; *Omaha & R. V. R. Co. v. Chollette*, 41 Neb., 578.) It is also urged that it was shown that the plaintiff's husband at the time of the injury was a member of the city council and of its committee on streets and alleys, and was, therefore, one of the persons charged with the duty of maintaining the streets in proper repair. This being the wife's action for her own benefit these facts operate in no wise as an estoppel against her. It is also contended that the injury occurred at a point outside of the line of the sidewalk as established by ordinance. It would seem from the evidence that at this point a sidewalk about twelve feet wide existed extending from the outer line of the sidewalk elsewhere along the street, back to a rink used for public entertainments; while the ordinance provided for a sidewalk only four feet in width. It is uncertain whether the defect complained of was within the four feet or beyond it; but assuming that it was beyond the limit established by ordinance, still the evidence shows that the situation was much the same as in *Foxworthy v. City of Hastings*, 25 Neb., 133. At least it is clear that the whole formed a continuous walk, open to the public, and that the city had exercised control over the whole thereof. The city having permitted the sidewalk its duty to maintain the same is not affected by the fact that under its ordinance a narrower walk might have been erected. (*Foxworthy v. City of Hastings*, 25 Neb., 133; *Kinney v. Tekamah*, 30 Neb., 605.) It is still further urged that the action is at least prematurely brought because the plaintiff had filed a claim with the city which had not been acted upon when the suit was brought. Under the statute relating to cities of the class of Chadron, the total failure to present a claim of this character does not bar an action. (Compiled Statutes, ch. 14, sec. 80; *Nance v. Falls City*, 16 Neb., 85.) In all other

respects we think there is ample evidence to sustain the verdict, but a review of the evidence would be useless.

JUDGMENT AFFIRMED.

ANCIL L. FUNK V. SARAH A. LATTA ET AL.

FILED FEBRUARY 5, 1895. No. 6202.

1. **Real Estate Brokers:** COMMISSIONS. Evidence examined, and *held* sufficient to sustain the verdict
2. ———: ———. In an action by a real estate broker to recover on a special contract for procuring a purchaser, the contract having been made by one alleged to be the agent of the owner and the authority of the agent being one of the issues, the court properly refused an instruction stating that the plaintiff was entitled to recover if he was employed by the owner or some one acting for her without stating that such person must be authorized to so act.
3. ———: ———: EVIDENCE. Certain rulings on the evidence examined, and *held* not erroneous.

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

Atkinson & Doty, for plaintiff in error.

Webster, Rose & Fisherdick, contra.

IRVINE, C.

This was an action by Funk against the Lattas to recover $2,500 alleged to be due on a special contract for procuring a purchaser for property alleged to belong to both defendants, the title to which the evidence discloses was in Sarah Latta alone. The answers are general denials, and there was a verdict and judgment for the defendants.

The theory of the plaintiff on the trial was that he had been employed by Dr. Latta to procure a purchaser for the property known as the Latta Block in Lincoln at the price of $90,000, and that Dr. Latta had agreed to pay him $2,500 for such services; that he had interested one Simeon Brownell in the property, had introduced him to Latta, and that Simeon Brownell wished his son, Frank Brownell, to join him in the purchase; that accordingly Frank Brownell came to Lincoln and a contract for the purchase of the property was entered into between Dr. Latta and Frank Brownell; that in these matters Dr. Latta was the authorized agent of his wife, Sarah Latta, or if not originally authorized, that she had ratified his acts; that for the purpose of avoiding the payment of the commission she had afterwards refused to convey the property to the Brownells, but many months thereafter had conveyed it to J. H. McMurtry who soon after conveyed it to Frank Brownell and Jennie Brownell; that this circuitous method was adopted for the purpose of defeating the plaintiff in the recovery of his compensation. There is evidence tending to support this theory, but there is also evidence tending to show that Dr. Latta never entered into the contract sued upon by the plaintiff, but instead of that told the plaintiff in effect that he did not wish the property to go into the hands of brokers, but that if any one brought to him a person who actually purchased the property, then he would pay a commission. There is also evidence tending to show that while Dr. Latta, undoubtedly with Mrs. Latta's consent, exercised considerable control over the property, still that he was without authority to employ a broker to sell it. There is also evidence tending to show that Simeon Brownell and Frank Brownell were not able to complete the purchase on the terms proposed. There is also evidence tending to show that the property was heavily incumbered—a junior mortgage securing a note which McMurtry had endorsed to third persons; that the mort-

gages were being foreclosed, and that there was a number of mechanic's liens against the property; that in this state of affairs McMurtry bought the property from Mrs. Latta, assuming the incumbrances and, in addition thereto, discharging a judgment of about $8,000 which was a lien on other property owned by Mrs. Latta; that thereafter he entered into negotiations with Frank Brownell and that the sale finally made was an entirely distinct transaction, after the negotiations between the Brownells and Dr. Latta had been abandoned. There being these conflicts in the evidence it is not for us to decide whether the jury, in our opinion, resolved the evidence correctly. The verdict is sustained by the evidence.

Complaint is made of one instruction given by the court of its own motion, but no exception was taken to the giving of this instruction and the action of the trial court in that respect cannot, therefore, be reviewed.

The plaintiff requested three instructions, which were refused. The refusal of these instructions is assigned as error in the same manner as in *Hiatt v. Kinkaid*, 40 Neb., 178. If one instruction of the group was properly refused the assignment of error must fail. The first of these instructions was as follows: "The jury are instructed that if they find from the evidence that this plaintiff was employed or authorized to procure a purchaser for the Latta block by Sarah A. Latta, or some one acting for her, and if you further find that this plaintiff, acting under his employment, did find a purchaser for said property who was able and willing to purchase the property at a price named by the defendant, then the plaintiff is entitled to his commission and your verdict will be for the plaintiff." This instruction was objectionable because of the phrase "some one acting for her." It was not sufficient to bind Sarah A. Latta that the plaintiff should be employed by some one acting for her. It was necessary that that person should be authorized by her to so act or that she should afterwards

ratify his conduct. The question of authority and ratification was one of the principal questions litigated, and the instruction as requested was misleading.

A number of assignments relate to rulings on the evidence. These are referred to in the brief in the most general language, and such comment as there is, is only upon the exclusion of evidence. The questions to which it is claimed the court erred in sustaining objections relate to facts concerning Dr. Latta's agency for his wife. We will not review them in detail. One was asked in the redirect examination and the objection was made for that reason. It was clearly not proper redirect examination. Other objections were properly sustained because the questions were asked in cross-examintion and were not pertinent to the subject-matter of the examination in chief. Several questions were objectionable as calling for conclusions. For instance, the following was put to the witness, Frank Brownell: "Did Dr. Latta act as the agent of his wife in the transaction with you respecting the sale of the Latta block?" No error in the record has been pointed out and the judgment of the district court is

AFFIRMED.

JAMES EDMONDS V. STATE OF NEBRASKA.

FILED FEBRUARY 6, 1895. No. 6808.

1. **Attorneys' Fees for Conducting Defense of Indigent Prisoner: ALLOWANCE.** When the district court appoints counsel under section 437 of the Criminal Code, to conduct the defense of an indigent prisoner, the claim of such attorney for services rendered in the case in the trial court and in this court should be presented to the district court for examination and allowance.

2. ——: ——. The supreme court is without authority to examine and allow the account or claim for such services.

APPLICATION by plaintiff in error to the supreme court for an allowance for fees of his attorney for service rendered in said court in the case reported in 42 Neb., 684. *Denied.*

John A. Rooney, for plaintiff in error.

NORVAL, C. J.

In the district court of Otoe county an information was filed charging the defendant with the commission of a felony. Upon a proper affidavit being filed showing that the accused was unable, by reason of poverty, to employ counsel, the district court appointed John A. Rooney, Esq., to appear for and defend the prisoner, who accepted the appointment and conducted the defense. At the trial the plaintiff in error was convicted of grand larceny and sentenced to imprisonment in the penitentiary. To reverse the judgment and sentence error was prosecuted to this court, where the judgment of the district court was reversed, the opinion in the case being reported in 42 Neb., 684.

At the present term a motion has been submitted by plaintiff in error that a reasonable allowance be made to Mr. Rooney for his services in the cause in this court. The question is presented whether we have any authority to make such allowance. Section 437 of the Criminal Code is in the following language:

"Sec. 437. The court before whom any person shall be indicted for any offense which is capital, or punished by imprisonment in the penitentiary, is hereby authorized and required to assign to such person counsel, not exceeding two, if the prisoner has not the ability to procure counsel, and they shall have full access to the prisoner at all reasonable hours; and it shall not be lawful for the county clerk or county commissioners of any county in this state to au-

dit or allow any account, [bill,] or claim hereafter presented by an attorney or counsellor at law for services performed under the provisions of this section, until said account, bill, or claim shall have been examined and allowed by the court before whom said trial is had, and the amount so allowed for such services certified by said court; *Provided*, That no such account, bill, or claim shall in any case, except in cases of homicide, exceed one hundred dollars."

The foregoing is the only statute in force in this state which provides for the assignment and payment of counsel for defendants in prosecutions for felonies. The section limits its application to defendants charged either with capital crime or with offenses which are punishable by imprisonment in the penitentiary, and then only where they are unable to employ and pay counsel. The law authorizes the court before whom the indictment is pending to assign such counsel; and it provides that the bill or account for such services shall be "examined and allowed by the court before whom such trial is had," and the amount so allowed for such services must be certified by said court before the county board is empowered to audit and pay said claim. A trial upon an indictment or information can be had only in the district court. It is therefore the province of that court to examine and allow the claim for services rendered by counsel appointed under the provisions of said section 437. The certificate of the court is not conclusive on the county board, but is *prima facie* evidence that the amount allowed for such services by the district court is just and correct. (*County of Boone v. Armstrong*, 23 Neb., 764.) The section under consideration, neither in express terms, nor by implication, confers authority upon this court to audit claims for services of an attorney rendered in this court in defending an indigent prisoner. The bill for such services should be presented for examination and approval to the trial court. The motion is

OVERRULED.

GEORGE H. WILSON V. STATE OF NEBRASKA.

FILED FEBRUARY 6, 1895. No. 7166.

1. **Fraudulent Removal of Mortgaged Property: INFORMATION.** In an information under section 10, chapter 12, Compiled Statutes, for fraudulently removing mortgaged property out of the county, it is unnecessary to aver that the mortgage was in writing. The allegation that the defendant "duly mortgaged and thereby conveyed" meets the requirements of said section.

2. ———: ———. In such a prosecution it is not necessary to set out in the information the mortgage *in hæc verba*, nor to aver the amount of the indebtedness the mortgage was given to secure.

3. ———: ———. It is sufficient in such an information to allege that the mortgaged property was fraudulently removed from the county where the same was situated at the time the mortgage was given thereon, with the intent to deprive the owner of said mortgage of his security, without avering that the owner of the mortgage was the owner of the debts thereby secured.

4. ———: ———. In the prosecution for the removal of mortgaged property contrary to the provisions of the statute the value of the property at the time of the removal need not be alleged in the information, nor proved upon the trial.

5. ———: ———. *Held*, That the information set out in the opinion charges a criminal offense.

6. ———. Under the statute, the gist of the offense for which punishment is therein prescribed is the fraudulent removal of mortgaged personal property out of the county with the intent to deprive the owner of the mortgage of his security. The mortgagor who fraudulently removes from the county any portion of the mortgaged chattels, during the existence of the lien or title created by the mortgage, is equally amenable to the provisions of the law as the mortgagor who so removes the entire property mortgaged.

7. **Criminal Law: REVIEW.** In order to review alleged errors occurring during the trial of a criminal case such errors must be pointed out to the trial court in the motion for a new trial and a ruling obtained thereon.

ERROR to the district court for Burt county. Tried below before AMBROSE, J.

H. E. Carter, for plaintiff in error.

A. S. Churchill, Attorney General, for the state.

NORVAL, C. J.

Plaintiff in error was convicted in the district court of Burt county of removing mortgaged property out of the county, with intent to deprive the owners of the mortgage of their security. At the commencement of the trial the defendant objected to the introduction of any evidence, on the ground that the information does not charge a crime, which objection was overruled, and an exception was taken by counsel for the prisoner. This ruling is assigned as error.

The information, after the usual formal averments, sets forth the charge against the prisoner in the following terms: "That George H. Wilson, late of the county aforesaid, did, on the 15th day of November, A. D. 1894, in the county of Burt and state of Nebraska, aforesaid, duly mortgage and thereby convey to Monroe and Stauffer, said Monroe & Stauffer being a partnership composed of Henry W. Monroe and Samuel W. Stauffer, and no others, the following personal property, to-wit: One bay mare named Nell, age seven years, weight about 1,000 pounds, diamond brand on shoulder; one bay mare named Minnie, aged six years, weight about 750 pounds, branded W on right shoulder; and that afterwards, to-wit, on the 26th day of November, 1893, during the existence of the lien and title created by said mortgage, and without the knowledge or consent of said Monroe & Stauffer, or said Henry W. Monroe or said Samuel W. Stauffer, or either of them, or any of them, unlawfully, willfully, and feloniously did remove, permit, and cause to be removed said mortgaged

property out of Burt county, where said property was situated at the time the said mortgage was given thereon, with the fraudulent intent of him, the said George H. Wilson, unlawfully and feloniously to deprive said Monroe & Stauffer, and each of them, of their security, said Monroe & Stauffer then and there being the owners of said mortgage." The statute on which the prosecution is founded, section 10, chapter 12, Compiled Statutes, declares: "That any person who, after having conveyed any article of personal property to another by mortgage, shall during the existence of the lien or title created by such mortgage, remove, permit, or cause to be removed, said mortgaged property, or any part thereof, out of the county within which such property was situated at the time such mortgage was given thereon, with intent to deprive the owner or owners of said mortgage of his security, shall be deemed guilty of felony, and on conviction thereof shall be imprisoned in the penitentiary for a term not exceeding ten years, and be fined in a sum not exceeding one thousand dollars."

It is first urged by counsel for plaintiff in error that the information is insufficient, in that it fails to allege the mortgage was in writing. It is unnecessary to decide whether the provisions of the statute under which the information is founded extend only to written chattel mortgages, but assuming, for the purposes of this case, that the section does not extend to or comprehend mortgages which are merely verbal, we are nevertheless of the opinion the averment in the information that the plaintiff did "duly mortgage and thereby convey," etc., is sufficient, and would authorize the introduction in evidence of a written mortgage. This allegation must be construed to mean that the defendant executed such a mortgage as is contemplated by the statute. It was not necessary to set out in the information the mortgage *in hæc verba*. The statute does not require such particularity in charging the offense. Unreasonable strictness should not be required in criminal

pleadings. If an information plainly charges a crime, and informs the accused what act of his is complained of, it is sufficient.

It is next insisted that the information is fatally defective and insufficient in not alleging that the mortgage was given to secure a valid indebtedness. This is hypercritical and untenable. The section we have been considering defines the offense which it creates. It contains all the elements which the law-makers saw fit to require should exist to constitute the crime. A mortgage must have been made conveying personal property to another, and the mortgagor must have removed, permitted or caused to be removed some portion of the property out of the county where it was situated when such mortgage was given thereon, during the existence of the lien or title created by the mortgage, with the intent to deprive the owner of his security. The crime is complete when all these things occur. Mr. Bishop, in his work on Criminal Procedure (vol. 1, sec. 611), says: "To the extent to which the statute defines the offense, leaving the rest, if anything, to the common law, it is ordinarily adequate, while nothing less will in any instance suffice, to charge the defendant with all the acts within the statutory definition, * * * substantially in the words of the statute, without further expansion." The doctrine laid down by this eminent author is sound law as well as good sense. The failure to allege the indebtedness which the mortgage was given to secure does not invalidate the information.

It is contended the information fails to state a crime for the reason that it does not allege that Monroe & Stauffer were the owners of the mortgage debt. It is averred that they were the owners of the mortgage at the time the property was removed, which complies with the terms of the statute.

Further objection is made to the information because it does not charge or show that the property removed had any

value at the time of the removal. The punishment in no manner depends upon the amount or value of the property. In that respect the law differs materially from the statute relating to larceny. In a prosecution for larceny in this state, where the value of the property is an essential element of the offense, it is necessary to allege some specific value of whatever property is charged to have been stolen. The reason of the rule is, that it is indispensable to conviction to prove the value of the property; since the decree of punishment depends on the value of the stolen property, it is essential that the value be proved on the trial and found by the jury to guide the court in fixing the punishment. It being essential to be proved, it is necessary that the value be averred in the information. But this rule does not apply to the case before us, since the punishment for the fraudulent removal of mortgaged chattels is not controlled by the value of the property removed. The presumption is that the property described in the information possessed some value at the time of the removal, unless the contrary is shown. If upon the trial it should be established that the property had no value the prosecution would end. It was not necessary for the state in the first instance to offer evidence on the question of value, hence it was not essential to have alleged the value of the property in the information. In some of the states it has been held that in prosecutions for the sale or removal of mortgaged property, the value of the property must be alleged in the indictment and found by the jury. But this rule obtains only in those states where the degree of punishment is determined by the value of the property sold or removed. (*Commonwealth v. Strangford*, 112 Mass., 289.) It has been repeatedly decided that in a prosecution for larceny it is unnecessary to aver in the indictment the value of the thing alleged to be stolen, when the statute makes the stealing of the particular article a crime without reference to its value. (1 Bishop, Criminal Procedure, secs.

541, 567; *Shepherd v. State*, 42 Ala., 531; *State v. Daniels*, 32 Mo., 558; *People v. Townsley*, 39 Cal., 405; *State v. Burke*, 73 N. Car. 83; *State v. Gallespie*, 80 N. Car. 396; *Lopez v. State*, 20 Tex., 780; *Davis v. State*, 40 Tex., 134; *Collins v. State*, 20 Tex. App., 197; *Green v. State*, 21 Tex. App. 64; *Sullivan v. State*, 13 Tex. App., 462; *People v. Stetson*, 4 Barb. [N. Y.], 151.) In our opinion the information in the case at bar charges an offense against the law of the state, and the court did not err in overruling the prisoner's objection to the admission of testimony thereunder. The views here expressed render unnecessary a consideration of the point that there was no proof introduced on the trial of the value of the property alleged to have been removed.

It is urged that the evidence fails to sustain a conviction, for the reason that there was no proof that the removal of the property impaired the security of the mortgagees. It was shown upon the trial that a portion of the mortgage debt had been paid prior to the commission of the acts charged in the information, and that the wagon, the remaining property described in the mortgage, had been increased in value by painting and other repairs. The contention of plaintiff in error is that no criminal liability exists under the statute in removing mortgaged property, where the mortgagor leaves at the disposal of the mortgagee sufficient property covered by the mortgage to fully liquidate the indebtedness. This position is unsound. The gist of the offense is the fraudulent removal with the intent to deprive the owner of the mortgage of his security. The fact that mortgagor was solvent, or had other property than that described in the mortgage from which the mortgagees could have collected their debt, or that the wagon was ample security for the claim, can make no difference. The mortgagees were entitled to have satisfaction out of the specific property on which their mortgage was a lien. By the fraudulent removal of a portion of the property

mortgaged, the value of their security was lessened. The mortgagor who fraudulently removes from the county a portion of the mortgaged chattels is equally amenable to the provisions of the law as the mortgagor who so removes the entire property mortgaged. No other reasonable interpretation can be placed upon the statutes. The language of the section is "remove, permit or cause to be removed, said mortgaged property, or any part thereof, out of the county," etc.

Objection is made to the ruling of the trial court in permitting the officer who made the arrest to testify what the prisoner said to him at the time. This evidence was stricken out by the court as soon as given. We cannot reverse the judgment because of the admission of this testimony, since the point was not passed upon by the trial court. A motion for a new trial was duly filed, but no ruling was ever had thereon in the lower court, hence, the decisions made during the progress of the trial cannot be considered by this court. (*Dillon v. State*, 39 Neb., 92.) There being no reversible error in the record, the judgment is

AFFIRMED.

UNION PACIFIC RAILROAD COMPANY v. WILLIAM J. KNOWLTON.

FILED FEBRUARY 6, 1895. No. 5606.

1. **Railroad Companies: DUTY TO FENCE TRACKS: DAMAGE BY KILLING STOCK.** Every railroad corporation in this state is required to fence its tracks, except at the crossings of public roads and highways and within the limits of towns, cities, and villages.

2. ——: ——. A point one mile distant from the nearest depot grounds not within the limits of any city, town or village, re-

mote from any railroad or highway crossing, and not necessary for use in making up trains, although occasionally used for such purpose, is not within the exception mentioned.

3. ——: ——. *Chicago, B. & Q. R. Co. v. Hogan*, 27 Neb., 801, and 30 Neb., 686, distinguished.

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

Harwood, Ames & Pettis, for plaintiff in error.

Stevens, Love & Cochran, contra.

POST, J.

This is a petition in error from the district court of Lancaster county, and presents for review a judgment of the district court for that county, whereby the plaintiff below, defendant in error, recovered for the value of a cow killed by the engine of the defendant railroad company.

The collision, which was the occasion of the controversy, occurred at a point about midway between the limits of the city of Lincoln and the village of West Lincoln, and about three-quarters of a mile distant from each place. About half a mile south east from the point in question the defendant's track is crossed by that of the Missouri Pacific Railroad Company. But between the crossing mentioned and West Lincoln it is not intersected by any railroad track, or any road or highway. Nor has the defendant any side tracks or switches between the Missouri Pacific track and West Lincoln. The jury were advised that the only question for their consideration was whether the track was fenced at the point where the collision occurred. But as it is conclusively shown that the track was not fenced at any point between the city of Lincoln and West Lincoln, the charge was practically a direction to find for the plaintiff. It will be perceived from the foregoing statement that the salient question was whether the defendant was required to fence its track at the point where the collision occurred.

On the part of the defendant it was contended that such point is within the actual limits of the Lincoln yard, that the said track was in constant use in the making up of trains, and that the fencing thereof would be dangerous to employees.

It is provided by law (Comp. Stats., sec. 1, art. 1, ch. 72): "That every railroad corporation whose line of road or any part thereof is open for use shall, within six months after the passage of this act, and every railroad company formed or to be formed, but whose lines are not now open for use, shall, within six months after the lines of such or any part thereof are open, erect and thereafter maintain fences on the sides of their said railroad or the part thereof so open for use, suitably and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages," etc.

In the *Chicago, B. & Q. R. Co. v. Hogan*, 27 Neb., 801, and 30 Neb., 686, it was held that a railroad company was not required to fence its station yard where the larger part thereof is within the limits of a city, and the part which extends beyond the city limits adjoins a platted addition thereto, and is in constant use by the company's servants in the transaction of the business as a common carrier. That case, although relied upon with apparent confidence by the railroad company, is not authority for the proposition contended for. The tracks therein mentioned were, to all intent and purpose, within the city, and were for that reason clearly within the spirit of the exception. As remarked by Judge NORVAL on the rehearing, 30 Neb., 686: "To have fenced that part of the depot grounds not within the city limits would have required the construction of cattle guards and wing fences across these grounds. * * * Such guards within station grounds could not be otherwise than exceedingly dangerous to those whose duty it is to attend to the switching of cars. * * * It is not believed that

the legislature contemplated or intended that a railroad company should fence that part of its station grounds extending outside of the limits of a city, town, or village, when such grounds are necessary for the proper transaction of its business as a common carrier."

It is conclusively shown that the defendant's depot grounds are situated more than a mile distant from the point of the collision. Nor is there in the record any evidence tending to prove that the use of the track between Lincoln and West Lincoln was necessary in the making up of trains, or that the facilities afforded by the tracks within the yard limits were insufficient for that purpose. The most that can be claimed by the defendant is that it is convenient for it to use the track in question in making up its trains and that it was occasionally used for that purpose. The legislature could not have intended the provision of the exception above noted to include tracks outside of the limits of cities, towns, and villages, remote as is this one from the depot grounds and side tracks and not necessary for use in making up trains. It follows that the defendant company was required to fence its track at the point where the collision occurred and that the judgment should accordingly be

AFFIRMED.

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

FILED FEBRUARY 5, 1895. No. 5138.

1. **Absconding Debtors:** ATTACHMENT. In a legal sense, a party absconds when he hides, conceals, or absents himself clandestinely with the intent to avoid legal process. *Gandy v. Jolly*, 34 Neb., 536, followed.

2. **Attachment:** SUFFICIENCY OF AFFIDAVIT: CONSTRUCTIVE SERVICE: VENUE. An affidavit filed in an action before a jus-

tice of the peace to obtain the issuance of a writ of attachment, contained the allegation "that said defendants have absconded with intent to defraud creditors," and the summons issued in the case was returned indorsed "I could not find the defendants within my county," with signature of the officer. *Held*, That the action was properly instituted in the county of the debtor's former residence and where property could be levied upon, and that constructive service was warranted and proper under the facts as they then appeared in the case.

3. **Finding and Judgment: Entry:** ATTACHMENT: JUSTICE OF THE PEACE. A finding by a justice of the peace, in an attachment suit, of the sum due plaintiff, an assessment of plaintiff's recovery, and an order of sale of the attached property, is but a judgment in form against defendants, and where the only relief sought is to subject the attached property to the payment of the debt, is sufficient as an entry, both in form and in substance, and is not void.

4. **Notary Public:** CERTIFICATE TO AFFIDAVIT: EVIDENCE. The certificate of a notary public to an affidavit is presumptive evidence of the facts stated in such certificate, including the statement that affiant signed the affidavit.

5. **Exemptions:** SUFFICIENCY OF CLAIM: DUTY OF SHERIFF: HOLDING LEVY. It is without the province of an officer holding property under levy of writ, pending sale by order of the the court in attachment proceedings, to question the validity or sufficiency of a schedule and affidavit, made according to the provisions of the statute governing such proceedings, and filed by the attachment debtor for the purpose of setting aside the property levied upon as exempt.

6. EXECUTIONS: FAILURE OF SHERIFF TO CALL APPRAISERS: DAMAGES. Where personal property is seized under an execution or writ of attachment against a debtor who has neither lands, town lots, nor houses subject to exemption, and an inventory under oath is made and filed by such debtor, as provided by section 522 of the Code, it is the duty of the officer holding the writ to call appraisers to determine the value of the property, and the neglect or refusal of the officer to do so will not deprive the debtor of his exemptions, but he may sue for the value of the property. (*Bender v. Bame*, 40 Neb., 521.)

7. **Sheriffs and Constables:** ACTION FOR SELLING EXEMPT PROPERTY: EVIDENCE. Where in an attachment case the defendant files the inventory under oath prescribed by statute to avail himself of the exemptions allowed by section 521 of the

Code, and the officer holding the writ fails or refuses to cause the property to be appraised and allow the debtor to select therefrom such property and to the value as the law provides he may, but sells the same regardless of the application for the exemption, in an action by the debtor against the officer, to recover the value of the property, the inventory and its accompanying affidavit are competent evidence to prove the facts they were intended to show within the scope and intent of the law providing for them, and the purpose for which they were formed.

8. ——: ——: ——. The verdict in this case *held* to be against the weight of the evidence and manifestly wrong.

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

There is a statement of the case in the opinion.

Dryden & Main, for plaintiffs in error:

The failure to file an affidavit for publication deprived the justice of the peace of jurisdiction and his judgment was void. (Maxwell, Justice Practice [ed. 1889], 330; Code, secs. 59, 60, 78, 932; *Blair v. West Point Mfg. Co.*, 7 Neb., 147.)

Had the justice of the peace acquired jurisdiction, no valid personal judgment based upon constructive service could have been rendered. (*Smith v. Griffin*, 59 Ia., 409; *Lutz v. Kelly*, 47 Ia., 307.)

When the exemption affidavit was filed it was the duty of the officer holding the writ to call appraisers and set aside the exempt property. (Code, sec. 522; *People v. McClay*, 2 Neb., 9; *State v. Cunningham*, 6 Neb., 92; *State v. Wilson*, 31 Neb., 462.)

Greene & Hostetler, contra:

The judgment was not void because of a failure to file an affidavit for publication. (*State v. Rankin*, 33 Neb., 266; *Paine v. Mooreland*, 15 O., 444; *Parker v. Miller*, 9 O., 114; *Mitchell v. Eyster*, 7 O., 257; *Voorheese v. Jackson*, 10 Pet. [U. S.], 449.)

HARRISON, J.

The plaintiffs commenced an action in the district court of Buffalo county, alleging in the petition filed therein that they were husband and wife, residents of the state of Nebraska; and that M. R. Smith was the head of a family; that on or about June 11, 1889, they were the owners and in possession of certain goods and chattels, a list of which was attached to the petition, from which it appeared that it was composed almost entirely of household furniture, etc., and all of the value of $137.10; that on or about said 11th day of June, 1889, N. H. Johnson instituted an action against the plaintiffs herein, before one William K. Learn, a justice of the peace of said county, and caused to be issued a writ of attachment, under and by virtue of which E. A. Cutting, at the instance and request of said N. H. Johnson, seized the property of plaintiffs as hereinbefore described; that no service of summons, or other service, was ever had upon plaintiffs herein (defendants in the attachment case) in such action, but that such proceedings were had in that case that, on the 25th day of July, 1889, a pretended judgment was rendered against the plaintiffs herein; that the same was wholly void, for the reason that the court had acquired no jurisdiction over the persons of these plaintiffs (defendants in said suit); that after the rendition of said judgment, M. R. Smith, one of the plaintiffs herein, filed in the office of William R. Learn, the justice of the peace before whom such judgment was obtained, an inventory and affidavit, filed with the petition, marked "Exhibit A," claiming all of the property hereinbefore described exempt from sale under execution or attachment proceedings; "that afterwards, and on or about the 25th day of August, 1889, the said defendant E. A. Cutting, by and at the request of the said N. H. Johnson, proceeded to sell the property by virtue of a pretended order of sale issued by the said Wm. R. Learn. The plaintiffs charge

the fact to be that neither of the said plaintiffs herein was the owner of any land, town lots, or houses subject to an exemption as a homestead, and the property so levied upon and sold as aforesaid was specifically exempt from attachment, and that said defendants herein have by virtue of the proceedings hereinbefore set forth obtained possession of said goods and chattels and unlawfully and wrongfully converted them to their own use, to the damage of the plaintiffs in the sum of $137.10. Wherefore the said plaintiff prays for judgment against the said defendants for the sum of $137.10, with interest from the 11th day of June, 1889, at seven per cent per annum, and for costs of suit."

The answer of the defendants was as follows: "Come now the said defendants, and for answer to complaint herein, say that the property described in said petition was seized by an order of attachment by a court of competent jurisdiction and went to final hearing and said attachment was, upon due consideration of said court, sustained and an order of sale of said property issued in due form, and said property was under said order of sale duly sold, or at least a part thereof. Defendants deny each and every allegation in said complaint not herein admitted, and ask to go hence with their costs." There was a reply filed denying each and every allegation of new matter contained in the answer. A trial of the issues before the court and a jury resulted in a verdict for the defendants, upon which, after a motion for new trial was heard and overruled, judgment was entered, and the plaintiffs bring the case here for review. The affidavit filed in the case before the justice of the peace, to obtain the issuance of the writ of attachment, contained the following, with other statements as grounds therefor: "He also makes oath that said defendants have absconded with intent to defraud their creditors."

From the record of the proceedings in the case before the justice of the peace, introduced in evidence in this action,

it appears that summons was issued and returned indorsed: "I could not find the defendants within my county. E. A. Cutting, Constable;" that the writ of attachment was duly served by seizing the property described in the petition in the case at bar. The case was continued for the forty days prescribed by law, and service was had by publication, and on the day set for hearing judgment was entered against the plaintiffs, the entry of the same being as follows: "July 25, 1889, 9 o'clock A. M., the cause came on for hearing upon the bill of particulars and the evidence, on consideration whereof I find that there is due from the defendant to the plaintiff the sum of $18.27. It is therefore considered by me that the said N. H. Johnson recover from the said M. R. Smith and Mrs. M. R. Smith the said sum of $18.27 and his costs herein expended, taxed by me at $13.85, and the constable is ordered to advertise and sell in the manner provided by law so much of the property heretofore attached as will satisfy said judgment and costs." Immediately following this entry, as shown by the transcript of the docket, follow these statements: "July 25, 1889, defendants filed motion and affidavit to discharge property exempt. August 10, 1889, at plaintiff's request, issued order of sale and gave same to Constable Cutting;" and it further appears that the attached property was sold, the proceeds therefrom amounting to $67.85.

It is argued by attorneys for plaintiffs that the judgment in this case was void for two reasons: First, no affidavit was filed setting forth the facts necessitating service by publication; second, no personal judgment could be or should have been rendered, based upon constructive service. With reference to the first of these objections it will suffice to say that in the affidavit for attachment in the case before the justice it was alleged that the debtor had absconded with intent to defraud his creditors, and by the return of the officer to the summons issued in the case it was disclosed that the defendants in the action could not be found

in the county. Combined, these facts constituted a basis warranting or authorizing constructive service. "To abscond means to go in a clandestine manner out of the jurisdiction of the courts, or to be concealed in order to avoid their process; to hide, conceal, or absent oneself clandestinely with intent to avoid legal process." (*Bennett v. Avant*, 2 Sneed [Tenn.], 153; *Hoggett v. Emerson*, 8 Kan., 262; *Ware v. Todd*, 1 Ala., 200; *Fitch v. Waite*, 5 Conn., 121.) "In a legal sense a party absconds when he hides, conceals, or absents himself clandestinely with the intent to avoid legal process." (*Gandy v. Jolly*, 34 Neb., 536, and citations in the opinion on page 539.) "A party may abscond, and subject himself to the operation of the attachment law against absconding debtors, without leaving the limits of the state." (*Field v. Adreon*, 7 Md., 209.) In *Gandy v. Jolly* it was held in regard to the commencement of an action, similar to the one instituted against plaintiffs herein, before the justice of the peace: "An ordinary action must be brought in the county where the defendant resides, or service of summons can be made upon him; but where a debtor absconds, and an attachment is issued against his property, the action may be brought in the county of his former residence, and where the debtor's property may be found." Section 932 of the Code provides as follows: "If the order of attachment is made to accompany the summons, a copy thereof, and the summons shall be served upon the defendant in the usual manner for the service of a summons, if the same can be done within the county, and when any property of the defendant has been taken under the order of attachment, and it shall appear that the summons issued on the action has not been, and cannot be, served on the defendant in the county, in the manner prescribed by law, the justice of the peace shall continue the cause for a period of not less than forty days, nor more than sixty days, whereupon the plaintiff shall proceed for three consecutive weeks to pub-

lish in some newspaper printed in the county, or if none be printed therein, then in some newspaper of general circulation in said county, a notice stating the names of the parties, the time when, by what justice of the peace, and for what sum said order was issued, and shall make proof of such publication to the justice, and thereupon said action shall be proceeded with the same as if summons had been duly served." Coupling the rules of law as decided by the courts (this and others), and their interpretation of the legal signification of the terms "abscond," or "absconding," as applied to a debtor by our law governing the subject of attachment, with the provisions of section 932, just quoted, and applying them to the facts in this case, fully answer the objection that no affidavit was filed with the justice, setting forth the necessary facts to call for service of publication. The attachment affidavit described the debtor as an absconding one, and the return of the officer to the summons showed that service could not be had in the county. This was sufficient to warrant the constructive service of which the plaintiffs complain.

In regard to the second objection, viz., that no personal judgment could or should have been rendered, and that the remedy afforded should have been confined to a finding of the amount due, and an order subjecting the property to sale, and applying the proceeds to the payment of the debt, it appears, by reference to the entry which the justice did make, hereinbefore quoted, that he made a finding of the sum due the plaintiff in the action, assessed the amount of the plaintiff's recovery, and ordered the sale of the attached property. This was but a judgment in form against the defendants in the suit, and the only relief sought was to subject the attached property to its payment, and for this purpose, as an entry, it was sufficient, both in form and in substance. If void or inoperative in any part or to any degree, it was in its validity as a judgment against the debtors personally, and as no attempt was or is being made

to so enforce it or to further enforce it than against the property over which the court had obtained jurisdiction by the writ of attachment, its validity or force as a personal judgment against the debtor is not involved, and need not be considered.

It is further insisted by the plaintiffs that, inasmuch as they had filed with the justice of the peace an inventory of all the property owned by them, and claimed the same as exempt, it should have been appraised, and if found to be of less value than $500, returned to them, and this not having been done, this action against the defendants herein, for conversion of the property, arose in their favor. Sections 521 and 522 of the Code, under head of "Exemptions," read as follows:

"Sec. 521. All heads of families who have neither lands, town lots, or houses subject to exemption as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of five hundred dollars in personal property.

"Sec. 522. Any person desiring to avail himself of the exemption as provided for in the preceding section must file an inventory, under oath, in the court where the judgment is obtained, or with the officer holding the execution, of the whole of the personal property owned by him or them at any time before the sale of the property; and it shall be the duty of the officer to whom the execution is directed to call to his assistance three disinterested freeholders of the county where the property may be, who, after being duly sworn by said officer, shall appraise said property at its cash value."

M. R. Smith, one of the plaintiffs herein, filed an inventory, as required by section 522 above quoted, with the justice before whom the attachment case and proceedings therein were had. It is contended by attorneys for defendants that there was no proof that the signature to the affidavit filed with the justice was Smith's signature. The

certificate of the notary public before whom the affidavit was made was presumptive evidence of the genuineness of the signature. (Compiled Statutes, ch. 61, sec. 6.) It is further insisted that the schedule of the property and statements made in the oath thereto were not evidence of the facts therein contained. The facts set forth in the inventory and affidavit were so arranged and sworn to in compliance with the provisions of the statute relating to the subject as a condition precedent to the appraisal of the property, and its purpose was to furnish sufficient evidence of the facts embodied therein to require the officer to act, and cause the property to be appraised, and when filed it was not within the province of the officer to question its validity or the correctness in matter of substance relating to the merits of the application. In the case of the *State v. Cunningham*, 6 Neb , 92, it is said: "The officer cannot question the correctness of the inventory. If the debtor has real estate which is exempt under the homestead law, or other personal property than that contained in his list, such personal property is liable to be seized for his debts, and he may be prosecuted for perjury. But when an inventory, under oath, is made by the debtor and filed with the officer holding the execution or order of attachment, he must call appraisers to ascertain the value of the property seized." (See, also, Waples, Homestead & Exemption, 854; *Douch v. Rahner*, 61 Ind., 64.) The inventory and oath, possessing the force and strength as testimony indicated by the statute, being that upon which the appraisal proceedings were to be based, and the property selected not to exceed the value of $500 to be delivered to the party making and filing the same, were, we think, competent evidence of the facts which they were intended to prove. (*In re Harris*, 22 Pac. Rep. [Cal.], 867.) The presumption of the genuineness of the signature attached to the oath, and the evidence of the facts contained in the inventory, and the affidavit verifying it, were not controverted by any of the evidence,

and this being true, the verdict of the jury was against the weight of the evidence, and in fact clearly and manifestly wrong and without testimony to sustain it.

It is now the firmly established rule in this state that "Where personal property is seized under an execution against a debtor who has neither lands, town lots, nor houses subject to exemption, and an inventory, under oath, is made and filed by such debtor, as provided by section 522 of the Code, it is the duty of the officer holding the writ to call appraisers to determine the value of the property, and the neglect or refusal of the officer to do so will not deprive the debtor of his exemptions, but he may sue for the value of the property." (*Bender v. Bame*, 40 Neb., 521; *Hamilton v. Fleming*, 26 Neb., 240; *Cunningham v. Conway*, 25 Neb., 615; *Schaller v. Kurtz*, 25 Neb., 655; *Kriesel v. Eddy*, 37 Neb., 63.) We mean to be understood by our statement that the oath and inventory are competent evidence in such a case as is the one now under consideration, that when proof has been made of the judgment and the issuance of the writ of execution, or the commencement of an action and issuance of attachment process therein and the levy of either writ as the case may be and seizure of the property thereunder, or these facts have been admitted as in this case, and the plaintiff (claimant in the exemption proceedings) produces an inventory and the oath thereto sufficient in form and substance to meet the requirements of our Code in relation to such papers, he can introduce them in evidence, and when introduced they establish that he had done all that the law required of him to entitle him to the appraisal provided by statute, and to receive from the officer holding the writ the property seized and held thereunder, or a portion thereof not exceeding in value the sum of the statutory exemption; and this being sufficient to entitle him to demand the property from the officer, we think is, or should be when coupled with proof or admission of the further facts of the sale of the property and ap-

propriation of the proceeds, sufficient, in the absence of any evidence contradicting or controverting, or tending so to do, the statement contained in the oath and inventory, to entitle him, in an action of conversion against the officer and other parties who have taken part in the proceedings or knowingly shared in the funds derived from the sale of the property, to a verdict and judgment for the value of the property so appropriated to the extent of the exemption. If this is not true, then the officer, by refusing to proceed with the appraisal or to deliver the property to the claimant when the necessary oath and inventory have been filed, can force the claimant into court, cause him the expense of the lawsuit and probable loss of the property accorded him by statute without such suit because he is unable to attend or for some reason may not be able to produce the testimony required to prove the facts, the burden of proof of which would be forced upon him. This would clearly be a violation of the spirit and intent of the exemption provisions of the law. Furthermore, the view we have herein expressed does not in any degree change the relative rights of the parties to the contract which created the indebtedness. The creditor did not, or could not depend upon the exempt property as ever being available for the payment of the debt or grant the credit with any such object in view. Hence he is placed in no worse position than he assumed by his own choice at the time of the creation of the debt. It follows that the judgment of the district court must be reversed and the case remanded.

REVERSED AND REMANDED.

J. FRANK BARR V. FRANK B. KIMBALL ET AL.

FILED FEBRUARY 6, 1895. NO. 5024.

1. **Review:** JUDGMENT NON OBSTANTE VEREDICTO. Where a motion was made for a judgment *non obstante veredicto*, but the record does not disclose that such motion was submitted to the judge of the trial court and his ruling obtained thereon and an exception taken thereto if adverse, there is nothing presented by the record for the consideration of a reviewing court.
2. **Landlord and Tenant:** FRAUD: DAMAGES: RECOUPMENT: CANCELLATION OF LEASE. A lessee who was induced to make a lease by the fraudulent statements of the lessor may, in an action by the lessor for rent due, recoup the amount of any damage he may have suffered by reason of such fraud and misrepresentation; or, if he has fully paid the rent, recover the damages in an action instituted for such purpose; or, on discovering the falsity of the representations made by the lessor, may rescind the contract of lease; that is, he may have his election of remedies or of courses to pursue.
3. **Damages:** LEASE: FALSE REPRESENTATIONS. In the case at bar the defendants were induced by the statements of the lessor in regard to the premises to make a lease for, and to occupy them for use in, a particular business, and there being sufficient evidence to sustain a finding of the jury that such representations were false and known to be so when made by the party making them, and without the knowledge of the lessees, and relied upon by them, and one of the results being necessarily the removal of the parties and the business from the premises to another location, *held*, there might be recovered as damages the actual, unavoidable expenses of such removal.

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

W. Henry Smith, for plaintiff in error.

R. D. Stearns, contra.

HARRISON, J.

In the petition in this case it is stated that on or about June 22, 1887, one W. G. Pitman leased to defendants for

a term of three years, commencing with that date, the east one-half of lot No. 3, in block No. 88, in the city of Lincoln, Nebraska, and the first floor and basement of building thereon, the rent to be $40 per month, payable in advance, of which it was claimed $160, or rent for four months, was past due and unpaid. There was a further statement that the plaintiff, after such leasing, became the owner of the leased premises by purchase from Mr. Pitman. The answer of defendants was as follows:

"The above named defendants appearing in the above action and for their answer to the plaintiff's petition herein say:

"1. That they deny the same, each and every allegation thereof, except what is hereinafter specially admitted.

"2. For a second and further answer the said defendants allege that on or about the 22d day of June, 1887, in writing, they, the said defendants, rented the premises mentioned in said petition herein, viz., the first floor and basement and lot situate on M street, in Lincoln, Nebraska, for the term of three years, of one W. G. Pitman, the owner of said premises, for a marble factory and stone business, and that they, the said defendants, were to use the basement of said building as a shop; that for the purpose of inducing these defendants to rent said premises for the purpose aforesaid he recommended said building and alleged that said building and basement was a good and substantial building, perfectly dry and safe in all respects and well adapted to said business, including said basement, at which time said Pitman well knew that it required a good strong building for said business; that said defendants, relying thereon, and believing the said statements and representations to be true, they being unable to see the east wall of said building, did then and there agree to pay said Pitman the sum of $40 per month for the use of said premises, which lease is made a part hereof; that thereupon, and shortly thereafter, they moved in said building and commenced to use said base-

ment as a workshop, but that shortly thereafter they were compelled to abandon the same on account of defective drainage and water; that said statements made by said Pitman as aforesaid were false and untrue, all of which he well knew, and were made for the purpose of misleading these defendants, and that thereafter he, the said Pitman, agreed to repair said basement and fit the same for said defendants' business, but which he never did, and on account thereof compelled said defendants to build a shop in the back yard of said premises, which shop cost to exceed the sum of $50, and said basement became useless, to defendants' damage of $200.

"3. For a further answer said defendants allege that in the spring of 1889 said plaintiff purchased said property of said Pitman, subject to the right of said defendants; that in May, 1889, the building on the east side of said store building was moved away, thereby exposing to view the east side of said store building, and these defendants then and there for the first time discovered the same to be in a very dangerous condition, and very unsafe for said business, the said wall being sprung out, and also discovered that the statements and representations made by the said Pitman as aforesaid were false and untrue, and these defendants charge and allege the fact to be that he well knew the same to be false and untrue when he made the same as aforesaid; that thereupon, and after these defendants discovered the condition of said building, they notified said plaintiff, calling his attention thereto, and also notified the fire warden of said city of the condition of said building; the said fire warden condemned said building and ordered and directed said plaintiff to forthwith repair and place the same in a proper and safe condition, all of which said plaintiff promised and agreed then and there to do; but he, the said plaintiff, neglected and refused to repair said building and place the same in a safe and proper condition; that from time to time said defendants called said plaintiff's at-

tention to said wall and building and insisted he should repair the same or they would be compelled to move therefrom on account thereof, as their said business required a safe and strong building; that said plaintiff refused to place said building in a safe condition and these defendants, at great expense, were compelled to move therefrom on account of the dangerous condition of said building, and by reason thereof and the false statements aforesaid were put to an expense and damage of over $200, and were compelled to pay out for moving exceeding the sum of $100, and also suffered damage and laid out and expended the sum of $50 in building the workshop aforesaid; and the defendants allege that upon their moving as aforesaid the said plaintiff took possession of said building and proceeded to occupy the same. Wherefore these defendants demand judgment for the damages aforesaid, against said plaintiff, in the full sum of $350, over and above all claims and offsets, with costs of this action."

The reply of plaintiff was a general denial. There was a trial before the court and a jury. The verdict of the jury contained a finding for the plaintiff in the sum of $174, and for the defendants in the sum of $120.20, and assessing the amount of plaintiff's recovery at the difference between the two sums, or $53.80. The plaintiff filed a motion for new trial, which was overruled, and judgment rendered in accordance with the verdict for the plaintiff, to reverse which he has prosecuted error proceedings to this court.

One assignment of error much insisted upon by attorney for plaintiff in error in the brief filed is that the court erred in overruling the motion of plaintiff for judgment *non obstante veredicto*. It appears from the record that such a motion was filed after the verdict was returned, and a copy of it is contained in the transcript, but the record is silent as to whether it was ever presented or brought to the attention of the trial court and its ruling obtained

thereon and an exception taken thereto. In the absence of anything in the record as to the action of the trial judge upon this motion, there is nothing before us in regard to it for consideration.

It is further argued on behalf of plaintiff that the matters stated in defendants' answer, and the testimony in support of them, were insufficient to constitute a defense to plaintiff's complaint or cause of action. The answer is probably informal and not very clear in its statements. The plaintiff made no effort to have these faults, if any exist, corrected in the manner and at the time when the law contemplates such correction should be made, but filed a reply and thus waived any objections to any informality of the allegations of the answer and put in issue all things which were sufficiently set forth therein, however objectionable in form or arrangement and the issue of the misrepresentations made to induce the defendants to enter into the lease, and the damages resulting therefrom were fairly raised by the pleadings. The testimony on the major number of the points involved in the issues was conflicting, but was amply sufficient to sustain the findings of the main elements of the defense. The knowledge of the lessor, of the manner in which the building was erected, both as to material and workmanship and of its defects and lack of strength and substantiality to fit it for the purpose of the defendants in the due course of the business in which they desired to occupy it, and of which purpose he was specifically informed by them; of his representations of such fitness and adaptability and of the falsity of such representations and the damages resulting to defendants therefrom; and the jury having passed upon the evidence and by their verdict announced a conclusion drawn therefrom, in accordance with a well established rule of this court we will not reverse or disturb it.

It is further contended that the law will not allow a recovery in favor of defendants upon the state of facts devel-

oped in this case. The rule is thus stated in 3 Sutherland, Damages [1st ed.], p. 174: "If there was fraud or misrepresentation by the landlord in making the lease, by which the lessee suffered damage, he may recoup therefor in an action for rent." The rule was recognized and applied in *Pryor v. Foster*, 130 N. Y., 171. The facts were that the defendant in the action leased to the plaintiff a house in the city of Buffalo for a certain term, representing that the furnace in the house was a good one and would heat the house so that it would be comfortable for persons therein and only consume eight or ten tons of coal per year; that eight tons would be enough if the weather during the winter was moderate, and ten tons if a cold winter. The decision was based upon the alleged falsity of the representations and the damages resulting to plaintiff (the lessee) therefrom, who it appears had fully paid the rent; and it was held that a tenant who has leased a house on the false representations of the landlord that the furnace would heat the house, does not, by payment of rent, waive his right to sue the landlord for damages sustained on account of such false representations. In Bigelow, Fraud, 184, it is said: "It is well established that if a party, with knowledge that a fraud has been perpetrated upon him in a particular transaction, confirm the transaction by making new agreements or engagements respecting it, or by retaining and using the subject of it after knowledge, or otherwise recognize it as binding, he thereby waives the right to treat it as invalid, and abandons his right to rescind if it be a case of contract, or to redress if it be a tort not attended with a contract with the wrong-doer. If the fraud result in a contract, performance of the same, after discovering that it was fraudulently obtained by the opposite party, does not preclude a person from suing for damages on account of the fraud. The injured party may retain the benefits of the contract, confirm its validity, and still recover damages for the fraud by which he was induced to make it; or he may recoup

any damages which he has sustained, if the opposite party sue him for money due on the contract or for other failure to perform it." It may be said that the defendants were not entitled to recover the damages they were given by the jury, which, under the evidence, must have been mainly, if not entirely, composed of the expenses of the removal of the stock of stones and monuments and the business, the necessary tools, and equipments, etc., to another location, but where, as in this case, the parties were, by the matters complained of, forced to leave or abandon the premises as in the case of an eviction, to which it practically amounted, and such abandonment being caused by the false and fraudulent representations of the lessor, and the natural, ultimate result of the fraud on his part, it seems but just and right that the defendants should be allowed to recover them. (See Field, Damages, p. 423, sec. 516, citing *Wilson v. Raybould*, 56 Ill., 417.) The judgment of the district court is

AFFIRMED.

JOHN W. GILLESPIE v. DEIDRICH SWITZER.

FILED FEBRUARY 6, 1895. No. 6047.

Executions: SALE UNDER DORMANT JUDGMENT: COLLATERAL ATTACK. A sale on an execution issued upon a dormant judgment is merely voidable, and neither such sale, nor the title acquired thereunder, can be assailed in a purely collateral proceeding.

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

Davis & Hibner, for plaintiff in error:

Execution sale of real estate is not justified under a dormant money judgment. (*Hervey v. Edens*, 6 S. W.

Rep. [Tex.], 306; *Barron v. Thompson*, 54 Tex., 235; *Norton v. Beaver*, 5 O., 178; *Miner v. Wallace*, 10 O., 403; *Bassett v. Proetzel*, 53 Tex., 569; *Deutsch v. Allen*, 57 Tex., 89; *Smith v. Dickson*, 9 Ga., 400; *Moseley v. Sanders*, 76 Ga., 293; *Hoskins v. Helm*, 14 Am. Dec. [Ky.], 133; *Godbold v. Lambert*, 70 Am. Dec. [S. Car.], 192; *Stone v. Gardner*, 20 Ill., 304.)

The same rule applies to judgments at law and decrees in equity. (*Cooms v. Jordan*, 22 Am. Dec. [Md.], 236.)

Harwood & Ames, contra:

A levy and sale under a dormant judgment is not void, but merely voidable; and such sale cannot be attacked collaterally. It is sufficient, until vacated by direct proceedings. (*Hinds v. Scott*, 11 Pa. St., 19; *Brown's Appeal*, 91 Pa. St., 485; *Yeager v. Wright*, 112 Ind., 230; *Martin v. Prather*, 82 Ind., 535; *Eddy v. Coldwell*, 31 Pac. Rep. [Ore.], 475.)

RYAN, C.

This action was brought in the district court of Lancaster county to recover possession of a certain described tract of land, together with rents which had accrued during its alleged detention. A jury was waived, and, upon a trial had, there was a judgment in favor of the defendant. Both parties claimed title through George H. Baker, who in 1873 owned the real property with reference to which this suit was begun. On September 13 of the year last named the property was mortgaged by Baker to Sloss & Smith. On the 20th day of April, following, Baker conveyed the aforesaid property to Luther L. Pease. Sloss & Smith began a foreclosure proceeding under their mortgage in September of 1874, and a final decree was entered on December 1 thereafter. By *mesne* conveyance plaintiff herein was vested with such interest as had been held by Pease, and on the claim that he was the owner of the property he

sought to recover it from the defendant, who, in his own behalf, insisted that he held the superior title. The questions urged arose out of the fact that although Sloss & Smith obtained their decree of foreclosure on December 1, 1874, there was issued no order of sale for its enforcement until January 19, 1880,—a period of over five years. As the title of defendant was derived through proceedings under said order of sale, the validity of these proceedings are questioned, because they were had under a decree for the enforcement of which no process had issued for a continuous period of more than five years previous to the issue of the aforesaid order of sale. An ordinary judgment for the recovery of money only, it is conceded by the defendant, would become dormant under the circumstances stated by virtue of the provisions of section 482 of the Code of Civil Procedure, but it is urged that there exists a clear distinction in this respect between a decree and a judgment of the character indicated. The effect of section 2 of the Code of Civil Procedure, it is asserted by plaintiff, was to abrogate all distinctions between actions at law and suits in equity. Possibly, this may be correct, and it is possible that in section 1105, Code Civil Procedure, the provision that the words "decree should mean judgment" has a direct bearing upon this proposition. It is not necessary, however, to determine this question, for, if it should be conceded for the sake of the argument that the position of the defendant is correct, there would then arise the question whether a sale under an execution issued upon a dormant judgment is absolutely void or merely voidable. Plaintiff insists that such a sale would be void, and, therefore, that it might, as in this case, be collaterly attacked, while the defendant, with equal tenacity, contends that the sale would at most be but voidable, and that, therefore, no question of its validity could be tolerated in a collateral proceeding.

In *Hinds v. Scott*, 11 Pa. St., 19, this question was discussed in the following language: "As between debtor

and creditor the land of the former is as accessible to the latter in payment of his debt as would be a horse or any other personal chattel, and a complaint that either species of property was applied in discharge of an unrevived judgment is entitled to equal favor. The question in this aspect of it has nothing to do with the lien of the judgment. It is simply a question whether the property of a debtor is liable to be sold in satisfaction of an execution issued against him. It would be strange, indeed, if, in Pennsylvania, such a debtor, seized of real estate, could hold his creditor at arm's length until he had revived his judgment under the act of 1798. True, there ought regularly to be a *sci. fa. post annum et diem;* but this is equally necessary where the object is the seizure of personalty. It is objected that there is none such here. Had this objection been made by the defendant in proper time the execution against him must have been set aside. But it is an irregularity insufficient to avoid the sheriff's sale, and, therefore, cannot be taken advantage of in this collateral proceeding. Indeed, it lies only in the mouth of the defendant himself to take the exception in proper time, for he may choose to, and frequently does, waive the writ of *sci. fa.* It is intended for his personal protection. Should he choose to suffer his land to be sold by execution without it, neither he, nor those claiming under him, can afterwards be permitted to call in question the validity of the sale; more especially this cannot be done, as is here attempted, in a collateral action of ejectment. (*Vastine v. Fury*, 2 Serg. & R. [Pa.], 426; *Bailey v. Wagoner*, 17 Serg. & R. [Pa.], 327; *Spear v. Sample*, 4 Watts [Pa.], 373.)"

In *Yeager v. Wright*, 112 Ind., 230, it was said: "The validity of a judgment, for the purpose of having execution upon it, is not impaired because, by the expiration of ten years, it has ceased to be a lien upon real estate. This was practically, as well as correctly, settled by the case of *Martin v. Prather*, 82 Ind., 535. The doctrine that an execu-

tion issued on a dormant judgment, without a revival or leave of court, is not void, but only voidable against direct proceedings to have it set aside or annulled, was also reaffirmed in that case. On that subject see, also, the cases of *Mavity v. Eastridge*, 67 Ind., 211, and *Richey v. Merritt*, 108 Ind., 347."

This question was fully considered in *Eddy v. Coldwell*, 23 Ore., 163, with the same result reached in the cases above cited.

In *Gerecke v. Campbell*, 24 Neb., 306, there was presented but one question, and that was the right of a debtor to recover back a payment which he had made upon a dormant judgment. The language used by Judge COBB, in illustrating the views of this court, is so apposite to our present subject of inquiry that it may profitably be reproduced. He said: "Section 29 of Herman on Executions—an authority cited by counsel for defendant in error—is devoted to the discussion of the validity of executions on dormant judgments. I quote from the text: 'The consequences of issuing an execution after a year and a day are the same as the consequences of a premature issue. The writ is voidable, but not void. The defendant may take proceedings to have it set aside. If he interposes no objection to the irregularity, others cannot do so for him. Even he cannot attack it collaterally, and a levy and sale made under it are sufficient to transfer his title.' To this the author cites twenty-nine American and English cases. Most of these I have examined, and found to fully sustain the text."

The views above expressed meet our approval, and this conclusion dispenses with the necessity of examining other questions urged. The judgment of the district court is

AFFIRMED.

WILLIAM A. WOODWARD, APPELLANT, V. WILLIAM A. PIKE ET AL., APPELLEES.

FILED FEBRUARY 6, 1895. No. 6391.

Judgment: INJUNCTION TO RESTRAIN COLLECTION: GROUNDS. A court of equity will not enjoin the enforcement of a judgment at law unless it appears that plaintiff had at the time of the rendition of such judgment a valid defense, and, if the relief prayed could have been afforded upon due application under section 602, Code Civil Procedure, relating to new trials, it must, in addition, be satisfactorily shown that by reason of fraud or circumstances beyond the control of plaintiff he has been prevented from availing himself of the provisions of the aforesaid section.

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

Ricketts & Wilson, for appellant.

H. J. Whitmore, contra.

RYAN, C.

This action was brought by the appellant in the district court of Lancaster county for the purpose of enjoining the collection of a judgment previously rendered in said court in another cause wherein appellee Pike had been plaintiff and appellant and Woodward had been defendant. The suit wherein the judgment complained of was rendered was commenced before a justice of the peace of Lancaster county. From a judgment of date July 6, 1892, in favor of Woodward, Pike appealed to the district court aforesaid, and on August 4, immediately following, filed his transcript therein. As this was within thirty days from the rendition of judgment the jurisdiction of the court last named duly attached. The appellant Pike did not within twenty days thereafter, as required by statute, file a peti-

tion; indeed this petition was not filed until September 22, 1892. After having filed his petition, by leave of court, plaintiff gave no notice thereof to defendant, but on December 23, 1892, took judgment against him by default. On January 26, thereafter, the defendant learned of the existence of said judgment and began this action to enjoin its collection. The practice sanctioned by this court probably required that upon the filing of this petition out of time the defendant should have had some sort of notice thereof before judgment was entered against him. (*Cockle Separator Co. v. Clark*, 23 Neb., 702; *Arnold v. Badger Lumber Co.*, 36 Neb., 841; *Schultz v. Loomis*, 40 Neb., 152.) While the practice pursued was irregular, the court was not without jurisdiction. The provisions of section 602 of the Code of Civil Procedure afforded ample means of redress for irregularities in proceedings, and for such unavoidable casualty or misfortune as had prevented a defense. There was no evidence offered in this case which even remotely indicated that the defendant had had no opportunity of availing himself of the provisions of the section just referred to. There was charged in the petition in this case no such acts of omission or commission as would justify the assumption that fraud had been practiced in procuring the judgment assailed. The failure of the complainant to avail himself of the means clearly given him by statute for the redress of his alleged grievances, does not entitle him to ask that a court of equity in a purely collateral proceeding shall supply another remedy. (*Young v. Morgan*, 13 Neb., 48; *Gould v. Loughran*, 19 Neb., 392; *Proctor v. Pettitt*, 25 Neb., 96; *Lininger v. Glenn*, 33 Neb., 188; *Petalka v. Fitle*, 33 Neb., 756.) This action was therefore properly dismissed by the district court, and its judgment is

AFFIRMED.

MILTON L. TRESTER, APPELLANT, V. WILLIAM A. PIKE ET AL., APPELLEES.

FILED FEBRUARY 6, 1895. No. 6049.

1. **Creditor's Bill: HUSBAND AND WIFE: DISMISSAL.** In an action to subject to the payment of her husband's debts real property held by the wife, a finding sustained by sufficient evidence that the said property was wholly acquired by means legally and equitably belonging to the wife, justified the district court in dismissing the action in so far as said property was concerned.

2. ——: ——: ——. In an action for the subjection of real property held by the wife to the payment of her husband's debts, findings sustained by the evidence, that the purchase price of said property was in part paid with the wife's own means, that there was failure of proof that the conveyance to the wife was for the purpose of defrauding creditors of her husband, and that said husband was at the time of the trial the owner of property in the county wherein the said trial was progressing, fully justified the dismissal of plaintiff's action.

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

Ricketts & Wilson, for appellant.

H. J. Whitmore, contra.

RYAN, C.

Appellant, having obtained judgments against William A. Pike in the county court of Lancaster county, commenced this action in the district court of said county to subject to the payment of said judgments certain real property in Germantown, Seward county, and also a certain lot in the city of Lincoln, of which property the ownership was in the wife of W. A. Pike.

One question urged is as to the competency of oral evidence to show that the judgment defendant owned property

subject to execution in the face of a return by the sheriff *nulla bona*. The testimony on this point was elicited by appellant's cross-examination, so that he has no proper standing to question its admissibility. Without passing upon the right of the appellant to subject in the Lancaster county district court real property situated in Seward county, it is needful only to say that the finding of the said district court that the property in Germantown was wholly acquired by means legally and equitably belonging to the wife was amply sustained by the evidence, and that, therefore, in any event it could not be subjected to the payment of the debts of her husband. There was a finding that the Lincoln lot had been acquired by $200 of the means of Hannah M. Pike, in whose name the title was taken and that the remainder of its value was paid with the means of her husband, W. A. Pike. There was also a finding that the evidence failed to show that the property described in the petition was conveyed to Hannah M. Pike with intent to defraud the creditors of the defendant William A. Pike. A careful reading of all the evidence convinces us that this finding was correct. It was also found by the court that W. A. Pike, at the time of the trial, had property in Lancaster county in his own name. This finding was predicated upon the following question and answer which are found in the cross-examination of defendant W. A. Pike: "Q. You never had any property of your own in Lincoln or in Nebraska? A. Yes, sir; I have. I have got it now. I will tell you where it is if you want to know." The question was as to the existence of property in Nebraska and also as to property in Lincoln. Probably the court construed this as an inquiry as to the existence of property in Lincoln, and on that understanding of it made the finding which was made as to the existence of property in that city. So much might be implied by a single inflection or by the emphasis of a word that we cannot say that the finding in question was not sustained

by the evidence,—meager though it was. It must, therefore, be accepted as sufficiently established by proof, first, that there was no evidence of an intent to defraud the creditors of W. A. Pike by the conveyance to his wife of the Lincoln property, and, second, that W. A. Pike was the owner of property in Lancaster county in his own name at the time it was attempted to subject to the payment of his debts the property held by his wife. The district court, upon the facts specially found, properly adjudged that there was no equity in the petition of plaintiff and thereupon dismissed his action. Its judgment is, therefore,

AFFIRMED.

ISAAC H. STRAWBRIDGE ET AL. V. W. G. SWAN.

FILED FEBRUARY 6, 1895. No. 6086.

1. **Real Estate Brokers:** COMMISSIONS: EMPLOYMENT: INSTRUCTIONS. In an action to recover for services alleged to have been rendered by plaintiff, a real estate agent in effecting an exchange of defendant's property, the jury were properly instructed that it was incumbent upon plaintiff to show by a preponderance of the evidence that defendant had employed plaintiff to act as his agent in the matter as to which compensation was claimed.

2. ———: ———: ———: ———. In an action of the character indicated the instruction that a man had the right to sell or trade his own property, and that if defendant acted for himself in the matter and did not employ plaintiff as his agent to procure him a customer, plaintiff could not recover for the alleged services, *held*, correctly to state the law, in view of the issues and of the proofs thereunder.

3. ———: DUAL EMPLOYMENT: COMMISSION. A real estate agent who has acted for both parties to an exchange of property can recover compensation only when his services have been limited to bringing together such parties as, without his interference,

have agreed upon an exchange of the property with reference to which such agent procured them to meet; and even this limited right to compensation does not exist as against a party who in advance did not know of and assent to the agent's dual employment. Following *Campbell v. Baxter*, 41 Neb., 729.

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

Adams & Scott, for plaintiffs in error, cited: *Butler v. Kennard*, 23 Neb., 357; *Anderson v. Cox*, 16 Neb., 10; *Lockwood v. Halsey*, 41 Kan., 166.

Leese & Starling, contra, cited: *Sherwin v. O'Connor*, 24 Neb., 603.

RYAN, C.

Plaintiffs in error, by their petition filed in the district court of Lancaster county, claimed a commission of $112.50 for having, as real estate agents and brokers, effected an exchange of defendant's real property. The answer was a denial of each averment of the petition, and as the issues thereby presented will be sufficiently apparent from the general discussion of the questions argued, a fuller description of the pleadings is deemed unnecessary. There was a verdict for the defendant, and the complaints of the plaintiffs in error in this court are: First, of the requirement made by the second instruction, that the evidence should show that plaintiffs had been employed as defendant's agent; and, second, because the court in its fifth instruction charged the jury that a man had the right to sell or trade his own property, and that if in making the trade the defendant acted for himself and did not employ plaintiffs as his agents to procure him a customer, the plaintiffs could not recover. It is possible that an attempt to condense the argument on these propositions might do it an injustice. We therefore quote from the brief on file the following language: "To tell the jury that they must find that the defendant employed the

plaintiffs to procure a customer is putting it too strong, and then to follow it by saying that if the defendant acted for himself in the matter, which could be understood by the jury in no other light than in the matter of the trade, or the actual making or consummating the trade, is certainly prejudicial to the plaintiffs' cause of action. A real estate agent is entitled to the commission agreed upon for exchanging real estate placed in his hands if the terms of the exchange are accepted by the owner, as the obligation to pay the commission then becomes fixed." In the petition the right to compensation was dependent upon the averments "that on or about the 12th day of August, 1891, the defendant was the owner of certain real estate in Hamilton county, Nebraska, and that on or about said time he placed the same in the hands of the plaintiffs to sell or trade for him, and that on the 12th day of August, 1891, he signed and delivered to plaintiffs a memorandum in writing of which the following is a copy:

"'I, W. G. Swan, will give my equity in my farm in Hamilton county, Nebraska (mort. $1,200), for the following property: House and lot 7, blk. B. & S. Add., mort. $450; lot No. 8, B. & S. Add.; lot No. 6, blk. No. 1, Madison Square; lots 1 and 2, blk. 39, G. M. B. Add. to University Place.

"'I accept the above proposition, land being as reprerented. CHAS. ROBERTSHAW.

"'STRAWBRIDGE & CULBERTSON, (*Agents*).

"'Swan to have oat crop on land, giving Robertshaw my interest in corn on said land, plaintiffs paying interest to date. W. G. SWAN.'

"Whereby he agreed that plaintiffs should sell and exchange said property for him for the property in said writing mentioned, and according to the terms of said writing."

On the face of the contract above set out it would appear that in signing it Messrs. Strawbridge & Culbertson

assumed to act as the agents of Charles Robertshaw. The language which followed the copy of the contract charges, however, that such was not the effect of the instrument, but that it amounted to an agreement on the part of Swan that plaintiffs should sell and exchange his property. If this was what was really done, this memorandum should have been left out of consideration, for it in terms was only a proposition made by Swan, and in no event could be given such a construction as to prove the agency of Strawbridge & Culbertson. The averments of the petition as to the existence of plaintiff's agency were not in any way extended by the insertion of the written contract, nor did the construction of that instrument, which followed it, in any way mend the matter. As to the relationship of principal and agent between plaintiffs and defendant, there was then in the petition only the general averment that defendant "placed his real estate in the hands of plaintiffs to sell or trade for him." In ordinary transactions the requirement that for services rendered as agent there should be shown either an antecedent employment or a subsequent ratification to entitle to compensation would not be denied. In relation to transactions in real property, however, there seems in the minds of plaintiffs to exist some sort of a belief that no relation of agency need be shown, but that, instead, it is sufficient to allege that the property was placed in the hands of plaintiffs to sell or trade for the defendant. In the proofs, too, it is assumed that no employment as agents need be shown, as will be illustrated by the testimony of G. J. Culbertson, one of the plaintiffs. His evidence was that he first saw the defendant in the real estate office of Mr. Funk; that while witness was in said office the defendant came in and said, "I have some land I would like to exchange;" that witness answered, "This is Funk's office, and I do not wish to transact any business here, and if you wish to have me transact your business come to my office. * * * Swan came to my office, and he listed

this property with me." This process of listing was thus described by this witness: "He came in and gave me the description of the 160 acres of land he had in Hamilton county, not far from Trumbull, and stated the conditions. He said there were 120 acres under cultivation, and he said it was in oats and corn. There was a twelve hundred dollar mortgage against it, and he would like to exchange it for some city property." Having described in the above terms the listing of defendant's property, this witness detailed the efforts he then made to effect an exchange of the "listed" property for some real property owned by a Mr. McLennan, which witness "had" on P street. Mr. Swan offered to trade some Harlan county land and some personal property which he owned for McLennan's property. This witness thought it would be useless to submit this proposition to McLennan, but finally he did so, and McLennan refused it. Afterwards this witness saw Mr. Robertshaw and told him about the Hamilton county farm, and after Mr. Swan had been shown the property of Mr. Robertshaw by witness he agreed to trade, and the memorandum of agreement copied in plaintiffs' petition was thereupon drawn up and signed. In his direct examination this witness did not disclose that the property of Mr. Robertshaw had been listed with him before it was shown to Mr. Swan. In his cross-examination, however, he admitted that he had the property of Robertshaw on his list for exchange for farm land; that he told Robertshaw about the Harlan county land, but Robertshaw did not want that land; that when witness told him about the Hamilton county land he said that possibly he could make a deal on that; that at the time of the exchange of Swan's property witness was the agent of Robertshaw for the sale of his city property which was traded to Swan.

It is apparent from this testimony of one of the plaintiffs that there was properly presented by the proofs such a state of facts as justified an instruction as to the necessity of

showing employment of plaintiffs as defendant's agent, as well as one which recognized the right of the defendant to sell his own property. The attempt to avoid the obligations, responsibilities, and disabilities of an agent, by disclaiming agency in name, was a matter of law properly met by the instructions given. The very mysterious process of "listing" property was but a puerile attempt to create evidence in favor of plaintiffs by entries made in their own records. To secure the necessary data for these entries the defendant, who had merely stated in a real estate office with which plaintiffs had no relations that he had some land he would like to exchange, was invited into the office of plaintiffs, where a description of his property was taken by plaintiffs, and we assume it was listed in a book, although it does not appear clearly from the evidence that even a book was used. Throughout the entire transaction there was no act or word which would indicate to Swan that by "listing" his property plaintiffs assumed the right to act as his agents. Indeed, the theory of plaintiffs seems now to be that there existed no necessity for employment in that capacity, but that if plaintiffs made known the mere fact that Mr. Swan was willing to exchange his Hamilton county farm, they were entitled to compensation, provided this information was imparted to one who afterwards by purchase or sale became the owner. This assumption seems to be somewhat based upon the fact that plaintiffs were real estate agents and brokers, as in the petition they described themselves. It is too much, however, to assume that their mere vocation entitled plaintiffs to dispense with being employed before assuming the authority of agents. (*Funk v. Latta*, 43 Neb., 739.) The fact, doubtless well advertised, that they were dealing in real estate, implied no more than that their services were offered to such owners of real property as chose to employ them. They could claim compensation only by virtue of some sort of agency and a mere listing of the property was not of itself suffi-

cient for that purpose. If plaintiffs were entitled to compensation it was because they had rendered services as the agents of the defendant and the instructons were in accord with this proposition. In any event, under the evidence the plaintiffs were not entitled to recover, for they admit that in the transaction under consideration they were acting for both parties, and there is no pretense that this fact was known, much less assented to, by the defendant. The plaintiffs by their petition claimed compensation for selling, exchanging, and trading the farm of the defendant; the services were not limited merely to bringing together parties who between themselves agreed upon and consummated an exchange of property. As we understand the law, a real estate agent is entitled to compensation from both parties to an exchange of property, only when the services of such agent are limited to bringing together parties who, each having property for exchange, arrange between themselves the entire trade, and even this limited service of the agent will not entitle him to compensation unless affirmatively he shows that his employer, of whom compensation is claimed in advance, knew of and assented to the agent's aforesaid dual employment. (*Campbell v. Baxter*, 41 Neb., 729; *Ormes v. Dauchy*, 45 N. Y. Sup. Ct., 85; *Rowe v. Stevens*, 53 N. Y., 621; *Rice v. Wood*, 113 Mass., 133; *Farnsworth v. Hemmer*, 1 Allen [Mass.], 494; *Rupp v. Sampson*, 16 Gray [Mass.], 398; *Raisin v. Clark*, 41 Md., 158; *Bell v. McConnell*, 37 O. St., 401.) The reasons for these stringent requirements are fully set forth and applied in the somewhat analogous case of *Jansen v. Williams*, 36 Neb., 869. From the considerations stated it results that the judgment of the district court is

AFFIRMED.

AGRICULTURAL INSURANCE COMPANY OF WATERTOWN, NEW YORK, v. JACOB A. MORROW.

FILED FEBRUARY 6, 1895. No. 5885.

Insurance: MORTGAGE ON INSURED PROPERTY: WAIVER: INSTRUCTIONS. Where there were proofs which tended to show the existence of a mortgage on property when it was insured, and that there was such knowledge of the existence of such mortgage as tended to show a waiver of that condition of the policy which rendered its provisions void if there existed a mortgage when such policy issued, *held* erroneous for the district court, after summarizing what facts might be deemed a waiver of such existing mortgage, to state that, if these facts were established, the provision of the policy as to incumbrance was eliminated therefrom, when there had been proof of a mortgage having been made after the policy had been issued, in respect to which mortgage the condition of the policy as to the forfeiture was by its terms just as applicable as to an existing mortgage.

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

Adams & Scott, for plaintiff in error.

J. L. Caldwell and *W. S. Hamilton*, *contra*.

RYAN, C.

The defendant in error recovered a judgment against the plaintiff in error in the Lancaster county district court on account of damages occasioned by fire to the insured household goods and other personal property of the defendant in error. The policy was dated January 21, 1891, the fire was on May 20, following. The duly authorized agent of the insurance company was W. I. Fryar, who, by an offer of fifteen per cent commission upon premiums, had induced L. Marshall to solicit insurance for him, and among other risks to secure that of defendant in error. Among

other defenses urged was one which in this connection may readily be disposed of, and that defense was that part of the property for the damage of which a claim is made was never owned by the insured. There was a note given for a certain sum of money due on the purchase price of a piano, in which note it was stipulated that the ownership of the piano should be held by the payee until the full payment of said note. This note, however, was dated May 11, 1891, and no recovery was sought for damages in respect to the aforesaid piano. As was done in the district court, therefore, this musical instrument may now be dismissed from consideration.

Complaint is made that proof was permitted that with knowledge of the existence of a chattel mortgage the policy in question was issued by the agent of plaintiff in error. No assignment was made of this in the petition in error, and it therefore is entitled to no consideration. When this mortgage fell due the defendant in error was unable to pay the sum secured by it, and thereupon Mr. Marshall paid it, and for the amount paid took another mortgage on the property previously mortgaged as well as insured. By answer the plaintiff in error had pleaded the conditions of the policy by virtue of which the existence of a mortgage at the time the policy was issued, or the making of a mortgage subsequently, without the consent of the insurer, avoided the liability of plaintiff in error, and by averments had entitled itself upon corresponding proofs to a release from liability by reason of the existence of a mortgage thereon when the property was insured and also by reason of a mortgage subsequently made on the same property. The relation of these mortgages to each other, in the light of the evidence, has already been stated. The effect of a waiver as to the first was described to the jury in the following instructions:

"4. You are instructed that said provision in said policy is valid, binding on plaintiff, and that a violation thereof by

plaintiff before loss is sufficient to avoid liability on defendant's part under said policy for damages by fire to property insured thereunder, providing that said provision was at the time of said fire one of the conditions of said policy. In this connection you are instructed that if you find from the evidence that the witness Marshall, while acting as the agent of W. I. Fryar, the defendant's agent at Lincoln, Nebraska, and while engaged in the business of soliciting fire insurance for defendant company, applied to plaintiff to insure his furniture in defendant company, and if you find from the evidence that the plaintiff then stated to said Marshall that his furniture was incumbered by chattel mortgage, and if you find from the evidence that said Marshall so informed defendant's agent, Fryar, at or prior to the time said policy was issued to the plaintiff, then, if you so find, said notice to defendant's agent, Fryar, of such incumbrance was notice to defendant, and you are instructed that, if you so find, then defendant is in law held to have waived said condition, to have eliminated the same from the policy, and would, if you so find, constitute no defense to this action.

"5. If you find from the evidence that witness Marshall received the $13 premium for the policy of insurance sued on by him soliciting from plaintiff, for defendant company, although said Marshall may not have signed said policy as agent, or if you find from the evidence that said Marshall directly or indirectly made or caused to be made on policy or contract of insurance sued on in this action, then you are instructed that the statute of this state, if you so find, makes said Marshall, to all intents and purposes, the agent of the defendant, and you are instructed that if you so find, then notice by plaintiff to said Marshall of such mortgage incumbrance on said property insured, made and given prior to the issuance of said policy, is notice to defendant, and if you so find, then said provision as to incumbrance was eliminated from said policy, and would constitute no defense to this action."

In the fourth instruction quoted it might with much plausibility be urged that the expression, "then defendant is in law held to have waived said condition, should be considered as but repeated in the expression," "to have eliminated the same from the policy," which immediately follows, and that, therefore, the instruction amounted simply to a statement that the issuing of a policy with knowledge by the agent of the insurer of the existence of a mortgage was a waiver of the right of the principal to insist on this defense. In the fifth instruction, however, the rule as to waiver of an existing mortgage by the issue of a policy by an agent of the insurer having knowledge of the existence of such mortgage was distinctly stated, and this was followed by the general instruction that if the jury find these facts established by the evidence, "then said provision as to an incumbrance was eliminated from the policy, and would constitute no defense to this action." Amplification is not required to show that although the insurance company might waive the right to object to an existing mortgage, this would not of necessity "eliminate" this protective provision as against another mortgage subsequently made. For the error pointed out in respect to the effects of proof of a waiver of the provision as to a forfeiture on account of an existing mortgage, the judgment of the district court is

REVERSED.

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

FILED FEBRUARY 6, 1895. No. 4871.

1. **Bank Checks: REASONABLE TIME TO PRESENT: LIABILITY OF INDORSER.** The evidence in this case examined, and *held* to show such facts as discharged defendant in error from liability to the plaintiff in error as indorser of ordinary checks.

2. ——— : ——— : ———. The decision in *First Nat. Bank of Wymore v. Miller*, 37 Neb., 500, adhered to.

REHEARING of case reported in 37 Neb., 500.

A. D. McCandless, Marquett, Deweese & Hall, and Samuel J. Tuttle, for plaintiff in error.

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

RYAN, C.

In this action there has already been filed an opinion, which was reported in 37 Neb., 500. A rehearing was granted, and on another argument the case has been again submitted for our consideration. In the opinion above referred to there is to be found a correct statement of the facts involved, so that another summary of them would be but a needless repetition.

The plaintiff in error now insists that the checks were received by it after banking hours of May 31, 1890, and that, therefore, as the day named was Saturday, there was no requirement that the checks should be forwarded earlier than the Monday following. The testimony of the defendant in error was that he indorsed the checks about half-past three o'clock in the afternoon, that of the cashier of plaintiff in error was that the indorsement was made about 4 o'clock. It does not appear from the evidence just what was the hour at which the bank closed. Before the payments out of the proceeds of the checks were made it appears that the bank had closed for general business, although for the accommodation of the defendant in error in this particular matter it still remained open. This, however, is not of the importance which plaintiff in error would attach to it, for the rule is, as was originally announced in this case, that to charge an indorser of an ordinary check it must be presented with all due dispatch and diligence consistent with the transaction of other commercial busi-

ness, and whether or not such diligence has been used must be determined from the facts of each particular case. On the trial there was introduced in evidence a stipulation in which it was expressly admitted "that the United States mails for the city of Cortland, Gage county, Nebraska, close at the post-office of the city of Wymore at 6 and 8 o'clock P. M. of each day, and that in due course of mail the first would reach Cortland by 9 o'clock of the same day, and the second by 10 o'clock A. M. of the next day, which was the fact upon the 31st day of May, 1890, and ever since has been." If on the day the checks were indorsed to plaintiff in error they had been mailed within two or three hours after indorsement they would have reached Cortland either at 9 o'clock the same evening or at 10 o'clock of Monday at farthest. Perhaps such dispatch as this should not be exacted in every case; certainly there is perceivable no reason for requiring it in this. If the checks had been forwarded on Monday they could have been presented for payment as early as on Tuesday. If there had been any funds to pay the checks on Tuesday, upon their presentation plaintiff in error could with justice insist that it had used due diligence in forwarding the checks to Cortland for payment. As it is, however, the checks were sent by such a circuitous route that although they were forwarded on the evening train of Saturday of May 31st they did not reach Cortland until Thursday of the week following. If these checks had not been mailed until Monday, which plaintiff in error contends was the earliest date required, they would not have reached Cortland via St. Joseph, Missouri, and Omaha, Nebraska, sooner than Saturday, allowing for that purpose the same length of time which was actually consumed in making the only trip of the kind of which we have any record. Thus, if plaintiff in error is correct, there should be allowed for the transmission of two checks a distance of twenty-seven miles as a matter of right almost an entire week and that, too, when

it is stipulated that over this intervening space two railway trains each day carried mail direct from Wymore to Cortland.

It is unnecessary to attempt by arbitrary rule to define just what time should be given for the presentation of an ordinary check under all circumstances. For the purposes of this particular case it is sufficient to say that the district court did not err in assuming, as in view of its general conclusions it must have done, that, in forwarding the checks by the circuitous route adopted, the plaintiff in error was guilty of negligence. It is not required that our views of the law heretofore expressed in this case should be restated. It will answer every purpose to say that a full examination of the record, and due consideration of the arguments of counsel, convince us that the rules announced were correctly stated and happily applied. If reassurance was necessary, it would be found in the fact that the supreme court of Wisconsin, in *Gifford v. Hardell*, a very similar case to this, reported in 60 N. W. Rep., on page 1064, has approved our former opinion. The judgment of the district court is

AFFIRMED.

GOTTLIEB BANTLEY, APPELLANT, V. LORINDA FINNEY ET AL., APPELLEES.

FILED FEBRUARY 6, 1895. No. 5877.

1. **Affidavits:** JURAT: SERVICE BY PUBLICATION: PAROL EVIDENCE. In the district court of Lancaster county, in 1882, one McWilliams recovered against one Bantley a decree for the specific performance of a contract for the sale of certain real estate. Bantley was a non-resident of the state, and the only service had upon him was by publication. Bantley did not comply with the decree, and McWilliams deposited with the clerk the considera-

tion the court found he was to pay Bantley for the land, took possession thereof, and afterwards conveyed it by warranty deed to one Finney. The affidavit on which the service by publication was based was made and signed by Webster, McWilliams' counsel, and duly filed; but such affidavit had attached thereto no jurat or certificate of an officer authorized to administer oaths certifying that Webster had in fact sworn to the affidavit. In 1891 Bantley brought an action against Finney to recover said real estate, alleging in his petition that Finney's claim thereto was based on the decree in McWilliams against Bantley; that the only service on him in said action was by publication; that the affidavit on which said constructive service was based was not sworn to, and that therefore the court had no jurisdiction over him, and its decree was void. *Held*, (1) That the jurat or certificate of an officer attached to an affidavit is no part of the affidavit itself; (2) that such jurat or certificate, if the officer making it had authority to administer oaths, enables such affidavit to be read in evidence as the oath of the party whom such officer certifies made such oath; (3) that the affidavit made by Webster did not lose its vitality because of the omission of the clerk to attach thereto his jurat certifying that Webster had in fact taken said oath; (4) that it was competent for Finney to show by parol that Webster did in fact swear to the affidavit which he filed in the case of McWilliams v. Bantley at the time of filing such affidavit; (5) that such parol evidence did not tend to vary or contradict the record in the case of McWilliams v. Bantley, but to support it; (6) that whether Webster swore to such affidavit at the time he made and filed it was a question of fact, and might be proved as any other fact, by any competent obtainable evidence.

2. ———. An affidavit is simply a declaration on oath, in writing, sworn to by a party before some person who has authority under the law to administer oaths.

3. ———: SERVICE BY PUBLICATION. The essentials of the affidavit required by section 78 of the Code of Civil Procedure, in order that a valid service by publication may be based thereon, are that the affidavit must be in writing, filed in the case where made, and sworn to.

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

The facts are stated by the commissioner.

Henry E. Lewis, Albert Watkins, and *Dawes, Coffroth & Cunningham,* for appellant:

The affidavit for service by publication is jurisdictional, and must be authenticated by the certificate of a competent officer. (*Atkins v. Atkins,* 9 Neb., 191; *Frazier v. Miles,* 10 Neb., 113; *Blair v. West Point Mfg. Co.,* 7 Neb., 147; Consolidated Statutes, secs. 4887, 4891, 4904.)

Courts require a strict compliance governing notice by publication. (Wade, Notice, sec. 1030; *Schell v. Leland,* 45 Mo., 289; *Bardsley v. Hines,* 33 Ia., 158; *Merrill v. Montgomery,* 25 Mich., 73; *Brisbane v. Peabody,* 3 How. Pr. [N. Y.], 109; *Hallett v. Righters,* 13 How. Pr. [N. Y.], 43; *Kendall v. Washburn,* 14 How. Pr. [N. Y.], 380; *Balch v. Shaw,* 7 Cush. [Mass.], 282; *Greenvault v. Farmers & Mechanics Bank,* 2 Doug. [Mich.], 498.)

An affidavit is an oath, in writing, by the party deposing, sworn before and attested by him who hath authority to administer the same. (1 Bacon, Abridgment, 121; *Watt v. Carnes,* 4 Heisk. [Tenn.], 532; *Shelton v. Berry,* 19 Tex., 155.)

Webster, Rose & Fisherdick, contra:

The jurat is no part of the affidavit, but only the *prima facie* and competent evidence that it is the affidavit of the person by whom it purports to have been made. (*Hitsman v. Garrard,* 16 N. J. Law, 124.)

The affidavit, good in form and actually subscribed and actually sworn to, filed before publication was made, is good for purpose of vesting jurisdiction in the original case; and, in the absence of the jurat, parol proof that the affiant swore to the affidavit is competent. (*Kruse v. Wilson,* 79 Ill., 233; *Pottsville v. Curry,* 32 Pa. St., 444; *Cusick's Election Case,* 136 Pa. St., 477; *Cook v. Jenkins,* 30 Ia., 452; *Hitsman v. Garrard,* 16 N. J. Law, 124; *Booth v. Rees,* 26 Ill., 45; *English v. Wall,* 12 Rob. [La.], 132.)

RAGAN, C.

On the 25th day of April, 1882, Gottlieb Bantley was the owner of the southeast quarter of section 24, in township 10 north, and range 7 east of the 6th P. M., in Lancaster county, Nebraska. On the 19th day of July, 1882, one Richard C. McWilliams brought a suit in equity in the district court of Lancaster county against said Bantley, the petition in which alleged, in substance, Bantley's ownership of said real estate on said 25th of April, and that on said day Bantley had agreed, in writing, to sell and convey to him, McWilliams, said real estate on certain terms and conditions, with all of which McWilliams on his part had complied; and the petition prayed for a decree of the court to compel Bantley to specifically perform his contract of sale. Bantley was a non-resident of the state of Nebraska, was not present in said state, but resided in and was a citizen of the state of Pennsylvania. The only service had upon Bantley in said suit was service by publication, as provided for by sections 77, 78, 79, and 80 of the Code of Civil Procedure. Bantley made no appearance in the action, either personally or by counsel, and on the 21st of October, 1882, his default was entered by the district court of Lancaster county and a decree rendered ordering and directing him to convey the above described premises to McWilliams, and that in default of such conveyance the decree should have the effect of a deed. Bantley did not comply with the decree of the court, and McWilliams, in compliance with the decree, deposited with the clerk of the court the consideration which the decree found McWilliams was to pay Bantley for the land, and thereupon took possession of the real estate and afterwards conveyed it by warranty deed to one Lorinda Finney. On the 21st day of February, 1891, Bantley brought this suit in equity in the district court of Lancaster county against said Finney, alleging that Finney claimed an

interest in said real estate by virtue of the decree, already mentioned, rendered in the case of McWilliams v. Bantley. The prayer of Bantley's petition in this case was that the decree in McWilliams v. Bantley might be adjudged void, that the possession of said real estate might be delivered to him, and for an accounting of the rents and profits of said real estate. The district court found the issues against Bantley and rendered a decree dismissing his case, from which he has appealed.

Section 78 of the Code provides that before service can be made by publication an affidavit must be filed that service of a summons cannot be made within this state on the defendant or defendants to be served by publication, and that the case is one of those mentioned in section 77 of the Code of Civil Procedure; and when such affidavit is filed, the party may proceed to make service by publication. In the suit of McWilliams v. Bantley the petition, as already stated, was filed with the clerk of the district court of Lancaster county on the 19th day of July, 1882. On the same date there was filed in the office of said clerk of said court in said suit of McWilliams v. Bantley a paper in words and figures as follows:

"In the District Court of Lancaster County, Nebraska.

"RICHARD C. MCWILLIAMS, PLAINTIFF,
v.
GOTTLIEB BANTLEY, DEFENDANT. } Affidavit.

"STATE OF NEBRASKA,
LANCASTER COUNTY. } ss.

"Joseph R. Webster, being first duly sworn, on his oath says: I am the attorney of record of Richard C. McWilliams, plaintiff in the above entitled cause. On the 19th day of July, A. D. 1882, he filed a petition in the district court of Lancaster county against Gottlieb Bantley, the object and prayer of which is to enforce the specific performance of a written contract for the sale of certain premises described as the southeast quarter of section 24, township

10 north, of range 7 east, of sixth principal meridian, made and entered into by and between the said defendant as vendor by J. P. Walton, his agent duly authorized in writing, and this plaintiff as vendee, on or about the 15th day of June, A. D. 1882, for sale of said premises at the price of $2,400, exclusive of agent's commissions, $800 payable in hand, $533⅓ on or before two years, and two like sums on or before three and four years, respectively, with interest at the rate of seven per cent per annum, to be secured by mortgage on said premises, and said plaintiff is absent from the county of Lancaster, and affiant makes this affidavit in his behalf for that reason. Said defendant is a non-resident and resides at Johnstown, in the state of Pennsylvania, and is absent from the state of Nebraska, and service of summons cannot be made within the state on him, wherefore the plaintiff prays for service by publication. J. R. WEBSTER.

"Signed in my presence and sworn to before me July, 1882. ——— ———, *Notary Public.*"

Indorsed: "Dist. Ct. Lancaster. Richard C. McWilliams v. Gottlieb Bantley. Affidavit for Publication. Filed July 19, 1882 A. D. A. D. Burr, D. C. Clerk. J. R. Webster for Plff."

This affidavit or paper contained all the averments of fact necessary to authorize McWilliams to make service upon Bantley by publication, and to give the court jurisdiction of Bantley if such service by publication should be made and proved as provided by sections 79 and 80 of the Code of Civil Procedure. There is no contention here that the averments in the paper or affidavit were not sufficient both as to substance and form, nor that the publication made and proved in pursuance of such paper or affidavit did not in all respects conform to the statute. But it will be observed that the affidavit or paper, though duly entitled in the case of McWilliams v. Bantley, though it has a proper venue, though it is entitled an affidavit and purports

to be an oath made by J. R. Webster, the counsel of McWilliams, signed by Webster and duly filed in the case by the clerk of the court, has attached to it no jurat or certificate of the clerk or any other officer authorized to administer oaths that such paper or affidavit was sworn to by said Webster before such officer.

The argument of the appellant is that until the affidavit required by section 78 of the Code of Civil Procedure was made and filed in the case of McWilliams v. Bantley, the court could acquire no jurisdiction over Bantley by service by publication. There can be no question as to the correctness of this argument. The court's jurisdiction in that case over Bantley depended upon service by publication first having been made and proved as provided by sections 79 and 80 of the Code of Civil Procedure, and the notice for its validity depended upon an affidavit made and filed as provided by said section 78. The appellant further contends that because the affidavit filed by Webster in McWilliams v. Bantley has not attached thereto the jurat or certificate of some officer authorized to administer oaths certifying that Webster signed and swore to the said affidavit, that therefore such paper is not an affidavit within the meaning of said section 78; consequently, that the service by publication was invalid, that the court acquired no jurisdiction of Bantley; and that its decree was a nullity.

On the trial of this case in the district court Finney was permitted to prove by the oral testimony of Webster, McWilliams' counsel in the suit against Bantley, and by one Burr, who was the clerk of the court on the 19th day of July, 1882, that the affidavit filed in the case of McWilliams against Bantley on said date was in fact sworn to on said date by said Webster before said clerk, and that the latter, through an oversight, neglected to attach his certificate or jurat to such paper to the effect that Webster had in fact sworn to it. The argument of the appellant is that such testimony was incompetent; that the record

in McWilliams v. Bantley must speak for itself; and that the decree in that case must stand or fall on the record as it exists.

An analysis of the case before us then brings us face to face with this question: Was it competent in this case for Finney to show by parol that the affidavit for constructive service filed in the case of McWilliams v. Bantley was sworn to by Webster, the party who made and signed such affidavit before the clerk of the court? The evidence of Webster and Burr that the former did swear to the affidavit signed by him is sufficient to support the finding of the district court that Webster did in fact swear to the affidavit he filed if the evidence was competent. "An affidavit is a written declaration under oath made without notice to the adverse party." (Code of Civil Procedure, sec. 367.) In *Harris v. Lester*, 80 Ill., 307, it is said: "An affidavit is simply a declaration, on oath, in writing, sworn to by a party before some person who has authority under the law to administer oaths. It does not depend on the fact whether it is entitled in any cause or in any particular way. Without any caption whatever, it is nevertheless an affidavit." In *Bates v. Robinson*, 8 Ia., 318, a party had made an affidavit, sworn to it before an officer authorized to administer oaths, but had not signed the affidavit. The officer administering the oath had attached his jurat or certificate to the affidavit that the party had sworn to it, and the court held that the affidavit was good; that it was not necessary to the making of a good affidavit that the party making it should sign it. In *Shelton v. Berry*, 19 Tex., 154, an affidavit is thus defined: "An affidavit is, originally, a voluntary oath taken before an officer. In practice it is an oath or affirmation, reduced to writing, and sworn or affirmed before some officer who has authority to administer it, and by whom it is certified. It is not necessary that it should be signed by the affiant." In *Hitsman v. Garrard*, 16 N. J. Law, 124, it is said that

an affidavit need not be signed by the affiant unless such signature is required by some statute or rule of court. A contrary rule was announced in *Hargadine v. Van Horn*, 72 Mo., 370, but by a divided court. The argument of the appellant that no affidavit for service by publication was filed in the case of McWilliams v. Bantley because what purported to be such affidavit in said case had attached thereto no jurat or certificate of an officer authorized to administer oaths that Webster in fact signed and swore to the statement in the affidavit, we think, cannot be sustained. The paper assailed as not being an affidavit was in writing, it was signed, and it was filed. Section 78 of the Code of Civil Procedure does not expressly require such an affidavit to be signed; but a fair construction of the section requires such affidavit to be in writing. The question here then is not whether Webster made an affidavit, whether it was in writing, whether it was filed, nor whether it was signed by him; but the question is, did he swear to that affidavit? If he swore to it, then it in all respects complied with the statute. The service by publication based thereon was proper, and the court had jurisdiction.

Is the fact that the affidavit made and filed by Webster has attached thereto no jurat or certificate of an officer authorized to administer oaths, certifying that Webster in fact swore to the statement written in the affidavit, conclusive proof that Webster did not swear to the affidavit or the facts stated therein? We think not. If such affidavit contained the jurat or certificate of the clerk of the court, such certificate or jurat would be *prima facie* evidence that Webster had sworn to the oath or affidavit signed by him. The jurat or certificate is no part of the oath or affidavit, but is simply evidence that the oath was made or the affidavit was sworn to. It is like the acknowledgment of a deed, which is no part of the deed itself, but authorizes the deed to be recorded and read in evidence without proving

the signatures to the deed; and so here the jurat or certificate attached to an affidavit, if the officer making such jurat or certificate had authority to administer oaths, enables such affidavit to be read in evidence as the oath of the party whom the officer certifies made such oath. (*Ladow v. Groom*, 1 Denio [N. Y.], 429; *Hitsman v. Garrard*, 16 N. J. Law, 124; *Morris v. State*, 2 Tex. App. Ct., 503.) Bantley's case against Finney is based upon the allegation in his petition that the affidavit filed for service by publication in the case of McWilliams v. Bantley was not sworn to. This allegation was denied by Finney in his answer herein, and hence we have the issue of fact, did Webster swear to the affidavit which he filed in the suit of McWilliams v. Bantley? To show that such affidavit was not sworn to Bantley in the trial of this suit put in evidence the record of the case of McWilliams v. Bantley, and this record did not positively show that Webster swore to the affidavit filed for service by publication. Was the parol evidence of Webster and Burr that the former did swear to the affidavit which he filed competent? We have not been referred to, nor have we been able to find, any case where the precise question has been argued and determined.

Sears v. Dacey, 122 Mass., 388 was an action brought in Massachusetts on a judgment recovered in another state. The issue was whether the defendant was served with process in the state in which the judgment was rendered. He introduced evidence that at the time the process was served in the foreign state he was not in said state and had not been since that time. The court held that the plaintiff might introduce evidence to show that the defendant was in the foreign state at the time the record showed the process in that case was served on him.

Cook v. Jenkins, 30 Ia., 452, was an action in ejectment. The defendants claimed title to the land under a judicial sale thereof based upon attachment proceedings. Cook's contention was that the sale and the attachment proceedings

were void, as the only service upon him was by publication, he at the time being a non-resident of the state of Iowa, and that the affidavit made and filed to procure the issuance of the attachment against him or his property was never sworn to by the party instituting the attachment proceedings. This contention was based upon the fact that the affidavit in the attachment proceedings, although it contained the jurat or certificate of an officer authorized to administer oaths, such jurat was not signed by such officer, and the court held that the contention was not sustained; and that although the jurat to the affidavit was not signed by the officer administering the oath, yet it had been sufficiently shown by the evidence that the affidavit was in fact sworn to. To the same effect see *Kruse v. Wilson*, 79 Ill., 233. This suit was also one in ejectment, the defendant claiming title to the land under judicial sale, based on attachment proceedings, the plaintiff claiming the attachment proceedings were void, because the affidavit was not sworn to. Breese, J., speaking for the court on this point, said: "On objection made in the circuit court, on the trial of this ejectment, that the affidavit was not sworn to, and was therefore void, William A. Hemon was sworn, and he testified he signed the affidavit, and swore to it at the time, in the clerk's office, before the deputy clerk. He was there to commence a suit in attachment, and swore to the affidavit for that purpose. He signed it there at the counter, at the same time that he swore to it. * * * If an oath was administered, and by the proper officer, as it assuredly was, the law was satisfied, and the mere omission of the clerk to put his name to an act which was done through him as the instrument, should not prejudice an innocent party, who has done all he was required to do. The clerk's omission to write his name, where it should have been written, was not the fault or neglect of the affiant. He signed and swore to the affidavit. The clerk filed it," etc. See, also, *Tallman v. Ely*, 6 Wis., 242, where it is said:

"Where there is a vagueness in a record upon the question of the appearance of a party defendant, parol proof of the appearance, as a fact, is competent. Such evidence does not tend to vary or contradict the record but to support it." (See, also, *Jamison v. Weaver*, 51 N. W. Rep. [Ia.], 65.)

The oath or affidavit made by Webster did not lose its vitality because of the omission of the clerk to certify then and there that Webster had taken this oath. If the clerk had attached his jurat to this affidavit made by Webster, then the affidavit, for all purposes and in all places, would have been *prima facie* evidence at least that Webster had made the oath, that is, that he was sworn by the clerk to the truth of the facts set forth in the affidavit. Whether Webster swore to this affidavit was made an issue—and the cardinal issue—in the case. It was a question of fact; and why should not it be proved, as any other fact, by any competent obtainable evidence? The evidence did not contradict the record in the case of McWilliams v. Bantley. That record did not affirmatively recite that Webster did not swear to the affidavit. It at least left that fact in doubt. If one by a suit in equity should seek to have a personal judgment rendered against him set aside upon the sole ground that he was never served with process in such case, and to prove that fact should put in evidence the record of the suit in which the judgment was rendered, from which it should appear that a summons had been issued directed to the defendant in the judgment and returned by the sheriff indorsed that on a certain day and at a certain place, he, the sheriff, had served said summons on said party therein mentioned, but the name of the sheriff should not be signed to such return, can it be doubted that it would be competent to show by parol by the sheriff that his failure to sign his name on the summons was an oversight, and that he did in fact serve the summons as therein directed and returned? We reach the conclusion, therefore, that in this case parol evidence was competent to show

that Webster did swear to the affidavit which he filed in the case of McWilliams v. Bantley, although such affidavit had attached thereto no jurat of an officer authorized to administer oaths certifying that Webster had in fact sworn to such affidavit. It follows from this that the decree assailed in this case was not void, but that the court pronouncing it had jurisdiction both of the subject-matter of the action and of the defendant therein.

Mr. Bantley in his petition filed in this case alleged that the decree in McWilliams v. Bantley was fraudulently obtained, in that McWilliams was not the real party in interest, but "was the fraudulent conduit for J. H. McMurtry." On the trial in the district court there was considerable evidence introduced on the issue made by this allegation of Bantley's petition and the answer of Finney thereto. This evidence was conflicting, and the district court found the issue against Bantley; and we cannot say that it came to an incorrect conclusion. The decree of the district court is

AFFIRMED.

EDGAR E. HARDIN ET AL. V. JOSEPH SHEUEY ET AL.

FILED FEBRUARY 6, 1895. No. 5442.

Conspiracy: EVIDENCE: REVIEW. The case re-examined, and the former opinion in 40 Neb., 623, adhered to.

REHEARING of case reported in 40 Neb., 623.

L. M. Pemberton and *F. B. Sheldon*, for plaintiff in error Hardin.

C. E. Bush and *Griggs, Rinaker & Bibb*, for plaintiff in error Buckley.

Rickards & Prout, J. E. Bush, and *N. T. Gadd, contra.*

RAGAN, C.

This is a rehearing of *Hardin v. Sheuey*, reported in 40 Neb., 623. A sufficient statement of the facts in the case will be found in the reported opinion. The judgment of the district court was reversed as to the plaintiffs in error Hardin and Buckley, but affirmed as of course as to plaintiff in error Kludas, as no brief or argument had been filed in this case on his behalf. We have again examined this record with all the care of which we are capable and have reached the following conclusions:

1. That there is no evidence in the record to support the verdict of the jury against the plaintiffs in error Hardin and Buckley.

2. Petition in error of Herman Kludas. We are unable to review the errors alleged to have been committed by the district court in the admission and rejection of evidence on the trial, as Kludas, in his petition in error filed in this court, has not specifically alleged and pointed out the rulings of the district court which he claims were erroneous. He assigns in his petition in error that the district court erred in giving and refusing certain instructions. We have examined all these instructions and have reached the conclusion that the district court neither gave nor refused an instruction to the prejudice of Mr. Kludas. The evidence in the record as to the character of the transaction between Sheuey and Kludas is voluminous and conflicting, and although the reading of this evidence impresses us very strongly that the version which Mr. Kludas puts upon the transaction between himself and Sheuey is the correct one, we are unable to say that the finding of the jury against Mr. Kludas is not supported by sufficient competent evidence.

It follows that the judgment of the district court pronounced against L. M. Buckley and Edgar E. Hardin must be and is reversed and the cause as to them is re-

manded for further proceedings; and the judgment of the district court pronounced against Herman Kludas is affirmed.

JUDGMENT ACCORDINGLY.

PAUL H. HOLM ET AL. V. CHARLES E. BENNETT.

FILED FEBRUARY 6, 1895. No. 6087.

1. **Principal and Agent:** UNAUTHORIZED ACT OF AGENT: RATIFICATION. A real estate agent leased his principal's property for the months of August and September and collected the rents. He then negotiated a sale of his principal's property and the deed was made and delivered September 14. The agent paid the rents in his hands to the purchaser of the property without his principal's knowledge or consent. The principal accepted the proceeds of the sale without knowing the disposition the agent had made of the rents. *Held*, That the agent was liable to the principal therefor.

2. ——: ——: ——. The unauthorized act of an agent when ratified by his principal is as binding as though the act had been within the scope of the agent's authority; and the principal, by accepting the benefits of an unauthorized act of his agent, may thereby ratify the act; but in order for the act of the principal in accepting the fruits of a transaction conducted by his agent to work a ratification of the agent's act the principal must have accepted the avails of the transaction with knowledge of all the material facts. The existence of the knowledge of the unauthorized act and the intention to ratify it must concur in the mind of the principal in order to estop him. *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207, followed.

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

Adams & Scott, for plaintiffs in error, cited: *Rogers v. Empkie Hardware Co.*, 24 Neb., 653; *Elwell v. Chamberlin*, 31 N. Y., 611; *Aultman v. Reams*, 9 Neb., 487.

S. L. Geisthardt, contra:

A full knowledge of all material facts is an indispensable condition of ratification; otherwise the receipt and retention of the benefits of an unauthorized act is no ratification of it. (Mechem, Agency, secs. 129, 148, and cases cited; *Smith v. Tracy*, 36 N. Y., 79; *Bell v. Cunningham*, 3 Pet. [U. S.], 69; *Schutz v. Jordan*, 32 Fed. Rep., 55; *Bohart v. Oberne*, 36 Kan., 291; *Bryant v. Moore*, 26 Me., 84; *Baldwin v. Burrows*, 47 N. Y., 199.)

RAGAN, C.

Charles E. Bennett in the year 1891 owned a house and lot in the city of Lincoln. In that year he employed Holm & Reed, real estate agents of said city, to lease said property for him, and at the same time authorized them to sell it. In June, 1891, they leased the property to Chancellor Canfield, of the State University, at $40 per month, who paid Holm & Reed the rent for said property for the months of August and September of said year. On the 24th of July, 1891, Holm & Reed negotiated a sale of said real estate. They notified Mr. Bennett that they could sell the property for him so as to net him $5,000, and he thereupon authorized them to make the trade. Bennett executed and delivered his deed to the purchaser, a Mrs. Giser, on the 14th of September, 1891; and about the same time Holm & Reed accounted for and paid over to Bennett the purchase price of $5,000, but did not account for or pay over to him the rents received from Chancellor Canfield for said property for the months of August and September. This suit was brought by Bennett in the district court of Lancaster county against Holm & Reed to recover said rents. Bennett had a verdict and judgment and Holm & Reed prosecute a petition in error to this court.

1. It is assigned as error that the verdict is not supported by sufficient competent evidence. The evidence is undis-

puted that Holm & Reed were agents for Bennett for leasing and selling the property; that they leased it to Chancellor Canfield for the months of August and September, 1891, and received the rents for those two months, amounting to $80, no part of which they have paid to Bennett. The contention of Holm & Reed is that at the time they sold the property to Mrs. Giser they agreed with her that she was to have not only the title to the property but the rents therefrom for the months of August and September. The jury found against Holm & Reed on this contention, and we think correctly so. A memorandum in writing of the contract of sale of the property between Mrs. Giser and Holm & Reed, of July 24, is in the record. This memorandum is silent as to the rents of the property. It further appears from the evidence that Holm & Reed were to, and did, receive from Mrs. Giser $5,150, but that Bennett had no knowledge of the fact that they were receiving more than $5,000. There is also evidence in the record which tends to show that after the trade was negotiated between Holm & Reed and Mrs. Giser the latter insisted that Holm & Reed should pay her the rents for the months of August and September, because there was a delay in the delivering to her of Bennett's conveyance of the property; and that Holm & Reed, in order that the trade might be consummated and they receive as commissions the $150 Mrs. Giser was paying for the property more than Bennett was receiving, on the day of the delivering to her of Bennett's deed paid her the $80 of rents in their hands belonging to Mr. Bennett. The evidence sustains the verdict.

2. It is also assigned as error that the district court erred in refusing to give the jury the following instruction: "If you find from the evidence that the defendants were the agents of the plaintiff for the renting and selling of the property of the plaintiff, and that they sold the same for the plaintiff, and in making the sale agreed with the purchaser that she should have the rents from the time of the

sale, and that said rents were turned over to her in pursuance of said agreement, and that the plaintiff has received the proceeds of said sale; and, with a knowledge of said agreement between his agents and the purchaser, keeps and holds said purchase money, he thereby ratifies and adopts said agreement, although he did not know of it at the time it was made." The court did not err in refusing to give this instruction. The record contains no evidence that Bennett knew at the time he received from Holm & Reed the proceeds of the sale of his house and lot that they had agreed to, and had paid the August and September rents to Mrs. Giser. By this instruction the court was, in effect, requested to tell the jury that if Bennett received from his agents the proceeds of the sale of his real estate, and afterwards learned they had paid over to Mrs. Giser the August and September rents, and he retained such purchase money, he thereby ratified the act of his agents in including in the sale the surrender of the August and September rents. The unauthorized act of an agent, when ratified by the principal, is as binding as though the act had been done within the scope of the agent's authority, and the principal, by accepting the benefits of an unauthorized act of his agent, may thereby ratify the act; but in order for the act of the principal, in accepting the fruits of a transaction conducted by his agent, to work a ratification of the agent's act, the principal must have accepted the avails of the transaction with knowledge of all the material facts. In other words, the existence of the knowledge of the unauthorized act, and the intention to ratify it, must concur in the mind of the principal in order to estop him. (*Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207; *Vermont State Baptist Convention v. Ladd*, 4 Atl. Rep. [Vt.], 634; *Jackson v. Badger*, 26 N. W. Rep. [Minn.], 908; *McClelland v. Whiteley*, 15 Fed. Rep., 322; *Craighead v. Peterson*, 72 N. Y., 279.) To estop Bennett here on the ground that by accepting the proceeds of the sale of his real estate he

had ratified the act of his agents in paying over to Mrs. Giser the August and September rents, it must appear that Bennett, at the time he accepted the proceeds of the sale, knew that his agents had paid to Mrs. Giser those rents as a part of the trade. The fact that after Bennett had received the proceeds of the sale of his real estate he then learned that his agents had paid to Mrs. Giser the August and September rents, and his retention of the proceeds of the sale, do not estop him from claiming from his agents the rents. In order for the retention by him of the proceeds of the sale, after learning the disposition which his agents had made of the rents, to estop him to claim them, he must have neglected, for an unreasonable length of time to repudiate their action in that respect. The evidence shows that he did not do this, but that very soon after he had received the proceeds of the sale of the real estate he called on his agents for an accounting of the rents for August and September; and the evidence in the record, and all the evidence on the subject, not only tends to show that Bennett accepted the proceeds of the sale of his real estate without knowledge of the fact that his agents had paid the August and September rents to Mrs. Giser, but that when he did learn of such act of his agents he repudiated it. The judgment of the district court is

AFFIRMED.

CHARLES YOUNG ET AL. V. WILLIAM LANE ET AL.

FILED FEBRUARY 5, 1895. No. 7121.

1. **Constitutional Law**: TAXATION. The constitution prohibits a county board from levying taxes which in the aggregate exceed $1.50 per $100 valuation, unless authorized so to do by a vote of the people of the county, except for the payment of indebtedness

existing at the adoption of the present constitution. *In re House Roll No. 234*, 31 Neb., 505, and *State v. Weir*, 33 Neb., 35, followed.

2. **Taxation.** Section 17, chapter 82*a*, Compiled Statutes, 1893, construed to be permissive only. Accordingly, *held*, that where county authorities have levied taxes, to provide for the current expenses of a certain year, to the constitutional limit, the court has no authority to control the action and discretion of such county board and compel it to reduce the amount of any levy made for county purposes and levy in lieu thereof a tax for the soldiers' relief fund.

SUBMISSION of controversy to supreme court. There is a statement in the opinion.

W. W. Holmes, for plaintiffs.

J. J. Carlin, for defendants.

No briefs filed.

RAGAN, C.

This is a submission without action, under the provisions of section 567 of the Code of Civil Procedure, of a controversy between the members of the soldiers' relief commission of Rock county and the board of commissioners of said county, to determine whether said county board has authority to levy, in addition to a fifteen mill tax imposed by said county board for county purposes, a three-tenths of one mill tax for soldiers' relief fund. From the agreed statement of facts it appears that the county commissioners of Rock county, on the 9th of January, 1894, made an estimate of the necessary expenses of the county for the current year, and the same was published as provided by law; that among the different items of expense so estimated and published was one for the sum of $200 for soldiers' relief fund; that on the 12th of February, 1894, the soldiers' relief commission of said county, in pursuance of the provisions of the statute, filed with the county clerk of said county a report

in writing, setting forth that the sum of $200 would be required to be levied by the county board as a soldiers' relief fund. On the last day of the session of the county commissioners, sitting as a board of equalization for the year 1894, said board made the following levies: General fund, nine mills; bridge fund, four mills; road fund, two mills; Brown county funding bond, one mill,—this last fund having been authorized by a vote of Brown county before the county of Rock was cut off therefrom. The total amount of the levy was $1.50 on the $100 valuation, excluding the one mill bond fund. The county commissioners, at the time they made these levies, neglected and refused to make any levy for the soldiers' relief fund. There are two questions presented in the case:

1. Whether the county board is authorized and required to levy, in addition to the fifteen mill levy made to meet the current expenses of the county, a levy of three-tenths of one mill for the soldiers' relief fund. Section 5, article 9, of the constitution provides that county authorities shall never assess taxes the aggregate of which shall exceed $1.50 per $100 valuation, except for the payment of an indebtedness existing at the adoption of this constitution, unless authorized by a vote of the people of the county. The levy of three-tenths of a mill tax for the soldiers' relief fund has not been authorized by a vote of the people, and is not for the purpose of paying an indebtedness existing at the adoption of the constitution; and, therefore, the county authorities of Rock county have no authority to make the levy, as the levy made has already reached the constitutional limit. (*In re House Roll No. 284*, 31 Neb., 505; *State v. Weir*, 33 Neb., 35.)

2. The second question presented by the record is whether the county authorities of Rock county are compelled to include in the levies of taxes made for the year 1894 three-tenths of a mill for the soldiers' relief fund. To do this, of course, some of the other levies would have to be re-

duced. Section 17, chapter 82*a*, Compiled Statutes, 1893, provides: "That the county boards of the several counties of this state are hereby authorized to levy, in addition to the taxes now levied by law, a tax not exceeding three-tenths of one mill upon the taxable property of their respective counties, * * * for the purpose of creating a fund for the relief and for funeral expenses of honorably discharged indigent Union soldiers, sailors, and marines," etc. The language of this statute is not mandatory, but permissive. If, in the judgment of the county authorities, the exigencies of the county are such that to provide for the current expenses of a certain year it is necessary to levy taxes to the constitutional limit, the court has no authority to control the action and discretion of the county board in that matter, and compel it to reduce the amount of a levy made for road, bridge, general, or other funds, and put in its place the soldiers' relief fund.

DISMISSED.

SANBORN S. HEWS, APPELLANT, V. C. C. KENNEY ET AL., APPELLEES.

FILED FEBRUARY 6, 1895. No. 6101.

1. **Trusts**: TITLE TO WIFE'S LAND HELD BY HUSBAND: CREDITORS' BILL. In 1882 a husband purchased a lot in the city of Lincoln, in Lancaster county, with the money of his wife, for her, under an agreement between them that the title should be taken in her name. The deed, however, without the wife's knowledge, was made to the husband and recorded. In 1884 the wife learned that the title to the lot was of record in her husband's name and requested him to convey it to her according to their agreement. The husband then made and delivered directly to the wife a deed for the lot. The husband was advised that this deed was invalid. It was never recorded, but lost or destroyed. In 1887 the husband and wife executed a deed of

the lot to one B., for the purpose of having him convey the title to the wife, which he then did. This deed the wife delivered to the husband for record, but he, without her knowledge, withheld it from the record, and it was lost. In 1889 B. executed and delivered to the wife a deed for the lot to take the place of the deed made by him in 1887. In 1886, in Richardson county, one Hews recovered a judgment against the husband, and in 1889 caused a transcript of such judgment to be filed and docketed in the office of the clerk of the district court of Lancaster county. The cause of action on which such judgment was based was not a credit which Hews had given the plaintiff on the faith of his being the owner of said lot. In a suit by Hews to subject this lot to the payment of his judgment, *held*, (1) that the real estate was the property of the wife and held in trust for her by her husband; (2) that as Hews had extended no credit to the husband on the faith of the latter's ownership of the lot, and had not been misled to his injury because the title to said lot was of record in the husband's name, that it was not liable for his debts.

2. **Fraud.** Under our statutes fraud is a question of fact and not of law. (Compiled Statutes, ch. 32, sec. 20.)

3. **Creditors' Bill: TRUSTS: HUSBAND AND WIFE: ESTOPPEL.** Cases have arisen in which courts of equity have made the property of the wife, the title to which was held in trust by the husband, liable for his debts; but these cases are not based upon the doctrine that the act of the wife in permitting the husband to carry in his own name and of record the title to her real estate, was a "fraud in law," but upon the doctrine that the wife, by permitting her husband to keep in his own name the title to her property, to hold it out to the world as his, to contract debts on the faith of his being the actual owner of the property, had estopped herself in equity against the husband's creditors deceived thereby, from claiming the property.

4. **Trusts: HUSBAND AND WIFE: CREDITORS' BILL.** Where a husband uses the money of his wife in paying for land, the title to which he takes in his own name, a trust will arise in favor of the wife, which a court of equity will protect against the husband's creditors, unless it is made to appear that such creditors gave the husband credit on the faith of his being the actual owner of the property of the wife, the title to which was in his name.

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

The facts are stated by the commissioner.

J. H. Broady, for appellant:

There is no resulting trust, because to prove a resulting trust of the sort pleaded in the answer it must be shown by proof, absolutely clear and satisfactory, that the identical money can be traced into the land while it is the property of the wife. (*Besson v. Eveland*, 26 N. J. Eq., 468; *Glover v. Alcott*, 11 Mich., 470; *Glidden v. Taylor*, 16 O. St., 521; *Humes v. Scruggs*, 94 U. S., 22.)

The conveyance of the land in question cannot be treated as a valid mortgage to secure a debt from the husband to the wife, but must be held a constructive fraud, at least, and void. (*Wake v. Griffin*, 9 Neb., 50; *Roy v. McPherson*, 11 Neb., 197; *Stevens v. Carson*, 30 Neb., 544.)

Marquett, Deweese & Hall, contra, in support of an argument in favor of the contention that the case presents an example of a resulting trust, cited: *Ross v. Hendrix*, 15 S. E. Rep. [N. Car.], 4; *Union Nat. Bank v. Harrison*, 16 Neb., 635; *Cresswell v. McCaig*, 11 Neb., 223; 1 Perry, Trusts [2d ed.], sec. 127; *Fillman v. Divers*, 31 Pa. St., 429; *Resor v. Resor*, 9 Ind., 347.

RAGAN, C.

On the 3d day of August, 1885, a cause of action accrued in favor of Sanborn S. Hews against one C. C. Kenney. On the 20th of October, 1886, Hews recovered a judgment against Kenney on said cause of action in the district court of Richardson county, and on the 4th day of May, 1889, a transcript of said judgment was duly filed and docketed in the office of the clerk of the district court of Lancaster county. On the 3d day of June, 1882, one D. B. Alexander and said C. C. Kenney entered into a contract in writing in and by which Alexander agreed to sell and convey to Kenney, when certain payments should be

made, the following described real estate, situate in said Lancaster county, to-wit: The east half of lot 10 of Little & Alexander's subdivision of lot 63 of S. W. Little's subdivision of the west half of the southwest quarter of section 24, in township 10 north, and range 6 east, of the 6th P. M. This contract was recorded in the office of the recorder of deeds of said Lancaster county on the 14th of June, 1882. On the 3d day of October, 1883, Alexander and his wife conveyed the said above described real estate to the said C. C. Kenney by warranty deed, which was filed and recorded in the office of the register of deeds of said Lancaster county on November 6, 1883. On the 9th day of May, 1887, C. C. Kenney and Carrie H. Kenney, his wife, by their warranty deed of that date conveyed said real estate to one Blitz G. Kenney, and this deed was filed and recorded in the office of the recorder of deeds of Lancaster county on the 10th of May, 1887. On the 24th day of June, 1889, said Blitz G. Kenney, by his warranty deed of that date, conveyed said premises to Mrs. Carrie H. Kenney, and this deed was filed and recorded in the office of the register of deeds of Lancaster county on the 27th of June, 1889. In May, 1890, said Hews brought this suit in the district court of Lancaster county against said C. C. Kenney, Carrie H. Kenney, his wife, and Blitz G. Kenney, the object of which suit, so far as the same is material here, was to have the conveyance of said real estate made by C. C. Kenney and Carrie H. Kenney, his wife, to Blitz G. Kenney, and the conveyance made by Blitz G. Kenney to Mrs. Carrie H. Kenney, set aside and said real estate decreed to be the property of C. C. Kenney and liable for the judgment against him owned by said Hews. It was alleged by Hews in his petition that said property was in fact the property of C. C. Kenney and that said conveyances were made without consideration and for the fraudulent purpose of placing the property of the said C. C. Kenney out of the reach of his creditors. The

district court found that the real estate in controversy "was purchased by the defendant Carrie H. Kenney in the year 1882 and paid for by her own personal means, and that subsequent to the purchase of said premises the said defendant Carrie H. Kenney caused a building to be erected on said real estate which was paid for from her own personal estate; that the defendant C. C. Kenney never at any time had any interest in or to said real estate * * * that the title to said real estate was taken and held in trust by said defendant C. C. Kenney for the use and benefit of the said defendant Carrie H. Kenney until the year 1887, when the same was conveyed by the said defendant C. C. Kenney to the defendant Carrie H. Kenney, his wife, through the defendant Blitz G. Kenney as trustee; and that the legal title to said real estate has been at all times since said date, and now is, in the said defendant Carrie H. Kenney," and rendered a decree dismissing the case, and Hews has appealed.

We shall not attempt to set out all or any considerable portion of the evidence given on the trial of this case in the district court. The appellant introduced evidence which tended to show that from the autumn of 1876 until about the year 1883 the appellees, C. C. Kenney and Carrie H. Kenney, his wife, resided in Richardson county; that C. C. Kenney was during that time the owner of a house and lot in Salem, in said county, and owned and conducted a drug business; that persons well acquainted with Kenney and his wife and more or less conversant with their financial affairs had no knowledge of any money or property owned by Mrs. Kenney during that time. The evidence in behalf of Mrs. Kenney tended to show that she was married to C. C. Kenney in the autumn of 1876; that she was the daughter of a Mr. Holt, who at that time and subsequently was engaged in the banking business at Falls City, Nebraska; that at the time of her marriage her father gave her $1,000 in cash and within a few months there-

after $700 more in cash and some other property; that this money was entrusted by Mrs. Kenney to her husband to be invested and used for her benefit; that he used some of it in his business, and that he loaned some of it; that some time in the year 1882 she induced her husband to sell out his business in Richardson county and remove to the city of Lincoln; that with that object in view the husband and wife came to the city of Lincoln in June, 1882; that they examined the property in controversy and it was agreed that it should be purchased and paid for out of the wife's money then in the hands of the husband and conveyed to her; that the contract of purchase of the property was then made with Alexander and $500 cash, paid to him on the purchase out of the wife's money. In the meantime they began the erection on said lot of a brick building, the cost of the construction of which was paid with the wife's money; that while the building was being constructed the wife and her husband borrowed $800 from the wife's father, giving their joint note for it, and that this money was used in constructing the building and was repaid to the wife's father out of the rents of the building after it was completed; that during the time the building was in progress of construction the wife's father gave her other sums of money which were used in the construction of the building; that the final payments on the lot were made to Alexander out of the wife's money; that some time after the deed was made by Alexander to C. C. Kenney for the lot the wife discovered that it had not been deeded to her, and called her husband's attention to the fact that the lot was paid for with her money, and by the agreement between them was to be hers, and thereupon, in 1884, C. C. Kenney executed and delivered a deed direct to Mrs. Kenney for the lot. This deed was never recorded. After the execution of this deed C. C. Kenney was advised by a lawyer that a deed from a husband to a wife direct was invalid under the laws of this state, and thereupon

the deed was destroyed, and C. C. Kenney and his wife made the conveyance of the 9th of May, 1887, to Blitz Kenney, who thereupon on the same date executed to Mrs. Kenney a deed for the real estate. This deed Mrs. Kenney delivered to her husband to have recorded, but without her knowledge or consent it was withheld from the record and was finally lost; and that the deed made by Blitz Kenney to Mrs. Kenney for the property on the 24th of June, 1889, was made to take the place of the deed last aforesaid which had been lost.

It will thus be seen that the finding of the district court is abundantly supported by the evidence. The husband having purchased this real estate with his wife's money for her and under an agreement between them that the conveyance should be made to her, when the property was conveyed to him he held it as her trustee. (*Ross v. Hendrix*, 15 S. E. Rep. [N. Car.], 4; *Cresswell v. McCaig*, 11 Neb., 222; *Union Nat. Bank v. Harrison*, 16 Neb., 635.) The learned counsel for the appellant, as we understand him, does not controvert this; but his argument is that the act of Mrs. Kenney in permitting the title to this real estate to stand in the name of her husband and of record in his name was a "fraud in law" against the husband's creditors. It is undoubtedly true that if a wife knowingly permits her husband to carry in his own name and of record the title to her real estate and to hold himself out to the world as the actual owner thereof, and if he is given credit, and is enabled to and does contract debts because those dealing with him suppose he is the owner of the real estate standing in his name, then the wife could not be heard to claim title to the real estate as against such creditors; but that is not this case. There is no evidence in the record that the cause of action on which is based the judgment which it is sought to have satisfied out of Mrs. Kenney's property was contracted on the supposition or belief that C. C. Kenney was the owner of the property in suit. By the statutes of

this state fraud is made a question of fact. (Compiled Statutes, ch. 32, sec. 20.) Cases have arisen, and will doubtless arise again, in which courts of equity have made the property of the wife, the title to which was held in trust by her husband, liable for his debts; but these cases are not based upon the doctrine that the act of the wife in permitting the husband to carry in his own name and of record the title to her real estate is a "fraud in law," but upon the theory that the wife, by permitting her husband to keep in his own name the title to her property, to hold it out to the world as his, to contract debts on the faith of his being the actual owner of the property, estops herself as against the husband's creditors deceived thereby from claiming the property. Such is the case of *Besson v. Eveland*, 26 N. J. Eq., 468, where it was held (I quote from the syllabus): "Where a husband uses the money of his wife in paying for land, the title to which he takes in his own name, a trust will arise in favor of the wife, which a court of equity will protect against the husband's creditors; but the design of the parties to create the trust must clearly appear, and the conduct of the wife be free from suspicion. But where the husband has taken the title to property in his own name, with his wife's knowledge, and she has permitted him for years to represent the property to be his, and, upon such apparent ownership, to obtain business credit and standing, equity will not protect the property from the husband's creditors, even if the design to create a trust in favor of the wife were clearly established by the evidence. He who is silent when conscience requires him to speak will not be permitted to speak when conscience requires him to be silent; and every transaction falls fairly within the operation of this maxim, where an innocent person, exercising reasonable prudence, has been misled to his injury by false lights or appearances, held out with the consent or knowledge of the person, subsequently alleging that the true state of affairs was totally different from what it

seemed." The question in the case at bar is one of equity between Mrs. Kenney and Hews. Under the evidence in the case who has the better right in equity, Mrs. Kenney or Mr. Hews? The appellant has not been injured nor misled because C. C. Kenney had in his own name and of record the title to his wife's property. The appellant extended no credit to C. C. Kenney on the supposition that he was the owner of the lot in controversy. The learned judge was entirely right in holding that Mrs. Kenney's property was not liable for the debt of her husband, and the decree is

AFFIRMED.

JOHN THOMAS V. ANNA MARKMANN.

FILED FEBRUARY 6, 1895. No. 5342.

1. **Sheriffs and Constables:** EXECUTIONS: UNLAWFUL SEIZURE OF PROPERTY: ACTION ON BOND. Where a constable with a process against the property of one person seizes by virtue thereof the property of another, he is guilty of official misconduct, for which he and his sureties are liable in an action on his official bond. *Turner v. Killian*, 12 Neb., 580, followed and reaffirmed.

2. **Res Adjudicata:** WRONGFUL LEVY UNDER EXECUTION: JUDGMENT AGAINST OFFICER: ACTION ON BOND. Where an officer, holding an execution issued on a judgment against A, by virtue of such execution seizes the property of B, and the latter recovers a judgment against such officer for the value of the property seized, then, in a suit by B against such officer and the sureties on his official bond to recover the amount of the judgment, such judgment is conclusive evidence against the officer and his sureties as to B's ownership of the property at the time it was seized by the officer, the amount of the damages and costs sustained by B by reason thereof in the absence of a showing that the court, had no jurisdiction to pronounce the judgment, or that it was procured by fraud or collusion. *Pasewalk v. Bollman*, 29 Neb., 519, reaffirmed.

3. **Action on Sheriff's Bond:** PLEADING. In such a suit

against an officer and the sureties on his bond the answer of the sureties alleged "that said judgment was procured by fraud, misrepresentation, and contrary to law." *Held*, A mere conclusion.

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

J. L. Kaley, for plaintiff in error.

A. C. Read and *H. C. Hitt, contra.*

RAGAN, C.

On the 7th day of January, 1890, before a justice of the peace of Douglas county, one Tincert recovered a judgment against one William Markmann for $13.57. January 27 an execution was issued on this judgment and delivered to a constable named Farquhar, who seized a gray mare and some harness in the possession of said Markmann, and as his property, for the satisfaction of such execution. On the 4th of February, 1890, Markmann replevied from the constable the mare and harness, and on the 7th of February the replevin suit was tried to a justice of the peace, who found the issues in favor of Markmann and rendered a judgment in his favor. No appeal or proceeding in error was prosecuted from this judgment. On the 26th of February the constable, Farquhar, made return of the execution in his hands to the justice who issued it, stating in the return that he had seized the mare and harness before mentioned to satisfy the execution, but that such property had been taken from his possession by writ of replevin and that he therefore returned the writ of execution unsatisfied. March 5, 1890, the justice before whom the judgment in favor of Tincert was rendered issued another execution on such judgment and delivered it to said constable Farquhar for service, and he again seized the mare and harness to satisfy such execution. On the 6th of March Mrs. Anna

Markmann brought a suit in replevin for the mare and harness taken by the constable, and on March 8 the summons in the replevin suit was returned as having been duly served on the constable, but that the officer serving it was unable to get possession of the property called for in the replevin summons because Farquhar had sent the property into the state of Iowa. March 10 the replevin action proceeded as one for damages against the constable Farquhar, and the justice found that Anna Markmann, at the commencement of the replevin suit, was the owner and entitled to the immediate possession of the mare and harness levied upon by Farquhar, found the value of the mare and harness to be $175, that Mrs. Markmann had sustained damages in the sum of $25, and thereupon rendered judgment against the constable, Farquhar, for $200 and costs. No appeal or proceeding in error was taken from this judgment. On the 20th of March the constable Farquhar returned his execution to the justice who issued it, stating in his return that he had seized the gray mare and harness already mentioned, had sold it at public auction, and had satisfied the execution. March 11, 1890, Mrs. Markmann brought another replevin suit before another justice against Farquhar to obtain possession of the mare and harness, but this suit was dismissed on the same day it was brought. The present action was brought by Mrs. Markmann against David P. Farquhar the above mentioned constable, and John Thomas and Edward Brennan, the sureties on his official bond as such constable.

The petition set out at length the election of Farquhar as constable; that he accepted the office and qualified for it by giving a bond, and that the defendants Thomas and Brennan were his sureties. The petition then recited the recovery of the judgment for $13.57 by Tincert against William Markmann; the issuing of an execution on said judgment, and the taking of the gray mare and harness by the constable for the payment of said judgment; that Mrs.

Markmann, at the time of the seizing of said gray mare and harness, was the owner of it, and so notified the constable; the bringing by her against Farquhar of the replevin action before the justice of the peace; the trial of said action and the judgment pronounced therein; that an execution had been issued on said judgment and returned wholly unsatisfied; that Farquhar was insolvent; and prayed judgment against all the defendants for the amount of the judgment with interest and costs rendered in her favor against the constable before the justice of the peace.

The answer admitted the official position of Farquhar, the giving by him of a bond as constable; that Thomas and Brennan were the sureties on said bond; the recovery of a judgment by Tincert against William Markmann for $13.57; the issuing of an execution on said judgment and its levy by Farquhar on the mare and harness; the bringing by Mrs. Markmann against Farquhar of the replevin action before the justice of the peace; the recovery of the judgment in said replevin action; but alleged the facts to be "that said Anna Markmann did not recover a valid and subsisting judgment, but that said judgment was recovered by fraud, misrepresentation, and contrary to law; that at the time of said [replevin] suit there was no appearance by the defendant Farquhar;" that the sureties were not parties to said replevin suit. The answer then alleged the bringing on February 4, 1890, of the replevin suit of Wm. Markmann against Farquhar for the mare and harness and that the writ of replevin issued in such case was issued contrary to law; and that Wm. Markmann recovered in said replevin suit by proving that he was the owner of the mare and harness. The answer alleges that Markmann was then the owner of the horse and harness, but denied that he was entitled to the possession of it.

The action at bar was tried to a jury and resulted in a verdict and judgment in favor of Mrs. Markmann, and the defendant John Thomas has prosecuted to this court a petition in error.

1. The first assignment of error is that the court erred in admitting in evidence the record showing the proceedings and judgment in the replevin suit of Anna Markmann against the constable Farquhar, had before the justice of the peace on the 10th of March, 1890. The seizure of this property by the constable was an act done by virtue of his office, and if the constable, holding an execution issued on a judgment against William Markmann, seized the property of Anna Markmann and sold it to satisfy such judgment, he was thereby guilty of official misconduct, for which he and the sureties on his official bond became liable. (*Turner v. Killian*, 12 Neb., 580; *People v. Schuyler*, 4 N. Y., 173; *Ohio v. Jennings*, 4 O. St., 418.) The record of the judgment put in evidence, and the admission of which is assigned as error here, showed that this mare and harness were taken in replevin proceedings by Mrs. Markmann against the constable, Farquhar; that at the time of the bringing of the replevin suit she was the owner and entitled to the possession of the property; that Farquhar wrongfully took and detained the property from Mrs. Markmann, to her damage in the sum of $200. There is a conflict in the authorities as to whether a judgment rendered against an officer for wrongfully seizing on execution and selling the property of one person for the debt of another, is conclusive evidence against the sureties of such officer in a suit on the officer's official bond to recover the judgment rendered against the officer for the wrongful conversion of such property. Some authorities hold that such a judgment rendered against the officer is only *prima facie* evidence against his sureties. Such is *Fay v. Edmiston*, 25 Kan., 439. In *Tracy v. Goodwin*, 87 Mass., 409, the rule was stated as follows: "A judgment recovered, without fraud or collusion, against a constable for a wrongful attachment of the goods of a third person on a writ is conclusive evidence, both as to damages and costs, in an action against him and his sureties upon his bond," and in *Dennie*

v. Smith, 129 Mass., 143, it was held that a judgment against a constable for the wrongful conversion of property was conclusive upon him and the sureties on his official bond in an action on such bond. We approve of the doctrine of the Massachusetts cases, and accordingly hold that where an officer, holding an execution issued on a judgment against A, by virtue of such execution seizes the property of B, and B recovers a judgment against such officer for the value of property seized, that then, in a suit by B against such officer and the sureties on his official bond to recover the amount of the judgment, such judgment is conclusive evidence against the officer and his sureties as to B's ownership of the property at the time it was seized by the officer, and the amount of the damages and costs sustained by B by reason thereof, in the absence of a showing that the court had no jurisdiction to pronounce such judgment, or that it was procured by fraud or collusion. (*Pasewalk v. Bollman*, 29 Neb., 519.)

2. There are other assignments of error which relate to instructions given and refused by the trial court, but what has already been said renders a special consideration of these assignments unnecessary. The district court instructed the jury upon the theory that the judgment in the replevin suit between Mrs. Markmann and the constable rendered by the justice of the peace was only *prima facie* evidence against the sureties on Farquhar's bond, and permitted the jury in the trial of this case to say whether the justice of the peace in the replevin suit reached the correct conclusion as to the value of the replevied property. Of course, this instruction was erroneous, but it was not prejudicial to the plaintiff in error.

3. It is also assigned as error that the verdict is not supported by sufficient evidence. We think it is. The plaintiff in error made some effort to show that the judgment in the replevin suit, made the basis of this action, was procured by fraud or collusion; and the court permitted the

jury, under proper instructions, to pass upon that question. The plaintiff in error has no just grounds of complaint as to the finding of the jury upon this issue. The answer which assailed the judgment did so in this language: "That said judgment was procured by fraud, misrepresentation, and contrary to law." This was a mere conclusion. The answer contained no averments of fact under which evidence was admissible to show that the judgment had been fraudulently procured. It is also suggested, as a part of the argument, that the verdict is not sustained by the evidence; that in the trial of this case there was no evidence introduced to show that Mrs. Markmann owned the mare and harness. The answer of the plaintiff in error admitted that Farquhar seized on execution and sold the property which was made the basis of the replevin suit of Mrs. Markmann against the constable, the judgment in which latter suit is made the basis of this action, and that judgment was conclusive evidence in this case against the defendants thereto that Mrs. Markmann was the owner of the mare and harness at the time it was seized by Farquhar, and conclusive evidence of the value of the mare and harness and the damages sustained by Mrs. Markmann by reason of its seizure by the constable. With the replevin suit brought by William Markmann against the constable for this property we have nothing to do. If that judgment was wrong, the constable should have appealed from it or prosecuted a proceeding in error to reverse it. With the replevin suit instituted by Mrs. Markmann against Farquhar on the 11th of March, 1890, and dismissed on the same day, we have nothing to do. It may be true, that notwithstanding Mrs. Markmann had recovered a judgment against Farquhar for the value of her mare and harness that she was desirous of procuring the possession of the property itself. Much of the argument of counsel for the plaintiff in error is devoted to showing that the judgment in replevin made the basis of this action was wrong. We

may concede that it was wrong, all wrong; but this action is not a retrial of that one, nor an action to review that judgment. It is as conclusive and binding as any other judgment pronounced by any other court until it is reversed or set aside by proceedings brought for that purpose. The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. JOHN J. GILLILAN ET AL., V. HOME STREET RAILWAY COMPANY ET AL.

FILED FEBRUARY 6, 1895. No. 6542.

1. **Mandamus: PRACTICE.** Parties to *mandamus* proceedings should pursue the practice established by the Code of Civil Procedure. The practice of attacking the application for the writ by motion or demurrer is one which will not be encouraged.
2. ———: CORPORATIONS: PARTIES. Stockholders of a corporation, merely as such, are not proper parties respondent in a proceeding to compel the corporation by *mandamus* to perform a corporate act.
3. ———: PLEADING. The relator in a *mandamus* proceeding must charge directly all facts necessary to entitle him to the writ. Inferences in his favor will not be drawn from vague or ambiguous language.
4. ———: ———. Inasmuch as the allowance of a writ of *mandamus* rests largely in the discretion of the court, and the writ will be refused where the proceeding is trivial or vexatious, averments showing a special interest in the relator will not be stricken out as immaterial, even in a case where it is not necessary to show such interest.

ORIGINAL application for *mandamus* to compel the respondents to restore a portion of an abandoned street railway line and to maintain and operate the same. *Denied.*

Leese & Starling, for relators.

William G. Clark, contra.

IRVINE, C.

This is an original application for a writ of *mandamus* to compel the respondents to restore a portion of an abandoned street railway line, and to maintain and operate the same. The application alleges that the relators are citizens of the United States and of the state of Nebraska, and residents and taxpayers of the city of Lincoln; that the Capital Heights Street Railway Company, from February, 1887, until December, 1890, operated and maintained a street railway in the city of Lincoln, with all facilities necessary to accommodate the traveling public, from the corner of Twelfth and O streets to the corner of Randolph and Fortieth streets, by a route specially described in the application; that the relators are the owners of a large number of lots and tenement houses abutting upon or adjacent to the streets along which said car line passed; that at the time of locating said line, "in consideration of constructing, operating, and maintaining a street car line and service thereon on Randolph street aforesaid, the property owners along Randolph street aforesaid paid to the said street car company a large sum of money, the exact amount of which is unknown to the relators; that among the number your relators paid to the said company the sum of $1,400 for the construction, operation, and maintenance of the street car line and service aforesaid; that after the said street railway was put in running order and was in operation your relators expended many thousand dollars in erecting buildings adjacent to said line of street railway. Said buildings are still owned by the relators. That about December, 1890, the Capital Heights Street Railway Company consolidated all its stock, property, and franchises

with the stock, property, and franchises of the Lincoln City Electric Railway Company; that the said last mentioned company operated and maintained the aforesaid street railway from December, 1890, until the year 1892 as an independent line of street railway; that during the year 1892 said last mentioned company was reorganized under the name of the Home Street Railway Company, one of the respondents named in this petition; that the said Home Street Railway was operated and maintained along the streets hereinbefore mentioned in direct competition with the respondent, the Lincoln Street Railway Company, a corporation duly organized and existing under the laws of this state; that the said last mentioned company is now operating and maintaining a street railway line on O street, and upon several other streets in the said city of Lincoln, and at all times hereinbefore mentioned did operate and maintain such line of street cars upon such last mentioned streets; that the respondent, F. W. Little, is the president of the aforesaid Lincoln Street Railway Company, and is now and has been for several years last past acting as such president.

"Your relators say that at all times herein mentioned the Home Street Railway Company and the Lincoln Street Railway Company have been independent and competing lines of street railway.

"Your relators further say that for the purpose of stifling the competition between the Home Street Railway Company and the Lincoln Street Railway Company, and for the further purpose of monopolizing all the street railways in the city of Lincoln, the respondent, the Lincoln Street Railway Company, purchased of, and from, the Home Street Railway Company all the stock, property and franchises of the said Home Street Railway Company, including all that part of said line formerly known as the Capital Heights Street Railway, paying to the said Home Street Railway Company the sum of $95,000 in the bonds

of the said respondent, the Lincoln Street Railway Company; that for the purpose of concealing the true state of facts surrounding said purchase, the stock of the said Home Street Railway Company was transferred to F. W. Little, the respondent herein, who holds the same in trust for the respondent, the Lincoln Street Railway Company."

The application then charges that shortly after said purchase a portion of said line was abandoned and soon after another portion, until there was a complete abandonment of the whole line; that rails and ties of a portion of the line have been torn up and carried away by the respondents and put in use in other parts of the city by the Lincoln Street Railway Company, and that the respondents now threaten to remove the remainder of the rails and ties; that these acts have been performed for the purpose of forfeiting the franchise; "that the relators are now compelled to walk one-half mile to obtain street car service from their property on Randolph and G streets; that by reason of the abandonment of such street car service on Randolph street and G street the property of the relators and of all citizens living and owning property along the aforesaid street car line of the Home Street Railway Company has become greatly depreciated in value; that a large number of relators' houses, situated in close proximity to said car line, have become vacant by reason of the abandonment of said line, and the property of the relators has been lessened in value many thousands of dollars."

To this application the Lincoln Street Railway Company and F. W. Little demur, and the Home Street Railway Company files a motion to strike out from the application certain averments, being those in regard to the relators' ownership of property near the car line, those in relation to the contribution of money for its construction, and those in regard to the injury to the relators' property by reason of the abandonment of the line.

The regular procedure in *mandamus* is to make the

application by motion supported by affidavit, whereupon the court may grant the writ without notice, may require notice to be given, or may grant a rule to show cause why the writ should not be allowed. (Code, sec. 649.) When the right to the writ is clear, and it is apparent that no valid excuse can be given for failure to perform the duty, a peremptory writ may be issued. In other cases the writ issued in pursuance of the motion is in the alternative. (Code, sec. 648.) The alternative writ and the answer thereto constitute the pleadings in the case. No other pleadings are permitted. (Code, sec. 653.) When a rule to show cause has been issued and the return thereto presents issues of fact, the court cannot try such issues at that stage of the proceedings, but in such case, if any writ issue, it must be the alternative writ and issues must thereon be regularly made up and tried. (*American Water-Works Co. v. State*, 31 Neb., 445.) It would seem, therefore, that the practice of attacking the application by motion or demurrer is irregular. This court has, however, permitted cases to be finally heard in pursuance of a rule to show cause, on the application and return thereto, and the parties having agreed to so proceed herein we shall treat the motion and demurrer as if they were regular, merely remarking that the practice is not one to be encouraged, and that the irregular nature of the proceeding renders the application to the case of established rules of pleading somewhat difficult. By the demurrer and motion it is sought to present to the court the question of the right to compel by *mandamus* the operation of a street railway, the circumstances necessary to an enforcement of such a right, the relations and duties to the public of a corporation which has succeeded another in the control of a street railway, and the nature of the interest, as public or private, which permits a relator to maintain such an action. To aid us in solving these important questions the respondent has filed a type-written brief, and the relator has filed a type-written

list of authorities which have been of service in spite of some inaccuracies in the titles of cases and the volume, name, and page of reports.

In support of the demurrer of the Lincoln Street Railway Company and F. W. Little two points are urged. First, that the allegations of the application do not show any connection of the demurring respondents with the line of road referred to which charges them with the duty of maintaining it; second, that the application nowhere charges that public interests have suffered by reason of the abandonment of the road, or that there is a public demand for its operation, and that private interests alone are insufficient to sustain the action. On the first point the allegations are that the Lincoln Street Railway Company has been, at all times mentioned, operating a line of street railway on several streets in Lincoln; that Little is its president; that the Home Street Railway Company and the Lincoln Street Railway Company have been independent and competing lines, and that, for the purpose of stifling competition between them and monopolizing all the railways in Lincoln, "the Lincoln Street Railway Company purchased of and from the Home Street Railway Company all the stock, property, and franchises of the said Home Street Railway Company, including all of that part of said line formerly known as the Capital Heights Street Railway, paying to the Home Street Railway Company the sum of $95,000 in the bonds of the said respondent, the Lincoln Street Railway Company; that for the purpose of concealing the true state of facts surrounding such purchase, the stock of the said Home Street Railway Company was transferred to F. W. Little, the respondent herein, who holds the same in trust for the respondent, the Lincoln Street Railway Company." In 1889 an act was passed to enable street railways to unite their roads by consolidation, purchase, sale, or by subscription to or purchase of capital stock. (Session Laws, 1889, ch. 38; Compiled Statutes, ch.

72, art. 7, secs. 6–10.) By this act three methods of union were provided. The first section permitted consolidation by means provided in the act where lines of two companies have been located and constructed so as to afford connected or continuous lines and routes of travel. The method and effect of such consolidation are prescribed in detail. Section 5 of the act authorizes any company existing in pursuance of law to lease or purchase any or all of any other street railway constructed by any other company. The same section also authorizes any company to purchase the capital stock of another. The application charges no facts from which consolidation could be inferred. It does charge a purchase by the Lincoln Street Railway Company of all the "stock, property, and franchises" of the Home Street Railway; but follows this allegation with the further averment that for the purpose of concealing the true state of facts surrounding said purchase, the stock of the Home Street Railway Company was transferred to Little, and that Little holds the same in trust for the Lincoln Street Railway. The relator in *mandamus* must show clearly his right to the writ, he must charge directly the facts entitling him thereto, and inferences in his favor will not be drawn from vague, ambiguous, or uncertain language which leaves his right in doubt. We think the averments referred to must be interpreted as charging merely that the purchase was by the acquisition of the stock of the Home Street Railway Company, and not by a transfer by that corporation to the Lincoln Street Railway Company, or to Little, of its tangible property. So far as the respondents demurring are concerned, then, the only allegations to connect them with the subject-matter of the action are that Little holds the stock of the Home Street Railway Company and that he holds it in trust for the Lincoln company. Where the act is a duty incumbent on a corporation, the writ may, according to circumstances, be directed to the corporation itself, to the select body of officers whose duty it is to perform

the act, or to the corporation and that body jointly. (Merrill, Mandamus, sec. 237, and cases cited.) But conceding this to be a case where a writ directed both to the corporation and its controlling officers would be proper, still the controlling officers are presumably the directors of the corporation and not the stockholders, and we know of neither authority nor principle permitting the stockholders, merely as such, to be made respondents in such a case. No other relation between either the Lincoln company or Little and the Home company is disclosed by the application, and the demurrer must, therefore, be sustained. On the other point argued the position of the respondents is that the writ will not issue to protect merely a private right; that the ground of intervention in all such cases is that the company has undertaken to perform a public function and to satisfy a public demand and that it will only be compelled to act when it is shown that such public demand exists and that the public will be incommoded by abandonment; that the test as to whether or not there is a public demand for the services is whether the traffic, provided the services were rendered, would be sufficient to at least pay operating expenses and some profit to the stockholders, and that it is not alleged in the application that such service is practicable, or that such public demand exists. These are questions of a grave and far-reaching character, and as the demurrer must be sustained upon the first ground we shall not undertake to decide the latter questions at this stage of the proceedings.

The motion of the Home Street Railway Company seeks to eliminate from the application all the averments by which it is sought to show a special interest in the relators by virtue of their contributing funds to the company which constructed the road, and by virtue of their owning property along its line. The application does not show that the money contributed was the consideration for any promise for any special operation of the line for any definite period.

It is simply stated that the money was paid in consideration of constructing, operating, and maintaining the line. These averments are entirly too indefinite to found thereon any right to have the line operated at this time by a company other than the donee, and further than this, we quite agree with counsel for the respondents that the writ of *mandamus* cannot be used to compel the specific performance of a merely private contract. The writ lies only to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. (Code Civil Procedure, sec. 645.) Where the duty is one arising by specific injunction of law from the office, trust, or station, then it may be enforced, even though its enforcement operates merely in favor of the individual relator; but the fact that respondents occupy such office, trust, or station, does not make every contractual obligation into which he enters a duty specially enjoined by law arising therefrom. The duty must be one arising from the office, trust, or station, to be enforced by *mandamus*, and not one arising merely through private acts and contracts. The relator must trace his right through the public duty of the respondents and not its private obligations. (*Crane v. Chicago & N. W. R. Co.*, 74 Ia., 330; *People v. Rome, W. & O. R. Co.*, 103 N. Y., 95.) Still it does not follow that because an action of this character could not be based alone on the allegations which respondents seek to strike out that such allegations are altogether immaterial. It is true that it has been repeatedly held in this state that where the question is one of public right and the object is to enforce a public duty, the relator need not show that he has any special interest in the result. It is sufficient to show that he is a citizen, and as such has an interest in the execution of the laws. (*State v. Shropshire*, 4 Neb., 411; *State v. Sterns*, 11 Neb., 104; *State v. Van Duyn*, 24 Neb., 586.) Such also is the doctrine of the supreme court of the United States in *Union P. R. Co. v. Hall*, 91 U. S., 343. The case last

cited was an application for a *mandamus* to compel the Union Pacific Railway Company to operate its road between Council Bluffs and Omaha, and it was shown that the relators were merchants in Iowa having frequent occasion to ship goods over the road. In *State v. City of Kearney*, 25 Neb., 262, it was said that the dividing line between the cases requiring the relator to show a special interest, and those requiring no interest to be shown is that interest must be shown where private or corporate rights are affected, but need not be shown where the relator is a mere informer, to procure the enforcement of a public duty. In that case the object of the writ was to compel the removal of a frame building maintained contrary to a fire ordinance. The relator did not show that he suffered any special injury by reason of the maintenance of the building and relief was denied for that reason. In *State v. Farney*, 36 Neb., 537, it is said: "That a private individual will be entitled to the writ of *mandamus* only in case he has some private right or particular interest to be subserved or some particular right to be preserved or protected, independent of that which he holds in common with the public at large."

The allowance of a writ of *mandamus* rests largely in the discretion of the court. Even where the duty is essentially a public one, and where it is not necessary to show any special interest, the court would undoubtedly be justified in denying the writ if the proceedings appeared to be vexatious or trivial. In the case of the *Union P. R. Co. v. Hall, supra*, the writ was allowed at the instance of relators, who were merchants in Iowa and frequent shippers on the respondent's road. It is hardly possible that it would have been allowed at the suit of a citizen of Maine who had no business relations with the company and would not be in anywise affected by the result. So here, if the question is to be considered one of public right it does not follow that the court would interfere by *mandamus* at the instance of any citizen of Lincoln having no special inter-

est in the event. By way of showing an interest alone and not by way of establishing a duty against the respondents, the averments are material and the motion is, therefore, overruled.

It may be remarked that this case was instituted before the decision in *State v. Lincoln Gas Co.*, 38 Neb., 33, and has been entertained as an original action for that reason.

JUDGMENT ACCORDINGLY.

JAMES W. WYLIE, APPELLANT, V. WILLIAM CHARLTON ET AL., APPELLEES,

AND

EMMA WYLIE, APPELLEE, V. WILLIAM CHARLTON ET AL., APPELLANTS.

FILED FEBRUARY 6, 1895. NOS. 5767, 5790.

1. **Parol Gifts of Land:** EQUITY. Equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements on the property. (*Dawson v. McFaddin*, 22 Neb., 131.)

2. ———: EVIDENCE. To establish such a case it is not necessary that the proof should be beyond a doubt. A preponderance of the evidence is all that is required in any civil action.

3. ———: ———. The circumstances which tend to cast suspicion upon such claims are circumstances to be considered in weighing the evidence to determine on which side the preponderance lies, but they do not create any rule of law as to the degree of proof.

4. **Witnesses:** HUSBAND AND WIFE. Under section 329 of the Code of Civil Procedure a wife cannot testify (subject to the exceptions of that section) on behalf of her husband, the plaintiff in an action to establish his title to land, as to conversations with persons since deceased whose representatives are the adverse party to the action. The inchoate estate of dower which

would accrue to the wife, should the husband succeed in the action, constitutes a direct legal interest in its event.

5. ——— : ———. The wife in this case was also one of the heirs of the deceased and a defendant in the action. *Held*, That her interest as such heir, not being an interest adverse to the representatives of the deceased, would not of itself be sufficient to exclude her testimony when offered against the representatives.

6. ———. Where a witness is interested on both sides of the record and the interests are of a different character, the court will not undertake to weigh such conflicting interests one against the other and admit the testimony of the witness, because by such weighing of such interests that in favor of the representatives may seem to be greater than that against them.

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

The opinion contains a statement of the cases.

Calkins & Pratt, for appellants:

Equity protects a parol gift of land, if accompanied by possession, where the donee, induced by the promise to give it, has made valuable improvements. (*Dawson v. McFaddin*, 22 Neb., 131; *Ford v. Steele*, 31 Neb., 521; *Brown v. Sutton*, 129 U. S., 238.)

Reasonable certainty is all that is required in proving a parol gift. (*Neale v. Neales*, 9 Wall. [U. S.], 1.)

The plaintiff, James W. Wylie, established the making of such a contract with a part performance that he was entitled to a decree for specific performance under the evidence admitted by the trial court. (*Brown v. Sutton*, 129 U. S., 238; *Mudgett v. Clay*, 31 Pac. Rep. [Wash.] 424; *Russell v. Russell*, 53 N. W. Rep. [Mich.], 920; *Haines v. Spanogle*, 17 Neb., 637.)

The court erred in refusing to allow Emma Wylie to testify as a witness for plaintiff James W. Wylie. (*Gillette v. Morrison*, 9 Neb., 401; *Kingsbury v. Buckner*, 10 Sup. Ct. Rep., 650; *Griffin v. Earle*, 13 S. E. Rep. [S. Car.], 473.)

Dryden & Main and *Ricketts & Wilson, contra:*

A court of equity will not compel donor's personal representatives to complete an imperfect gift by the doing of an act which the donor, if living, might have refused to do. (*Walsh's Appeal*, 122 Pa. St., 177.)

To establish a parol gift or sale of land between parent and child the evidence must be direct, positive, express, and unambiguous. The terms of the sale or gift must be clearly defined and all the acts necessary to its validity must have special reference to it, and to nothing else. (*Collins v. Lofftus*, 34 Am. Dec. [Va.], 719; *Erie & W. V. R. Co. v. Knowles*, 11 Atl. Rep. [Pa.], 250; *Allison v. Burns*, 107 Pa. St., 50; *Poorman v. Kilgore*, 67 Am. Dec. [Pa.], 425.)

A parol gift or sale of real estate cannot be specifically enforced unless possession of the property was taken after and in pursuance of such gift or sale. (*Poorman v. Kilgore*, 67 Am. Dec. [Pa.], 425; *Cox v. Cox*, 67 Am. Dec. [Pa.], 432; *Green v. Groves*, 10 N. E. Rep. [Ind.], 401; *Birkbeck v. Kelly*, 9 Atl. Rep. [Pa.], 313.)

As to the incompetency of Mrs. Wylie to testify as a witness the following cases are cited: *Wamsley v. Crook*, 3 Neb., 344; *Ivers v. Ivers*, 47 N. W. Rep. [Ia.], 149; *Richards v. Crocker*, 20 N. Y. Sup., 954; *Mills v. Davis*, 21 N. E. Rep. [N. Y.], 68; *Donnell v. Braden*, 30 N. W. Rep. [Ia.], 777; *Erwin v. Erwin*, 7 N. Y. Sup., 365; *Hoffman v. Hoffman*, 18 N. Y. Sup., 387.

IRVINE, C.

These two cases are based on separate records, but they present the same state of facts and were apparently tried together, under a stipulation which provides that the evidence taken in one shall be considered in the other, with the exception of the evidence of James W. Wylie. They are founded on the same contract and, while presenting some

points of difference, are in so far identical that one opinion treating both cases will economize space and, perhaps, best present the questions involved. One case was begun by James W. Wylie, and the other by Emma Wylie, his wife; that by James Wylie made defendants the heirs and administrators of Ann Charlton, deceased. The defendants in Emma Wylie's case were the same, except that she herself was a defendant in James Wylie's case. Each petition alleged that in January, 1886, Ann Charlton, a widow, was the owner in fee-simple of the northwest quarter of section 8, town 11, range 18 west, and the equitable owner, by virtue of a contract of sale from the Union Pacific railway, of the east one-half of the northeast quarter of section 7. It will be observed that the eighty acres last described adjoin the quarter section first described, and lie immediately west thereof. The petitions further allege that on January 20, 1886, James Wylie married Emma, the daughter of Ann Charlton, whereupon Ann Charlton agreed with Wylie and wife that if they would remove to Buffalo county, live upon, improve, and cultivate said lands, Ann Charlton would give to her daughter Emma the eighty-acre tract in fee-simple, free from all incumbrances, and would sell to James Wylie the quarter section for the sum of $2,000, to be paid when James should have sufficiently stocked said land, and that meanwhile James should pay to Ann Charlton such rent as might be agreed upon in lieu of interest on the $2,000; that this proposition was accepted and that Wylie and wife moved upon said land, and have ever since resided thereon; that they have improved and cultivated the same and performed all the conditions of the contract on their part; that in October, 1889, it was agreed between Wylie and Mrs. Charlton that the purchase money for the quarter section should be paid and the conveyance made in the fall of 1890; that on June 6, 1890, Ann Charlton died intestate, leaving as her heirs William Charlton, her son,

Ella Charlton, Elizabeth Stevens, and Emma Wylie, her daughters, and William Charlton, second, her grandson, and that William Charlton was her administrator. The prayer in each petition was for a specific performance of the contract. The answers admitted the relationship of the parties, the death of Ann Charlton and the ownership by her of the land described, and denied all other allegations of the petitions. In James Wylie's case the court found for the defendants and dismissed the case. In Emma Wylie's case the court found for the plaintiff and decreed specific performance as to the eighty acres. As we have said, the evidence was the same for the most part in both cases. The difference was this, that in Emma Wylie's case the court permitted James Wylie, her husband, to testify as to the conversation with the deceased which constituted the parol contract which it was sought to enforce. In James Wylie's case the court excluded the testimony of Mrs. Wylie as to the same facts. Neither party attempted to testify in his own behalf as to such conversations. The result was in Emma Wylie's case there was direct evidence from her husband as to the contract; in James Wylie's case there was no direct evidence. From the decrees so rendered appeals have been taken; in Emma Wylie's case by the defendants, in James Wylie's by the plaintiff.

In the case of Mrs. Wylie the ground of the appeal is that the decree is not sustained by the evidence. It is not urged that the court erred in admitting the husband's testimony. One point relied upon is that the contract proved did not, with sufficient certainty, describe the land. It is true that Wylie's testimony is simply to the effect that Mrs. Charlton agreed to convey to her daughter "one of the eighties." This would be uncertain standing alone, but there is evidence that when the plaintiffs moved upon the land they occupied a sod house standing on the quarter section, and that Wylie thereafter erected a barn across the section line road on the eighty-acre tract claimed by Mrs.

Wylie; that while this barn was being erected Mrs. Charlton was present and a discussion arose as to where it should be placed, Mrs. Charlton expressing an intention of erecting a house for her daughter on the eighty-acre tract and thinking for that reason the barn should be placed on the quarter section. To this the Wylies responded that in case they should desire to sell either tract it would be better that both house and barn should be on the same tract. Mrs. Charlton assented to this and the barn was for that reason placed on the eighty acres. There is some other evidence tending to show a recognition by Mrs. Charlton of the eighty-acre tract claimed as that which was to be conveyed to her daughter. We think that this evidence was sufficient to identify the tract and to sustain the finding of the trial court in that particular. In addition to this point the defendants contend that equity will not interfere to complete an imperfect gift. Of the cases cited in support of that point *Walsh's Appeal*, 122 Pa. St., 177, is a fair illustration. That was a case in which it was sought to enforce a *donatio mortis causa*. The gift failed because of a want of the appropriate elements to support such a gift. The contract alleged would present no such case. It presents a case of a parol gift of land, followed by possession and making of improvements. That such a gift will be sustained and enforced in equity is no longer an open question in this state. (*Dawson v. McFaddin*, 22 Neb., 131; *Ford v. Steele*, 31 Neb., 521. See, too, *Neale v. Neales*, 9 Wall. [U. S.], 1; *Brown v. Sutton*, 129 U. S., 238.) It is still further urged that the proof in this case lacks the requisite degree of certainty, and in support of that contention counsel call attention to the rule announced in many cases, of which *Allison v. Burns*, 107 Pa. St., 50, is an extreme example, to the effect that in order to sustain a parol gift of land it must be established by credible proof of such weight and directness as to make out the facts beyond a doubt; that posses-

sion must have been taken and maintained and improvements made on the faith of the promise to convey, and that compensation in damages would be inadequate. We do not question that this rule, somewhat qualified, is a safe one to pursue in weighing the evidence. The courts have, perhaps, gone so far in the way of declaring exceptions to the statute of frauds that the efficacy of the statute has been endangered, and care should be taken in such exceptional cases to avoid the mischief which the statute endeavored to prevent; but we cannot accept the rule referred to as a rule of law governing the review of a case. To accept it as such would require in a civil case at least as high a degree of certainty as in a criminal case. As said by NORVAL, J., in *Stevens v. Carson*, 30 Neb., 544, "It has been repeatedly held by this court, in civil cases, that the party holding the affirmative of an issue is only required to establish it by a preponderance of the evidence." To adopt any rule which as a matter of law requires a higher degree of proof in any civil case would conflict with the rule so established. The true rule is stated in *Neale v. Neales*, 9 Wall. [U. S.], 1, which is that the law requires no more than that the case as stated be made out with reasonable certainty. The fact that the gift lies in parol, the fact that a temptation exists to make out a false case, and in such cases as this the fact that the person by whom the parol testimony might be contradicted is dead, are merely facts affecting the weight of the evidence. They are proper for consideration in determining on which side the preponderance of the evidence lies, but they do not require a different rule as to the degree of evidence required. In this case we think the terms of the contract were shown with reasonable certainty. There is no doubt that the Wylies moved upon the land at the time alleged, that they continued to reside there, that they made lasting and valuable improvements. There was some evidence tending to overcome the proof so made. In the first place the facts

already referred to, which in their nature are calculated to arouse suspicion in all such cases. In the second place, there is evidence that Wylie habitually, after the first year, divided the crop, giving to Mrs. Charlton one-third thereof. In the next place, some admissions of Wylie are shown conflicting with his claim of title, and it was shown that he filed a claim against Mrs. Charlton's estate for the expense of the improvements. But the admissions and acts of Wylie, while competent against him, were not competent as against his wife and should not be considered in her case, and it seems that the district judge did consider them in his case and not in hers. The evidence in Mrs. Wylie's case, therefore, fairly conflicts. There was sufficient to support the finding of the district court in her favor and that finding will not be disturbed.

The case of James Wylie presents a different aspect. It lacked all direct proof of the contract relied upon to sustain it. The only evidence to sustain the case was proof of possession by the Wylies, and of improvements made on the land. There was the same evidence as in Mrs. Wylie's case to meet this and, in addition thereto, the evidence as to Wylie's filing a claim against the estate for the improvements, and as to his declarations was competent and entitled to some weight. The declarations were somewhat ambiguous, and perhaps entitled to little weight, and his act in filing the claim against the estate was by him explained in such a manner that the trial court might have been justified in accepting the explanation and giving little or no force to his act; but there being no evidence in his case to establish the contract, except that afforded by his possession and by the making of improvements, and the evidence of declarations by Mrs. Charlton, and there being, on the part of the defendants, some evidence of declarations contrary to his claim of right, evidence of his making a claim against the estate, inconsistent with that claim of right, and in addition thereto to circumstances presenting at

once the opportunity, and the temptation to now make a false claim, we think it was for the trial court to determine whether or not a preponderance of evidence existed in his favor. The trial court found the issues against him, and its finding should not be disturbed, unless the court erred in excluding the testimony of Mrs. Wylie, which was offered as direct proof of the contract. Mrs. Wylie's testimony was undoubtedly excluded upon the theory that it fell within the prohibition of section 329 of the Code of Civil Procedure, which is as follows: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation."

Many years ago it became apparent that the common law rule rendering incompetent as witnesses all persons interested in the result of an action was impolitic, and not adapted to the institutions of modern civilization. The injustice done by excluding such witnesses was manifestly a greater evil than that resulting from admitting their testimony and thus affording a temptation to perjury. The legislatures then began to make inroads upon the rule until the broad step was taken which has been embodied in our Code of Civil Procedure, of enacting that every human being shall be a competent witness in all cases, except under certain contingencies expressly provided for. (Code

of Civil Procedure, sec. 328.) In these progressive steps of legislation a great variety of statutes appeared, at first extending the competency of witnesses, and then, in connection with such broad provisions as are found in section 328 of our Code, limiting their competency in certain cases. The legislatures have quite generally recognized the fact that when one party to a transaction has died the other party should not be permitted to testify to such transaction as against the representatives of the deceased; but the methods by which the legislatures have sought to accomplish this are so varied and the decisions under such statutes are so numerous that it is scarcely practicable to review the authorities and induce from them a rule for guidance in the case before us. Especially is this true, because the decisions have turned so much upon the phraseology of the statutes. A reference to a few cases cited in argument will demonstrate this fact.

In Iowa it is held that a party adverse to the representative of a deceased cannot examine a witness as to a conversation with the deceased when such witness is interested on behalf of the representative and adversely to the party calling him. (*Neas v. Neas*, 61 Ia., 641; *Ivers v. Ivers*, 61 Ia., 721; *Donnell v. Braden*, 70 Ia., 551.) But these cases construe a statute which provides: "No party to any action or proceeding, nor any person interested in the event thereof, * * * shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination, deceased, insane, or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person," etc. (Iowa Rev. Stat., sec. 4889.) The language of this statute is quite plain, although it extends the prohibition beyond the reason thereof. So in *Ellis v. Alford*, 64 Miss., 8, a husband and wife joined in a bill to have the wife's conveyance of her separate estate canceled on the

ground of fraud. It was held that in such a case the testimony of the wife was incompetent, but that of her husband was competent. But this was under a statute simply providing that "no person shall testify as a witness to establish his own claim to any land for or against the estate of a deceased person." The statute excluded only the testimony of one on his own behalf. So, in like manner, a comparison of statutes of other states with ours generally discloses such a difference in language that their decisions are not applicable to our law, or, if applicable at all, only to a limited extent. It is, therefore, necessary to solve the question presented without much reference to adjudications based on other statutes.

It will be observed that Mrs Wylie was interested on both sides of the record. If the plaintiff prevailed, she would become entitled to an inchoate estate of dower as the plaintiff's husband. If the defendants prevailed, she would be entitled apparently to a one-fifth interest in the land as heir of her mother. Three questions are in effect thus presented: First—Was her interest, as the wife of the plaintiff, such a direct legal interest as to disqualify her? Second—Was her interest, as heir, such as to disqualify her when called to testify adversely to that interest? Third—Assuming that either or both of such interests rendered her incompetent, did the fact that she was interested on both sides remove the disqualification? In solving these questions some allusion to the common law may be useful, if not necessary. It must be remembered that at common law any interest in the event rendered a witness absolutely incompetent and that such interest was not necessarily a direct or a legal interest. It was said: "The true test of the interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action." (1 Greenleaf, Evidence, sec. 390.) It was also said that such interest must

be present, certain, and vested; but by examining the cases cited in the admirable discussion of the subject in the text-book cited (Greenleaf, Evidence, secs. 390–430) it will be seen that interests in some cases quite indirect were considered sufficient to exclude the witness. Our Code seeks, in section 328, to remove all disqualifications, and then by subsequent provisions to establish certain limited disqualifications, and it is not unreasonable to infer that the legisture meant by section 329 to retain in force the common law disqualifications in so far as it fell within the language of the statute. This is the construction placed by the supreme court of Iowa upon the statute of that state. That court holds that in determining what interest is sufficient to exclude the testimony the common law tests apply. (*Wormley v. Hamburg*, 40 Ia., 22; *Goddard v. Liffingwell*, 40 Ia., 249.) Such, too, seems to be implied in this state from the case of *Ransom v. Schmela*, 13 Neb., 73, where it was held that a liability for costs in the action was a direct legal interest which rendered a witness incompetent. This was one of the interests which rendered a witness incompetent at the common law. But while it seems clear that the term "interest" was used in our statute in the common law sense, it is equally clear that by restricting the disqualification to those having a direct legal interest in the action the legislature intended to admit the testimony of some persons having interests not direct or not legal which at common law would have excluded them. In this state a woman by marriage becomes entitled to an inchoate estate of dower in all the land whereof the husband is seized of any estate of inheritance during the coverture. (Compiled Statutes, ch. 23, sec. 1.) This is an interest which, when it once attaches, remains and continues a charge or incumbrance upon the real estate, unless released by the voluntary act of the wife or extinguished by operation of law. A sale of land under execution upon a judgment against the husband alone will not defeat it.

(*Butler v. Fitzgerald*, 43 Neb., 192.) While the estate thus acquired is not one in possession, it is such a present vested interest of a legal character, and creates such a direct legal interest in an action to establish title in her husband, as falls within the inhibition of section 329. The object of this section was to prevent a party testifying against the representatives of a deceased person, where the interest of such party in the result of the action is of such a character as to hold out a temptation to perjury to such an extent as to run counter to the policy of the law. Surely the acquisition of an estate, even one to take effect *in futuro*, but of such a character as to be recognized at law, and not capable of being defeated by any act of the tenant, presents such an interest. We are aware that at common law it was held that the interest of an heir apparent did not disqualify him, but no one could be the heir of a living person. No present interest was recognized in the heir apparent. His estate might be defeated by the conveyance or will of his ancestor. The law does recognize an inchoate estate of dower and no act of the husband can defeat such estate. To the first question proposed we therefore answer that Mrs. Wylie, as the wife of the plaintiff, did have such an interest as to bring her testimony within the prohibition of section 329, and that the district court did not err in excluding her testimony as to conversations with Mrs. Charlton. Counsel argue that, aside from this interest, her interest as heir disqualifies her from testifying on behalf of her husband adversely to such interest, and in support of that contention cite the Iowa cases above referred to. But, as we have pointed out, those cases construed a statute plain in its terms, and by its express terms going beyond the reason which led to its enactment. It was not for the court, in spite of such direct language, to confine the statute so as merely to meet the mischief which it was sought to prevent. Our statute does not contain such words. The defendants would have it construed as if it read that no person having

a direct legal interest in the result of an action shall be permitted to testify when the party adverse to the one calling him is a representative of a deceased person. Having in view the common law rule as to competency, and the mischief which this statute sought to prevent, it should be construed as if it read that no person having a direct legal interest in the result of an action shall be permitted to testify, when the party interested adversely to the witness' interest is the representative of a deceased person.

It still remains to be considered whether the fact that Mrs. Wylie was interested on both sides of the record rendered her competent. At common law it was said that if the witness is equally interested on both sides he is competent, but if there is a certain excess of interest on one side he will be incompetent to testify on that side. (1 Greenleaf, Evidence, 391.) An inspection of the cases upon which that statement is based discloses, however, that the courts did not attempt to weigh different interests, one against the other, but admitted the testimony only where the interest was precisely the same. Thus, in *Ilderson v. Atkinson*, 7 T. R. [Eng.], 480, a witness was held competent because, whichever way the action resulted, he was bound to pay the amount involved, according to its event, either to one party or to the other. To the same effect is *Birt v. Kershaw*, 2 East [Eng.], 458. In other cases, a witness was held incompetent because, while there was an equal liability in one way on either side, the success of the party calling him would relieve him from a distinct and additional liability. (*Jones v. Brooks*, 4 Taunt. [Eng.], 464; *Larbalestier v. Clark*, 1 B. & Ad. [Eng.], 899.) Where interests are precisely equal on either side, it may be that the case is out of the reason of the common law, although not out of the letter of our statute; but where there is an interest adverse to the representative of the deceased, we do not think that the courts, without any standard of comparison, should attempt to weigh that interest against an

interest of a different character on the side of such representative, and so undertake to say that the interest on behalf of the representative is greater than that against him, and that an exception to the statute should in that case be made. Where the interest is the same on either side, it may perhaps be said that there is not within the meaning of the statute any interest in the event of the action; but where the interests are different in character, the only safe rule is to follow the statute and exclude the witness' testimony. We think the district court ruled correctly on this point and the result is that both judgments should be

AFFIRMED.

JOHN C. DOLEN V. E. A. BUCHANAN.

FILED FEBRUARY 19, 1895. No. 6451.

District Courts: POWER OF ONE JUDGE TO SET ASIDE JUDGMENT OF ANOTHER: FRAUD. Where a judgment is rendered against a defendant in a district court having two judges, by one of the judges thereof, an application at the same term to vacate and set aside such judgment on the ground that the same was obtained upon a forged waiver of service of summons and confession of judgment, may properly be heard by whichever judge of the court is presiding at the time the application is presented.

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

A. Hardy, for plaintiff in error, cited: *Marvin v. Weider*, 31 Neb., 774.

L. M. Pemberton, contra, cited: *Buchanan v. Mallalieu*, 25 Neb., 204.

NORVAL, C. J.

At the June term, 1891, of the district court of Gage county, to-wit, on July 29, the plaintiff in error recovered a judgment against the defendant in error in the sum of $4,300 and costs of suit, the Hon. T. Appelget at the time being the presiding judge. Plaintiff attached to and filed with his petition in the case a writing, purporting to be signed by the defendant, waiving the issuing and service of summons in the action, entering his voluntary appearance therein, and consenting that judgment be entered in favor of the plaintiff in the sum of $4,300 and costs. Subsequently, at the same term of court, on July 31, 1891, the defendant filed in said cause the following motion:

"In the District Court of Gage County, Nebraska.

"J. C. DOLEN, PLAINTIFF,
v.
E. A. BUCHANAN, DEFENDANT. } Motion.

"Comes now the defendant and moves the court to set aside the judgment obtained against him in said cause in this court on the 29th day of July, 1891, for the sum of $4,300, for the reason that said judgment was falsely and fraudulently obtained, and was obtained without the service of any summons upon, or notice to, defendant, and upon a forged waiver of service of summons and confession of judgment and without authority of law, as is shown by the affidavit hereto attached, marked 'A,' and made part thereof; and for the further reason that affiant has a good defense to said action, as is also shown by said affidavit.

"PEMBERTON & BUSH,
"*Attorneys for Defendant.*"

The foregoing motion to set aside the judgment and findings in the case came on for hearing before the court on the following day of the same term at which they were entered, the Hon. J. H. Broady then being the sole presiding

judge, when said motion was sustained and the judgment previously rendered was vacated. At a subsequent term of the court the cause was dismissed, because of the failure of the plaintiff to give security for costs.

The only point urged for a reversal is the ruling of Judge Broady in setting aside the judgment rendered at the same term by Judge Appelget. It is not claimed that the grounds set up in the motion to vacate were insufficient to authorize the court to make the order of which complaint is made, nor that the motion was not supported by the evidence adduced on the hearing, but it is strenuously insisted that it was reversible error for Judge Broady to set the judgment aside, since Judge Appelget occupied the bench when such judgment was entered. Stated in another form, that judgment pronounced by one judge of the district court cannot be vacated at the same term by another judge of the same district, even though the judgment was procured upon a forged waiver of service of summons and confession of judgment. The opinion in *Marvin v. Weider*, 31 Neb., 774, is cited to support the contention of counsel. In that case, in a *per curiam* opinion, it was held, where a judicial district has two judges, that the ruling made by one of the judges thereof, upon a demurrer to a pleading, is binding upon the other judge, unless for cause it is set aside. It is not necessary now to determine whether the precedent cited was correctly decided or not, for it is obvious that the decision does not conflict with the ruling made in the lower court in the cause now before us, inasmuch as the judgment rendered by Judge Appelget was vacated and set aside upon a proper showing, and for a sufficient cause, namely, that the written waiver of the issuance and service of summons, and confession of judgment, was a forgery. This case falls squarely within the exception to the rule announced in *Marvin v. Weider, supra.* To hold that the application to vacate the judgment on account of fraud can only be made to the judge who rendered the original judg-

ment would be a monstrous doctrine, one we must decline to adopt. Although there are two judges of the district court of Gage county, yet the one presiding has the power to make any order or judgment in a cause; but where one judge has made a ruling, comity requires the other should respect it. That there is no conflict of decision in the case at bar is plain. We entertain no doubt, and so decide, that the application was properly heard by Judge Broady, and his decision was a just one. The judgment is therefore

AFFIRMED.

JOHN F. JOLLY V. STATE OF NEBRASKA.

FILED FEBRUARY 19, 1895. No. 5631.

1. **Instructions:** FAILURE TO NUMBER: EXCEPTIONS: REVIEW. The failure of the trial court to number the different paragraphs of the charge to the jury, or to write the word "given" on the margin of each instruction, as required by the statute, cannot be relied upon in this court for a reversal of the judgment where no objection was specifically taken on that ground in the trial court at the time the charge was given.

2. **Limitation of Actions:** CRIMINAL LAW. A prosecution for a misdemeanor, where the penalty fixed by statute is restricted to a fine of not exceeding $100 and to imprisonment not exceeding three months, must be instituted within one year from the time such offense was committed.

3. **Criminal Law:** ASSAULT AND BATTERY: STATUTE OF LIMITATIONS. On the trial of a prosecution for an assault and battery it is error for the court to charge the jury that it was sufficient if they found the offense was committed within eighteen months prior to the filing of the complaint.

4. ———: ———: ———: HARMLESS ERROR IN INSTRUCTIONS. The giving of such instruction is error without prejudice, where the undisputed evidence discloses that the act charged was committed less than a year prior to the filing of the complaint.

5. **Review**: INSTRUCTIONS: ASSIGNMENTS OF ERROR. Instructions of which no complaint is made in the motion for a new trial, or in the petition in error, will not be reviewed in this court.

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

H. Wade Gillis, for plaintiff in error.

George H. Hastings, Attorney General, contra.

NORVAL, C. J.

The plaintiff in error was convicted before a justice of the peace of an assault and battery. He thereupon appealed to the district court, where, on a trial to a jury, he was found guilty of an assault, and was sentenced to pay a fine of $100 and costs of suit.

The first error assigned is the failure of the court to number the different paragraphs of the charge to the jury, and to write the word "given" on the margin of each instruction, as required by the statute. No exception was taken on the grounds stated when the instructions were read, hence the point is not available in this court. (*Gibson v. Sullivan*, 18 Neb., 558; *Omaha & Florence Land & Trust Co. v. Hansen*, 32 Neb., 449; *City of Chadron v. Glover*, 43 Neb., 732.)

It is next contended that the court erred in charging the jury that it was sufficient if they found the offense was committed within eighteen months prior to the date of the filing of the complaint. The contention of his counsel is that the statute of limitations runs against this offense in twelve months from the time the same was committed. Section 256 of the Criminal Code, relating to the limitation of criminal prosecutions, provides: "No person or persons shall be prosecuted for any felony (treason, murder, arson, and forgery excepted), unless the indictment for the

same shall be found by a grand jury, within three years next after the offense shall have been done or committed. Nor shall any person be prosecuted, tried, or punished for any misdemeanor, or other indictable offense below the grade of felony, or for any fine or forfeiture under any penal statute, unless the indictment, information, or action for the same shall be found or instituted within one year and six months from the time of committing the offense, or incurring the fine or forfeiture, or within one year for any offense, the punishment of which is restricted by a fine not exceeding one hundred dollars, and to imprisonment not exceeding three months," etc. It will be observed that a prosecution for any offense denominated a misdemeanor, where the penalty prescribed by the statute is restricted to a fine of not exceeding $100 and to imprisonment not exceeding three months, must be brought within one year from the time the offense was committed. As to all other misdemeanors, the statute of limitations is eighteen months. The statute (section 17 of the Criminal Code) fixes the penalty for an unlawful assault, or an assault and battery, at a fine not exceeding $100, or imprisonment in the county jail not exceeding three months. The instruction of the court was, therefore, erroneous, but the plaintiff in error was not prejudiced thereby. The record discloses that the complaint in this case was filed in the justice's court on the 8th day of June, 1891, and the undisputed testimony shows that the offense with which the plaintiff in error stands charged was committed on the 29th day of May, 1891, the date laid in the complaint. Had there been any evidence tending to show that the assault was committed more than a year prior to the filing of the complaint, then the error in the instruction would have been fatal; but as there was no such evidence given, no prejudice to the accused is shown. It has often been decided that a civil cause will not be reversed for the giving of an erroneous instruction where the party complaining could not possibly have

been prejudiced thereby. (*Converse v. Meyer*, 14 Neb., 190; *Knowlton v. Mandeville*, 20 Neb., 59; *Lamb v. Hotchkiss*, 14 Neb., 102; *O'Hara v. Wells*, 14 Neb., 403.) No good reason can be suggested why the same rule should not apply to criminal prosecutions.

Objection is made in the brief filed of the following instruction given by the court on its own motion: "If you find from the evidence in the case, and beyond a reasonable doubt, that defendant did strike said John Bennett as charged in the information, and that before the lick was given by defendant he moved out of his way in order to be within striking distance of and so he could strike said Bennett, he is guilty." The giving of this instruction was not complained of, either in a motion for a new trial or in the petition in error, hence we cannot review the same. From a careful perusal of the evidence contained in the bill of exceptions we are satisfied that it is sufficient to sustain the verdict. The judgment is

AFFIRMED.

STATE OF NEBRASKA, EX REL. DANIEL S. CONROY, V. FRED A. MILLER.

FILED FEBRUARY 19, 1895. No. 7512.

1. **Criminal Law**: INDICTMENT AND INFORMATION. In this state prosecutions for crime may be either upon information or by indictment.
2. **Information**: TIME TO FILE. An information must be filed by the prosecutor during the term of court at which the accused is required to appear, in case he is held in jail.
3. **Criminal Law**: FAILURE TO FILE INFORMATION: DISCHARGE OF PRISONER. Before a defendant in a criminal prosecution, who has been committed to jail in default of bail by the examining magistrate, is entitled to be discharged under section 389

of the Criminal Code it must appear that neither an information was filed, nor an indictment was found, against him at the term of the district court at which he is held to answer.

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

Alex. Altschuler, for relator.

A. S. Churchill, Attorney General, contra.

NORVAL, C. J.

On the 5th day of January, 1895, the plaintiff in error applied to the Hon. E. P. Holmes, one of the judges of the district court of Lancaster county, for a writ of *habeas corpus*, against Fred A. Miller, sheriff of said county. Upon the hearing the application was denied. The petitioner prosecutes error.

It is alleged in the petition, substantially, and by the respondent admitted to be true, that on the 18th day of September, 1894, the relator was arrested upon the charge of grand larceny filed against him in the police court of the city of Lincoln, and, upon a preliminary examination had before said court, he was required to enter into a recognizance in the sum of $200 for his appearance at the next term of the district court of said county, and in default of bail he was committed to the county jail, where he has ever since been confined; that the first term of said district court held after said preliminary hearing convened on the 24th day of September, 1894, and ended on December 31, 1894; that no information has been filed by the county attorney in said court against the relator upon said charge, or for the commission of any other offense. The relator contends that he is entitled to be discharged from imprisonment on the ground that an information was not filed against him during the September, 1894, term of the district court of Lancaster county. The proper determination of this ques-

tion requires an examination and construction of several provisions of the Criminal Code. Section 389 of said Code reads as follows: "Any person held in jail charged with an indictable offense shall be discharged if he be not indicted at the term of the court at which he is held to answer, unless such person shall have been committed to jail on such charge after the rising and final report of the regular grand jury for said term, in which case the court in its discretion may discharge such person or order a new grand jury, as provided in section four hundred and five, or require such person to enter into recognizance with sufficient security for his appearance before said court to answer such charge at the next term thereof; *Provided*, That such person so held in jail without indictment shall not be discharged, if it appears to the satisfaction of the court that the witnesses on the part of the state have been enticed or kept away, or are detained and prevented from attending court by sickness or some inevitable accident." The foregoing section was under consideration in *Ex parte Two Calf*, 11 Neb., 221, where it was held that a person, who has been committed to jail upon a preliminary examination for a criminal offense, is entitled to be discharged from such imprisonment where no indictment is returned against him at the term of court at which he is held to answer, unless the state's witnesses have been prevented from attending court. This holding is but declaratory of the plain provisions of the statute. Since that decision was pronounced the legislature has made provision for prosecuting offenses on information, reserving, however, to the judges of the district courts the power to call grand juries when it is deemed expedient so to do. (See ch. 54, Criminal Code.) Now prosecutions may be either upon information filed by the county attorney or by indictment. Section 579 of said Code provides, *inter alia*, that all informations shall be filed during term, in the district court having jurisdiction of the offense. Sections 581 and 583 are as follows:

"Sec. 581. That the provisions of chapters 40, 41, 42, 43, 44, 45, of the Criminal Code, in relation to indictments, and all other provisions of law applying to prosecutions upon indictments, to writs, and processes therein, and the issuing and service thereof, to motions, pleadings, trials, and punishments, or the execution of any sentence, and to all other proceedings in cases of indictment, whether in the court of original or appellate jurisdiction, shall in the same manner and to the same extent, as near as may be, apply to informations, and all prosecutions and proceedings thereon.

"Sec. 583. It shall be the duty of the prosecuting attorney of the proper county to inquire into and make full examination of all the facts and circumstances connected with any case of preliminary examination, as provided by law, touching the commission of any offense wherein the offender shall be committed to jail, or become recognized or held to bail, and if the prosecuting attorney shall determine in any such case that an information ought not to be filed, he shall make, subscribe, and file with the clerk of the court a statement in writing, containing his reasons, in fact and in law, for not filing an information in such case, and that such statement shall be filed at and during the term of court at which the offender shall be held for his appearance; *Provided*, That in such case such court may examine said statement, together with the evidence filed in the case, and if, upon such examination, the court shall not be satisfied with said statement, the prosecuting attorney shall be directed by the court to file the proper information, and bring the case to trial."

It will be observed that section 581, quoted above, makes the provisions of the Criminal Code relating to indictments and prosecutions thereunder applicable, so far as possible, to prosecutions upon informations filed by the county attorney. Construing, therefore, said section 389 and the provisions of said chapter 54 of the Criminal Code to-

gether, as we must, it is perfectly plain that where the party is in jail the information must be filed against him during the term of the district court at which he is held to answer. The filing of the information, in case the accused is in custody, cannot be put off to await the convenience of the prosecuting officer until a subsequent term of the court. To hold otherwise would be the rankest kind of judicial legislation. We must not, however, be understood as intimating by this that an amended information, in a proper case, may not be filed at any term of court.

The opinion in *Hammond v. State*, 39 Neb., 252, is not in conflict with the conclusion reached herein. In that case section 389 was not under consideration, but sections 390 and 391 of the Criminal Code alone were construed. The point we have been discussing was in no manner involved in the case above mentioned, but the question within what time a defendant who has been indicted, or an information filed against, shall be brought to trial was involved, as the following quotation from the syllabus of the decision will disclose: "1. A defendant in a criminal prosecution, who has never been committed to jail, or otherwise detained in custody, is not entitled to be discharged under the provisions of section 390 of the Criminal Code, on the ground that he has not been brought to trial before the end of the second term after the finding of the indictment or the filing of the information. 2. The provision of section 391 of the Criminal Code, for the discharge of any person indicted who, after having given bail, shall not be brought to trial before the end of the third term of the court held after the finding of such indictment, is held to exclude the term at which the indictment is found." In this state, as already stated, prosecutions for crimes may be in either of two modes, by indictment presented by a grand jury, or upon information filed by the prosecuting attorney. In case a party is bound over to the district court to answer a criminal offense, and the grand jury, after investigating the

charge, reports ignoring a bill, the prosecutor cannot file an information against the prisoner for the same offense, at least until another preliminary examination before a magistrate has been had. (*Richards v. State*, 22 Neb., 145.) But where no grand jury has been ordered, the prosecution by information is the exclusive mode. (*Jones v. State*, 18 Neb., 401.) So, too, where an indictment is defective, the court may permit the county attorney to withdraw the same and file an information charging the offense covered by the indictment. (*Alderman v. State*, 24 Neb., 97.) In the case at bar, while the application for the writ alleges that no information has been filed against the relator, it fails to aver that no indictment has been returned against him. In addition to the facts stated in the application herein it should have contained an averment to the effect that no indictment was found against the relator at said September term of the court, or that no grand jury was ordered, summoned, selected or impaneled for said term. Suppose the petition for the writ merely showed that no indictment was returned against the relator at the term at which he was held to answer. Would it be sufficient to entitle him to be discharged from custody? Clearly not; for the obvious reason indictment is not the sole mode provided by statute for the prosecution for crime. Before a prisoner has the right to demand his release by *habeas corpus*, under the provisions of said section 389, the application for the writ must disclose not only that no information was filed against him at the term of court at which he was required to appear, but that he was not indicted at said term for any crime, or that no grand jury was ordered for said term of court. It follows the application was insufficient to entitle relator to be discharged, and the order of the district court denying the writ must, therefore, be

AFFIRMED.

STEPHEN D. TERRY V. BEATRICE STARCH COMPANY.

FILED FEBRUARY 19, 1895. NO. 5697.

1. **Contracts:** BREACH: ACTION FOR DAMAGES BEFORE TIME FOR PERFORMANCE. *Held*, That plaintiff was not entitled to recover damages for loss sustained by reason of a breach of the contract, set out in the opinion, after the suit was instituted, since the time fixed for full performance by the defendant had not then elapsed.

2. **Review:** ADMISSION OF EVIDENCE: HARMLESS ERROR. A judgment will not be reversed for error committed by the trial court in admitting immaterial testimony, when it is clear, upon an examination of the whole record, that the verdict must have been the same had the objectionable evidence been excluded.

3. ——: ——: PREJUDICIAL ERROR. Error may be predicated upon the admission of improper evidence in a cause tried to a jury, when it is obvious that the unsuccessful party was, or may have been, prejudiced thereby.

4. **Instructions:** EVIDENCE: REVIEW. It is error for the court to give an instruction which assumes as established a disputed question of fact. It is for the jury alone to pass upon conflicting evidence.

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

See opinion for statement of the case.

L. M. Pemberton, for plaintiff in error:

Defendant's answer admits the making of the contract as alleged by plaintiff, and admits the violation of the contract by itself in the first instance. It then alleges as a defense that, after violating the contract itself, it put an end to the contract because plaintiff did not make payments as stipulated in the contract. Defendant could not take advantage of its own wrong and breach of contract to prevent plaintiff having the benefit of his contract. (*Jones v. Tay-*

lor, 56 Am. Dec. [Tex.], 55; *Cape Fear Navigation Co. v. Wilcox*, 78 Am. Dec. [N. Car.], 260.)

As to plaintiff's measure of damages the following authorities are cited: *Hinde v. Liddell*, L. R., 10 Q. B. [Eng.], 265; *Simpson v. Crippin*, L. R., 8 Q. B. [Eng.], 14; *Scott v. Kittanning Coal Co.*, 89 Pa. St., 231; *Blackburn v. Reilly*, 47 N. J. Law, 290; *Freeth v. Burr*, L. R., 9 C. P. [Eng.], 208.

Alfred Hazlett, contra.

NORVAL, C. J.

On the 20th day of October, 1890, the plaintiff and defendant entered into a written contract, of which the following is a copy:

"This agreement, made and entered into this 20th day of October, 1890, between the Beatrice Starch Company, of Gage county, Nebraska, party of the first part, and S. D. Terry, of the same place aforesaid, party of the second part, witnesseth: The said party of the first part, for and in consideration of the payments and agreements hereinafter promised and entered into and to be made and performed by the said party of the second part, hereby agrees to deliver in tanks to second party all the refuse corn arising and accumulating from the manufacture of starch in the starch manufactory of first party in Beatrice, Nebraska, for the period of two years from and after the first day of November, 1890, and also agrees to furnish grounds for feed lot, viz., the two (2) acres adjoining first party's property on the south, it being the same property purchased of Zimmerman by first party, and to furnish tank of sufficient capacity to hold at least two days' grinding, and also to furnish steam for heating the feed furnished suitable for feeding. And the party of the first part further agrees to run and operate said manufactory during said term, unless prevented by unavoidable accidents and casualties, so as to

grind not less than two hundred and fifty (250) bushels per day for each working day, excepting the months of July and August of each year. Said delivery to be made on the feed lot above described. In consideration of the premises the said party of the second part agrees to take said refuse corn and to pay therefor the sum of six and two-thirds ($6\frac{2}{3}$) cents for each and every bushel of corn ground in said starch manufactory, for the time aforesaid, payments to be made every sixty days during the continuance of this contract. It is further agreed by and between the respective parties that the second party is to make all improvements on said feeding lot that he may think necessary for feeding purposes, except tanks to store feed in, which first party furnished, and at the expiration or other determination of this contract the second party agrees to purchase all improvements placed on said feeding lot for feeding purposes by second party, at a price to be agreed upon by said parties; and in case they cannot agree as to price, then it is to be referred to three (3) disinterested parties, each party selecting one, and the two thus selected to select the third, and the price fixed and agreed upon by two of said arbitrators shall be binding upon the parties hereto. It is further agreed that if on sixty (60) days' trial it shall be found that said refuse corn was not suitable feed for cattle and that when properly fed therewith the cattle would not thrive on said feed, then this contract may be determined by the party of the second part by giving first party fifteen (15) days' notice of such election; but in case of such determination the first party is not to take or pay for the improvements made on said feed lot by second party and he may remove them. It is further agreed that if first party cannot commence to supply said refuse corn on the 1st day of November, 1890, he is to be allowed ten days (10) grace thereafter to commence the delivery of said refuse corn. It is further agreed that first party is to supply second party with the necessary water to be used for feeding purposes.

"Signed this 20th day of October, 1890.

"THE BEATRICE STARCH COMPANY,

"By A. C. SCHEIBLICH, *Sec. & Treas.*

"S. D. TERRY.

"In presence of

"A. H. BABCOCK."

This action was brought by the plaintiff to recover damages for an alleged breach of the foregoing agreement, by reason of the defendant's failure to furnish the refuse corn according to the terms of the contract. The answer, after admitting the incorporation of the defendant and the execution of the contract above set forth, admits that the defendant did not commence to furnish to the plaintiff any feed prior to December 1, 1890, and from which time, until the 15th day of the same month, it did not supply the full amount of feed required by said contract, and alleges that it was prevented by unavoidable accidents and casualities from so doing. The defendant further answering avers that, with the exceptions aforesaid, it has performed all the terms and conditions of said contract on its part to be kept; that plaintiff made no claim for damages for the failure of the defendant to supply the full amount of feed required by the contract, from the 10th day of November, 1890, to the 15th of the following month, but continued in possession under said contract, and used the feed furnished by the defendant up to February 28, 1891, when defendant declared the contract forfeited, and annulled the same, by reason of plaintiff's failure to perform the same and make the payments therein required of him. The answer sets up, by way of counter-claim, that from December 15, 1891, defendant furnished the full amount of feed to plaintiff required by the contract, amounting in value to the sum of $1,099.56, and that plaintiff has not paid said amount, nor any part thereof. The defendant consents to the allowing $200 as damages to the plaintiff by reason of the failure to furnish the amount of feed stipulated in the contract,

for and during the time stated aforesaid, and prays judgment against the plaintiff for said sum of $1,099.56, with interest thereon, less the $200 damages to plaintiff. Plaintiff replied to the answer by a general denial. There was a trial to a jury, with a verdict and judgment of $300 in favor of the defendant. Plaintiff brings the case to this court for review.

It will be observed that the contract, by its terms, was to continue in force for the period of two years from and after the taking effect thereof, which was fixed for November 1, 1890, unless the defendant was unable to commence complying with the contract on that date, in which case he was allowed ten days after the time specified in which to commence the delivery of the refuse corn arising and accumulating from the manufacture of starch at its factory, or mill; that it was to grind not less than 250 bushels of corn per day for the term of two years, except during certain months; defendant was to furnish and deliver to plaintiff during said period all of said refuse corn, for which plaintiff agreed to pay six and two-third cents cents per bushel for every bushel ground by the defendant. The evidence discloses that the company did not commence the delivery of the feed to plaintiff until the fore part of December, 1890, and ceased to furnish any after February 28, 1891, and for a portion of the time between said dates it did not furnish the full amount of feed, or refuse corn, stipulated for by the contract. The plaintiff contends he was entitled to damages for the full two years the contract was to run, while the trial court ruled, upon the admission of testimony, that he could only recover the damages sustained up to the commencement of the action in the court below, which was on March 26, 1891. There was no error in the ruling mentioned. This suit was instituted more than a year and a half before the contract by its terms would have expired, and it is plain that plaintiff was not entitled to recover in this cause for any damages he might sustain by reason of

the breach of the contract by the defendant after the action was brought. There had been only a partial breach, as the time fixed for entire performance by the defendant had not then elapsed. For the damages which had accrued when the suit was instituted, he can recover herein, and not more. (*Carstens v. McDonald*, 38 Neb., 858.)

The views expressed meet the objections urged against the decisions of the court below, in refusing plaintiff's first request to charge, which was to the effect that plaintiff was entitled to have his damages assessed for the full time covered by the contract. Besides there was no evidence upon which to predicate the instruction. It is undisputed that, after the contract was executed by the parties, plaintiff fenced the lot near the defendant's mill, put in feed troughs and tanks suitable for feeding purposes, and placed in said lot something over three hundred head of cattle, to which the refuse corn furnished by the defendant was fed. On the trial the defendant was permitted, over plaintiff's objections, to prove that these cattle were of a very inferior quality. This testimony was clearly inadmissible under the issues in the case. It was wholly immaterial and foreign to the questions to be tried what kind of cattle, or their condition, which plaintiff owned and fed the refuse corn to. As stated in the briefs of the attorney for the defendant, "it made no difference what plaintiff chose to do with such feed as defendant furnished him. He might feed it to anything he wished, or not feed it at all." The defendant does not contend that the testimony to which reference has been made was admissible, but it is urged that the jury could not have been influenced thereby. A verdict will not be set aside for the erroneous ruling of a trial court admitting or excluding testimony, when an examination of the record shows that the verdict is the only one which should have been returned. (*Delaney v. Errickson*, 11 Neb., 533; *Brooks v. Dutcher*, 22 Neb., 644.)

The remaining question to be considered is whether

plaintiff was in any manner prejudiced by the admission of the testimony as to the kind and condition of the cattle which he was feeding. In other words, had the testimony been excluded, could the result have been more favorable to the plaintiff? It is undisputed that the total value of the feed delivered by the defendant to the plaintiff under the contract, according to the stipulated price to be paid for the same, is $1,033.55, and that no portion of said sum has been paid to the defendant. All the witnesses agree that defendant commenced to furnish the full quantity of feed mentioned in the contract on December 15, 1890, and continued so to do until the 11th day of the following February. Although Mr. Scheiblich, the secretary and treasurer of the defendant, testified that the full amount was delivered up to and including February 21, and that a less quantity was supplied from said date until the end of the month, as well as during the first half of the month of December, 1890, plaintiff and his witness admit that some refuse corn was delivered to the defendant both prior and subsequent to the period during which 250 bushels per day were furnished. It is also disclosed that the kind of feed contracted for could not be procured in the vicinity of Beatrice, other than of the defendant, and that plaintiff, after the breach of the contract, was compelled to feed his cattle shelled corn, which, according to the evidence, is the best substitute for the refuse corn from the factory. The testimony on the part of the plaintiff is to the effect that two-fifths of a bushel of shelled corn is equal for feeding purposes to one bushel of refuse corn furnished by the defendant. Stated differently, that it would require 100 bushels of shelled corn per day to put on as much flesh as the feed of 250 bushels of corn after it has passed through the starch mill. The testimony of the witnesses for the defendant tends to show that one-fifth of a bushel of shelled corn is equivalent to one bushel of the refuse corn. It is shown that the average market value of corn at Beatrice

from December 1, 1890, to the following March was 50 cents per bushel. By the terms of the contract the feeding of the cattle would cost the plaintiff $6\frac{2}{3}$ cents per bushel for the feed, or $\$16.66\frac{2}{3}$ per day, while feeding them corn cost him $25 per day if but 50 bushels were used, or $50 per day in case 100 bushels were fed. The plaintiff therefore sustained damages for each day during the time the defendant failed to supply any feed in the sum of $\$8.33\frac{1}{3}$, according to the testimony of the defendant's witnesses, or $\$33.33\frac{1}{3}$ per day, should the testimony of the plaintiff's witness be adopted as the most accurate and reliable. While, as already noted, there is some conflict in this testimony as to the precise length of time the defendant complied with the contract by furnishing the full quantity of feed required, yet it being undisputed that the total value of the feed furnished by the defendant is $1,033.55, it is clear that the entire quantity of refuse corn supplied was approximately 15,500 bushels, and allowing 250 bushels per day as called for by the contract, would last but 62 days. From November 10, 1890, the date the contract went into effect, to February 28, 1891, the day the last feed was furnished by the defendant and the contract was declared terminated by it, is 110 days. Deducting therefrom 62, the number of days in which the total feed furnished should have been supplied, we have remaining 58 days, during which there was an entire failure on the part of the defendant to comply with its agreement. If we allow plaintiff damages at $\$33.33\frac{1}{3}$ per day, as fixed by the testimony of his witness, his aggregate damages would be a fraction over $1,933.33, or nearly $900 more than was due from the plaintiff to the defendant on account of feed supplied, and yet the latter recovered $300. If the correct measure of plaintiff's damages was but $\$8.33\frac{1}{3}$ per day, as some of the evidence tends to show, he has no right to complain of the verdict. The writer is inclined to believe that the sum last stated more nearly represents the actual daily loss sus-

tained by plaintiff by reason of the breach of the contract by the defendant. We are in part led to this conclusion by the fact that for a short time while the mill was not running the plaintiff agreed to, and did, accept from the defendant as a compliance with the contract, 50 bushels per day of shelled corn, or one-half the quantity which the former at the trial insisted was equivalent to 250 bushels of corn after the starch had been extracted therefrom by the starch factory. There was, however, evidence before the jury from which they might have found that the pecuniary loss sustained was much greater than $8.33\frac{1}{3}$ per day. There being a conflict in the evidence relating to the question of damages, we cannot say that the verdict is the only one which should have been returned in the case. Nor can we determine that the plaintiff was not prejudiced by reason of the admission of testimony as to the kind and condition of the cattle which he had been feeding. On the contrary, the jury may have been, and probably were, influenced in their deliberations by the admission of the testimony alluded to, and hence the plaintiff is entitled to a new trial by reason thereof.

Complaint is made of the giving of the second instruction, which reads as follows:

"2. The written notice by defendant to plaintiff, dated February 24, 1891, was a consent to wait on plaintiff till February 27, 1891, for pay for the feed before that received by plaintiff from defendant under the contract. That notice and defendant's answer herein operate as a waiver of the default of plaintiff to make payment before February 27, 1891, but not as a waiver of such default of payment beyond the last named date. From that date, the undisputed evidence shows, neither party is entitled to anything under the contract for any time subsequent to that date; but on the pleadings and proofs the plaintiffs must be allowed to stand on the contract and claim under it up to that date, and the rights of both parties under

the contract must be determined in this action up to said February 27, 1891, at which time the plaintiff must be held to have abandoned the future part of the contract. From the beginning of the contract up to February 27, 1891, the plaintiff must pay to defendant the contract price for all feed he received from defendant under the contract, and defendant must pay to plaintiff all damages plaintiff has suffered by reason of defendant's failure to comply with the contract. You will return your verdict accordingly, subtracting the less from the greater, and rendering your verdict for the difference in favor of he party to whom you find due the greater amount."

This instruction assumes that plaintiff had violated the contract by not making payment according to the terms thereof, and then informs the jury that certain acts of the defendant constituted a waiver of the default of plaintiff to make payment for the feed before February 27, 1891, but not after that date. Under the contract, plaintiff was to pay for the feed furnished at the end of each sixty days. While it is true plaintiff has never paid anything, there was evidence before the jury tending to show that at the expiration of the first sixty days he had sustained damages by reason of the defendant's failure to comply with the contract in a sum equal to, or greater than, the value of the feed furnished during said period. If this evidence was true, and the jury were the sole judges thereof, plaintiff did not owe defendant anything at the end of the first sixty days, and, therefore, he was not in default by reason of his not paying the defendant at that time for the feed which had been previously furnished. The instruction was erroneous in assuming that the plaintiff was guilty of a breach of the contract. That was for the jury to determine from the evidence under proper instructions. Again, by the instruction the jury were charged that neither party was entitled to recover under the contract for anything subsequent to February 27. In this the court erred. If plaintiff was

not in default, he was entitled to recover all damages sustained up to the commencement of the suit by reason of the breach of the contract by the defendant. As elsewhere stated, on the admission of testimony the court ruled that plaintiff could recover damages up to the date the action was instituted, while by this instruction he was limited to an earlier date.

For the errors indicated the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

FANNIE M. RANDALL ET AL., APPELLEES, V. NATIONAL BUILDING, LOAN & PROTECTIVE UNION OF MINNEAPOLIS, APPELLANT.

FILED FEBRUARY 19, 1895. No. 5736.

1. **Supreme Court Commission:** PRACTICE. The fact that opinions are prepared by the commissioners of this court is no indication that such cases have not been examined by the judges. All questions of law, and, so far as practicable, questions of fact, are considered by each of the judges and commissioners, and opinions are invariably submitted for examination and criticism by the entire membership of the court.

2. **Building and Loan Associations:** STOCK PAYMENTS: MORTGAGE. Stock payments by a borrowing member of a building and loan association are not *ipso facto* credits upon his indebtedness so as to reduce *pro tanto* the amount due on his mortgage.

3. ———: ———. But a borrower may elect to have payments on account of stock applied upon his indebtedness to the association. (*Randall v. National Building, Loan & Protective Union*, 42 Neb., 809.)

4. ———: DEFAULT IN PAYMENT OF INTEREST: PROVISION FOR FORFEITURE: ENFORCEMENT. An agreement whereby the stock of a borrowing member of a building and loan association,

pledged as collateral security for his loan, is to be forfeited upon default of interest, without allowing credit on account of payments previously made on such stock, is unconscionable, and will not be enforced by the courts of this state, although recognized as valid in the association's own state.

MOTION for rehearing of case reported in 42 Neb., 809. *Motion overruled.*

George D. Emery and *W. A. Prince*, for the motion.

POST, J.

It is evident from the brief submitted by counsel for the appellant that they are not familiar with the methods of transacting business in this court. The fact that the opinion heretofore filed (42 Neb., 809) was not prepared by a member of the court must not be taken as an indication that the conclusion therein announced represents the views of the commissioners only. On the contrary, every question of law, and, so far as practicable, every issue of fact, is examined by all of the members of the court, both judges and commissioners; and, in accordance with our invariable rule, opinions, whether prepared by judges or commissioners, are submitted for examination and criticism by the entire membership of the court. This observation is suggested not alone by the courteous remarks of counsel for appellant, but also by the fact that our practice, which is conceded to be an innovation upon the rule in other jurisdictions, is apparently not understood by members of the profession in our sister states.

1. But to return to the case at bar, not only is the judgment heretofore announced that of the court, but is in accordance with our unanimous conclusion at the time its cause was argued and submitted.

2. A re-examination of the subject in the light of able briefs has tended to confirm the views stated on the former occasion. It may be conceded that the liability of a mem-

ber of a building and loan association on his stock and on his loan, if he be a borrower, are entirely different, and that payments on the former are not necessarily credits on the latter. It does not follow, however, that a failure to pay interest or dues in accordance with his agreement or the by-laws of the association will, in every instance, *per se*, amount to a forfeiture of his stock so as to authorize a confiscation of the amount paid thereon. We adopt as sound the doctrine announced in the text of Thompson, Building Associations, 97, viz.: "If the borrower is in default, having violated the rules, he has forfeited his right to any interest profit, but he has not thereby forfeited his stock, and he can apply that as a credit if he chooses." We are inclined also to agree with the view recently expressed by the supreme court of North Carolina in *Rowland v. Old Dominion Building & Loan Association*, 18 S. E. Rep., 965, that an agreement whereby the stock of a member of a building association, held as collateral security for a loan made to the pledgor, is to be forfeited upon default of payment of dues or interest, without allowing credit on account of payments previously made on such stock, is unconscionable, and should not be enforced by the courts of this state, although recognized as valid in the association's own state. We have not overlooked the recent case of *Southern Building & Loan Association v. Anniston Loan & Trust Co.*, 15 So. Rep. [Ala.], 123, which certainly sustains the proposition contended for by the appellant herein; but that decision appears to rest upon the authority of *North American Building Association v. Sutton*, 35 Pa. St., 463, overruling, as it is said, cases in that state asserting a different doctrine. However, that assumption is, we think, due to a misconception of the effect of the case last cited. According to the earlier Pennsylvania cases stock payments by a borrowing member were regarded as credits on his mortgage, reducing *pro tanto* the amount of his indebtedness to the association; and although that doctrine has been modified by *North*

American Building Association v. Sutton, supra, to the extent that payments by a borrower on account of his stock are no longer *ipso facto* credits on his mortgage, they may be still so applied at his election, as is evident from the following question from the case mentioned: "What was then said, however [referring to prior decisions of that court], is not to be regarded as laying down the rule that payment of dues on the stock *ipso facto* works an extinguishment of so much of the mortgage. The debtor may so apply it, but the payment itself is not an application of the money to the reduction of the mortgage. * * * The debtor is not compelled to give up his stock whenever suit may be brought upon his bond or mortgage. Such would, however, be the necessity of his case if the law applied, against his consent, the installments paid by him upon his stock to the discharge of his indebtedness for the money borrowed." (See, also, *Watkins v. Workingmen's Building & Loan Association,* 97 Pa. St., 514; *Economy Building Association v. Hungerbuehler,* 93 Pa. St., 258.) The Alabama case is not, it seems, sanctioned either by the weight of authority or the sounder reasoning, as is demonstrated by the opinion of our brother IRVINE above referred to. The motion for a rehearing is accordingly denied.

MOTION DENIED.

HARRISON, J., not sitting.

PRENTISS D. CHENEY v. GUSTAVE H. STRAUBE.

FILED FEBRUARY 19, 1895. No. 6586.

1. **Covenants:** ACTION FOR BREACH: POSSESSION. A covenantee is not required to resist an action by the holder of the paramount title until actually dispossessed by legal process, but may recover

against his covenantor after voluntarily surrendering to the holder of the better title. He at most assumes thereby the burden of establishing the title which he has thus recognized.

2. ——: DAMAGES. Evidence *held* to sustain the judgment complained of.

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

L. C. Chapman, for plaintiff in error:

In an action for breach of covenant the plaintiff, under an allegation that he was compelled to surrender possession of the land to the holder of the superior title, has the burden of proof and must clearly establish the adverse title to which he has thus surrendered and that is paramount. When the plaintiff yields up possession quietly he does so at his peril. (2 Devlin, Deeds, secs. 925, 926; 3 Sedgwick, Damages [8th ed.], sec. 956; *Landt v. Major*, 31 Pac. Rep. [Col.], 524; *Hunt v. Amidon*, 40 Am. Dec. [N. Y.], 283.)

J. Hall Hitchcock and *S. P. Davidson, contra.*

POST, J.

The facts essential to an understanding of this case are fully stated in the opinion of this court on a former hearing. (See *Cheney v. Straube*, 35 Neb., 521). The plaintiff below, Straube, recovered on a second trial and the judgment therein has been removed into this court a second time on the petition in error of Cheney, the defendant below.

The first proposition argued on this hearing is that Straube voluntarily surrendered to Panco, the holder of the alleged paramount title, and that he has failed to establish the validity of the title thus recognized. It was said on the former hearing that one who voluntarily surrenders to a stranger asserting title must, in an action against his

covenantor for breach of warranty, establish the validity of the title which he has recognized. The trial court submitted to the jury the question whether Straube's title was extinguished by the foreclosure proceeding and whether Panco, the purchaser under the decree of foreclosure, was the holder of the paramount title at the time of the surrender by the former to him.

The following facts are established by the record: (1.) The existence of the mortgage at the date of the conveyance by Cheney to Straube. (2.) The foreclosure proceeding by the holder of the mortgage and the unsuccessful defense in the district court, and also in this court. (3.) The sale, confirmation, and deed. (4.) The demand of Panco, the purchaser, and surrender by Straube. The voluntary surrender under the circumstances stated is equivalent to an actual eviction and is, therefore, no defense by the purchaser upon his covenant of warranty. The covenantee in such a case is not required to prolong the controversy until dispossessed by legal process, but may surrender to the holder of the paramount title. He at most assumes the burden of establishing the adverse title. (2 Devlin, Deeds, 925, 926; *Real v. Hollister*, 20 Neb., 114; *Cheney v. Straube*, 35 Neb., 521.) The court might, and doubtless would, had a request been made therefor, have withdrawn the question from the jury and declared the surrender to have been equivalent to an eviction; but however that may be, it is clear that there is no error in the rulings on that branch of the case of which the plaintiff in error can complain.

2. The only question for the consideration of the jury was the amount of damage, and as the verdict is responsive to the evidence and in accordance with the rule previously announced in this case, it follows that the judgment must be

AFFIRMED.

WILLIAM TORPY v. JOHN W. JOHNSON ET AL.

FILED FEBRUARY 19, 1895. No. 6457.

1. **Contribution: JOINT TORT-FEASORS.** In an action for contribution by one joint wrong-doer against another the test of recovery is whether the plaintiff, at the time of the commission of the act for which he has been compelled to respond, knew that such act was wrongful.

2. **Intoxicating Liquors: ACTION AGAINST SALOON-KEEPER: EVIDENCE: DIRECTING VERDICT.** Evidence *held* to warrant a direction against the plaintiff, a licensed saloon-keeper, in an action for contribution from the defendant, also a saloon-keeper, on the ground that the furnishing of liquor to an habitual drunkard, for which he had been compelled to respond, was known by him to be wrongful and unlawful. (*Johnson v. Torpy*, 35 Neb., 604.)

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

Daniel F. Osgood, for plaintiff in error:

Where there is a question of fact to be passed upon by the jury, it is error for the court to direct a verdict. (*Grant v. Cropsey*, 8 Neb., 205; *Eaton v. Carruth*, 11 Neb., 235.)

E. W. Thomas, S. P. Davidson, and *J. Hall Hitchcock*, *contra:*

It was the duty of the court, under the evidence, to direct a verdict for defendant. (*Lent v. Burlington & M. R. R. Co.*, 11 Neb., 204.)

POST, J.

This cause was before us at the September, 1892, term, at which time it was held that the plaintiff herein, Torpy, was not entitled to contribution from the defendant Johnson on account of money paid to satisfy a judgment on the

bond of the former as a licensed saloon-keeper. (See *Johnson v. Torpy*, 35 Neb., 604.) The principle therein recognized is that contribution will not be enforced in favor of a wrong-doer who knew, at the time of the commission of the act for which he has been compelled to respond, that such act was wrongful. The judgment on account of which contribution is sought in this case was recovered in the district court of Johnson county in an action by the widow of William Rowell, and the wrong alleged was the selling and furnishing of liquor which caused or contributed to the death of the deceased. We held on the former hearing that since Rowell was admitted to have been a common drunkard at the time of the furnishing to him by Torpy of the liquor for which the recovery was allowed the latter is presumed to have known that he was doing an unlawful and wrongful act, and therefore not entitled to contribution from Johnson, who is alleged to have furnished liquor which also contributed to the result stated. Torpy attempted on the second trial to overcome the presumption of notice by proof that he was not aware of Rowell's character for sobriety, that his, Rowell's, reputation was that of a sober man, and that the furnishing of the liquor was not, therefore, wrongful within his knowledge. The district court decided that there was an entire failure of proof to sustain that contention, and accordingly directed a verdict for the defendant, upon which judgment was subsequently entered and which it is sought to reverse by means of this proceeding.

The direction of the district court we regard as altogether proper. The record establishes by positive proof that which we found as an inference from the facts in evidence on the former hearing, viz., that the furnishing of the liquor to Rowell was not only wrongful in its legal sense, but was so understood by the plaintiff at the time it was so furnished. In his answer to the petition of Mrs. Rowell it is distinctly alleged that the plaintiff's husband

had for more than eighteen years been addicted to the excessive use of intoxicating liquors; that for a long time prior to the date named in the petition the deceased had been almost continuously in a state of intoxication, and instead of contributing to the support of his family, had long been a charge upon them. He admits that he was, some time during the year 1887, notified by Mrs. Rowell not to furnish liquor to her husband, for the reason that he, Rowell, was drinking to excess. He denies having furnished liquor to the deceased during that year, but admits that the latter drank in his saloon during the year 1888. The proof that the plaintiff was aware of Rowell's habits is of the clearest and most conclusive character. Indeed, if there is in the record evidence to the contrary it has not been called to our attention. True, plaintiff in his direct examination makes a pretense of denial, but his testimony is of too conflicting and unsatisfactory a character to be made the basis of a finding in his favor, even if uncontradicted; but when viewed in the light of the admitted facts, including the plaintiff's sworn answer in the former action, his claim at this time is evidently a mere pretense, and unworthy of serious consideration. The judgment is right and is

AFFIRMED.

JOHN F. POLK V. GEORGE W. COVELL ET AL.

FILED FEBRUARY 19, 1895. No. 5978.

1. **Appeal:** PARTIES. One of several defendants having separate and distinct defenses may prosecute an appeal from the county court to the district court, without joining his co-defendants.
2. ——: ——. When the interests of the several defendants are inseparably connected, an appeal by one defendant brings up the whole case.

4. **Review of Joint Judgment: PARTIES.** But in order to secure a review of a joint judgment by petition in error all persons interested must be made parties to the proceeding, as plaintiffs or defendants.

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

See opinion for statement of the case.

C. S. Polk, for plaintiff in error, contending that the appeal to the district court was erroneously dismissed, cited: *Wilcox v. Raben*, 24 Neb., 368; *Lepin v. Paine*, 18 Neb., 629; *McHugh v. Smiley*, 17 Neb., 626, and cases there cited; *Reynolds v. Dietz*, 34 Neb., 271; *Cooper v. Speiser*, 34 Neb., 500; *Lamb v. Thompson*, 31 Neb., 448; *Ewers v. Rutledge*, 4 O. St., 210; *Mattison v. Jones*, 9 How. Pr. [N. Y.], 152.

George W. Covell, contra, contending that the appeal of John F. Polk from the judgment of the county court did not bring up the entire case, and did not give the district court jurisdiction of Milton D. Polk, who did not appeal, cited: *Moore v. McGuire*, 26 Ala., 463; *Wolf v. Murphy*, 21 Neb., 472; *Hendrickson v. Sullivan*, 28 Neb., 790; *Curten v. Atkinson*, 29 Neb., 612; *Consaul v. Sheldon*, 35 Neb., 247; *Hardee v. Wilson*, 13 Sup. Ct. Rep., 39; *Williams v. United States Bank*, 11 Wheat. [U. S.], 414; *Masterson v. Herndon*, 10 Wall. [U. S.], 416; *Miller v. McKenzie*, 10 Wall. [U. S.], 582; *Simpson v. Greeley*, 20 Wall. [U. S.], 152; *Owings v. Kincannon*, 7 Pet. [U. S.], 399; *The Protector*, 11 Wall. [U. S.], 82; *Feibelman v. Packard*, 108 U. S., 14; *Estis v. Trabue*, 128 U. S., 225; *Mason v. United States*, 136 U. S., 581; *Smetters v. Ramey*, 14 O. St., 287; *Lovejoy v. Irelan*, 17 Md., 535; *Duvall v. Cox*, 5 How. [Miss.], 12; *Green v. Planters Bank*, 3 How. [Miss.], 43; *Young v. Ditto*, 2 J. J. Marsh. [Ky.], 72; *Fotterall v. Floyd*, 6 Serg. & R. [Pa.], 315; Elliott, Appel-

late Procedure, sec. 138; *Sloan v. Whiteman*, 6 Ind., 434; *Douglay v. Davis*, 45 Ind., 493; *Burns v. Singer Mfg. Co.*, 87 Ind., 541; *State v. East*, 88 Ind., 602; *Concannon v. Noble*, 96 Ind., 326; *Kain v. Gradon*, 6 Blackf. [Ind.], 138; *Kirby v. Holmes*, 6 Ind., 33; *Barger v. Manning*, 43 Ind., 472; *Emmert v. Darnall*, 58 Ind., 141; *Indianapolis Piano Mfg. Co. v. Caven*, 58 Ind., 328; *Conaway v. Ascherman*, 94 Ind., 187; *Bradshaw v. Callaghan*, 8 Johns. [N. Y.], 558; *Fenner v. Bettner*, 22 Wend. [N. Y.], 621; *Todd v. Daniel*, 16 Pet. [U. S.], 521; *Osborne v. Poe*, 6 Humph. [Tenn.], 111; *Smith v. Cunningham*, 2 Tenn. Ch., 565; *Hendricks v. State*, 73 Ind., 482; *Pierson v. Hart*, 64 Ind., 254; *Barger v. Manning*, 43 Ind., 472; *Henry v. Hunt*, 52 Ind., 114; *Reeder v. Maranda*, 55 Ind., 239; *McKeen v. Boord*, 60 Ind., 280; *Herzog v. Chambers*, 61 Ind., 333; *Hammon v. Sexton*, 69 Ind., 37; *Hunt v. Hawley*, 70 Ia., 183; *Goodwin v. Hilliard*, 76 Ia., 555; *Day v. Hawkeye Ins. Co.*, 77 Ia., 343; *Senter v. De Bernal*, 38 Cal., 640; *Thompson v. Ellsworth*, 1 Barb. Ch. [N. Y.], 627; *Cotes v. Carroll*, 28 How. Pr. [N. Y.], 436.

POST, J.

This action originated in the county court of Douglas county, where the defendant in error Covell sued to recover the sum of $800 for services rendered as attorney for Milton D. Polk in an action lately pending in the circuit court of the United States for the district of Nebraska. John F. Polk was joined as a defendant on an alleged original promise to be answerable for the value of the services so rendered at the request of his co-defendant. The defendants therein filed separate answers, which do not call for notice in this connection, except that the material allegations of the petition were by each put in issue. A trial was had, resulting in a general finding and judgment for the plaintiff against both defendants. Subsequently, and within the time prescribed by law, John F. Polk, desiring

to prosecute an appeal from said judgment to the district court for Douglas county, filed with the county judge the following undertaking, which was in due form approved:

"In the County Court, Douglas County, Nebraska.

"GEORGE W. COVELL
v.
MILTON D. POLK AND
JOHN F. POLK.

"Whereas, on the 18th day of June, 1892, George W. Covell recovered a judgment against Milton D. Polk and John F. Polk, in said court, for the sum of $800 and costs of said suit, taxed at $16.40, and the said defendant John F. Polk intends to appeal said cause to the district court of Douglas county:

"Now, therefore, I do promise and undertake to the said George W. Covell, in the sum of $1,640, that the said John F. Polk shall prosecute his appeal to effect, and without unnecessary delay, and that said appellant, if judgment be adjudged against him on the appeal, will satisfy such judgment and costs. JOHN F. POLK.

"WM. A. GRAY.

"Executed in my presence, and surety approved by me, this 27th day of June, 1892. J. W. ELLER,

"*County Judge.*"

A transcript was in due time filed in the district court, whereupon the plaintiff therein, Covell, moved to dismiss the appeal, assigning as grounds for such motion:

"1. This court has no jurisdiction of the subject-matter.

"2. That all parties interested in the judgment sought to be appealed from, as shown by the record, have not appealed from the judgment, and, therefore, have not been brought into this court.

"3. The record shows a joint judgment against Milton D. Polk and John F. Polk for $800, yet John F. Polk only appeals and Milton D. Polk does not appeal and is not made a party appellant in this court."

The foregoing motion was, according to the transcript, sustained, to which order the said John F. Polk in due form excepted and from which he has prosecuted this proceeding in error.

It will be noticed from the foregoing statement that the only question presented by the record is whether there was in the district court a defect of parties, or, in other words, was Milton D. Polk a necessary party to the appeal? It has been settled by repeated decisions of this court that all of several defendants jointly bound by a judgment or decree are necessary parties to a petition in order to secure a review thereof by proceedings in error, and may be made plaintiffs or defendants in conformity with the provisions of the Code in civil actions. (See *Wolf v. Murphy*, 21 Neb., 472; *Hendrickson v. Sullivan*, 28 Neb., 790; *Curtin v. Atkinson*, 36 Neb., 110; *Consaul v. Sheldon*, 35 Neb., 247; *Andres v. Kridler*, 42 Neb., 784.) But a distinction has long been recognized in this state between proceedings by petition in error and by appeal. For instance, in *McHugh v. Smiley*, 17 Neb., 626, it is said: "The rule as to appeals appears to be this, that when the action is against several defendants who have distinct and separate defenses, the judgment as to one defendant, in a proper case, may be appealed, in which case it will only be necessary to take up so much of the record as pertains to his case. Where, however, the interests of the parties are inseparably connected, an appeal will take up the case as to all." (See, also, *Lepin v. Paine*, 18 Neb., 629; *Wilcox v. Raben*, 24 Neb., 368; *Cooper v. Speiser*, 34 Neb., 500.) In *Wilcox v. Raben* judgment was recovered against the principal and sureties on a promissory note in the county court of Hamilton county, from which the principal alone appealed to the district court, where judgment was entered against all of the makers. It was in the subsequent proceeding insisted that as the appeal was taken by Wilcox, the principal, alone, the district court was without jurisdiction to render judgment

against the sureties. But REESE, C. J., disposed of that contention by remarking that it is settled, in this state at least, that where the interests of the parties are inseparably connected the appeal will remove the cause to the appellate court as to all. It is not pretended that the appeal in this case brought up the judgment against Milton D. Polk, and it is clear that it did not, since the interests of the two defendants were not inseparably connected. Milton D. Polk was the principal defendant, who was primarily liable for the value of the plaintiff's services, and is presumed to be satisfied with the judgment of the county court. John F. Polk, on the other hand, stands in the relation of a surety for his co-defendant, a fact known to the plaintiff therein. It is evident, therefore, that the result of the appeal cannot affect the liability of the principal, and no sufficient reason has been suggested for holding that he must be joined as a party in order to confer jurisdiction upon the district court. We are referred to numerous cases which appear to sustain a different view; but whatever may be the rule elsewhere, the right of a surety having a separate defense to prosecute an appeal without joining his principal is, under our practice, too well settled to admit of a doubt. A closer examination of the authorities cited proves the diversity of opinion to be less radical than would appear from a casual reading thereof. Doubtless much of the confusion upon the subject is due to the different senses in which the term "appeal" is used in the provisions regulating appellate proceedings in the several states and in the courts of the United States. Judge Elliott, in his work on Appellate Procedure, 15, defines it as the removal of a suit in equity, or an action at law, from an inferior to a superior court, and his definition certainly harmonizes with the provisions of the Indiana Code, where the only means of review is by appeal. The cases from that state, as well as most, if not all, of the others cited, refer to proceedings which, under our modified

system of the common law, would be prosecuted by petition and denominated error, as distinguished from appeals. They do not, therefore, conflict with the cases cited from this court. There is reason, too, for the distinction recognized in this state. The proceeding by petition in error is substantially an independent action, in which the plaintiff, as the moving party, controls both the pleading and the process of the court. He may accordingly make defendants all necessary parties who refuse to join as plaintiffs to secure the review of a judgment or decree. In short, the provisions of title 3 of the Code, relating to parties, is applicable to petitions in error. Our Code, however, makes no provision for the acquiring of jurisdiction by notice of parties jointly liable for a judgment upon a refusal to join as appellants. A case in point is that of the plaintiff in error. His co-defendant, the principal debtor, is, as we have seen, presumably satisfied with the judgment, and, therefore, unwilling to join in the appeal. He is, therefore, practically without remedy by appeal, unless permitted to prosecute a separate proceeding, a result to be avoided if possible in view of the liberal rules of interpretation universally applied to remedial statutes. It follows that the order dismissing the appeal must be reversed and the cause remanded for further proceedings in the district court.

REVERSED AND REMANDED.

H. T. CHAPMAN, APPELLEE, V. ISAAC BREWER ET AL., APPELLEES, AND DES MOINES MANUFACTURING & SUPPLY COMPANY, APPELLANT.

FILED FEBRUARY 19, 1895. No. 5670.

1. **Mortgages:** MECHANICS' LIENS: PRIORITIES. "A party taking a mortgage on real estate is bound, at the time, to know

whether material has been furnished or labor performed in the erection, reparation, or removal of improvements on the premises within the four prior months." *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207, followed.

2. ———: ———: ———. "The lien of a mortgage on real estate taken while a building is in process of erection thereon, is subject to the claims of material-men and laborers for material already and thereafter furnished, and for labor already and thereafter performed in the erection of such building, when the commencement of such furnishing of material or the commencement of the performance of such labor was prior to the record of said mortgage." *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207, followed.

3. ———: ———: ———: EVIDENCE. Evidence may be introduced during trial to show that the date of the commencement of labor or furnishing material stated in the claim filed to perfect a mechanics' lien is erroneous and that the beginning of the labor or furnishing was of an earlier date, where the establishing of such prior date will only affect the rights of parties to the suit who were bound to take notice of the true date of the commencement of labor or furnishing material, and whose mortgage liens were acquired after such true date and prior to the time of filing the claim for lien, and who did not and could not depend upon it for notice of such date, and whose rights could not be and were not changed or affected by the statement of the date in the claim for lien.

4. **Appeal:** ISSUES NOT PRESENTED BELOW. In an appeal case, an issue not presented by the pleadings and not fairly within their scope, and, therefore, presumably not decided by the trial court, will not be considered in this court.

5. **Mechanics' Liens:** OATH. The oath required by statute to be made to a claim for a mechanic's lien may be upon information and belief.

6. ———: CORPORATIONS. The words "any person," used in the statute which provides for the filing of a mechanic's lien to designate who may acquire such liens, includes both natural and artificial persons, or corporations, and in this last signification is not confined to corporations created by virtue of the laws of this state, but applies to and includes foreign corporations or those formed under the laws of other states as well.

7. **Corporation:** EVIDENCE OF EXISTENCE. The proof in this case *held* to sufficiently establish the existence of the appellant company as a corporation to relieve it from collateral attack.

8. **Foreign Laws:** PROOF. Where there is no proof of the provisions of the statutes of a sister state, they will be presumed to be the same as those of our own state upon the subject involved.

9. **Pleading:** CORPORATIONS. Where a pleading in one portion of it contains a denial of the corporate existence of a company and in another paragraph of the pleading the issue is raised of the right of the company, as a foreign corporation, to acquire or enforce a mechanic's lien in this state, the pleading will be construed as an admission of the corporate capacity of such company.

10. **Mechanics' Liens:** CORPORATIONS: VERIFICATION OF CLAIM. A treasurer and book-keeper of a corporation, where the articles of incorporation require every officer of the company to be a stockholder, may verify the claim for a mechanic's lien.

11. ———: WAIVER BY TAKING MORTGAGE. The acceptance of a mortgage by a mechanic's lien-holder, covering the property to which the mechanic's lien has attached, will not be deemed a waiver of the former lien, where such was not the intention of the parties, and such additional security does not infringe upon the rights of other parties.

12. ———: STATEMENT FOR LIEN. The statement in regard to a lien, contained in the contract for furnishing material, etc., the basis for the claim of mechanic's lien, *held* not to be a waiver of the right to the statutory lien.

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

A statement of the case appears in the opinion.

E. E. Byrum, for appellant:

Appellant's mechanic's lien is superior to the mortgage. (*Doolittle v. Plenz*, 16 Neb., 153; *Manley v. Downing*, 15 Neb., 639; *White Lake Lumber Co. v. Russell*, 22 Neb., 129; *Rogers v. Omaha Hotel Co.*, 4 Neb., 58; *Great Western Mfg. Co. v. Hunter*, 15 Neb., 37; *Ballou v. Black*, 17 Neb., 389.)

Appellant's corporate capacity was sufficiently shown. (*Conard v. Atlantic Ins. Co. of New York*, 1 Pet. [U. S.], 386; *Durham v. Hudson*, 4 Ind., 501.)

The verification of the lien was made by a proper person. (*Great Western Mfg. Co. v. Hunter*, 15 Neb., 38.)

The oath for a claim made upon information and belief is sufficient. (*Dorman v. Crozier*, 14 Kan., 224; *City of Atchison v. Bartholow*, 4 Kan., 124.)

Appellant did not waive its mechanic's lien by taking a mortgage. (*Miller v. Fin*, 1 Neb., 255; *Delaware Railroad Construction Co. v. Davenport & St. P. R. Co.*, 46 Ia., 406; *Great Western Mfg. Co. v. Hunter*, 15 Neb., 38; *Hoagland v. Lusk*, 33 Neb., 376; *Irish v. Pulliam*, 32 Neb., 24; *Bissell v. Lewis*, 56 Ia., 239.)

Appellant had a right to show that work began prior to the date fixed by the claim for a lien. (*Doolittle v. Plenz*, 16 Neb., 156; *Davis v. Hines*, 6 O. St., 473; *Thomas v. Huesman*, 10 O. St., 152; *Knutzen v. Hanson*, 28 Neb., 591.)

Miller & Son, B. Ready, and *Davis, Gantt & Briggs*, *contra:*

Appellant's claim for a lien should have been positively verified. (*Dorman v. Crozier*, 14 Kan., 224; *City of Atchison v. Bartholow*, 4 Kan., 124; *Ex parte Bank of Monroe*, 7 Hill [N. Y.], 177; *Globe Iron Roofing & Corrugating Co. v. Thatcher*, 6 So. Rep. [Ala.], 366.)

The mortgage lien is superior, because it is shown on the face of the mechanic's lien that no work was performed or material furnished for the building upon which the mechanic's lien is claimed, until after the mortgage was recorded. (*Olson v. Heath Lumber Mfg. Co.*, 33 N. W. Rep. [Minn.], 791; *Goss v. Strelitz*, 54 Cal., 640; *Russell v. Bell*, 44 Pa. St., 54; *Dearie v. Martin*, 78 Pa. St., 55; *Sherry v. Schroage*, 48 Wis., 93; *Armstrong v. Hallowell*, 35 Pa. St., 485; *Vreeland v. Boyle*, 37 N. J. Law, 346; *Minor v. Marshall*, 27 Pac. Rep. [N. M.], 481.)

If any lien existed in favor of appellant, it was waived by the taking of a mortgage. (*Goble v. Gale*, 41 Am. Dec. [Ind.], 219; *Pease v. Kelly*, 3 Ore., 417; *Nason v. Potter*,

6 Vt., 28; *Gilman v. Brown*, 1 Mason [U. S.], 191; *Kinsey v. Thomas*, 28 Ill., 505; *Gardner v. Hall*, 29 Ill., 277; *Gorman v. Sagner*, 22 Mo., 137; *Barrows v. Laughman*, 9 Mich., 213.)

A. M. Gooding, also for appellees.

HARRISON, J.

This action was instituted in the district court of Cedar county by the plaintiff H. T. Chapman to foreclose a real estate mortgage, executed and delivered to him by Isaac and Lucinda Brewer, upon property described in the petition, situated in Cedar county. The other parties made defendants to the action, in addition to the Brewers, were the Cedar County Bank and the Des Moines Manufacturing & Supply Company. The defendant company answered and filed a cross-bill, in which it claimed a mechanic's lien prior in point of time to either of the mortgages. The Cedar County Bank filed an answer or cross-petition setting up a lien by mortgage executed and delivered to it by the Brewers, claiming it to be second and subsequent only to plaintiff's mortgage. Plaintiff filed a reply to the answer and cross-petition of the company, by which was raised the question of the priority of the mechanic's lien of the company. Upon trial the court determined and adjudged that the liens of the plaintiff and Cedar County Bank were prior and superior to that of the company, and from this decree the company has appealed to this court.

In the original claim of lien filed which was introduced in evidence, there appears the following statement: "That on and between the 30th day of December, 1889, and the 25th day of January, 1890, they furnished lumber and materials and machinery supplies and labor for said building," etc. The mortgage to Chapman was dated November 15, 1889, and recorded November 21, 1889, and the mortgage of the Cedar County Bank was dated November

15, 1889, and recorded November 27, 1889. In the answer, or cross-petition, of the Des Moines Manufacturing & Supply company it was stated that work was commenced November 5, 1889, in and on the mill, by a party sent by it from Des Moines for such purpose, and the proof shows that work was so commenced by their workman, Morris, on the 5th or 7th of November, 1889, and that some of the material was furnished during the month of October immediately preceding. In the bill, or statement of account, attached to the claim of lien there is, of date December 31, 1889, an item of charge in the following words, viz.: "50 days by Morris to Dec. 31, '89, @ $4, $200." It is strenuously argued that the company is bound by the statement in the claim filed in reference to the dates between which the labor was performed and material furnished, and that the evidence introduced, of a different and earlier date of the commencement of such labor, etc., was incompetent and could not be received to vary or change the date assigned in the claim as it appeared of record. It may be well, in order to fully and properly understand the situation of the parties, to state here that the claim of lien was filed March 17, 1890. The statute of this state in regard to mechanics' liens is as follows: "Any person entitled to a lien under this chapter shall make an account, in writing, of the items of labor, skill, machinery, or material furnished, or either of them, as the case may be, and, after making oath thereto, shall, within four months of the time of performing such labor and skill, or furnishing such machinery or material, file the same in the office of the register of deeds," etc., and does not require that the dates of performance of labor or furnishing material shall be stated in the claim for lien; and where it appears from the affidavit filed and the accompanying account of labor or material that such performance and furnishing were within the time required by the law to entitle the claimant to a lien it is sufficient. The lien papers in this case disclose that

the last labor was performed, or material furnished, January 25, 1890, and the claim filed March 17 of the same year. This fulfilled the requirement of the statute. In *Noll v. Kenneally*, 37 Neb., 879, this court stated the rule to be as follows: "The failure of an account filed to secure a mechanic's lien to state the dates the various items of materials were furnished will not vitiate the lien, if it appears from the account and affidavit thereto attached that such materials were furnished within the requisite time to entitle the claimant to a lien therefor." In *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207, it was held: "A party taking a mortgage on real estate is bound, at the time, to know whether material has been furnished or labor performed in the erection, reparation, or removal of improvements on the premises within the four prior months;" and further, "the lien of a mortgage on real estate, taken while a building is in process of erection thereon, is subject to the claims of material-men and laborers for material already and thereafter furnished, and for labor already and thereafter performed, in the erection of such building, when the commencement of such furnishing of material, or the commencement of the performance of such labor, was prior to the record of said mortgage." Applying the rules of law as announced by this court, just quoted, to the facts in the case at bar, and further bearing in mind that by the provisions of our statute on the subject under discussion the lien attaches at the commencement of the labor or furnishing material, and the relative positions of the liens involved are not, in so far as they are governed by their respective dates, very difficult to ascertain or of assignment. The fact that the date of the commencement of labor or furnishing of material was stated to be December 30, 1889, when it should have been November 5th or 7th, could not, and did not, have any significance for or to mortgage lien-holders, or in any manner affect their rights under the mortgages executed during the month of November at a time

when the work and furnishing which were the foundation of the lien were in progress, and had been from a date prior to such execution, as they were bound to take notice of these things, and their mortgages were taken subject to any rights of lien which had accrued or attached in favor of mechanics or material-men. Their rights were acquired long prior to the time the statement was filed in which appeared the erroneous date, and such statement was not notice to them, nor could or were their liens or rights in any way affected by it, and the evidence of the true date was competent and its reception in no manner or extent harmful or prejudicial to the parties holding the mortgages. (2 Jones, Liens, sec. 1066; *Wakefield v. Latey*, 39 Neb., 285.)

It is argued that it appears upon the face of the original claim of lien, filed by appellant, which was introduced in evidence, that the claim was verified before Gardner V. Wright, a notary public, and who was secretary of the appellant company, and also shown by the articles of incorporation to be a stockholder therein and thus directly interested, and that being so interested he was incompetent to administer the oath to the party verifying the lien. However this may be, it was not, we think, sufficiently raised by the pleadings and was, evidently, not an issue in the trial court and cannot be considered in this court. It is further urged that the verification of the claim of lien was upon information and belief, and that it should have been sworn to positively to fulfill the requirements of our statutory provisions in regard to the verification of a claim for a mechanic's lien. Such has been stated to be the rule in Kansas, under a statute very similar in its exactions in this respect to our own. (*Dorman v. Crozier*, 14 Kan., 224. See, also, *Globe Iron Roofing & Corrugating Co. v. Thatcher*, 6 So. Rep. [Ala.], 366). But this court in construing the provisions of the mechanic's lien law has invariably announced and adhered to the doctrine that they must be given a liberal construction, agreeably to which it

has been held that the oath may be made by an agent. (See *Great Western Mfg. Co. v. Hunter*, 15 Neb., 33.) And in a case such as is the one now under consideration, where the oath must necessarily be made by some one for the corporation and whose only knowledge of the transaction from which the claim for lien arises is, from the inherent nature of the business, derived from information and very frequently may not be personal or direct, it would seem very proper to apply the rule of liberal construction, and that an oath made upon information and belief must be adjudged a compliance with the requirements of the mechanic's lien statute, wherein it states that the claim for lien should be filed "after making oath thereto," and is a "making oath thereto" within these words when liberally construed. Nor are we without authority to support such views. In Missouri, where the statute provides, referring to the claim for lien, "which shall in all cases be verified by the oath of himself or some credible person for him" (Rev. Stats., Mo., 1889, sec. 6709), it was held, in the case of *Finley v. West*, 51 Mo. App., 569, that "an affidavit on belief of the affiant is a substantial compliance with the lien law." (See, also, Phillips, Mechanic's Liens, sec. 366*a*.)

Another contention is that our statute provides for a lien in favor of "any person" and not in favor of a corporation, and that a corporation cannot acquire a lien under our statutes. "Persons also are divided by the law into either natural persons or artificial. Natural persons are such as the God of Nature formed us. Artificial are such as are created and devised by human laws, for the purposes of society and government, which are called corporations, or bodies politic." (1 Blackstone Commentaries, 123.) "Enactments which related to persons would be variously understood, according to the circumstances under which they were used, as including or not including corporations. In its legal significance it is said the word 'person' is a generic term and as such, *prima facie*, includes artificial as

well as natural persons, unless the language indicates that it is used in a more restricted sense;" and further: "If any general rule can be drawn from the decisions it would be this: that where the act imposes a duty towards or for the protection of the public or individuals, grants a right properly common to all, and from participation in which the limited character of corporate franchises and the absence of any natural rights in corporations do not, by any policy of the law, debar them, the term 'persons' will, in general, include them whether the act be a penal or a remedial one." (See Endlich, Interpretation of Statutes, secs. 87, 89, and cases cited.) We are satisfied that the word "persons" in our mechanic's lien law includes an artificial person, or corporation.

It is further insisted, and very strenuously, and we will discuss it here, for it is directly connected with and is a branch of the subject last considered, *i. e.*, the right of a corporation to file and hold a lien, that the appellant company was a foreign corporation, and if it should be decided that a home or domestic corporation could acquire or possess a mechanic's lien it would not extend to and include a foreign corporation as competent to do so. There are authorities to the effect that wherever corporations are embodied under the term "persons" it will be construed to embody only such as are formed under the laws of the state enacting the statute so construed; but we do not believe it was the intention of our legislature in the use of the words "any person" to restrict their meaning, but they were used in their largest and most extended sense and meaning, and to include both foreign and home corporations as well as natural persons. There was a denial of the corporate existence of appellant company, and it is contended that there was no sufficient proof of the corporation. The articles of incorporation, signed by the incorporators and acknowledged before a notary public, and showing, by indorsement thereon, to have been filed and

recorded in the office of the recorder of Polk county, Iowa, and also filed and recorded in the office of the secretary of state of Iowa, were introduced in evidence, and proof was made of the user of the corporate rights and powers by the company and its engagement in business for a considerable length of time. There was also offered and received in evidence what purported to be a copy of the statutes of the state of Iowa, but it was not sufficiently identified to make it competent under the rule governing the introduction of such testimony in our state, but in the absence of proof the statutory law of the state of Iowa, in relation to the subject involved, *i. e.*, the creation of a corporation, must be presumed to be the same as ours. (*Scroggin v. McClelland*, 37 Neb., 644.) This being true, there was proof which established the existence of at least a *de facto* corporation, or such an one that its existence could not be collaterally attacked. It may be added here that if the proof of the corporate capacity of the corporation was insufficient, or failed, the appellee, after denying such fact, alleged affirmatively that the company could not hold a mechanic's lien for the reason that it was a foreign corporation. This, we think, should be treated as an admission of the corporate existence of the company.

The objection was made that the party making oath to the lien was not a competent party to do so. D. H. Buxton, who verified the claim, states in his oath that he is the book-keeper and treasurer, a member of the firm of Des Moines Manufacturing & Supply Company. Of the articles of incorporation of appellant company the tenth states that "no person shall be elected director or officer of this corporation who it not a stockholder." From all the foregoing it appears that the person who made the oath to the claim of lien was an officer of the company, and, presumably, in accordance with the requirements of article 10 above quoted, a stockholder, and, moreover, the book-keeper of the company whose claim of lien he verified. We think

this constituted him competent to make the necessary oath to the claim of lien, and when he had done so it was valid and sufficiently verified to meet the objection that it was not verified by a person who was a proper person to make oath to it for the company.

It appears that the appellant company received notes for the balance due it under its contract for furnishing the material and performing the labor upon the mill, and that these notes were secured by a mortgage upon the mill property, and the mortgage also covered other property. By so doing, it is claimed, it waived its right and lien under the lien law. The notes and mortgage were taken as security and were not, so far as the record disclosed, delivered as payment of the claim or account, or accepted as such or as in lieu of the lien, or looked upon or treated as a waiver of the lien or right to file the same.

In the case of the *Great Western Mfg. Co. v. Hunter*, 15 Neb., 32, it was held: "The contract for furnishing certain machinery for a grain elevator contained a clause as follows, in substance: 'Should shipment be made before payment in full the title, right of possession, and ownership of the aforesaid machinery shall remain in the above first party until the note is paid,' etc. Held not a waiver of a right to a mechanic's lien," and in the case of *Hoagland v. Lusk*, 33 Neb., 376, the rule was stated to be: "The acceptance by a material-man of a note and chattel mortgage as collateral security for materials previously furnished for the erection of a building under a contract with the owner is not a waiver of the lien of the material-man, unless such was the intention of the parties." In the text of the opinion is the following statement: "In January the firm of Lusk Bros. & Co. failed. At that time the plaintiff took a note executed by William S. Lusk, secured by chattel mortgage on some potatoes, as collateral security of the plaintiff's claim. The potatoes were subsequently sold under the mortgage and the proceeds applied towards the payment of the plaintiff's

demand. The note and chattel mortgage were not accepted by the plaintiff as payment, but simply as additional and collateral security, without any intention to waive the lien given by statute. The taking of the security did not affect the lien. Upon the proposition there is an irreconcilable conflict in the authorities. The rule which we have stated is, we think, sustained by the better reason. (*Ford v. Wilson*, 11 S. E. Rep. [Ga.], 559; *Howe v. Kindred*, 44 N. W. Rep. [Minn.], 311; *Hinchman v. Lybrand*, 14 Serg. & R. [Pa.], 32; *Montandon v. Deas*, 14 Ala., 33.)" (See, also, *Smith v. Parsons*, 37 Neb., 677; *Kilpatrick v. Kansas City & B. R. Co.*, 38 Neb., 621; *Union Stock Yards State Bank of Sioux City v. Abrams*, 42 Neb., 880; *Smith & Vaile Co. v. Butts*, 16 So. Rep. [Miss.], 242.)

We gather from the opinions of this court in which the subject of the lienor accepting other security than the lien allowed by statute has been discussed, that this court is committed to the doctrine that it is not a waiver of the statutory lien unless it appears that such was the intention, or, from the facts of the case, that it would be inequitable as between the parties to permit the holding of the further security and also the existence of the lien. We are aware that it has been held that if the party take a mortgage upon the same property upon which the statutory lien is claimed it is a waiver of the lien, or if it has been perfected by filing, etc., will displace it. In the decisions which we have examined in which the rule is so announced, the reason given or shown by the facts of the case for the doctrine was that other lien-holders had become such by relying upon the record as showing the relations of the other parties, and to permit the mechanic or material-man who had taken the mortgage to assert the right to the statutory lien would prejudice the rights so acquired. In the case at bar this can have no application or relevancy. It will be remembered that the appellees (mortgagees) received their mortgages after the company's rights to a lien had attached and

with notice of such right, or that they were required to take notice of it. They took their mortgages charged with notice of the appellant's right of lien and subject thereto, and as the company's mortgage was not in existence until long after theirs had been executed and recorded, the fact that it was made could in no manner affect them or their rights under their mortgages, and that it was created or had an existence did not or could not alter or vary the positions of their mortgage liens with reference to the appellant's statutory lien, or, as to it, either advance or displace them, and we cannot see wherein they can be prejudiced or an injustice done to them or their rights by permitting appellant to enforce its statutory lien or wherein the execution and delivery of the mortgage to appellant so affected their liens or rights as entitled them to assert that it was a waiver of the other lien, and, furthermore, as there is nothing in the case which shows, or from which it can rightfully be inferred, that the mortgage was accepted as payment, or which evinced an intention that it was to take the place or to be instead of the statutory lien or displace it, we conclude that the lien, as to this objection, must be upheld and was not waived by taking the subsequent mortgage or thereby rendered incapable of enforcement. In Jones, Liens, section 1013, the rule is stated to be: "The taking of a mortgage upon the same property upon which the creditor claims a statutory lien, may not displace the lien. The mortgage is regarded as a cumulative security, and the creditor may enforce either the lien or the mortgage. So also the taking of the collateral obligation of another person for the payment of the lien debt does not ordinarily debar the lien-holder from claiming the security of his lien, unless the circumstances are such that an intention to waive the lien may reasonably be inferred." (*Payne v. Wilson*, 74 N. Y., 348.) In *Howe v. Kindred*, 44 N. W. Rep. [Minn.], 311, we find the following statement: "The reason usually given in the adjudicated cases for holding that a mechanic

or material-man has lost his lien by taking security, either upon the property to which the lien attaches, or upon other property, is that subsequent lien-holders and purchasers have a right to rely upon the record, and should be protected against secret liens. * * * This reason is without force in the case at bar. The appellant took his mortgage long prior to any of the acts relied upon by him as constituting an extinguishment of the lien; and, when taken, it was subject to plaintiff's right to perfect a claim already attached to the premises. His situation has never been changed by anything plaintiffs may have done." In *Gilcrest v. Gottschalk*, 39 Ia., 311, it is said: "It seems to us that the taking of a mortgage from the debtor upon the same identical property covered by the mechanic's lien and for the same debt, cannot be deemed collateral security on the same contract. There is nothing in the record to show that the mortgage was intended and accepted as collateral security. It was not such unless so intended and accepted. (See 1 Bouvier, Law Dictionary, 240; Powell, Mortgages, 393.) The mechanic or material-man will retain his lien unless he does something evincing an intention to rely upon his new or collateral security and not upon the lien the law has given him. (*Clark v. Hunt*, 3 J. J. Marsh. [Ky.], 558.)"

It was stated in a written contract between the company and Isaac Brewer, pursuant to the terms of which the material, etc., was furnished for which the company claimed its lien, that "—— agrees that said Des Moines Manufacturing & Supply Company shall have a lien upon all the machinery, fixtures, etc., herein mentioned, and upon the building and real estate where said machinery is placed, to secure all claims of said company," and it is urged that by accepting or becoming a party to the contract with the above clause in it the company waived its right to a lien under the mechanic's lien law. The above agreement for a lien, if such it may be called, is a triumph of indefiniteness. It mentions

no kind of a lien, and no mention is made of whether one will be created in the future or whether it is to attach at the time of the execution of the contract or at some time during the progress of the labor or furnishing of material. It cannot be determined from its terms whether the parties viewed it as establishing a lien or as a mere statement that a mortgage would be executed at some subsequent date, and it does not appear that the appellees had it in view when they acquired their mortgage liens, or that their actions in taking the mortgages were in any manner or to any degree governed or affected by it; nor does it appear from the facts and circumstances of the case that when the contract was made there was any intention to waive the right of a lien under the statute or to accept what was given or to be given, as expressed in the contract, in lieu of the statutory lien. We do not think there was any waiver of the right to a lien by reason of the statement hereinbefore quoted, which appeared in the contract. In *Great Western Mfg. Co. v. Hunter, supra,* it is said: "As to the third subdivision of this point, that plaintiffs cannot have a mechanic's lien for the machinery furnished, for the reason that by the terms of the contract they retained a vendor's lien on the machinery, while I find some difficulties presented in some of the cases cited, yet, as it is a general principle of law that a creditor may have as many securities for his debt as he can obtain without infringing upon the rights of others, and as the rights of no other person have been by any possibility affected by the said clause in the contract, I do not deem it as an objection to the plaintiff's right to a lien." The appellant's lien was the prior and superior one, and the decree of the district court must be reversed wherein it declared it inferior and subsequent to the mortgage liens and a decree entered in this court establishing its priority.

DECREE ACCORDINGLY.

INDEX.

Absconding Debtors.

In a legal sense, a person absconds when he hides, conceals, or absents himself clandestinely with the intent to avoid legal process. *Smith v. Johnson*..... 754

Accessories. See CRIMINAL LAW, 1.

Actions. See HUSBAND AND WIFE. SUMMONS.

Causes of action for malicious prosecution, for damage to plaintiff by arresting occupants of her place of business, and for slander may be properly joined. *Dinges v. Riggs*... 710

Affidavits.

1. A notary's certificate to an affidavit is presumptive evidence of the facts stated in the certificate. *Smith v. Johnson*..... 755
2. The jurat of an officer attached to an affidavit is no part of the affidavit. *Bantley v. Finney*..... 795
3. The jurat of an officer attached to an affidavit enables the affidavit to be read in evidence as the oath of the person whom the officer certifies made the oath. *Id.*
4. An affidavit is a declaration on oath, in writing, sworn to by a person before some one who has authority to administer oaths. *Id.*

Alienation. See DOWER.

Alimony. See DIVORCE.

Alteration of Instruments. See REVIEW, 19, 20.

Animals.

Where a bull breaks into a pasture and, by consent of his owner and the owner of the pasture, is permitted to remain there over night, during which time he kills a mare belonging to a third person, the latter may recover damages from the owner of the bull. *Duggan v. Hansen*..... 277

Appeal. See REVIEW.

1. In an action to foreclose a mortgage where defendants, against whom no personal judgment is sought, disclaim

Appeal—*concluded.*

all interest in the equity of redemption, they cannot complain of a decree which affects only the land. *Myers v. Mahoney* 208

2. The giving of an appeal bond under sec. 1007, Code, is necessary to confer upon the district court jurisdiction of an appeal by a school district from a justice of the peace. *School District v. Traver*..... 524
3. Right of appeal does not exist unless it is conferred by statute. *State v. Betha* 451
4. Appeal does not lie from the action of a board of county supervisors in impeaching a county officer. *Id.*
5. Where a petition was filed in the district court in a cause appealed from the county court, it was erroneous to overrule a demurrer to such petition for the sole reason that the question presented by the demurrer had not been urged or relied upon in the inferior court. *Thompson v. Campbell*..... 556
6. One of several defendants, having separate and distinct defenses, may prosecute an appeal from the county court to the district court without joining his co-defendants. *Polk v. Covell*..... 884
7. When interests of several defendants are inseparably connected, an appeal by one defendant brings up the whole case. *Id.*
8. An issue not presented by the pleadings will be disregarded on appeal. *Chapman v. Brewer*..... 891

Appeal Bonds. See REVIEW, 34.

Appearance.

1. After entry of judgment by a justice of the peace, a defendant who moves to retax costs thereby enters his appearance and waives jurisdiction. *Dryfus v. Moline, Milburn & Stoddard Co.*..... 233
2. Where a defendant appears and files a motion to dismiss because of defects in service by publication, he thereby waives such defects. *Welch v. Ayres*..... 326
3. One who voluntarily appears and presents to the district court for adjudication his claim by a proper pleading cannot question the jurisdiction of that court. *Ragan v. Morrill*..... 361

Assault. See CRIMINAL LAW, 10. RAPE.

Evidence as to intent in a prosecution for assault with intent to murder. *Krchnavy v. State*..... 337

Assault and Battery.

1. The defendant may be convicted of assault and battery under an information charging him with aiding another to commit an assault with intent to wound. *Wagner v. State* 1
2. Sufficiency of information under sec. 17*b*, Criminal Code, to charge an assault with intent to inflict great bodily injury. *Murphey v. State* 34
3. Under such an information, whether there was an intent to inflict great bodily injury is generally a question for the jury. *Id.*
4. If serious bodily harm of any kind was contemplated by the assailant, it is sufficient to justify a conviction under sec. 17*b*, Criminal Code. *Id.*
5. Sufficiency of evidence discussed in the opinion to sustain a conviction of assault with intent to inflict great bodily injury. *Id.*
6. Prosecution must be instituted within one year from commission of offense. *Jolly v. State* 857

Assignment. See MORTGAGES, 5-7.

1. An assignment of a debt for the purpose of evading exemptions is unlawful. *Bishop v. Middleton* 10
2. A subscription contract is assignable, and the assignee is the proper party to bring suit thereon. *Gerner v. Church* ... 692

Assignments of Error. See REVIEW, 5-12.

Asylums. See INSTITUTION FOR BLIND.

Attachment. See BILL OF EXCEPTIONS, 3. GARNISHMENT.

1. A levy on realty by posting a copy of the order of attachment is not effective against third persons where there is an occupant. *Shoemaker v. Harvey* 76
2. Where defendant is not in possession of land, a valid levy cannot be made upon his equitable interest. *Id.*
3. An attachment levied after the delivery of the tax list to the county treasurer is inferior to the lien of the taxes. *Reynolds v. McMillan* 183
4. A motion to discharge an attachment must be filed before judgment in the action, but if so filed the court may rule thereon after judgment. *Stutzner v. Printz* 306
5. In reviewing the record of a county court in sustaining an attachment, and in rendering judgment for plaintiff, an order reversing the judgment without reference to the attachment amounts to an affirmance of it, where there is

Attachment—*concluded.*

no exception or request for further rulings, and the district court may refuse to entertain an independent motion to discharge for the same reasons alleged below. *Id.*

6. The validity of a mortgage cannot be determined on the hearing of a motion by defendant to dissolve an attachment issued on the ground that he executed the mortgage with intent to defraud his creditors. *Landauer v. Mack* 430
7. In sustaining an attachment as against defendant it is sufficient to establish the existence of a statutory ground as to him without regard to the rights of other parties. *Id.*
8. In an action in a justice court an attachment affidavit alleging that defendant absconded with intent to defraud creditors was sufficient to authorize constructive service, where the officer to whom the summons was directed made a return that he could not find defendant in the county. *Smith v. Johnson* 755
9. In an attachment suit before a justice a finding of the sum due plaintiff, an assessment of plaintiff's recovery, and an order to sell the attached property is sufficient as an entry of judgment. *Id.*

Attorney and Client.

1. Right of an attorney to have a case reinstated where he alleged his client permitted a judgment of dismissal to be entered under a secret settlement to prevent the attorney from obtaining fees. *Kretsinger v. Weber*..... 468
2. The claim for attorney's fees for defending an indigent prisoner in the district court and for services in the supreme court upon review must be presented and allowed in the lower court. The supreme court has no authority to allow such claims. *Edmonds v. State*..... 742

Attorneys' Fees. See TAXATION, 9.

Australian Ballot Law. See ELECTIONS.

Bail.

A recognizance for an appeal from a justice court is invalid where it fails to designate the court where the prisoner is to appear. *Pill v. State*..... 23

Ballots. See ELECTIONS.

Bank Checks. See NEGOTIABLE INSTRUMENTS, 5.

Bill of Exceptions. See REVIEW, 19, 20.

1. A bill of exceptions must be certified by the clerk as being a part of the record or as being the original bill. *Wax v. State*..... 18

Bill of Exceptions—*concluded.*

2. A clerk of the district court is only authorized to allow and sign a bill of exceptions in the exceptional cases provided by sec. 311 of the Code. *Glass v. Zutavern*..... .. 334

3. A justice of the peace or county judge has no authority to settle a bill of exceptions preserving the testimony taken upon the hearing of a motion to dissolve an attachment. *Donaldson v. Fisher*..... 260
Donaldson v. Ellsworth..... 262
Michigan Stove Co. v. Miller..... 332

4. Affidavits considered by the trial court will be disregarded on appeal unless preserved by a bill of exceptions. *Omaha Fire Ins. Co. v. Dierks*..... 473
Gray v. Godfrey..... 672

Blind, Institute for. See INSTITUTION FOR BLIND.

Bonds. See CONTRACTS, 8. PRINCIPAL AND SURETY, 3-5. RES ADJUDICATA, 3.

In action on a penal bond judgment may be for actual damages sustained, not exceeding the penalty of the bond and interest from date of breach, less payments. *Mullen v. Morris*..... 597

Boundaries.

1. Where the original mounds or monuments established during a government survey can be identified, they will control courses and distances. *Peterson v. Skjelver*..... 663

2. Where it is shown by uncontradicted evidence that a section corner was located by the government surveyors at a certain point, such location must control, even though it is at a place different from that given in the field notes and plat. *Id.*

Bridges. See DAMAGES, 2.

Briefs. See REVIEW, 8, 9.

Builders' Bonds. See CONTRACTS, 8.

Builders' Contracts. See CONTRACTS, 6.

Building and Loan Associations.

1. Stock payments by borrowing member are not *ipso facto* credits upon his indebtedness; but a borrower may elect to have payments on account of stock applied to his indebtedness. *Randall v. National Building, Loan & Protective Union*..... 876

2. Agreement for forfeiture of stock of borrowing member of foreign building and loan association without allowing

Building and Loan Associations—*concluded.*

credit to borrower for previous payments is unconscionable and will not be enforced, though recognized as valid in the association's own state. *Id.*

Burden of Proof. See FRAUDULENT CONVEYANCES. NEGOTIABLE INSTRUMENTS, 1, 2. PRINCIPAL AND SURETY, 5. VENDOR AND VENDEE.

Change of Venue. See VENUE.

Charitable Institutions. See INSTITUTION FOR BLIND.

Chattel Mortgages. See PARTNERSHIP, 8.

1. Execution and filing of a release may not be conclusive evidence of payment of the debt in favor of the mortgagee. *Waggoner v. First Nat. Bank of Creighton*..... 85
2. The lien of taxes is superior to the lien of a chattel mortgage executed after the tax list has been delivered to the county treasurer. *Reynolds v. Fisher*..... 172
3. A pre-existing debt is a sufficient consideration for a chattel mortgage and protects the mortgagee to the same extent as a new consideration. *Chaffee v. Atlas Lumber Co*..... 224
4. The presumption of fraud arising from the possession of mortgaged chattels by the mortgagor remains only so long as he retains possession. *Id.*
5. A mortgagee by failing to dispose of the chattels according to the provisions of the mortgage and statute does not, for that reason alone, lose his lien; but he may be required to account to a subsequent lienor for the value of the goods. *Id.*
6. An insolvent debtor may prefer one creditor to the exclusion of others. *Id.*
7. Sufficiency of information under sec. 10, ch. 12, Comp. Stats., charging the mortgagor with fraudulently removing mortgaged property. *Wilson v. State*..... 745
8. A mortgagor who fraudulently removes from the county any portion of the mortgaged chattels is liable in a criminal prosecution. *Id.*

Checks. See NEGOTIABLE INSTRUMENTS, 5.

Clerk District Court. See BILL OF EXCEPTIONS, 2.

Collateral Attack. See EXECUTIONS.

Collateral Security. See PLEDGES.

Commission. See REAL ESTATE AGENTS.

Compromise and Settlement.
Validity of settlement as to creditors. *Baldwin v. Burt*..... 254

Confession. See CRIMINAL LAW, 3, 4.

Conflict of Jurisdiction.
A judgment of the district court cannot be reached by garnishment proceedings before the county court. *Scott v. Rohman*..... 618

Consideration. See CHATTEL MORTGAGES, 3. NEGOTIABLE INSTRUMENTS, 2, 3.

Conspiracy.
Verdict against part of the defendants was not supported by evidence. *Hardin v. Sheuey*..... 806

Constables. See SHERIFFS AND CONSTABLES.

Constitutional Law.
1. Sec. 531c of the Code, providing for the better protection of the earnings of employes of corporations and individuals engaged in interstate business, is valid. *Bishop v. Middleton*..... 10
2. The validity of an act will not be determined on review where the question was not presented below. *Pill v. State.* 27
3. A city may tax intrastate business of a telegraph company transacted within its limits. *Western Union Telegraph Co. v. City of Fremont*..... 499
4. The constitutional right of appeal does not prevent the legislature from requiring the appellant to give an appeal bond. *School District v. Traver*..... 525
5. The choice of sanitary measures is a legislative function, which has been entrusted to the various municipal bodies and which the courts will not assume to control. *Coombs v. MacDonald*..... 632

Construction. See CONTRACTS, 4.

Constructive Service. See ATTACHMENT, 8. COUNTIES, 9. SUMMONS.

Continuance.
1. Order denying continuance was properly sustained where applicant failed to show unavoidable absence of an important witness or that his testimony could subsequently be obtained. *Home Fire Ins. Co. v. Johnson*..... 71
2. Where a witness is without the jurisdiction of the court and no effort to procure his deposition has been made, an application for a continuance on the ground of his absence may be overruled. *Kansas City, W. & N. W. R. Co. v. Conlee*..... 121

Contracts. See BUILDING AND LOAN ASSOCIATIONS. EVIDENCE, 3, 7. PRACTICE, 2. SALES. WARRANTY.

1. Sec. 531c of the Code, to prevent garnishment of wages, in its application to debts incurred prior to its passage, does not impair the obligations of contracts. *Bishop v. Middleton*, 10

2. An oral contract under which a company employs a person for one year at a fixed salary per month, service to begin at a future date, is voidable at the option of either party. *Kansas City, W. & N. W. R. Co. v. Conlee*..... 121

3. Contracts which are valid, except as against those in adverse interest, cannot be assailed by persons not prejudiced thereby. *Baldwin v. Burt*..... 254

4. In an action on a contract, where both parties in the district court adopt a particular construction, neither will be permitted to urge a different one in the reviewing court. *Woodward v. Baird*..... 310

5. Evidence discussed *held* insufficient to show plaintiff's right to have a conveyance executed by her canceled on account of fraud, duress, and undue influence. *Firestein v. Horwich*..... 453

6. Contract to put a hot air furnace in a hotel in a workmanlike manner requires its construction in such manner as not to expose the building to danger from fire. *Uhlig v. Barnum*..... 584

7. An agreement by creditors of an insolvent bank with its stockholders and officers to discount claims and extend time of payment is sufficient consideration for a bond to secure payment of indebtedness of the bank. *Mullen v. Morris*..... 596

8. A court house contract requiring *inter alia* payment by the contractor of all lawful claims for work and material, *held*, a promise by him to satisfy the lawful claims of laborers and material-men, making the sureties on his bond for the faithful performance of the contract liable for a breach of that requirement. *Korsmeyer Plumbing & Heating Co. v. McClay*..... 649

9. The doctrine of the common law, that monopolies are odious and therefore illegal, has reference to such franchises and agreements as tend to restrict trade, and does not apply to police regulations in the interest of public health or morality. *Coombs v. MacDonald*..... 632

10. The rule that the law of the place where a contract is made becomes a part of the contract applies to a city ordinance. *Gerner v. Church*..... 691

Contracts—*concluded.*

11. "Seating capacity" as used in a subscription contract for an opera house *held* to mean the capacity for permanent or temporary seats from which auditors may hear and see the exhibition, exclusive of passage-ways. *Id.*

12. It is competent for a party, when sued upon a written contract, to show by parol that he was induced to execute the contract by the fraud or material false representation of the party seeking to enforce it. *Id.* 692

13. Where the time for completing a continuing contract has not expired the plaintiff, in an action for a breach thereof, can only recover the damages sustained before the suit was instituted. *Terry v. Beatrice Starch Co* 866

Contribution.

In an action for contribution between joint tort-feasors the test of recovery is whether plaintiff, at time of commission of the act which rendered him liable, knew it was wrongful. *Torpy v. Johnson* 882

Conversion. See PLEDGES, 1, 2.

Conveyances. See FRAUDULENT CONVEYANCES.

Corporations. See GARNISHMENT, 1. MANDAMUS, 5. SALES, 1. VENUE, 4.

1. Where the mortgage made by a corporation contains a copy of resolutions showing their adoption by the board of directors and authority for making the mortgage, no further proof is necessary to show a *prima facie* authorization by the directors. *Hayden v. Lincoln City Electric R. Co* 681

2. Sufficiency of evidence to establish the existence of a corporation so as to relieve it from collateral attack. *Chapman v. Brewer* 891

3. A treasurer and book-keeper, where the articles of incorporation require every officer to be a stockholder, may verify a claim for a mechanic's lien. *Id.*

Costs. See REPLEVIN, 3. TAXATION, 9.

1. The awarding and taxation of costs rests in the discretion of the trial court, where no statutory provision controls. *Woodard v. Baird* 310

2. Prejudice does not result from an order overruling a motion to require plaintiff to give additional security, where a valid judgment including costs goes against defendant. *Watson v. Roode* 349

Counties. See APPEAL, 4. DAMAGES, 2.

1. A county board in passing on claims acts judicially, and its judgment is final unless reversed on appeal. *Sioux County v. Jameson*..... 265
2. Claims against a county must be filed with the county clerk. *State v. Merrell*..... 575
3. The county board alone has authority to audit and allow claims against a county. *Id.*
4. A county board in passing upon claims against the county acts judicially. *Id.*
5. Provisions of sec. 24, ch. 23, Comp. Stats., that county boards shall not sell the public grounds of any county without first submitting the question to the electors, are mandatory and a limitation on the powers of counties. *Douglas County v. Keller*..... 635
6. A sale of public grounds of a county without consent of electors at authorized election is a nullity, and passes no title to purchaser. *Id.*
7. Public bodies acting under special powers must act strictly within the conditions prescribed. *Id.*
8. There is no authority for submission to electors of a county of a proposition to ratify the unauthorized acts of its officers. *Id.*..... 636
9. In an action against a county to recover the price paid by purchasers of public property, at a void sale by the county board claiming to have been authorized by the electors at a general election, the purchasers are not chargeable with constructive notice that the proposition to sell was in fact defeated. *Id.*
10. Where county officers have levied taxes to the constitutional limit, they will not be compelled by the courts to reduce the amount of a levy for county purposes and levy in lieu thereof a tax for the soldiers' relief fund. *Young v. Lane*..... 813

County Board. See COUNTIES.

County Courts.

It is not essential to the validity of a judgment of the county court that it be entered in handwriting of county judge or signed by him. *Scott v. Rohman*..... 618

County Treasurers. See TAXATION.

Courts. See COUNTIES, 4. COUNTY COURTS. DISTRICT COURTS. JUDGES. JUSTICE OF THE PEACE. SUPREME COURT.

Covenants.

1. Damages cannot be recovered on covenants in penal bond in excess of the penalty fixed in the bond. *Mullen v. Morris* 596
2. Covenantee is not required to resist action by holder of paramount title, but may recover against his covenantor after surrendering to the holder of the better title. *Cheney v. Straube* 879

Creditors' Bill.

1. A creditors' bill to subject property held by a wife to payment of debts of the husband should be dismissed in absence of proof that the conveyance to her was made to defraud his creditors, where it is shown that part of the purchase price was paid with the wife's money and that the husband had property in the county. *Trester v. Pike*, 779
2. Land bought with the money of a wife by a husband who took the deed in his own name without her knowledge, will not be subjected to the payment of his debts where the credit was not extended to him on the faith of his title. *Hews v. Kenney* 815

Criminal Law. See ATTORNEY AND CLIENT, 2. CHATTEL MORTGAGES, 7, 8. HOMICIDE. INDICTMENT AND INFORMATION. LIMITATION OF ACTIONS, 3. MURDER.

1. In misdemeanors there are no accessories. *Wagner v. State*, 1
2. In misdemeanors all who participate are guilty as principals. *Id.* 3
3. Before proving a confession the defendant should be permitted to cross-examine the witness as to the circumstances under which the confession was made. *Willis v. State* 102
4. Where defendant fails to inquire about the circumstances under which a confession was made until after a witness has made a responsive answer to a question by the state relating to the confession, the court may refuse to strike out the answer. *Id.*
5. The trial court may, in its discretion, refuse to exclude the witnesses for the state from the court room during trial. *Murphey v. State* 34
6. It is within the discretion of the trial court to permit the state to introduce evidence not strictly rebutting. *Id.*
7. Presumption that an assailant who inflicted great bodily injury contemplated the result of his assault. *Id.*

Criminal Law—*continued.*

8. Where intent is an element of a crime, one who does not participate in the intent, and is without knowledge of it, cannot be guilty as an accessory before the fact. *Wagner v. State*..... 2

9. Where the offense consists of an act with a specific intent, it may not be error to instruct that the accused is presumed to have intended the natural and proximate consequences of his voluntary act. *Krchnavy v. State*..... 337

10. Under an information charging in one count an assault with intent to murder and in another count an assault with intent to do great bodily harm, it is error to submit to the jury the question of defendant's guilt or innocence under the charge of the first count when there is no evidence to support it. *Botsch v. State*..... 501

11. The credibility of witnesses and the weight to be given their testimony are questions for the jury. *Carleton v. State*... 373

12. A reviewing court can only inquire whether the evidence was sufficient to warrant the jury in finding the defendant guilty. *Id.*

13. Where the evidence is circumstantial, the circumstances established must, to warrant a conviction, be such as to exclude every reasonable hypothesis except that of defendant's guilt. *Id.*

14. Evidence cannot be excluded because it is not material to every issue in the case. *Id.*

15. Where evidence offered is admissible for any purpose an objection to it should be overruled. *Id.*

16. The court should instruct the jury on the law of the case whether requested to do so or not. *Id.*

17. A statement by the court that an instruction relating to certain evidence would be given does not excuse the defendant from requesting it to be given at the proper time. *Id.*

18. The failure or refusal of the trial court to instruct the jury should be excepted to below to make error available. *Id.*

19. It is not necessary to repeat in every instruction the degree of proof required where the jury has been told that the state must make out the whole case beyond a reasonable doubt. *Id.*

20. An incomplete instruction may not be erroneous where the entire charge states the law applicable to the case without confusion or conflict. *Id.*

Criminal Law—*continued.*

21. A repetition of a proposition of law in the instructions is not reversible error unless it appears that such repetition might operate to the prejudice of accused. *Id.*

22. Discussion of instruction defining reasonable doubt. *Id.*

23. The giving of an argumentative instruction is not necessarily a ground for setting aside a conviction. *Id.*

24. Where the evidence as to the misconduct of a juror is conflicting a finding thereon of the trial court will be sustained. *Id.*

25. The fact that a member of the jury, before it was sworn, was found with liquor in his possession is not a ground for setting aside a verdict, it not being established that he was intoxicated, or that after his acceptance as a juror he partook thereof. *Id.*

26. Intoxication of defendant may be considered by the jury for the purpose of determining whether he was capable of entertaining the intent charged. *Head v. State*..... 31

27. The jury may consider the interest of the prisoner in weighing his evidence. *Housh v. State*..... 163

28. Mere non-direction by the trial court affords no ground for reversal of conviction unless proper instructions have been asked and refused. *Id.*

29. Filing a motion to quash a verdict more than three days after rendition thereof is equivalent to amending a motion for a new trial at that time, which cannot be done. *Willis v. State*..... 104

30. Erroneous rulings made during a trial, to be available in the appellate court, must be pointed out to the trial court in the motion for a new trial and ruled on. *Wilson v. State*..... 745

31. To entitle a party to a review of instructions the giving of them must be assigned for error in the motion for a new trial and petition in error. *Jolly v. State*..... 858

32. Judgment will not be reversed for failure to number and mark instructions "given" unless objected to on that ground when given. *Id.*..... 857

33. In a prosecution for assault and battery, where undisputed evidence shows the act was committed within a year from the filing of the complaint, the judgment will not be reversed because the court gave an erroneous instruction authorizing conviction if the offense was committed within eighteen months from filing complaint. *Id.*

Criminal Law—*concluded.*

34. A defendant in prison in default of bail is not entitled to be discharged under sec. 389 of the Criminal Code unless it is shown that neither an information was filed, nor an indictment found, against him during the term at which he was held to appear. *State v. Miller*..... 860

Damages. See ACTIONS. ANIMALS. BONDS. COVENANTS. HUSBAND AND WIFE. JUDGES. MALICIOUS PROSECUTION. MUNICIPAL CORPORATIONS, 4. 6. PRACTICE, 3. RAILROAD COMPANIES. RES ADJUDICATA, 3. SHERIFFS AND CONSTABLES, 3. STATUTE OF FRAUDS. STREET RAILWAYS, 1. SURFACE WATER.

1. A mortgagee who fails to dispose of the chattels according to the terms of the mortgage and the provisions of statute is liable in damages to a subsequent lienor. *Chaffee v. Atlas Lumber Co*..... 225
2. A county is liable in damages for injuries resulting from an unsafe county bridge, though no notice of the defects had been given to any officer of the county. *Raasch v. Dodge County*..... 508
3. It is the duty of a party suffering damages from breach of a contract to exert himself to lighten damages, and he cannot recover damages which would have been avoided had he performed such duty. *Uhlig v. Barnum*..... 585
4. An officer executing a writ who wrongfully refuses to call appraisers to determine the value of exempt property is liable to the judgment debtor for damages. *Smith v. Johnson*..... 755
5. A tenant who is compelled to move his place of business from leased premises may recover from the landlord the necessary costs of removal, where the tenant was induced to take the lease through false representations of the lessor, while relying upon the fraudulent statements. *Barr v. Kimball*..... 766
6. Damages for breach of a continuing contract can only be recovered to the time suit was brought, where the time for completion had not expired. *Terry v. Beatrice Starch Co.*, 866

Death by Wrongful Act. See RAILROAD COMPANIES, 3.

Deeds. See TAX DEEDS.

Depositions.

1. Either party may commence taking depositions any time after service of summons. *Kansas City, W. & N. W. R. Co. v. Conlee*..... 121

Depositions—*concluded.*

2. Where a deposition was wrongfully transmitted and never filed, a subsequent deposition of the same witness taken on proper notice before the same notary in the same case will not be quashed on the ground that the notary failed to propound the cross-interrogatories originally filed. *City of Chadron v. Glover* 733

Descent and Distribution.

The provision of sub. 1, sec. 176, ch. 23, Comp. Stats., for an allowance to the widow, of certain property of her deceased husband, as well when she receives the provision made for her in his will as when he dies intestate, refers only to the property mentioned in that subdivision. *Godman v. Converse* 464

Desertion. See HUSBAND AND WIFE, 1.

Disclaimer. See APPEAL, 1.

Dismissal. See REVIEW, 33–35.

Divorce.

Alimony should not be awarded a wife in installments during her life. *McGechie v. McGechie*..... 523

District Courts.

In a district having two judges, an application to set aside a judgment on the ground of fraud may properly be heard by whichever judge of the court is presiding at the time the application is made. *Dolen v. Buchanan*..... 854

Donations. See GIFTS.

Dormant Judgments. See JUDGMENTS, 4.

Dower.

1. The statute prescribing in what real estate a wife is entitled to dower is declaratory of the common law. *Breed v. McCoy*..... 208
   Butler v. Fitzgerald..... 192
2. Where the right of dower has once attached, it remains a charge upon the real estate unless released by the voluntary act of the wife or extinguished by operation of law. *Id.*
3. Execution sale, judicial confirmation and conveyance does not extinguish the inchoate dower right of wife in real estate. *Id*..... 193
4. Realty sold under execution issued on a judgment against the husband alone, followed by confirmation and deed, is

Dower—*concluded.*

real estate aliened by the husband within the meaning of sec. 7, ch. 23, Comp. Stats. *Id.*

5. "Enhanced in value," as used in sec. 7, ch. 23, Comp. Stats., is limited to appreciation in value of real estate by reason of alienee's improvements. *Id.*
6. For the purpose of assignment of dower in land aliened by the husband during marriage the value of the land should be estimated at the time of the assignment, excluding increase in value resulting from alienee's improvements made after alienation. *Id.*

Duress. See CONTRACTS, 5.

Educational Institutions.

The institution for the blind at Nebraska City is one for "educational purposes" within the meaning of sec. 19, art. 5, of the constitution. *Curtis v. Allen*..... 184

Ejectment. See BOUNDARIES.

1. In ejectment by a tenant in common against a person in possession without right the plaintiff can recover only to the extent of his title. *Johnson v. Hardy*..... 368
2. Where the evidence shows that plaintiff has no interest in the land, questions of law suggested by him on error from a judgment in favor of defendant will not be examined. *Wildman v. Shambaugh*..... 371

Elections.

1. The Australian ballot law contemplates that the name of each candidate shall be printed once only on a ballot, accompanied with such political or other designations as correspond to the nomination papers. *State v. Allen*..... 651
2. The custodian of nominating certificates, in passing upon objections thereto, may determine from extrinsic evidence whether the candidates therein named were in fact nominated by a convention claiming to represent a party which cast the requisite number of votes at the last election. *Id.*
3. It is not the province of the secretary of state to determine which of two rival state conventions of the same party is entitled to recognition as the regular convention. *Id*..... 652
4. Where two factions of a political party nominate candidates and certify their action to the secretary of state, he will not inquire into the regularity of the convention held by either faction, but will certify to the several county clerks the names of candidates nominated by each. *Id.*

Eminent Domain.

Sufficiency of petition for injunction to restrain a railroad company from using right of way until it obtains title or pays the damages under condemnation proceedings. *Blakeslee v. Missouri P. R. Co*..... 61

Equity. See ATTACHMENT, 2. CONTRACTS, 5. GIFTS. JUDGMENTS, 5. JUDICIAL SALES, 1. JURY TRIAL, 2. REVIEW, 42. SALES, 1. TRUSTS.

Error Proceedings. See REVIEW.

Estoppel. See REVIEW, 32.

1. Plaintiff is not estopped by an immaterial allegation of his petition. *Foley v. Holtry*..... 133
2. A wife in her right to sue for personal injuries is not estopped by the acts of her husband. *City of Chadron v. Glover*..... 733
3. A wife, by permitting the title to her property to be held in the name of her husband, may be estopped from asserting that her interest in it is superior to that of creditors who extended credit on the faith of the husband's ownership. *Hews v. Kenney*..... 816

Evidence. See AFFIDAVITS. BOUNDARIES. CHATTEL MORTGAGES, 1. CORPORATIONS, 1. CRIMINAL LAW, 3-6, 11-15, 27. DEPOSITIONS. ELECTIONS, 2. FOREIGN LAWS. HOMICIDE, 7-9. MECHANICS' LIENS, 2-4. MORTGAGES, 12. NEGLIGENCE, 3. PARTNERSHIP. RES ADJUDICATA, 3. REVIEW, 26. SHERIFFS AND CONSTABLES, 2. WARRANTY. WITNESSES.

1. Showing necessary to justify admission of secondary evidence. *Baldwin v. Burt*..... 245
2. In an action by a pastor against the deacons of a church for libel, evidence by another clergyman as to what effect the libelous statements would have upon the plaintiff was *held* inadmissible, as being opinion evidence. *Piper v. Woolman*..... 280
3. Actual representations by an applicant for insurance may be proved by parol evidence, though the statements were incorrectly reduced to writing by the company's agent and attested as true by the signature of the insured. *German-American Ins. Co. v. Hart*..... 442
4. Parol evidence is not admissible to establish a contemporaneous oral agreement not to negotiate a negotiable instrument. *Waddle v. Owen*..... 489
5. Evidence to show that notes were pleged to secure a debt. *Sharmer v. McIntosh*..... 510

Evidence—*concluded.*

6. Possession of instruments which pass by delivery alone is *prima facie* evidence of ownership or claim of any lesser interest. *Id.*

7. A new contract with reference to subject-matter of former one *held* not to supersede the former where the circumstances show the parties intended it to be supplementary thereto. *Uhlig v. Barnum*..... 581

8. Sufficiency of proofs to show owner's use of a hot air furnace in a reasonably prudent manner. *Id.*

9. In an action on the Lansing opera house subscription contract set out in the opinion, it was *held* error to exclude as evidence a city ordinance showing the thickness required for theatre walls and evidence that the ordinance had been violated in the erection of the building. *Gerner v. Church*..... 691

10. In a personal injury case application for appointment of physicians to examine plaintiff physically should be made before the trial begins. *City of Chadron v. Glover*..... 733

11. Where an officer fails to attach his jurat to an affidavit, parol evidence in a proper case may be admitted to prove that affiant did in fact swear to the affidavit. *Bantley v. Finney*..... 795

Exceptions. See BILL OF EXCEPTIONS. REVIEW, 38, 40.

Executions. See ATTACHMENT. DOWER, 3, 4. EXEMPTIONS. JUDGMENTS, 2. JUDICIAL SALES. SHERIFFS AND CONSTABLES, 2.

Execution sale under a dormant judgment and the title acquired by the purchaser cannot be attacked collaterally. *Gillespie v. Switzer*..... 772

Executors and Administrators.

A widow who accepts the terms of a will which provides that the bequest to her is in lieu of all appropriations the law would give her except a year's support is not entitled to a further allowance for support pending the settlement of the estate. *Godman v. Converse*..... 464

Exemptions. See GARNISHMENT, 1.

1. The validity or sufficiency of a schedule and affidavit for exemption made according to statutory provisions cannot be questioned by an officer holding a levy on property under an attachment. *Smith v. Johnson*..... 755

2. The refusal of an officer holding an execution to call appraisers to determine the value of the property levied upon

Exemptions—*concluded.*

will not deprive the owner, who has filed an inventory according to sec. 522 of the Code, of his right of exemption. *Id.*

Factors and Brokers. See REAL ESTATE AGENTS.

Free Imprisonment.

A city marshal acting under a warrant lawful on its face and issued by proper authority is not liable for damages unless he acts oppressively. *Atwood v. Atwater*..... 147

False Pretenses.

1. To authorize a conviction it is sufficient if it appear that defendant's false representation was one of the causes which induced the person defrauded to part with his money. *Wax v. State*..... 18

2. A verdict of guilty should not be set aside because it fixes the value of the money at a few dollars more than is established by the evidence where the uncontradicted proof shows that the sum procured exceeded thirty-five dollars. *Id.*

False Representations. See DAMAGES, 5. INSURANCE, 5, 7.

1. A purchaser is justified in relying on a representation where it is a positive statement of fact requiring an investigation do discover the truth. *Foley v. Holtry*..... 134

2. A purchaser may rescind, though he did not rely wholly upon the false representation of the seller. *Id.*

Fees. See ATTORNEY AND CLIENT, 2. INTOXICATING LIQUORS, 1.

Fences. See RAILROAD COMPANIES, 1, 2.

Final Order. See REVIEW, 16.

Findings. See ATTACHMENT, 9.

Fires.

Liability of contractor of hot air furnace for fire resulting from defective construction. *Uhlig v. Barnum*..... 584

Foreclosure. See MORTGAGES.

Foreign Laws.

In absence of proof of a foreign statute it will be presumed to be the same as that of the state of the forum. *Chapman v. Brewer*..... 892

Forfeiture. See BUILDING AND LOAN ASSOCIATIONS.

Forum of Jurisdiction. See VENUE.

Fraud. See NEGOTIABLE INSTRUMENTS, 1. PRINCIPAL AND SURETY, 2.

Fraud is a question of fact and not of law. *Hews v. Kenney*..... 816

Frauds. See STATUTE OF FRAUDS.

Fraudulent Conveyances. See CREDITORS' BILL. TRUSTS.

1. In an action of replevin, involving the validity of a conveyance from a son to his father, the son is not required to establish good faith by more than a preponderance of the evidence. *McEvony v. Rowland*..... 97
2. Sufficiency of evidence to sustain a verdict in favor of the validity of the conveyance. *Id.*..... 98
3. The presumption of fraud arising from the mortgagor's possession of chattels may be overcome by evidence. *Chaffee v. Atlas Lumber Co.*..... 225
4. A conveyance without consideration, and in fraud of the rights of creditors, cannot be assailed by one not prejudiced thereby. *Baldwin v. Burt*..... 246
5. The burden is on one claiming through a conveyance from an insolvent debtor to his wife to prove that it is not fraudulent as to creditors. *Glass v. Zutavern*..... 334
6. A preference by an insolvent debtor in favor of a creditor must be an honest one and not a device to enable the former to fraudulently delay or defeat other creditors. *Landauer v. Mack*..... 430
7. A preference to secure a *bona fide* indebtedness will not protect the creditor where he was aware of and participated in a fraudulent purpose to defeat the claims of other creditors. *Id.*
8. Right of members of a partnership to create by mortgage in favor of another firm, of which they are the sole members, a preference as against creditors. *Bonwit v. Heyman*... 537
9. Evidence as to *bona fides* of a transaction among relatives where the rights of creditors were involved. *Id.*

Fraudulent Removal of Mortgaged Property. See CHATTEL MORTGAGES, 7, 8.

Fraudulent Representations. See CONTRACTS, 12.

Garnishment. See CONFLICT OF JURISDICTION.

1. Sec. 531c of the Code for the protection of earnings of employes of corporations and persons engaged in interstate business applies to a debt incurred before its passage and

Garnishment—*concluded.*

thereafter assigned in good faith to one who transferred it to avoid exemption laws. *Bishop v. Middleton* 10

2. A judgment debtor is liable to the process of garnishment when the two actions are brought in the same court, but not otherwise. *Scott v. Rohman*..... 618

Gifts.

1. The contract of subscription to an opera house, set out in opinion, *held* to be a donation. The donee may assign his interest in such a contract and the assignee may sue for the amount subscribed. *Gerner v. Church*..... 691
2. Equity protects a parol gift of land accompanied by possession where the donee has made valuable improvements on the property. *Wylie v. Charlton*..... 840
3. Evidence to establish donee's rights under a parol gift of land. *Id.*

Habeas Corpus. See CRIMINAL LAW, 34.

Highways.

Instruction as to relative rights of travelers and companies operating street railways. *Omaha Street R. Co. v. Cameron*, 305

Homicide. See MURDER.

1. Under a charge of murder, an instruction permitting a verdict of manslaughter if the evidence warrants is not objectionable on the ground that it excludes a verdict of acquittal where the jury are directed in another paragraph to acquit defendant unless they find him guilty beyond a reasonable doubt. *Housh v. State*..... 163
2. Instruction as to the meaning of the word "malice" in its legal sense. *Id.*
3. The bare belief that one is about to suffer death or great bodily harm will not of itself justify him in killing his assailant. *Id.*
4. The question of the existence of reasonable grounds for killing an assailant is for the jury. *Id.*
5. The evidence was *held* sufficient to justify a verdict of manslaughter in a case where defendant justified his act on the ground of self-defense. *Id.*
6. Refusal of instructions as to law of self-defense. *Krchnavy v. State*..... 337
7. An instruction that defendant is presumed to have intended the consequences of his voluntary acts may not be erroneous. *Id.*
8. Where a weapon and its use in the commission of an as-

Homicide—*concluded.*

sault are such as to admit of but one conclusion in that respect, the question of whether or not it is deadly, within the meaning of the law of homicide, is for the court. *Id.*

9. Where the weapon may or may not be likely to produce a fatal result according to the manner of its use, its character in that respect is one of fact for the jury. *Id.*

10. Proof of intent is necessary to sustain a conviction under a charge of assault with intent to murder. *Botsch v. State*, 501

11. Admissibility of evidence to prove that deceased was a person of ferocity and violent disposition for the purpose of showing that defendant acted without malice or in self-defense. *Carleton v. State*..... 373

12. Manner of proving the character of deceased. *Id.*

13. Where a jury is instructed that a killing in self-defense is excusable, the instruction is not erroneous because it does not say that such killing is excusable, although malicious, malice having been defined in other instructions. *Id.*

14. Instructions on law of self-defense discussed and sustained. *Id.*

15. The length of time that intervenes between a purpose to maliciously kill and its execution is not material. *Id.*

Horse Railways. See STREET RAILWAYS.

Husband and Wife. See CREDITORS' BILL. FRAUDULENT CONVEYANCES, 5. WITNESSES, 4, 5.

1. A person who causes a husband to abandon his wife is liable to the latter in an action for damages. *Hodgkinson v. Hodgkinson*..... 269

2. A married woman may maintain an action for personal injuries to recover damages by her sustained as distinguished from any sustained by her husband. *City of Chadron v. Glover*..... 733

Impeachment. See APPEAL, 4.

Indictment and Information. See ASSAULT AND BATTERY, 2. CRIMINAL LAW, 10.

1. An information charging the commission of an offense, which is a felony under the statute, is not bad because of a failure to charge that the act was feloniously committed. *Wagner v. State*..... 1

2. Sufficiency of information charging murder in the first degree. *Willis v. State*..... 102

3. Sufficiency of information under sec. 10, ch. 12, Comp.

Indictment and Information—*concluded.*

Stats., charging a mortgagor with fraudulently removing mortgaged property. *Wilson v. State*..... 745

4. Prosecutions for crime may be either upon indictment or information. *State v. Miller*..... 860

5. An information must be filed during the term at which the accused is required to appear where he is confined in jail. *Id.*

Information. See INDICTMENT AND INFORMATION.

Injunction. See JUDGMENTS, 5.

1. A petition for an injunction is not sufficient where it states conclusions and not the facts upon which they are based. *Blakeslee v. Missouri P. R. Co.*..... 61

2. Sufficiency of evidence to sustain an injunction to prevent execution of a judgment on the ground that it was entered by a county court more than four days after trial. *Paul v. Davidson*..... 505

Insolvency. See PARTNERSHIP, 8.

Institution for Blind.

The mere fact that persons are blind, poor, and indigent does not entitle them to any privilege in the institution for the blind at Nebraska City, except to receive an education, and incidentally such aid and support as thereby shall be rendered necessary. *Curtis v. Allen*..... 184

Instructions. See CRIMINAL LAW, 10, 16–23, 28.

1. Instructions defining the reasonable doubt necessary to justify acquittal under charge of murder. *Willis v. State*, 102

2. Instructions should clearly outline the issues as presented by the pleadings. *Dwelling House Ins. Co. v. Brewster*..... 528

3. An assignment of error directed to a group of instructions will not be considered further than to ascertain that one of them is correct. *McEvony v. Rowland*..... 99

4. Instructions will not be considered on review unless objections are specifically made by proper assignments of error. *Chaffee v. Atlas Lumber Co.*..... 225

5. Where the charge involves more than one single proposition a general exception to it is insufficient, and the whole charge will stand if any portion of it is correct. *Omaha Fire Ins. Co. v. Dierks*..... 478

6. The failure to mark an instruction "given" or "refused," unless excepted to on that ground, cannot be reviewed. *City of Chadron v. Glover*..... 733
Jolly v. State..... 857

Instructions—*concluded.*

7. Rulings as to giving and refusing instructions will not be reviewed unless excepted to. *City of Chadron v. Glover*... 733
8. It is error to give an instruction which assumes as established a disputed question of fact. *Terry v. Beatrice Starch Co*..... 866

Insurance.

1. An insurance contract should not be so technically construed as to compel the insured to furnish to the company notice of loss it already possesses. *Omaha Fire Ins. Co. v. Dierks*..... 474
2. An instruction placing the burden of proof where it did not belong in an action on a policy was *held* to be erroneous. *Dwelling House Ins. Co. v. Brewster*..... 528
3. Where the company denies all liability under the policy, and refuses to make payment on grounds other than insured's failure to give notice of loss, it waives such notice. *Omaha Fire Ins. Co. v. Dierks*.....475, 570
Dwelling House Ins. Co. v. Brewster..... 528
4. Validity of verdict against insurer where plaintiff failed to prove an allegation that he notified the company of the loss. *Omaha Fire Ins. Co. v. Dierks*..... 475
5. Where a company writes insurance, retains the premium, and neglects, for nearly four months, to cancel the policy before loss, knowing that insured made an unintentional misrepresentation as to the extent of the incumbrance upon the property, it is not released as an insurer on the ground of such misrepresentation. *German-American Ins. Co. v. Hart*..... 441
6. The holder of a policy who, contrary to its provisions, mortgaged the insured chattels may recover for a loss where he discharged the lien before the fire occurred. *Omaha Fire Ins. Co. v. Dierks*..... 474
7. A provision invalidating a policy for false representation by insured that he had title to the property, should be enforced against one who made such a false statement, where no reason is shown for avoiding forfeiture. *Ehrsam Machine Co. v. Phenix Ins. Co*..... 554
8. Where a policy provided that the alienation of the title of the insured without the knowledge or consent of the insurer would avoid the policy, this provision will be enforced when no reason to the contrary is shown to exist. *Id.*
9. An instruction submitting the question of a waiver of the

Insurance—*concluded.*

provisions of a policy in reference to incumbrance on the ground that the insurer took the risk with knowledge of the facts is erroneous when applied to a lien which attached after the policy was issued and to which it applied. *Agricultural Ins. Co. v. Morrow*..... 788

Interest. See USURY.

Amount recoverable on foreclosure of valid tax sale certificate. *Alexander v. Thacker*..... 495

Interstate Commerce. See CONSTITUTIONAL LAW, 1. TAXATION, 10.

Intervention. See REVIEW, 32.

Intoxicating Liquors.

1. Where a liquor license has been canceled on appeal a licensee who paid a fee is entitled to repayment *pro tanto* for the unexpired time. *Chamberlain v. City of Tecumseh*..... 221

2. Where a licensed saloon-keeper had been compelled to respond in damages for injuries resulting from sale of liquor to a person known to him to have been an habitual drunkard, and subsequently sued another saloon-keeper for contribution, the court properly directed a verdict for defendant. *Torpy v. Johnson*..... 882

Intoxication. See CRIMINAL LAW, 26.

Joinder of Actions. See ACTIONS.

Judicial Sales. See ATTACHMENT, 1, 2. DOWER, 3, 4. EXECUTIONS. REVIEW, 43.

1. A purchaser obtains no title under a sheriff's deed where he induced others to refrain from bidding by promises to pay them money; and the parties whose interests have been thus defrauded may have the sale and deed set aside without paying the purchaser the sums paid by him on his bid and in discharging other liens. *Goble v. O'Connor*..... 49

2. A sheriff under a judicial sale conveys by his deed no greater estate than would the judgment debtor by a quit-claim deed. *Butler v. Fitzgerald*..... 193

Judges. See DISTRICT COURTS.

A judge who acts within his jurisdiction in a judicial capacity is not liable for such acts. An error of judgment does not make him liable for damages. *Atwood v. Atwater*..... 147

Judgments. See ATTACHMENT, 5, 9. ATTORNEY AND CLIENT, 1. COUNTIES, 1. COUNTY COURTS. DISTRICT COURTS. PLEADING, 9. RES ADJUDICATA. REVIEW, 15–17. SUMMONS, 5.

1. A judgment *non obstante veredicto* can only be rendered where the pleadings of the party who recovered the verdict confess facts entitling the other party to judgment. In other cases where there is no motion for a new trial judgment should be entered on the verdict. *Gibbon v. American Building & Loan Association*..... 132
2. A judgment rendered against a vendor before he executes a deed is a lien on the unpaid purchase money due him, and his interest in the land may be sold under execution. *Olander v. Tighe*..... 344
   Hart v. Tighe 348
3. The rendition of judgment by a court without jurisdiction is not ground, in an independent case, for a perpetual injunction restraining the judgment creditor from prosecuting any remedy in respect to the claim upon which his judgment was based. *Paul v. Davidson* 505
4. Execution sale under dormant judgment cannot be attacked collaterally. *Gillespie v. Switzer* 772
5. Where a defendant could have obtained relief from a judgment at law by motion for a new trial, a court of equity in absence of fraud will not restrain the collection of the judgment. *Woodward v. Pike* 777

Jurat. See AFFIDAVITS.

Jurisdiction. See APPEARANCE. JURY TRIAL, 2. REVIEW, 42. SUMMONS.

Jury. See CRIMINAL LAW, 25. NEW TRIAL, 1, 2, 6. TRIAL, 5.

Jury Trial.

1. The right, in actions at law, to have disputed questions of fact tried and determined by a jury is guarantied by the constitution. *Risse v. Gasch*..... 288
2. In an equity case, where there is a prayer for equitable relief, a jury for the trial of an issue of fact cannot be demanded as a matter of right. *Sharmer v. McIntosh*..... 509

Justice of the Peace. See APPEARANCE, 1. ATTACHMENT, 8, 9. BILL OF EXCEPTIONS, 3. VENUE, 1–3.

Where the pleadings fail to disclose the existence of a partnership between the parties, or that the action is in relation to a partnership matter, it is error for the justice

Justice of the Peace—*concluded.*

during a jury trial to dismiss the action upon a motion suggesting that the partnership relation had been shown by plaintiff's testimony. *Buckley v. Hook*..... 552

Landlord and Tenant.

A tenant who was induced to lease property through fraudulent statements of the lessor may, upon discovery of the fraud, rescind the lease, sue the lessor for damages, or recoup the damages when sued by the lessor for rent. *Barr v. Kimball*..... 766

Lease. See DAMAGES, 5.

Levy. See ATTACHMENT, 1, 2.

Lex Loci. See CONTRACTS, 10.

Libel.

1. Any written or printed statement which falsely and maliciously charges another with the commission of a crime is libelous *per se*. *World Publishing Co. v. Mullen*..... 126
2. A publication to be libelous *per se* need not contain the technical language essential to charge a crime. *Id*..... 127
3. Any language, the nature and obvious meaning of which is to impute to a person the commission of a crime, or to subject him to public ridicule, ignominy, or disgrace, is actionable *per se*. *Id.*
4. In determining whether the words of a publication are libelous the courts will not resort to a technical construction of the language used. It will be construed in its ordinary and popular sense. *Id.*
5. Where the charges made are libelous *per se* the law presumes they were made maliciously. *Piper v. Woolman*.... 287
6. Written accusations by deacons of a church, charging the pastor with uttering untruths, giving way to violent and unchristian temper and defaming church members, are libelous *per se*. *Id*..... 280
7. The findings of the church in the trial under such charges are not competent evidence in a suit for libel. *Id*..... 281
8. Plea of qualified privilege, set out in opinion, *held* sufficient. *Id.*

Liens. See JUDGMENTS. MECHANICS' LIENS. TAXATION.

Limitation of Actions. See MUNICIPAL CORPORATIONS, 4. TAXATION, 7.

1. An action by a subsequent mortgagee to enforce his equities as against the mortgagor and purchaser through

Limitation of Actions—*concluded.*

a decree foreclosing the prior mortgage, to which he was not a party, may be brought within ten years. *Baldwin v. Burt* 246

2. Evidence as to when material was furnished to establish time when a statement for a mechanic's lien should be filed. *Buchanan v. Selden* 559

3. In misdemeanor cases, where the penalty is restricted to fine not exceeding one hundred dollars and imprisonment not exceeding three months, the prosecution must be instituted within one year from commission of offense. *Jolly v. State* 857

Malice. See HOMICIDE, 2, 13.

Malicious Prosecution. See ACTIONS.

Where there is no evidence of special damages the jury may determine the general damages by their opinions and judgment as reasonable men. *Ellison v. Brown* 68

Mandamus. See APPEAL, 4. COUNTIES, 10. ELECTIONS, 3.

1. *Mandamus* will not issue to compel a treasurer to pay a warrant unless the right of relator to receive payment is clear. *State v. Cook* 318

2. *Mandamus* will not lie to compel a county to audit and allow a claim against the county. *State v. Merrell* 575

3. The writ will not be granted unless the relator has a clear right to have the respondent perform the identical ministerial act prayed for. *Id.*

4. The practice of attacking the application for a writ of *mandamus* by motion or demurrer is one which will not be encouraged. *State v. Home Street R. Co.* 830

5. Stockholders of a corporation are not proper parties respondent in a proceeding to compel the corporation by *mandamus* to perform a corporate act. *Id.*

6. The relator must charge directly all facts necessary to entitle him to the writ. Infernces in his favor will not be drawn from vague or ambiguous language. *Id.*

7. Averments showing a special interest in the relator will not be stricken out as immaterial even in a case where it is not necessary to show such interest. *Id.*

Manslaughter. See HOMICIDE.

Married Women. See HUSBAND AND WIFE.

Maxims.

"*Caveat emptor*" applies to judicial sales. *Butler v. Fitzgerald*, 193

Maxims—*concluded.*
"He that hath committed iniquity shall not have equity."
Goble v. O'Connor..... 58

Measure of Damages. See DAMAGES.

Mechanics' Liens. See MORTGAGES, 10, 11.
1. A subcontractor is not entitled to a lien unless he proves that the sworn statement required by sec. 2, art. 1, ch. 54, Comp. Stats., was filed within sixty days from the date material was last furnished. *Wells v. David City Improvement Co.*..... 366
2. Where a subcontractor's itemized account shows that more than sixty days intervened between two dates when material was furnished, the presumption is that the material was furnished under separate contracts. *Buchanan v. Selden* 559
3. Where a contractor orders material, receives it at the station designated, and pays the freight the day it arrives, it is furnished on that day, though, at his request, the consignor allows it to remain at the station several days. *Id.*
4. Evidence to support a finding that a subcontractor did not file his sworn statement within sixty days from the date the last item was furnished. *Id.*
5. The acceptance of a mortgage by a lien-holder is not a waiver of the lien, there being no intention to waive it. *Chapman v. Brewer*..... 892
6. The statement contained in a contract for furnishing material *held* not to be a waiver of the right to a lien. *Id.*
7. The oath to a claim for a lien may be on information and belief. *Chapman v. Brewer*..... 891
8. Under the mechanics' lien law a foreign corporation may acquire a lien. *Id.*

Misconduct of Jury. See NEW TRIAL, 6.

Mistake.
To defeat an action to recover money voluntarily paid under a mistake of fact it is not sufficient that plaintiffs might have known the facts. *Douglas County v. Keller* 636

Monopolies. See CONTRACTS, 9.

Monuments. See BOUNDARIES.

Mortgages. See APPEAL, 1. ATTACHMENT, 6. BUILDING AND LOAN ASSOCIATIONS. CHATTEL MORTGAGES. CORPORATIONS, 1. JUDICIAL SALES. LIMITATION OF ACTIONS, 1. MECHANICS' LIENS, 5. RECEIVERS, 2.
1. Defense by a grantee of a married woman that the mortgage was given only to secure her husband's pre-existing

Mortgages—*concluded.*

debt must be pleaded. The validity of such a defense is not decided. *Chadron Banking Co. v. Mahoney*..... 214

2. Sufficiency of foundation for admission of copy as secondary evidence of a mortgage. *Baldwin v. Burt*..... 246
3. An answer to a petition to foreclose, denying there is anything due on the note and mortgage, tenders no issue. *Id.*
4. Where a mortgage is given partly to secure a loan and partly to pay an unmatured senior mortgage held by another, the latter refusing to accept payment, both mortgagees may foreclose after default, and recover the amount actually due, with costs, though the money to satisfy the first lien was, by consent of the mortgagor, retained by the junior mortgagee and never applied to the purpose intended. *Moore v. Kime*..... 518
5. A record of a registered assignment of a mortgage securing an unmatured negotiable note is notice to a purchaser of the mortgaged premises that the mortgagee has sold his interest in the mortgaged debt. *Eggert v. Beyer*..... 712
6. Sec. 39, ch. 73, Comp. Stats., is a legislative command that the registry laws shall not be so construed as to make the record of an assignment of a mortgage notice to the mortgagor that the debt has been assigned. *Id.*
7. In the absence of a statutory enactment to the contrary, a mortgagor whose debt is not evidenced by negotiable paper will be protected in making payment to the original mortgagee where he has no notice of an assignment of the debt. *Id.*
8. Where the mortgage secures a debt evidenced by negotiable paper the mortgagor must at his peril pay the debt to the legal owner and holder of such paper. *Id.*
9. A *bona fide* holder of negotiable paper secured by a mortgage cannot be deprived of his security by mortgagor's payment to mortgagee. *Id.*
10. A person in taking a mortgage on land is bound to know whether any material or labor for improvements has been furnished within four months. *Chapman v. Brewer*..... 890
11. The lien of a real estate mortgage executed during the erection of a building is subject to the claims for labor and material already and thereafter furnished. *Id.*..... 891
12. Admissibility of evidence to show that the date of commencing improvements was earlier than that fixed by a claim for a mechanic's lien where the rights of mortgagees are involved. *Id.*

Municipal Corporations. See TAXATION, 10.

1. The treasurer may only make payment upon orders of the officers in whom the law reposes the authority to direct such payment. *State v. Cook*..... 318
2. The state may confer upon a municipal corporation in the exercise of police power authority to grant an exclusive privilege for the removal of garbage. *Coombs v. MacDonald*..... 634
3. It is within the jurisdiction of the city council of Lincoln to pass an ordinance fixing the thickness required for the walls of certain buildings. *Gerner v. Church*..... 691
4. A suit for personal injuries may be brought against a city of the second class before the claim for damages has been presented to the city council. *City of Chadron v. Glover*... 733
5. Where a city permits a sidewalk to be maintained beyond the sidewalk line as fixed by ordinance, and exercises control thereof, it must keep the walk in repair. *Id.*
6. A petition for damages for personal injuries, charging a city with negligence in constructing a cross-walk so that some of the stones projected two inches above the general surface, is, in that respect, sufficient, and will justify a verdict for the plaintiff, when supported by sufficient evidence. *City of Aurora v. Cox*..... 727
7. A city is bound to keep its streets in a reasonably safe condition for public travel, and whether it has failed in that regard is generally a question of fact. *Id.*

Murder. See HOMICIDE.

1. Discussion of the law of self-defense. *Willis v. State*..... 102
2. Instructions defining reasonable doubt. *Id.*
3. Error resulting from a failure to include the element of malice in defining, in an instruction, murder in the first degree, may be cured by a correct statement of the law in an other portion of the charge. *Id.*
4. Sufficiency of information charging the defendant with the crime of murder in the first degree. *Id*..... 104
5. Evidence *held* sufficient to sustain a conviction of murder in the first degree. *Carleton v. State*..... 373
6. A purpose to maliciously kill and deliberation and premeditation thereon before committing the offense, with execution of the purpose, constitute murder in the first degree. *Id*..... 375

Negligence. See ANIMALS. STREET RAILWAYS, 1.

1. Negligence is a cause of action or defense and must be

Negligence—*concluded.*

proved by the party alleging it. *Spears v. Chicago, B. & Q. R. Co.* ... 720

2. In a suit by an administrator against a railroad company for negligently causing the death of plaintiff's intestate there is no presumption that either party was guilty of negligence. *Id.*

3. Whether a certain act or omission is or is not competent evidence of negligence is for the court, but whether such evidence convicts a party of negligence is for the jury. *Id.*

4. A petition sufficiently charges negligence against a city when it alleges facts from which a person may reasonably infer that a street was not kept in a condition reasonably safe for travel. *City of Aurora v. Cox* ... 727

Negotiable Instruments. See EVIDENCE, 4. MORTGAGES, 5-9. PLEDGES, 1, 2. PRINCIPAL AND SURETY, 2. USURY.

1. Where the defense is fraud in the inception of the note the burden is on indorsee to prove that he is a *bona fide* holder for value. *Kelman v. Calhoun* ... 157
Fawcett v. Powell ... 437

2. Where the only defense to an action by an indorsee is failure of consideration, the burden is on defendant to overcome the presumption that the note was transferred for value before maturity. *Kelman v. Calhoun* ... 157

3. Insufficiency of evidence to show failure of consideration. *Id.*

4. The warrants of a city are not negotiable instruments. *State v. Cook* ... 318

5. To charge an indorser of an ordinary check it must be presented with all due dispatch and diligence consistent with the transaction of other commercial business, and whether such diligence has been used must be determined from the facts of each case. *First Nat. Bank of Wymore v. Miller* ... 791

New Trial. See CRIMINAL LAW, 29. JUDGMENTS, 1. REVIEW, 38, 39.

1. Where the evidence as to the misconduct of a juror is conflicting, an order overruling a motion for a new trial based on the ground of such misconduct will not, as a rule, be disturbed by a reviewing court. *Murphey v. State* ... 35
Willis v. State ... 119

2. A party who chooses to accept a juror shown by exami-

New Trial—*concluded.*

nation to be disqualified cannot, after trial, allege the prejudice of the juror as a ground for a new trial. *Id.*

3. A new trial cannot be granted on grounds other than those provided by statute. *Risse v. Gasch*..... 287
4. It is not error to refuse a new trial on the ground of newly discovered evidence when the statements in the affidavit upon which it is based are contradicted by the sworn evidence of the proposed witness. *Housh v. State*..... 163
5. Showing in support of a motion for a new trial on the grounds of newly discovered evidence, accident, and surprise, *held* insufficient. *Peterson v. Skjelver*..... 663
6. A party who moves for a new trial on the ground of misconduct of the jury must show that the acts upon which his complaint is founded were not known to him in time to be presented to the court during the trial. *Id.*
7. A motion for a new trial on the ground of accident and surprise must be supported in the trial court by affidavits filed there. *Omaha Fire Ins. Co. v. Dierks*..... 473
8. A motion for a new trial is insufficient where it does not state the grounds on which it is based. *Kent v. Green*..... 674
9. Sufficiency of evidence to sustain an order denying a new trial where the motion was based on the ground that the case was called and tried in defendant's absence contrary to an agreement of counsel made out of court. *Id.*

Nominations. See ELECTIONS.

Notary Public. See AFFIDAVITS, 1.

Notes. See NEGOTIABLE INSTRUMENTS.

Notice. See DAMAGES, 2. PRINCIPAL AND SURETY, 4.

Oath. See MECHANICS' LIENS, 7.

An affidavit actually sworn to does not lose its vitality because the officer who administered the oath failed to attach his jurat. *Bantley v. Finney*..... 797

Office and Officers. See APPEAL, 4. ELECTIONS. JUDGES. MANDAMUS. SHERIFFS AND CONSTABLES.

Opera Houses. See CONTRACTS, 11.

Ordinances. See CONTRACTS, 10.

Ownership. See EVIDENCE, 6.

Parol Contracts. See CONTRACTS, 2.

Parol Evidence. See EVIDENCE, 3.

Parties. See APPEAL, 1. RES ADJUDICATA, 1. REVIEW, 32.

1. Where a subscription contract has been assigned, the assignee is the proper party to bring suit to enforce payment. *Gerner v. Church*..... 692
2. In order to secure review of a joint judgment by petition in error, all persons interested must be made parties to the proceeding as plaintiffs or defendants. *Polk v. Covell*..... 885

Partnership. See JUSTICE OF THE PEACE.

1. The question of the existence of a partnership is for the court where there is no dispute as to the facts. *Waggoner v. First Nat. Bank of Creighton*..... 84
2. Where there is a dispute as to the facts necessary to constitute a partnership the question of its existence is for the jury. *Id.*
3. Definition of partnership. *Id.*
4. Sharing the losses of a venture is not essential to a partnership. A community of interest in the profits of the business as such may be sufficient to constitute the relation of partners. *Id.*
5. Sharing in the profits is *prima facie* evidence of partnership, but is not conclusive. *Id.*
6. One who shares in profits as compensation for services, without any interest in or control of the property, is not for that reason a partner. *Id.*..... 85
7. One who has no interest in or control of the property is not constituted a partner by making a loan of money for a share of the profits. *Id.*
8. Right of members to create in favor of another firm of which they are sole members a preference as against creditors. *Bonwit v. Heyman*..... 537

Payment. See BUILDING AND LOAN ASSOCIATIONS. CHATTEL MORTGAGES, 1. MORTGAGES, 9. PLEADING, 6. REVIEW, 43.

To defeat an action to recover money voluntarily paid under a mistake of fact it is not sufficient that plaintiff might have known the facts. *Douglas County v. Keller*..... 636

Personal Injuries. See HUSBAND AND WIFE, 2. PRACTICE, 3.

Petition in Error. See PARTIES, 2. REVIEW.

Pleading. See CORPORATIONS, 2. INJUNCTION, 1. JUSTICE OF THE PEACE. MANDAMUS, 6. MORTGAGES, 1. MUNICIPAL CORPORATIONS, 6. REVIEW, 41. USURY, 3. VENUE, 4.

Pleading—*continued.*

1. It is unnecessary to plead what the law presumes. *Bishop v. Middleton* 10
2. The plea of *nil debet* puts in issue no fact and cannot be regarded as a defense. *Baldwin v. Burt* 246
3. One who states a legal conclusion cannot object to an answer thereto in the same terms on the ground that it is a conclusion of law instead of an allegation of fact. *Id.*
4. In an action on an official bond to recover on a judgment previously rendered against the officer, an allegation of the sureties in their answer that the judgment was procured by fraud and misrepresentation, and that it is contrary to law, is a mere conclusion. *Thomas v. Markmann*..... 823
5. Where averments in a cross-petition are not denied, proof to establish them is unnecessary. *Chadron Banking Co. v. Mahoney*..... 215
6. Payment to be available as a defense must be pleaded; but where payments are alleged in the petition, although denied by answer, defendant will be entitled to credit therefor. *Mullen v. Morris*..... 597
7. The filing of a motion to dissolve an attachment does not excuse the defendant from pleading to the petition in the case. *Stutzner v. Printz*..... 306
8. Sufficiency of an allegation of a pledge of notes as a security for indebtedness. *Sharmer v. McIntosh*..... 509
9. Case where a decree for plaintiff was construed to be an order overruling a demurrer to the petition and the entry of judgment thereon. *Moore v. Kime*..... 517
10. In an action against an insurance company the defense that the policy was not in force at the time the loss occurred is inconsistent with the defense the company had no notice of loss. *Omaha Fire Ins. Co. v. Dierks*.....475, 570
11. Plaintiff in his reply may aver a state of facts different from that alleged in an immaterial statement of his petition. *Foley v. Holtry*..... 133
12. The office of a reply is to deny the facts alleged as defenses in the answer, or to allege facts in avoidance of such defenses. *Piper v. Woolman*..... 280
13. Any allegation of an answer to which the reply pleads waiver, estoppel, or avoidance must be treated as admitted, though the reply contains also a general denial of each and every allegation of the answer. *Dwelling House Ins. Co. v. Brewster*..... 528

Pleading—*concluded.*

14. Sufficiency of reply in denying affirmative matter pleaded in the answer, and effect of failure to direct the trial court's attention to defects in pleadings. *Johnson v. McLennan*... 685

Pledges.

1. The payee of a negotiable instrument secured by pledges of negotiable instruments of third persons may negotiate it and transfer the securities without incurring liability for conversion. *Waddle v. Owen*..... 489
2. A payee of a negotiable instrument who transfers it with the pledged securities before it is due or before tender of payment is not liable in trover for conversion of the securities by the transferee. *Id.*
3. Sufficiency of proof to show that notes were pledged to secure a debt. *Sharmer v. McIntosh*..... 510
4. One who receives as collateral security for a loan contemporaneously made, negotiable bonds not due, without knowledge of any defense thereto, is to the extent of the loan entitled to protection as a *bona fide* purchaser. *Hayden v Lincoln Street R. Co*..... 680

Police Power. See MUNICIPAL CORPORATIONS, 2.

Political Parties. See ELECTIONS.

Possession. See EVIDENCE, 6.

Practice. See APPEAL, 5. ATTACHMENT, 6. MANDAMUS, 4, 7. NEW TRIAL, 7. REVIEW, 33, 35, 39.

1. Where a court overrules a motion, a second one for the same purpose should not be entertained unless leave to file it has been given. *Stutzner v. Printz*..... 306
2. Courts are under no obligation to enforce agreements relating to a case made out of court and not called to the attention of the judge. *Kent v. Green*..... 674
3. If it is proper for a court, in an action for personal injuries, to appoint physicians to examine plaintiff physically, the application must be made before the trial begins. *City of Chadron v. Glover*..... 733

Preferring Creditors. See FRAUDULENT CONVEYANCES, 7.

Principal and Agent. See REAL ESTATE AGENTS.

1. Sufficiency of evidence to support a finding that a mortgagee who assigned the debt had no authority as agent for the assignee to collect it. *Eggert v. Beyer*..... 712
2. In accepting the fruits of a transaction the principal does not ratify the unauthorized acts of his agent unless he had knowledge of all the material facts. *Holm v. Bennett*, 808

Principal and Surety. See CONTRACTS, 8.

1 The relation of principal and surety may exist without the knowledge or consent of the principal where it is voluntarily assumed by the surety for the accommodation of the beneficiary for a sufficient consideration. *Gist v. Feitz*, 238

2. A defense by a surety that he was induced to sign a note through the false representation of the payee that the principal maker desired the surety to sign it, is sufficient. *Id.*

3. Where a surety signs a bond, in form a joint obligation, on condition that others are to sign with him, the instrument is invalid as to him if delivered without compliance with such condition, unless the obligee received the bond without notice of the condition, or the surety, after signing, waived the condition. *Mullen v. Morris*..... 596

4. Where a bond is delivered to the obligee without being executed by all persons named in the body as obligors, it is sufficient to put the obligee on inquiry whether those who signed consented to its being delivered without the signatures of the others. *Id.*

5. Where a bond not signed by all persons named therein as obligors is delivered to obligee, it is not presumed to be invalid, but it is for the obligors to show they were not to be bound unless it was executed by the others. *Id.*

Property. See EVIDENCE, 6.

Prosecuting Attorneys. See INDICTMENT AND INFORMATION, 5.

Public Policy. See MUNICIPAL CORPORATIONS, 2.

Publication. See SUMMONS.

Railroad Companies. See EMINENT DOMAIN.

1. Railroad companies are required to fence their tracks, except at the crossings of public roads and highways and within the limits of towns, cities, and villages. *Union P. R. Co. v. Knowlton*..... 751

2. A point one mile distant from the nearest depot grounds not within the limits of any city, town, or village, remote from any railroad or highway crossing, and not necessary for making up trains, although occasionally used for such purpose, is not within the exception of the statute requiring railroad corporations to fence their tracks. *Id.*

3. The mere fact that a man is found dead under a railroad car does not raise the presumption that he came to his death through negligence of the railroad company. *Spears v. Chicago, B. & Q. R. Co*..... 720

Rape.

1. In a prosecution for assault with intent to ravish a child under the age of consent the prisoner's intention to have carnal knowledge of her with her consent, and not otherwise, is immaterial. *Head v. State*..... 30
2. Sufficiency of evidence to sustain a conviction under such a charge. *Id.*

Ratification. See COUNTIES, 8. PRINCIPAL AND AGENT, 2.

Real Estate Agents.

1. Plaintiff in an action to recover for services in effecting an exchange of defendant's property must show by a preponderance of the evidence that he was employed by defendant. *Strawbridge v. Swan*..... 781
2. In an action by a broker to recover for services in procuring a customer, plaintiff cannot recover where defendant acted for himself and did not employ plaintiff as agent. *Id.*
3. An agent who represented both parties in exchanging property cannot recover compensation from one of the parties who did not consent to the agent's dual employment. *Id.*
4. In an action for commissions a broker who procured a purchaser under a contract with an agent of the property owner cannot recover from the latter, where the authority of such agent is denied and not proved by the broker. *Funk v. Latta*..... 739
5. Where agents collected rent due their principal at the time of making a sale and paid it to the purchaser of the premises without the knowledge of the vendor, who accepted the proceeds of the sale, the latter may recover from the agents the amount of rent so collected. *Holm v. Bennett*..... 808

Reasonable Doubt.

Carleton v. State..... 375

Receivers.

1. Rules for appointment of receiver. *Chadron Banking Co. v. Mahoney*..... 215
2. In mortgage foreclosure, under a prayer for a receiver pending the action, it is error on final hearing to appoint a receiver before appeal or application for stay. *Id.*

Recognizance. See BAIL.

Records. See MORTGAGES, 5, 6.

Recoupment. See LANDLORD AND TENANT.

Registration. See MORTGAGES, 5-7.

Release. See CHATTEL MORTGAGES, 1.

Religious Societies. See LIBEL, 6-8.

Replevin. See FRAUDULENT CONVEYANCES, 1.

1. A county treasurer may replevy personalty upon which there is a lien for taxes where there is no other remedy. *Reynolds v. Fisher* 172
2. Sufficiency of evidence to show plaintiff's right to possession. *Wilcox v. Beitel* 457
3. Where defendant contests the case on an affirmative claim of right to possession plaintiff need not prove demand and refusal in order to recover costs. *Id.*

Res Adjudicata.

1. A decree dismissing a suit on the ground that plaintiff is not the party in interest is not a decision on the merits of the case so as to bar a subsequent action. *Baldwin v. Burt*, 257
2. A judgment rendered by a court having jurisdiction settles as between the parties all questions litigated. *Chase v. McManigal* 686
3. A judgment against an officer for the value of property wrongfully seized, is conclusive evidence, in an action on the official bond against the principal and sureties, of plaintiff's ownership of the property at the time of the seizure and the amount of damages sustained. *Thomas v. Markmann* 823

Rescission. See SALES, 1.

Review. See APPEAL. ATTACHMENT, 5. BILL OF EXCEPTIONS. COSTS, 2. CRIMINAL LAW. EJECTMENT, 2. INSTRUCTIONS. MURDER, 3. NEW TRIAL. PARTIES, 2. RECEIVERS, 2. SCHOOL DISTRICTS. TRIAL.

1. The judgment will be reversed where the findings are contrary to the admitted facts. *Chamberlain v. City of Tecumseh* 221
2. A judgment conforming to the pleadings will be affirmed where the parties fail to file briefs. *Langdon v. Campbell*... 67
3. Assignments of error directed generally to a group of instructions are insufficient. *Glass v. Zutavern* 336
4. Assignments alleging error in a group of instructions will be overruled where one instruction is correct. *Spears v. Chicago, B. & Q. R. Co* 720
   Funk v. Latta 741

Review—*continued.*

5. Assignments of error must be specific. *McEvony v. Rowland* 99
Risse v. Gasch 289
Omaha Fire Ins. Co. v. Dierks 474
City of Chadron v. Glover 732
Hardin v. Sheuey 807

6. "Errors of law occurring at the trial" is too indefinite as an assignment of error. *Mullen v. Morris* 597
Risse v. Gasch 288

7. Alleged errors not assigned in the petition in error will be disregarded. *Erck v. First Nat. Bank* 614

8. Assignments of the petition in error not argued will be deemed waived. *Bishop v. Middleton* 10
Erck v. First Nat. Bank 614
Omaha Fire Ins. Co. v. Dierks 477

9. A judgment conforming to the pleadings and evidence will be affirmed where the cause was submitted without briefs or oral argument. *Moore v. McCollum* 617

10. An assignment of error as to overruling a motion for a new trial is insufficient where it fails to specify the ground to which it applies. *Wax v. State* 19

11. Where a motion for a new trial is based on several different grounds, an assignment that it was erroneously overruled is insufficient. *City of Chadron v. Glover* 733

12. The filing of assignments of error in an appeal case does not make the proceeding one in error. *Chadron Banking Co. v. Mahoney* 214

13. Where a party appeals and subsequently files a petition in error, he will be deemed to have elected to proceed in error and not by appeal. *Woodard v. Baird* 310

14. A ruling on a motion for a continuance will not be disturbed except for an abuse of discretion on the part of the trial court. *Kansas City, W. & N. W. R. Co. v. Conlee* 121

15. A case tried to a jury will not be reviewed before entry of judgment on the verdict. *Seven Valleys Bank v. Smith* 237

16. An order retaining for trial an appeal from an inferior court is not final so as to be the foundation of an error proceeding. *Edgar v. Keller* 263

17. One who has consented to a decree of foreclosure and sale thereunder cannot question the correctness of the decree in so far as it was authorized by his stipulation. *Hayden v. Lincoln City Electric R. Co.* 681

Review—*continued*

18. In a reviewing court the transcript of appeal is the sole evidence of the proceedings below. *Dryfus v. Moline, Milburn & Stoddard Co.* 233
Chadron Banking Co. v. Mahoney 214

19. Error does not appear as to the introduction in evidence of a written instrument on the ground of material alteration where the copy in the bill of exceptions and other evidence fail to disclose such alteration. *Chadron Banking Co. v. Mahoney* 214

20. In such a case an affidavit not used below, but attached to the record for review, is not competent to show the alteration of the original instrument. *Id.*

21. An affidavit filed in the appellate court, stating when the terms of the lower court were held, is incompetent to contradict a contrary showing in the transcript. *Woodard v. Baird* 310

22. The supreme court does not acquire jurisdiction where the plaintiff in error fails to file with his petition in error a transcript of the proceedings below containing the final judgment. *Jandt v. Deranlieu* 422

23. The petition in error upon which the district court acted in reversing the judgment of a county court is a necessary part of the record for review in the supreme court. *Id.*

24. The action of the district court in affirming an order dissolving an attachment in the county court will not be reviewed in the supreme court when the record of the county court has been omitted from the transcript. *Goldsmith v. Wix* 573

25. A decree will not be set aside because incompetent evidence was introduced to prove an allegation not denied. *Chadron Banking Co. v. Mahoney* 215

26. In a case tried to the court without a jury, the admission of improper evidence is not of itself a ground for reversal. *Sharmer v. McIntosh* 509

27. The erroneous admission of immaterial testimony will not be ground for reversal where it is clear from the whole record that the verdict must have been the same had the objectionable evidence been excluded. *Terry v. Beatrice Starch Co.* 866

28. In appellate proceedings the examination of the reviewing court will be confined to questions determined by the trial court. *Coombs v. MacDonald* 632
Woodard v. Baird 310

Review—*continued.*

Omaha Fire Ins. Co. v. Dierks 478

Thompson v. Campbell 556

29. A motion for judgment *non obstante veredicto* presents no question for review where the record fails to show that it was ruled on below. *Barr v. Kimball* 766

30. The constitutionality of a law will not be determined upon review where the question was not presented below. *Pill v. State* 27

31. Affidavits supporting a motion for a new trial on the ground of accident or surprise will not be considered when filed originally in the supreme court. *Omaha Fire Ins. Co. v. Dierks* 473

32. Where one asks to intervene, files a pleading, and is examined by an adverse party, the latter cannot for the first time, upon appeal from a decree adjudicating the rights of intervenor, urge that the intervenor had not by an order been made a party below. *Chadron Banking Co. v. Mahoney* 214

33. A motion to dismiss appellate proceedings after submission of the cause on its merits comes too late. *Moore v. McCollum* 617

34. Review of an order refusing to reinstate an appeal which had been dismissed because appellant failed to comply with an order to furnish an additional appeal bond. *Rose v. Burr* 359

35. Where there is no motion for a new trial, or bill of exceptions, and the petition in error and transcript present no question for review, the judgment below may be affirmed, on motion to dismiss an error proceeding. *Erck v. Omaha Nat. Bank* 614

36. Where the journal entry of a ruling on a motion shows an exception, it will be presumed that the party aggrieved was present or represented by counsel. *Rose v. Burr* 358

37. A judgment will not be reversed because the jury has drawn from the evidence an inference different from that the court might have drawn. *Spears v. Chicago, B. & Q. R. Co* 720

38. Rulings on evidence and sufficiency of testimony to support a finding will not be considered on error in absence of an exception to the order below overruling a motion for a new trial. *Twomey v. Willman* 28

39. A motion for a new trial in the district court is not necessary in order to review the proceedings affirming a judg-

Review—*concluded.*
ment of a justice of the peace. *Dryfus v. Moline, Milburn & Stoddard Co.* 233
40. An exception to a final judgment is unnecessary. *Erck v. First Nat. Bank* 614
41. A ruling amending a pleading below cannot be reviewed on error unless it affirmatively appears what particular amendment was allowed. *German-American Ins. Co. v. Hart* 441
42. A defendant who answers and submits to equity jurisdiction cannot for the first time on appeal urge that plaintiff had an adequate remedy at law. *Dorsey v. Nichols* 241
43. Case where payment of decree, to stop sale of land, did not prevent appellant from prosecuting his appeal. *Green v. Hall* 275
44. Where the only question is as to the sufficiency of conflicting evidence, the judgment will be affirmed. *Fabens v. Atchison & N. R. Co* 74
Crump v. King 145
Prewitt v. York County 267
Risse v. Gasch 288
Wells v. David City Improvement Co 366
Gray v. Godfrey 672
Kent v. Green 673
Johnson v. McLennan 684
45. On appeal, where there is such a contradiction and confusion in the evidence that it is uncertain how the issues should have been determined, the judgment will be affirmed. *Ripley v. Larsen* 687

Sales. See FRAUDULENT CONVEYANCES, 1.
1. Where an officer of a corporation knows the secretary's report is false and induces one who relies upon it to make a purchase of corporate stock on the faith of the report, the purchaser may have the contract canceled. *Foley v. Holtry* 133
2. Instructions in an action for breach of warranty in the sale of a horse. *Watson v. Rood* 349

Satisfaction. See MORTGAGES, 9.

School Districts.
Where a school district appeals from a justice of the peace it must give an appeal bond. (Code, sec. 1007.) *School District v. Traver* 524

Schools. See EDUCATIONAL INSTITUTIONS.

Seals. See TAX DEEDS.

Secretary of State. See ELECTIONS, 3, 4.

Self-Defense. See HOMICIDE, 3, 4.

Propriety of instruction relating to duty of a person when assailed. *Willis v. State*..... 103

Settlement. See ATTORNEY AND CLIENT, 1.

Sheriffs and Constables.

1. A ministerial officer is not liable in an action for false imprisonment where he acted under a warrant lawful on its face and issued by proper authority. *Atwood v. Atwater*... 147
2. In an action against an officer for damages for wrongfully selling exempt property the execution debtor's inventory and affidavit for exemption may be admitted in evidence. *Smith v. Johnson*..... 755
3. A constable who wrongfully seizes the property of one person under a process against another is liable on his official bond for damages. *Thomas v. Markmann*..... 823

Slander. See LIBEL.

Soldiers' Relief Fund. See COUNTIES, 10.

State and State Officers. See ELECTIONS.

Statute of Frauds.

An oral contract under which a company employs a person for one year at a fixed salary per month, service to begin at a future date, is within the statute. *Kansas City, W. & N. W. R. Co. v. Conlee*..... 121

Statutes. See CONSTITUTIONAL LAW. DOWER. FOREIGN LAWS. MORTGAGES, 6. TABLE, *ante*, p. lxxiii.

In construing an ambiguous provision the courts will adopt the interpretation most in harmony with the spirit of the act. *State v. Allen*..... 651

Stenographers. See TRIAL, 1.

Street Railways.

1. Discussion of instructions and evidence in a case where a person sued a street railway company for damages resulting from its negligence in colliding with plaintiff's carriage at street intersections. *Omaha Street R. Co. v. Cameron*... 297
2. Application for *mandamus* to compel a street railway to restore and operate an abandoned line denied. *State v. Home Street R. Co.*..... 830

Subrogation.

Bonwit v. Heyman..... 542

Subscription.

1. The terms of a written contract of subscription to a building cannot, in the absence of fraud, be contradicted by parol evidence showing conditions of payment, and oral promises of plaintiff as to the character of the material to be used. *Gerner v. Church*..... 691
2. In an action on a subscription contract the defendant may introduce evidence to show that he was induced to subscribe through plaintiff's fraudulent misrepresentations in relation to sham subscriptions. *Id.*
3. The party to bring suit on a subscription contract is the person entitled to the benefit of the subscription. *Id.*

Summons. See ATTACHMENT, 8.

1. In an action for the recovery of money, where the defendant has within the state no property, nor debts owing to him, jurisdiction will not be acquired over his person by the publication of a summons. *Welch v. Ayres*..... 326
2. For the purpose of ascertaining jurisdiction by publication of summons it is competent for the court to hear testimony, where the question is properly raised by defendant. *Id.*
3. In order to obtain a valid service by publication the affidavit required by sec. 78 of the Code must be in writing, sworn to, and filed in the case where made. *Bantley v. Finney*..... 795
4. An affidavit for publication from which the officer's jurat had been omitted was *held* sufficient where it was established by parol evidence that affiant did in fact swear to the affidavit. *Id.*
5. The fact that a judgment exceeds the sum indorsed on the summons is immaterial where defendant appeared and answered to the merits. *Erck v. Omaha Nat. Bank*..... 614

Supreme Court.

All opinions, whether prepared by judges or commissioners, are submitted for examination and criticism to the entire membership of the court. *Randall v. National Building, Loan & Protective Union*..... 876

Surface Water.

1. A person has no right to collect surface water and discharge it upon the land of another to the damage of the latter; but subject to this limitation a land-owner may drain and dispose of surface water as he sees fit. *Bunderson v. Burlington & M. R. R. Co*..... 545
2. For the construction of an embankment proper for rail-

Surface Water—*concluded.*

road purposes, which deflects surface water from its normal course, a railroad company is not liable in damages to the proprietor or lessee of neighboring lands thereby incidentally overflowed. *Id.*

Tax Deeds.

A valid tax deed cannot be executed under the present revenue law, since there is no provision of law for an official seal for a county treasurer. *Alexander v. Thacker*..... 494

Taxation. See COSTS, 1.

1. A county treasurer has no authority to compel payment of taxes unless a warrant is attached to the tax list when it is delivered to him. *Reynolds v. Fisher*..... 172
2. Where the tax list for a year consists of two books, a treasurer's warrant attached to one is sufficient authority for the collection of any tax in either. *Id.*
3. Taxes on personalty are a lien upon all the personal property owned by the person assessed. *Id.*
4. A county treasurer may replevy personalty upon which there is a lien for taxes, and have the right to possession determined, where there is no other remedy. *Id.*
5. The lien of taxes on personalty is superior to the lien of a chattel mortgage executed after the tax list was delivered to the county treasurer. *Id.*
6. The lien of an attachment levied after the tax list was delivered to the county treasurer is inferior to the lien of the taxes. *Reynolds v. McMillan*..... 183
7. An action to foreclose a tax lien is barred within five years after the time to redeem from the tax sale has expired. *Alexander v. Thacker*..... 494
8. Amount plaintiff is entitled to recover on foreclosure of a valid tax sale certificate under the law of 1879. *Id.*
9. On foreclosure of a tax lien, based on a valid tax sale, plaintiff's attorney should be allowed a fee equal to ten per cent of the amount of the decree. *Id.*
10. Municipal corporations may impose upon telegraph companies doing business within the city limits taxes for intrastate messages. *Western Union Telegraph Co. v. City of Fremont*..... 499
11. The constitution prohibits a county board from levying taxes which in the aggregate exceed $1.50 per $100.00 valuation, unless authorized to do so by a vote of the people of the county. *Young v. Lane*..... 812

Telegraph Companies. See TAXATION, 10.

Tender.

A creditor is not obliged to accept payment of a debt before it is due, and he loses no rights under a tender made before maturity of the debt. The creditor gains no rights by such a tender. *Moore v. Kime*..... 518

Theatres. See CONTRACTS, 11.

Torts. See ACTIONS.

Contribution not enforced between joint tort-feasors. *Torpy v. Johnson*..... 882

Transcript. See REVIEW, 21–24.

Treasurers. See TAX DEEDS.

Trial. See CONTRACTS, 4. CRIMINAL LAW. JUSTICE OF THE PEACE. NEW TRIAL. PRACTICE. REVIEW, 25–27. WITNESSES.

1. Refusal of court to require services of a stenographer is not reversible error where no prejudice results. *Home Fire Ins. Co. v. Johnson*..... 71
2. An erroneous exclusion of testimony is ordinarily cured by the admission of that excluded. *Id.*
3. Where, under conflicting evidence, the jury may reasonably find for plaintiff it is error to direct a verdict for defendant. *Hargrave v. Home Fire Ins. Co*..... 271
4. Where there is an offer of proof, the question asked must show that a favorable answer would tend to establish a material fact in issue. *Cutting v. Baker*..... 470
5. A party who saw a juror taking notes of testimony during the trial and permitted, without objection, such notes to be taken into the jury room, is not in a position to urge the misconduct of the juror as a ground of error. *Watson v. Rood*..... 349
6. A verdict cannot be impeached by a party by affidavits purporting to contain statements of jurors in reference to acts and discussions in the jury room. *Peterson v. Skjelver*, 663

Trover and Conversion. See PLEDGES, 1, 2.

Trusts. See CONTRACTS, 9. PARTNERSHIP, 8.

Where a husband buys land with his wife's money and has the deed made to himself, a trust arises in her favor which equity will protect against his creditors, unless the credit was extended to him on the faith of his ownership. *Hews v. Kenney*..... 816

Ultra Vires. See COUNTIES, 5–9.

Usury.

1. A transaction providing for a loan at ten per cent, where a seven per cent note is given, and an advance payment of interest deducted from the loan, which with the interest on the note does not exceed ten per cent, is not usurious. *Pierce v. Davey*..... 45
2. Payee of usurious note can only recover the amount loaned diminished by all payments on principal and interest. *Brewster v. Bank of Ainsworth*..... 79
3. A petition to recover double the amount of interest paid to defendant is sufficiently definite where it shows the dates and amounts of the loans, the usurious rate of interest, and the date and amount of interest actually paid upon closing the transaction described. *Ord Nat. Bank v. Wells*.... 550
4. Payment of usurious loan is not a condition precedent to an action against a national bank to recover double the amount of usurious interest paid on the loan. *Exeter Nat. Bank v. Orchard*..... 579
   First Nat. Bank of Exeter v. Orchard..... 583

Vendor and Vendee. See COUNTIES, 5–8. CREDITORS' BILL, 2. JUDGMENTS, 2. JUDICIAL SALES. MORTGAGES, 5.

The burden of proof is upon him who alleges that he purchased without notice of the equity of the adverse party, relying upon the apparent ownership of his grantor. *Baldwin v. Burt*..... 246

Venue. See ATTACHMENT, 8.

1. Where defendant has seasonably filed a proper affidavit for a change of venue from a justice of the peace, the duty of that officer to transfer the case to the nearest qualified justice in the county is mandatory. *Paul v. Ziebell*..... 424
2. In an affidavit for a change of venue the defendant may state any well-founded objection to the qualification of any justice of the peace in the county. A failure to do so is a waiver of the objection. *Id.*
3. The plaintiff is not authorized to prove the disqualification of the nearest justice of the peace to defeat defendant's right to a change of venue. *Id.*
4. Where a corporation fails to challenge the jurisdiction of the court or to plead wrongful venue as a defense it waives the objection that it was sued in the wrong county. *Exeter Nat. Bank v. Orchard*..... 580
   First Nat. Bank of Exeter v. Orchard..... 583

Verdict. See JUDGMENTS, 1. TRIAL, 6.

Wages. See CONSTITUTIONAL LAW, 1.

Waiver. See APPEARANCE, 2, 3. INSURANCE, 9. MECHANICS' LIENS, 5. REVIEW, 8, 32. SUMMONS, 5. VENUE, 4.

Warrants. See NEGOTIABLE INSTRUMENTS, 4.

Warranty. See COVENANTS.

Where a written warranty states that a horse is registered, the seller cannot, in an action for a breach, prove that he informed the purchaser prior to the sale that the horse was not registered. *Watson v. Roode*..... 348

Wills.

1. Sufficiency of evidence to support a finding that the paper in controversy was not the last will and testament of the deceased. *Risse v. Gasch*..... 288
2. One who accepts benefits under a will must, as a rule, conform to all of its provisions and renounce every right inconsistent therewith. *Godman v. Converse*..... 463

Witnesses. See CONTINUANCE, 2. CRIMINAL LAW, 3–5, 11–15. EVIDENCE, 2.

1. The state in rebuttal may show that a witness for the defense was intoxicated when the crime about which he testified was committed. *Willis v. State*..... 102
2. Cross-examination in relation to matters not pertinent to the subject-matter of the examination in chief is improper. *Funk v. Latta*..... 742
3. A party who is interested adversely to the representative of a deceased person is not, for that reason, incompetent as a witness in the action; but his testimony as to transactions and conversations with decedent are incompetent. *Sharmer v. McIntosh*..... 510
4. A wife's inchoate estate of dower in the lands of her husband gives her a direct legal interest in the event of a suit by her husband for recovery of title to land, so that when the suit is against the representative of a deceased person she cannot, under sec. 329 of the Code, be permitted to testify on her husband's behalf as to conversation with the deceased. *Wylie v. Charlton*..... 840
5. The interest of heir, not adverse to representative, is not sufficient to exclude testimony of a witness when offered against representative of a deceased person; but a witness interested on both sides will not be permitted to testify to conversations with deceased. *Id*..... 841

Words and Phrases.

1. "Asylum." *Curtis v. Allen*..... 189
2. "Enhanced in value." *Butler v. Fitzgerald*..... 193
3. "Corporations engaged in interstate business." *Bishop v. Middleton*..... 10
4. "Great bodily injury." *Murphey v. State*..... 34
5. "Malice." *Housh v. State*..... 163
6. "Seating capacity." *Gerner v. Church*..... 690
7. "Surface water." *Bunderson v. Burlington & M. R. R. Co.*, 545

Writs. See SUMMONS.