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JOHN FITZGERALD, FOR HIMSELF AND ON BEHALF OF ALL OTHER STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, APPELLANT, V. FITZGERALD & MALLORY CONSTRUCTION COMPANY AND THE MISSOURI PACIFIC RAILROAD COMPANY, APPELLEES.

FILED APRIL 4, 1895. NO. 5309.

1. **Corporations**: LIABILITY FOR TORTS OF OFFICERS. The term "scope of authority," as used in the law defining the liability of corporations for the tortious acts of their officers and agents, is not susceptible of a precise definition, but is limited to acts in some way incident to the employment and duties of such agents and having some relation to the obvious purpose of their appointment.

2. ———: ———: SALE OF BONDS: CONSTRUCTION COMPANY. A railroad company delivered to a construction company its bonds which had been earned by the latter in building certain lines of road. Afterward the directors of the construction company, a majority of whom were officers of the railroad company or controlled by it, voted to sell said bonds, then worth their face, to the stockholders of the construction company *pro rata*, according to the number of shares held by each, at a discount of ten per cent. The minority stockholders not being able to take and pay for the amounts thereof allowed to them, bonds were by a subsequent resolution disposed of at the same rate to the directors interested in the railroad company. No part of the proceeds thereof were returned to the last named company nor did it profit in any way by the transaction. *Held*, In an action by the minority stockholders of the construction company against the railroad company for an accounting, that the action of the directors named in disposing of said bonds at a discount was not within the scope of their authority as officers of the last named corporation and that said company is not liable for the loss thereby occasioned.

3. ———: ———: ———: ———. The fact that such bonds may have been withheld for a considerable time after they were earned by the construction company, to the damage of the latter in the loss of promised subsidies and prospective profits, although actionable in the proper proceeding, will not render the rail-

road company liable for loss by reason of the negligent or corrupt action of the directors of the last named company in disposing of said bonds for less than their value.

4. **Damages.** In all actions for damages the wrong done and the injury sustained must bear toward each other the relation of cause and effect, and the damages must be the natural and proximate consequence of the act complained of.

5. **Corporations:** OFFICERS: CONSPIRACY: RATIFICATION. *Held*, (1) From an examination of the evidence, that the loan to the construction company of $2,500,000 of the bonds of the railroad company by the president of the latter was a personal transaction in which said corporation was in nowise interested, and not made in pursuance of a conspiracy to which it was a party, having for its purpose the wrecking of a construction company; (2) that the last named company ratified said transaction by receiving and appropriating the bonds, and subsequently paying interest thereon with the knowledge and consent of all the stockholders.

6. **Contracts:** PLEADING. The illegality of an agreement, unless disclosed by the pleadings or proofs of the party claiming through it, must, in order to be available to the adverse party, be specially pleaded.

7. **Public Policy:** CONTRACTS. Agreement examined in the light of the evidence, and *held* not void as against public policy.

8. **Payment.** A debt will not be extinguished by the payment of a less sum than the amount actually due, unless based upon a new and sufficient consideration.

9. **Release and Discharge:** CONSIDERATION. The settlement of a doubtful or disputed claim is generally a sufficient consideration for a compromise; but in order to have such effect it is essential that there be in fact a dispute or doubt of the rights of the parties. An arbitrary refusal to pay, based on the mere pretense of the debtor, made for the obvious purpose of exacting terms which are inequitable and oppressive, is not such a dispute as will of itself support a compromise resulting in a reduction of the amount of his indebtedness

10. **Corporations:** CONTRACTS BY DIRECTORS WHO ARE MEMBERS OF TWO RIVAL COMPANIES: VALIDITY. Persons who are directors of two corporations have no implied authority to bind either by contracts with respect to subjects in which their interests are adverse; and all such agreements, unless subsequently ratified, may be avoided at the suit of non-consenting stockholders.

11. **Equity**: RESCISSION: DURESS. When money is paid or concessions exacted through necessity in order to obtain property illegally withheld, where its detention is accompanied by immediate hardship or irreparable injury, such transaction may be avoided on the ground of compulsion, although perhaps not amounting to a technical duress.

12. **Principal and Agent**: RATIFICATION. Acquiescence by a principal in the fraudulent or unauthorized act of his agent is in effect a new agreement made with an intent to condone the wrong done, and will not be inferred from doubtful evidence, but should be established like any other material fact, by the party asserting it.

13. **Equity**: RESCISSION: LACHES. Mere lapse of time, unaffected by other circumstances, will not bar the right to rescind a voidable transaction, since it is not for a wrong-doer to impose extreme vigilance or promptitude as conditions to the exercise of the rights of the injured party.

14. ———: ———: ———: EVIDENCE. But the failure of the injured party to object after knowledge of the wrong is evidence of ratification, and may, especially when long continued, be sufficient of itself to warrant a finding for the party alleging such fact.

15. **Parties**: OBJECTIONS. Objection on account of the absence of parties who are not indispensable to a determination of a controversy should be made by answer or demurrer, otherwise the court may determine the rights of the parties before it.

16. **Removal of Causes.** The courts of this state will not examine an order of the circuit court of the United States remanding a cause for want of jurisdiction in order to determine whether such proceeding is in accordance with the practice of that court. Such an inquiry should be made only in the court by which the order is made.

17. **Receivers**: GARNISHMENT. It is no objection to the appointment of a receiver of a corporation, in an action by a stockholder for and accounting in its behalf against a corporation indebted to it, that the debtor corporation was summoned as garnishee of the first named corporation in an action against it by attachment, where the attachment proceeding has been abandoned and judgment entered for damage only, without any reference to the garnishee.

18. **Courts**: JURISDICTION. It is a rule recognized alike by state and federal tribunals that the court which first acquires juris-

diction of the subject of an action will retain such jurisdiction until the final determination of the controversy.

19. **Amount of Decree.** *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb., 374, so modified as to authorize a decree in favor of the plaintiff for $300,906.33.

REHEARING of case reported in 41 Neb., 374.

Deweese & Hall and *J. M. Woolworth*, for appellant.

B. P. Waggener, *John L. Webster* and *A. R. Talbot*, *contra*.

POST, J.

This cause was argued and submitted to us in the month of July, 1892; but leave to reargue was subsequently requested and allowed, and the cause assigned for hearing before the commissioners by whom were submitted the opinions heretofore filed. (See 41 Neb., 374–511.) A consideration of motions filed subsequent to the decision above mentioned having suggested a doubt of some of the propositions therein approved, a rehearing was ordered and the cause again submitted on its merits. It will be necessary on this hearing, for reasons which will hereafter appear, to notice but few of the many questions originally presented, and in the consideration of those our endeavor will be to apply well established principles of equity to the admitted facts of the case, rather than an analysis of the multitude of authorities cited in the numerous briefs and on the oral argument.

The result of our examination, it may be noted, is substantially in accordance with the views of the court as constituted at the time of the hearing first alluded to, although in justice to Mr. Commissioner RYAN it should be remarked that the different conclusion stated in the opinion mentioned was reached after consultation with the majority of the court and fairly reflects the views then entertained by us. It will

not be necessary at this time to state in detail the facts out of which this controversy arose, in view of the elaborate statements in the former opinions.

We will first notice the question presented by the claim of the plaintiff based upon the sale of the bonds of the Missouri Pacific Railway Company. Briefly stated, the facts are these: The construction company held certain bonds of the Missouri Pacific company which had been received by it in payment for the construction of certain roads in which the first named company had acquired a controlling interest and which to the amount of $5,000,000 were, by resolution of the board of directors of the construction company sold to certain of its stockholders at a discount of ten per cent of their face value, resulting in an apparent net loss to the company of $500,000. In this connection it should be remembered that the action is not against the favored stockholders for a misappropriation of the funds of the construction company, neither is it in form or substance an action to pursue property which in equity belongs to the company. That a corporation is entitled to recover against an unfaithful officer for the misappropriation of its funds is elementary law; and if, as alleged, the sale of the bonds was the consummation of a conspiracy on the part of George Gould, Russell Sage, and other directors, having for its ultimate object the wrecking of the construction company, they are, without doubt, answerable for their wrong when called upon for an accounting in an appropriate action. It may also be assumed, although the question is not necessarily involved in this hearing, that contracts whereby officers of a corporation realize large profits directly or indirectly at its expense are presumptively fraudulent and voidable at the election of the latter. But is the Missouri Pacific Railway Company answerable for the alleged wrongful act; and if so, upon what recognized principle of equity jurisprudence? It is not contended that the last named company was present, in a legal sense,

participating in the sale of the bonds, or that it is the recipient of any of the profits derived from or on account of that transaction. If, therefore, it must account for the loss to the construction company by reason of the profligacy of the latter's officers, its liability depends upon other and different principles.

In order that the position of the plaintiff may not be lost sight of in the contemplation of the complex transactions involved, we copy here the brief but comprehensive summary of his argument prepared by the reporter accompanying the opinion heretofore approved: "The sale by the directors and purchase by the stockholders of the Missouri Pacific bonds at a discount was a fraud. Neither the directors nor the stockholders can buy or sell the property of a corporation for less than its value without rendering themselves and all concerned liable. Without the aid of the Missouri Pacific Company the fraud in the sale of the bonds could not have been accomplished. There was due to the construction company at the time it was forced to borrow from Gould $2,500,000 in bonds the sum of $3,170,000 in bonds of the Missouri Pacific Company. The latter company acted with its directors and the directors of the construction company, and the resolution under which the bonds were sold was for its benefit as well as others. It received part of the fruits of the conspiracy, and the wrong must be viewed as a whole. By conspiring together for the purpose alleged the conspirators assumed to themselves the attributes of individuality in the prosecution of the common design, thus rendering what was done by each in the execution of such design the act of all." And on the argument it was said that the Missouri Pacific Company, having been made the instrument of its officers and managers in the perpetration of the fraud upon the construction company, must be regarded as a wrongdoer, and jointly liable with the other conspirators. The evidence which is the foundation for that contention is in-

dicated by the twenty-eighth, twenty-ninth, fortieth, forty-first, forty-second, and forty-third findings of the district court, and which are here set out in full:

"(28.) The court further finds that at all times from the date of the organization of the Fitzgerald & Mallory Construction Company up to April 17, 1889, the plaintiff herein, John Fitzgerald, was a director of said construction company. That the directors of said company were five in number. That prior to November 3, 1886, a majority of said directors were friendly to the interests of the plaintiff. That since said 3d day of November, 1886, three of said five directors, together with the treasurer, have been directly or indirectly interested in the defendant railway company, have acted in the interest of said railway company in all matters concerning the management of said construction company, where the interest of the railway company and the construction company have come in conflict.

"(29.) The Missouri Pacific Railway Company failed to act in the authorization of the issuance of its bonds to pay over as provided in its contracts with the construction company until December 10, 1886, when, by its board of directors, it authorized the issuance of five million ($5,000,000) dollars of Missouri Pacific five per cent trust bonds, and said bonds were issued in pursuance of said authorization under date of January 1st, 1887."

"(40.) The court further finds that on the 28th day of July, 1887, at a meeting of the board of directors of the Fitzgerald & Mallory Construction Company, held at New York city, where were present Russell Sage, R. I. Cross, and Sidney Dillon, and absent S. H. Mallory and the plaintiff herein, it was resolved to sell four million ($4,000,000) dollars Missouri Pacific railway five per cent bonds to the stockholders of the said construction company at ninety per cent of the face value, and Jay Gould, the president of the Missouri Pacific Railway Company, fur-

nished two million five hundred thousand ($2,500,000) dollars in bonds to add to one million five hundred thousand dollars ($1,500,000) bonds then possessed by the construction company, for the purpose of completing the required amount to make the sale. That under said resolution all the stockholders, with the exception of John Fitzgerald and S. H. Mallory, took their *pro rata* share of said bonds, and in the amount of three million two hundred thousand ($3,200,000) dollars. That when informed of said transaction the said Fitzgerald and Mallory protested against the same.

"(41.) That on said July 28, 1887, the full amount of said two million five hundred thousand ($2,500,000) dollars additional bonds furnished by Jay Gould was due the construction company from the defendant, the Missouri Pacific Railway Company, and the same should be treated as a payment by the said railway company to the construction company, and the said railway company should pay all charges made by the said Gould on account of said advancement.

"(42.) That on the 23d day of September, 1887, R. I. Cross, the treasurer of the construction company, paid from the funds of the said company the sum of sixty-two thousand five hundred ($62,500) dollars to Jay Gould on account of interest on the two million five hundred thousand ($2,500,000) dollars bonds delivered to the construction company July 28, 1887. That the said sixty-two thousand five hundred ($62,500) dollars so paid is a proper charge against the Missouri Pacific Railway Company, and in favor of the Fitzgerald & Mallory Construction Company in this action, and the same is allowed.

"(43.) That on the 22d day of September, 1887, at a meeting of the directors of the Fitzgerald & Mallory Construction Company, held in New York city, where all of the directors were present, a sale of bonds in the amount of one million eight hundred thousand ($1,800,000) dollars

[not] already sold [was] ordered made to the New York stockholders of the Fitzgerald & Mallory Construction Company *pro rata*, said sale being made at ninety per cent of par value. That it was further ordered at said meeting of directors that one million five hundred thousand ($1,500,000) dollars of Missouri Pacific bonds be distributed among the stockholders of the construction company as a declared dividend upon stock."

It may not be out of place to look behind the foregoing findings to the record upon which they are based, and which, so far as evidenced by the books of the construction company, is found in the minutes of three meetings of the board of directors. The first of said meetings was held in New York, July 28, 1887, those present being R. I. Cross, Russell Sage, and Sidney Dillon, and the record, or so much thereof as relates to the subject in hand, is as follows:

"Mr. R. I. Cross, member of the committee appointed to investigate the condition of the company, reported, in substance, as follows: That the company is indebted to its stockholders to the extent of $1,500,000 for money borrowed; that it is indebted to the Missouri Pacific Railway Company $772,856.27, and to Morton, Bliss & Co. to the extent of about $600,000; that $500,000 would be required to complete the company's contract with the Missouri Pacific Railway Company. And thereupon the following resolution was adopted:

"*Resolved*, That the treasurer is hereby instructed to sell a sufficient amount of the Missouri Pacific Railway Company's trust five per cent bonds at not less than ninety cents, to provide funds to pay for the amount borrowed, amounting to $1,500,000 and interest; and that for the further purpose of the company the treasurer is authorized to sell further amounts of the same bonds at the same price to the extent of, say $4,000,000 in all, to the shareholders, with the understanding that the prorate share of these

bonds of any stockholder who is not prepared to take his share within ten days from this date shall be first offered to the other stockholders *pro rata*.

"On motion of Mr. Cross it was voted that the treasurer is hereby authorized to borrow from Mr. Jay Gould $2,500,000 of the Missouri Pacific Railway Company's five per cent bonds, to be returned to him when the construction company receives the bonds due under its contract with the Missouri Pacific Railway Company."

At the second meeting, on September 20, 1887, the directors all being present with the exception of Sidney Dillon, the following appears:

"After full discussion by members of the board, it was, on motion by Mr. Cross, voted that the treasurer of this company be and hereby is authorized to sell $2,000,000 of the Missouri Pacific Railway Company's five per cent bonds at ninety cents, to provide funds for the completion of the work of the construction company, and to give the stockholders *pro rata* the first option of buying the same. Mr. Cross also reported that Mr. Mallory's account showing the amount of money expended by himself and Mr. Fitzgerald previous to the execution of the contract was correct, and, on motion, they were given credit for that amount."

At the meeting of September 22, the following proceedings were had:

"NEW YORK CITY, September 22, 1887.

"Pursuant to call, meeting of the directors was held this day at No. 195 Broadway, New York.

"Present, S. H. Mallory, John Fitzgerald, Russell Sage, R. I. Cross, and Sidney Dillon.

"On motion of Mr. Dillon it was unanimously voted that the resolution passed at the last meeting of the directors providing for the sale of the Missouri Pacific Railway Company's five per cent bonds be amended so as to read as follows:

"*Resolved*, That the treasurer of this company be and hereby is authorized to sell $1,800,000 of the Missouri Pacific Railway Company's five per cent bonds at ninety cents, to provide funds for the completion of the work of the construction company, and that said bonds be sold to the following stockholders of the company who were ready to buy the same, as follows:

Russell Sage	$375,000
Morton, Bliss & Co	300,000
Jay Gould	675,000
H. G. Marquand	150,000
Sidney Dillon	150,000
George J. Gould	75,000
I. & S. Wormser	75,000
Total	$1,800,000"

The foregoing transactions do not include the $1,500,000 of bonds earned and delivered to the construction company upon the completion of the first 150 miles of road. The last named installment had been previously disposed of to the apparent satisfaction of all concerned, and does not call for further mention on this branch of the case. Mr. Mallory, president of the construction company, on being advised of the action taken at the meeting of July 28, addressed to Mr. Cross, treasurer of the company, the following letter:

"WINFIELD, KAS., Aug. 3, 1887.

"*R. I. Cross, Esq., Treasurer F. & M. Const'n Co.*—DEAR SIR: When I left New York it was supposed that the bonds were negotiated at par, etc., and I am much surprised to be informed to take my allotment in ten days or have them sold at 90. I object to this. I have had to stand a ten per cent reduction on 150 miles, and now another ten per cent on the whole is more than I can stand.

"I hereby subscribe for $400,000 five per cent Missouri Pacific bonds at 90, and will write to Mr. Gould to protect

me. If he does not, I desire to make loan from you at six per cent interest and I will secure with bonds and construction stock, I paying up Mr. Gould.

"Yours truly, S. H. MALLORY."

And referring to the subject of the above communication Mr. Mallory testified as follows:

Q. These $2,500,000 were disposed of for the benefit of the company, were they not?

A. I suppose that the $2,500,000 of bonds—that is a part of the $4,000,000.

Q. In the sale and disposition of these bonds at a discount of ten per cent, and when the stockholders took those bonds at ten per cent discount, did the Missouri Pacific Railway Company get any benefit out of that deduction, to your knowledge?

A. Not that I know of, but its stockholders got the benefit.

Q. The discount of ten per cent went to the benefit of your associate stockholders, who availed themselves of the opportunity?

A. Yes, sir.

Q. And the Missouri Pacific Railway Company, so far as you know, was not a party to the sale and disposition of any of those bonds at a ten per cent. discount?

A. No, sir.

Q. But you and Mr. Fitzgerald could have had the same benefit as the other stockholders if you had been in a position pecuniarily to have availed yourselves of it?

A. Yes, sir.

The foregoing is substantially all of the facts in evidence tending to characterize the transactions involved, and upon which the liability of the Missouri Pacific Company, if answerable in this action, must depend.

As stated in the former opinion, corporations are liable civilly for damages occasioned by the torts of their officers and agents committed while acting within the scope of their

authority as such; but although that principle may be regarded as fundamental, its practical application to the varied transactions of our commercial life is by no means free from difficulty owing to the want of a precise definition of the term "scope of authority." We have been referred to no clearer exposition of the subject than that found in Mechem, Agency, 312, viz.: "But while, as has been seen, authority is often to be implied from the conduct of the parties, yet it is a necessary and logical limitation upon the construction of such an authority that the power implied shall not be greater than that fairly and legitimately warranted by the facts. The reason of this rule is so apparent and so just that it needs no argument to support it. If the agency arises by implication from acts done by the agent with the tacit consent or acquiescence of the principal, it is to be limited in its scope to acts of a like nature; if it arises from the general habits of dealing between the parties, it must be confined in its operation to dealings of the same kind; if it arises from the previous employment of the agent in a particular business, it is, in like manner, to be limited to that particular business. In other words, an implied agency is not to be extended by construction beyond the obvious purpose for which it is apperantly created." In *Reynolds v. Witte*, 13 S. Car., 5, a very instructive case, it is said: "We must distinguish between the authority to commit a fraudulent act and the authority to transact the business in the course of which the fraudulent act was committed. Tested by reference to the intention of the principal, neither negligence nor fraud is within the scope of the agency, but tested by the connection of the act with the property is as much within the scope of the agency as negligence in allowing others to take it. The proper inquiry is, whether the act was done in the course of the agency and by virtue of the authority as agent. If it was, then the principal is responsible, whether the act was merely negligent or fraudulent."

And in a recent English case we find the following language: "Although a definition is difficult, I should say the act for which the master is to be held liable must be something incident to the employment for which the servant is hired and which it is his duty to perform." (*Stevens v. Woodward*, 6 Q. B. Div. [Eng.], 318.) Like views are expressed in 2 Hill, Torts, 323; Angell & Ames, Corporations, sec. 311; Beach, Private Corporations, 448; *Evansville & C. R. Co. v. Baum*, 26 Ind., 70; *Mott v. Consumers Ice Co.*, 73 N. Y., 543; *Brokaw v. New Jersey R. & T. Co.*, 32 N. J. Law, 332; *Johnson v. Barber*, 5 Gilm. [Ill.], 425; *Sherman v. Dutch*, 16 Ill., 285; *Keedy v. Howe*, 72 Ill., 136; Evans, Principal & Agent, 558*; Smith, Master & Servant, 339*; 2 Thompson, Negligence, p. 885. We are constrained to hold, from a careful re-examination of the subject, that our former conclusion in the application of the foregoing rule to the facts stated is indefensible. The Missouri Pacific Company had, as we have seen, on and previous to the transaction above recorded, delivered to the construction company the full amount of bonds to which the latter was entitled, and had to that extent, at least, performed the obligations of its contract. And it is not even charged that any portion of said bonds, or the proceeds thereof, were directly or indirectly returned to it. The time of said delivery may become material in view of another question presented by the record, but can have no bearing upon the issue now under consideration. It is sufficient for our present purpose that they were in fact delivered; that they became the property of the construction company, and were thereafter not subject to the control of the Missouri Pacific. True, a majority of the directors were, as found by the district court, friendly to the railroad company, and whenever its interests conflicted with those of the construction company voted against the interests of the latter; but how on this record could the railroad company have been interested in the sale of the bonds, whether at a discount or at a premium?

We assume for the purpose of this inquiry that the proofs warrant, not merely a finding of fraud by Gould and his associates, but that such fraud was accomplished by means of a conspiracy on the part of men officially related to the Missouri Pacific Company and presumably solicitous for its welfare. But we are unable to say from the record that the wrecking of the construction company, or the defrauding of its stockholders, was in any proper sense an incident to their powers or duties as representatives of the first named company, or so related to their employment as to be within the scope of their power according to the most liberal interpretation of the term. Had Sage, Dillon, and Cross, the three directors who are found to have been interested in the Missouri Pacific Company, at or prior to the meeting of July 28, entered into a conspiracy to defraud the construction company by embezzling and converting to their own use the $1,500,000 of bonds then owned and held by it, and had actually consummated their fraudulent purpose, we cannot conceive how the legal aspect of the case would have been essentially different. Yet no one will contend that the act of the conspirators would in that case be within the scope of their power as officers of the railroad company so as to render it liable for the result of their fraud. Equity is always solicitous of the rights of innocent stockholders of corporations, and although Jay Gould and his associates named in this record appear to own or control a majority of the stock of the Missouri Pacific Company, it is a matter of common notoriety, of which we must take notice, that there are many honest investors in that class of securities, and that some of the stock of that company is presumably held by persons innocent of any participation in the fraud charged. Now, if it is to answer in this action for the wrong alleged, the loss must be borne not alone by the participants in the fraud, but as well by the innocent and helpless stockholders. The foregoing fact is suggested, not because it is sufficient of itself to ex-

cuse a corporation for such wrongful acts of its officers as are clearly within the scope of their powers, but as a reason for caution by the courts in application of the recognized rule. Before leaving this subject it should be observed also that this action is, in its practical effect, one for an accounting by the construction company against the railroad company. It follows, as was said in the former opinion, that the proceeds of whatever judgment is rendered in favor of the plaintiff must, after satisfying the debts of the first named company, be distributed ratably among its stockholders; but, according to the record, eighty per cent of the stock of that company is held by Gould and the recreant officers above named, while the debts thereof appear to be trifling, not exceeding $60,000 in amount. It is evident, therefore, and such is the effect of our previous decision, that the allowance of this claim is to assess the sum of $500,000, not against Gould and his associates, but against the stockholders of the Missouri Pacific Company, and of which amount $400,000 and interest, less the ratable share of the debts of the construction company, must be turned over, not to Fitzgerald or Mallory, but to the very parties who are responsible for the confusion and disaster which overtook their venture.

But there is still another light in which the transactions in question may be viewed, and that is one suggested by the dissenting opinion heretofore filed, viz., that Messrs. Sage, Dillon, and Cross, the latter being at all times controlled by Gould, instead of acting in the interest of the Missouri Pacific Company were in fact using their positions of trust toward that company to profit personally at its expense and at the expense of its stockholders. It is sufficient, without further reference to the record, that the above conclusion is irresistible from the admitted facts, and is given especial emphasis as a ground of defense in the brief of counsel for the railroad company. Allusion is made to that fact in this connection merely for the pur-

pose of illustrating the attitude of the officers named toward the Missouri Pacific Company, the extent to which, if at all, the construction company or Fitzgerald and Mallory are affected by such corrupt purpose being reserved for consideration in connection with another branch of the case. It is further suggested as a ground for this claim that in consequence of the failure of the Missouri Pacific Company to deliver its bonds at the several times specified in the contract, the construction company was delayed in the completion of its work and was thereby subjected to great loss, both of promised subsidies and prospective profits; but that fact, although charged as a part of the general scheme to defraud, is not made the basis of a distinct claim of relief. And, conceding all that is claimed for the evidence bearing upon that point, we are still unable to perceive the force of the plaintiff's reasoning, inasmuch as there is no apparent relation between the alleged breach of contract by the railroad company and the subsequent disposition of the bonds by the construction company. The rule which should control in this and like cases is aptly stated in *Warwick v. Hutchinson*, 45 N. J. Law, 61, viz.: "The wrongful act must be the act of the defendant, and the wrong done and the injury sustained must be as to each other the relation of cause and effect, and the damages, whether they arise from withholding a legal right or the breach of a legal duty, must be the natural and proximate consequence of the act complained of." (See, also, *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb., 210; *Bridges v. Lanham*, 14 Neb., 369.) It follows that the claim based upon the discount of the bonds sold was rightly rejected by the district court and its action in that regard must be affirmed. This conclusion renders unnecessary an examination of the question of the alleged acquiescence to which prominence is given in the several briefs as well as the oral argument.

We will now briefly notice the claim in behalf of the

construction company on account of the sum of $62,500 paid to Jay Gould as interest, and to which reference is made in the forty-second finding of the district court. We said, referring to this claim, in the former opinion: "That for this amount, with interest, the Missouri Pacific Railway Company is liable to the construction company, as a necessary corollary, follows from the propositions heretofore discussed." The contention of plaintiff's counsel was that the pretended loan of the $2,500,000 of bonds by Gould was but a part of the conspiracy against the construction company and that the Missouri Pacific should be required to account for interest paid thereon on the ground that the directors, as in the transaction resulting in the disposition of the bonds, were acting within the scope of their authority. It was in that view of the case that the claim was allowed, and it follows naturally from what is here said with regard to the liability of the Missouri Pacific Company that our former decision will not stand the test of authority and that the claim in question must accordingly be rejected. But we find in the record another sufficient reason for the same conclusion. The loan was one of bonds payable in kind, and the claim in question is the precise amount of the semi-annual interest thereon as represented by the September, 1887, coupons paid by the Missouri Pacific Company at maturity, probably to Morton, Bliss & Co., the construction company's bankers, although the record is not clear on that point. But in the statement rendered by said firm for the month of September we find the following entry on the debit side of the account: "23d Sept., coups. $2,500,000 M. P. 5 per cent bds. borrowed of Jay Gould, $62,500." There is other evidence confirmatory to the above and which leaves no room to doubt the payment of the amount of this claim by the railroad company at maturity. It is a fact worthy of note, too, in this connection that the construction company does not claim to have returned said bonds and coupons, but that on the contrary there is still

due thereon an admitted balance of $82,000. Our conclusion, after a careful scrutiny of the evidence explanatory of the transaction under consideration, may be thus briefly summarized: (1.) The transaction was a personal one between Gould and the construction company, for which the Missouri Pacific Company is not responsible. (2.) The construction company ratified said transaction by receiving and appropriating the bonds borrowed and voluntarily paying the interest accruing thereon with the knowledge and approval of its directors, including the plaintiff as well as Mr. Mallory, its president.

Our examination includes a further inquiry, and which involves the claim in behalf of the construction company for $150,000 on account of the enforced reduction of the contract rate from $11,000 to $10,000 per mile for the first 150 miles of road constructed. The allegations of the plaintiff's bill, so far as they relate to this subject, are fully set forth in the opinion of Commissioner RYAN above mentioned and need not be repeated in this opinion. But preliminary to a consideration of the merits of that claim we are met by the contention that the transactions out of which it originated are in contravention of settled rules of public policy, and therefore void *ab initio*. Inasmuch as our investigation has led to a conclusion at variance with that stated in the opinion approved, as well as the able dissenting opinion of Commissioners RAGAN and IRVINE on the former hearing, it is deemed proper to mention here some of the facts which tend strongly to characterize the transaction, so far as the construction company is concerned, and which are especially significant as bearing upon the question of the good faith of the minority stockholders, Fitzgerald and Mallory. Our views with respect to the transaction, so far as it concerns the directors and others officially related to the Missouri Pacific Company, sufficiently appear from what has been said, and do not require further notice. The district court, it should be re-

marked, determined that question in favor of the legality of the contract by the twenty-fourth finding, as follows:

"(24.) The court finds that each and all of the above named contracts for the construction of the several roads named were in nowise unconscionable contracts, but were fair and reasonable contracts, in which the interests of all the parties to the several contracts were properly protected, and at the time of the execution of the said contracts the officers of the Fitzgerald & Mallory Construction Company, who executed said contracts on behalf of the construction company, acted in good faith in the interests of the construction company, and the officers of the Missouri Pacific Railway Company, who executed said contracts on behalf of said railway company, acted in good faith in the interest of the said railway company."

The above finding, so far as it asserts the good faith of the Missouri Pacific Company, cannot be sustained, since, as we have seen, it is, even according to the contention of that company, clearly against the evidence. It is charged in paragraph three of the plaintiff's bill, and fully established by the proof, that at the date of the contract with the Denver, Memphis & Atlantic Railroad Company, to-wit, April 6, 1886, and the subsequent contract with the Missouri Pacific Company, on May 4 following, the directors of the construction company were John Fitzgerald, the plaintiff herein, S. H. Mallory, S. S. King, T. M. Stuart, and Edward A. Temple, but that after the officers of the Missouri Pacific acquired a majority of the stock of the last named corporation they demanded the resignation of all of said directors except Fitzgerald and Mallory, and that on the 3d day of November, 1886, the board of directors were chosen to which reference is made in the twenty-eighth finding above set out. We have searched the record in vain for evidence tending to prove that the construction company, as organized at the date of said contracts, contemplated any other than legitimate transactions. It is

true the agreed rate for the construction of the Denver, Memphis & Atlantic line may appear exorbitant in the light of subsequent contracts, but the explanation thereof seems altogether reasonable, viz., that the securities of that company would have little marketable value compared with the bonds of the Missouri Pacific, in which Mr. Gould was personally interested, and in which he was investing his private fortune. But the record does contain evidence of good faith on the part of the construction company. On the 30th day of October, 1886, Mr. Mallory, as president, made and published the following statement:

"*To the Stockholders of the F. M. C. Co.:* Mr. Gould advises me that he offers 120 for F. M. C. Co. stock and Mo. P. take road and pay all liabilities of Const. Co. The following statement is made for our information: We have now 115 miles of track down, the grading and bridging mostly done on ninety-eight miles more and expect to get track on by July 1. The following is the estimated cost of 203 miles at $11,128 per mile, $2,268,638.84, for which we should receive per contract, 203 miles, $12,000, Mo. Pac. bonds.....$2,436,000 00
Subsidies..... 456,000 00

$2,892,000 00

$623,861 16

Making a dividend of forty-one per cent on $1,500,000 stock. When construction company was formed and contract made with Mo. Pac. it was not expected that over thirty per cent would have to be called in. Now it is the western stockholders who have made it possible for you to realize forty per cent in less than an average of six months time. We gave you an equal interest with us without any bonus, expecting that you would provide the necessary funds to carry on the work. Your means are at command—ours in land, merchandise, banks, etc., not easy to realize on. We built 200 miles of railroad in six months, therefore we

think that if it is thought best to terminate contract or sell out stock, that the Missouri Pacific pay forty per cent, which is no more than the contract price—at same time get a cheap road, worth more than it costs, and also to give to Mallory & Fitzgerald the town sites on line now under construction which have been secured by Town Site Company. * * * We went into the project in good faith, and have so acted. Statements and reports have not been made, probably, as should have been done. What we thought of was to get road, other things would take care of themselves, which I see has caused a feeling of distrust in your mind, and we are ready for any equitable adjustment. Under our contract there is 200 miles more of road not yet started on which the profits will equal those already earned."

In a subsequent statement, the date not appearing, Mr. Mallory says:

"The F. M. Construction Co. was organized with $1,000,000 capital. For reasons well known to all, capital was increased to $1,500,000, which was considered ample to build road and complete contracts. The control of the company was taken by New York people. It was expected that the company finances would be looked after for all alike. * * It is a well known fact that the western stockholders are not able to furnish means to build their portion of the 591 miles of road. The balance are. Our bonds were not sold when they could have been at par, and owing to circumstances over which we have no control we are compelled to take a discount of ten per cent. At the west end I have endeavored to give the eastern stockholders all the benefits arising from the construction of the road, and now I claim the company should take such steps as are necessary to procure funds to complete contracts."

The foregoing quotations are reinforced by other evidence, but are sufficient for our purpose, and satisfy us that prior to the ascendancy of the Gould interest in the man-

agement of the construction company, its only purpose was to make a legitimate, although liberal, profit out of said contracts, and that Fitzgerald and Mallory have been victims and not perpetrators of any wrongs subsequently committed in its name or through its agency.

There is also a question of pleading presented in this case. The legality of the several contracts is not assailed by answer or otherwise in the answer. The rule is correctly stated in the dissenting opinion as follows: "When upon the trial it is apparent from the evidence material to the issues that the cause of action rests upon an agreement against public policy the court will of its own motion refuse to enforce such agreement when the parties are *in pari delicto*." It may be added, however, as the essence of the authorities, that where the illegality of an agreement is not suggested by the plaintiff's pleadings or proofs it must, in order to be available to the adverse party, be especially pleaded. (*Wilde v. Wilde*, 37 Neb., 891.) If the parties hereto are *in pari delicto* within the rule stated, it is by reason not of the original scheme for the building of the Denver, Memphis & Atlantic road on the contracts mentioned, but on account of the subsequent manipulation thereof in fraud of the rights of the stockholders of the Missouri Pacific Company or others; and if the transactions alleged as the basis of this action are void for illegality, it is by reason of some fact or facts not disclosed by the plaintiff's bill or proofs, and should therefore have been pleaded by the respondent company.

Coming now to the merits of the claim, let us first ascertain the terms of the contract under which the 150 miles of road in question was constructed. The only specifications descriptive of the character of the work are contained in the following quotation from the contract of May 4: "The railroad to be constructed for the Denver company shall be of standard gauge, of not less than 56-pound steel rails, 2,600 ties to the mile, with stations not more

than eight miles apart, and water stations not more than twenty miles apart, and shall be equal in its general character to the roads now being constructed by the Missouri Pacific Railway Company in the state of Kansas, all subject to the approval of the chief engineer of the Pacific Company." By another provision payment was to be made for each ten miles of road as constructed, the contract price as finally agreed upon being $11,000 per mile, in the five per cent trust bonds of the Missouri Pacific Company. On May 25 Mr. Mallory addressed the vice president of the Missouri Pacific, Mr. Hopkins, advising him that ten miles of road would be completed the next week, and adds, "I suppose you are attending to the bonds." On June 7 he addressed Mr. Hopkins as follows: "We will want another 10 P. C. June 20 and another July 10 unless you can make disposition of bonds or make a loan for the company. If bonds are not ready I suggest a loan." On June 15 Mr. Hopkins addressed Mr. Mallory as follows: "Yours of May 25 and June 7 received. I find it will take some time before we can get the trust company to cancel bonds and mortgage. * * * Our attorneys inform us that this company cannot issue its bonds without calling a meeting of the stockholders to obtain their permission. This will make some delay and prevent any sale of bonds for the present, so you will have to obtain what money you want by calls on the stockholders." On October 10 Mr. Mallory wrote Mr. Hopkins as follows: "Under our contract the road should have been paid for in ten-mile sections. If this had been done the calls made would not have been necessary. * * * Funds are now needed to pay estimates and pay rolls. If not furnished the work will be delayed and subsidies jeopardized." It was this failure to pay for the road as constructed that occasioned the two statements of Mr. Mallory heretofore set out and which was continued until February 7, 1887, on which day a meeting of the directors was held in the city of New York, with the following result:

"195 BROADWAY, NEW YORK CITY,
"February 7, 1887.

"An adjourned meeting of the directors of the Construction Company was held this day, at which were present S. H. Mallory (who was chairman of said meeting), George J. Gould, R. I. Cross, and Russell Sage; also Mr. Jay Gould.

"The minutes of the previous meeting were read, and on motion of Mr. Sage were approved.

"Mr. Jay Gould, on behalf of the Pacific Company, stated that certain portions of the Denver railway were unsatisfactorily constructed, and for that reason the Missouri Pacific would decline to pay more than $10,000 per mile for the 150 miles of railroad built; that the Pacific Company was ready to take the road at that price.

"On motion of Mr. Cross, it was voted that the proposition of the Pacific Company to receive the 150 miles at $10,000 per mile be accepted."

The foregoing record and correspondence is set out, not because it sheds any direct light upon the subject of the completion of the road, but as preliminary to the principal question and as illustrating the relations of the parties to each other at the time of the alleged reduction. The findings of the district court on that issue are as follows.

"(14.) On the 15th day of June, 1886, the said construction company had ten miles of said road completed and ready for delivery to the Missouri Pacific Railway Company. That on the 15th day of July, 1886, the construction company had thirty miles of said road completed and ready for such delivery. That on the 14th day of February, 1887, the construction company had one hundred and fifty miles of said railroad completed and ready for delivery, with the exception of some finishing work upon the road-bed, bridges, and cattle guards. That on August 1, 1887, said road was entirely completed.

"(15.) That said railroad was turned over and delivered

to the defendant the Missouri Pacific Railway Company by the defendant the Fitzgerald & Mallory Construction Company, as follows: One hundred and fifty miles on the 14th day of February, 1887; twenty-nine and eighty-three hundredths miles on the 11th day of August, 1887; ninety-three and fifty-seven hundredths miles on the 11th day of August, 1887; one hundred and twenty-four and forty-two hundredths miles on the 1st day of October, 1887; twelve and eighty-two hundredths miles on the 15th day of December, 1887."

It is, as we have seen, contended by the Missouri Pacific Company that the action of the board of directors of the construction company on February 7, 1887, was simply the settlement and satisfaction of a disputed claim, and should, therefore, be upheld by the applications of familiar principles; but to that proposition we cannot assent. In the first place it is not shown that there was a *bona fide* dispute between the parties, while on the other hand the evidence tends strongly to prove that the claim with respect to character and condition of the work was a mere pretense on the part of the Missouri Pacific Company, or of Mr. Gould in its name. The latter had inspected a portion of the first 150 miles of road in the month of September previous, and his objection to the work is indicated by one answer, viz.: "I told Mr. Mallory the work was very defective, badly located and badly constructed, and I told him I would feel ashamed to ask the Missouri Pacific to accept it." George Gould, who accompanied the last named witness at the time mentioned, testified: "Well, I distinctly recollect that Mr. Jay Gould was thoroughly disgusted with the way the road had been built, and he told Mr. Mallory so. Becoming tired and disgusted, he came back before he had gone quite over the road. I remember he stated that it was in such bad condition that he would not go further over it, and told Mr. Mallory he would have the Missouri Pacific engineer go over the balance and make a report to him. * * *

He was particularly disgusted with the alignment of the road. There was an unnecessary amount of curvature." Mr. S. H. H. Clark, who was also one of the party, testified in his examination in chief that with the exception of the alignment and broken grades and the ties, he considered it a fair road. He also testified that Mallory's attention was directed to the fact that some of the ties were inferior in size and quality, and that the latter agreed to put in 176 extra ties per mile. We have not searched the record in order to determine whether the defendant company was a party to the location of the line, since the strong presumption is that the route, if not actually located, was at least approved by the engineering department of the road, hence objections on account of the alignment after the road was completed and ready for delivery should not be regarded with favor. It is unnecessary to refer to the plaintiff's evidence as to the condition of the line in September, 1886, or even in February, 1887, since it is as well established as a disputed proposition can be, that it was finally completed according to the terms of the contract, under the direction and at the cost of the construction company. It is a fact worthy of comment that Mr. McLaughlin, chief engineer of the Missouri Pacific, was not produced as a witness, although Mr. Thayer, the engineer under whose direction the work was carried on, had testified in behalf of the plaintiff that he had gone over the line with him, McLaughlin, about February 13, 1887, when the road was finally inspected and approved by the latter, and the only objection made thereto was to suggest an improvement in one bridge, which was subsequently made. In the record of the meeting of February 7 no mention is made of the chief engineer or suggestion that he had refused to accept the road on account of the defective construction, or that the work was not equal in character to other lines constructed by the defendant company in Kansas.

During the argument, in response to a question by the writer relative to the expense incurred by the Missouri Pacific Company in completing this particular 150 miles of road, it was answered, without being challenged, that the road was fully completed by the construction company. And it is conceded that subsequent to the meeting of March 7 the last named company, at its own expense, employed from 250 to 350 men on that part of the line for a period of from one to three months in taking out false work, putting in truss bridges, widening banks and excavating, etc. Briefly stated, the construction company, on the demand of the Missouri Pacific, first accepted a reduction of $1,000 per mile to compensate for an alleged breach of contract, and proceeded immediately at its own expense to complete the road according to the letter of the agreement, so that the railroad company, in addition to the road for which it contracted, was enriched to the amount of $150,000 out of the treasury of the construction company. We must confess to overlooking the unconscionableness of the transaction in our admiration for the genius which could conceive and successfully execute such a plan. The rule has been long recognized, and may be regarded elementary, that a debt cannot be extinguished by the payment of a part thereof unless made and accepted upon a new and sufficient consideration. (*Fitch v. Sutton*, 5 East [Eng.], 230; *Heathcote v. Crookshanks*, 2 T. R. [Eng.], 24; *Harrison v. Close*, 2 Johns. [N. Y.], 448; *Keele v. Salisbury*, 33 N. Y., 648; *Hastings v. Lovejoy*, 140 Mass., 261; Bishop Contracts, 412.)

Another intrinsic vice of the transaction is that a majority of the directors of the construction company were, by reason of adverse interest, disqualified to act therein. The action of February 7, 1887, differs from that resulting in the disposition of the bonds, since the Missouri Pacific Company was one of the contracting parties, and represented at said meeting by Mr. Gould, whose dominion over both corporations, it appears, was absolute. The directors

of the construction company present thereat were Messrs. Mallory, who acted as president, Cross, George Gould, and Sage, the two latter being also directors of the Missouri Pacific Company. One who is agent for two parties cannot, in the absence of express authority from each, represent both in a transaction in which their interests conflict. (Morawetz, Corporations, 528; Mechem, Agency, 455.) And never was the infallible truth that a man cannot serve two masters better illustrated than by the facts of this case. Each party to the agreement was interested in securing the most advantageous terms consistent with fair dealing and the rights of the other, hence Messrs. Gould and Sage could not at the same time protect the rights of both corporations. Conceding the personal integrity of the directors named, as well as of Mr. Cross, who acted with them, still the law has placed the seal of its disapproval upon the transaction and pronounced it fraudulent, not on account of any imputed evil purpose on their part, but from motives of public policy. It was said in *Gorder v. Plattsmouth Canning Co.*, 36 Neb., 548: "The relation of directors to the stockholders of a corporation is not essentially different from that ordinarily existing between trustees and *cestui que trust.* Courts of equity will set aside such contracts for fraud, and generally on a slight showing of fraud on the part of the trustee." And the proposition that this transaction is fraudulent as against the construction company, without regard to the motives of the directors named, is sustained by the following among the many cases which might be cited to the same effect: *United States Rolling Stock Co. v. Atlantic & G. W. R. Co.*, 34 O. S., 450; *Kitchen v. St. Louis, K. C. & N. R. Co.*, 69 Mo., 204; *Flagg v. Manhattan R. Co.*, 4 Am. & Eng. R. R. Cases [N. Y.], 141; Beach, Private Corporations, 247.

The alleged settlement is voidable for another reason viz., it was procured under circumstances amounting to practical compulsion, which is nearly related to duress, and

may be made the ground of relief either at law or equity. A payment or concession exacted will be held compulsory when made or allowed through necessity in order to obtain possession of property illegally withheld, where the detention is fraught with great immediate hardship or irreparable injury. (Pollock, Contracts, 555*; *Astley v. Reynolds*, 2 Strange [Eng.], 915; *Shaw v. Woodcock*, 7 B. & C. [Eng.], 73; *Cobb v. Charter*, 32 Conn., 358; *Harmony v. Bingham*, 12 N. Y., 99; *Stenton v. Jerome*, 54 N. Y., 480; *Peyser v. Mayor*, 70 N. Y., 495; *Spaids v. Barrett*, 57 Ill., 289; *Chandler v. Sanger*, 114 Mass., 365; *Lonergan v. Buford*, 148 U. S., 581.) The contract, as we have seen, provides for payment on the completion of each ten miles of road. Thirty miles thereof was completed as early as July 15, 1886, and according to the statement of Mr. Mallory, under date of October 30, 1886, there was then completed 115 miles of road and, in addition thereto, 98 miles which would be finished not later than January 1 following. The only response to the repeated calls upon the Missouri Pacific for money was assessments of the stock of the construction company until increasing demands had exhausted not only the resources of the company but the private funds as well of Messrs Fitzgerald and Mallory. So that at the date of the meeting in February both the individuals named and the company were confronted by bankruptcy and financial ruin. It was under these circumstances that the construction company chose to accept payment at the rate of $10,000 per mile instead of the contract price, rather than the alternative of an entire abandonment of the enterprise in which it was engaged, and that such action was compulsory within the rule established by the authorities cannot on the record be doubted.

It is the province and delight of equity to brush away mere forms of law, whenever designed as an ambuscade from whence to assail either public or private rights. Such, in substance, is one of the maxims of the law, and never

was it more fittingly applied than to the facts of this case. But it is strenuously insisted that both the complaining stockholders and the construction company are, by reason of their acquiescence in the alleged compromise, now estopped to deny its legality. Let us briefly examine that question in the light of the record. Mr. Mallory, referring to the subject, testified: "I objected to the throwing off of the $1,000 per mile at all times, but the majority of the board accepted it and I had to acquiesce." Mr. Black, secretary of the Denver Company, who was present at the meeting of February 7, was asked if Mallory consented to the proposition of Mr. Gould, and in reply said: "I don't think he did, not at the meeting at least, because at the meeting he opposed it and made quite a lengthy statement in opposition. He said the company had earned the full contract price and was entitled to it." Mr. Fitzgerald, who was not present at that meeting, testified that on learning of the action taken by the board he objected, and soon thereafter talked the matter over with Messrs. Sage and Dillon, who would not consent to a correction. He protested at different times to other members of the board and threatened suit for the recovery of the balance claimed, but offered no resolution to rescind the action complained of. Acquiescence in a fraudulent transaction is in effect a new agreement made consciously with an intent to condone the wrong done, and will not be inferred from doubtful evidence, but should be established like any other material fact, by the party asserting it. We are referred to no positive act indicating acquiescence in this instance, the only claim being that it should be inferred from the time intervening between the date of the action complained of and the institution of the suit, to-wit, one year, ten months, and seventeen days. Time alone, unaffected by other circumstances, will not bar the right to rescind a voidable transaction, since it is not for a wrong-doer to impose extreme vigilance and promptitude as conditions to the exercise of the rights of the injured party. (Pollock,

Contracts, 548*; *Pence v. Langdon*, 99 U. S., 581; *Montgomery v. Pickering*, 116 Mass., 227; *Tarkington v. Purvis*, 128 Ind., 187; *Maxon v. Payne*, L. R., 8 Ch. App. [Eng.], 881; *Foley v. Holtry*, 41 Neb., 563.)

There is still another contention of the defendant company which calls for notice in this connection, viz., that there is a defect of parties hereto. It is said that the action in this class of cases is primarily against the defaulting directors or officers and that the proceeding against the corporation is but an incident thereto, from which it is argued that George Gould, Sage, Dillon, and Cross are necessary parties to a determination of this controversy. The case of *Slattery v. St. Louis & New Orleans Transportation Co.*, 91 Mo., 217, to which we have been referred, appears to sustain the proposition contended for. But unfortunately for the defendant that objection was not made by answer or demurrer and is not now available, inasmuch as the case actually made involves only the rights of parties before the court. (Civil Code, sec. 46; Boone, Code Pleading, sec. 51; Maxwell, Code Pleading, p. 66; *Reformed Presbyterian Church v. Nelson*, 35 O. S., 638.)

It is deemed unnecessary to restate the entire account between the defendant and the construction company. We are, after a careful comparison, however, constrained to adopt the method of computation employed in the dissenting opinion as the more satisfactory, and which has the apparent approval of the defendant company. To the finding therein in favor of the construction company we add the further sum of $150,000, being the balance due at the contract rate for the first 150 miles of road, with interest. The account may accordingly be summarized thus:

Balance as per previous finding.....	$63,816 95
Interest to January 1, 1895.....	4,839 38
Additional allowance.....	150,000 00
Interest at seven per cent to January 1, 1895,	82,250 00
	$300,906 33

In the plaintiff's amended bill he prays for a receiver to wind up the business of the construction company and to distribute its property among the stockholders thereof, after paying and satisfying all of its just debts, and a supplemental application has been addressed to us for the appointment of a receiver here instead of remanding the cause for final action by the district court. We should, in view of our settled practice, feel constrained to dismiss the application summarily, but realizing that we are not without blame for the long delay in this court, to the prejudice of all parties concerned, we have decided to retain the cause for such further action as may hereafter be deemed appropriate. The usual and orderly course of procedure would be through the agency of a receiver. The application is, however, resisted in this instance for reasons which will be here noticed.

The first objection which we notice is that this court is without jurisdiction of the action, and which is seriously urged, notwithstanding the hearing of the cause on its merits in the district court and in this court. From the record submitted in connection with the supplemental proceeding it appears that the cause was at one time removed into the circuit court of the United States for the district of Nebraska on the petition of the Missouri Pacific Company; that there was thereafter a plea to the jurisdiction of that court and a motion to remand, both of which were overruled by the district judge, but that subsequently an order remanding the cause was made by the circuit judge. The last named order is, it is contended, in excess of authority and void, hence the circuit court still has jurisdiction of the action. We will not examine the grounds for that claim. It is a sufficient answer that in all cases of apparent conflict between the state and federal courts the latter are the exclusive judges of their jurisdiction over the subject of the action. (*Freeman v. Howe*, 24 How. [U. S.], 459.) We must, therefore, decline to review the finding by the cir-

cuit court against its jurisdiction of this cause or the order remanding it to the district court of Lancaster county.

The second objection is based upon the following facts: On the 24th day of December, 1888, John Fitzgerald personally sued the Fitzgerald & Mallory Construction Company in the district court of Lancaster county on account for money and material furnished and services rendered. Said cause was removed to the circuit court for the district of Nebraska, where a trial was had, resulting in a judgment for the plaintiff therein in the sum of $51,412.62, which was subsequently affirmed by the supreme court of the United States, and is still unsatisfied; that an order of attachment was issued from the district court of Lancaster county, and served by summoning the Missouri Pacific Company, as garnishee of the construction company, and that in the final judgment the said garnishee was ordered and adjudged to hold, subject to the further orders of the circuit court, all money owing by it to the said defendant; wherefore it is said that whatever sum is now due from the defendant to the construction company is in the custody of that court and beyond the control of a receiver named by us. A critical examination of that proposition is rendered unnecessary, since counsel have overlooked the fact that the attachment proceeding was evidently abandoned in the circuit court, where the record shows an ordinary judgment for damage unaccompanied by an order against the Missouri Pacific Company as garnishee. This case is therefore plainly distinguishable from *Reed v. Fletcher*, 24 Neb., 435, and *Northfield Knife Co. v. Shapleigh*, 24 Neb., 635, cited by defendant.

Lastly, it is objected on the ground that a receiver for the construction company was named by the circuit court for the district of Nebraska on the 12th day of January, 1895, in a suit brought against it by by the Kansas, Colorado & Pacific Railroad Company, a Kansas corporation. It is a rule, recognized alike by state and federal tribunals, that

the court which first acquires jurisdiction of the subject of an action will retain such jurisdiction until the final determination of the controversy. Indeed, as remarked by Mr. Justice Swayne in *Taylor v. Taintor*, 16 Wall., 370, "It is indeed a principle of universal jurisprudence that where jurisdiction has attached to person or thing, it is, unless there is some provison to the contrary, exclusive in effect until it has wrought its function." (See, also, *Home Ins. Co. v. Howell*, 9 C. E. Greene [N. J.], 238; *Ackerly v. Vilas*, 15 Wis., 401; *Taylor v. Carryl*, 20 How. [U. S.], 583; *Freeman v. Howe*, 24 How. [U. S.], 450; *Ober v. Gallagher*, 93 U. S., 199.) No sufficient reason having been suggested for denying the application, a receiver will be appointed with authority to collect the amount here adjudged against the defendant company, and to disburse the same under the directions of the court. Decree for plaintiff in the sum of $300,906.33, to draw interest from the first day of this term.

DECREE ACCORDINGLY.

RYAN, C., adheres to the views heretofore expressed by him.

STATE OF NEBRASKA, EX REL. PETER MCMULLEN, APPELLEE, V. AMBROSE AFFHOLDER ET AL., APPELLANTS.

FILED APRIL 4, 1895. No. 7180.

Mandamus: REVIEW. A *mandamus* proceeding under our Code of Civil Procedure is an action at law and can be reviewed only on error and cannot be appealed. *State v. Lancaster County*, 13 Neb., 223, followed.

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

H. H. Bowes, for appellants.

Charles T. Dickinson, contra.

HARRISON, J.

The appellee as relator filed a petition in the district court of Burt county December 9, 1893, in an action then commenced by him against the appellants as officers of school district No. 58, Burt county, the object of which was to obtain the issuance of a writ of *mandamus*, ordering the appellants to comply with the provisions of an act of the legislature entitled "An act to provide cheaper text-books, and the district ownership of the same," (Comp. Stats., 1893, pp. 771*a*, 771*b*,) and furnish to his children, and other pupils of the school in the district, text-books for their use. An alternative writ was allowed and served upon appellants, to which they made a return or answer, and as a result of the submission to and consideration of the case by the district court a judgment was rendered against the respondents, by which a peremptory writ of *mandamus* was allowed to issue against them, from which judgment they appealed to this court.

An action of *mandamus* is an action at law and governed, in regard to trial and review, by the rules of practice applicable to such actions and can only be reviewed in this court in an error proceeding, and not by appeal. In the case of *State v. Lancaster County*, 13 Neb., 223, a case in which a *mandamus* proceeding was appealed to the supreme court, it was held: "A *mandamus* under our practice is an action at law, and is reviewable only on error and not by appeal;" and in the opinion it was said: "Appeals are authorized by statute in actions in equity, but a proceeding by *mandamus* is strictly a legal action. In *Commonwealth v. Dennison*, 24 How. [U. S.], 97, Taney, C. J., says: 'A *mandamus* in modern practice is nothing more than an action at law between the parties, and is not now regarded as a

prerogative writ.' An action at law can be reviewed only on error." (*State v. Lancaster County*, 13 Neb., 223; *State v. Chicago, St. P., M. & O. R. Co.*, 19 Neb., 482; *State v. School District*, 30 Neb., 527; Maxwell, Pleading & Practice, 729.) The appeal in the case at bar must be dismissed.

APPEAL DISMISSED.

MARY SHEEDY, APPELLANT, V. JAMES H. MCMURTRY, APPELLEE.

FILED APRIL 4, 1895. No. 7160.

1. **Right of Plaintiff to Dismiss Action: CONDITIONS.** The right of a plaintiff to dismiss an action at any time he so desires is not an absolute unqualified right, but conditions precedent, such as payment of costs, may be imposed by the court in its discretion.

2. **Appeal: DISMISSAL: PRACTICE: ATTORNEY'S LIEN: SETTLEMENT.** An action for specific performance of a contract for sale of real estate, was compromised after trial had in the district court and appeal taken to this court, a third party purchasing the interest of plaintiff in such action. The defendant in the action, for a valuable consideration, became entitled to be released and discharged from all obligations existing upon him by virtue of such contract and a dismissal of the action. After these occurrences and motion filed by defendant to dismiss the suit and a dismissal filed by the party who succeeded to the interest of plaintiff, the attorney for plaintiff filed a lien for fees and expenses in conducting the suit, also a petition asking to be allowed to intervene and prosecute the appeal unless such fees and expenses were paid. *Held*, That inasmuch as the plaintiff's rights against defendant had been extinguished by settlement made before the lien was filed, or any notice of it given to defendant, there was nothing to which it could attach remaining in the hands of defendant, and the defendant was entitled to have the cause dismissed. *Held further*, That the right to payment of such fees and expenses by the plaintiff, or the party who succeeded to her rights, could not be properly litigated in this action at this time.

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

Charles O. Whedon and *Charles E. Magoon*, for appellant.

J. R. Webster, *contra*.

HARRISON, J.

On the 27th day of May, 1893, Mary Sheedy and James H. McMurtry entered into a contract by which she agreed to sell and he to purchase certain real estate situate in the city of Lincoln, and at a subsequent date during the same year an action was commenced by Mary Sheedy in the district court of Lancaster county, the relief sought being a specific performance of the contract. Issues were joined and trial of them had in the district court and an appeal from the decree therein rendered taken to this court by the plaintiff. As the result of the negotiations between the parties and others during its pendency here, the property involved was conveyed by Mrs. Sheedy to Kent K. Hayden, the consideration being $1,750, and the following instrument executed by her and delivered to him:

"Know all men by these presents, that I, Mary Brust, formerly Mary Sheedy, in consideration of fifteen hundred dollars to me in hand paid and receipt whereof is hereby acknowledged, do hereby set over and assign to Kent K. Hayden, of Lincoln, Nebraska, all interest, claim, demand, or right of action I have or may claim against James H. McMurtry, of Lincoln, Nebraska, in, under, or in any way arising out of the contract for sale of my interests in the real estate and property of the estate of John Sheedy, deceased, bearing date May 27, 1893, and I hereby authorize my said assignee to prosecute, collect, compromise, satisfy, release, and discharge all suits or claims founded on or growing out of said contract in his own name or in my

name as to him shall seem fit, but at his own cost and expense, and to his own proper use, and I hereby name, constitute, and appoint him, Kent K. Hayden, my true and lawful attorney in fact by these presents, irrevocable, in my name, place, and stead to do all things necessary or proper to be done in the premises as fully and effectually as I might do if myself personally present, hereby ratifying and confirming all my said attorney shall do in the premises."

It further appears that of the $1,750, the consideration agreed to be paid for Mrs. Sheedy by Kent K. Hayden, McMurtry paid $750 and Hayden $1,000, the agreement between these two parties being that in consideration of the payment of the $750 by McMurtry, Hayden would release and discharge McMurtry from any and all liability under the contract of purchase, the basis of the action for specific performance. Hayden, on October 2, 1894, executed and delivered to McMurtry a full release, satisfaction, and discharge of all obligations on his part arising out of such contract, and on the same date the attorney for McMurtry filed a motion in this case for the dismissal of the appeal, setting forth therein, as grounds therefor, the facts in reference to the transactions between Mrs. Sheedy, Hayden, and McMurtry, and which in the main, as to the substance and effect, we have hereinbefore stated, and on January 2, 1895, served a notice of this motion on attorneys for appellant, and on January 15, 1895, the following was filed in this court for Kent K. Hayden: "Comes now appellant Mary Sheedy, by Kent K. Hayden, her attorney in fact, and hereby dismisses the appeal taken by her herein from the judgment of the district court, at her own costs." On January 26, 1895, the attorney for appellant filed the following: "Notice is hereby given that I, Chas. O. Whedon, an attorney at law, and attorney for the appellant in this suit, claim and have a lien on the premises described in the petition, and belonging to the appellant at the time this suit was commenced, and on all the property in said

petition described and on the contract set forth in the petition in this case for the sum of $523.25, for my services as attorney for said appellant and for moneys expended and disbursed in the prosecution of this suit; $400 of said sum being for services as attorney for plaintiff and appellant and $123.25 for and on account of moneys paid out in the prosecution of this action;" and on January 28, 1895, filed a petition in which he asked to be allowed to intervene, and unless his fee and money expended by him, etc., were paid, that the dismissal of the action be not allowed and he be permitted to prosecute it to final decree for the purpose of obtaining payment of the fee and other moneys. After a hearing in this court the following order was made and entered: "This cause came on to be heard upon a motion by the appellee to dismiss the appeal herein, on consideration whereof it is ordered by the court that said motion to dismiss be sustained on condition that Kent K. Hayden within ten days pay to the clerk of this court all the taxable costs in this court and the court below, including printing of briefs."

The right of a plaintiff to dismiss his action at any time he so desires before it has been submitted to the court or a jury, as a matter of course, as a general proposition, is without doubt. In this state he may do so during vacation if no set-off or counter-claim is filed by the opposing party, but it is upon payment of the costs. (Sec. 430*a*, Comp. Stats., 1893, p. 911.) But we think that the existence of the right of a plaintiff to dismiss at any time during the pendency of a cause, as a general proposition, must be qualified, and is not absolute in the sense that it takes the subject without the control of the court in which the cause is pending, so that it cannot, within its discretion, impose the condition of the payment of costs as obligatory and precedent to a dismissal of the action. In the case of *Young v. Bush*, 36 How. Pr. [N. Y.], 240, after citing in support of the doctrine that the court may make the allowance of

a dismissal depend upon the payment of costs, *McKenster v. Van Zandt*, 1 Wend. [N. Y.], 13, *Harden v. Hardick*, 2 Hill [N. Y.], 384, and *Huntington v. Forkson*, 7 Hill [N. Y.], 195, it is said: "The principle asserted in all these cases and numerous others is, that the right to discontinue is not absolute, that it is to be exercised under the control of the court, and that equitable terms may be imposed in proper cases, and that the right to discontinue may be disallowed in the discretion of the court, or restricted * * upon equitable considerations."

It appears from some affidavits filed in support of the motion to dismiss that neither McMurtry nor Hayden, at the time of the transaction of the business between them and Mrs. Sheedy, had knowledge that attorney for appellant had any claim or demand against Mrs. Sheedy for fees, money expended for her in prosecuting the suit, or costs paid, and it is not claimed or shown that there was any fraud or collusion practiced or attempted in the transaction between Mrs. Sheedy, Kent K. Hayden, and James H. McMurtry which resulted in a full settlement of the matters at issue in the case, and McMurtry's right to a dismissal of it. No lien had then been filed, nor was, as we have seen, filed until January 26, 1895, after the appeal of the case to this court, and the settlement and filing of the dismissal by Hayden, and the motion to dismiss for McMurtry. A lien in favor of the attorney upon property in the hands of the adverse party belonging to his client can only exist from the time of giving notice of the lien to that party, and as to the rights of James H. McMurtry, under the facts shown by the testimony accompanying this motion, we are satisfied he was warranted in perfecting any settlement that he could effect with Mrs. Sheedy, or the party who succeeded to her rights in the premises (*Elliot v. Atkins*, 26 Neb., 403; *Lavender v. Atkins*, 20 Neb., 206; *Rowe v. Fogle*, 10 S. W. Rep. [Ky.], 426; *Mosely v. Jamison*, 14 So. Rep. [Miss.], 529; Weeks, Attorneys at Law,

sec. 382, and cases cited in note 3; 1 Am. & Eng. Ency. Law, 970 *et seq.*, and notes); and filing the attorney's lien after the settlement was completed could not confer any rights in favor of the attorney as against McMurtry other than existed at the time of its filing in favor of his client, and these had been fully and entirely extinguished by the adjustment of the difficulty, which had been previously completed, and any liability of Mary Sheedy in favor of the attorney for fees or expenses due him in the case, or against Hayden, if he assumed and agreed to pay such liability, cannot properly be litigated in this case at this time in this court. An order conforming to the views herein expressed and dismissing the action on the payment of all costs was made and entered March, 1895.

DISMISSED.

FRED SCHELLY V. C. SCHWANK.

FILED APRIL 4, 1895. No. 4672.

1. **Instructions:** ASSIGNMENTS OF ERROR. Where instructions are grouped in the respective paragraphs of a petition in error in which the giving or refusal to give them is assigned as error, such errors will be examined no further than to determine that of those given one was correct, or of the instructions refused the action as to one was not erroneous.
2. **Assignments of Error.** An assignment in a petition in error that "there was error of law occurring at the trial, duly excepted to" is not sufficient to obtain a review of the action of the court upon the admission of testimony.
3. **Review:** SUFFICIENCY OF EVIDENCE. Where there is sufficient evidence to sustain a verdict it will not be disturbed.

ERROR from the district court of Madison county. Tried below before POWERS, J.

E. P. Weatherby and *S. O. Campbell*, for plaintiff in error.

Allen, Robinson & Reed, contra.

HARRISON, J.

This action was commenced in the district court of Madison county by defendant in error against George Davis, and in the petition it was alleged, in substance, that on the 13th day of May, 1886, the firm of Wiegand & Stratman was indebted to defendant in error in the sum of $400, and executed and delivered to him for said amount a note and a mortgage of certain personal property to secure its payment, and on the next day defendant in error, or George Dopson, his agent, took possession of the mortgaged chattels and advertised them for sale, or was proceeding in the regular manner to foreclose the mortgage; that on the 3d day of July, of the same year, George Davis, the then sheriff of Madison county, by virtue of a writ of execution issued from the county court, levied on the property, took it into his possession, and converted the proceeds to his own use, thereby depriving the defendant in error of the security for the payment of the note, or debt evidenced by it. There was a further allegation of the insolvency of Wiegand & Stratman and each of them. The answer of the sheriff denied each and every allegation of the petition, except that there was a firm doing business under the name and style of Wiegand & Stratman, and that the members composing the firm were August Wiegand and Bernard Stratman, and the allegation in relation to insolvency, and alleged affirmatively that at the time he took and sold the goods and chattels described in the petition he was sheriff of Madison county, and did so as such officer and by virtue of an execution issued by the county judge of the said county upon a judgment which had been rendered in the county court in favor of Fred Schelly and against Wie-

gand & Stratman. The reply filed was a general denial. Before the trial of the cause the execution creditor, Fred Schelly, was substituted as defendant for and instead of George Davis. The case was tried to the court and a jury, the jury returning a verdict in favor of defendant in error, and after motion for new trial, filed on behalf of the adverse party, was submitted and overruled, judgment was rendered on the verdict and the case has been presented to this court for review.

It is assigned for error in the petition that "the court erred in giving the first, third, and fourth instructions asked by the plaintiff." In the motion for new trial this error was stated as follows: "The court erred in giving the instructions asked for by the plaintiff, to all of which the defendant then and there duly excepted." So far as the record discloses, there were but three instructions by request of defendant in error, and in the argument in the briefs filed by counsel for plaintiff in error it is not claimed that the third one was erroneous. All objection to it is therefore waived, and after examination we are satisfied that this instruction was correct and applicable, and, following the rule of this court, that where several instructions are grouped in an assignment of error relating to their giving, they will be examined no further than to ascertain that any one of them was correctly given, this assignment will not be further considered. (*Jenkins v. Mitchell*, 40 Neb., 664.)

Another allegation of the petition in this court is that "the court erred in refusing to give the first, second, and third instructions asked by defendant in the lower court." An examination of the instructions referred to in this assignment discloses that one, if not more of them, was fully covered by the instructions given by the court on its own motion, and this being determined, they will not be further considered, having been assigned collectively. (*Hewitt v. Commercial Banking Co.*, 40 Neb., 820; *Murphy v. Gould*, 40 Neb., 728.)

It is claimed that the court erred in admitting certain testimony. This is not referred to in any assignment in the petition in error unless it was intended to be included in the general statement that "there was error of law occuring at the trial, duly excepted to." This assignment was insufficient to obtain a review of the rulings of the district court on the admission of evidence. (*Houston v. City of Omaha*, 44 Neb., 63; *Risse v. Gasch*, 43 Neb., 287; *Mullen v. Morris*, 43 Neb., 592; *Murphy v. Gould*, 40 Neb., 728.)

The only further assignment of error is that the verdict is not sustained by sufficient evidence. From an examination of all the testimony it appears that there was a conflict on some of the points at issue in the case, but we are satisfied of its sufficiency to sustain the findings and verdict of the jury, including its conclusion upon the question of the amount of the recovery as stated in the verdict. It is the established rule that where there is ample evidence to sustain a verdict, or it is not clearly or manifestly wrong, it will not be disturbed; hence the verdict in this case must stand. (*Prewitt v. York County*, 43 Neb., 267.)

The judgment of the district court is

AFFIRMED.

A. H. WEIR & COMPANY, APPELLEE, V. SUSIE L. THOMAS, APPELLEE, IMPLEADED WITH SARAH F. HARRIS, APPELLANT, ET AL.

FILED APRIL 4, 1895. No. 6206.

Mechanics' Liens: MORTGAGES: PRIORITIES. In a contest for priority as between a mortgage filed for record August 21, 1890, and a claim for a mechanic's lien in which the material was alleged to have been delivered "between August 21, 1890, and January 22, 1891," *held*, that the word "between" excluded the 21st, from which it resulted that the lien of the mortgagee was senior and superior to that of the material-man.

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

Harwood, Ames & Pettis, for appellant.

Mockett, Rainbolt & Polk, S. L. Geisthardt, Darnall & Babcock, and *J. S. Kirkpatrick, contra.*

RYAN, C.

In its petition the firm of A. H. Weir & Co. alleged that in pursuance of a contract with F. J. Andrews it had furnished material for a building on and between August 21 and January 22, 1891, for which, after crediting all payments, there still remains due a balance of $404.30, for which sum, with interest, there was a prayer for a foreclosure. Sarah F. Harris, one of the defendants, appeals from the decree, which postponed her rights to those of A. H. Weir & Co. Her mortgage on the premises, against which the mechanic's lien was claimed, was filed on August 21, 1890. In the itemized account attached to the affidavit filed for a lien there were descriptions of lumber, but no date was specially given in connection with any of these items earlier than August 23, 1890. To establish its priority over this mortgage, however, the following language, with which the statement of account was prefaced, was relied upon by plaintiff: "Lincoln, Neb., December 29, 1890. Estimate on original bill made by A. H. Weir & Co. For Susie L. Thomas job. F. D. Andrews, contractor. Delivered between August 21, 1890, and January 22, 1891." If this language fairly implies that the two dates named are included by the use of the word "between," the finding of the district court adverse to the mortgage in question is sustainable, otherwise not.

In the case of *Bunce v. Reed*, 16 Barb. [N. Y.], 347, was involved the definition of the word "between," found in the same connection as above. Judge Hand said: "The

affidavit of publication is defective in this case unless the words 'between the 7th day of December, 1850, and the 1st day of March, 1851,' supply the defect. The 7th day of December was Saturday, and that was the last day notice could have been published. It has been decided that 'till' includes the day to which it is prefixed. (*Dakins v. Wagner*, 3 Dowl. P. C. [Eng.], 535.) But 'between,' when properly predicable of time, is intermediate, and strictly does not include in this case either the 7th of December or 1st of March. Between two days was exclusive of both. (*Atkins v. Boylston Fire & Marine Ins. Co.*, 5 Met. [Mass.], 440.) The affidavit does not show a publication eighty-four days."

In *Atkins v. Boylston, supra*, the coffee insured was "to be shipped between February 1 and July 15, 1840," under the terms of the policy. In the opinion of the court there was the following language: "It is undoubtedly true that the word 'between' is not always used to denote an intermediate space of time or place, as the plaintiff's counsel has remarked. We speak of a battle between two armies, a combat, a controversy, or a suit at law between two or more parties; but the word thus used refers to the actions of the parties, and does not denote locality or time. But if it should be said that there was a combat between two persons between two buildings, the latter word would undoubtedly refer to the intermediate space between the buildings, while the former word would denote the action of the parties. But it was argued that the word 'between' is not always used as exclusive of the termini when it refers to locality. Thus, we speak of a road between one town and another, although the road extends from the center of one town to the other; and this, in common parlance, is a description sufficiently intelligible, although the road in fact penetrates each town. But if all the land between two buildings or between two other lots of land be granted, then certainly only the intermediate land between the two lots of land, or the two buildings would pass by the grant.

And we think the word 'between' has the same meaning when it refers to a period of time from one day, month, or year to another. If this policy had insured the plaintiff's property to be shipped between February and July, it would clearly not cover any property shipped in either of those months. So we think the days mentioned in the policy are excluded. We think the word 'between' has the same meaning in this respect as the words used in the second policy. In that policy the goods insured are to be shipped subsequently to the 14th of July and prior to the 15th of October next following. This would be construing the contract according to the most common meaning of the word 'between,' and there is nothing in the contract to intimate that the word was used in any other sense."

This meaning of the word "between" not only is sanctioned by the only adjudicated cases which we have been able to find, but as well it has the approval of our own judgment. From this it inevitably results that the lien in favor of A. H. Weir & Co. related back from the time of its filing so as to include August 22 and exclude August 21. The mortgage to Sarah F. Harris, which was filed for record on August 21, should therefore have been decreed senior and superior to the mechanic's lien of A. H. Weir & Co. This conclusion seems to be somewhat at variance with the following language at the close of the opinion of this court in *Noll v. Kenneally*, 37 Neb., 885, to-wit: "The fair inference to be drawn from the statement in the account for the lien we are considering is that the materials were furnished between the dates therein named and that the last were furnished on the date last given. (See *Manly v. Downing*, 15 Neb., 637; *Hayden v. Wulfing*, 19 Mo. App., 353; *Bangs v. Berg*, 48 N. W. Rep. [Ia.], 90; *Johnson v. Stout*, 44 N. W. Rep. [Minn.], 534.)" An examination of the cases cited will show that they support the proposition that when it appears from the statements in the affidavit, or from the itemized account thereto attached, that the labor or ma-

terial was furnished within the prescribed statutory time immediately antecedent to filing the same, it is a sufficient compliance with the requirements of the mechanic's lien law to render such filing effective, and as this was the only question in dispute which involved the sufficiency of the sworn statements filed to secure a lien, such language as implies more is but *dictum*. This explanation is made upon the suggestion of the writer of the opinion referred to and has his entire approval.

The judgment of the district court, in so far as thereby the rights of A. H. Weir & Co. were adjudged superior to the lien of the mortgage made to Sarah F. Harris, is reversed and this cause is remanded to said district court with directions to modify its decree accordingly.

REVERSED AND REMANDED.

OMAHA STREET RAILWAY COMPANY V. MELVIN BAKER, BY HIS NEXT FRIEND, MARGARET FERRIS.

FILED APRIL 4, 1895. NO. 6190.

Street Railways: NEGLIGENCE OF MOTORMAN: PERSONAL INJURIES: EVIDENCE. The evidence in this case considered, and found not to sustain the verdict upon which judgment was rendered.

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

John L. Webster, for plaintiff in error.

C. A. Baldwin and *Weaver & Giller, contra.*

RYAN, C.

On the 15th day of February, 1891, Melvin Baker, a lad between thirteen and fourteen years of age, was per-

manently injured by a car operated by the Omaha Street Railway Company. In a suit for damages on account of such injuries there was a verdict and judgment against the railway company in the district court of Douglas county for the sum of $2,500. Melvin Baker, as a messenger for the Western Union Telegraph Company, was required to take a street car going southward on the Sixteenth street line. For this purpose he came out of the alley between Douglas and Farnam streets, across which the Sixteenth street car line of plaintiff in error ran. The motor train on which he proposed riding had just passed when Melvin came out of the alley, and that he might catch it he ran diagonally in a northwesterly direction across a street railway track and immediately in front of a motor train thereon, consisting of two cars moving northward. When the south-bound motor train was nearly opposite the one bound northward, Melvin with one hand had seized the hand-hold on the rear of the foremost of the two cars going southward, and, with the other, the guard rail of the rear platform of the same car, and was still on the ground, when, as he claims, the motorman on the train going northward seized him by the neck, caused him to lose his holds and fall beneath the wheels of the rear car of the north-bound motor train. It is not necessary to determine whether or not the plaintiff in error would be liable if its sole ground of defense was that it was not answerable for an act of the motorman on the north-bound train entirely foreign to the scope of his duties. This proposition will not therefore be discussed. The evidence of the lad as to the agency which directly caused his fall was as follows:

Q. Had you one foot on the step?

A. No, sir.

Q. What then?

A. I felt something jerk me by the neck and I had to let loose. The car I had hold of was in motion and I could not hold on any longer.

Q. What was there, if anything, on the track going north?

A. A motor. * * *

Q. What did you say caused you to let go your hold?

A. Something grabbed me by the neck. I couldn't say sure it was the motorman, for I don't know whether there was anybody else on the front platform or not.

Q. State what you mean to say. Whether some person took hold of you by the neck?

A. Yes, sir; some person did.

Q. Where did he take hold of you?

A. Right in in the middle of the neck, on my coat.

Q. Where was the person, whoever it was, that took hold of your clothing by the neck?

A. On the front platform.

Q. Of what?

A. Of the motor.

Q. Going which way?

A. North.

Q. When you let go, under these circumstances, what became of you then?

A. I fell.

Q. Tell the court and jury what condition you fell; that is, after you fell how did you lie?

A. With my head to the south. * * *

Q. Which way was your head?

A. South.

Q. Tell the jury when you fell, and, with your head to the south, whether your face was up or down.

A. Up.

Q. What then happened to you after you fell and were on the ground and lying in that condition?

A. I just felt the wheel hit my arm; it just held there for a little while and then passed on over.

Q. Which arm did it catch?

A. The right arm.

It is not questioned that the boy's arm was very seriously injured by the wheel passing over it in the manner described. On his cross-examination, the testimony of Melvin was that he did not have a chance to look back to see who had caught him by the neck; that he did not see who it was behind him that caught hold of him and did not know where the person was standing that "grabbed hold" of him. Mrs. Dale was a witness for the plaintiff in the district court and testified that with her husband she was riding on the west side of the foremost car of the motor train going northward, and that, looking out of the front window, she saw the boy crossing the track toward the northwest; that she was somewhat scared by his attempting to cross the track with the north-bound train so close, moving toward him; that it was evident to her that he could not cross both tracks before the south-bound train would reach him; that it was her impression that no one was on the front platform of the car on which witness was riding except the motorman; that when she saw the boy crossing the track he was about ten or fifteen feet ahead of the car in which she was riding. The testimony of Mrs. Dale's husband was in substantial accord with that of his wife, though he ventured no statement as to any one being with the motorman on the platform. In addition to what his wife had sworn he testified that after the boy had crossed the track in front of the train on which the witness was riding he did not see the boy, and that "almost immediately the other car held up and ours put on the brakes, and I heard a cry, a boy cry at the rear end of our car—of our train." The motorman of the north-bound train testified that when the boy crossed in front of him he not only set the brake but reversed his motor to avoid injuring the boy, and that he did not take hold of him in any manner whatever. In relation to the efforts of the motorman to avoid running against the boy while he was crossing the track there is no question made, for whatever the degree of care was which

was exerted it was conceded that the result was that he reached the south-bound train uninjured—such efforts if made, however, precluded the possibility of his seizing the boy. The right of recovery on plaintiff's own theory was wholly dependent upon the establishment of the alleged misconduct of the motorman of the north-bound train in causing the boy to lose his holds on the car moving southward. The evidence of the boy, bearing upon this proposition, has been quite fully set out, because he alone gave testimony to establish it. It must be conceded from his own statements that he did not attempt to take the car at the street crossing, the only place at which stops were made to receive passengers. From his testimony, taken as a whole, it does not appear that he testified that the motorman seized him, as of a fact of which he had knowledge. On the contrary, he expressly admitted that he could not say who it was, but apparently argumentatively he asserted that it was the motorman of the north-bound train. No one else testified on this subject but the motorman himself, and he flatly denied that he touched the boy in any way. The requirement of a showing that the accident was caused by the negligence or misconduct of the street car company, or its employes, was hardly met by the testimony of the defendant in error as to questions of fact, even conceding his counsel's theory of the law to be correct. There was no direct evidence that the motorman touched this boy. True, the boy testified that he did, but he admits that he could not, and did not know whether it was the motorman or not. In this condition of his testimony certain circumstances have a great weight in showing that this lad mistakenly ascribed the blame for his misfortune to the motorman on the north-bound train, for his own statements were that when he was thrown to the ground his face was up and his head was toward the south. There is no conflict in the evidence that both the north-bound train and the south-bound train were in motion when the accident occurred.

This being true, if the motorman on the train northward-bound caught this boy by the neck and threw him to the ground, the fall must have been in the direction in which said motorman himself was moving, and it was therefore unavoidable in such case that the boy's head should have been toward the north, probably with the face upward. If, on the other hand, the impelling force was moving southward, the boy would have fallen with his head toward the south. In the hurry of crossing to avoid the close approaching train from the south, and the confusion resulting from finding himself suddenly between two trains moving in opposite directions, it was perhaps natural that this boy could scarcely understand how the swiftly following accident happened. That his impression that the motorman seized him was but conjecture is evident from his own statement; that in this conjecture he was mistaken, is quite obvious from the circumstances just noted. As there was no sufficient evidence to sustain the verdict the judgment of the district court is

REVERSED.

LOUIS H. KORTY ET AL. V. JAMES K. MCGILL ET AL.

FILED APRIL 4, 1895. No. 6008.

1. **Principal and Surety:** BONDS. The mere fact that a principal in a proposed bond expressed to an agent of the proposed obligee an opinion as to the necessity of paying off an existing indebtedness to a third party, for which the proposed sureties were then liable, before requesting said proposed sureties again to become liable as such on the proposed bond, did not constitute such payment an indispensable condition precedent to the acceptance of the proposed bond by the obligee therein named.

2. ———: GUARANTY: BONDS. Where the principal has paid for all goods bought before the execution of a bond guarantying that he would pay for all merchandise by him purchased, the fact of

such purchase before execution of the bond is immaterial to the liability of the sureties for goods sold their principal after they had signed his bond.

3. **A bond of guaranty of payments for goods** to be purchased by the principal, in which it was provided that the obligee should give a credit of sixty days therefor, was not rendered inoperative as against sureties thereon by the obligee taking promissory notes "in making settlements" without reference to a limitation of sixty days, where the taking of promissory notes "in making settlements" was in general terms expressly authorized by the instrument itself.

4. **Guaranty:** TERMINATION OF CONTRACT: NOTICE. A guaranty of payments by the principal therein named contained a provision that the contract might be terminated by the party to whom the payments were guarantied upon his giving sixty days' notice of an intention to annul the same for any reason other than failure of the principal to perform any prescribed conditions, one of which was the making of payments at certain times. *Held*, That default in the condition specially referred to dispensed with the giving of notice as a condition precedent to the exercise of the right to terminate said contract.

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

Howard B. Smith, for plaintiffs in error.

Jacob Fawcett, contra.

RYAN, C.

This action was brought in the district court of Douglas county by the defendants in error against Joseph D. Porter, Louis H. Korty, and William J. Mount for a balance due from Porter to the defendants in error. There was a verdict and judgment as prayed. Joseph D. Porter refused to join plaintiffs in error in this proceeding and was, therefore, named as one of the defendants in error. The plaintiffs in error signed as sureties a bond in which Joseph D. Porter was principal and the firm of James K. McGill & Co. was the obligee. In this bond it was re-

cited that the obligee had agreed to sell Joseph D. Porter, during its pleasure, Hammond type-writers, etc., to be sold by Porter in certain defined territory, and that McGill & Co. had agreed to give sixty days' notice of its intention to annul its contract with Porter for any reason other than the failure of said Porter to keep and perform any condition of said obligation. The sales of Porter, it was provided, should be at a discount of thirty per cent from retail price, and, as recited, it had been agreed by the obligee that a credit of sixty days should be given on goods sold from time to time. Following the above provision was this language: "And, whereas, the said James K. McGill & Co. may, at different times, lend certain type-writers to said Joseph D. Porter; and, whereas, in making settlements from time to time the said Joseph D. Porter may give to the said James K. McGill & Co. promissory notes for amounts due to them on such settlements: Now, therefore, if the said Joseph D. Porter shall well and faithfully attend to the said business and shall well and faithfully pay to said James K. McGill & Co. the full amount due from time to time, and shall well and faithfully pay all notes given to them in settlements as aforesaid, whether said notes are still held by said James K. McGill & Co., or have been assigned by them, and shall, when requested by said James K. McGill & Co., turn over to them, their agents or assigns, all borrowed type-writers or consigned goods, and shall well and faithfully keep and perform all of the agreements herein contained and any and all future agreements which he may make with said James K. McGill & Co. in relation to the aforesaid business, then this obligation to be void; otherwise to be and remain in full force and effect."

The sureties contend that the above bond was presented to McGill & Co. by Mr. Porter without authority and by said firm was received with knowledge of that fact, wherefore it results that it was never legally delivered and

never became of binding force. This contention is founded upon the fact that previous to the delivery of the bond sued upon the plaintiffs in error were sureties for Mr. Porter upon a like bond to the Hammond Company as obligee, on which the principal and sureties were still liable to the amount of about $400, which liability, as is claimed, was to have been paid before the bond sued on was to be delivered. It is said in argument that the testimony of Mr. Porter was to the effect claimed. The statement of Mr. Porter to the agent of the firm of McGill & Co. was that it would be necessary for him, Porter, to square up this $400 before he could go to Korty and Mount and ask them for their signature. This did not imply that such payment was in contemplation of the parties a condition precedent to the delivery of the present bond. In relation to the liability of the sureties for goods sold before the delivery of the bond it is to be borne in mind that the aggregate amount of sales to Mr. Porter, between February 11, 1889, and March 6, 1890, was $7,427.85. The credits within the same period amounted to $6,190.34. On the 21st day of August, 1889, there seems, from the statement of the account, to have been had some sort of an examination of the condition of affairs between the principal and the obligee named in this bond. At any rate this statement shows that at that time there was owing but a balance of $81.01. On September 2, immediately following, there was paid in notes more than sufficient to cover the above sum and such further indebtedness as meantime had been contracted. Whether or not the items ordered before the bond was accepted would have been covered by its terms, therefore, practically becomes immaterial, for in fact they have been paid by the principal.

It is urged that there were such extensions of credits beyond the limit fixed by the terms of the bond that the sureties were thereby discharged. There was in the bond only an agreement recited to have been made by McGill &

Co. that said firm would give a credit of sixty days on type-writers and other articles sold the principal obligor. Later on, as a preamble to the conditions, it was recognized as probable that Mr. Porter might give to the said James K. McGill & Co. promissory notes in making settlements for amounts due. There was no description attempted of the promissory notes which would be available for use in the settlements contemplated. One condition of the bond was that the principal should well and faithfully pay all notes given in settlement as aforesaid. In argument it is insisted that the words "notes given in settlements as aforesaid" limited the duration of the notes to sixty days, for, it is reasoned, a credit of that length of time was provided for in the bond and during that time the indebtedness might be evidenced by notes, and that for notes of that kind alone the sureties were liable. If the language had been in effect that, for balance on account, or on settlements of account between the principal and the obligee, notes of the former to the latter might be given to cover the sixty days time contemplated, there would have been force in the contention under consideration. But such was not the case, neither is there anything in the evidence to indicate that, in fact, notes were ever taken to cover the sixty days credit to which Mr. Porter was entitled. There seems to have been turned in to the company certain notes for which credits were given on account. Some of these may have been paid, probably were, but there were others which, having been discounted at the bank and not paid at maturity, were taken up by James K. McGill & Co. Of this class there was only one given by Mr. Porter, which note was for $300, on which there was paid $200. This action was not brought on these notes, but on an account current between McGill & Co. and Joseph D. Porter in which the several notes figured simply as items of debit or credit. Since the several notes taken on settlements were not intended to cover the sixty days credit pro-

vided, and apparently were given or indorsed to the obligee as conditional payments, there was no ground for the assumption that by the taking of these notes a credit different from that contemplated was given to the principal, resulting in the release of his sureties. In our view, it was not necessary that sixty days' notice in writing should have been given of the intention of McGill & Co. to terminate the relations between that firm and the principal obligor, for the evidence shows that the relations were terminated because of his default,—a condition of affairs which by the terms of the bond itself dispensed with the necessity of giving notice. This being true, there was no error in excluding evidence which tended to show the existence of a valuable good-will of trade thereby destroyed which by Mr. Porter had been pleaded as a counter-claim.

There are asserted miscellaneous grievances, such as a remark of the court upon presentation of a motion to instruct that no ground of counter-claim had been established; that said court very much doubted whether there was sufficient evidence, but that the motion would be overruled. This language was not intended for the jury, and when it was excepted to there was a prompt statement to that effect addressed directly to the jury. In the instructions the duty of jurors to disregard all remarks which had been made by the court during the trial with reference to questions of fact was very fully and emphatically stated. Under these circumstances it is not believed possible that the result was at all affected by the language of which complaint is now made. Among the general complaints made there is one as to the striking out of certain evidence after it had been admitted. If there was error in this, plaintiffs in error cannot avail themselves of it, for no exception was taken to any ruling of that character. Speaking for himself alone, the writer hereof suggests that motions of this character are of very doubtful advantage, for, if the motion is sustained, the striking out is simply from the record.

No power short of Omnipotence can in fact withdraw it from the jury. If a party has procured it to be stricken from the record, he is in a very awkward situation to insist that, nevertheless, the error appears in the record. It is not necessary to consider separately the several errors assigned and argued as to the giving or refusal to give instructions. The various propositions involved have already received full consideration and there exists no necessity for amplification, merely to illustrate just how the different questions were presented.

There were submitted special interrogatories, which were fully answered in consonance with the general verdict. Each of these was sustained by sufficient evidence, and the judgment upon the general verdict is

AFFIRMED.

OMAHA FIRE INSURANCE COMPANY V. ANNA BERG ET AL.

FILED APRIL 4, 1895. No. 5376.

1. **Instructions**: EXCEPTIONS: REVIEW. The refusal to give an instruction requested cannot be reviewed in the absence of an exception.
2. **Review**: EVIDENCE: OMISSIONS FROM BILL OF EXCEPTIONS. The assignment that the verdict is not sustained by the evidence cannot be considered, where from the bill of exceptions it appears, without question, that therefrom has been omitted evidence which may be important.
3. **Trial**: ADMISSION OF EVIDENCE: REVIEW. The ruling sustaining an objection to a question cannot be reviewed where there was made no tender of evidence which an answer, if permitted, would disclose.
4. **Pleading**: MOTION TO STRIKE: HARMLESS ERROR. It was not error to overrule a motion to strike out portions of a petition where, by reason of such ruling, it does not appear that the moving party was prejudiced.

5. ———. Courts very properly refuse affirmatively to direct what language must be employed in drafting pleadings.

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

Hewett & Olmstead and *A. J. & W. S. Poppleton*, for plaintiff in error.

Capps & Stevens, contra.

RYAN, C.

This action was begun in the county court of Adams county. Afterwards it was tried in the district court, to which it had been taken by appeal. There was a verdict against the insurance company for the sum of $200, on which judgment was duly rendered. The cause of action upon which plaintiff recovered, it was stated in the petition, had its existence by reason of the facts that the insurance company had insured Louis Carroll against loss or damage by fire happening to a stallion owned by Carroll; that during the time covered by the policy there was a loss of the horse insured, after which time Carroll assigned to the plaintiffs in the district court one-half of the amount due as aforesaid; that with notice of this assignment the insurance company settled with Carroll, intentionally ignoring said assignment, and that the insurance company has ever since refused to pay the sum of $200, being the one-half of the insurance money due, which one-half was assigned as aforesaid, or to pay any other sum.

In the motion for a new trial there was no assignment with reference to instructions except that "the court erred in refusing to give the instructions asked for by the defendant." In the record we find but one instruction of the class designated. In respect to it there was a minute made of the words "rejected to by the court," also of the word "refused," but there was no exception noted, consequently the alleged error is not now properly presented.

In the petition in error it is asserted that the verdict was not sustained by the evidence, but we cannot consider this assignment, for from the bill of exceptions itself it appears that there were introduced in evidence certain exhibits designated as "Exhibit E," "Exhibit F," and "Exhibit G." True, these were copies of the petition, answer, and reply filed in the county court, yet in the answer indicated there may have been admissions of very important facts alleged in the petition. Under these circumstances we cannot say that the verdict was without support of sufficient evidence.

It is insisted that there was error in excluding the evidence of Mr. Roundtree, an adjuster of the insurance company, as to his reason for making a settlement with Carroll who had not possession of the policy. We cannot conjecture how it was possible that an answer to this inquiry would be important, and, as there was no offer of proof proposed to be made by such answer, we cannot review the ruling of the court in sustaining an objection to the question propounded.

It is urged that there was error in refusing to strike out certain designated parts of plaintiff's petition for the reason that the parts objected to were redundant and immaterial. In general terms these criticised averments were as to the ownership of the horse when the policy was issued; the conditions of the policy; the description of the place where the horse was when the damage was sustained; the knowledge of the insurance company of the interest of the assignee in the loss when, nevertheless, payment was made to Carroll; the delivery of the policy to plaintiff; and the contemporaneous agreement between plaintiff and Carroll that a certain firm of attorneys at law should collect the loss and therefrom pay $200 to plaintiff; and the averments that, notwithstanding the full time for making settlement had long since expired, nevertheless that such settlement had not been made. It may be that it was not required that all the facts should have been alleged as fully

as was done, yet we cannot understand how the insurance company was prejudiced by this, perhaps unnecessary particularity. In the above generalization it was impossible to place the second paragraph of the motion to strike, for the reason that this paragraph was to strike from the second paragraph of the petition, immediately following the description of the business for which the insurance company had been organized, the words "as such company, in the legitimate course of its business, the defendant herein did, on the 12th day of June, 1891, insure the above described horse," for, connected with this language of the motion, there were in brackets the words "and insert in lieu thereof 'a certain horse belonging to Louis Carroll.'" No authority has been cited in support of this proposed substitution of other language for that chosen by the pleader who drew the petition. It is conceivable that such a right of substitution might possibly be abused, though in this particular case it would doubtless have occasioned no injury. It seem to us that if an attorney for a defendant discovers in the petition of his adversary language for which he wishes to substitute something better, the only course open is privately to suggest and urge the adoption of the proposed amendments. If, upon being so reasoned with, plaintiff's attorney should persist in holding his own the better chosen language, courts cannot interfere, however grave his mistake, for the duty of using the very best language is an obligation of so imperfect a nature that it cannot be judicially enforced.

Upon a careful review of the entire record we have been able to discover no error and the judgment of the district court is

AFFIRMED.

LINCOLN & BLACK HILLS RAILROAD COMPANY V. WILLIAM F. SUTHERLAND ET AL.

FILED APRIL 4, 1895. No. 6238.

1. **Surface Water:** RAILROAD COMPANIES: NEGLIGENCE IN CONSTRUCTION OF EMBANKMENT: EVIDENCE: WITNESSES. A draw some seven miles in length crossed the premises of a farmer. The surface waters produced by rains and melting snows were wont to run into this draw from the surrounding territory and thence find their way to the Platte river. A railroad company constructed its road-bed across the premises and built an embankment, without culvert or opening over the draw. In a suit by the farmer against the railroad company for damages for negligently constructing the embankment without an opening, whereby the surface waters were stopped and overflowed the farmer's land and destroyed his crop, *held*, (1) that the evidence sustained the finding of the jury that the railroad company negligently constructed its embankment across the draw; (2) that such negligence of the railroad company was the proximate cause of the damages sustained by the farmer; (3) that nothing in the case made the production of expert testimony a necessity; (4) that any person who was acquainted with the draw and the manner in which the embankment was constructed, and the manner in which it affected the waters in the draw, was a competent witness to state such facts; and that it was for the jury to say, from all the facts and circumstances in evidence in the case, whether the embankment was negligently constructed.

2. ———: DAMAGES. The doctrine of this court is the rule of the common law, that surface water is a common enemy, and that an owner may defend his premises against it by dike or embankment, and if damages result to adjoining proprietors by reason of such defense, he is not liable therefor.

3. ———: ———. But this rule is a general one and subject to another common law rule, that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor.

4. ———: NEGLIGENCE: DAMAGES. Therefore, every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless guilty of some act of neg-

ligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow on the premises of the latter to his damage; but if, in the execution of such enterprise, he is guilty of negligence, which is the natural and proximate cause of injury to his neighbor, he is accountable therefor. *Anheuser-Busch Brewing Association v. Peterson*, 41 Neb., 897, followed and reaffirmed.

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

The facts are stated by the commissioner.

A. W. Agee and *J. W. Deweese*, for plaintiff in error:

The owner of the lower estate may, without incurring liability for damages, erect a dike or embankment to prevent the flow of surface water on his land, even though it it may cause the water to back up and overflow adjoining lands. (*Morrison v. Buckport*, 67 Me., 353; *Murphy v. Kelley*, 68 Me., 521; *Sweet v. Cutts*, 50 N. H., 439; *Beard v. Murphy*, 37 Vt., 104; *Luther v. Wennisimmet Co.*, 9 Cush. [Mass.], 171; *Emery v. City of Lowell*, 104 Mass., 16; *Buffum v. Harris*, 5 R. I., 253; *Wakefield v. Newell*, 12 R. I., 75; *Wadsworth v. Tillotson*, 15 Conn., 366; *Gillett v. Johnson*, 30 Conn., 180; *Adams v. Walker*, 34 Conn., 466; *Chadeayne v. Robinson*, 11 Atl. Rep. [Conn.], 592; *Waffle v. New York C. R. Co.*, 58 Barb. [N. Y.], 413; *Wagner v. Long Island R. Co.*, 2 Hun [N. Y.], 633; *Bowlsby v. Speer*, 2 Vroom [N. J.], 351; *Limerick & Colebrookdale Turnpike Co.'s Appeal*, 80 Pa. St., 425; *Atchison, T. & S. F. R. Co. Hamner*, 22 Kan., 763; *Cairo & V. R. Co. v. Stevens*, 73 Ind., 278; *Pettigrew v. Evansville*, 25 Wis., 223; *Fryer v. Warne*, 29 Wis., 511; *Lessard v. Stram*, 22 N. W. Rep. [Wis.], 284; *Johnson v. Chicago, St. P., M. & O. R. Co.*, 50 N. W. Rep. [Wis.], 771; *O'Connor v. Fond du Lac, A. & P. R. Co.*, 52 Wis., 526; *Burke v. Missouri P. R. Co.*, 29 Mo. App., 370; *Schneider v. Mis-*

souri P. R. Co., 29 Mo. App., 68; *Munkers v. Kansas City, St. J. & C. B. R. Co.*, 72 Mo., 514; *Barnes v. Sabron*, 10 Nev., 218; *Davis v. Londgreen*, 8 Neb., 43; *Pyle v. Richards*, 17 Neb., 181.)

When plaintiff in error obtained the right of way and paid the damages, this included any damages which might occur by reason of the obstruction of the flow of surface water from one portion of the lands of defendants in error to another portion thereof, by the grading of the road-bed. (*Wallace v. Columbia & G. R. Co.*, 12 S. E. Rep. [S. Car.], 815.)

The plaintiff in error, even if bound to so construct its road-bed as to permit the surface water which might be reasonably expected to accumulate on the lands of the defendants in error, to flow over its right of way, yet it is not bound to provide against such extraordinary rainfalls or freshets as could not be reasonably apprehended from careful observation and consideration of the history of the country, by a skillful engineer. (*Union Trust Co. v. Cuppy*, 26 Kan., 762; *Baltimore & O. R. Co. v. Sulphur Spring Independent School District*, 96 Pa. St., 65.)

W. T. Thompson, contra:

The company is liable for a failure to permit some egress for the surface water. (*Wharton v. Stevens*, 50 N. W. Rep. [Ia.], 562; *Vannest v. Fleming*, 79 Ia., 638; *Palmer v. Waddell*, 22 Kan., 352; *Kelly v. Dunning*, 39 N. J. Eq., 482; *Livingston v. McDonald*, 21 Ia., 160; *Anderson v. Henderson*, 124 Ill., 164; *Gormley v. Sanford*, 52 Ill., 158; *Gillham v. Madison County R. Co.*, 49 Ill., 484; *Peck v. Goodberlett*, 109 N. Y., 180; *Jeffers v. Jeffers*, 107 N. Y., 650; *McCormick v. Horan*, 81 N. Y., 86; *Martin v. Riddle*, 26 Pa. St. 415; *Kauffman v. Griesemer*, 26 Pa. St. 407; *Taylor v. Fickas*, 64 Ind., 173; *Ogburn v. Connor*, 46 Cal., 346; *Lord v. Carbon Iron Mfg. Co.*, 42 N. J. Eq., 157; *Boyd v. Conklin*, 54 Mich., 583; *Tootle v.*

Clifton, 22 O. St., 247; *Bates v. Westborough*, 151 Mass., 174; *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 138; *Stewart v. Schneider*, 22 Neb., 286; *Kearney v. Thoemason*, 25 Neb., 147.)

The position taken by counsel that the damages paid for the right of way through the lands of defendants in error included any damages which they might sustain by the stoppage of the flow of the surface water is erroneous. (*Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb., 585; *Fremont, E. & M. V. R. Co. v. Lamb*, 11 Neb., 592; *Jackman v. Missouri P. R. Co.*, 15 Neb., 524; *King v. Iowa M. R. Co.*, 34 Ia., 458; *Lehigh Valley R. Co. v. Lazarus*, 28 Pa. St. 203; *Patten v. Northern C. R. Co.*, 33 Pa. St., 426; *Fleming v. Chicago, D. & M. R. Co.*, 34 Ia., 353; *Delaware, L. & W. R. Co. v. Salmon*, 10 Vroom [N. J.], 299.)

RAGAN, C.

Sutherland Bros. owned the southwest quarter of section 25, township 14 north, and range 7 west of the 6th P. M., in Merrick county, and used and occupied said premises for farming purposes. Across this land, running in a northeasterly direction was a depression, called in this country a "draw." This draw was some seven miles in length. It headed or began some three miles southwest of the premises of the Sutherlands and emptied into Silver creek or some of its tributaries. This draw was not a running stream, but the waters from melting snows and rains which fell on a large area of land on either side of this draw drained into it and thence made their way through it and other channels to the Platte river. The Lincoln & Black Hills Railroad Company, a railway corporation of the state and hereinafter called the "Railroad Company," constructed its railroad bed and railway across this land of the Sutherlands and built across this draw a solid embankment of earth. At the place where the embankment was built

across the draw on the land of the Sutherlands the bottom of the draw was about a rod in width. Some time after the construction of this embankment by the Railroad Company a heavy freshet or rainfall occurred; the embankment stopped the waters which had collected in this draw and were making their way to the Platte river and threw them back upon the lands and crops of the Sutherlands and damaged them. The Sutherlands then brought this action against the Railroad Company to recover the damages which they had sustained by reason of the obstructed waters ruining their crops. The basis of their action against the Railroad Company was the negligent construction of the embankment across the draw, in this: that in constructing it they left no opening in the embankment through which the waters which had been accustomed to collect in said draw might escape. The Sutherlands had a verdict and judgment, and the Railroad Company prosecutes to this court a petition in error.

1. It is not argued here by counsel that the court erred in instructing the jury except in one instance, which will be hereinafter noticed; nor is there any argument that the court erred in the admission or rejection of any particular testimony. The entire argument relied upon here for a reversal is that the verdict and judgment are contrary to the evidence and the law of the case. The evidence shows, practically without conflict, the facts already stated. It shows that after this embankment was constructed across the draw, when the water stood in the draw at the embankment to the depth of a foot, that it would flow back a distance of five hundred feet; it shows also that the water would have to be almost two feet deep in the draw at the embankment before the water would begin to escape or run off in the ditches constructed by the Railroad Company for that purpose by the side of its track. We think that the evidence justified the finding of the jury that the Railroad Company negligently constructed its embankment

and road-bed across this draw. Counsel for the Railroad Company intimate in their argument that there is no evidence in the record that this embankment was not constructed in the usual manner of constructing embankments for railroads. In other words, the argument appears to be that in order to enable the Sutherlands to recover it was necessary for them to introduce the evidence of experts that this embankment was improperly or negligently constructed. We do not agree to this argument. We think that any person who was acquainted with this draw, and the manner in which the embankment was constructed, and the manner in which it affected the waters run into this draw, was competent to state the facts; and that it was for the jury to say, from all the facts and circumstances in evidence in the case, whether the embankment was negligently constructed. In other words, there was nothing in this case—if indeed there is in any case—which made the production of expert testimony a necessity. Another argument of counsel is that the loss sued for here was caused by an extraordinary rainfall and freshet—a rainfall unprecedented and such as the Railroad Company, at the time it constructed the embankment, was not required to anticipate. We think this argument is more untenable than the other. It is the freshet and rainfall the Railroad Company was charged with the duty of anticipating and providing against. We conclude, therefore, that the evidence sustains the finding of the jury that the Sutherland Bros. have sustained the damages for which they obtained judgment, and that such damages were the proximate result of the negligence of the Railroad Company in constructing its embankment across the draw in question without putting in a culvert or other opening in said embankment for the escape of the waters which were accustomed to run into said draw.

2. But it is argued that the judgment pronounced is contrary to the law of the case, because the Railroad Company, in constructing the embankment across the draw,

built it as it did to defend itself against surface waters; that surface water is a common enemy, and that the owner may defend his premises against surface water by dike or embankment, and if damages result to adjoining proprietors by reason of such defense, he is not liable therefor. The general rule contended for by counsel will not be questioned; but in this particular case the railroad company was not defending itself against surface waters by building this embankment. It did not build the embankment to keep the surface waters off its track, but it built it in order to put its road-bed across the draw on a level with its road-bed on either side thereof; and it neglected to put an opening in this embankment, perhaps because it was cheaper to build the embankment of dirt than it was to build a culvert of wood or stone. The question of the right of a proprietor to defend himself against surface waters has been several times before this court.

In *Davis v. Londgreen*, 8 Neb., 43, this court held: "The owner of a natural pond or reservoir, wherein the surface water from the surrounding land accumulates, and from which it has no means of escape except by evaporation or percolation, cannot lawfully, by means of a ditch, discharge such water upon the land of his neighbor, to his injury."

In *Pyle v. Richards*, 17 Neb., 180, Pyle's land lay immediately north of Richards'. A railroad bed and tracks lay on the line between the two pieces of land. Richards' land was lower than Pyle's. A ravine arose southwest of Pyle's land, extended northeast across it and across Richards' land. This ravine was fed by springs. During a portion of the year a very small stream of water flowed down the ravine and it was occasionally dry; and a large amount of surface water from melting snows or heavy rains ran into this ravine and thence found its way to the Nemaha river. Pyle built a dam across this ravine on his own land and cut a new channel so that the water which was in this ravine in wet weather was discharged through

a culvert under the railroad bed aforesaid, and thence on the lands of Richards. Richards sued Pyle for damages he had sustained by reason of the discharge of these waters on his lands, and the court held that Richards was entitled to recover.

In *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 138, the railroad company constructed its road-bed across Marley's land and cut ditches on its right of way on either side of its track for the purpose of draining its track and right of way of surface water. The surface water which collected in one of these ditches was carried down and discharged in large volumes on the land of Marley, and he sued the railroad company for damages by reason thereof, alleging, as the basis of his suit, the negligent construction of the ditches by the railroad company on its right of way, their capacity being insufficient to carry off and discharge the surface water accumulating therein. The jury found that Marley had been damaged by the discharge of this surface water through the ditches constructed by the railroad company and that the ditches were negligently constructed by being of insufficient capacity to properly carry off the surface waters. This court sustained the finding of the jury, holding that: "A party has no right to collect surface water in a ditch or drain and permit it to flow onto the land of another without the latter's consent, and if he do so he will be liable for the damages sustained."

In *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb., 406, the railroad company built a solid embankment across the valley of the Nemaha river, from the bank of the river to the foot-hills. It put no culvert or opening in the embankment between the foot-hills and the river. At the time when the waters of the Nemaha river overflowed its banks, these overflow waters, it was claimed, were deflected by this embankment and flowed in a stream across the river and overflowed the lands of Morrissey on the opposite banks. For the damages he sustained by these over-

flowing waters he sued the railroad company, and based his action on the ground that it had negligently constructed its embankment. This court held that it would presume, in the absence of evidence on the subject, that the embankment was for railway purposes and properly constructed, and that the railroad company for the constructing of the embankment in a proper manner was not liable in damages to Morrissey because the embankment deflected the surface waters that overflowed his lands.

In *Lincoln Street R. Co. v. Adams*, 41 Neb., 737, Adams owned a lot in the city of Lincoln which fronted north on, and was on a level with, the street. Immediately west of his lot was a railroad embankment some feet higher than the level of his lot and the level of the street in front of his lot. Just east of Adams' lot was a hill over which the street passed. The railway company laid its track in this street and in so doing made a cut in the hill and made an embankment in the street in front of Adams' lot so as to bring their street railroad bed on a level with the railroad embankment west of Adams' lot. A heavy rain storm occurred and the surface water on the hill which had been wont theretofore to run off in all directions was collected in this cut made by the street railway company and discharged in a body on the lot of Adams. And as the street railway company where it graded up the street in front of Adams' lot had put no culvert or left no opening in said grade for the escape of such waters they were held in a body on Adams' lot and damaged it; for which damages he sued the railway company. Its defense was that in making the cut in the hill and the embankment in the street that it was defending itself against surface water, the common enemy, and was therefore not liable; but the jury found that the street railway, in constructing its embankment in front of Adams' lot, had negligently constructed it in not leaving an opening in it for the escape of surface waters, and the court sustained the finding of the jury.

These cases, and all of them, recognize the rule of the common law that surface water is a common enemy and that the proprietor may by embankment or dike or otherwise defend himself against its encroachments and will not be liable in damages which may result from the deflection or repulsion of such surface waters defended against, provided that the proprietor in making the defenses on his own land himself exercised ordinary care; but these cases, and all of them, also recognize the rule that a proprietor must so use his own property as not to unnecessarily and negligently injure another. The most lucid and logical statement of the rule under consideration that has been made by this court will be found in *Anheuser-Busch Brewing Association v. Peterson*, 41 Neb., 897, where POST, J., speaking for the court, said: "Every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow on to the premises of the latter to his damage; but if in the execution of such enterprise he is guilty of negligence, which is the natural and proximate cause of injury to his neighbor, he is accountable therefor." This is the doctrine of this court and is the essence of and controls every other decision of this court on the subject. *Bunderson v. Burlington & M. R. R. Co.*, 43 Neb., 545, does not, nor was not intended to, announce a contrary doctrine. In the last case it was said that the overflow complained of was not attributable to the railway embankment. As the evidence in the case at bar shows that the railroad company in constructing its embankment across the land of Sutherland Bros. was guilty of negligence in not constructing in said embankment a culvert or an opening for the surface waters which accumulated in the draw to escape, and as such negligence was the proximate cause of the injury sustained by Sutherland Bros.,

the judgment pronounced is not contrary to the law of the case.

3. Counsel for the plaintiff in error indulge in some criticisms upon the trial court in an instruction which it gave to the jury, because in such instruction the court, in speaking of the draw hereinbefore referred to, alludes to it as a "water-way," etc. We do not think the jury could possibly have been misled by this instruction, as the evidence, and all the evidence in the case, is to the effect that the draw was not a stream of flowing water, nor was it claimed or pretended to be such by Sutherland Bros.; and the court, by using the word "water-way," meant only the road or way which the surface waters took that accumulated in the draw; and the jury by the expression of the court did not understand him to be speaking of the draw as a flowing stream. There is no error in the record and the judgment of the district court is

AFFIRMED.

LINCOLN SHOE MANUFACTURING COMPANY V. GEORGE SEIFERT.

FILED APRIL 4, 1895. No. 6216.

Corporate Stock: CONTRACT OF SUBSCRIPTION. This case presents the same questions of law and fact as *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb., 279, and following that case the judgment of the district court is reversed.

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

Thomas C. Munger, for plaintiff in error.

Ricketts & Wilson, contra.

RAGAN, C.

The Lincoln Shoe Manufacturing Company sued George Seifert in the district court of Lancaster county on a subscription made by him to the capital stock of the manufacturing company. Seifert demurred to the petition on the grounds that the facts stated therein did not constitute facts sufficient to constitute a cause of action. The district court sustained this demurrer and dismissed the action of the manufacturing company, and it has prosecuted to this court a petition in error.

The facts of this case are the same as those in *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb., 279, and on the authority of that case the judgment of the district court rendered in this is reversed and the cause remanded.

REVERSED AND REMANDED.

ROCHESTER LOAN & BANKING COMPANY ET AL. V. LIBERTY INSURANCE COMPANY.

FILED APRIL 4, 1895. No. 6214.

1. **Insurance:** PROOFS OF LOSS: WAIVER. An insurance contract provided that the policy should be void if the interest of the insured in the premises was other than unconditional and sole ownership; if the insured premises be or become vacant or unoccupied and so remain for ten days; that in case of a fire the insured should furnish the insurer proof of loss. In a suit upon such policy the insurer interposed the defense that the insured did not furnish proof of loss as required by the policy. An affidavit made by the insured and furnished to the insurer, containing certain statements concerning the fire, set out in the opinion, and *held* to substantially comply with the provision of the policy requiring the insured to furnish the insurer proof of loss; (2) that the insurance company, by refusing to pay the loss and defending the action on the ground that the policy in suit was not in force at the date of the loss, thereby waived the furnishing

to it of any proof of loss whatever. *Dwelling House Ins. Co. v. Brewster*, 43 Neb., 528, and cases there cited, followed.

2. ———: TITLE TO PROPERTY: INSURABLE INTEREST. A second defense of the insurer was that the insured at the date of the issuance of the policy was not the sole and unconditional owner of the insured real estate. *Held*, (1) That this issue was one of fact for determination by the jury, and the district court erred in not submitting it to them. (2) If, by a loss, the holder of an interest in property is deprived of the possession, enjoyment, or profit thereof, or a security or lien resting thereon, or other certain benefits growing out of or depending upon such property, he has an insurable interest therein. *German Ins Co. v. Hyman*, 34 Neb., 704, followed. (3) It seems that where a policy is issued to one who holds the legal title to real estate, where no inquiries are made as to whether any other person is interested in such property, and no representations are made by the insured further than that he is the owner of the premises, that it is not a defense to the insurance company, in an action on such policy, that the insured, though holding the legal title to the premises, was a mere trustee for an undisclosed beneficiary.

3. ———: VACANT PROPERTY: KNOWLEDGE OF COMPANY: ESTOPPEL. The third defense of the insurance company was that the insured property, at the time of the issuing of the policy in suit, was vacant; and at the date of the fire had been vacant and unoccupied for ten days. The insured admitted the facts of the defense, but pleaded in avoidance thereof that the insurer issued the policy in suit with actual knowledge of the fact that the insured property was then vacant and unoccupied. *Held*, (1) that the provision in the policy rendering it void in case the insured property was at the date of the policy or should afterwards become vacant or unoccupied was inserted therein for the benefit of the insurer; (2) that the existence of the vacancy at the date of the issuance of the policy did not render the policy in suit void but voidable at the election of the insurer; (3) that as the insurer issued the policy in suit with actual knowledge of the fact that the insured premises were at the time vacant and unoccupied, it is now estopped from alleging such vacancy as a defense to an action on the policy; (4) that the knowledge of the agent of the insurance company that the property insured was vacant at the date of the issuance of the policy in suit was the knowledge of the company.

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

See opinion for statement of the case.

James H. Macomber, for plaintiffs in error:

The company made defense upon the merits of the case, contending and answering that the policy was void, whereby it cannot now be heard to allege and rely upon a want of proof of loss. (*Phenix Ins. Co. v. Bachelder*, 32 Neb., 490.)

Oral testimony is not admissible to show that the title was held in trust. (*Bicknell v. Lancaster City & County Fire Ins. Co.*, 58 N. Y., 677; *Ayers v. Hartford Fire Ins. Co.*, 17 Ia., 188; *German Ins. Co. v. Hyman*, 34 Neb., 704.)

The insurer had an insurable interest in the property. (*Phenix Ins. Co. v. Bawdre*, 67 Miss., 620; May, Insurance, sec. 81; *Bicknell v. Lancaster City & County Fire Ins. Co.*, 58 N. Y., 677; *Phœnix Ins. Co. v. Mitchell*, 67 Ill., 43; *German Ins. Co. v. Hyman*, 34 Neb., 704; *Warren v. Davenport Fire Ins. Co.*, 31 Ia., 461; *McDonald v. Black*, 20 O., 185; *Hancox v. Fishing Ins. Co.*, 3 Sumner [U. S.], 132; *Western Horse & Cattle Ins. Co. v. Sheidle*, 18 Neb., 495; *Hoose v. Prescott Ins. Co.*, 84 Mich., 309; *Hall v. Niagara Fire Ins. Co.* 53 N. W. Rep. [Mich.], 728.)

The vacancy of the building for ten days just prior to the fire does not work a forfeiture of the policy. (*Springfield Ins. Co. v. McLimans*, 28 Neb., 850; *Billings v. German Ins. Co.*, 34 Neb., 502; *Menk v. Home Ins Co.*, 76 Cal., 51; *Home Ins Co. v. Gilman*, 112 Ind., 7; *Bonnert v. Pennsylvania Ins. Co.*, 129 Pa. St., 558; *Newman v. Covenant Mutual Ins. Association*, 76 Ia., 56; *Aurora Fire & Marine Ins. Co. v. Kranich*, 36 Mich., 289; *Bennett v. Agricultural Ins. Co.*, 106 N. Y., 243; *German Ins. Co. v. Rounds*, 35 Neb., 752; *England v. Westchester Fire Ins. Co.*, 51 N. W. Rep. [Wis.], 954; *Devine v. Home Ins. Co.*, 32 Wis., 471; *Dickinson v. State*, 20 Neb., 81; *Helme v.*

Philadelphia Life Ins. Co., 100 Am. Dec. [Pa.], 621; *Hoffman v. Ætna Fire Ins. Co.*, 32 N. Y., 405.)

Jacob Fawcett, contra:

The policy was void because the insured was not the owner of the property. (*Henning v. Western Assurance Co.*, 42 N. W. Rep. [Ia.], 308; *Grigsby v. German Ins. Co.*, 40 Mo. App., 276; *Trott v. Woolwich Mutual Fire Ins. Co.*, 83 Me., 362; *Clark v. Dwelling House Ins. Co.*, 81 Me., 373; *Pelican Ins. Co. of New Orleans v. Smith*, 9 So. Rep. [Ala.], 327; *Barnard v. National Fire Ins. Co.*, 27 Mo. App., 26; *De Armand v. Home Ins. Co.*, 28 Fed. Rep., 603; *Crescent Ins. Co. v. Camp*, 64 Tex., 521; *Lasher v. St. Joseph Fire & Marine Ins. Co.*, 86 N. Y., 423; *Mers v. Franklin Ins. Co.*, 68 Mo., 127; *Hinman v. Hartford Fire Ins. Co.*, 36 Wis., 159; *Columbian Ins. Co. v. Lawrence*, 2 Pet. [U. S.], 25; *Day v. Charter Oak Fire & Marine Ins. Co.*, 51 Me., 99; *Denison v. Phœnix Ins. Co.*, 52 Ia., 457.)

Vacancy without the consent of the company indorsed upon the policy renders the same void. (*Royal Ins. Co. v. Lubelsky*, 86 Ala., 530; *Hotchkiss v. Home Ins. Co.*, 58 Wis., 297; *Ins. Co. of North America v. Garland*, 108 Ill., 220; *Newmarket Savings Bank v. Royal Ins. Co.*, 150 Mass., 374; *Evans v. Queen Ins. Co.*, 31 N. E. Rep. [Ind.], 843; *England v. Westchester Fire Ins. Co.*, 51 N. W. Rep. [Wis.], 954; *Boyd v. Vanderbilt Ins. Co.*, 16 S. W. Rep. [Tenn.], 470; *Herrman v. Adriatic Fire Ins. Co.*, 85 N. Y., 162; *Barry v. Prescott Ins. Co.*, 35 Hun [N. Y.], 601; *Hartshorne v. Agricultural Ins. Co.*, 50 N. J. Law, 427; *Bennett v. Agricultural Ins. Co.*, 50 Conn., 420; *Moore v. Phœnix Fire Ins. Co.*, 64 N. H., 140; *American Ins. Co. v. Padfield*, 78 Ill., 167; *Sexton v. Hawkeye Ins. Co.*, 69 Ia., 99; *Fishe v. Council Bluffs Ins. Co.*, 74 Ia., 676; *Cook v. Continental Ins. Co.*, 70 Mo., 610; *Farmers Ins. Co. v. Wells*, 42 O. St., 519; *Dewees v. Manhattan Ins. Co.*, 35 N. J. Law, 366.)

RAGAN, C.

This action was brought in the district court of Douglas county by L. G. Bangs against the Liberty Insurance Company of the city of New York (hereinafter called the "Insurance Company"). The action was based on an ordinary fire insurance policy issued by the Insurance Company to Bangs on certain real estate situate in the city of Omaha. The Rochester Loan & Banking Company (hereinafter called the "Loan Company") was joined as a party plaintiff because the policy provided that the loss, if any, should be payable to it as mortgagee. At the close of the evidence the jury, in obedience to a peremptory instruction of the district court, returned a verdict in favor of the Insurance Company, and to reverse the judgment of dismissal pronounced on such verdict Bangs and the Loan Company have prosecuted to this court a petition in error.

1. The policy in suit contained among other things the following provisions: That the policy should be void if the interest of the insured in the insured premises be other than unconditional and sole ownership; if the insured premises be or become vacant or unoccupied and so remain for ten days; that if a fire occurred the insured, within sixty days, should render a statement to the company, signed and sworn to by the insured, stating the knowledge and belief of the assured as to the time and origin of the fire, etc. One of the defenses interposed by the Insurance Company to the action was that the insured did not furnish it, the company, "proofs of loss as required by the terms and conditions of said policy of insurance." The fire occurred on the 7th day of November, 1891, and on the 1st day of December, 1891, Bangs made and furnished the Insurance Company an affidavit in words and figures as follows:

"STATE OF IOWA, } ss.
CARROLL COUNTY. }

"I, L. G. Bangs, being duly sworn, depose and say:

That my house on lot 3 of Allen's subdivision of lot 5, Ragan's Addition to Omaha, Nebraska, was destroyed by fire on the night of November 7, 1891; that the causes of the fire are unknown to me; that the damage done to my buildings was about $1,000, and that said building was insured in the Liberty Insurance Company for $900 by policy dated April 28, 1891; that I have made inquiry and am unable to find anything about the origin of the fire. The policy on said buildings was for $800 on the house and $100 on the barn. L. G. BANGS.

"Subscribed and sworn to," etc.

We remark: (1.) This was a substantial compliance with the terms of the policy requiring Bangs to furnish the Insurance Company proofs of loss. (*Hanover Fire Ins. Co. v. Gustin*, 40 Neb., 828.) (2.) That if Bangs had wholly failed to furnish the Insurance Company any proofs of loss whatever, such failure under the circumstances of this case would afford the Insurance Company no defense whatever to this action. Here, as we shall presently see, the Insurance Company refuses to pay the loss, and defends against this action on the ground that the policy in suit was, at the date of the loss of the insured property, not in force. In *Phenix Ins. Co. v. Bachelder*, 32 Neb., 490, this court, speaking through its present chief justice, NORVAL, said: "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." (See, also, *Western Home Ins. Co. v. Richardson*, 40 Neb., 1.) In *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 473, it was held: "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." (See, also,

Omaha Fire Ins. Co. v. Dierks, 43 Neb., 473.) The precise question was squarely presented and decided in *Dwelling House Ins. Co. v. Brewster*, 43 Neb., 528, where HARRISON, J., speaking for this court to the point, said: "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." We conclude, therefore, that the Insurance Company waived the defense under consideration, in view of the fact that it defended the action on the ground that the policy was not in force at the date of the loss; and if the Insurance Company had not waived such defense, that the evidence establishes that the insured sufficiently complied with the provisions of the policy in reference to furnishing the Insurance Company proofs of loss.

2. The second defense of the Insurance Company was that Bangs, at the time of the issuance of the policy in suit, was not the unconditional and sole owner of the real estate insured; that such real estate was in fact the property of the Loan Company, the title to which property was held in trust for it by Bangs. The policy in suit was issued on the 28th of April, 1891. It is undisputed that prior to the 21st of April, 1891, the Loan Company was the owner and held the legal title to the insured real estate. On the 21st day of April, 1891, the Loan Company, at its home office in the state of New Hampshire, executed to Bangs an absolute warranty deed for this property, which was recorded in the office of the register of deeds some time in the following May. On the trial of this action Bangs swore that he was the owner of this real estate and had been since the date of his deed, and that he purchased it of the Loan Company at private sale. The president of the Loan Company testified on the trial that Bangs was the owner of the property. We are unable to understand upon what theory the learned district judge reached the conclusion, if he did reach such conclusion, that this evidence

was insufficient to establish that Bangs was the unconditional owner of the insured property. The president of the Loan Company and Bangs, at the time of the issuance of the policy in suit, resided in Carroll, Iowa; and Bangs admitted in his testimony that he had never seen this property, and that he did not furnish the money which paid the insurance premium. The evidence of the president of the Loan Company was that he or the Loan Company took out the insurance on the property in the name of Bangs, and that he or the Loan Company paid the premium; that he had corresponded with certain real estate agents in the city of Omaha for the purposes of having them effect a sale of this property and to procure a tenant for the property and collect rents. But when it is remembered that the Loan Company had a mortgage upon this real estate, then its conduct in the premises was entirely consistent with Bang's ownership of the property. Nor are we able to understand how Bangs could be deprived of the title to his property because a person holding a mortgage on it should insure it in Bangs' name for the mortgagee's benefit. In any event this evidence, and the effect of it, was not for the learned district court but for the jury, and had the court permitted this case to go to the jury, and it had returned a special finding that Bangs, at the time the policy in suit was issued, was not the unconditional owner of the real estate, the evidence in this record would not support such a finding.

Considerable stress is placed by counsel for the Insurance Company upon the fact that it does not appear from the evidence what, if any, consideration Bangs paid the Loan Company for this property, but we do not think that is a matter which concerns the Insurance Company. The Loan Company may have given its property to Bangs, and if so, he would nevertheless be the owner of it. Indeed, it would seem that had the Loan Company conveyed the title to this property to Bangs without consideration and for the fraudulent purpose of placing it beyond the reach of the

Loan Company's creditors, that that would not afford any defense to the Insurance Company. *German Ins. Co. v. Hyman*, 34 Neb., 704, was an action on an insurance policy issued on a stock of millinery to Mrs. Hyman. The insurance company defended on the ground that Mrs. Hyman was not the owner of the goods insured and destroyed; that they had been purchased with the money and proceeds of property given her by her husband for the purpose of defrauding his creditors. POST, J., in discussing and overruling this defense, said: "Suppose plaintiff in error were a trespasser instead of an insurer and was called upon to answer for a conversion of the property. Would it be heard in defense to say that the title of the insured had been acquired in fraud of the rights of a third party? Certainly not. Nor is there any rule of law or morals which will sanction such a defense in this action. It is said that had the plaintiff in error known of the business record of Louis Hyman, that is, the fact that he had once made an assignment, it would have refused to insure the property. It is a sufficient answer to this claim that there is no rule of law which imposes upon the owner of property the duty to volunteer such information to an insurance company. An interest, to be insurable, does not depend necessarily upon the ownership of the property. It may be a special or limited ownership disconnected from any title, lien, or possession. If the holder of an interest in the property will suffer loss by its destruction he may indemnify himself therefrom by a contract of insurance. If, by the loss, the holder of the interest is deprived of the possession, enjoyment, or profit of the property, or a security or lien resting thereon, or other certain benefits growing out of or depending upon it, he has an insurable interest." From this it seems that possession with claim of ownership of personal property invests one with an insurable interest therein; and that if an insurance company insures such property, and a loss occurs, it cannot defend against the payment of such loss on

the ground that the insured party held the property in trust for some other person, even to enable such third person to consummate a fraud, where it effected such insurance without inquiry as to the insured's actual title, and without the express and positive false representations of the insured as to his actual title believed in and acted upon by the insurance company. And it seems that where a policy is issued to one who holds the legal title to real estate, where no inquiries are made as to whether any other person is interested in such property, and no representations are made by the insured further than that he is the owner of the property, that it is not a defense to the insurance company, in an action on such policy, that the insured, though holding a legal title to the premises, was a mere trustee for an undisclosed beneficiary. If any other person than Bangs has any interest or ownership in this real estate, or any part of it, it does not appear from the evidence before us, further than the lien thereon by the Loan Company by virtue of its mortgage. We are not called upon to decide, nor do we decide, whether the provision in the policy requiring the insured to be the unconditional and sole owner of the insured property is complied with when such property is real estate and the insured has the legal title thereto, even if it should develop that he held such title in trust for the use of some other person. That question is not before us.

3. The third defense of the Insurance Company was that the insured property, at the time of the issuance of the policy, was vacant and at the date of the fire had been vacant and unoccupied for ten days. The reply of the insured admits that the property was vacant as stated, but pleads in avoidance of this defense a waiver or estoppel thereof by the company. The provision in an insurance policy rendering it void because the insured property is, at the time of its insurance, or shall afterwards become, vacant and unoccupied for a certain time, is inserted therein

for the benefit of the insurer; it is a provision which the insurer may waive; and the existence of the vacancy at the date of the insurance or the happening of the vacancy afterwards does not render the policy void but voidable at the election of the insurer. On the 20th day of April, 1891, the president of the Loan Company at Carroll, Iowa, addressed the letter to the agents of the Insurance Company in Omaha, Nebraska, in which he made this inquiry: "Please let me know what rate you will give me for three years' risk on the following properties: One thousand dollars on a one and one-half story frame dwelling house, with addition, on lot 3, Allen's subdivision of lot 5, Ragan's Addition to Omaha?" This is the property covered by the insurance policy in suit. On the 25th of April, 1891, the agents of the Insurance Company answered this letter, acknowledging its receipt, stating that the rate for one year was fifty cents, for three years one per cent, for five years one and one-half per cent, and then said: "The one and one-half story on lot 3, Allen's subdivision of lot 5, Ragan's Addition, we would not wish to carry more than $800 on this dwelling. The last described dwelling is vacant, but the barn is occupied." On the 27th of April the president of the Loan Company wrote to the agents of the Insurance Company as follows: "Please send me policy on the one and one-half story dwelling on the insured property, $800 on the dwelling and $100 on the barn. Make the policy in the name of L. G. Bangs, present owner, with mortgage clause loss, if any, payable to the Rochester Loan & Banking Company. Send policy to me and I will return draft for premium." In pursuance of this correspondence the agents of the Insurance Company issued the policy in suit and on the 29th of April, 1891, enclosed it in a letter to the president of the Loan Company at Carroll, Iowa. On the 30th of the same month the president of the Loan Company transmitted to the agents of the Insurance Company the premium on the policy.

It would seem almost unnecessary to cite authorities to show that since the insured property was vacant and unoccupied at the date of the issuance of the policy in suit, which fact was actually known by the Insurance Company, and with that knowledge actually before it, it chose to insure the property, that in doing so it elected to and did waive the conditions in the policy that the same should be void if the property was at the time it was insured vacant. The knowledge of the agents of the Insurance Company that the property was vacant at the date of the issuance of the policy was the knowledge of the company. Notice to an insurance agent who issues a policy, of facts relating to the subject-matter of the insurance, is notice to the company, and if he fails to properly state them in the policy when relied upon and trusted to do so, the company should not be permitted to escape liability on that ground. (*Commercial Ins. Co. v. Spankneble*, 52 Ill., 53.) In *Williams v. Niagara Fire Ins. Co.*, 50 Ia., 561, it was held: "Notwithstanding the policy provided that if the premises became unoccupied during the life of the policy, without the written consent of the company indorsed thereon, the policy should be void, it was held that where an agent insured an unoccupied building, and received the premium therefor, the company was estopped from denying that the policy had a legal existence." And in *Aurora Fire & Marine Ins. Co. v. Kranich*, 36 Mich., 289, it was held: "The provision in a policy that 'if at any time during the continuance of this policy * * * the insured property * * * shall become vacant or unoccupied' the insurer shall be absolved from all liability, is held to have no application to the case of buildings that are vacant at the time the policy is issued, the insurer having notice of the fact." To the same effect see *Short v. Home Ins. Co.*, 90 N. Y., 16; *Bennett v. Agricultural Ins. Co.*, 12 N. E. Rep. [N. Y.], 609.

The evidence in the record then does not sustain the de-

fense of the Insurance Company that the policy in suit was not in force at the date of the loss because of the fact that the insured property was and had been vacant for ten days at the time of its destruction and was vacant at the time the policy was issued; but the evidence does sustain the plea of confession and avoidance interposed to this defense by the insured that the company, by its conduct in insuring the property, knowing that it was vacant at the time, had estopped itself from interposing this defense. It must be borne in mind that the condition of the property, so far as occupancy is concerned, was the same at the time it was destroyed as at the date of its insurance. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

INSURANCE COMPANY OF NORTH AMERICA V. HENRY BACHLER.

FILED APRIL 4, 1895. No. 6124.

1. **Insurance**: EFFECT OF INCUMBRANCE. An insurance contract provided that the policy should be void if the insured should fail to make known every fact material to the risk, including the amount of incumbrance, if any, on the insured property, whether interrogated with reference thereto or not. In a suit on such policy the insurer interposed the defense that the policy sued on never took effect, because at the date of its issuance there was an outstanding mortgage against the real estate of which the insurer had no knowledge. The application for the insurance was oral. No inquiries were made by the agent of the insurer as to the condition of the title to the property. The insured said nothing about the existence of the mortgage, but he kept silent because he did not know that it was his duty to disclose its existence. He did not keep silent from any sinister motive or with the intention on his part to deceive or mislead the insurer. *Held*, (1) That the existence of the mortgage on the insured prop-

erty was a fact material to the risk; (2) that the insured's acceptance of the policy under the circumstances was not a representation that the insured property was free from incumbrance; (3) that the silence of the insured under the circumstances was not a misrepresentation as to the condition of his title.

2. ———: EXISTENCE OF MORTGAGE: VALIDITY OF POLICY. Where the insured was not questioned as to incumbrances on his property, and did not intentionally conceal the facts, the existence of a mortgage thereon does not invalidate the policy. Following *Vankirk v. Citizens Ins. Co.*, 48 N. W. Rep. [Wis.], 798.

3. **Review**: ADMISSION OF IRRELEVANT EVIDENCE: FAILURE TO OBJECT. Assignments of error that a verdict rendered is not supported by sufficient evidence, and the judgment pronounced thereon is contrary to the law of the case, cannot be sustained because certain evidence admitted without objection on the trial was irrelevant under the pleadings. *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 473, followed.

4. **Insurance**: BUILDINGS. Insurance upon a building is insurance upon a building as such and not upon the materials of which it is composed. *German Ins. Co. v. Eddy*, 36 Neb., 461, followed.

5. ———: TOTAL LOSS. To sustain the finding of a jury that a building destroyed by fire was a total loss within the meaning of the statute it is not necessary that the evidence should show that the material of which such building was composed was by the fire transformed into cinders, smoke, and ashes.

6. **Contracts to Arbitrate**: DEFENSE TO ACTION. If parties to a contract agree if a dispute arise between them that such dispute shall be submitted to arbitrators, refusal to arbitrate or no arbitration is not a defense to an action brought on such contract by one of the parties thereto. *National Masonic Accident Association v. Burr*, 44 Neb., 256, and cases there cited followed.

7. **Costs**: TAXATION: REVIEW. In order to review the question of retaxation of costs a motion to retax the costs must be made to the trial court and a ruling had thereon by that court. *Real v. Honey*, 39 Neb., 516, followed.

8. **Valued Policy Act**: COSTS: ATTORNEYS' FEES: CONSTITUTIONAL LAW. Section 45, chapter 43, Compiled Statutes, 1893, construed, and *held*, (1) that the courts of the state, by virtue of said section, have the power, upon rendering judgment against an insurance company on a policy of insurance on real property, to allow the plaintiff in the action a reasonable sum as an attorney's fee, to be taxed as part of the costs in the case (*Han-*

over Fire Ins. Co. v. Gustin, 40 Neb., 828, followed); (2) that the subject-matter of said section is not embraced within the prohibitions of section 15, article 3, of the constitution, (3) and is not, therefore, prohibited as special legislation; (4) that as said section is general and uniform throughout the state and operates alike upon all persons and localities of a class, it is not obnoxious to the constitution as being class legislation.

9. **Insurance:** VALUED POLICY ACT: CONTRACTS TO LIMIT LIABILITY. Where real property is wholly destroyed by fire, any provision of a policy of insurance covering such property which in any manner attempts to limit the amount of the loss to less than the sum written in the policy is in conflict with the statutory rule, invalid, and will not be enforced. *Home Fire Ins. Co. v. Bean*, 42 Neb., 537, followed and reaffirmed.

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

The opinion contains a statement of the case.

Jacob Fawcett, for plaintiff in error:

The action must fail, because there was a mortgage upon the insured premises at the time of the fire, the existence of which had not been disclosed to the company. (*Waller v. Northern Assurance Co.*, 10 Fed. Rep., 232; *Bowman v. Franklin Fire Ins. Co.*, 3 Ins. L. J. [Md.], 935; *Hinman v. Hartford Fire Ins. Co.*, 36 Wis., 159.)

The right of an insurance company to insist upon an appraisal as a condition precedent to the commencement of a suit, where the policy contains such a provision, is now the settled law of the land. (*Redell v. Kennedy*, 16 N. E. Rep. [N. Y.], 326; *Knoche v. Chicago, M. & St. P. R. Co.*, 34 Fed. Rep., 471; *Doyle v. Patterson*, 6 S. E. Rep. [Va.], 138; *Herrick v. Belknap*, 27 Vt., 673; *Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y., 250; *Holmes v. Ritchet*, 56 Cal., 307; *Faunce v. Burke*, 16 Pa. St., 480; *Reynolds v. Caldwell*, 51 Pa. St., 298; *Flaherty v. Germania Ins. Co.*, 7 Ins. L. J. [Pa.], 226; May, Insurance, sec. 493; *Reed v. Washington Fire & Marine Ins.*

Co., 14 Ins. L. J. [Mass.], 465; *Scott v. Avery*, 5 H. L. Cas. [Eng.], 811; Myers, Federal Decisions, p. 1036, sec. 72; Wood, Insurance, p. 757; *Scottish Union & Nat. Ins. Co. v. Clancy*, 8 S. W. Rep. [Tex.], 630; *German-American Ins. Co. v. Steiger*, 109 Ill., 254; *United States v. Robeson*, 9 Pet. [U. S.], 319; *Lovejoy v. Hartford Fire Ins. Co.*, 11 Ins. L. J. [Ill.], 186; *Gasser v. Sun Fire Office*, 19 Ins. L. J. [Minn.], 243; *Sullivan v. Sussong*, 9 S. E. Rep. [S. Car.], 156; *Johnson v. American Fire Ins. Co.*, 43 N. W. Rep. [Minn.], 59; *Chippewa Lumber Co. v. Phenix Ins. Co.*, 44 N. W. Rep. [Mich.], 1055; *Pioneer Mfg. Co. v. Phœnix Assurance Co.*, 10 S. E. Rep. [N. Car.], 1057; *Hamilton v. Liverpool Ins. Co.*, 136 U. S., 254; *Mossness v. German-American Ins. Co.*, 52 N. W. Rep. [Minn.], 932.)

E. F. Warren, also for plaintiff in error.

John C. Watson, contra:

If an insurance company elects to issue a policy without an application, or any representations concerning title, it cannot, after loss, complain that insured's interest was not correctly stated in the policy, or that an existing incumbrance was not disclosed. (*Western Assurance Co. v. Mason*, 5 Bradw. [Ill.], 141; *Hartford Fire Ins. Co. v. Haas*, 8 Ky., 610; *Washington Mills Emery Mfg. Co. v. Weymouth & Braintree Mutual Fire Ins. Co.*, 135 Mass., 503; *Castner v. Farmers Mutual Fire Ins. Co.*, 46 Mich., 15; *Traders Ins. Co. v. Barracliffe*, 45 N. J. Law, 543; *Agricultural Ins. Co. v. Yates*, 10 Ky., 984; *O'Brien v. Ohio Ins. Co.*, 52 Mich., 131; *Rawls v. American Life Ins. Co.*, 36 Barb. [N. Y.], 357; *Pennsylvania Mutual Life Ins. Co. v. Wiley*, 100 Ind., 92; *Dilleber v. Home Life Ins. Co.*, 69 N. Y., 256; *Higgins v. Phœnix Mutual Life Ins. Co.*, 74 N. Y., 9.)

Valued policy laws are held to be valid and enforceable, because based upon grounds of public policy and intended

to do away with great evils, mischiefs, and abuses that were subverting business morality and injuring business interests, and being founded upon such considerations, like all other private contracts, their provisions or terms cannot be waived, either by express stipulation or doubtful implication. (*Rielly v. Franklin Ins. Co.*, 43 Wis., 449; *Williams v. Hartford Ins. Co.*, 54 Cal., 442; Chitty, Contracts, 598; *Staines v. Wainright*, 6 Bing. N. C. [Eng.], 174; *Phalen v. Clark*, 19 Conn., 421; *Nellis v. Clark*, 4 Hill [N. Y.], 424; *Dodson v. Harris*, 10 Ala., 566; *Martin v. Wade*, 37 Cal., 168; *Hoover v. Pierce*, 27 Miss., 13; *Thompson v. Citizens Ins. Co.*, 45 Wis., 388.)

"Wholly destroyed" does not mean an absolute extinction by fire of the property. (*Williams v. Hartford Fire Ins. Co.*, 54 Cal., 442.)

The term "total loss" is a native of marine insurance, and the precedents for the construction of the valued policy laws were at least given color by this doctrine of total loss as founded in that branch of law. Here, it must be observed, as a very important factor, that a total loss may be either actual or constructive. (*Idle v. Royal Exchange Assurance Co.*, 8 Taunt. [Eng.], 755; *Cambridge v. Anderton*, 1 C. & P. [Eng.], 60; *Dyson v. Rowcroft*, 3 Bos. & P. [Eng.], 474; *Gordon v. Massachusetts Fire & Marine Ins. Co.*, 2 Pick. [Mass.], 249.)

When the loss is not absolutely total in the ordinary sense of the term, but occurred in such a manner that the insured is deemed to be justified in abandoning all efforts to save what remains, under the marine insurance law, upon a formal notice of abandonment of his interest to the underwriter, he is entitled to claim a total loss. (*Peele v. Merchants Ins. Co.*, 3 Mason [U. S.], 27; *Bradlie v. Maryland Ins. Co.*, 12 Pet. [U. S.], 397; *Coeplin v. Phœnix Ins. Co.*, 46 Mo., 211; *Ruckman v. Merchants Louisville Ins. Co.*, 5 Duer [N. Y.], 342; *The Brig Sarah Ann*, 2 Sum. [U. S.], 206; *Fulton Ins. Co. v. Goodman*,

32 Ala., 108; *German Ins. Co. v. Eddy*, 36 Neb., 461; *German Ins. Co. v. Penrod*, 35 Neb., 273.)

Insurance companies cannot nullify the effects of the valued policy law by inserting in their policy arbitration clauses. (*Hall v. People's Mutual Fire Ins. Co.*, 6 Gray [Mass.], 185; *Bartlett v. Union Mutual Fire Ins. Co.*, 46 Me., 500; *Reichard v. Manhattan Life Ins. Co.*, 31 Mo., 518; *Amesbury v. Bowditch Mutual Fire Ins. Co.*, 6 Gray [Mass.], 596; *Nute v. Hamilton Mutual Ins. Co.*, 6 Gray [Mass.], 174; *Indiana Mutual Fire Ins. Co. v. Routledge*, 7 Ind., 25.)

A provision of the policy which conflicts with the statutes of the state where the company is doing business is null and void. In such cases the statute enters into and becomes a part of the contract and controls any conflicting provisions in the policy. (*Fletcher v. New York Life Ins. Co.*, 13 Fed. Rep., 526; *Wall v. Equitable Life Assurance Society*, 32 Fed. Rep., 273; *Vore v. Hawkeye Ins. Co.*, 41 N. W. Rep. [Ia.], 309; *Reiner v. Dwelling House Ins. Co.*, 42 N. W. Rep. [Wis.], 208; *Sly v. Ottawa Agricultural Ins. Co.*, 29 U. C. C. P., 28; *Goring v. London Mutual Fire Ins. Co.*, 11 Ont. [Can.], 82; *Frey v. Mutual Fire Ins. Co.*, 43 U. C. Q. B., 102; *Sauvey v. Isolated Risk & Farmers Fire Ins. Co.*, 44 U. C. Q. B., 523.)

If the policy does not clearly indicate that arbitration and award are conditions precedent to any action on the policy, then it is bad, and an action may be brought at once. (*Birmingham Fire Ins. Co. v. Pulver*, 18 N. E. Rep. [Ill.], 804; *Gere v. Council Bluffs Ins. Co.*, 67 Ia., 272; *Reed v. Washington Fire & Marine Ins. Co.*, 138 Mass., 572; *Williams v. Hartford Ins. Co.*, 54 Cal., 442; *German-American Ins. Co. v. Steiger*, 109 Ill., 254; *Mark v. National Fire Ins. Co.*, 24 Hun [N. Y.], 565; *Liverpool, London & Globe Ins. Co. v. Creighton*, 51 Ga., 95; *Schollenberger v. Phœnix Ins. Co.*, 7 Ins. L. J. [Pa.], 697.)

If an arbitration clause seeks to oust the courts of juris-

diction by making the award of the arbitrators final, it is not binding on the assured. (*Case v. Manufacturers Fire & Marine Ins. Co.*, 21 Pac. Rep. [Cal.], 843; *German-American Ins. Co. v. Etherton*, 25 Neb., 505; *Crossley v. Connecticut Fire Ins. Co.*, 27 Fed. Rep., 30; *Lasher v. Northwestern National Ins. Co.*, 18 Hun [N. Y.], 98; *Mentz v. American Fire Ins. Co.*, 79 Pa. St., 478; *Trott v. City Ins. Co.*, 1 Cliff. [U. S.], 439; *Cobb v. New England Mutual Marine Ins. Co.*, 6 Gray [Mass.], 192; *Stephenson v. Piscataqua Fire & Marine Ins. Co.*, 54 Me., 55; *Allegre v. Maryland Ins. Co.*, 2 G. & J. [Md.], 136.)

In case of total loss arbitration cannot be made a condition precedent to action by the assured. (*Rosenwald v. Phenix Ins. Co.*, 3 N. Y. Supp., 215.)

In those states having a valued policy law the condition for arbitration is not binding on the assured in case of total loss. (*Thompson v. St. Louis Ins. Co.*, 43 Wis., 459; *Thompson v. Citizens Ins. Co.*, 45 Wis., 388.)

RAGAN, C.

To reverse a judgment pronounced against it by the district court of Otoe county in favor of Henry Bachler in a suit based on an ordinary fire insurance policy the Insurance Company of North America (hereainfter called the "Insurance Company") has prosecuted to this court proceedings in error.

1. The first assignment of error is that the district court erred in giving instructions numbered 1 to 10, both inclusive, upon its own motion; and the second assignment is that the court erred in refusing to give the instructions 1 to 11, both inclusive, requested by the plaintiff in error. The court did not err in giving all these instructions, nor err in refusing to give all the instructions asked for, and for that reason these assignments must be overruled.

2. No specific ruling of the district court in the admission or rejection of evidence is assigned as error in the pe-

tition in error filed here. Our examination of the record then is confined to the determination of whether the verdict pronounced by the jury is supported by sufficient competent evidence, and whether the judgment pronounced by the court is contrary to the law of the case.

3. The policy sued on was issued on the 1st day of October, 1889, and insured the property of Bachler from loss or damage by fire for one year. October 1, 1890, a renewal certificate was issued by the Insurance Company continuing the policy in force for another year, and on October 1, 1891, another renewal certificate was issued continuing the policy in force until October 1, 1892. On the 22d day of February, 1892, the insured property was destroyed by fire. At the time the policy was originally issued and at the time the policy was renewed on the 1st of October, 1891, there existed an unrecorded mortgage against the insured property. This mortgage was recorded in June, 1891, and was in existence and a lien upon the insured property at the time the policy was renewed October 1, 1891. The policy, among other provisions, contained the following: "The acquiring by a third party of an insurable interest in the property or any part thereof by virtue of a mortgage or a deed of trust executed by the assured subsequent to the date hereof * * * shall cause an immediate termination of this policy," etc. The argument here is that because of the existence of this mortgage on the insured property October 1, 1889, that the policy sued upon never took effect and never was in force, and as the mortgage still existed upon the property on the 1st of October, 1890, that the renewal certificate issued on that date continuing the policy in force for one year was without effect for that purpose. This is a violent construction of the contract. Its language is in effect that if the insured shall subsequent to the date of the issuance of the insurance policy mortgage the insured property, etc., that the execution of such mortgage shall terminate the policy.

The insured did not incumber this property by mortgage subsequent to the date of the renewal of the policy made the subject of this suit, namely, October 1, 1890, nor did he incumber this property subsequent to the time that the original contract of insurance was issued, to-wit, October 1, 1889. The fact that there existed a mortgage upon the property insured at the date of the issuance of the insurance contract did not itself prevent the policy from taking effect. The evidence shows, without conflict, that neither the original issuance of this policy nor either of its renewals were based on any written application made by the insured to the Insurance Company for the insurance; that the agent of the company at neither of said times made inquiries of the insured as to whether the property proposed to be insured was incumbered by a mortgage; that the agent of the Insurance Company at neither of said times knew of the existence of the mortgage upon the insured property; and that the insured at neither of said times informed the agent of the Insurance Company that the property was incumbered by a mortgage. But the evidence also warrants the conclusion that the insured was not actuated by any sinister motive in not disclosing to the agent of the Insurance Company the existence of this mortgage; that as he was not interrogated upon the subject he remained silent because he was ignorant of the fact that he was under any obligation to disclose the existence of the mortgage. The policy contained a provision that if the insured should "fail to make known every fact material to the risk, including the amount of incumbrance, if any, on said property, whether interrogated with reference thereto or not, this policy shall be void." It is now argued that the judgment under consideration here is contrary to the law of the case, because of the failure of the insured to inform the Insurance Company of the existence of this mortgage upon the insured property at the time the policy was originally issued, October 1, 1889, or at least at the date

when the renewal certificate was issued, October 1, 1891. In support of this contention counsel cite us to *Waller v. Northern Assurance Company*, 10 Fed. Rep., 232. The provision in the policy made the subject of that action was practically the same as the provision in the policy here, and it appeared from the evidence that the only interest the assured had in the property was that of a mortgagee. It also appeared that at the time the insured applied for the insurance no inquiries were made by the insurance company's agent as to the title the insured had in the property, and the insured made no representations as to the character of his estate in the property which he desired insured, and the court held, McCrary, C. J., delivering the opinion, that it was the duty of the insured, when he applied for the insurance, to disclose the nature of his interest in the insured property, whether or not any inquiry was made of him on the subject. The case cited then appears to sustain the contention of counsel.

Another case cited by counsel is *Becker v. Hibernian Ins. Co.*, 44 Ind., 95. We have been unable to find this case. Certainly there is no such case in the 44th Indiana.

Another case cited in support of this contention is *Hinman v. Hartford Fire Ins. Co.*, 36 Wis., 159. In that case the insured made and signed an application in writing to the insurance company for the insurance, in which application were the following questions and answers: "Q. Is the property mortgaged? A. No. Q. Are you the sole and undisputed owner of the property to be insured? A. Yes. Q. Do you own the ground on which the building stands? A. By contract." The policy contained a provision that if the assured in his application had made any erroneous representation, or had omitted to make known any fact material to the risk, or if the insured was not the sole and unconditional owner of the property insured, or of the land on which the building stood, that the policy should be void. The undisputed evidence at the

trial showed that at the time the policy was issued that the insured had no title whatever to the real estate, but was in possession thereof under a contract of purchase. The court held that the answers of the insured, taken together, were equivalent to a statement that although he held the land and building under a contract of purchase, yet no person other than himself had any substantial interest in them; that he had fully paid for the land and was the equitable owner, with the right to enforce a conveyance to himself of the legal title; that such representation was material and false, and rendered the policy void. It will thus be seen that the decision in the case last cited is not applicable to the facts of the case under consideration. Counsel also cite us to *Pennsylvania Ins. Co. v. Gottsman*, 48 Pa. St., 151, and *Brown v. Commonwealth Ins. Co.*, 41 Pa. St., 187. We have not examined these authorities, but assumed for the purposes of this case that they support the contention of counsel.

The rule laid down in the case in 10 Fed. Rep., *supra*, is far away from the weight of authority on the question under consideration. The true rule, we think, and the one supported by the decided weight of authority, was announced by the supreme court of Wisconsin in *Vankirk v. Citizens Ins. Co. of Pittsburgh*, 48 N. W. Rep. [Wis.], 798, in the following language: "Where the assured was not questioned as to incumbrances on his property, and did not intentionally conceal the facts, the existence of a mortgage thereon does not invalidate the policy." To the same effect see *Alkan v. New Hampshire Ins. Co.*, 10 N. W. Rep. [Wis.], 91. This is also the rule in Michigan. (See *Castner v. Farmers Mutual Ins. Co.*, 8 N. W. Rep. [Mich.], 554.) *O'Brien v. Ohio Ins. Co.*, 17 N. W. Rep. [Mich.], 726, where it was held: "Where insurance is applied for orally, and the applicant is unaware of any provision in the policy regarding incumbrances, and is not guilty of any misleading conduct, his bare silence cannot be deemed a

misrepresentation; and if the agent in such a case did not read the policy to the applicant or call his attention to the clause relating to incumbrances, the existence of a mortgage would be no impediment to a recovery from the insurance company." See, also, *Guest v. New Hampshire Fire Ins. Co.*, 33 N.W. Rep. [Mich.], 31, where it was held: "A mere failure of the assured to mention incumbrances on the insured property, if not inquired about, where the application for insurance is oral, and no deceit is practiced, will not vitiate the policy." It is also the rule in Massachusetts. (See *Washington Mills Emery Mfg. Co. v. Weymouth & Braintree Mutual Fire Ins. Co.*, 135 Mass., 503.) It is also the rule in New Jersey. (See *Trade Ins. Co. v. Barracliffe*, 45 N. J. Law, 543.) In Wood, Insurance, it is stated that when no inquiries are made the intention of the assured becomes material, and to avoid the policy it must be found not only that the matter was material, but also that it was intentionally and fraudulently concealed.

We conclude, therefore, that Bachler's failure to inform the agent of the Insurance Company of the existence of the mortgage upon the insured property either at the date that the policy was issued or renewed did not vitiate the policy or prevent its going into effect. It is not doubted that the existence of the mortgage on the property was a fact material to the risk. But the application for this insurance was oral. No inquiries were made by the agent of the Insurance Company as to the condition of the title to the property; and Bachler said nothing about the existence of the mortgage for the reason that he did not know that it was his duty to disclose the existence of the mortgage. It is not pretended that Bachler kept silent from any sinister motive or with any intention on his part to deceive or mislead the Insurance Company. In other words, Bachler's acceptance of the policy was not under the circumstances a representation that the insured property was free from the mortgage; nor was his silence under the circumstances a misrepresentation as to the condition of his title.

4. Another argument under this head is this: The Insurance Company, in its answer, set up as a defense to the suit the existence of this mortgage on the insured property at the date that the policy was originally issued and at the dates of its renewal. The reply to this defense was a general denial. The undisputed evidence is, as already seen, that the mortgage was on the property when the policy was originally issued and at each of the times when it was renewed, and the contention is that, therefore, the judgment pronounced is contrary to the law and evidence of the case; but this is in effect saying that the district court erred in permitting the insured to prove the circumstances under which the policy was issued and renewed, that the application for the insurance was oral, that the Insurance Company had no knowledge of the existence of the mortgage, made no inquiries respecting it, and the insured on his part did not know that it was his duty to communicate the existence of the mortgage to the insurance agent and made no disclosure of the existence of the mortgage for that reason. This precise question arose and was decided in *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 475, and it was there held that if such evidence was irrelevant under the pleadings, counsel for insurance company should have objected to the ruling of the district court on that ground, and then specifically assigned the ruling of the district court in admitting such evidence in his petition in error.

5. The next argument is that the verdict that the insured property was wholly destroyed by fire is not supported by sufficient evidence. This was purely a question of fact for the jury, and while there is some conflict in the evidence, we cannot say that the verdict lacks sufficient evidence to support it. The insured building was a frame structure, the rear wall of which was veneered with brick. The evidence does not show that the material of which the building was composed was transformed by the fire into cinders, smoke, and ashes; nor is it necessary that the evidence

should so show, in order to support the jury's finding, that the loss was total. We conclude from the evidence in the record, included in which evidence is a photograph of the premises immediately after the fire, that the insured premises was reduced to a wreck by the fire; that what remained of the building was practically valueless. There were some boards and some bricks and some pieces of material and parts of the floors and walls that were not consumed, but after the fire the building insured did not exist as a building. An insurance upon a building is an insurance upon a building as such, and not upon the materials of which it is composed. (*Williams v. Hartford Ins. Co.*, 54 Cal., 442; *German Ins. Co. v. Eddy*, 36 Neb., 461.)

6. The policy in suit contained this provision: "If differences shall arise between the parties hereto as to the amount of any loss or damage, * * * the matter shall, at the written request of either party, be submitted to three impartial arbitrators, each party to choose one, and the two so chosen to choose the third, whose award, in writing, signed by a majority of the arbitrators, shall be binding on the parties as to the amount of such loss or damage, but shall not decide the legal liability of the company under this policy. And in such case of disagreement, the determination of the amount of the loss or damage sustained by arbitrators as aforesaid shall be a condition precedent to the right of the assured, or either party, to institute proceedings at law for the recovery of the claim hereunder." One of the defenses interposed by the Insurance Company to this action was that a disagreement arose between it and Bachler as to the amount of the loss or damage he had sustained by reason of the fire; that the Insurance Company, in pursuance of the provision of the policy just quoted, requested, in writing, of Bachler that the amount of such loss or damage might be arbitrated, and that Bachler had refused to submit the amount of loss or damage he had sustained by the fire to arbitration. Assuming that the evi-

dence in the record sustains without conflict the contention of the Insurance Company that it demanded that the amount of the loss or damage sustained by Bachler on account of the fire should be submitted to arbitration and that he had refused to arbitrate it, the defense must fail. This precise question was decided adversely to the contention of the plaintiff in error in *German-American Ins. Co. v. Etherton*, 25 Neb., 505, and again decided in *German Ins. Co. v. Eddy*, 36 Neb., 461. The question was again considered in *Home Fire Ins. Co. v. Bean*, 42 Neb., 537. The court, speaking through HARRISON, J., said: "A provision in a policy that no suit or action against the insurer 'shall be sustained in any court of law or chancery until after an award shall have been obtained' by arbitration, fixing the amount due after loss, is void, the effect of such provision being to oust the courts of their legitimate jurisdiction." This question was again considered in *National Masonic Accident Association v. Burr*, 44 Neb., 256, and the foregoing cases were again examined and the court held: "Whatever be the rule elsewhere, it is the firmly established doctrine here that if parties to the contract agree that if a dispute arise between them that such dispute shall be submitted to arbitration, refusal to arbitrate or no arbitration is not a defense to an action brought on such contract by one of the parties thereto, as the effect of such agreement is to oust the courts of their legitimate jurisdiction and is contrary to public policy and therefore void."

7. The district court made an order allowing counsel for Bachler a certain sum of money as an attorney's fee, and ordered the amount allowed taxed as part of the costs of the case to the Insurance Company. This order of the court is assailed on two grounds: (1.) That there was no evidence before the court to show that the amount allowed as an attorney fee was a reasonable fee for services rendered in the case. The order of the court by which an attorney

fee was taxed as part of the costs in the action was not made one of the grounds of the motion filed by the Insurance Company for a new trial, nor is this action of the court subsequently assigned as error in the petition in error filed in this court; and the Insurance Company filed no motion in the district court to retax the costs. The ruling of a district court in the taxation of costs has been frequently before this court. One of the later expressions on the subject is found in *Real v. Honey*, 39 Neb., 516, in which the opinion was prepared by the present chief justice, NORVAL, and the conclusion reached thus stated in the syllabus: "In order to review the question of taxation of costs, a motion to retax the costs must be made in the trial court, and a ruling obtained thereon by that court." Whether the district court erred then in allowing counsel for Bachler an attorney's fee and ordering it to be taxed as part of the costs is not before us for review. (2.) But it is argued that the law under which this attorney fee was allowed is unconstitutional, and that therefore the order of the court was void. It is admitted that this order was made in pursuance of section 45, chapter 43, Compiled Statutes, 1893, which provides, in substance, that the court, upon rendering judgment against an insurance company in a suit upon a policy issued insuring real estate against loss or damage by fire, tornado, or lightning, where such property shall have been wholly destroyed, shall allow the plaintiff in the suit a reasonable sum as an attorney's fee, to be taxed as part of the costs. This section of the statute was construed by this court in *Hanover Fire Ins. Co. v. Gustin*, 40 Neb., 828, and it was there held that the courts of the state, by virtue of this provision of the statute, had the power, upon rendering judgment against an insurance company on any policy of insurance on real property, to allow the plaintiff in the action a reasonable sum as an attorney's fee to be taxed as part of the costs in the case. The constitutionality of the law, however, was not

raised in the argument, nor was the point decided in the case. Here it is argued that the law is unconstitutional, because it is class or special legislation. No authority is cited in support of this proposition, nor do we think any can be found. The subjects of special legislation prohibited by the constitution are all enumerated in section 15, article 3, of that instrument. This section of the constitution does not prohibit the legislature from passing such a law as the one under consideration. That the legislature may legislate upon any subject not prohibited by the constitution is a proposition too well recognized to call for the citation of authorities in its support. We know of nothing in the constitution which prohibits the legislature from enacting that the successful party in litigation may recover a judgment against his adversary for the amount of the costs expended or accrued by him in the prosecution of such suit, nor do we know of anything that prohibits the legislature from including in the term costs a reasonable attorney's fee. We conclude, therefore, that the law assailed as unconstitutional is a valid law; that it is not within said section 15 of the constitution which prohibits special legislation. (*State v. Berka*, 20 Neb., 375; *McClay v. City of Lincoln*, 32 Neb., 412; *Lancaster County v. Trimble*, 33 Neb., 121; *State v. Robinson*, 35 Neb., 401; *Koen v. State*, 35 Neb., 676; *State v. Norris*, 37 Neb., 299; *Hunzinger v. State*, 39 Neb., 653.) It is said that this act is class legislation because it applies only to insurance companies; but where a law is general and uniform throughout the state, and operates alike upon all persons and localities of a class, it is not objectionable as wanting uniformity of operation.

8. The final argument that the judgment is contrary to the law of the case is this, the insurance policy provided: "It is further declared to be a condition precedent to the granting of insurance that the amount claimable hereunder shall not exceed the actual loss ascertained as above,

any so called valued policy law to the contrary notwithstanding." The building was insured in the sum of $1,500 and was totally destroyed by fire. The contention is that the actual value of the building was less than the sum for which it was insured, and that by the provision quoted above from the contract of insurance Bachler agreed, in effect, that the Insurance Company should not be liable to him for any greater sum than the actual value of the building; that this contract was a valid one, and that the courts are bound to enforce it. This precise question was before this court in *Home Fire Ins. Co. v. Bean*, 42 Neb., 537, and the point was decided adversely to the contention of the plaintiff in error here. HARRISON, J., speaking for the court, said: "Where real property is wholly destroyed by fire, any provision of a policy of insurance covering such property which in any manner attempts to limit the amount of the loss to less than the sum written in the policy is in conflict with the statutory rule, invalid, and will not be enforced." This case is decisive of the question under consideration. The judgment of the district court is

AFFIRMED.

NORVAL, C. J., not sitting.

HOME FIRE INSURANCE COMPANY OF OMAHA V. HAMMANG BROTHERS & COMPANY.

FILED APRIL 4, 1895. No. 5922.

1. **Insurance**: ADDITIONAL RISKS: WRITTEN CONSENT: WAIVER: NOTICE: PRINCIPAL AND AGENT. The plaintiff in error had an insurance risk of $1,000 on the property of the defendants in error. At the same time another insurance company had a risk of $1,000 on the same property. The plaintiff in error knew of

the risk carried by the other company. The day before the risk of the plaintiff in error expired its agent requested permission of the defendants in error to write them a policy for $1,500 on the insured property to take the place of the policy about to expire. The defendants in error consented, cautioning the agent at the time to make a memorandum in writing on the new policy of the existence of the $1,000 of insurance held by the other insurance company. The agent promised to do this, and the next day wrote the policy in suit, but forgot to make the memorandum thereon of the other insurance. The agent was a banker, and after writing the policy in suit he placed it in a vault in his bank, in which the defendants in error kept their private papers, and they never saw the policy until after the loss occurred. In a suit upon the policy the insurance company defended on the ground that the policy in suit was never in force because the existence of the other insurance policy was not indorsed on the policy in suit when it was issued. The policy provided that it should be void if there was at its date any other insurance on the insured property, unless consent of the company thereto should be indorsed on the policy. *Held*, (1) That the existence of the additional insurance on the property did not of itself render the policy in suit void, but only voidable at the election of the insurer; (2) that such provision was inserted in the policy for the benefit of the insurer and was a provision which it might waive (*Hughes v. Ins. Co. of North America*, 40 Neb., 626, followed); (3) that the insurance company having written the policy in suit with full knowledge of the existence of the other policy is estopped from insisting that the policy in suit never took effect because there was indorsed thereon no memorandum of the existence of the other policy (*Phenix Ins. Co. v. Covey*, 41 Neb., 724, followed); (4) that the agent's knowledge, at the time he wrote the policy in suit, of the additional insurance on the insured property was the knowledge of the insurance company and that it was bound thereby.

2. ———: PROOFS OF LOSS: WAIVER. Another defense of the insurance company was that the insured had not furnished proofs of loss as required by the policy. A written statement of facts concerning the loss sworn to by the insured and furnished to the insurer set out in the opinion, and (1) *held* to be a sufficient compliance with the provision of the policy requiring the insured to furnish proofs of loss. *Hanover Fire Ins. Co. v. Gustin*, 40 Neb., 828, followed. (2.) The conduct of the insurer after being advised of the destruction of the insured property, set out in the opinion, and *held* that the insurer by such conduct waived the furnishing of any proof of loss whatever. *State Ins. Co. v. Schreck*,

27 Neb., 527, and *Hartford Fire Ins. Co. v. Meyer*, 30 Neb., 135, followed. (3.) That the refusal of the insurer to pay the loss, and its defense made thereto on the ground that the policy in suit was not in force at the date of the destruction of the insured property, was a waiver by the insurer of the provision of the policy requiring the insured to furnish it proofs of loss. *Dwelling House Ins. Co. v. Brewster*, 43 Neb., 528, followed.

3. ———: ———: ———. The provision of an insurance policy requiring proof of loss to be furnished the insurer within a specified time and in a particular manner is waived by the insurer, if, with a knowledge of the fire, its adjusting agent goes upon the ground, examines into the circumstances of the fire, takes possession of the books and invoices of the insured, and with his help makes an estimate of the amount of the loss. *Union Ins. Co. v. Barwick*, 36 Neb., 223, followed.

4. ———: ———: ———. Where the proof of loss submitted to an insurer is unsatisfactory it should return the same to the insured within a reasonable time, stating in what respect it is considered defective; and if it fails to do so it will be held to have waived any defect in such proof. *Phenix Ins. Co. v. Rad Bila Hora Lodge*, 41 Neb., 21, followed.

5. ———: CERTIFICATE OF MAGISTRATE: VALIDITY OF PROVISION: WAIVER. The insurance policy in suit contained a provision to the effect that in case a loss occurred, as a condition precedent to the right of the insured to maintain an action therefor he should furnish to the insurer a certificate of a magistrate, notary public, or commissioner of deeds, whose office was next to the place of the fire, stating that such officer had examined the circumstances of the fire, knew the character and financial condition of the insured, and believed that he had without fraud sustained loss on the insured property to an amount certified by the officer. A defense of the insurance company to the action was that no such certificate was furnished. *Held*, (1) That the insurance company by its conduct, set out in the opinion, after being advised of the loss, and by refusing to pay the loss and defending against the same on the ground that the policy in suit was not in force at the date of the loss, had waived the furnishing of such certificate, the same being part of proof of loss; (2) that the validity of any such provision was doubtful; (3) the constitution guaranties to the citizen a remedy by due course of law for any injury to himself, his property, or reputation; and it seems that the right of an insured to maintain an action in the courts of the state on an insurance contract cannot be made to depend upon his first furnishing to the insurer a certificate of a notary public

as to his moral character, financial standing, and the notary's opinion as to whether the loss resulted from the fraud of the insured, nor as to the amount of such loss.

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

The facts are stated by the commissioner.

Jacob Fawcett, for plaintiff in error:

Where a policy requires the furnishing of proofs of loss as a condition precedent to a right of recovery on the policy the proofs must be furnished. (*German Ins. Co. v. Fairbank*, 32 Neb., 757.)

The defendants in error never furnished the plaintiff in error with a certificate under the hand and seal of the magistrate, notary public, or commissioner of deeds nearest the place of the fire. There can therefore be no recovery. (*Columbian Ins. Co. v. Lawrence*, 2 Pet. [U. S.], 25; *Leadbetter v. Etna Ins. Co.*, 13 Me., 265; *Inman v. Western Fire Ins. Co.*, 12 Wend. [N.Y.], 452; *Johnson v. Phœnix Ins. Co.*, 112 Mass., 49; *Roumage v. Mechanics Fire Ins. Co.*, 1 Green [N. J. Law], 110; *Protection Ins. Co. v. Pherson*, 5 Ind., 417; *Noonan v. Hartford Fire Ins. Co.*, 21 Mo., 81; *Cornell v. Hope Ins. Co.*, 3 Martin n. s. [La.], 223; *Kerr v. British American Assurance Co.*, 32 U. C. Q. B., 569; *Cayon v. Dwelling House Ins. Co.*, 32 N. W. Rep. [Wis.], 540; *Morrow v. Waterloo County Mutual Fire Ins. Co.*, 39 U. C. Q. B., 441; *Campbell v. American Popular Life Ins. Co.*, 1 McArthur [D. C.], 246; Wood, Insurance, secs. 416, 713; *Williams v. Queens Ins. Co.*, 19 Ins. L. J. [Conn.], 26; *Lane v. St. Paul Fire & Marine Ins. Co.*, 52 N. W. Rep. [Minn.], 649.)

The policy was void by reason of the additional insurance. (*German Ins. Co. v. Heiduk*, 30 Neb., 288; *Cleaver v. Traders Ins. Co.*, 32 N. W. Rep. [Mich.], 662; *England v. Westchester Fire Ins. Co.*, 51 N. W. Rep. [Wis.],

946; *Johnson v. Dakota Fire & Marine Ins. Co.*, 45 N. W. Rep. [N. Dak.], 799; *Wilkins v. State Ins. Co.*, 45 N. W. Rep. [Minn.], 2; *Jennings v. Chenango County Mutual Ins. Co.*, 2 Denio [N. Y.], 75; *Brown v. Cattaraugus County Mutual Ins. Co.*, 18 N. Y., 385; *Chase v. Hamilton Ins. Co.*, 20 N. Y., 52; *Western Assurance Co. v. Rector*, 3 S. W. Rep. [Ky.], 415; *McNierney v. Agricultural Ins. Co.*, 48 Hun [N. Y.], 244; *Franklin Fire Ins. Co. v. Martin*, 8 Ins. L. J. [N. Y.], 134; *Smith v. Cash Mutual Fire Ins. Co.*, 24 Pa. St., 324; *Loehner v. Home Mutual Ins. Co.*, 17 Mo., 248; *Hartford Fire Ins. Co. v. Webster*, 69 Ill., 392; *Dewees v. Manhattan Ins. Co.*, 6 Vroom [N. J.], 366; *Winneshiek Ins. Co. v. Holzgraffe*, 53 Ill., 517; Ostrander, Fire Insurance, 72; *Walker v. State Ins. Co.*, 26 Pac. Rep. [Kan.], 718; *Herbst v. Lowe*, 65 Wis., 316; *Ripley v. Ætna Ins. Co.*, 30 N. Y., 136; *Glendale Mfg. Co. v. Protection Ins. Co.*, 21 Conn., 37; *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn., 235; *Barrett v. Union Mutual Fire Ins. Co.*, 7 Cush. [Mass.], 180; *Insurance Co. v. Mowry*, 96 U. S., 544; *Smith v. Cash Mutual Fire Ins. Co.*, 24 Pa. St., 320; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill., 168; *Higginson v. Dall*, 13 Mass., 96; *Whitney v. Haven*, 13 Mass., 172; *Weston v. Emes*, 1 Taunt. [Eng.], 115; *Swan v. Watertown Fire Ins. Co.*, 96 Pa. St., 42; *Greenwood v. New York Life Ins. Co.*, 27 Mo. App., 411.)

W. S. Cook and *D. Z. Mummert, contra:*

The company, by sending its agent to adjust the loss, calling for bills and additional evidence, waived proofs of loss and certificate of notary. (*Cannon v. Home Ins. Co. of New York*, 53 Wis., 585; *Brown v. State Ins. Co.*, 74 Ia., 428; *Oshkosh Gas Light Co. v. Germania Fire Ins. Co.*, 71 Wis., 454; *Zielke v. London Assurance Corporation*, 64 Wis., 442; *Green v. Des Moines Fire Ins. Co.*, 50 N. W. Rep. [Ia.], 558; *Bach v. State Ins. Co.*, 64 Ia., 595; *Merchants Ins. Co. v. Holthaus*, 43 Mich., 423; *Bromberg v. Minne-*

sota Fire Association, 45 Minn., 318; *Miller v. Hartford Fire Ins. Co.*, 70 Ia., 704; *Harriman v. Queen Ins. Co.*, 49 Wis., 71; *Commercial Union Assurance Co. v. Hocking*, 115 Pa. St., 407; *Union Ins. Co. v. Barwick*, 36 Neb., 223; *German-American Ins. Co. v. Barwick*, 36 Neb., 223; *Billings v. German Ins. Co.*, 34 Neb., 502.)

Knowledge by the agent of the existence of the additional insurance is knowledge of the plaintiff, and the failure to make objections is a complete waiver of any objection that the additional insurance was not indorsed upon the policy. (*Copeland v. Dwelling House Ins. Co.*, 43 N. W. Rep. [Mich.], 991; *Tubbs v. Dwelling House Ins. Co.*, 48 N. W. Rep. [Mich.], 296; *Kitchen v. Hartford Fire Ins. Co.*, 23 N. W. Rep. [Mich.], 616; *Brandup v. St. Paul Fire & Marine Ins. Co.*, 7 N. W. Rep. [Minn.], 735; *Bennett v. Council Bluffs Ins. Co.*, 31 N. W. Rep. [Ia.], 948; *Cleaver v. Traders Ins. Co.*, 39 N. W. Rep. [Mich.], 571; *Barnes v. Hekla Fire Ins. Co.*, 39 N. W. Rep. [Ia.], 122; *Hamilton v. Home Ins. Co.*, 7 S. W. Rep. [Mo.], 261; *Kausel v. Minnesota Farmers Mutual Fire Association*, 16 N. W. Rep. [Minn.], 430; *Reynolds v. Iowa & Nebraska Ins. Co.*, 46 N. W. Rep. [Ia.], 659; *Crouse v. Hartford Fire Ins. Co.*, 44 N. W. Rep. [Mich.], 496; *Gristock v. Royal Ins. Co.*, 47 N. W. Rep. [Mich.], 549; *Reiner v. Dwelling House Ins. Co.*, 42 N. W. Rep. [Wis.], 208; *Donnelly v. Cedar Rapids Ins. Co.*, 28 N. W. Rep. [Ia.], 607; *Temmink v. Metropolitan Life Ins. Co.*, 40 N. W. Rep. [Mich.], 469; *Eggleston v. Council Bluffs Ins. Co.*, 21 N. W. Rep. [Ia.], 652; *Brumfield v. Union Ins. Co.*, 7 S. W. Rep. [Ky.], 893; *Michigan Shingle Co. v. State Investment & Ins. Co.*, 53 N. W. Rep. [Mich.], 545; *Ins. Co. of North America v. McLimans*, 28 Neb., 653.)

W. C. Walton, also for defendant in error.

RAGAN, C.

Hammang Bros. & Co. brought this suit in the district court of Washington county against the Home Fire Insurance Company of Omaha, Nebraska, (hereinafter called the "Insurance Company,") to recover the value of certain merchandise which they alleged they owned, which had been insured against loss or damage by fire by the Insurance Company, and which merchandise had been destroyed by fire. Hammang Bros. & Co. had a verdict and judgment, and the Insurance Company brings the same here for review. There is no contention here but that the policy sued upon was issued, that the premium was paid, and that the property was destroyed by fire; nor is there any claim made that the actual loss sustained by Hammang Bros. & Co. was not greater than the amount of the insurance; nor is it claimed that the fire resulted from any fraud or neglect on the part of the insured. To reverse the judgment of the district court counsel for the Insurance Company has argued four points here, which we notice as follows:

1. One of the defenses the Insurance Company interposed to this action in the district court was that the insured did not furnish to the Insurance Company proofs of loss as required by the insurance contract. The policy provided: "When a fire has occurred, damaging the property hereby insured, the assured shall give immediate notice and render a particular account of such loss, signed and sworn to by them; if there is other insurance, shall give a detailed account of same, with copies of the written portions of all policies; shall also give the actual cash value of the property, their interest therein, the interest of all other parties therein, if any, giving their names; the amount of the loss or damage; for what purpose and by whom the building insured or containing the property insured, and the several parts thereof, were used; when and how the

fire originated; and an itemized estimate of value of the property destroyed." The fire occurred on the 31st day of October, 1890. On the 25th day of November, 1890, the assured made a statement in writing, swore to the same before a justice of the peace, and transmitted it to the Insurance Company. This written statement or proof of loss set out that a fire had occurred on the 31st of October, 1890, destroying and injuring the property covered by the policy in suit; that the date of such policy was the 14th of June, 1890; that the policy had been issued to Hammang Bros. & Co.; that the amount of the insurance was $1,500; that the property damaged and destroyed consisted of hardware, stoves, tinware, and other articles usually kept in a hardware store; that the loss was payable to Hammang Bros. & Co.; that the Omaha Fire Insurance Company of Omaha, Nebraska, had also a policy of $1,000 on the destroyed property; that the goods saved were well protected; that an inventory was being made of the goods saved; that the books of the firm of Hammang Bros. & Co. had been saved; that the fire which destroyed the insured property was communicated to the building in which it was situate from a fire in a livery barn across an alley west of the store of Hammang Bros. & Co.; that an inventory of the stock of Hammang Bros. & Co. had been taken on January 1, 1890; that the condition of the insured property saved was fairly good; and that there had been no change in the risk or its external exposures since the policy was issued. It will be seen that this proof of loss furnished by Hammang Bros. & Co. to the Insurance Company is not a strict compliance with the requirements of the policy, but we think it is a substantial compliance with that provision of the insurance contract. Technical accuracy in making out a proof of loss is not essential. The proof of loss is sufficient if it shows upon its face that the insured made an honest effort to comply with the requirement of the insurance contract. (*Continental Ins.*

Co. v. Lippold, 3 Neb., 391; *German-American Ins. Co. v. Etherton*, 25 Neb., 505; *Hanover Fire Ins. Co. v. Gustin*, 40 Neb., 828.)

The insured property was situate in the town of Arlington, and the Insurance Company was domiciled in the city of Omaha. Immediately after the receipt by the Insurance Company of the proof of loss hereinbefore mentioned the Insurance Company sent to Arlington its adjuster. This adjuster remained there several days inquiring into the circumstances of the fire and the amount of the loss. He took possession of the books and invoices of the insured, and estimated the value of the property saved from the fire, the amount of stock on hand at the time the fire occurred, and the amount of the loss or damage which the insured had sustained by reason of the fire, and offered to pay the insured $900 in settlement of their loss. The Insurance Company, when it received the paper called a "proof of loss," hereinbefore referred to, retained possession of the same, made no complaints to the insured that the proofs furnished were insufficient or defective; nor did it request the insured to furnish any other or different proof of loss at any time or place. The Insurance Company then by its conduct waived the insufficiency of the proofs of loss furnished it by the insured, and in fact waived any proof of loss whatever. For the purpose of settling—if such a question can ever be settled—that the clause in an insurance contract requiring the insured in case of the destruction of the insured property to furnish the insurer proofs of loss is inserted in the insurance contract for the benefit of the insurer, and the furnishing of such proofs of loss may be waived by such conduct of the insurer, having knowledge of the loss, as establishes an intention on his part to waive the furnishing of such proofs of loss, we collate some of the authorities in point.

In *State Ins. Co. v. Schreck*, 27 Neb., 527, *Hartford Fire Ins. Co. v. Meyer*, 30 Neb., 135, and *St. Paul Fire & Marine*

Ins. Co. v. Gotthelf, 35 Neb., 351, it was held: "Provisions of an insurance policy covering a stock of goods for notice of loss within a specified time and in a particular manner will be held to have been waived by the insurer where, with knowledge of the loss of part of said stock by fire, it, by its adjusting agent, demands and obtains possession of the remainder of the goods and books of the insured and is engaged several days, with the help of the latter, in ascertaining the amount of the loss."

In *Union Ins. Co. of California v. Barwick*, 36 Neb., 223, and *Western Home Ins. Co. v. Richardson*, 40 Neb., 1, it was held: "In case the preliminary proof of loss submitted to the company is unsatisfactory, it should return the same to the insured within a reasonable time, stating in what respect it is considered defective, and if it fails to do so, but rejects such proof on the ground that the same was not furnished in proper time, it cannot afterwards avail itself of the insufficiency of such preliminary proof."

See *Phœnix Ins. Co. v. Rad Bila Hora Lodge*, 41 Neb., 21; *Harriman v. Queen Ins. Co. of London*, 5 N. W. Rep. [Wis.], 12; *Cannon v. Home Ins. Co. of New York*, 11 N. W. Rep. [Wis.], 11; *Zielke v. London Assurance Corporation*, 25 N. W. Rep. [Wis.], 436; *Bromberg v. Minnesota Fire Association*, 47 N. W. Rep. [Minn.], 975; *Mercantile Ins. Co. v. Holthouse*, 5 N. W. Rep. [Mich.], 642; *Green v. Des Moines Fire Ins. Co.*, 50 N. W. Rep. [Ia.], 558; *Commercial Union Assurance Co. v. Hocking*, 8 Atl. Rep. [Pa.], 589. In this last case the court held: "An insurance company which receives proofs of loss when offered, refers them to its adjuster, and retains them without objection or complaint for five months, will be held to waive a compliance with the conditions of the policy even though the proofs were not made within the time nor in the form required by the policy."

But, as we shall see hereafter, the Insurance Company refused to pay this loss and defended this action on the

ground that the policy in suit was not in force at the time the loss occurred. This, then, constituted another waiver on the part of the Insurance Company of the furnishing to it of proofs of loss by the insured. "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." (*Phenix Ins. Co. v. Bachelder*, 32 Neb., 490; *Western Home Ins. Co. v. Richardson*, 40 Neb., 1; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 473; *Dwelling House Ins. Co. v. Brewster*, 43 Neb., 528.)

2. Another defense interposed in the court below and argued here is this: The policy, as already seen, provided that in case a loss of the insured property should occur that the insured should furnish the Insurance Company with proofs of loss and "shall also produce a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds nearest to place of fire, * * * stating that he has examined the circumstances attending the loss, knows the character and condition of the assured, and firmly believes that the assured has without fraud sustained loss on the property insured to the amount which he shall so certify." The insured furnished no such certificate as the one required by this provision; and the argument is that therefore the insured could not recover. Of this defense we have this to say: (1.) That it was really included in the defense of the failure of the insured to furnish the Insurance Company proofs of loss. All that has been said above in reference to that defense applies to this defense and argument. (2.) We very seriously doubt if any such provision in the contract can be enforced. Here the argument of the Insurance Company in effect is that we insured your property and agreed with you that in case it should be lost and damaged that we would pay the amount of such loss or damage. You have paid us a premium for carrying this risk, and the property has been destroyed without

fault on your part; but you have not furnished us the certificate of an officer whose office is next to the place where the fire occurred, certifying that he has examined the circumstances attending the loss, knows your character and financial condition, and that he believes you have sustained loss without fault on your part; and, until you furnish such certificate, you cannot maintain a suit in the courts of the state on this contract. The right of a citizen to maintain an action in the courts of this state is fixed by the constitution and the laws thereof, and we do not think that right can be made to depend upon the whim of a justice of the peace or a notary public. Suppose that this justice of the peace should be the enemy of the insured, or for any other reason should refuse to furnish the insured a certificate of good moral character and should refuse to examine into the circumstances attending the loss and the financial condition of the insured. How is the insured to compel the making of this certificate? We are aware that the supreme court of the state of Minnesota in *Lane v. St. Paul Fire & Marine Ins. Co.*, 52 N. W. Rep., 649, sustained a provision like the one under consideration, and held that the furnishing of the certificate was a condition precedent to the right of the insured to recover, and that his inability to furnish the certificate because of the refusal of the magistrate to give it afforded no excuse for the insured's failure. But it is to be remembered that in that state the legislature prescribes the terms and conditions of all fire insurance policies, and such was the policy considered in the case last cited. Furthermore, the constitution of this state provides: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law and justice administered without denial or delay." (Constitution, sec. 13, art. 1.) It may be that the legislature has the authority to provide that before an insured can maintain an action in the courts to recover for a

loss on an insurance policy he must procure the certificate of a magistrate next to where the loss occured that he has examined into the conditions of the loss and believes that it occurred without the fault of the insured, that the insured is of good moral character, and that he is acquainted with his financial condition. But we shall hesitate a great while before we uphold any such provision as this in the absence of express legislation requiring it. We are also aware that provisions similar to this have been considered and upheld in other courts; and it is said that the rule announced in the Minnesota case is sustained by a line of authorities reaching back to an early date in the English courts. However this may be, and however venerable such a rule may be, however much it may be sanctified by authority and covered with the dust and cobwebs of ages, we decline to be bound by it.

3. The policy provided it should be void "if there is now or shall hereafter be obtained any other insurance, whether valid or not, on the said property or any part thereof," unless the consent of the company to such other insurance was indorsed on the policy. Another defense of the Insurance Company in the district court was that at the time of the issuance of the policy in suit the insured had a policy of one thousand dollars upon the insured property issued by the Omaha Fire Insurance Company, and that the existence of such latter policy, or the consent of the Insurance Company thereto, was not indorsed in writing on the policy in suit. Hammang Bros. & Co. in reply admitted the facts stated as a defense and pleaded in avoidance thereof, or as an estoppel against the Insurance Company, that the Insurance Company wrote the policy in suit with actual knowledge of the existence of the policy held by them in the Omaha Fire Insurance Company. The evidence shows that prior to the 14th of June, 1890, one Badger, a banker in Arlington, was the agent of the Insurance Company; that a man named Cook, in said town

of Arlington, was the agent of the Omaha Fire Insurance Company; that for the year immediately preceding June 14, 1890, the Omaha Fire Insurance Company had a risk upon the property of the insured for one thousand dollars; that about the 13th of June, 1890, Mr. Badger went to Hammang Bros. & Co. and said to them that their policy in the Insurance Company would expire by the 14th of June and asked them to permit him to write them a policy for two thousand dollars on their stock of merchandise. The insured responded that they were carrying two thousand dollars of insurance then, one thousand in the Omaha Fire Insurance Company and one thousand dollars in Badger's company (the Insurance Company). Mr. Badger replied that he knew that, but that the insured, considering the amount of stock they carried, should carry more than two thousand, and asked them if they would not allow him to write a policy in his company to take the place of the one it carried, as that would expire by the 14th of June, for fifteen hundred dollars, thus making the total amount of insurance of the insured on their stock twenty-five hundred dollars. The insured demurred to this somewhat on the grounds that the rate was too high, but finally they authorized Badger to write on the 14th of June, 1890, the policy in suit for fifteen hundred dollars in the Insurance Company to take the place of the one the Insurance Company was carrying for one thousand dollars, and which would expire by the 14th of June. They also instructed Mr. Badger to make a memorandum in writing on the fifteen hundred dollar policy which he was about to issue to the effect that they had a thousand dollars of insurance at that time in the Omaha Fire Insurance Company on the same stock of merchandise. Mr. Badger promised to do this, and says in his testimony that the only reason he did not it was because he forgot it. On the 14th day of June, Badger wrote the policy in suit, and on that date, or very shortly after that, wrote a letter to the Insurance Company, his

principal, stating to it that he had written a policy for Hammang Bros. & Co. on the 14th of June, 1890, for a year for fifteen hundred dollars to take the place of their policy of one thousand dollars which expired on that date, and in this letter he informed the Insurance Company, his principal, that the Omaha Fire Insurance Company had a policy of one thousand dollars on the same property. The policy in suit, after it was written by Mr. Badger, was placed by him in a vault in his bank, where it appears that Hammang Bros. & Co. kept their private papers, and they, nor either of them, ever saw the policy until after the fire occurred out of which this suit arose. Badger collected from Hammang Bros. & Co. the premium for the policy in suit and duly remitted it to the Insurance Company. It appears also from the evidence that Badger, before he wrote the policy in suit, and before talking with Hammang Bros. & Co. of writing it, knew through Mr. Cook, the agent of the Omaha Fire Insurance Company, that that company had a policy of one thousand dollars on the same property insured by the policy here.

The argument of counsel for the Insurance Company here is not that Hammang Bros. & Co. concealed from the Insurance Company the existence of the policy in the Omaha Fire Insurance Company, not that Badger made any inquiries as to any other insurance outstanding on the property and that Hammang Bros. & Co. answered falsely such inquiries or kept silent, but the entire defense and the argument here are rested upon the proposition that because no memorandum in writing of the existence of the policy in the Omaha Fire Insurance Company was indorsed on the policy in suit, that the latter never was in force. If Hammang Bros. & Co. had themselves violated the provision of the policy in reference to additional insurance on the property such violation would not of itself have rendered the policy in suit absolutely void, but only voidable at the election of the insurer. Such a provision is

inserted in insurance policies for the benefit of the insurer and is a provision which it may waive. (*Hughes v. Ins. Co. of North America*, 40 Neb., 626.) But the evidence quoted above shows that the insured have not violated any provision of the policy with reference to other insurance than that in suit. The insured did not write the policy in suit. It was not their business to write it. They fully and fairly disclosed to the agent of the Insurance Company—what he already knew—the existence of the policy in the Omaha Fire Insurance Company, and requested this agent to make a memorandum in writing on the policy in suit of the existence of the other policy. The Insurance Company's agent intended to do this, and it must be said in justice to Mr. Badger that his failure to make this memorandum seems to have been the result of forgetfulness. Here, then, was actual knowledge of the additional insurance complained of in the possession of the Insurance Company's agent when he solicited and wrote the insurance policy in suit. This knowledge of the agent was the knowledge of the company. Knowledge on the part of the agent of an insurance company, authorized to issue its policies, of facts which render the contract voidable at the insurer's option, is knowledge of the company. (*Gans v. St. Paul Fire & Marine Ins. Co.*, 43 Wis., 108; *Bennett v. Council Bluffs Ins. Co.*, 31 N. W. Rep. [Ia.], 948.) This precise question was before this court in *Phenix Ins. Co. v. Covey*, 41 Neb., 724. RYAN, C., writing the opinion of the court, said: "Where an insurance agent, with authority to receive premiums and issue policies, exercises such authority with knowledge of the existence of concurrent insurance on the premises, the company is estopped, after a loss, to insist that the policy is void because consent to such concurrent insurance was not given in writing." This case is decisive of the question under consideration. We are satisfied with the rule as there announced, and adhere to it. That it states the rule correctly, we have no

doubt, and that it is sustained by the authorities see, among others, the following cases: *State Ins. Co. v. Jordan*, 29 Neb., 514; *Billings v. German Ins. Co.*, 34 Neb., 502; *German Ins. Co. v. Penrod*, 35 Neb., 273; *German Ins. Co. v. Rounds*, 35 Neb., 752; *McEwen v. Montgomery County Mutual Ins. Co.*, 5 Hill [N. Y.], 101; *American Ins. Co. v. Gallatin*, 3 N. W. Rep. [Wis.], 772; *Oshkosh Gas Light Co. v. Germania Fire Ins. Co.*, 37 N. W. Rep. [Wis.], 819; *Reiner v. Dwelling House Ins. Co.*, 42 N. W. Rep. [Wis.], 208; *Vankirk v. Citizens Ins. Co.*, 48 N. W. Rep. [Wis.], 798; *Kitchen v. Hartford Fire Ins. Co.*, 23 N. W. Rep., [Mich.], 616. In this last case the court said: "An insurance company is bound by the acts or conduct of an agent who has power to solicit insurance, make examination and survey of the premises, take applications and forward them to the home or branch office, deliver policies, and collect premiums; and when a party insured notifies such agent of his intention to take additional insurance, and when he has obtained such insurance requests him to inform his company of that fact, the company cannot, after a loss, hold the policy issued by it void because its written consent to the taking of such additional insurance was not indorsed on the policy, as provided therein." (*Crouse v. Hartford Fire Ins. Co.*, 44 N. W. Rep. [Mich.], 496; *Gristock v. Royal Ins. Co.*, 47 N. W. Rep. [Mich.], 549; *Cleaver v. Traders Ins. Co.*, 39 N. W. Rep. [Mich.], 571; *Temmink v. Metropolitan Life Ins. Co.*, 40 N. W. Rep. [Mich.], 469; *Copeland v. Dwelling House Ins. Co.*, 43 N. W. Rep. [Mich.], 991; *Tubbs v. Dwelling House Ins. Co.*, 48 N. W. Rep. [Mich.], 296; *Brandup v. St. Paul Fire & Marine Ins. Co.*, 7 N. W. Rep. [Minn.], 735; *Kansel v. Minnesota Farmers Mutual Fire Ins. Association*, 16 N. W. Rep. [Minn.], 430; *Eggleston v. Council Bluffs Ins. Co.*, 21 N. W. Rep. [Ia.], 652; *Donnelly v. Cedar Rapids Ins. Co.*, 28 N. W. Rep. [Ia.], 607; *Miller v. Hartford Fire Ins. Co.*, 29 N. W. Rep. [Ia.], 411; *Bennett v. Council Bluffs Ins. Co.*, 31

N. W. Rep. [Ia.], 948; *Mattocks v. Des Moines Ins. Co.*, 37 N. W. Rep. [Ia.], 174; *Brown v. State Ins. Co.*, 38 N. W. Rep. [Ia.], 135; *Barnes v. Hekla Fire Ins. Co.*, 39 N. W. Rep. [Ia.], 122; *Reynolds v. Iowa & Nebraska Ins. Co.*, 46 N. W. Rep. [Ia.], 659; *Hamilton v. Home Ins. Co.*, 7 S. W. Rep. [Mo.], 261; *Brumfield v. Union Ins. Co.*, 7 S. W. Rep. [Ky.], 893.)

4. But it is argued that the evidence of Mr. Badger, the Insurance Company's agent, and the evidence of the members composing the firm of Hammang Bros. & Co., showing that at the time and before the issuance of the policy in suit that Badger knew of the existence of the policy in the Omaha Fire Insurance Company, and agreed to and did write the policy sued on here, and agreed to make a memorandum in writing thereon of the existence of such Omaha Fire Insurance Company's policy, was incompetent, and that the court erred in admitting it. It is said that the effect of this evidence was to vary and contradict the terms of a written contract, to-wit, the policy between the parties. We think this evidence tended to prove the plea of estoppel set up by the insured to the defense of other insurance on the property made by the Insurance Company was competent and material, and we do not think the effect of the evidence was such as counsel contend.

5. The final assignment of error is that the court erred in not sustaining the application of the Insurance Company for a new trial on the ground of accident and surprise. We cannot consider this assignment, for the reason that the affidavits used in the district court in support of this ground of the motion for a new trial are not preserved in the bill of exceptions.

The judgment of the district court was right. It is accordingly in all things

AFFIRMED.

NORVAL, C. J. I concur in the result.

F. KUHL ET AL. V. PIERCE COUNTY.

FILED APRIL 4, 1895. No. 6062.

1. **Error Proceedings**: PARTIES. All parties to a joint judgment are necessary parties to a petition in error filed here by one of their number to reverse it; but this rule does not require that all the parties to a suit in which a judgment has been rendered should be made parties to the error proceedings instituted here for a review of such judgment. Only the parties who are liable on, or bound by, the judgment are necessary parties to the proceeding in error here.

2. **Reference**: RIGHT TO JURY TRIAL. A legal action cannot be referred except by consent of parties, as a litigant cannot be deprived of his constitutional right to a jury for the trial of issues of fact made by the pleadings in a legal action. *Mills v. Miller*, 3 Neb., 87, followed.

3. **Equity**: ACCOUNTING: ACTION AGAINST COUNTY TREASURER: EMBEZZLEMENT: JURY TRIAL: PLEADING: RIGHTS OF SURETIES. To recover public moneys collected and embezzled by him, Pierce county brought an action against its defaulting county treasurer and all the sureties on his two official bonds, the treasurer having been elected for two terms, the sureties on said bonds being different persons. The petition alleged that the ex-treasurer was insolvent, and that the county was unable to prosecute an action at law on either of said bonds because the books and records kept by the treasurer did not disclose when the defalcation complained of occurred, and there was no evidence known to the county by which it could prove, in an action at law, whether such defalcation occurred during the treasurer's first or second term of office. The prayer of the petition was for an accounting in equity. *Held*, (1) That the averments of the petition made out a cause of action in favor of the county upon contracts for the payment of money only unincumbered by any collateral agreements, contracts, or securities whatever; (2) that the action was one legal in its nature; (3) that the facts averred in the petition were not sufficient to entitle the county to equitable relief; (4) that the county would not be permitted to make use of a state of facts brought about by the neglect of the legal duties of its county board to deprive the sureties on their treasurer's official bond of their constitutional right to a jury trial; (5) that the sureties on the treasurer's bond were entitled to a jury for the trial of the issues of fact made by the pleadings.

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

See opinion for statement of the case.

C. Hollenbeck, for plaintiffs in error:

There is no privity of interest between the sureties on the first and second bonds. The liability incurred by a surety on an official bond is for the term for which the officer was elected, and the courts have universally held that the liability of a surety on such bond is to be strictly construed according to the terms of the bond. (Murfree, Official Bonds, sec. 731.)

There is no trust, express or implied, in the office of county treasurer. His liability for the funds in his hands, or received by him in his official capacity, is absolute and unconditional. It is his duty to collect money and pay it over in the manner provided by law. This duty is strictly legal. He cannot evade it or excuse himself in any way for a non-compliance with it. If the money is stolen or destroyed through no act of his, he cannot be heard in defense to show acts of care or diligence for the purpose of escaping liability. He is an insurer of money in his hands. (Murfree, Official Bonds, sec. 694; *State v. Harper*, 6 O. St., 607; *Commonwealth v. Comly*, 3 Pa. St., 372; *United States v. Prescott*, 44 U. S., 578; *Muzzy v. Shattuck*, 1 Denio [N. Y.], 233.)

If the remedy in this action is purely legal then this action ought not to have been referred, and the court had, in that case, no authority to appoint a referee over the objection of the plaintiffs in error. (*Mills v. Miller*, 3 Neb., 87; *Kinkaid v. Hiatt*, 24 Neb., 562.)

The causes of action were improperly joined. (*Cassady v. Board of Trustees*, 93 Ill., 394; *Screwmen's Benevolent Association v. Smith*, 7 S. W. Rep. [Tex.], 793; *Oglesby's Sureties v. State*, 11 S. W. Rep. [Tex.], 873.)

Discovery has ceased to be one of the objects sought by courts of equity. (*Lamaster v. Scofield*, 5 Neb., 148.)

Where an officer holds two successive terms of office and is a defaulter, the presumption of law is that such defalcation occurred during his last term of office. (*Kelley v. State*, 25 O. St., 567; *Morley v. Town of Metamora*, 78 Ill., 394.)

Powers & Hays, also for plaintiffs in error.

W. W. Quivey and *Allen, Robinson & Reed, contra*, cited: *State v. Churchill*, 3 S. W. Rep. [Ark.], 352; *Bruce v. United States*, 17 How. [U. S.], 437.

RAGAN, C.

At the general election held in November, 1887, one Carl Korth, was duly elected treasurer of Pierce county. He qualified by giving bond and entering upon the discharge of his duties. The plaintiffs in error (hereinafter called the "sureties") signed Korth's official bond as treasurer for the term for which he was elected and which expired on the first of January, 1890. At the November election, 1889, Korth was again elected treasurer of Pierce county for two years and again qualified and entered upon the discharge of his duties for the second term commencing January 1, 1890. A large number of parties became sureties on his official bond for his second term of office. None of the plaintiffs in error, the sureties, were signers of the second bond. On the 18th of December, 1890, Korth resigned and was found to be a defaulter, and this action was brought by Pierce county to the district court against Korth and all the sureties on both his bonds. The petition contained the necessary averments of the election of Korth as treasurer of the county for two terms as aforesaid; his acceptance of the office for each of said terms and his giving bonds to faithfully discharge the duties of his office, account for and pay over all moneys which should come

into his hands as such treasurer during each of said terms of office. The petition then alleged that Korth did at various times during the time he held said office misappropriate large amounts of money and convert the same to his own use, and that he was on the 18th of December, 1890, a defaulter in the sum of $35,517.41, which sum he had neglected and refused to account for and pay over to the proper authorities; that Korth had resigned the office of treasurer and that he was wholly insolvent. The petition then alleged that the county "is unable to prosecute an action at law on either of said obligations for the reason that the books, papers, and records of said * * * treasurer * * * as compiled and made by said defendant Korth during the term that he exercised the duties and functions of said office, * * * and as said books now appear do not disclose and show wherein the said defalcation occurred, nor is there any record or evidence known to plaintiff whereby plaintiff can in any action at law show whether said defalcation occurred during the period of time covered by said first obligation or during the period of time covered by said second obligation." The prayer of the petition was that an accounting in equity might be had, to the end that it might be adjudged and decreed when the several misappropriations and conversions of money occurred, the amounts thereof, and for what amounts of the defalcation the sureties on the first and second bonds were respectively liable. The sureties demurred to this petition on the ground that the petition did not state facts sufficient to entitle the county to equitable relief. The signers or sureties on the second bond submitted a similar demurrer. These demurrers were by the court overruled and the "sureties" and the signers of the second bond answered. The answers among other defenses alleged that the petition did not state facts sufficient to entitle the plaintiff to equitable relief. No reply appears to have been filed by the county. After the issues were thus made up the sure-

ties, and the signers of the second bond as well, demanded a jury trial, which was denied by the court, and on motion of the county the case was referred to a referee "to take the evidence and report the facts and evidence to this court." This order was made against the objection and exceptions of the sureties and the signers of the second bond as well. In due time the referee heard the evidence, made his findings of fact and reported the same, and on the 13th of October, 1892, the district court overruled the exceptions filed to the report of the referee and denied the motions for a new trial and entered three judgments as follows: (1) a judgment against Carl Korth only for $37,777.40; (2) a judgment against the sureties only for $14,544.18; (3) a judgment against the signers of the second bond only for the sum of $23,233.22. Carl Korth has neither appealed from the judgment rendered against him nor filed in this court any petition in error to reverse the same. Such judgment, therefore, is not before us for review. Whatever conclusion may be reached in the matter under consideration here must be taken and understood as neither reversing, vacating, modifying, nor in any manner affecting the said judgment rendered in favor of Pierce county against Carl Korth. The signers of Korth's second bond have filed in this court a petition in error praying for a reversal of the judgment rendered by the district court against them; but as the judgment was rendered on the 13th of October, 1892, and their exceptions to the referee's report and their motion for a new trial overruled at the same time; and as they did not file in this court their petition in error until the 14th of January, 1895, we are precluded from reviewing the judgment rendered against the signers of the second bond. Hence, the conclusion reached in the matter before us must be taken and understood as not reversing, vacating, modifying, or in any manner whatever as affecting the judgment rendered by the district court of Pierce county in this action against the signers of the second bond.

To reverse the judgment of the district court against the signers of Korth's first bond, the sureties, in due time, filed in this court a petition in error, and this judgment is the only one before us for review.

The county has submitted a motion in this court to dismiss the petition in error of the sureties. The only ground of which motion that we deem it necessary to notice is that all the parties to the judgment against the sureties in the district court are not parties to the petition in error filed here for its reversal. The only defendant in error is the county of Pierce. The plaintiffs in error are the signers only of the first bond. The contention is that Carl Korth and all the signers of the second bond should be made parties plaintiffs in error or parties defendant to the proceeding instituted in this court by the sureties to reverse the judgment of the district court against them. If the judgment which the sureties seek to reverse here was a joint and several judgment, not only against them, but against Carl Korth and the signers of his second bond as well, then the motion of the county would be well taken. The rule of this court is: "All the parties to a joint judgment are necessary parties to a petition in error filed here by one of their number to reverse it." (*Wolf v. Murphy*, 21 Neb., 472; *Curten v. Atkinson*, 29 Neb., 612; *Consaul v. Sheldon*, 35 Neb., 247.) In *Andres v. Kridler*, 42 Neb., 784, the rule was again under consideration, and the court held: "Where only a part of several defendants, against all of whom a joint judgment has been rendered, file a petition in error for the purpose of procuring the vacation of such judgment, and the judgment defendants, who have not joined in the petition in error, are not made defendants in error, there exists such defect of parties that the judgment complained of cannot be reviewed." The question was again before the court in *Polk v. Covell*, 43 Neb., 884, and it was held: "In order to secure a review of a joint judgment by petition in error all persons inter-

ested must be made parties to the proceedings as plaintiffs or defendants." These cases then amount to this, that where it is sought by error proceedings in this court to review the judgment of a district court all the parties made jointly liable by such judgment must be before this court; but the motion here does not fall within this rule. Korth was not a party to the judgment which we are asked to review, nor were any of the sureties or signers of Korth's second bond parties to this judgment. The only parties made liable by the judgment we are reviewing are the parties who signed Korth's first bond, namely, plaintiffs in error, the sureties. The motion must, therefore, be overruled.

This brings us to a consideration of the real merits of this case, namely, the correctness of the ruling of the district court in refusing the plaintiffs in error a jury for the trial of the issues of fact made by the pleadings. These issues were whether the treasurer was a defaulter at the expiration of his first term of office, and if so, the amount of such defalcation. Section 6 of the bill of rights provides that the right of trial by jury shall remain inviolate. This is a constitutional guaranty that the right of trial by jury shall remain as it did prior to the adoption of the constitution of 1875. Without going into a history of this provision it is sufficient to say that at the time of the adoption of the present constitution the right of trial by jury was guarantied by the constitution of the state to its citizens substantially as the right existed at common law. By section 280 of the Code of Civil Procedure it is provided that issues of fact arising in actions for the recovery of money shall be tried by a jury. The spirit of the constitution and laws of this state seems to be this, that if an issue of fact arise in an action equitable in its nature such issue of fact is triable to the court; but if the issue of fact arise in a purely legal action then the issue of fact is triable to a jury. The action at bar seems

to us to be one purely legal in its nature. It is an action upon a contract for the payment of money only unincumbered by any collateral agreements, contracts, or securities whatever. The test of equity jurisdiction is the absence of an adequate remedy at law. (*Welton v. Dickson*, 38 Neb., 767; *Watson v. Sutherland*, 72 U. S., 74.)

In the petition filed in this case by the county two reasons are assigned for the interference of a court of equity. The first is that the defaulting treasurer is insolvent; but insolvency alone will not deprive a citizen when sued upon an ordinary contract for the payment of money or upon an official bond which he has executed agreeing to account for and pay over money which he may collect for the municipal corporation of which he is an officer, of his constitutional right to have the fact as to whether he has violated his contract in not making the payment at the time, place, and in the amount promised; or whether, as such officer of such municipal corporation, he has collected funds of the public and converted them to his own use. The second reason assigned for the interference of a court of equity is that the county is unable to determine from the books and records kept by this treasurer whether his defalcation occurred during his first or second term of office, and that the county is not in possession of any evidence by which it can show when such defalcation occurred. Of this averment of the petition we have this to say: (1.) That these plaintiffs are liable, and liable only, for whatever defalcation this treasurer may have committed during the existence of his first term of office. And if it be true that the county has no evidence to show that the defalcation complained of did occur during said term, we do not see how a court of equity or a referee would be any better able to find the fact that the defalcation did then occur than would a jury. Even a court of equity or a referee must find conclusions of fact from evidence. Nor is there any averment in the petition that the county will be able to

produce evidence to show that the defalcation complained of occurred during the treasurer's first term before the chancellor, if the equity court takes jurisdiction of the case. (2.) By the statutes of this state the counties thereof are made bodies politic; that is, political corporations. The control and management of the affairs of these counties is entrusted to a board of supervisors or county commissioners. These county boards are invested with authority, and it is their duty to examine the accounts and books of the county treasurer at stated intervals. The law prescribes what books and what kind of books the treasurer shall keep, and it was the duty of the county authorities of this county to see that the treasurer kept such books and kept them in the manner provided by law, and in the event of his failure or refusal to do so, impeach him and oust him from office. Again, where a county treasurer is elected to succeed himself the county authorities are prohibited from approving his official bond for his second term until he has fully accounted for all the moneys collected by him during his first term of office. If the county authorities of Pierce county had performed their duties, there need have been no very great uncertainty as to the time when the defalcation occurred. If they had at stated times during the treasurer's first term of office examined the treasurer's books and vouchers and compelled him to produce and account for the money which such books showed was in his hands, they would have known of the defalcation very soon after it occurred; and when this treasurer's first term of office expired, before he qualified for the second term, if the county authorities had obeyed the law and performed their duties and had examined the treasurer's books and his vouchers, they could have ascertained what moneys were in his hands at that time as treasurer, as they had the authority to require him to produce this money; that is, to satisfy them that he had this money on hand, not that he had drafts, bills of exchange, and promissory notes for it, or that he had an

amount on deposit in a bank equivalent to the amount which the books showed he had in his hands as treasurer, but the lawful money of the United States in specie. The county cannot be permitted to make use of the existence of a state of facts brought about by the negligence, the laches, and the violations of duty of its county board to deprive the sureties on their treasurer's bond of their constitutional right to a jury trial. Had the county authorities of this county examined the accounts of its treasurer and settled with him at the expiration of his first term of office, as the law required them to do, and the treasurer had at that time in his possession the amount of money which the settlement and accounting disclosed he should have in his hands as such treasurer, such settlement would have afforded in any suit, either at law or in equity, a very strong presumption that the defalcation occurred subsequently to such settlement. In the absence, then, of all authority on the subject, we have not the slightest doubt but this action is a legal one, and that these sureties were entitled to a jury trial of the issues of fact therein.

A legal action cannot be referred except by consent of parties, as neither party can be deprived of the right to a trial by a jury in such cases, and in actions involving an account between the parties it is only in cases of an equitable nature that a reference can be ordered without consent of the parties. (*Mills v. Miller*, 3 Neb., 87. See, also, *Lamaster v. Scofield*, 5 Neb., 148.) In this last case it was held: "Under the Code, discovery has ceased to be one of the objects sought in a court of equity. Jurisdiction, therefore, in cases of mutual accounts between parties, cannot be maintained on that ground, and is restricted to cases which have their origin in intimate or confidential relations of the parties, and does not extend to ordinary cases of mutual accounts between creditor and debtor." (See, also, *Hosford v. Stone*, 6 Neb., 378; *Kinkaid v. Hiatt*, 24 Neb., 562.)

Oglesby's Sureties v. State, 11 S. W. Rep. [Tex.], 873, was a case very much like the one under consideration, and it was there held: "In an action against two distinct sets of sureties on the bonds of a collecting officer given for his first and second terms, respectively, allegations in the petition that plaintiff is unable to determine whether the defalcations complained of occurred during the first or during the second term, and that, therefore, all the sureties are joined that their equities may be adjusted and a multiplicity of suits avoided, are demurrable. The liability of each set of sureties is purely legal, and the facts alleged present no ground for equitable jurisdiction." We think this case is a correct enunciation of the law. We are aware that a contrary conclusion was reached in *State v. Churchill*, 3 S. W. Rep. [Ark.], 352, but we do not feel justified in adopting the conclusion reached in that case in view of the provisions of our constitution and statutes.

We conclude, therefore, that the learned district court erred in refusing the plaintiffs in error a jury for the trial of the issues of fact made by the pleadings in this case, for which its judgment is reversed and the cause remanded with instructions to permit the county, if it so desires, to file an amended petition at law against the plaintiffs in error upon paying all the costs of this action up to that time.

REVERSED AND REMANDED.

CENTRAL CITY BANK v. W. H. C. RICE.

FILED APRIL 4, 1895. No. 6338.

1. **Verdict for Defendant in Action on Notes.** Evidence examined, and *held* sufficient to support the verdict.
2. **Review of Ruling on Motion for New Trial:** SUFFICIENCY OF EVIDENCE. The discretion of a trial judge to set a verdict

aside because not sustained by the evidence is broader than that of an appellate court. It will be presumed that the trial judge, in overruling a motion for a new trial grounded upon the insufficiency of the evidence, has exercised his deliberate judgment thereon, and his ruling will not be interfered with unless clearly wrong. (*Davis v. Hilbourn*, 41 Neb., 35; *Dewey v. Chicago & N. W. R. Co.*, 31 Ia., 373.)

3. **Negotiable Instruments:** DENIAL OF PLAINTIFF'S OWNERSHIP. In an action on a promissory note by an alleged indorsee thereof a denial of the indorsement and of plaintiff's ownership is a good defense.

4. **Pleading:** AMENDMENTS: REVIEW. The permitting or refusing of leave to amend pleadings rests within the discretion of the trial court, and its action will not be reversed except for abuse of discretion and on its being made to appear that the party complaining was prejudiced. Prejudice will not in such case be presumed. *Omaha & R. V. R. Co. v. Moschel*, 38 Neb., 281, followed.

5. **Trial:** ADMISSION OF EVIDENCE. Certain rulings of the trial court on the admission of evidence examined, and *held* not erroneous.

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

W. T. Thompson, for plaintiff in error.

J. W. Sparks and *W. R. Watson, contra.*

IRVINE, C.

This action was brought by the bank on ten promissory notes for $25 each, made by Rice to the order of a corporation styled the Opera House Company, and alleged to have been indorsed and transferred to the bank. The answer denies the transfer, denies that the bank is the owner of the notes, and then pleads specifically a number of facts which practically, for the most part, merely support the denials referred to. There was a verdict for the defendant, the judgment whereon the bank by this proceeding seeks to reverse.

The principal contention is with regard to the sufficiency of the evidence. The evidence on behalf of the plaintiff tended to show that the notes sued upon were given to the Opera House Company in payment for stock issued to Rice; that a judgment had been rendered against the Opera House Company, and for the purpose of raising funds to satisfy this judgment, and for other purposes, certain stockholders of the Opera House Company, including Rice, made their notes to a banking partnership, having the same name as the plaintiff, for $1,300; and that the Opera House Company pledged as security to this note the notes sued upon, together with a number of others of like character. When the $1,300 note came due a portion thereof was paid from the proceeds of the collateral notes and the remainder thereof was paid by an absolute sale of the unpaid collateral notes to the bank, the purchase money being applied to the discharge of the $1,300 note. After this transaction the plaintiff bank was incorporated and purchased all the assets of the banking partnership, including the notes in question. The evidence on the part of the defendant tended to show that one F. M. Persinger was treasurer of the Opera House Company, and as such officer had possession of the notes; that he was also a partner in the bank prior to the incorporation; that some of these stock notes had been lawfully pledged prior to the transaction in question; that one N. R. Persinger, also a partner in the bank and a stockholder in the Opera House Company, was in arrears to the latter for his stock payments, and that an arrangement was made whereby the bank should furnish the money to satisfy his delinquency, taking certain of of these stock notes as collateral, N. R. Persinger to indemnify the makers of the notes against loss on this account; that Metcalf, the president, and the defendant, the secretary of the Opera House Company, indorsed certain notes for the purpose of carrying out this agreement, but Persinger failed to provide the indemnity and the agree-

ment was never fulfilled. The evidence also tends to show that while Metcalf's indorsement of the notes here sued on was genuine, Rice, as secretary, never did indorse these particular notes, and that the indorsement thereon purporting to be his is a forgery. Defendant's evidence also tends to show in regard to the $1,300 note that a joint note of certain stockholders was to be made for that amount, and in addition thereto each of the makers was to deposit as collateral his several notes in proportion to his stock. The minutes of the Opera House Company corroborate this theory and disclose no authority for pledging the stock notes as security to the loan. Rice testifies that he paid the individual note thus pledged. We think in this condition of the evidence the verdict is supported. There is certainly enough to warrant the jury in finding that the Opera House Company never authorized a transfer of the notes; that the indorsement of the secretary was a forgery, and that the pledge was made by F. M. Persinger without authority in that behalf. It is disclosed by the record that this verdict was the result of a second trial of the case, and that a former verdict of the same character had been set aside by the trial judge. Whether the evidence was the same we have no means of determining. On the one hand it is argued that the determination of the trial judge in overruling the motion for a new trial directed against this verdict lends weight thereto, while on the other hand we understand the argument to be that the setting aside of the former verdict has weight the other way, and that in sustaining the present verdict the trial judge did so merely to afford a more expeditious hearing in this court. We cannot adopt the latter view. The authority reposed in the trial court to set aside a verdict because not supported by sufficient evidence is an authority to be exercised judicially, and we must presume that the trial judge did so exercise it and that his action in overruling the motion for a new trial was the result of his delib-

erate judgment upon the sufficiency of the evidence. Where the evidence is conflicting and the *nisi prius* court has overruled the motion for a new trial grounded upon the insufficiency of the evidence, this court will not interfere. "And this because, first, the jury have found the verdict and given credit to the witnesses on the one side of the conflict; second, the judge, who also heard the testimony from the mouths of the witnesses and weighed the same in the balance of his more cultured and accurate legal judgment, has, by overruling the motion, given his approval and indorsement to the verdict; and third, this court can never have the benefit of observing the conduct and deportment of the witnesses while testifying, nor even the peculiarity of their expression. * * * The rule ought not and does not have any application whatever to the *nisi prius* courts. * * * Whenever it appears that the jury have, from any cause, failed to respond truly to the real merits of the controversy, they have failed to do their duty and the verdict ought to be set aside and a new trial granted," the trial judges, however, being careful not to invade the legitimate province of the jury. (*Dewey v. Chicago & N. W. R. Co.*, 31 Ia., 373; *Davis v. Hilbourn*, 41 Neb., 35.)

It is argued that the defendant is not in any position to litigate the respective rights of the bank and the opera house company. This is true, but his defense is not based on such relations. The bank, as part of its case, must show that it is the lawful holder of the notes. Unless the bank is the owner of these notes, a judgment thereon would be no defense to the defendant in an action brought against him by the Opera House Company, or the real owner of the same notes. It is very clear that the answer sets up a good defense. (*Schroeder v. Nielson*, 39 Neb., 335.)

On the trial the defendant was given leave to amend by interlineation his answer so as to deny the genuineness of the indorsements on the notes. The granting of this leave is assigned as error. The permitting or refusing of amend-

ments rests within the discretion of the trial court, and this court will not review the action of the trial court in that regard unless it be made to appear that there was an abuse of discretion to the prejudice of the party complaining. Prejudice will not be presumed. (*Omaha & R. V. R. Co. v. Moschel*, 38 Neb., 281.) It was not made to appear that this amendment prejudiced the plaintiff. The plaintiff did not even ask a postponement in order to obtain an opportunity of meeting the new issue. Error therefore does not appear.

Certain assignments of error relate to the evidence. N. R. Persinger was called by the plaintiff to identify the notes sued on, and testified that they had been transferred by the banking partnership to the plaintiff bank. On cross-examination he was asked, "Is the signature on the face of those notes and the signature to the indorsements of them the same? Look at each one carefully." This was objected to as not proper cross-examination and the overruling of the objection is assigned as error. While the genuineness of the indorsements by the Opera House Company to the banking partnership was not within the scope of the direct examination, we think it was proper in cross-examination as to the identity of the notes, which was the subject-matter of the direct examination, to call attention to the peculiarities which might affect the witness' judgment as to the identity of the papers.

Error is also assigned because the defendant was permitted to testify that he never indorsed his name to the notes. It is argued that his indorsement was not necessary to transfer these notes to the bank; but conceding that this is true, still, if he had indorsed them for the purpose of transferring them to the bank he could not now maintain a defense on his own behalf based on his want of authority so to do. This evidence was material at least for the purpose of avoiding the estoppel. The defendant was also permitted to testify that he had not, as secretary of the com-

pany or as a stockholder, authorized Persinger to turn over the notes to the bank. This was admissible on the same ground as the last question. He was further asked whether the Opera House Company had, by resolution, authorized the transfer. It is argued that this question was misleading because authority might be given otherwise than by resolution, but it was proper, by proof, to negative *seriatim* and not collectively all the methods of transfer, and while the contents of a resolution might not be proved by parol, it is always permissible in such cases to inquire of a witness as to the existence of a written instrument as preliminary to its production, proof, or identification.

A page of the treasurer's book was offered in evidence, but two items thereon were excluded on objection of the defendant. The exclusion of these items is assigned as error. No offer was made disclosing the materiality of these items, and while, perhaps, the whole page should have gone in evidence, if any portion was admitted, still, as counsel did not point out in what respect the excluded items were material, and as we cannot conceive from an examination of the items themselves how they were material, the error, if error it was, was without prejudice.

JUDGMENT AFFIRMED.

POST, J., not sitting.

W. R. SNYDER ET AL. V. F. I. DANGLER.

FILED APRIL 4, 1895. No. 6125.

1. **Fraudulent Conveyances:** SALES: CHANGE OF POSSESSION. Where a sale of goods is not followed by an actual and continued change of possession, the presumption is that the sale was made with the intention of hindering, delaying, or defrauding creditors of the vendor, and in a contest with such creditors

the burden is on the vendee to prove that he purchased in good faith and for value.

2. ———: ———: ———: BURDEN OF PROOF. Therefore, where there was evidence in a contest between a vendee and creditors of the vendor tending to show that there had been no change of possession, it was error to instruct the jury that the burden of proof was on the creditors to establish fraud.

3. ———. A conveyance of goods for the purpose, on the part of the vendor known to the vendee, of hindering, delaying, or defrauding creditors is void as to such creditors, even though the vendor be not insolvent.

4. ———. All persons who were creditors of the vendor at any time while the goods remained in his possession or under his control are within the protection of the statute against fraudulent conveyances.

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

B. F. Smith, for plaintiffs in error, cited: *Claffin v. Rosenberg*, 42 Mo., 439; *Mills v. Thompson*, 72 Mo., 367; *Wilhoyte v. Udell*, 9 So. Rep [Ala.], 550; *Runge v. Brown*, 23 Neb., 817; *Gilbert v. Merriam & Roberson Saddlery Co.*, 26 Neb., 194; *Bowie v. Spaids*, 26 Neb., 635.

Papps & Stevens, contra, cited: *Clark v. White*, 12 Pet. [U. S.], 178; *Conord v. Nicoll*, 4 Pet. [U. S.], 291; *Levan's Appeal*, 112 Pa. St., 294; *Dodge v. Masten*, 17 Fed. Rep., 660; *Densmore v. Tomer*, 11 Neb., 118; *Clemens v. Brillhart*, 17 Neb., 238; *Ahlman v. Meyer*, 19 Neb., 63; *Stephenson v. Ravencroft*, 25 Neb., 678.

IRVINE, C.

Dangler brought this action against Snyder for the conversion of a stock of merchandise. Snyder answered alleging the recovery by Myers & Herzog, Dolan, Drewery & Co., and Burnham, Bauer & Co. of judgments against Hattie R. Hollingsworth; and that Snyder, as constable, had levied executions issued on these judgments on the prop-

erty in question as the property of Hattie R. Hollingsworth and had sold the property under such executions. He denied that Dangler was the owner, and alleged that Hattie Hollingsworth was the owner at the time of the levy. Afterwards the judgment creditors were admitted to defend, and they answered in the same manner, except that they specially pleaded that the claim of the plaintiff was made for the purpose of hindering, delaying, and cheating the creditors of Hollingsworth. The reply was a general denial. There was a verdict and judgment for the plaintiff. The only assignments calling for notice relate to the instructions.

The theory of the plaintiff was that he had purchased the goods of Hollingsworth in good faith and for value. The theory of the defendants was that the pretended purchase was made for the purpose of defrauding Hollingsworth's creditors. There was evidence tending to show that prior to the sale relied upon by plaintiff, plaintiff had been in charge of the goods as the agent of Hollingsworth; that Hollingsworth's name was on a sign over the door; that after the purchase by plaintiff he remained in possession apparently in the same manner as before; that the sign was not removed or changed and that there was no visible or actual change in possession. On this state of the evidence the court, after stating the issues, instructed the jury as follows:

"You are instructed by the court that it is incumbent upon the plaintiff to prove by a fair preponderance of the evidence that he was the owner of the goods described in this case at the time said goods were levied upon by the said Snyder, and it is incumbent upon the plaintiff to prove by a fair preponderance of the facts all of the material allegations made in his petition.

"The court further instructs the jury that there being a general denial filed to the answer of the defendant in this case, that it is incumbent upon the defendants in this case

to show by a fair preponderance of the evidence that the purchase of and the transfer of the goods in question by H. R. Hollingsworth to the plaintiff was made by the said H. R. Hollingsworth with the intention of hindering, delaying, and defrauding her creditors, and that the plaintiff was cognizant of such intention, and had notice and knowledge thereof.

"2. The court instructs the jury in this case that the law does not prevent a man from selling or in anywise disposing of his property, although he may be insolvent, and the mere fact of the transfer may tend to delay or hinder his creditors will not, alone, render the same fraudulent. The power of the debtor to sell his property implies a corresponding right of another to purchase, and insolvency does not vitiate the transfer, and when a transfer is made for a valuable consideration there must not only be a fraudulent intention on the part of the debtor, but there must also be a participation in that intention on the part of the purchaser. And if you find in this case that at the time of the sale of the goods described in the petition to the plaintiff by H. R. Hollingsworth that she was insolvent, the mere insolvency of the said H. R. Hollingsworth at that time will not render the sale fraudulent, unless you find that the sale was made by H. R. Hollingsworth with the intention to defraud, hinder, or delay her creditors, and that the plaintiff in this action, at the time he purchased said goods, had notice or knowledge of said indebtedness and insolvency and intention; and unless you so find, your finding will be for the plaintiff in this action showing the amount of his judgment and what the evidence shows the goods in the petition were worth at the time they were taken, with seven per cent interest thereon from the time of taking the same, if you find they were taken by the defendant as charged."

"5. The court further instructs the jury in this case that the burden of proving fraud is upon the defendants in

this case, and that fraud is never presumed, and that unless the defendants by a fair preponderance of the evidence establish the fact that H. R. Hollingsworth sold the property described in the petition to the plaintiff with the intention of hindering, delaying, and defrauding her creditors, and that the plaintiff had knowledge or notice of such facts that would put a man of ordinary intelligence upon inquiry that would lead to notice, you will find for the plaintiff.

"Instruction No. 1, asked for by the defendants in the case below. 'The court instructs the jury that if you find that H. R. Hollingsworth was the owner of the goods in question, and that F. I. Dangler was in charge of them from April 1, 1891, to the 17th day of August, 1891, as her agent, and the jury further finds that after the 17th day of August, 1891, until the goods were taken by the constable September 7, 1891, the goods remained in the same place and there was no change of possession by any acts that would give notice to outsiders of such change, such as a change of the sign and visible acts of ownership, other than that which was exercised before Dangler claimed the goods, and the jury finds that Dangler had notice of the existence of debts against Hattie R. Hollingsworth, then Dangler was not a *bona fide* purchaser without notice, and he cannot recover against the *bona fide* creditors of Hattie R. Hollingsworth, who had levied executions upon the goods.'

"Modified by the court: 'Unless he, Dangler, proves that he paid a valuable consideration for said stock of goods, and that he purchased it in good faith without intent to hinder and delay the creditors in the collection of their debts.'"

All these instructions were requested by the parties and no other material instructions were given. There could be no doubt that instructions 1, 2, and 5, standing alone, would be erroneous as applied to this case, although they may be

correct statements of the law in the abstract. The burden was in the first place on the plaintiff to establish his ownership of the goods as the jury was told in the first instruction; but this burden was satisfied by proving a sale in fact, and then, if an actual and continued change in possession had been established, the burden would devolve upon the defendants, as stated elsewhere in instructions 1, 2, and 5, to prove a fraudulent intent and a participation therein by plaintiff. But there being evidence that no change in possession had taken place, if the jury found that such was the fact, the burden would remain upon the plaintiff to establish that he purchased for value and in good faith. (Compiled Statutes, ch. 32, sec. 11; *Robinson v. Uhl*, 6 Neb., 238; *Densmore v. Tomer*, 11 Neb., 118; *Densmore v. Tomer*, 14 Neb., 392.) In view of the evidence as to possession the instructions referred to which were requested by the plaintiff were, therefore, misleading, because the jury would infer that, regardless of the facts relating to possession, the burden was on the defendants to establish fraud. The modification of the instruction asked by the defendants we do not think cured the error. This modification implies a correct statement as to the burden of proof, but only by the use of the language "unless he, Dangler, proves," etc., whereas the first instruction and the fifth requested by the plaintiff stated clearly that fraud must be established by a fair preponderance of the evidence. The court nowhere distinguished the rules in regard to the burden of proof as depending on the fact of possession, and the instructions when taken as a whole, instead of helping one another out and comprising a correct statement of the law, were confusing and misleading. The case illustrates the fact that the trial judge should assume the duty of himself preparing instructions covering the law of the case and not depend entirely upon instructions requested by the parties, which will seldom alone afford a systematic and logical statement of the law.

The defendant in error seeks to avoid the effect of the instructions by urging that the plaintiff was in any view entitled to a verdict, because it was not shown that Hollingsworth was insolvent. This is immaterial. The statute makes all conveyances of goods or things in action void as against creditors when made with the intent of hindering, delaying, or defrauding creditors. (Compiled Statutes, ch. 32, sec. 17.) It is the intent with which the conveyance is made, and not the fact that it necessarily operates to defraud creditors, which avoids it.

It is also urged that the defendants were not creditors within the meaning of the statute. The proof shows they were creditors before the sale and during the whole time intervening between the sale and the levy. They were, therefore, within the protection of the law. (Compiled Statutes, ch. 32, sec. 12; *Densmore v. Tomer*, 14 Neb., 392.)

REVERSED AND REMANDED.

ARTHUR J. RICHARDSON V. SUSAN F. HALSTEAD.

FILED APRIL 4, 1895. No. 6037.

1. **Trespassing Animals**: DUTY OF DISTRAINOR TO FEED. The owner of live stock taken up under the herd law by the owner of cultivated lands, on which they are found trespassing, is not, while the stock remains in the possession of the land-owner by virtue of his lien, under obligations to feed, water, or care for such stock. Such obligations devolve upon the lienor.

2. ———: ———: DEGREE OF CARE. In keeping the stock and caring therefor the lienor is required to exercise only such care as would be exercised by a person of ordinary prudence under the circumstances.

3. ———: ARBITRATION: RES ADJUDICATA: DAMAGES TO STOCK. The authority of arbitrators appointed under the herd law is merely to appraise the damages and costs sustained by the land-

owner, and, therefore, any right of action which may accrue to the owner of the stock by reason of the former's negligence in keeping the same is not barred by the fact that the statutory arbitration was had and damages assessed and paid.

4. **Instructions.** An instruction which misstates the law is not cured by other instructions stating it correctly, because the jury would be left in doubt as to which paragraph was correct. (*Wasson v. Palmer*, 13 Neb., 376.)

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

Sedgwick & Power, for plaintiff in error.

Harlan & Harlan, contra.

IRVINE, C.

The plaintiff in error seized certain live stock of the defendant in error found trespassing upon his land. Arbitrators were appointed under the herd law, damages assessed and paid. Among the animals so taken up were certain milch cows. Thereafter the defendant in error brought this action against the plaintiff in error, alleging that while the stock was in his possession he had negligently failed to properly feed, water, and care for said stock, and to milk said cows, whereby said stock was damaged. On the issues joined, which need not be here set out, there was a verdict for the defendant in error for $1, and the plaintiff in error brings the case here because, as he says, he deems the questions of law involved of sufficient general importance to justify his course in spite of the small amount of the judgment.

The only assignments of error discussed in the briefs are directed against the eighth, ninth, and eleventh instructions given by the court. These are as follows:

"8. You are instructed that where stock of any kind is taken up for trespass the owner thereof is not required to look after, feed, water, or care for the same; and if any

portion thereof are milch cows, the owner is not required to milk the same, but is justified in leaving the feeding, watering, and caring of such stock, and the milking of such cows, to the party taking up the same, and you are instructed that in this case the plaintiff was under no obligations to feed, water, or care for the stock or to milk her cows while in the possession of the defendant.

"9. You are instructed that the fact that the notice was served on plaintiff to pay damages claimed by the defendant by reason of the trespass of the said stock upon the land of defendant, and that damages for the same were paid by the plaintiff, in no way affects the right of the plaintiff to recover such damages from the defendant as you find from the evidence she has sustained."

"11. But if you find by a preponderance of the evidence in this case that the defendant, while in the possession of the stock and milch cows of the plaintiff, failed to so keep, water, or milk the same as to prevent injury resulting therefrom, you should find for the plaintiff in such sum as is equal to the damage that you find from all the evidence the plaintiff has sustained by reason of the failure of the defendant to so keep, feed, water, or milk such stock or milch cows of the defendant."

No particular criticism is made upon the eighth instruction, except as it is connected with the ninth and eleventh. We think the instruction was correct. The herd law (ch. 2, art. 3, Compiled Statutes) gives to owner of cultivated lands a lien for his damages upon animals trespassing thereon, and authorizes him to take the stock into his possession. It follows, therefore, that when the land-owner avails himself of the statute by taking up the stock he is entitled to the possession hereof, and the owner of the stock is not only under no obligations to care for the same while so held, but he has no right to interfere with the possession of the lienor. He has certainly no implied license to enter upon the lands of the lienor for the purpose of caring for

the stock, and if he undertook to do so without express license he would himself become a trespasser.

The ninth instruction is criticised because, as counsel argue, if it is true that proceedings under the herd law in no way affect the right to recover damages in such a case as the present, then one who takes up cattle *damage feasant* becomes a trespasser and the herd law is in effect repealed. We do not think this a just criticism of the instruction. The court was not speaking of the recovery of any damages except such as were sued for in this case, to-wit, those caused by negligence in the keeping of the stock. As applied to such a case it is true that the award and payment of damages to the land-owner under the herd law does not affect any cause of action the owner of the animals may have for such negligence. The only issue before the arbitrators is the amount of damages done by the stock to the cultivated land, and the costs incurred by the owner of the land. This is all the arbitrators may find, and it is only for this that the statute authorizes the entry of judgment. Therefore, for any tort incidentally committed the parties have no remedy under the herd law, but are relegated to the ordinary procedure.

The eleventh instruction we think erroneous. The word "therefrom" renders the instruction somewhat ambiguous, but we think that its clear effect was to convey to the jury the impression that it was the duty of the defendant below, while in possession of the stock, to so keep, feed, water, or milk the same as to prevent injury to the stock, and if he failed to do so he would be liable for any injury resulting from such failure. This makes the lienor an insurer of the safety of the stock against all damages arising from the manner in which it is kept. The lienor's duty is not so great. His position is analogous to that of a bailee, and he is only required in the care of the stock to take such precautions as a person of ordinary prudence would take under similar circumstances. In the fifth and again in the

seventh instruction the court stated correctly the rule of care required, and defendant in error contends that the eleventh instruction was thereby cured under the rule requiring the whole charge to be construed together. But this is not a case where an instruction incomplete in itself or too general is helped out by further instructions explaining, complementing, or qualifying the first. Here, the rule stated in the eleventh instruction is in conflict with the rule stated in the fifth and in the seventh. In such case it is impossible to say which instruction the jury followed, and the correct instructions do not cure the error. (*Wasson v. Palmer*, 13 Neb., 376; *Ballard v. State*, 19 Neb., 609; *Fitzgerald v. Meyer*, 25 Neb., 77; *McCleneghan v. Omaha & R. V. R. Co.*, 25 Neb., 523; *Robb v. State*, 35 Neb., 285; *First Nat. Bank v. Lowrey*, 36 Neb., 290; *Carson v. Stevens*, 40 Neb., 112.) For the error in the eleventh instruction the judgment must be reversed.

REVERSED AND REMANDED.

A. B. SMITH V. RICHARD J. MASON.

FILED APRIL 5, 1895. NO. 6185.

1. **Principal and Surety**: PAYMENT BY ONE SURETY: CONTRIBUTION. Where one of two or more sureties discharges the debt of the principal debtor, by giving his individual note for part of the sum due and money for the residue, which is received by the creditor as payment, and the evidence of the original debt surrendered, such surety is entitled to demand contribution from the other joint sureties, although the new note has not been paid.

2. ———: ———: ———: AMOUNT OF RECOVERY. In an action by a surety against one of several co-sureties for contribution, the share to be recovered is controlled by the number of solvent co-sureties. In other words, the insolvent ones are to be ex-

cluded, and the burden must be distributed equally between the sureties who remain solvent.

3. ———: ———: ———: INSOLVENCY OF PRINCIPAL. In order to recover contribution it is not necessary to aver and prove the insolvency of the principal debtor.

4. ———: ———: ———. The mere refusal of a surety to accept property from the principal as indemnity will not defeat his right to contribution where he has paid the original debt.

5. ———: ———: ———: INTEREST. In an action by one surety against co-sureties for contribution, the plaintiff is entitled to the legal rate of interest on the amount paid by him from the date of such payment.

6. ———: EXTENSION OF TIME: CONSIDERATION. An agreement between a creditor and the principal debtor for an extension of the time of payment will not operate to release the surety, where there is no consideration for the agreement.

7. ———: ———: ———. The mere voluntary forbearance on the part of the creditor, enlarging the time of payment, without consideration, or the mere failure to institute an action against the principal when the debt becomes due, will not alone discharge the surety.

8. **Review:** ASSIGNMENTS OF ERROR. In order to obtain a review of the rulings of the trial court on the admission or exclusion of evidence, the particular rulings relied upon for a reversal must be specifically assigned in the petition in error.

9. **Foreign Statutes:** PLEADING AND PROOF. The statutes of another state must be pleaded and proved to be of any avail. In the absence of evidence to the contrary, the laws of the sister state will be presumed to be the same as our own.

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

See opinion for references to authorities upon the propositions discussed.

Thomas Ryan and *J. L. Epperson & Sons*, for plaintiff in error.

Thomas H. Matters and *C. J. Dilworth, contra.*

NORVAL, C. J.

On the 21st day of August, 1888, the plaintiff and defendant, together with S. M. Lewis and J. E. Hopper, executed a promissory note as sureties for one William Mason, calling for the sum of $1,000, drawing interest at seven per cent from date, payable to the order of Robert Frost's Sons, and maturing in two years. The principal debtor being insolvent, and having failed to pay the note at maturity, the plaintiff below, Richard J. Mason, paid the same, and on September 9, 1892, brought this action for contribution against his co-surety, A. B. Smith. The petion alleges the execution and delivery of the note; that Lewis, Hopper, and the plaintiff and defendant signed the same as sureties merely; that the principal on said note, William Mason, had become insolvent at the maturity thereof, and the plaintiff was compelled to, and did, pay said note on the 21st day of August, 1891, and said Lewis and Hopper were insolvent when the note became due, and have been ever since said time; that the plaintiff requested the defendant on September 5, 1892, to pay the sum of $647.35, as his contributive share of said note, which he refused to do, and that no part of said amount has been paid. The defendant, for answer, admits the execution and delivery of the note as alleged by the plaintiff, denies all other averments of the petition, and alleges that an extension of the time of payment of the note was granted the said William Mason and the plaintiff, without the consent of the defendant. For further answer it is alleged that about the time the note became due the principal signer, William Mason, offered to turn over to the plaintiff property of sufficient value to pay the amount due thereon, to indemnify and save the plaintiff harmless from any loss on account of his having signed said note, but the plaintiff refused to receive or accept the indemnity so offered him and failed to inform the defendant of the fact until after this

suit was brought. The plaintiff replied, denying all new matter in the answer. There was a verdict for the plaintiff below in the sum of $714.40, the defendant presented a motion for a new trial, which was overruled by the court, and the plaintiff having entered a remittitur in the sum of $42.35, judgment was rendered upon the verdict against the defendant in the sum of $672.05, to review which he has removed the cause to this court by proceedings in error.

It is insisted that the verdict is not sustained by sufficient evidence, for the following reasons:

1. Because the plaintiff has never paid the note.

2. The evidence fails to show the insolvency of the co-sureties, Lewis and Hopper.

3. That there was an extension of the time of payment, without the defendant's consent, which released him from all liability.

We will notice these objections in the order stated. On the question of payment the uncontradicted evidence discloses that on August 21, 1891, the defendant in error paid the payees named in the note about the sum of $200 in cash, and for the remainder of the debt he executed and delivered to them his individual promissory note. At the same time the original note was surrendered to the defendant in error with this indorsement made thereon by the holders thereof: "One thousand two hundred and ten dollars paid August 21, 1891, by R. J. Mason, in full satisfaction of this note. R. Frost & Sons." The evidence fails to disclose whether the note executed on August 21 has been paid by the maker or not. It is insisted that upon the facts above stated contribution cannot be enforced by the defendant in error against his co-sureties or either of them, since it has not been shown that the second note has been paid. It is well settled that before a surety is entitled to call upon a co-surety for contribution he must have actually paid the debt. (Bispham, Principles of Equity, sec. 330, and cases cited.) But this doctrine does

not require that the indebtedness should have been paid in money by the surety. If there has been delivered to the holder of the obligation, property which is received in full satisfaction of the demand, it is equivalent to a payment in cash, and will authorize the surety to call upon his co-sureties for reimbursement on the basis of the value of the property so turned over, not exceeding the debt thereby discharged. So, too, the taking of the individual note of the surety for the debt is as much a payment, and authorizes an action against the co-surety, as though the payment had been made in money. We entertain no doubt that the mere taking of a new note will not be regarded as a payment, in the absence of an agreement or understanding that it shall have that effect. The controlling question is whether the note of the defendant in error was taken as an extinguishment of the original debt. The proofs show that it was so received and accepted by R. Frost & Sons, therefore, it was entirely immaterial whether the individual note given by the defendant in error has been paid or not. As between co-sureties, a discharge of their obligation by the acceptance in lieu thereof, by the creditor, of the note of one of the sureties for part of the debt and money for the residue is deemed in law such a payment as will entitle such surety to demand contribution from the other joint sureties, even though the substituted note has not been paid. The rule applicable to the case under consideration is correctly stated in 1 Brandt, Suretyship & Guaranty, sec. 285, thus: "If two co-sureties are bound for a debt, and one of them pays it by giving his note for it, which is accepted by the creditor as payment, the surety thus paying may at once, and before paying the note so given as payment, sue his co-surety for contribution the same as if he had paid the debt in money. In holding this it has been said: 'Where one person is obligated to pay money for the use of another, a payment made in any mode, either property or negotiable paper or securities, if such payment is received as

full satisfaction of the demand, it is equivalent to, and will be treated as, a payment in cash. * * * Where the payment is received as a complete satisfaction, and the debt or obligation is extinguished, it is a matter of no moment to the person to whose use the payment is made whether it is made in money, property, or obligations. The benefit to him is the same, and the obligation to refund should be the same.'" The doctrine of the text is abundantly sustained by numerous decisions, among which are the following: *Witherby v. Mann*, 11 Johns. [N.Y.], 518; *Stone v. Porter*, 4 Dana [Ky.], 207; *Robertson v. Maxcey*, 6 Dana, [Ky.], 101; *Cornwall v. Gould*, 4 Pick. [Mass.], 444; *Stubbins v. Mitchell*, 82 Ky., 536; *Atkinson v. Stewart*, 2 B. Mon. [Ky.], 348; *Ralston v. Wood*, 15 Ill., 159; *Brisendine v. Martin*, 1 Ired. Law [N. Car.], 286; *Pinkston v. Taliaferro*, 9 Ala., 547; *Anthony v. Percifull*, 8 Ark. [3 Eng.], 494; *White v. Carlton*, 52 Ind., 371; *Keller v. Boatman*, 49 Ind., 104.

The case of *Bell v. Boyd*, 76 Tex., 133, cited in the brief of plaintiff in error, does not conflict with the rule above stated. In that case a principal and one of several sureties executed their note, which was accepted by the creditor, in payment of the former note. While it was held in that case that the surety upon the new note was not entitled to contribution from the sureties upon the original note, the court recognize the doctrine that, where one of several sureties discharges the original obligation by his individual note, he is in a position to recover contribution from his co-sureties. We find no fault with the decision referred to. There was no payment of the original indebtedness, but merely a change in the form of the contract by the principal and one of the sureties to the first note, giving a new obligation. This had the effect to release and discharge the sureties who did not sign the last note from their obligation to the creditor, as well as from contribution to their co-surety. Ordinarily, where one of sev-

eral sureties, who are equally bound, pays the debt, he is entitled to recover as contribution from the solvent co-sureties a *pro rata* share of the amount so paid, with interest. There are some cases which hold that in an action for contribution the question of solvency or insolvency of the co-sureties is not material, but that the one paying the debt is entitled to recover contribution without regard to the insolvency of any of them. The better and the more equitable rule, one supported by the weight of authority, and which we think should obtain, is that contribution must be based upon the number of solvent co-sureties. In other words, the insolvent ones are to be excluded, and the burden must be distributed equally between those who are solvent. (*Breckinridge v. Taylor*, 5 Dana [Ky.], 110; *Bosley v. Taylor*, 5 Dana [Ky.], 157; *Morrison v. Poyntz*, 7 Dana [Ky.], 307; *Henderson v. McDuffee* 5 N. H., 38; *Broasdman v. Paige*, 11 N. H., 431; *Burroughs v. Lott*, 19 Cal., 125; *Acers v. Curtis*, 68 Tex., 423; *Liddell v. Wiswell*, 59 Vt., 365; *Young v. Clark*, 2 Ala., 264; *Young v. Lyons*, 8 Gill [Md.], 162; *Gross v. Davis*, 87 Tenn., 226.)

As regards the insolvency of the co-sureties, Lewis and Hopper, the evidence in the bill of exceptions is all one way, and shows that they are married men, and while they own some little property, it is exempt, and that nothing could be collected from either upon execution. We think the evidence fully and clearly established their insolvency. The proofs tend to show that William Mason, the principal maker of the note, is insolvent, and payment cannot be obtained from him. Whether sufficient to establish his insolvency, is not important. According to the weight of authority, the right of the surety to recover contribution from a co-surety in no manner depends upon the insolvency of the principal debtor, although the decisions upon the subject are not harmonious. (*Roberts v. Adams*, 6 Porter [Ala.], 361; *Buckner v. Stewart*, 34 Ala., 529; *Sloo v.*

Pool, 15 Ill., 47; *Rankin v. Collins*, 50 Ind., 158; *Judah v. Mieure*, 5 Blackf. [Ind.], 171; 1 Brandt, Suretyship, sec. 290.)

It is argued that the defendant in error was released from all liability by an extension of the time of payment of the original indebtedness. This defense is not available for two reasons: First, it is not sufficiently pleaded in the answer. It is there averred that the date of payment of the debt was extended by the creditors without the defendant's consent, but it is not alleged that there was any consideration for such extension. In order that an agreement to extend the time of payment made by the creditor with the principal debtor may operate to release the surety, it must be for a sufficient consideration and without the sureties' consent. (*Burr v. Boyer*, 2 Neb., 265; *Dillon v. Russell*, 5 Neb., 484.) If the consideration for such extension must be proved, and there can be no doubt of it, it must also be pleaded. In the next place, it does not appear from the record that there was any agreement entered into for an extension of the time of payment of the original note, but the evidence shows the contrary to be true. The note matured August 1, 1890, and was not taken up until a year later; but this fact alone did not discharge the sureties. There was but merely a voluntary forbearance on the part of the payees to enforce the collection of the note, without any consideration for the same. The mere failure to bring an action upon the note when it matured did not have the effect to release the sureties. (*Dillon v. Russell, supra; Sheldon v. Williams*, 11 Neb., 272.)

It is contended that the verdict is contrary to the fourth instruction to the jury given by the court upon its own motion, which was to the effect that if the jury found from the evidence that plaintiff was surety on, and was compelled to pay, the note in controversy, and that his co-sureties, Lewis and Hopper, were solvent, plaintiff was entitled to recover from the defendant a sum equal to one-fourth of

the amount paid by the plaintiff with seven per cent interest from the time of payment. The judgment being for one-half the sum paid by the plaintiff with interest thereon, it is argued that the jury disregarded the fourth instruction. This could not be so unless there was insufficient evidence before the jury upon which to base a finding that Lewis and Hopper were insolvent. We have already passed upon the proposition adversely to the defendants in another part of the opinion. Both Lewis and Hopper being execution proof, under the rule stated above, and announced in the third paragraph of the charge of the court, the measure of the plaintiff's recovery was one-half of the sum paid by him to discharge the original indebtedness, with interest. The verdict is not contrary to the instructions.

William Mason was called and examined as a witness on behalf of the defendant, and during such examination was asked this question: "State whether anything was said between you and your brother [referring to defendant in error] or on your part in relation to turning out to him, as security or indemnity, this land in payment as far as it would go, on payment of this debt." Plaintiff objected to the question being answered, for incompetency and irrelevancy, which objection was sustained, and an exception taken. Thereupon the defendant made the following offer of proof: "The defendant now offers to show by this witness that on or about the time the plaintiff claims to have taken up the original note, he [witness] had a quarter section of land in Furnas county, Nebraska, of the value of sixteen hundred dollars; that this land he offered to turn out to the plaintiff, his brother, Richard Mason, to indemnify and secure the payment as far as it might go on this obligation, which he claims to have taken up from Frost's sons, and that the tender remained good for some months afterwards; that the plaintiff, Richard Mason, without consulting with Mr. Smith or any of the parties to the note, upon his own motion refused to receive this property

for himself or the sureties, and refused to have anything to do with it whatever, either as an indemnity or payment; that he never gave Mr. Smith and the other co-signers of the note notice of such having been offered or tendered; that Mr. Smith and the other co-signers were ignorant of the fact until after this suit had been brought; that the plaintiff refused to receive it, and wholly failed to notify any of the parties of there being this or any other property that might be applied in this way; that the property and these proceeds have since been disposed of, and was not at the time this suit was brought available for the purpose it was offered. Objected to, as incompetent, immaterial, and irrelevant. Sustained. Exception." There was no error in excluding the foregoing offered testimony. The facts sought to be established thereby did not constitute either full or partial defense to the action. We are not aware of any rule of law which made it the duty of the plaintiff to accept from the principal debtor property as security or indemnity against loss by reason of his having signed the note. Plaintiff in error has cited in his brief cases which sustain the familiar doctrine that, where one surety has accepted security from the principal debtor, all the co-sureties are entitled to the benefit thereof; and if such security is released or given up without the consent of all the joint sureties, the one so releasing cannot obtain contribution against the others. This principle has long been recognized and applied by the courts, but it is no warrant for holding that a surety is bound at his peril to accept indemnity from his principal when offered, and if he fails so to do, that he is not entitled to contribution from his co-sureties. There is another reason why we cannot reverse the judgment for the failure to admit the testimony already mentioned, and that is the question is not sufficiently raised by the petition in error. During the trial numerous rulings adverse to the plaintiff in error were made by the court on the admission and exclusion of testimony, yet not

one of such rulings has been specifically assigned as error in the petition in error, the assignments therein being general and indefinite, such as "the court erred in excluding evidence offered by the defendant" and "the court erred in admitting evidence offered by the plaintiff and objected to by the defendant." Similar assignments have frequently been held too indefinite to be considered. (*Wanzer v. State*, 41 Neb., 238; *Kirkendall v. Davis*, 41 Neb., 285; *Cortelyou v. Maben*, 40 Neb., 512; *Bloedel v. Zimmerman*, 41 Neb., 695; *Wonderlick v. Walker*, 41 Neb., 806; *Wiseman v. Ziegler*, 41 Neb., 886.)

In the brief filed several rulings of the court on the admission and exclusion of testimony relating to the solvency or insolvency of the co-sureties and to the extension of the time of payment of the original note are discussed, but such rulings will not be reviewed or considered by us, because of the insufficiency of the assignments in the petition in error relating thereto.

The eighth assignment in the petition in error is as follows:

"8. The court erred in excluding instructions 1, 2, and 3 requested by the defendant."

The first and second requests were not based upon the evidence in the case, and for that reason they were properly rejected. Had the offered testimony above set out, which was excluded, been admitted, then there would have been evidence before the jury upon which to base these requests to charge. The three requests refused being grouped in the assignment in the petition in error, and as two of them were properly denied, following the repeated decisions of the court, the assignment will not be further considered. Objection is made to the third instruction, which is in the following language: "If you find, gentlemen of the jury, that plaintiff was surety on and paid this note as alleged, and that at the time, and ever since up to September 9, 1892, the other parties on the note besides plaintiff and defendant were

insolvent, then you will find for the plaintiff and assess his damages at one-half the sum you shall find to have been paid by him, with seven per cent interest per annum from the time of payment up to March 21, 1893." The rule laid down in this instruction is in accordance with the views already expressed by us in the opinion, and the authorities cited in support thereof. As we have seen, the insolvency of one or more of several co-sureties does operate to increase the amount the solvent ones are ratably liable to pay in an action for contribution. Further discussion of the point here is wholly unnecessary. It is argued that the instruction is bad in allowing the plaintiff seven per cent interest. It claimed that as the note was made payable in the state of Illinois, it should be construed according to the laws of that state, and, therefore, plaintiff was entitled to only five per cent interest (which is said to be the legal rate in Illinois) instead of seven per cent. Undoubtedly the rate of interest recoverable is the legal rate from the time the plaintiff paid the debt, even though the original note bore a higher rate. (*Bushnell v. Bushnell*, 77 Wis., 435.) In this state the rate of interest allowed by law is seven per cent. The statute of Illinois on the subject of interest is neither pleaded nor proved, hence we must presume that it is the same as the law of this state. (*Ruth v. Lowrey*, 10 Neb., 260; *Lord v. State*, 17 Neb., 526.)

There was an error in the assessment by the jury of the amount of recovery, but the same was cured by the entry of a remittitur by the plaintiff of the sum of $42.35. The plaintiff paid on August 21, 1891, in discharge of the debt, $1,200, which, with interest at seven per cent from that time to the date of the trial, March 21, 1893, one year and seven months, amounted to $1,344.10. One-half of this sum, or $672.05, was the amount for which judgment was rendered against the befendant below.

It is finally argued that the verdict should have been set aside on the ground of newly discovered evidence.

That is one of the grounds set up in the motion for a new trial. We are not advised of what the alleged newly discovered evidence consisted, since the evidence adduced on the hearing of the motion is not made a part of the record by the bill of exceptions. Copied into the transcript is an affidavit of one Lewis, which may or may not have been read on the hearing of the motion, but it cannot be considered, because not authenticated in the manner provided by statute.

JUDGMENT AFFIRMED.

ERICK ERICKSON, APPELLEE, V. FIRST NATIONAL BANK OF OAKLAND ET AL., APPELLANTS.

FILED APRIL 5, 1895. No. 6400.

1. **Alteration of Instruments:** RATIFICATION: PLEADING. Where a promissory note has been materially altered without the knowledge or consent of the maker, and the holder relies upon a subsequent ratification of the instrument by the maker, such ratification must be pleaded in order to be of any avail.
2. **Estoppel:** PLEADING. The facts constituting an estoppel *in pais* must be pleaded.
3. **Material Alteration of Instruments.** The fraudulent erasure of the name of the original payee of a promissory note, after its execution, by a party to the instrument and the substitution of another, without the consent of the maker, is a material alteration.
4. ———: VALIDITY OF NOTE. Such an alteration invalidates the paper as to the maker, who has not assented to, or ratified, the change, even in the hands of a *bona fide* holder for value.
5. ———: ———: INJUNCTION TO RESTRAIN TRANSFER. A court of equity has no jurisdiction to enjoin the transfer or collection of such a note, since the maker has an adequate remedy at law.
6. ———: ———: ———. The fact that a party is apprehensive that his witnesses by whom he expects to establish his defense

against a note may die or move away, is not alone sufficient ground to enjoin the negotiation of the instrument, since the testimony of witnesses may be perpetuated under the provisions of the Code of Civil Procedure.

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

See opinion for statement of the case.

Sears & Thomas, for appellants:

The alteration of a note in any material part renders it wholly invalid as against a party not consenting thereto, even in the hands of an innocent purchaser. (*Palmer v. Largent*, 5 Neb., 223; *Brown v. Straw*, 6 Neb., 536; *State Savings Bank v. Shaffer*, 9 Neb., 1; *Townsend v. Star Wagon Co.*, 10 Neb., 616; *Davis v. Henry*, 13 Neb., 497; *Barnes v. Van Keuren*, 31 Neb., 165; Randolph, Commercial Paper, sec. 1777.)

The petition contains no allegation and there is no proof of an intention to negotiate the note by indorsement; and since indorsement is necessary to cut off defenses in the hands of third persons, there is no threatened or contemplated act of injury to be restrained and injunction will not lie. (*Britton v. Berry*, 20 Neb., 325; *Camp v. Sturdevant*, 16 Neb., 693; *Doll v. Hollenbeck*, 19 Neb., 639; 3 Randolph, Commercial Paper, 991; *Spangler v. City of Cleveland*, 43 O. St., 526.)

The following cases were also cited by counsel for appellants: *Wise v. Newatney*, 26 Neb., 88; *Dickerson v. Colgrove*, 100 U. S., 578; *Mace v. Heath*, 30 Neb., 620; *May v. Cahn*, 34 Neb., 652.

H. H. Bowes, contra, cited: *Watson v. Sutherland*, 5 Wall. [U. S.], 74; *Irwin v. Lewis*, 50 Miss., 362; *Boyce v. Grundy*, 3 Pet. [U. S.], 210; 10 Am. & Eng. Ency. Law, 794; *Ferguson v. Fisk*, 28 Conn., 501; *Hullhort v. Scharner*, 15 Neb., 62; High, Injunctions [2d ed.], secs. 66, 67, 1375;

Wilhelmson v. Bentley, 25 Neb., 473; *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207; *Warren v. Faut*, 79 Ky., 1.

NORVAL, C. J.

This was an action brought by Erick Erickson in the district court of Burt county to restrain the defendants from the negotiation of a certain promissory note executed by the plaintiff and one Erick Munk, and for the cancellation of said note. From a decree in favor of the plaintiff, the defendants have prosecuted an appeal to this court.

The petition sets up two grounds for relief, namely, that the plaintiff was induced to sign the note as the surety for one Munk by the false and fraudulent representations of the latter, and that the note, after its execution, has been materially altered and changed by erasing the name of the original payee and inserting in lieu thereof the name of the First National Bank of Oakland, without the knowledge and consent of the plaintiff. The answer admits that the defendant bank purchased the note, and denies all other averments in the petition. The trial court found that the note had been materially altered, as alleged by the plaintiff, and its decision was placed upon that ground alone.

The proofs in the record show that one Erick Munk, an oculist of the city of Omaha, prior to the month of December, 1892, had made occasional professional visits to Oakland, and on the 2d day of said month he called upon the plaintiff in Oakland and induced him to sign a note as surety in the sum of $1,500, due in six months, and upon the representation of said Munk that he was about to purchase the half interest in the business of one Smith, an oculist and aurist of either Des Moines, Iowa, or Cincinnati, Ohio, and that the note was to be used for that purpose. The note was executed in blank as to the payee, it being agreed that Smith's name should be inserted as the payee when his initials should be ascertained, which Mr. Munk subsequently did, by writing in the name of D. B.

Smith. Afterwards, without the knowledge or consent of appellee, Mr. Munk erased the name of D. B. Smith and inserted the name of the First National Bank of Oakland as payee. The note plainly showed that the erasure had been made, and in this condition it was sold by Mr. Munk to the bank, who informed the officers of the bank at the time of what had been done. It also appears that the appellant Bickman, the president of the bank, went to the plaintiff before purchasing the note and inquired if he had signed a note with Mr. Munk for $1,500. Erickson replied that he had. The note, however, was not shown him, nor did he know at the time that it had been altered. Subsequently the bank notified the plaintiff of the purchase of the note. There was introduced on the trial evidence for the purpose of showing that the plaintiff ratified the alteration of the instrument after the delivery and negotiation, with knowledge of the circumstances attending the change of the payee, also evidence for the purpose of establishing an estoppel against the appellee. It is doubtful whether the evidence upon these questions was sufficient to establish either a ratification or an estoppel. Whether it does or not is wholly immaterial, since no such issues were tendered by the pleadings. The alteration is specifically set out in the answer. Whether the instrument had been materially changed after its execution and delivery was raised by the answer, but not so either as to the question of ratification, or whether the plaintiff had been estopped by his acts from denying the validity of the note in question. If the defendants desired to rely either upon an estoppel or ratification, they should have pleaded in the answer the facts upon which they base such defenses. The doctrine is plain, and needs neither authority nor elaboration to substantiate.

It is urged that a partnership was formed between Erickson and Munk for the purpose of purchasing the business of Mr. Smith, and that by reason thereof Munk

was authorized to make the alteration. A sufficient answer to this contention is that no partnership is alleged nor proved.

It is conceded, and there is no doubt of it, that the fraudulent erasure of the name of the original payee of a promissory note after its execution by a party to the instrument and the substitution of another without the consent of the maker, is a material alteration. The doctrine is elementary. (*Davis v. Bauer*, 41 O. S., 257; *German Bank v. Dunn*, 62 Mo., 79; *Stoddard v. Penniman*, 108 Mass., 366; *Patch v. Washburn*, 16 Gray [Mass.], 82; *Bell v. Mahin*, 29 N. W. Rep. [Ia.], 331; *Cumberland Bank v. Hall*, 1 Halst. [N. J. Law.], 262.) It is equally as well settled that the material alteration of an instrument invalidates it as to the maker, who has not assented to or ratified the change, even in the hands of a *bona fide* holder for value. (See cases cited above and *Brown v. Straw*, 6 Neb., 536; *Savings Bank v. Shaffer*, 9 Neb., 1; *Davis v. Henry*, 13 Neb., 497; *Hurlbut v. Hall*, 39 Neb., 889.) There can be no question that if suit were brought upon this note against the plaintiff he could avail himself of the defense that he had been discharged by the change of the instrument. The plaintiff having a complete defense at law, is he entitled to relief in equity? We think the answer can only be in the negative. It is a familiar doctrine of equity jurisdiction that the equitable powers of a court may be invoked by a person where the relief afforded at law is not plain or is inadequate, but where the aggrieved party has a full and complete remedy at law, equity will not interfere by injunction. In 10 Am. & Eng. Ency. Law, 792, the rule is correctly summarized in the following language: "If in an action at law the plaintiff can obtain full and adequate relief, a suit in equity for an injunction cannot be maintained by him. Nor can a defendant invoke the aid of a court of equity upon mere legal grounds, because in such case his defense is available at law. To entitle the defendant to relief he must have

an equitable defense which is not available at law, or a good defense at law which, by reason of fraud or accident, without any negligence on his part, he was prevented from using." The text is sustained by numerous authorities cited in the note on the same page. Applying the same rule to the facts in the case at bar, it is obvious that the appellee is in no position to invoke the interposition of a court of equity. His defense against the note is a legal one, not equitable. Full and complete relief can be had at law, therefore a court of equity will not lend its extraordinary aid by injunction. If appellee's defense could be cut off by a transfer of the note to a good-faith purchaser, then we concede he would be entitled to restrain such transfer; but, as we have already seen, the note is absolutely void as to the appellee in whosesoever hands it may come, unless there has been a ratification of the change by the appellee, or he has by his own acts and conduct been estopped from denying the validity of the instrument.

In *Hullhorst v. Scharner*, 15 Neb., 62, it is held that a court of equity will enjoin the transfer of a negotiable note obtained by duress and fraud, and in *Wilhelmson v. Bentley*, 25 Neb., 473, it was ruled that where a negotiable note is tainted with the vice of usury and the payee is about to transfer the same to a *bona fide* purchaser, the maker may enjoin such transfer. These cases are not similar to the one at bar, for the reason that the transfer of the notes in the cases mentioned, to an innocent purchaser for value before maturity, would have cut off all the defenses of the makers. In such cases the makers have the undoubted right to take the initiative and enjoin the negotiation of the notes, since the remedy afforded at law was wholly inadequate. Where a negotiable note is about to be transferred before due so as to cut off the defense of the maker, equity, at the suit of the latter, will enjoin the negotiation and order the instrument to be delivered up for cancellation; but otherwise if the note is non-negotiable. (*Perrine v.*

Striker, 7 Paige Ch. [N. Y.], 598; *Morse v. Hovey*, 9 Paige Ch. [N. Y.], 197.)

No authority has been cited in the briefs, nor after diligent search have we been able to find a single case, which holds that a court of equity will assume jurisdiction to restrain the transfer or collection of a promissory note which has been materially changed after its execution; but there are numerous adjudications laying down the rule that equity will not interfere by injunction. (See *Dorsey v. Monnett*, 20 Atl. Rep. [Md.], 196; *Northern Pacific R. Co. v. Cannon*, 49 Fed. Rep., 517; *Johnson v. Andrews*, 28 Ga., 17; *Globe Mutual Life Ins. Co. v. Reals*, 79 N. Y., 202.)

The *American Water-Works Co. v. Venner*, 18 N. Y. Sup., 379, was an action brought for the purpose, among others, of restraining the defendants from bringing actions upon, or transferring, certain promissory notes given by the plaintiff and payable upon demand, the plaintiff claiming the right to set-off or counter-claim the indebtedness of the defendants to it. It was held that a court of equity will not interfere by injunction, since the defense claimed against the notes was as available at law as in equity.

Grand Chute v. Winegar, 15 Wall. [U. S.], 373, was a suit in equity by a municipal corporation to enjoin the obligee of certain bonds issued by the corporation from prosecuting suits on such bonds and to cancel the same, on the ground that the bonds were issued without authority and in violation of law. Relief was denied because the plaintiff had a perfect and complete defense to the bonds at law.

It was held in *Allerton v. Belden*, 49 N. Y., 373, that the interposition of a court of equity may be sought when equitable relief exists against the note, unless, from the form of the note, the defense is not available at law. That was an action by an accommodation indorser of a note discounted at a usurious rate of interest to annul the note, suit being brought after the maturity of the instrument, it being

alleged in the bill that the makers were insolvent, that plaintiff had requested the holder to bring an action on the note, and that he declined to do so, but intended to delay action until plaintiff's security became worthless and proof of usury impossible. Relief was denied. The court in the opinion say: "The allegations in his complaint disclose a perfect defense at law to any action which might be brought against him on his indorsement, and no fact is stated showing any necessity for the interposition of a court of equity, or entitling the plaintiff to become an actor in the matter. The mere fact that a party has made an agreement, or given a security which is void for usury, is not, and never was, sufficient to entitle him to apply to a court of equity to have the contract annulled. The right to this relief exists only where from the form of the security the defense cannot be made available at law, or where the instrument sought to be avoided is a cloud upon the title to land, or some other necessity for the interposition of a court of equity is shown."

In *Fowler v. Palmer*, 62 N. Y., 533, it is held that an action cannot be maintained to cancel a note and to restrain the bringing of a suit thereon, or for selling or disposing of a promissory note past due, upon the ground that it has been paid.

Town of Venice v. Woodruff, 62 N. Y., 462, was an action to have certain bonds delivered up and canceled, and to restrain the holders from transferring them. The bonds were void even in the hands of a *bona fide* holder. It was decided that the suit could not be maintained. In the opinion of the court it is said: "The cases in which a court of equity exercises its jurisdiction to decree the surrender and cancellation of written instruments are, in general, where the instrument has been obtained by fraud, where a defense exists which would be cognizable only in a court of equity, where the instrument is negotiable, and by a transfer the transferee may acquire rights which the present

holder does not possess, and where the instrument is a cloud upon the title of the plaintiff to real estate. * * * There must exist some circumstance establishing the necessity of a resort to equity to prevent an injury which might be irreparable, and which equity alone is competent to avert. If the mere fact that a defense exists to a written instrument were sufficient to authorize an application to a court of equity to decree its surrender and cancellation, it is obvious that every controversy in which the claim of either party was evidenced by a writing could be drawn to the equity side of the court, and tried in the mode provided for the trial of equitable actions, instead of being disposed of in the ordinary manner by a jury. Whether, therefore, the question be regarded as one of jurisdiction or of practice, it is established, by the later decisions that some special ground for equitable relief must be shown, and that the mere fact that the instrument ought not to be enforced is insufficient, standing alone, to justify a resort to an equitable action."

Upon principle we are constrained to hold that plaintiff is not entitled to enjoin the transfer or collection of the note.

It is argued that the remedy afforded at law is not so speedy as in equity, since he must wait the pleasure of the holders of the note to bring suit thereon before he can make his defense, and by that time the witnesses to prove the alteration of the instrument may have died or moved away. The fact that the bank has failed to bring an action upon the note and that the defense may be lost by reason of his witnesses being scattered, is insufficient to invoke the powers of equity. We are not aware of any authority which sustains an equitable action upon such ground, and it is not believed that any such can be found. The appellee has ample authority, under the provisions of sections 421 to 427 of the Code of Civil Procedure, to perpetuate the testimony of his witnesses, even before suit is brought

against him. (*Allerton v. Belden, supra; Minturn v. Farmers Loan & Trust Co.*, 3 N. Y., 498; *Globe Mutual Life Ins. Co. v. Reals*, 79 N. Y., 203.)

The decree of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

B. F. MADSEN V. STATE OF NEBRASKA.

FILED APRIL 5, 1895. No. 5701.

1. **Briefs:** WAIVER OF ERROR. Assignments in a petition in error not argued in the brief of the plaintiff in error will be considered waived.
2. **Criminal Law:** ERRORS DURING TRIAL: REVIEW. In order to obtain a review of alleged errors occurring during the trial the attention of the district court must be challenged to the same in a motion for a new trial, and such alleged errors must be specifically assigned in the petition in error.

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

Ira C. Bachelor and *Silas Cobb*, for plaintiff in error.

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

NORVAL, C. J.

An indictment was returned to the district court of Douglas county, charging the plaintiff in error, as a member of the city council of the city of Omaha, with having solicited a bribe. A verdict of guilty was returned, whereupon a motion for a new trial was filed, alleging:

1. The verdict was not sustained by the evidence.
2. The verdict is contrary to law.

3. Newly discovered evidence, material to the defendant, which he could not with reasonable diligence have discovered and produced at the trial.

4. Surprise, which ordinary prudence could not have guarded against.

The motion for a new trial was overruled by the court, and the plaintiff in error was sentenced to pay a fine of $300 and the costs of prosecution.

The petition in error alleges the following errors:

1. In refusing to instruct the jury to return a verdict of not guilty.

2. In giving the first, second, and third instructions, and each of them.

3. The overruling of the motion for a new trial.

4. In permitting testimony to be given before the jury over the objection of the plaintiff in error.

In the brief filed by counsel of plaintiff in error, none of the errors assigned in the petition in error are relied upon for a reversal of the judgment. Again, it will be observed that not one of the grounds contained in the motion for a new trial is embodied in the petition in error. Owing to the peculiar condition of the record indicated above, no proposition is presented to this court for review. It has more than once been held that assignments in a petition in error not argued in the brief will be considered waived. (*Scott v. Chope*, 33 Neb., 41; *Brown v. Dunn*, 38 Neb., 52; *Phenix Ins. Co. v. Reams*, 37 Neb., 423; *Gill v. Lydick*, 40 Neb., 508; *Glaze v. Parcel*, 40 Neb., 732.) It is a well established rule that in order to obtain a review of alleged errors occurring during a trial, the attention of the trial court must be challenged to the same in a motion for a new trial, and such alleged errors must be specifically assigned in the petition in error. (*Tecumseh Town Site Case*, 3 Neb., 267; *McCormick v. Drummett*, 9 Neb., 384; *Tomer v. Densmore*, 8 Neb., 384; *Shaffer v. Maddox*, 9 Neb., 205; *Birdsall v. Carter*, 11 Neb., 143; *Lowe v. City of Omaha*, 33 Neb.,

587; *Dillon v. State*, 39 Neb., 92; *Haverly v. Elliott*, 39 Neb., 206.) The judgment is

AFFIRMED.

HORTENSE LOTHROP, APPELLANT, V. ANTON MICHAELSON, APPELLEE.

FILED APRIL 5, 1895. No. 5678.

1. **Ejectment**: OCCUPYING CLAIMANTS: REPORT OF APPRAISERS: OBJECTIONS. Objections to the report of appraisers made under the provisions of the occupying claimants act (ch. 63, Comp. Stats.) should be filed on or before the second day of the term of the district court next after the filing of the appraisement with the clerk of the court, where such report is made and filed in vacation.

2. ———: ———: ———: ———: REVIEW. The court may permit such objections to be filed out of time, but it is not reversible error to refuse so to do, where no abuse of discretion is shown.

3. ———: ———: APPRAISEMENT. The appraisers appointed under said law are required to make their appraisement from a view of the premises. They have no authority to take the testimony of witnesses.

4. ———: ———: IMPROVEMENTS: MEASURE OF RECOVERY. Where an occupying claimant is allowed for valuable and lasting improvements made while in possession, the measure of his recovery is the amount the real estate increased in value by reason of such improvements, and not the cost of making the same. (*Fletcher v. Brown*, 35 Neb., 660.)

5. **Limitation of Actions**: TAX LIENS. The statute of limitations relating to the foreclosure of tax liens is no bar to the recovery of taxes under the provisions of the occupying claimants' act.

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

John Lothrop, for appellant, cited: *O'Dea v. Washington County*, 3 Neb., 121; *Blair v. West Point Mfg. Co.*, 7 Neb., 146; *Fletcher v. Brown*, 35 Neb., 660; *Warren v. Demary*, 33 Neb., 327.

Jesse T. Davis, contra, cited: *Helphrey v. Redick*, 21 Neb., 80.

NORVAL, C. J.

The appellant brought an action of ejectment in the district court of Washington county against the appellee to recover possession of certain real estate situate in said county. The answer denies the title of the plaintiff, and sets up title to the premises in the defendant under a tax deed. The answer further alleges that the defendant, while in possession of the real estate, has paid certain taxes thereon and made valuable and permanent improvements upon the land. The defendant prays, in case a judgment of ejection is entered against him, that he recover under the provisions of the occupying claimants' law for the said improvements and taxes. The case was tried to a jury at the September, 1891, term of the district court, who found the plaintiff to be the owner and entitled to the possession of the premises, and judgment was rendered upon the verdict. Subsequently the parties entered into and filed a written stipulation to the effect that the defendant was an occupying claimant, under the statutes of this state, and that the Honorable Herbert J. Davis, one of the judges of said district court, should make an order for the appointment of appraisers to ascertain the value of the permanent improvements made by the defendant, as well as the rents and profits of said land. The order was made in accordance with the stipulation. The appraisers were appointed, who subsequently made their report in writing. This report was, on motion of the plaintiff, set aside, on account of the failure of the appraisers to take and subscribe the

oath required by statute. An order was issued to summon new appraisers, and the sheriff, in accordance with the command thereof, selected three disinterested freeholders of the county, who, after qualifying, made and filed their report in writing in vacation, and within the time required by the court, with the clerk of the district court, to-wit, on the 2d day of January, 1892. The referees found the value of the premises at the time the defendant went into possession thereof in the sum of $100, total rents and profits to be the sum of $90, and the total value of the lasting and valuable improvements made by the defendant while in possession to be $715.20. The appraisement itemizes the various improvements and the value of each is assessed. The fifth item is as follows: "5. We find that the defendant has grubbed and cleared ten acres of said land, which we assess of the cash value of $100." On the first day of the February, 1892, term of the district court, to-wit, on February 29, the defendant filed a motion to confirm said report of the appraisers, and on the 2d day of March, 1892, the plaintiff filed a motion to be permitted to file exceptions to said report, which last motion was denied on March 9, and the following decree was entered upon the journal in said cause:

"And now, on this 9th day of March, 1892, this cause came on to be heard upon the report of the appraisers heretofore selected by the sheriff of Washington county, Nebraska, under the order of this court to appraise the valuable and lasting improvements made thereon by the occupying claimant, Anton Michaelson, on the south half of the northeast quarter of section 22, township 18, range 12 east, of the 6th P. M., which report is in words and figures as follows:

* * * * * * *

"And no objections having been filed to the report of said appraisers that the said report was made within the time required under the order of this court and the

written instructions given to said appraisers by the court, the court finds that the same is reasonable and fair, and that no injustice has been done either party, except item 5 in said appraisers' report, which is, by consent of the occupying claimant, disallowed and stricken out by the court. The amount found due by the appraisers, after deducting the amount of said premises and the amount stricken out by the court, to be the sum of $525.20. And thereupon this cause came on further to be heard upon the amount paid as taxes by the occupying claimant, and after hearing the proofs the court finds that the occupying claimant has paid taxes, including interest, at the rate of ten per cent per annum from the dates of the payment of each item of taxes paid by him on said premises, to be the sum of $370.45.

"It is therefore ordered, adjudged, and decreed by the court that Anton Michaelson, the occupying claimant, have and recover of the said plaintiff Hortense Lothrop the sum of $525.20 for valuable and lasting improvements, made upon said premises, and the further sum of $370.45 as taxes, making a total of $895.65, and that the same is hereby decreed to be a lien upon the above described premises; that the said Hortense Lothrop shall, on or before the 15th day of August, 1892, elect to receive the value of the lands found by the appraisers without the improvements thereon, the same being the sum of $100, and in case she elects so to do, she shall deposit with the clerk of the district court of Washington county, Nebraska, a general warranty deed of said premises to Anton Michaelson, or tender the same to him in person; or, in case she shall not so elect, then, in that case, she shall pay to the said Anton Michaelson the said sum of $895.65 so found due for improvements and taxes as aforesaid on or before the 15th day of August, 1892, together with interest thereon at the rate of seven per cent per annum on the sum of $525.20, at ten per cent per annum on the sum of $370.45 from the

first day of this term of court, with costs of suit. And that in case the said plaintiff, Hortense Lothrop, shall fail to elect to pay for the improvements and taxes found due to the occupying claimant, or shall fail to elect or take the appraised value of the lands within the time mentioned in this decree, then, and in that case, the occupying claimant, Anton Michaelson, shall, on or before the 1st day of September, 1892, pay to the said Hortense Lothrop, or to the clerk of the district court of said county, the sum of $100, so found as the value of said lands without the improvements thereon, for the use and benefit of the said Hortense Lothrop.

"Plaintiff excepts."

It is insisted that the court erred in overruling plaintiff's motion for leave to file objections to the report of the appraisers. By the provision of section 5 of the act for the relief of occupants and claimants of real estate (ch. 63, Comp. Stats.), objections to an appraisement made under said law are to be filed on or before the second day of the term of court next after the filing of said appraisement with the clerk of the district court, where such report of the appraisers is made in vacation. In the case at bar, as already stated, the appraisement was filed in vacation, and it was not until the third day of the term of court next thereafter that the motion was made for permission to file objections to the same. Such leave to file was, therefore, not made within the time limited by said act. Doubtless, the trial court possessed the power to permit the plaintiff to file objections to the report after the expiration of the period fixed therefor by statute, but its failure so to do is not reversible error, unless it appears that there has been a clear abuse of discretion. This the record before us fails to disclose. The plaintiff's motion for leave to file objections was not accompanied by any showing excusing the delay in the filing thereof, nor did she at that time present to the court her objections to the report. There is copied

into the transcript a paper purporting to be exceptions to the report and certain affidavits which were filed with the clerk of the district court on March 9, but they cannot be considered, for the reason that they have not been embodied in, or made a part of, the bill of exceptions. There is nothing in the record to show that they were ever called to the attention of the trial judge at any time. No abuse of discretion being shown, we cannot reverse the decree for the refusal of the court to permit objections to the appraisement to be filed out of time.

The next contention of appellant is that she was not allowed to appear and produce witnesses before the appraisers before they made their report. There are two answers to this objection: First, it does not appear, except by the affidavits above mentioned, and which are not a part of the record in the case, that any application was made by the appellant, or any one for her, to be allowed to produce and examine witnesses before the appraisers. Again, there is no provision in the occupying claimants' act which authorizes the appraisers to take testimony for the purpose of ascertaining the value of the real estate, or the value of the permanent improvements placed thereon by the occupant of the premises, or the amount of the rents and profits received by him. The proceedings are regulated entirely by statute. The appraisers are required to make their appraisement from a view of the real estate in question. (See sec. 5, ch. 63, Comp. Stats.)

The next point argued is that the value of the land at the time the defendant went into possession, as fixed by the appraisers, is too low. They placed the value at $100. No evidence was adduced in the district court upon this branch of the case after the appraisement was filed, therefore we are unable to determine whether the market value of the premises was more than the sum returned in the appraisement or not.

It is insisted that an unjust value was placed upon the

improvements by the report, and the case of *Fletcher v. Brown*, 35 Neb., 660, is relied upon to sustain this contention. It was there held, in an opinion by Judge POST, that the occupant of real estate is entitled to recover for the valuable and lasting improvements made by him while in possession under a claim of title, the amount the real estate is increased in value by reason of such improvements, and not the costs of making the same. The rule stated was not violated in the case under consideration. It is the value of the improvements, and not the costs thereof, that the appraisers awarded to the defendant Michaelson.

Lastly, it is said that there was error in allowing the sum of $370.45 for taxes paid on the land by the defendant, for the reason that the same is barred by the statute of limitations relating to the foreclosure of tax liens. The statute invoked by appellant has no application to proceedings under the occupying claimants' act. By section 1 of said last named act it is provided that the person entitled to the benefits of the provisions shall not be evicted or turned out of possession of the real estate until he has been reimbursed "for all taxes and assessments paid upon said real estate by such claimant, and the persons under whom he claims, with interest thereon, at the same rate of interest as provided by law for delinquent taxes, and for all sums of money paid by such occupant or claimant, or those under whom he claims, to redeem such real estate from any sale or sales for non-payment of taxes previous to receiving actual notice by the commencement of suit on such adverse title or claim by which such eviction or cancellation may be had, unless such occupant or claimant shall refuse to pay the person so setting up and proving an adverse and better title the value of such real estate without improvements made thereon as aforesaid, upon the demand of the successful claimant as hereinafter provided." (Sec. 1, ch. 63, Comp. Stats.) The foregoing provision is unambiguous. There is no room for construction. Under it the court

could not have done otherwise than allow the defendant the amount of all taxes paid by him upon the land, with interest. The decree is right and is

AFFIRMED.

M. J. BROATCH ET AL. V. R. A. MOORE.

FILED APRIL 5, 1895. NO. 5702.

Judgments: ACTION AGAINST FIRM: SUMMONS: SERVICE. An action in the county court was entitled "M. J. B. v. N. & H." In the bill of particulars it was alleged that "said defendants N. O. N. and J. H. are indebted to the plaintiff." Judgment was entered by default against the defendants without naming them. Service was made under the provisions of section 25 of the Code authorizing service against companies or firms not incorporated, the return being as follows: "I served this writ on the within named J. H. at his usual place of business, * * * the within N. O. N. not being found in the county." *Held*, A judgment against the firm of N. & H., and not the individual members thereof.

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

Cavanagh, Thomas & McGilton, for plaintiffs in error.

R. A. Moore, pro se.

POST, J.

This was an equitable proceeding in the district court for Buffalo county by which it was sought to prevent the sale of lot No. 814 in the city of Kearney by the defendant Schars, as sheriff, on execution to satisfy a judgment in favor of his co-defendant, Broatch, and against the firm of Nelson & Hanson. An answer was filed, which need not be noticed further, for reasons which will hereafter appear.

A hearing was had in the district court, where there was a finding for the plaintiff therein and a decree in accordance with the prayer of the petition. A motion for a new trial was made and overruled and the cause removed into this court for review upon the following assignments of error:

"1. The court erred in granting said decree.

"2. Said decree is not sustained by sufficient evidence."

The paper purporting to be a bill of exceptions was, on motion of the defendant in error, stricken from the record at a former term, thus leaving for determination a single question, viz., Is the decree warranted by the pleadings? The finding being for the defendant in error on substantially all of the issues, our examination will be confined to the petition alone, since it is apparent that if a cause be therein stated for the relief sought, the decree must be affirmed. By it we are informed that on the 25th day of October, 1882, N. O. Nelson and John Hanson, then partners doing business in the firm name of Nelson & Hanson purchased the lot above described and procured a deed to be made therefor to said firm. On the 2d day of February, 1884, Nelson, by deed, in due form conveyed his interest in said lot to Hanson, said firm having been dissolved in the meantime by mutual consent. On the 6th day of the same month Broatch, plaintiff in error, recovered a judgment against the said firm in the county court of Buffalo county on a firm indebtedness for $335.32 and costs, taxed at $2.60, and on the 20th day of the same month caused a transcript thereof to be filed with the clerk of the district court for Buffalo county. On the 2d day of September, 1885, the defendant in error purchased said premises from Hanson and one Gillespie, although the interest of the latter does not appear.

The real controversy relates to the character of the judgment, a transcript of which is attached to the petition and made a part thereof. If regarded as a personal judgment against Hanson, it was a lien upon the premises at the time

defendant in error acquired title through his conveyance from the former, and the petition accordingly failed to state a cause of action. On the other hand, it is conceded that if the judgment is against copartnership merely, it is, for the purpose of this controversy, not a lien, and the petition is not subject to demurrer. Turning to the transcript, we observe the action was entitled "M. J. Broatch v. Nelson & Hanson." In the bill of particulars, which is set out at length, we find the following: "Plaintiff complains of the said N. O. Nelson and John Hanson for that on the 1st day of January, 1884, said defendants were indebted to the plaintiff. * * * Wherefore the plaintiff prays judgment against said defendants," etc. Summons was issued, but for whom does not appear from the record. In the return thereof it is recited as follows: "I served the within writ of summons on the within named John Hanson at the usual place of business by delivering a copy, etc., * * * the within named N. O. Nelson not found in the county." On the return day the following record was made: "Default is this day entered on motion of the attorney for the plaintiff, * * * and it appearing that the defendants are indebted to the plaintiff in the sum of $335.32, it is considered and adjudged that the plaintiff have judgment against the defendants in the sum of $335.32 and costs of this action, taxed at $2.60." The question is certainly not free from doubt, but there is disclosed by the foregoing record one fact which leads us to construe the judgment as against the firm of Nelson & Hanson rather than the individual members thereof. It will be perceived that jurisdiction was acquired therein, if at all, under the provisions of section 25 of the Code, which authorizes service in actions against any company or firm by copy left at the usual place of business of the defendant with a member of said firm, or clerk or general agent thereof, and declares that "executions issued on any judgments rendered in such proceedings shall be levied only on partnership property."

The validity or regularity of the proceedings of the county court are not directly called in question by this action, and yet the fact cannot be overlooked that unless that court acquired jurisdiction under the provisions of the section cited, its judgment as against Nelson is absolutely void, a result evidently not contemplated by the plaintiff therein or the court.

It is not necessary to review the cases cited in the brief of the plaintiffs in error. It is sufficient that the conclusion here reached in nowise conflicts with *King v. Bell*, 13 Neb., 412, *Morrissey v. Schindler*, 18 Neb., 672, *Rowland v. Shephard*, 27 Neb., 494, and *First Nat. Bank v. Sloman*, 42 Neb., 350. It follows that the petition states a cause of action and that the decree restraining the sale of the lot described, to satisfy the judgment against Nelson & Hanson, is right and should be

AFFIRMED.

CHARLES E. DOLAN V. STATE OF NEBRASKA.

FILED APRIL 5, 1895. NO. 6913.

Instructions in Criminal Cases: DUTY OF COURT. It is the duty of the trial court, particularly in criminal prosecutions, whether so requested or not, to present the issues to the jury by instructions, and a charge which, by the omission of certain elements, has the effect of withdrawing from the consideration of the jury an essential issue of the case is erroneous. (*Carleton v. State*, 43 Neb., 373.)

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

John P. Maule and *Charles A. Robbins*, for plaintiff in error:

The court erred in not instructing the jury that under

the information the prisoner could be convicted of assault and battery. (*Thurman v. State*, 32 Neb., 224; *Penderson v. State*, 21 Tex. App., 485.)

A. S. Churchill, Attorney General, and *F. W. Collins,* for the state.

POST, J.

This was a prosecution in the district court for Lancaster county on an information charging the crime of assault with intent to murder. A verdict was returned finding the accused guilty as charged, and a motion for a new trial having been overruled, he was sentenced to a term in the penitentiary, which he seeks to reverse by means of this proceeding.

The only assignment which we shall notice is that the charge of the court excluded from the consideration of the jury the question of the defendant's guilt of a lower grade of assault, and required them to convict, if at all, of the crime charged. The instruction to which exception is taken is as follows:

"The assault by the defendant upon the person of Albert Eisler at the time and place alleged in the information is not denied, but it is contended by the defendant that at the time of the assault he was under the influence of liquor and acted irresponsibly. Upon this point you are instructed that drunkenness is no excuse for the commission of a crime. You should consider, however, the testimony upon this point in determining whether or not one of the elements necessary to constitute the crime existed, and that element is the intent of the defendant to kill Albert Eisler at the time of making the assault. If at the time of making the assault the defendant was under the influence of liquor, and to such an extent that he was unable to distinguish between right and wrong, and committed the act without any defined purpose to kill, he would not be guilty

as charged. If, however, the defendant, at the time of the assault, was able to distinguish between right and wrong, and able to form a definite purpose in his mind to kill Albert Eisler, then the defendant is responsible for his act. In determining this question, if the evidence raises any doubt in your minds as to the formation of such intent by the defendant at the time of the assault, he is entitled to the benefit of the doubt and should be acquitted."

The only reference which need be made to the defendant's evidence is that it tended strongly to prove that he was at the time of the alleged assault (by shooting with a revolver) intoxicated, so drunk, in fact, that he was not conscious of the act of shooting, and incapable of entertaining the specific intent essential to the crime of murder had death ensued as the result of the act charged. Whether the jury should have credited such evidence is not for us to say. It is sufficient that he was entitled to have it considered under proper instructions by the court. In *Volmer v. State*, 24 Neb., 838, a case quite similar, so far as the question at issue is concerned, to the one at bar, the failure to advise the jury that they might convict of the lower grade of offense (manslaughter) was held reversible error. But it is argued by the state that the instruction is a correct statement of the proposition therein contained, and if the accused desired a direction on the subject of assault with intent to inflict great bodily injury, assault and battery, or a simple assault, he should have made such request at the trial. The information included a charge of the lower degrees of assault, as well as assault with intent to murder (2 Bishop, Criminal Procedure, 63), and it was the right of the accused to have all of the issues properly submitted to the jury. We had occasion recently in the case of *Carleton v. State*, 43 Neb., 373, to examine the subject with care, and the conclusion therein announced is that it is the duty of the trial court to properly present the issues to the jury, and a charge as a whole which, by the omis-

sion of certain elements, has the effect of withdrawing from the consideration of the jury essential issues is erroneous. In *State v. Vinsant*, 49 Ia., 241, which was a prosecution for rape, the court say: "Whoever is charged with rape is charged with all that constitutes it, and one of the elements of rape is an assault," and the judgment was reversed because the jury were not directed to find the accused guilty of a simple assault in case the evidence warranted such a verdict. (See, also, *Commonwealth v. Drum*, 19 Pick. [Mass.], 480.) And in a note to section 2494, 2 Thompson, Trials, it is said that the court ought not so to instruct the jury as to take from them the right of determining the grade of the crime of which the accused stands charged, citing, in addition to the cases referred to, *Adams v. State*, 29 O. St., 412, and *Shaffner v. Commonwealth*, 72 Pa. St., 60. It is true that the exception includes several other paragraphs of the charge which are admitted to be correct; but the foregoing instruction, which is the only one having any bearing upon the subject, is set out not for the purpose of criticism, but in order to demonstrate that the issue of the defendant's guilt of the lesser grades of assault was not in fact submitted to the jury. For reasons stated the judgment is reversed and the cause remanded for further proceedings in the district court.

REVERSED AND REMANDED.

C. F. M. STARK, APPELLANT, V. MAGNUS OLSEN ET AL., APPELLEES.

FILED APRIL 5, 1895. No. 5945.

1. **Conflict of Laws:** EXECUTION OF NOTE AND MORTGAGE. On the 13th day of March, 1886, in Cedar county, this state, O. and wife executed and delivered a mortgage conveying lands in

said county to D., a resident of Iowa, to secure a loan made by the latter, a loan broker, in the usual course of business. *Held*, In the absence of evidence explanatory of the transaction, the presumption is that the payment of the proceeds of the loan and the delivery of the note and mortgage were contemporaneous acts, and that the note is not an Iowa contract, although it appears from its face to have been executed in that state twelve days previous to the execution of the mortgage.

2. ———. In the absence of evidence to the contrary, laws of other states will be presumed to be the same as ours.

3. ———. Such presumption applies not alone to the written but as well to the unwritten laws of other states.

4. **Negotiable Instruments:** PROVISION FOR ATTORNEYS' FEES. A note, otherwise in form negotiable, will not be held non-negotiable by reason of a provision therein for an attorney's fee in case suit is brought thereon to enforce collection.

5. ———: PROVISION TO DECLARE DEBT DUE. Nor will a note be held non-negotiable on account of the following condition: "If default be made in the payment of any interest coupon, said principal sum may, at the option of the holder of this note, become due and payable without further notice." (*Heard v. Dubuque County Bank*, 8 Neb., 10.)

6. **Mortgages:** NOTES: EVIDENCE OF INDORSEE'S TITLE TO SECURITY. In an action of foreclosure it appeared that O., the defendant, borrowed money of D. and executed a note therefor to D.'s wife, secured by an instrument denominated a mortgage or trust deed, in which D. was named as trustee with power to reconvey on payment of the note at maturity. On the day of its execution D. indorsed said note in the name of his wife and forwarded it to his correspondent in Boston, by whom it was on the day of its receipt sold and indorsed for value, accompanied by the mortgage, to C. J. S., through whom, by will duly proved, the plaintiff claims title. It was the custom of D. to take securities, payable to his wife's order, and dispose of them through eastern brokers by indorsement in her name with her knowledge and consent. *Held*, Sufficient evidence of title as against the mortgagor.

7. ———: REGISTRATION OF ASSIGNMENTS: NOTES: BONA FIDE HOLDERS. Section 39, chapter 73, Compiled Statutes, providing that "the recording of an assignment of a mortgage shall not in itself be deemed notice of such assignment to the mortgagor, * * so as to invalidate any payment made by them, or either of them, to the mortgagee," has no application to the

holder of negotiable securities whose title was acquired before maturity for value in the usual course of business. (*Eggert v. Beyer*, 43 Neb., 711.)

8. **Power of Trustee Under Deed:** NOTICE. Where a trustee is invested with the apparent title to property, persons dealing with him are not chargeable with undisclosed limitations upon his power with respect to the subject of the trust; but where his powers are clearly defined by deed or other instrument creating the trust, duly filed or recorded in conformity with the registration laws, persons dealing with him in respect to the trust property must at their peril take notice of the extent of such power.

9. **Principal and Agent:** DISCHARGE OF MORTGAGE BEFORE MATURITY: AUTHORITY. Agency with power to acknowledge satisfaction of a mortgage before maturity will not be presumed, as against a *bona fide* holder, from the mere fact that the mortgagee, who had disposed of the security in the usual course of business, forwards to his correspondent at whose office it is payable funds for the satisfaction of interest coupons.

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

The facts are stated in the opinion.

Barnes & Tyler, for appellant:

The stipulation for payment of an attorney's fee does not render the note non-negotiable. (*Sea v. Glover*, 1 Ill. App., 335; *Carlon v. Kenealy*, 12 M. & W. [Eng.], 139; *German Mutual Fire Ins. Co. v. Franck*, 22 Ind., 364; *Chicago Railway Equipment Co. v. Merchants Nat. Bank*, 136 U. S., 268.)

A provision in a note allowing the payee to declare the debt due does not impair the negotiability of the instrument. (*Heard v. Dubuque County Bank*, 8 Neb., 10; *Chicago Railway Equipment Co. v. Merchants Nat. Bank*, 136 U. S., 268; *Sperry v. Horr*, 32 Ia., 184.)

The negotiability of the note is to be determined by the law of the place where it was made. (1 Randolph, Com-

mercial Paper, sec. 47; 1 Daniel, Negotiable Instruments, sec. 874; *Warder v. Arell*, 2 Wash. [Va.], 282.)

Registration of assignment could not affect the rights of a *bona fide* holder of the note. (*South Branch Lumber Co. v. Littlejohn*, 31 Neb., 606; *Williams v. Keyes*, 51 N. W. Rep. [Mich.], 522.)

An instrument given to secure the payment of money is a mortgage. (*Hurley v. Estes*, 6 Neb., 386; *Webb v. Hoselton*, 4 Neb., 318; *Cotterell v. Long*, 20 O., 464; *Sargent v. Howe*, 21 Ill., 149.)

The deed of trust is a mere incident to the debt, and passed with the assignment of the note. (*Studebaker Mfg. Co. v. McCargur*, 20 Neb., 500; *Kuhns v. Bankes*, 15 Neb., 92; *Webb v. Hoselton*, 4 Neb., 308; *Kyger v. Ryley*, 2 Neb., 28; *Carpenter v. Longan*, 16 Wall. [U. S.], 271.)

Payment to the original trustee after the note and trust deed had been transferred by him to an innocent purchaser for value before maturity did not affect the rights of the latter to enforce payment. (*Best v. Crall*, 23 Kan., 482; *Davis v. Miller*, 14 Gratt. [Va.], 13; *Dutton v. Ives*, 5 Mich., 515; *Blumenthal v. Jassoy*, 29 Minn., 177; *Grant v. Kidwell*, 30 Mo., 455; *Swall v. Clarke*, 51 Cal., 227; *Webster v. Lee*, 5 Mass., 334; *Burhaus v. Hutcheson*, 25 Kan., 625; *Block v. Kirtland*, 21 Ark., 393.)

On the question of agency the court is referred to the following cases: *Thomas v. Bowman*, 29 Ill., 426, 30 Ill., 84; *Minell v. Reed*, 26 Ala., 730; *Furnas v. Frankman*, 6 Neb., 429; *Loomis v. Simpson*, 13 Ia., 532; *Wright v. Boynton*, 37 N. H., 9.

A trustee has only the powers conferred by the trust. When limitations appear of record, persons dealing with him must take notice of his want of authority. He had no power to receive payment and release the debt before it was due, without the consent of the beneficiary. (*Swartout v. Curtis*, 5 N. Y., 301; *Newman v. Samuels*, 17 Ia., 536; *Livermore v. Maxwell*, 55 N. W. Rep. [Ia.], 37.)

Benjamin M. Weed and *Carter & Brown, contra:*

The note sued upon is non-negotiable. (1 Daniel Negotiable Instruments, sec. 30; *Bank of Carroll v. Taylor*, 25 N. W. Rep. [Ia.], 810; *Hegeler v. Comstock*, 45 N. W. Rep. [S. Dak.], 333; *Dow v. Updike*, 11 Neb., 95; *First Nat. Bank of Stillwater v. Larsen*, 19 N. W. Rep. [Wis.], 67; *McComas v. Haas*, 8 N. E. Rep. [Ind.], 579; *Hughitt v. Johnson*, 28 Fed. Rep., 865; *Smith v. Marland*, 59 Ia., 645; *Hardin v. Olson*, 14 Fed. Rep., 705; *Lamb v. Story*, 45 Mich., 488; *Hall v. Toby*, 1 Atl. Rep. [Pa.], 369; *Maryland Fertilizing & Mfg. Co. v. Newman*, 29 Alb. L. J. [Md.], 213; *Garretson v. Purdy*, 14 N. W. Rep. [Dak.], 100; *Jones v. Radatz*, 27 Minn., 240; *First Nat. Bank of Trenton v. Gay*, 63 Mo., 38; *Andrews v. Pond*, 13 Pet. [U. S.], 65; *Thompson v. Ketcham*, 4 Johns. [N. Y.], 285; *Stix v. Mathews*, 63 Mo., 371; *Mahoney v. Fitzpatrick*, 133 Mass., 151; *Way v. Smith*, 111 Mass., 523; *Whitwell v. Winslow*, 134 Mass., 343; *Palmer v. Ward*, 6 Gray [Mass.], 340; *Russell v. Swan*, 16 Mass., 314; *Blakeley v. Grant*, 6 Mass., 386; *Quigley v. Mexico Southern Bank*, 80 Mo., 295; *Van Eman v. Stanchfield*, 10 Minn., 197; *Farris v. Wells*, 68 Ga., 604; *Hadden v. Rodkey*, 17 Kan., 429; *Canal Bank v. Bank of Albany*, 1 Hill [N. Y.], 287.)

As to the questions of assignment, the effect of payment by appellees, and the release of the trust deed the following authorities are cited: *Ellis v. Sisson*, 96 Ill., 105; *Willis v. Twambly*, 13 Mass., 204; *Bush v. Lathrop*, 22 N. Y., 535; *Crocker v. Whitney*, 10 Mass., 316; *Jones v. Witter*, 13 Mass., 304; *Miller v. Kreiter*, 76 Pa. St., 78; *Heermans v. Ellsworth*, 64 N. Y., 159; *Noble v. Thompson Oil Co.*, 79 Pa. St., 354; *Hull v. Conover*, 35 Ind., 372; *Prescott v. Hull*, 17 Johns. [N. Y.], 284; *Osgood v. Artt*, 17 Fed. Rep., 575; *Shufeldt v. Gillilan*, 124 Ill., 460; *Bank of Stockton v. Jones*, 65 Cal., 437; *Merrell v. Springer*, 24 N. E. Rep. [Ind.], 259; *Reed v. Marble*, 10 Paige [N. Y.],

409; *Union College v. Wheeler*, 61 N. Y., 88; *Johnson v. Carpenter*, 7 Minn., 120; *McCabe v. Farnsworth*, 27 Mich., 52; *Jones v. Smith*, 22 Mich., 360; *Rogers v. De Forest*, 7 Paige [N. Y.], 272; *Perkins v. Dibble*, 10 O., 440; *Waters v. Waters*, 20 Ia., 363; *Terry v. Allis*, 16 Wis., 504.

As to the power of the trustee to receive payment the following authorities are cited: *Connecticut General Life Ins. Co. v. Eldredge*, 102 U. S., 545; *Williams v. Jackson*, 107 U. S., 478; *Hadley v. Chapin*, 11 Paige [N. Y.], 253; *Van Rensselaer v. Aikin*, 22 Wend. [N. Y.], 249; *McNair v. Picotte*, 33 Mo., 57; *Verges v. Giboney*, 47 Mo., 171; *Renfro v. Adams*, 62 Ala., 302; *Daniels v. Densmore*, 32 Neb., 40; *Bryant v. Richardson*, 25 N. E. Rep. [Ind.], 808.

As to the question of agency the following cases are cited: *Sherwood v. Saxton*, 63 Mo., 78; *Chesley v. Chesley*, 49 Mo., 540; *Cassady v. Wallace*, 15 S. W. Rep. [Mo.], 138; *Livey v. Winton*, 30 W. Va., 554.

POST, J.

This is a proceeding for the foreclosure of a mortgage or trust deed executed by the appellees Olsen and wife, covering certain lands in Cedar county. In addition to the mortgagor and wife the Lombard Investment Company and Andrew Burggen were named as defendants, but as their rights are not involved in this appeal they will not be noticed further in this opinion. The mortgage, which was acknowledged before a notary public of Cedar county on the 13th day of March, 1886, was given to secure payment of the note of Olsen purporting to have been executed at Le Mars, Iowa, March 1, 1886, for $1,500, payable to the order of P. M. Dunn at Boston, Massachusetts, March 1, 1891, with interest from date at seven per cent, payable semi-annually, as evidenced by coupons attached thereto. Said mortgage or trust deed was executed to J. M. Dunn, as trustee for P. M. Dunn, the payee of the note

above described, and provides that the said trustee shall have power to reconvey said premises whenever said principal note and interest coupons are fully paid to the said P. M. Dunn or her assigns. In this connection it should be mentioned that J. M. Dunn, who is named as trustee in said mortgage, was, at the time of the execution thereof, engaged in making loans at Le Mars and negotiating the notes and mortgages taken in the course of his business through brokers in New York, Boston, and elsewhere. It was customary for him to name P. M. Dunn, his wife, as payee of notes so taken, and to indorse them, when disposed of, in her name. She had no knowledge of the note and mortgage in this case, but the practice of her husband in thus dealing in her name is shown to have been with her knowledge and consent, if not, indeed, with her express approval. It should be mentioned also that she has so far ratified his action with respect to the transaction here involved as to disclaim any interest in the note or mortgage. On the 16th day of March, 1886, J. M. Dunn forwarded said note and mortgage to the firm of John Jeffries & Sons, brokers, doing business in Boston, with directions to sell the same and remit the proceeds thereof through his correspondent in New York. The note at that time bore the following indorsement executed by J. M. Dunn:

"Without recourse I hereby sell, transfer, and set over to John Jeffries & Sons the within note and annexed coupons, together with all my rights and interest under the trust deeds securing the same. P. M. DUNN."

On the 11th day of March, 1886, the plaintiff, C. F. M. Stark, then acting as agent for his mother, Mrs. C. J. Stark, applied to Jeffries & Sons for investments, and was furnished with a list of securities held by them for sale, including this mortgage of which they had been previously advised by Dunn. Said mortgage was selected by Mr. Stark among others, and the agreed price therefor, $1,502.91, left with the brokers named as a special deposit

until the receipt of the note and mortgage, which was on the 20th day of the same month, and on which day they were delivered to the purchaser, said note bearing the indorsement of Jeffries & Sons identical in form with that above set out, although no written assignment of the mortgage by the said P. M. Dunn, or in her name, was made at that time. Previous to the commencement of this action Mrs. Stark died, and by her will, which was duly proved, the plaintiff, her only heir and sole devisee, was named as sole executor. The latter deeming an assignment of the note essential in order to perfect his title, as executor, indorsed the same without recourse to Geo. K. Barstow, a clerk in the office of Jeffries & Sons, by whom it was immediately in the same manner indorsed and transferred to him, accompanied by the mortgage. The foregoing history of the transactions upon which the plaintiff's title depends is essential to an understanding of the issues presented, as will hereafter appear.

It is deemed necessary to here notice some of the allegations of the answer of Olsen and wife, viz.:

1. That on or about December 8, 1888, they paid to P. M. Dunn and J. M. Dunn, trustee, the full amount of said note, with interest, and that the said P. M. Dunn and J. M. Dunn, trustee, executed and delivered to them a release in writing, whereby they acknowledged satisfaction in full of the said mortgage.

2. That no assignment of said mortgage had ever been filed for record in Cedar county, and that they had no knowledge or information that it had been assigned to, or was owned by, any person other than the mortgagee.

3. An express denial of the assignment by P. M. Dunn and an allegation that the pretended assignment in her name by J. M. Dunn was unauthorized and void.

4. That the said J. M. Dunn was, at the date of the alleged payment by the defendants, the general agent of the plaintiff and John Jeffries & Sons, with power to re-

ceive payment and execute a release of said mortgage in the name of the holder thereof.

In support of the allegation first above mentioned they introduced in evidence a written instrument bearing date of December 8, 1888, purporting to have been executed by P. M. Dunn and J. M. Dunn as trustee, whereby, in consideration of $1 and other good and valuable considerations, they "remise, convey, and quitclaim" to Magnus Olsen all their title, claim, or demand through a trust deed for the premises described in the pleadings, executed March 1, 1886. Said instrument was acknowledged before a notary public for Plymouth county, Iowa, and filed for record in Cedar county December 17 following. We may for our present purpose construe it as referring to the mortgage which is the subject of this controversy, although not definitely described therein. Another fact to which our attention is directed by the briefs of counsel, but which sheds no direct light upon the transactions involved, is that Mrs. Dunn, on the 26th day of February, 1891, executed what purports to be a formal assignment of the mortgage or trust deed to Mrs. Stark, but in which the land mentioned therein is erroneously described as situated in Dixon county. There is, however, one fact worthy of note in this connection as tending to illustrate the business relations between Mrs. Dunn and her husband, viz., that the instrument last mentioned, including the name of the assignor in the body thereof, is upon a printed form, which is strongly corroborative of the statement that it was the custom of her husband to take securities in her name.

The first proposition to which we will give attention is that the note in this case is by its terms non-negotiable, because it is uncertain both as to amount and time of payment. The condition to which we are referred to support that contention is the following: "And if default be made in the payment of any interest coupon or part thereof, then said principal sum may, at the option of the legal holder

of this note, become due and payable without further notice; and if suit be commenced to collect this note or foreclose the trust deed securing the same, I agree to pay a reasonable attorney's fee as provided by law. This note bears ten per cent interest per annum from maturity until fully paid." The note, as has been remarked, purports to have been executed at Le Mars, in the state of Iowa, while the mortgage was executed in this state, the consideration for both being the loan mentioned. It is also disclosed by the record that said loan was made on the written application of Olsen, the mortgagor, in accordance with the custom of loan brokers. The inquiry is, therefore, naturally suggested whether the note is an Iowa contract and to be governed by the laws of that state, or whether the laws of this state will be applied in order to determine its negotiability. We shall not, however, undertake a careful examination of the authorities bearing upon the subject, since a solution of the question may be readily attained from a closer inspection of the facts established by the record. We have not the benefit of the testimony of either of the Olsens, or of J. M. Dunn, but the mortgage, as we have seen, was executed and delivered twelve days subsequent to the date borne by the note. From the deposition of W. L. Jeffries, a member of the firm of Jeffries & Sons, we learn that the application of Olsen for the loan was forwarded to said firm "shortly prior to March 11," and that on the day last named the witness advised Dunn by telegraph of the sale of the loan. The irresistible inference from these facts is that the delivery of the note and mortgage and the payment to Olsen of the proceeds of the loan were contemporaneous acts, that they occurred as late as the 13th day of March, presumably in Cedar county, and that the former is, therefore, for all purposes, a Nebraska contract. But the laws of this state must govern the construction of the contract for another reason. The plaintiff alleges that the note was executed in Iowa, and pleads the statute of

that state authorizing the allowance of an attorney's fee which he claims in this action. That allegation is, however, put in issue by the answer and is not supported by any evidence in the record. We must presume, therefore, that the laws of Iowa, so far as they relate to the subject under consideration, are the same as ours. (*Ruth v. Lowrey*, 10 Neb., 260; *Lord v. State*, 17 Neb., 526; *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb., 374.) Turning to the decisions of this court we find the question fully settled by *Heard v. Dubuque County Bank*, 8 Neb., 10, where, referring to the question of costs and attorneys' fees, it is said: "We do not think that the amount of money represented by a note or bill is made any the less certain by reason of its containing a stipulation that if it is not paid at maturity the maker will pay a part of the expenses of its collection. * * * The stipulation to pay attorney fees is harmless, to say the least, while the note is undishonored and entitled to pass as commercial paper. It is only when it has become dishonored by its maker and ceases to have any standing in the commercial world that this provision becomes operative." It was further held that the note therein was negotiable notwithstanding the following provision: "The said McDonald & Co. [payees] have full power to declare this note due and take possession of said machine at any time they may deem themselves insecure, even before the maturity of the note."

It is urged however, by defendants that the note being payable in Massachusetts the question whether it is an Iowa or a Nebraska contract is wholly immaterial, for the reason that its character as regards negotiability must be determined by the laws of the state in which it is, by its terms, to be performed. It is not necessary to determine here whether the rule contended for has any application to mortgage securities, since what has been said respecting the laws of Iowa applies with equal force to those of Massachusetts. The presumption above alluded to is not limited to

statutory enactments, but applies as well to the unwritten law of other states. (Rorer, Interstate Law, 122, and cases cited.) Assuming, therefore, that the note was not negotiable according to the laws of Massachusetts, that fact, to be available to the defendants, should have been specially pleaded and proved as any other matter material to the rights of the parties.

This brings us to the question of the plaintiff's title to the securities. The contention of the defendant, as will be inferred from what has been said, is that the indorsement by J. M. Dunn in the name of his wife is in legal effect a forgery and cannot, therefore, be made the basis of a legal title. The fact, however, that the business was conducted in her name, that she was aware of the custom of her husband in that regard, and especially of his course of dealing with Jeffries & Sons, not to mention her subsequent express ratification of his act, leaves no room to doubt his agency with power to contract in her name. But there is an additional fact of which mention was omitted in its natural order, and which should be noticed on account of its bearing upon this as well as upon another phase of the case. The coupons accompanying the note were assigned directly to Mrs. Stark, and those, seven in all, which matured prior to March 1, 1890, were paid by remittances from J. M. Dunn and presumably returned to the maker, and bearing as they did the indorsement of Mrs. Dunn, were sufficient to charge him, defendant, with a notice of her equities.

The next question discussed involves a construction of sections 39 and 46, chapter 73, Compiled Statutes, entitled "Real Estate." Section 46 merely authorizes the recording of assignments of mortgages. Section 39 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." Those provisions were before us for our con-

struction in the recent case of *Eggert v. Beyer*, 43 Neb., 711, and the conclusion therein is decisive of every proposition asserted in connection with this branch of the case. It is in effect there held that the statute has no application to the holder of negotiable paper secured by mortgage whose title is acquired in the usual course of business for value before maturity, and that if the mortgagor in such case chooses to make payment to another than the holder of the security, he must do so at his peril. To the authorities there cited may be added the recent case of *Williams v. Keyes*, 90 Mich., 290, in which it is said, referring to the same provision: "The statute means no more than that the mortgagor shall not be required to search the record before making payment to the one *prima facie* entitled to receive it. In case of negotiable securities the holder alone is *prima facie* entitled to receive payment." The analysis of the subject in the cases cited is so thorough and satisfactory as to leave nothing to be added at this time, and the rule therein stated must be accepted as the law of this case.

It is contended also that whatever may have been the rights and obligations of J. M. Dunn as to P. M. Dunn, the payee of the note, or her assigns, he was authorized as trustee to execute the release and his action in that regard is a sufficient protection to the defendant in this action. But his authority must be determined from the instrument itself, which is in reality a mortgage, although on its face referred to both as a mortgage and a deed of trust. And unfortunately for the defendant's contention, it confers no authority upon the trustee to acknowledge satisfaction before the maturity of the debt thereby secured, or upon any condition except payment in full to the holder of the security, or with his consent. It should be remembered here that a wide distinction is recognized between a case like this where the trustee is a mere agent for the beneficiary, whose powers are clearly defined by the instrument creating the trust, and one in which he is the holder of the

legal title. In the latter case it is well settled, on principle as well as authority, that persons dealing with the trustee are not chargeable with undisclosed limitations upon his power. Although the rule thus stated is elementary law, it is not out of place to cite in this connection the case of *Livermore v. Maxwell*, and four other cases, 55 N. W. Rep. [Ia.], 37, which are instructive, since they are authority for the principle here applied, and for the further reason that they involve transactions of the same trustee in all essential respects identical with that presented by the record in this case. The court there say: "Even if Mr. Dunn did have authority to receive payment at maturity of the note, that did not authorize him to receive it when he did. The note was payable 'on the 1st day of December, 1890,' not on or before, yet Mr. Dunn assumed to receive payment nearly two years before it was due. It is argued that as Mrs. P. M. Dunn joined in the release of the deed, the payment should be held good as to these defendants. The defendants knew that the note was negotiable by indorsement, they had each paid interest coupons that were returned to them bearing the indorsement to the plaintiff, and they knew that neither J. M. nor P. M. Dunn had the note or coupons to surrender at that time the payment was made. We are in no doubt but that these defendants knew that the note and coupons had been transferred and made the payment upon the mistaken belief that J. M. Dunn had authority as trustee to receive it." We agree with what is there said, as well as the conclusion reached.

Finally, it is argued that J. M. Dunn was the agent of the plaintiff and of his mother, Mrs. Stark, during the lifetime of the latter, and authorized to receive payment in their behalf; but that contention has no foundation whatever in the record. The only evidence which can be said to bear upon the question is the fact that Dunn forwarded to Jeffries & Sons the amount of the coupons as they matured. The law will not from that fact alone infer the

relation of principal and agent as against the plaintiff. The reasonable inference is that suggested by the supreme court of Iowa, viz., that the payments of both principal and interest were made by the defendant to J. M. Dunn in the mistaken belief that the latter, as trustee, was authorized to receive it; but, however that may be, it is evident that to the extent which he, Dunn, acted in a representative capacity in the receipt of the money he was the agent of the defendant Olsen and not of the plaintiff.

It follows from what has been said that the decree should have been for the plaintiff. It will accordingly be reversed and remanded to the district court for a decree in accordance with this opinion

REVERSED AND REMANDED.

ALFRED E. HARGREAVES ET AL., APPELLANTS, V. LUDWIG KORCEK ET AL., APPELLEES.

FILED APRIL 5, 1895. No. 5878.

1. **Mortgages:** DURESS: EVIDENCE: HUSBAND AND WIFE. Threats of prosecution and immediate imprisonment of the husband, when used to induce a man and his wife to execute and deliver a mortgage upon their homestead to secure the payment of a judgment against him, where the threats so overcome their wills as to induce them to affix their signatures to such mortgage and thus give a security which they would not voluntarily have executed, are sufficient to constitute duress and avoid the operation of the instrument so obtained.
2. **Duress:** CANCELLATION OF MORTGAGE: EVIDENCE. The evidence examined, and *held*, sufficient to support the findings and decree of the district court.

APPEAL from the district court of Buffalo county. Heard below before HOLCOMB, J.

A statement of the case appears in the opinion.

Tibbets, Morey & Ferris, for appellants:

To support the contention that the mortgage was not executed under duress the following cases were cited: *Mundy v. Whittemore*, 15 Neb., 647; *Wilson Sewing Machine Co. v. Curry*, 25 N. E. Rep. [Ind.], 896; *Sornborger v. Sanford*, 34 Neb., 499; *Harmon v. Harmon*, 61 Me., 231; *Plant v. Gunn*, 2 Woods [U. S.], 372; *Thorn v. Pinkham*, 24 Atl. Rep. [Me.], 718; *Mascola v. Montesanto*, 61 Conn., 50; *Hackley v. Headley*, 45 Mich., 569; *Griffith v. Sitgreaves*, 90 Pa. St., 161; *Green v. Scranage*, 19 Ia., 461; *Humphrey v. Humphrey*, 79 N. Car., 396; *Stouffer v. Latshaw*, 2 Watts [Pa.], 167; *Alexander v. Pierce*, 10 N. H., 494; *Meek v. Atkinson*, 1 Bailey [S. Car.], 84; *Compton v. Bunker Hill Bank*, 96 Ill., 301.

Oldham & Murphy, contra.

The efforts to convince appellees that Mr. Korcek had committed a crime, and the threats of sending him to the penitentiary for a term of years if the debt was not secured by a mortgage on the homestead, constitute duress, and vitiate the mortgage. (*Meech v. Lee*, 46 N. W. Rep. [Mich.], 383; *Lomerson v. Johnson*, 13 Atl. Rep. [N. J.], 11; *McCormick Harvesting Machine Co. v. Hamilton*, 41 N. W. Rep. [Wis.], 727; *Strang v. Peterson*, 10 N. Y. Sup., 139; *Miller v. Bryden*, 34 Mo. App., 602; *Adams v. Irving Nat. Bank*, 116 N. Y., 606; *Morrison v. Faulkner*, 15 S. W. Rep. [Tex.], 797; *Schultz v. Catlin*, 47 N. W. Rep. [Wis.], 946; *Mayer v. Oldham*, 32 Ill. App., 233; *Winfield Nat. Bank v. Croco*, 26 Pac. Rep. [Kas.], 939; *Morrill v. Nightingale*, 28 Pac. Rep. [Cal.], 1068; *Bryant v. Peck*, 28 N. E. Rep. [Mass.], 678; *Morse v. Woodworth*, 29 N. E. Rep. [Mass.], 525.

Dryden & Main, also for appellees.

HARRISON, J.

The appellants commenced an action in the district court of Buffalo county against the appellees to foreclose a mortgage on real estate, alleging, in substance, that on the 11th day of July, 1889, appellants obtained a judgment against Ludwig Korcek in said district court for the sum of $1,093.48, and on the 12th day of July, 1889, Ludwig Korcek and his wife Mary, for the purpose of securing the payment of the indebtedness evidenced by the judgment, executed and delivered to appellants, a mortgage deed conveying to them the south half of the southwest quarter of section 10, township 9 north, of range 15 west, in Buffalo county, Nebraska; that by the terms of the mortgage the judgment was to be paid July 10, 1890. There was an allegation of default in the condition of the mortgage in regard to payment. It was also pleaded that certain persons and firms had, or claimed to have, judgment liens upon the premises described in the mortgage, "And plaintiffs allege that such judgments are not liens upon the above described premises, for the reason that said Ludwig Korcek is a married man and the head of a family, and with his said wife, Mary Korcek, occupies and holds said premises as their homestead, and the same are of a less value than $2,000." The petition closed with a prayer for foreclosure, deficiency judgment, etc. To this petition various judgment and other creditors of Ludwig Korcek filed answer, each setting up a claim and praying such relief as was deemed appropriate in the particular instance, by the pleader. It appears that Ludwig Korcek had been in mercantile business in Kearney, Nebraska, for a number of years and just prior to the execution of the mortgage, the basis of this action, disposed of his stock of merchandise and the business; that the judgment recovered by appellants against Ludwig Korcek which the mortgage was given to secure was for the amount of an account in their

favor for merchandise sold to him. Korcek's sale of his stock of merchandise was, he alleges, used by appellants as the foundation for the threats made by them to obtain the execution of the mortgage in suit in the case at bar. This statement will serve to explain the reference in the portion of the answer of appellees quoted herein to the sale of the stock of merchandise. The Korceks filed separate answers and subsequently filed an answer, in which they joined, and which was treated as an amended answer. In this they admitted the indebtedness of Ludwig Korcek to the appellants in some amount, the rendition of judgment, the execution of the mortgage, that appellees were husband and wife, the homestead character of the premises described in the petition and their residence thereon, but denied that Mary Korcek was indebted to appellants in any sum or in any manner. They further answered as follows:

"That on or about the 12th day of July, 1889, * * * a practicing lawyer of the city of Lincoln, Nebraska, and the then attorney of the plaintiffs aforesaid, together with a salesman in the employ of the plaintiffs aforesaid, visited the said Ludwig and Mary Korcek for the purpose of obtaining security on said account; that the said attorney and said salesman, for the purpose of inducing these answering defendants to execute said mortgage as aforesaid, falsely and fraudulently represented to the said Ludwig and Mary Korcek that the said Ludwig Korcek had unlawfully, fraudulently, and feloniously sold and disposed of said stock of merchandise and concealed the same, or a part thereof, for the purpose of defrauding his creditors, and the plaintiffs in particular, and that unless the said Ludwig and Mary Korcek executed and acknowledged to the plaintiffs a mortgage upon the premises hereinbefore described, to secure the said claim, that the said Ludwig Korcek would be arrested, prosecuted, and imprisoned in the penitentiary of the state of Nebraska; that said plaint-

iffs, by their said agents as aforesaid, represented to the said Ludwig and Mary Korcek that a warrant had already been issued for the arrest of the said Ludwig Korcek for said crime as aforesaid, and that the same was in the possession of the sheriff of Buffalo county and would be served, and the said Ludwig Korcek immediately taken to jail, unless said mortgage was executed upon said premises as aforesaid. * * *

"8. These answering defendants allege that it is wholly untrue that the said Ludwig Korcek had been guilty of disposing of said property for the purpose of cheating and defrauding his creditors and deny that he had been guilty of any criminal offenses whatever, and the said defendant Mary Korcek alleges that at the time the said mortgage was executed she was wholly ignorant of the facts as to the alleged criminal offenses except as advised by the said attorney and the said salesman, agents of the plaintiffs as aforesaid, and was wholly ignorant of the law governing the same; that she is of German nationality and understands the English language very imperfectly, and that by reason thereof, and by reason of said false and fraudulent representations of the agents of the plaintiff as aforesaid, and being, as aforesaid, entirely ignorant of the facts and of the law, the said Mary Korcek and the said Ludwig Korcek were in great fear of immediate arrest and incarceration of the said Ludwig Korcek, husband of the said Mary Korcek, defendant as aforesaid, and by reason of the said threats and undue influence, and while thus agitated and put in fear by reason of the said fraudulent statements and threats and misrepresentations of the said plaintiffs as aforesaid, and acting under fear of said imprisonment, these answering defendants signed said pretended mortgage upon their homestead without consideration, and not otherwise."

There were some other allegations contained in the answer, but we need not consider them here. The prayer of the answer was that the mortgage be declared null and void

and canceled of record. The reply filed by appellants was a general denial of all new matter contained in the amended answer. A trial to the court of the issues between the appellants and the Korceks resulted in a finding in favor of the Korceks and a decree declaring the mortgage null and void and ordering its cancellation, and plaintiffs in the district court have appealed to this court.

There was a sharp and decided conflict in the testimony adduced with reference to what was said by the various persons who were present at the home of the Korceks on the day when the mortgage to appellants was executed, but there was ample evidence to support the finding of the trial court, and following the well established rule of this court, the finding will not be disturbed. It remains then to determine whether the Korceks were under duress at the time they signed and delivered the mortgage. The parties who represented appellants drove from Kearney to Korcek's farm, where they arrived about 9 or 10 o'clock in the forenoon and remained until 3 or 4 in the afternoon, being the greater portion of the time they were there engaged in endeavoring to obtain the execution of the mortgage, and which they finally accomplished. They took with them from Kearney a law book, the statutes, and—now being guided in our statements mainly by the evidence which must have been followed by the trial court to reach the conclusion it did—it appears that soon after they reached the farm some law was read from this book to the Korceks, and the husband was informed that he had committed a crime and unless he signed the mortgage he would go to the penitentiary, and in Korcek's testimony we find the following:

He said he had a warrant and the sheriff is over across the creek, and if I did not sign the security mortgage the sheriff would take me right away from the place.

Q. Take you to jail?

A. He would take me right away; yes, sir.

Mrs. Korcek states that substantially the same was said

to her, and they both testify as to their unwillingness and refusal to execute the mortgage, but that finally, influenced by the threats, they did so. There were other witnesses who gave practically the same account of what transpired at Korcek's on that day; one of whom, William Wilson, who went with the parties who were representing appellants, states in his testimony:

They told Korcek they wanted him to sign the mortgage first, and Korcek very naturally objected. Then they went into this penitentiary business. They said: "Mr. Korcek, you have committed a crime, and you are liable to be put in the penitentiary, and we have a warrant for you which the sheriff, John Wilson, now holds, and if you don't sign this mortgage to-day he will arrest you and we will have you put in the penitentiary." They said: "Hargreaves Bros. is a strong firm and vindictive, and they will spend every dollar they have got but what they will put you in the penitentiary." Mr. Korcek objected and said he hadn't committed any more crime than any one else who had sold out had committed. * * *

Q. What was the effect of these threats upon Mrs. Korcek?

A. Mrs. Korcek cried and took on, of course, but she hung out after Mr. Korcek consented to sign the mortgage. She still refused to sign it, and she said that was her home and she didn't feel like signing it away.

Upon the subject of what constitutes duress and whether or not it includes threats and such threats as appear to have been made to the Korceks, there seems to have existed and exist a diversity and contrariety of opinions, the result of which has been decisions of courts of last resort, wherein we find the differences of opinion embodied and expressed, and we have been cited to a number of them, agreeably to the doctrine of which the threats used to influence the Korceks to execute the mortgage did not constitute duress, and would furnish no reason in equity

equity for avoiding the instrument or ordering it canceled; but we are satisfied that the better rule is that where, as in this case, the threat was of immediate imprisonment, accompanied by the statement that the warrant had been issued, whether such statement be true or not, and the threat operates to overcome the will of the party, as in this case, and a settlement is procured which could not have otherwise been obtained, such as resulted here, the execution of a mortgage upon the homestead of the party threatened, which was not subject to the payment of the indebtedness and could not by any process or in any manner, except the voluntary act of the owner, be so subjected, and its further execution by the wife, who did not owe the debt and was not and could not be made liable for its payment, and without whose signature the instrument signed would have been worthless and ineffective, that it constituted duress, and against its results relief might be sought and obtained in a court of equity.

In the case of *Morse v. Woodworth*, 29 N. E. Rep. [Mass.], 525, it appeared that Morse had been book-keeper for Woodworth and was suspected, and probably guilty, of an embezzlement of money belonging to his employer, and by threats of prosecution and imprisonment a settlement was obtained from Morse for the money which he was accused of appropriating. The action was by Morse to, in effect, avoid such settlement. It was admitted that no criminal or civil proceedings had been commenced against him, and his right to avoid his acts rested upon the ground that the threats of imprisonment had moved him to make the settlement and constituted duress, and entitled him to have the settlement annulled. It was held: "Where defendant, by such threats of arrest and imprisonment as would overcome the mind and will of an ordinary man, compels a settlement which plaintiff would not have made voluntarily, plaintiff, even though guilty of the embezzlement, may avoid such settlement on the ground

of duress;" and in the text of the opinion it is stated: "The question of law involved is whether one who believes, and has reason to believe, that another has committed a crime, and who, by threats of prosecution and imprisonment for the crime, overcomes the will of the other, and induces him to execute a contract which he would not have made voluntarily, can enforce the contract if the other attempts to avoid it on the ground of duress. Duress at the common law is of two kinds,—duress by imprisonment and duress by threats. Some of the definitions of duress *per minas* are not broad enough to include constraint by threats of imprisonment; but it is well settled that threats of unlawful imprisonment may be made the means of duress as well as threats of grievous bodily harm. The rule as to duress *per minas* has now a broader application than formerly. It is founded on the principle that a contract rests on the free and voluntary action of the minds of the parties meeting in an agreement which is to be binding upon them. If an influence is exerted on one of them of such a kind as to overcome his will, and compel a formal assent to an undertaking when he does not really agree to it and make that appear to be his act, which is not his, but another's, imposed on him through fear which deprives him of self-control, there is no contract unless the other deals with him in good faith, in ignorance of the improper influence and in the belief that he is acting voluntarily. To set aside a contract for duress it must be shown first that the will of one of the parties was overcome, and that he was thus subjected to the power of another, and that the means used to induce him to act were of such a kind as would overcome the mind and will of an ordinary person. It has often been held that threats of civil suits and of ordinary proceedings against property are not enough, because ordinary persons do not cease to act voluntarily on account of such threats; but threats of imprisonment may be so violent and forceful as to have that effect. * * * A

contract obtained by duress of unlawful imprisonment is void, and if the imprisonment is under legal process, in regular form, it is nevertheless unlawful as against one who procured it improperly for the purpose of obtaining the execution of a contract, and a contract obtained by means of it is void for duress. So it has been said that imprisonment under a legal process issued for a just cause is duress that will avoid a contract if such imprisonment is unlawfully used to obtain the contract. (*Richardson v. Duncan*, 3 N. H., 508. See, also, *Foshay v. Ferguson*, 5 Hill [N. Y.], 154; *United States v. Huckabee*, 16 Wall. [U. S.], 414; *Miller v. Miller*, 68 Pa. St., 486; *Walbridge v. Arnold*, 21 Conn., 424.) It has sometimes been held that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener who is seeking to obtain a contract by his threat. Imprisonment that is suffered through the execution of a threat, which was made for the purpose of forcing a guilty person to enter into a contract, may be lawful as against the authorities and the public, but unlawful against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime. One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose, and he is in no position to claim the advantage of a formal contract obtained in that way, on the ground that the rights of the parties are to be determined by their language and their overt acts without reference to the influences which moved them. In such a case there is no reason why one should be bound by a contract obtained by force, which in reality is not his but another's. We are aware that there are cases which tend to support the contention of the defend-

ant. (*Harmon v. Harmon*, 61 Me., 227; *Bodine v. Morgan*, 37 N. J. Eq., 426; *Landa v. Obert*, 45 Tex., 539; *Knapp v. Hyde*, 60 Barb. [N. Y.], 80.) But we are of opinion that the view of the subject heretofore taken by this court, which we have followed in this opinion, rests on sound principles, and is in conformity with most of the recent decisions in such cases, both in England and America. (*Taylor v. Jaques*, 106 Mass., 291; *Hackett v. King*, 6 Allen [Mass.], 58; *Harris v. Carmody*, 131 Mass., 51; *Bryant v. Peck & Whipple Co.*, 154 Mass., 460; *William v. Bayley*, L. R., 1 H. L. [Eng. & Irish App.], 200, 4 Giff. [Eng.], 638, note; *Adams v. Irving Nat. Bank*, 116 N. Y., 606; *Eadie v. Slimmon*, 26 N. Y., 9; *Foley v. Greene*, 14 R. I., 618; *Town of Sharon v. Gager*, 46 Conn., 189; *Bane v. Detrick*, 52 Ill., 19; *Fay v. Oatley*, 6 Wis., 45.) We do not intimate that a note given in consideration of money embezzled from the payee can be avoided on the ground of duress, merely because the fear of arrest and imprisonment, if he failed to pay, was one of the inducements to the embezzler to make the note; but if the fact that he is liable to arrest and imprisonment is used as a threat to overcome his will, and compel a settlement which he would not have made voluntarily, the case is different. The question in every such case is whether his liability to imprisonment was used against him, by way of a threat, to force a settlement. If so, the use was improper and unlawful; and if the threats were such as would naturally overcome the mind and will of an ordinary man, and if they overcame his, he may avoid the settlement." (See, also, *Winfield Nat. Bank v. Croco*, 26 Pac. Rep. [Kan.], 939; *Morrison v. Faulkner*, 15 S. W. Rep. [Tex.], 797; *Morrill v. Nightingale*, 28 Pac. Rep. [Cal.], 1068; *Horton v. Bloedorn*, 37 Neb., 666; *Hullhorst v. Scharner*, 15 Neb., 57.)

The appellants had, prior to the date of the execution of the mortgage, procured the levy of an execution upon some

personal property belonging to the Korceks, and it was in the possession of the officer who levied the writ at the time the mortgage was made and delivered, and the appellants introduced testimony showing that they ordered the personal property released from the levy and returned to Korcek and that the officer, in compliance with such order, returned the chattels to Korcek; that it was part of the agreement at the time of the execution of the mortgage upon the real estate that the personalty should be released and returned to Korcek, and was a portion of the consideration for the signing and delivery of the instrument, and it is contended on behalf of appellants that before the appellees could claim the relief prayed for in the petition on the ground of duress, conceding it to have been sufficient to avoid the mortgage, it was incumbent upon them to show that the personal property which had been released from the levy by appellants and the lien of the execution had been returned or tendered to appellants, to be by them again subjected to a levy and regularly sold thereunder, and the proceeds applied in payment of their judgment, as they state was their intention and would have been done in the first instance had it not been released in accordance with the terms of the agreement with the Korceks as a part of the consideration for their mortgaging their homestead to appellants. Counsel for appellees contend that all evidence of the transaction in reference to the personal property and the levy of execution upon it and its release from the levy, etc., was incompetent, not being pleaded or raised in any manner by the pleading, or so connected with the issues as joined that it was competent or of any avail to appellants. However this may have been, the evidence on this point was conflicting and the trial court, if it considered the testimony competent, must have made a finding on this branch of the case in favor of the Korceks, and there was sufficient testimony to sustain such a finding, and we must conclude that there is nothing in this branch

of the case which would warrant us in disturbing the finding and judgment of the trial court. The decree of the district court is

AFFIRMED.

RAGAN, C., not sitting.

JOSEPH J. POUNDER ET AL., APPELLANTS, V. J. P. ASHE ET AL., APPELLEES.

FILED APRIL 5, 1895. NO. 4973.

1. **Religious Societies:** REGULARITY OF ECCLESIASTICAL PROCEEDINGS: REVIEW BY CIVIL COURTS. Where a local church organization is a member of an association of congregations having a set of general rules for the government and conduct of all its members and officers and the orders and judgments of the association are binding upon the minor organizations or congregations composing it, its decisions, in so far as they relate exclusively to church affairs and government, are absolute and will be so regarded by legal tribunals.

2. ———: ———: ———. Courts which have no ecclesiastical jurisdiction will not review or revise the proceedings during trial by, or judgments of church tribunals, constituted by the organic laws of the church organization, where they involve solely questions, of the church organization and discipline or infractions of the laws and ordinances enacted by its ruling body for the government of its officers and members.

3. ———: ———: REMOVAL OF CLERGYMEN: REVIEW OF PROCEEDINGS: INJUNCTION. Where charges have been preferred against a minister of the gospel, and he has been adjudged guilty by the highest tribunal of the church organization before which the matter has been presented, and deposed from the ministry and expelled from membership in the church, courts will recognize such judgments of the church tribunal and enforce their observance when regularly brought to their notice, and in an action for the purpose will enjoin the one against whom they were rendered from further acting in the capacity of a minister or enjoying the rights of a member of the particular church or-

ganization, and will also enjoin such party and members of the local congregation or others who have combined with him from excluding from the church building and property and its use for any proper purpose, or from disturbing them in or during such use, parties, ministers appointed to take charge of the congregation and church, by the then, so far as the evidence in the case before the court discloses, recognized and appointive power, or in so excluding and disturbing a presiding elder of the church from or in its proper occupancy or use or any members in good standing who desire to worship therein in a regular manner and according to the established rules and ordinances of the church, where it further appears that the church property was conveyed to the organization or its trustees, for church purposes and in such a manner that it is subject to the control of the general association or governing power of the church and its rules and laws.

REHEARING of case reported in 36 Neb., 564.

Norval Bros. & Lowley, for appellants.

Ed. P. Smith, E. B. Esher, and *E. C. Biggs, contra.*

HARRISON, J.

The appellants commenced this action in the district court of Seward county, the object being to obtain an order of injunction restraining the appellees from interfering with or disturbing appellants in their use of a certain church building known as the Church of Mount Zion of the Beaver Crossing Mission of the Evangelical Association of North America, or their conducting religious exercises therein, and also restraining J. P. Ashe of defendants from officiating as minister at religious gatherings of the congregation in such church. There was a trial of the issues joined in the district court and a finding and judgment in favor of defendants, from which plaintiffs appealed to this court, and on hearing the judgment of the trial court was affirmed. A motion for rehearing was presented and granted. For a statement of the case we refer to the former opinion, reported in 36 Neb., 564. The decision of the controversy

hinges, in the main, upon the right of Mr. Ashe to remain in charge as clergyman or minister of the congregation at Beaver Crossing. The deed by which the lots upon which the church was situated was conveyed to the trustees of Zion church was introduced in evidence, and an examination of it shows that no person in particular can maintain any claim to its occupancy to the exclusion of others unless the right to do so be derived through the conference or governing bodies of the church organization, as it was conveyed to be used as a place of worship by the ministry and membership of the Evangelical Association of North America, which placed it entirely under the control and at the disposal of the ruling powers of the association. The discipline provides for the meeting of an annual conference and also a general conference, the first being held for, and having control and supervision over, the affairs of the association in what is designated a conference district, and the second to meet every four years for the whole association. Mr. Ashe had been assigned by an annual conference, as minister, to the performance of the church work at Beaver Crossing, and subsequently charges had been preferred against him and a trial had upon such charges, before a body called together and constituted as provided for in the discipline. He was notified of the time of trial and appeared before the court or investigating committee at the time appointed for the hearing and took some part in the proceedings, read what in the evidence is stated to have been a protest against the action then being taken, listened to a small portion of the testimony, and then withdrew. The committee adjudged him guilty and reported their action to the next annual conference, accompanying the report with the evidence and papers before them at the time of the trial. The annual conference made an examination of the matter as provided by the discipline and approved and ratified it. This action discharged him from the ministry and expelled him from the church. The discipline provided for

an appeal from the determination of the committee before which the trial took place to the annual conference, and also from the decision of the annual conference to the general conference, neither of which privileges was claimed or exercised by Mr. Ashe, he, evidently, having concluded to continue in the work of the ministry of Beaver Crossing, regardless of the action of either or both of these bodies, the committee and annual conference. The charges and specifications made against Mr. Ashe, and upon which he was tried and adjudged guilty by the committee, were as follows:

"BEAVER CROSSING, June 4, 1890.

"I, A. W. Shenberger, presiding elder of the Blue Springs district of the Platte river conference of the Ev. Association, do prefer charges against Rev. J. P. Ashe, for actions and sayings unbecoming a minister, and which has caused dissensions and disturbed the peace and harmony and prosperity of our society at Beaver Crossing.

"Specification A. In having certain resolutions passed by the board of trustees of the church which caused great dissatisfaction, which is contrary to the discipline.

"Specification B. In misrepresenting the interest and action of the Platte river conference, and especially at its last session, and the interest of the members of the society at Beaver Crossing, by intimidating on the finance.

"Specification C. In neglecting or refusing to observe our book of discipline as found on page 67, question 96, answer 2, also in answer 4, in lines 2 and 3, at the top of page 68, in book of discipline.

"A CHARGE FOR IGNORING HIS SUPERIOR IN OFFICE AND DECEPTION.

"Specification A. On Monday, June 2, he told me that he did not recognize me as a presiding elder nor a member of the church since last conference. Same night in the church he said I was no elder and that he would not accept any charge from me.

"Specification B. In practicing deception, in keeping me ignorant of what he was influencing the trustees to do, giving the wrong advice to the members, which is an open violation of the discipline as found on page 71, answer 8.

"Specification C. In practicing deception on me, inasmuch as he was told by ex-Bishop Esher at the last annual conference that he, Ashe, should stay at Beaver Crossing, and then some time in the future he should come over to —— and bring the church property and people with him.

"Specification D. In communing with me on Sabbath, the first of June, also recognized me to hold quarterly conference on Saturday previous and do business, and then on the following Monday told me I was no P. E., neither member of the church."

In the discipline, part 6, chapter 2, sections 119 and 120 are as follows:

"Sec. 119. Ques. What shall be done if an elder, deacon, or preacher is under report of being guilty of some crime expressly forbidden in the word of God as an unchristian practice, sufficient to exclude a person from the kingdom of grace and glory? Ans. 1. In case there be no bishop present the presiding elder shall call in as many ministers of the church as he shall think proper, yet not less than three, and bring the accuser and accused face to face. If the accused be clearly convicted of the alleged crime, he shall be suspended from all his legal functions, excluded according to the nature of the offense until the next annual conference, which shall finally decide the case. * * * But in case a presiding elder has charges against a preacher in his district the trial shall be conducted in the absence of the bishop by the presiding elder of an adjacent district.

"Sec. 120. Ques. What shall be done in case of improper words, actions, or temper? Ans. The accused shall be reprimanded by his senior in office. Should he repeat the same transgression, then one, two, or three preachers

are to be taken along as witnesses to enforce a second reproof. If he be not then cured of the evil he shall be tried at the next annual conference, and if found guilty and incorrigible, he shall be excluded."

The committee evidently proceeded under section 119 in the trial, judgment, and recommendations, which they made and embodied in their report to the annual conference. This, it is contended by appellees, was an error on their part, that the charges were not such as to call for or to authorize any trial under section 119, but rather disclosed that Mr. Ashe was a fit subject to be labored with and reproved or reprimanded, and if not reformed by such labor and admonition, then to be tried by the next annual conference as provided in section 120. We will further say here, that in what is termed an "Appendix" to the discipline, it is stated that a committee to investigate charges "has to decide under which paragraph of the rules governing investigations the charges are to be placed."

In our former opinion it was held that inasmuch as the right to the occupancy and use of the church property would be affected, and to a limited extent involved and determined, the adjudication of the church committee or body vested with jurisdiction was not conclusive and absolute, but the whole proceedings would be reviewed, and if discovered to be erroneous and not in accordance with the organic rules prescribed by the governmental ecclesiastical body, would be held void in so far as they necessarily and directly involved property rights. The appellants contended against the application of the doctrine then announced, both at the time of the original hearing and in arguments filed on rehearing. After a re-examination of the case and the authorities bearing upon the disputed question, which are conflicting, we are satisfied that our former decision was erroneous and must be overruled. The parties contending are but divisions of the one congregation belonging to the same church organization. It is

true that each division is claiming that the other is a rebellious portion of the church and not entitled to recognition as members of the organization, but notwithstanding this, they owe allegiance to one and the same church, have one and the same belief, and are acting under the same church government and discipline, and, so far as the facts of this case disclose, are all members of the congregation at Beaver Crossing and recognized as such by the powers that be, the conference, bishops, presiding elders, etc., except Mr. Ashe, who has been deprived, by some at least, of these same powers, all that have in any manner had his case under consideration, of his right to act in a ministerial capacity and of membership in the church. The lay members joined the church knowing (or such knowledge must be imputed to them) and accepting and adopting the profession of faith of the association and accepting the rules and regulations of the organizations for the direction and guidance of their actions as such members, and Mr. Ashe as a member, and also a minister, and from all the evidence, a bright and active one, must be presumed to have been fully acquainted with the discipline and rules and regulations, and the right of the association to try him in the manner it did, if charges were preferred against him, including that of the duty of the committee to adjudicate the question of under which section and paragraph of the rules the charges must be heard and determined, and when he joined the church and entered its ministry, having assented to them, and, having thus selected and agreed to the tribunal and its powers and jurisdiction, in so far as it affects him alone and his rights to exercise his office as minister and as a member of the association, the civil courts cannot and will not examine the proceedings of the trial committee provided by the discipline, to ascertain whether it has in all things acted in accordance with the rules of the church, or construe the disciplinary laws of the association and take upon them the work of a re-

view or retrial of the case and render in it such verdict or judgment as from the court's construction of the laws of the church, should have been announced. The church property is for the use of the members of the church, so long as they remain members, for the worship of God according to their articles of faith and in the manner provided by the rules and instructions and discipline of the association and may be so used at any proper time by any member; but where a party had been deprived of no other rights than those of officiating as minister and drawing his salary for such work and expelled from the participation in the services of the church as a member, and, so far as the record of such action as to him discloses, it has been done in the manner prescribed in the rules and regulations to which he gave his assent when he joined the organization, and from the judgment of the inferior committee and conference which so expelled him, although the right of appeal to a higher church tribunal exists, so far as we are informed, he does not care to or has not exercised it, while these rights may by him have been considered almost priceless and far greater and more to be prized than any property rights, they are not so looked upon in courts of law, nor do we think a case is presented in which a court of law is called upon to or should review the proceedings during the church trial. Furthermore, the church should be free from the interference of the courts where there is nothing drawn into question but the jurisdiction of the church over one of its members or ministers or officers, and to try him, and, if need be, expel him for the violation of some church ordinance or law, so long as such action does not infringe upon his rights as a citizen or the powers and jurisdiction of the state. In this country of ours it has been almost, if not quite universally, and is now thought to be, the best policy, and consistent with good government, to let the church and state be completely severed, or as nearly so as may be and can be with due observance of all proper laws.

The case of *Watson v. Avery*, 2 Bush [Ky.], 332, is cited in the former decision of the case at bar, and is undoubtedly a strong and leading case in support of the doctrine therein stated. Upon the controversy which was litigated in *Watson v. Avery*, with sufficient additions to the facts therein litigated afterwards made by the efforts in that behalf of the parties to the dispute to warrant the United States courts in hearing the questions involved, notwithstanding the plea of former adjudication in an opinion written by Mr. Justice Miller in the case of *Watson v. Jones*, reported in 13 Wall. [U. S.], 679, very strong ground was taken in favor of the contrary doctrine. It is said: "In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority, is that whenever the questions of discipline or of faith, or ecclesiastical rule, custom, or law, have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them in their application to the case before them. We concede at the outset that the doctrine of the English courts is otherwise. * * * In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine and to create tribunals for the decision of controverted questions of faith within the association and for the ecclesiastical government of all the individual members, congregations, and officers within the general association is unquestioned. All who unite them-

selves to such a body do so with an implied consent of this government and are bound to submit to it. But it would be a vain consent, and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions and of their right to establish tribunals for the decision of questions arising among themselves that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for. * * * But it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character, a matter over which the civil courts exercise no jurisdiction, a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them, becomes the subject of its action. It may be said here also that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted, and in a sense often used in the courts; all of those may be said to be questions of jurisdiction. But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become in almost every case the *criteria* by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, * * * and would in effect transfer to the civil courts, where property rights were concerned, the decision of all ecclesiastical questions."

In the *German Reformed Church v. Seibert*, 3 Pa. St.,

291, the following language is used: "The decisions of ecclesiastical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offense against the word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt which would do anything but improve either religion or good morals." (See, also, *Rike v. Floyd*, 6 O. Cir. Ct. Rep., 80; *Chase v. Cheney*, 58 Ill., 509, 11 Am. Rep., 95; *Shannon v. Frost*, 3 B. Mon. [Ky.], 258; *Nance v. Busby*, 15 L. R. A. [Tenn.], 801; *State v. Bibb Street Church*, 4 So. Rep. [Ala.], 40; *Landis v. Campbell*, 79 Mo., 433, 49 Am. Rep., 239; *Robertson v. Bullions*, 9 Barb. [N. Y.], 64; *Gaff v. Greer*, 88 Ind., 122; *White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends*, 89 Ind., 136.)

The former decision herein is overruled, the judgment of the district court is reversed, and a decree entered in this court granting a perpetual injunction against the appellees.

DECREE ACCORDINGLY.

NORVAL, C. J., not sitting.

J. W. BINGHAM v. FRANK W. HARTLEY.

FILED APRIL 5, 1895. No. 5255.

Instructions: BURDEN OF PROOF: HARMLESS ERROR: REVIEW. An instruction is not of necessity prejudicially erroneous because its meaning is obscure; and although therein the burden of proof is unintelligibly defined, a cause will not therefore be

reversed when the record shows that another instruction was given which, with clearness, placed such burden upon the defendant in error.

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

Phelps & Sabin, for plaintiff in error.

Grimison & Thomas, contra.

RYAN, C.

This action, brought by the defendant in error for the recovery of the amount of a board bill, was originally tried before a justice of the peace of Colfax county. Afterwards, an appeal having been taken to the district court of said county, there was rendered a judgment in favor of the defendant in error for the sum of $84 on a verdict for the same amount. In the petition in error there are assigned with such distinctness as to entitle to consideration but two errors argued in the brief of plaintiff in error. The first of these is that the verdict is not sustained by sufficient evidence. A careful perusal of the bill of exceptions shows that this assignment is not well founded. The other assignment is directed against the ninth instruction given in the following language: "The burden of proof does not depend altogether, nor to any definite extent, upon the number of witnesses testifying for the respective parties, but rather upon the persuasiveness of the evidence furnished by such witnesses." It is highly probable that when the district judge wrote this instruction he had in mind a definite proposition which he intended to state with clearness. In this however, he failed. The jury from this instruction could have obtained no light as to the burden of proof. If the court intended in this instruction to state that the weight of the testimony on each side was dependent upon the conditions enumerated, the idea was quite correct. Probably the

jury so understood the instruction, in which event no harm was done. Whether this is true or not it is scarcely possible that the jury could have acted under a mistaken understanding of the burden of proof, for, immediately following the above, there was a clear instruction that the burden of proving the reasonable value of the board and lodging was upon the plaintiff, and that there should, if the jury found for the plaintiff, be an allowance of such sum as by a preponderance of the evidence the board and lodging had been shown to be worth. Under these conditions we cannot believe that plaintiff in error was prejudiced by the giving of the instructions complained of, and the judgment of the district court is

AFFIRMED.

NELLIE B. WEEKS ET AL. V. PALMER DEPOSIT BANK.

FILED APRIL 5, 1895. No. 5476.

Partnership: EVIDENCE OF MEMBERSHIP. Where it was sought to hold the defendant liable as a member of a partnership firm, the mere statements, of one who claimed to be acting for, and as a member of, said firm were not competent to establish the disputed partnership relation.

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

John Patterson and *Webster & White*, for plaintiffs in error.

Webster, Rose & Fisherdick and *Meiklejohn & Thompson*, *contra*.

RYAN, C.

This action was brought in the Merrick county district court by the Palmer Deposit Bank against James C. Weeks

and Nellie B. Weeks on certain guaranties of notes signed by Weeks & Co. James C. Weeks made no defense. By Nellie B. Weeks the contention was that she was not a member of the firm of Weeks & Co. at the time the aforesaid guaranties were made, and that this fact was known to the said banking firm. She had been, without question, a member of the firm of Weeks & Co. while that firm transacted a mercantile business at Palmer, which was from some time in 1887 until about the first of March, 1888. About the date last named the stock at Palmer was closed out and James C. Weeks opened another store at Cushing, and there conducted a merchandising business under the name of Weeks & Co., and, while doing so, transferred to the aforesaid bank certain promissory notes on each of which there was a written guaranty signed "Weeks & Co." On a trial had there was a verdict against Nellie B. Weeks for $196.93, on which judgment was duly rendered. To reverse this judgment she prosecutes error proceedings to this court.

The evidence tending to establish the liability of Mrs. Weeks upon the above guaranty was not very direct. It was shown that she was a member of the firm of Weeks & Co. while that firm was in business in Palmer; that the husband of Nellie B. Weeks and herself constituted the firm of Weeks & Co. at Palmer, where the business was managed for the most part by James C. Weeks. When this store was opened at Cushing there was no change in the manner of keeping the account of Weeks & Co. with the defendant in error. James C. Weeks made deposits to the credit of Weeks & Co. and drew money on checks signed Weeks & Co. by him.

W. C. Batty, a member of the banking firm doing business under the name of the Palmer Deposit Bank, was examined as a witness and testified that the reasons that the said bank had for believing that Mrs. Weeks was a member of the firm of Weeks & Co. at Cushing were, as the

witness expressed it: "The representation they made when they came to Palmer to us as Weeks & Co., of which I have spoken, and the fact that the stock was moved from Palmer from Weeks & Co.'s store at Palmer to Weeks & Co.'s store at Cushing, and the fact we had never received any notice of dissolution, account kept in the same way, deposits came down by express, they borrowed money the same way as Weeks & Co., the notes Mrs. Weeks signed as she had the Palmer business, they in that way held out every representation they were Weeks & Co."

Mrs. Weeks in her testimony denied that the firm of which she had been a member at Palmer removed any portion of its stock to Cushing; denied that she had any knowledge of money being borrowed by Weeks & Co. for its business at Cushing; denied that she knew that an account was still kept with the bank in the name of Weeks & Co., and, in general, it may be said, denied that she was a member of a firm of Weeks & Co. at Cushing, or had ever done or knowingly permitted anything to be done which would countenance that idea. For the purpose of showing that in fact Mrs. Weeks was a member of the firm of Weeks & Co. in its business at Cushing there were permitted to go in evidence, over proper objections, three letters written by James C. Weeks without the knowledge or assent of his wife, as we must assume, for she so testified, and there was no attempt on this point to offer contradictory evidence of any character. These letters were as follows:

"CUSHING, NEB., May 31, 1888.

"*Hargreaves Bros., Lincoln, Neb.*—GENTLEMEN: Inclosed find our check No. 268, for invoice March 31st in full, $38.18. Please credit same and oblige,

"Yours truly, WEEKS & CO."

"PALMER, NEB., August 20, 1888.

"*Burdett, Smith & Co., Chicago, Ill.*—GENTLEMEN: Yours of August 16th to hand, and in reply will say you

can ship us the pattern 88. Weeks & Co. of Cushing and Palmer are as one. The Cushing store is a branch of Palmer store.

"Yours truly, WEEKS & Co."

"PALMER, NEB., May 7, 1888.

"*Hargreaves Bros., Lincoln, Neb.*—GENTLEMEN: Please ship us to our store at Cushing one medium sized bunch bananas, and oblige,

"Yours truly, WEEKS & Co."

There is no pretense that the above letters in any way influenced the bank in extending credit to Weeks & Co. at Cushing, or that their existence was ever known to said bank. The letters, therefore, if at all competent, were admissible, because they afforded direct evidence that Mrs. Weeks was in fact a partner in the business being carried on at Cushing. The rule applicable is thus stated in *Converse v. Shambaugh*, 4 Neb., 376: "When the existence of the partnership is admitted or otherwise established, the admission of one of the partners as to any matter between the firm and another party is to be received as evidence against all the partners. But where the existence of the partnership is denied and there is proof to establish its existence, then the admission of a party that he is a partner affects him alone and such admission is no evidence of the existence of the partnership so as to create a liability against the others. (*McPherson v. Rathbone*, 7 Wend. [N. Y.], 216; *Nelson v. Lloyd*, 9 Watts [Pa.], 22; *Cottrill v. Vanduzen*, 22 Vt., 511.)" In *McCann v. McDonald*, 7 Neb., 305, it was held that the statement of one claiming to be a partner, as to who were partners, bound no one but himself in the absence of independent proof of the existence of the partnership relation. The same rule governs as does where the question involved is whether or not one who purports to speak for another is in fact his agent. In *Norstrum v. Halliday*, 39 Neb., 828, it was said: "The testimony of the agent, where not upon other grounds incompetent,

is admissible to prove his authority, but his mere acts or declarations not brought home to the principal or ratified by the principal are not admissible." This case has been followed in *Burke v. Frye*, 44 Neb., 223, filed at this term.

There was evidence from which it might be inferred that part of the stock was removed from Palmer to Cushing and became part of the stock at the latter place. This was positively denied by Mrs. Weeks. Under these circumstances unauthorized statements, such as were contained in the above letters signed in the name of a firm, of which Mrs. Weeks testified she had previously ceased to be a member, could not but have had an effect upon the minds of the jurors, adverse to her contention in this respect. In the absence of proof of authority on the part of her husband to bind her, the above cases go to the extent of holding that such authority not being allowed to rest upon mere presumption, must be deemed to have no existence, and, therefore, it results that the statements in these letters which tended to show that Mrs. Weeks was in fact a member of the firm of Weeks & Co. at Cushing were incompetent.

Other assignments of error are urged, but since the questions discussed are not at all likely to again arise they need not be considered. The judgment of the district court is reversed.

REVERSED AND REMANDED.

POST, J., not sitting.

WILLIAM J. MAWHINEY V. OAKLEY E. GREEN.

FILED APRIL 5, 1895. No. 5787.

Replevin: VERDICT: DIRECTION FOR DEFENDANT: EVIDENCE. In this case there were involved only questions of fact, as to which the evidence was such as fully justified the direction given the jury to find for the defendant in error.

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

N. C. Pratt, for plaintiff in error.

M. V. Moudy, contra.

RYAN, C.

By virtue of an execution issued for the satisfaction of a judgment against Thomas Apgar, the sheriff of Nance county levied upon 437 bushels of oats in a bin situated upon the farm of Apgar. These oats were replevied from the sheriff by Oakley E. Green, to whom, while said oats were growing in the field, they had been mortgaged. At the time the execution was levied the officer who held it was notified of the existence of the aforesaid mortgage, nevertheless he refused to yield possession of the property. In accordance with the express direction of the district court of Nance county so to find there was a verdict for plaintiff in that court. Judgment having been duly rendered thereon, the defendant prosecutes error proceedings for the reversal of the aforesaid judgment.

In the brief submitted by plaintiff in error it is stated that there is involved only one question, and that a question of law. As the discussion proceeds, however, it seems to develop three closely related propositions of fact, rather than law, which shall now receive attention in the order in which they occur. It is first insisted that, as the mortgage was on "thirty-five acres of growing oats," etc., this description was inoperative as against oats afterwards placed in a bin. The evidence left no doubt, however, as to the oats in the bin on the farm whereon the crop was grown being a part of the oats which were growing when the mortgage was executed. The question involved was simply one of identity, which the evidence precluded being settled otherwise than as it was. As to the presumption

which arises from the failure to take and hold continuous possession of the mortgaged property under the provisions of section 11, chapter 32, Compiled Statutes, it is necessary only to state that the evidence showed that the mortgage was made in good faith and without fraudulent intent, in the absence of any attempt to establish the contrary. This being true, the presumption indicated was overcome. (*Davis v. Scott*, 22 Neb., 154.) It is next urged the mortgage was upon a portion of the oats growing, and that, therefore, the mortgage was void for uncertainty. If this was correct, there would be presented a question of law; but such is not the case. The mortgage covered thirty-five acres of growing oats, and there is no question made that there were more than that number of acres of oats on the farm of Mr. Apgar. The levy was on 437 bushels in a bin. Probably these oats were but a part of what grew on the entire tract, yet this fact has no tendency to render invalid a mortgage upon all the oats that had previously been growing. The judgment of the district court is

AFFIRMED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V. A. K. GRIFFITH ET AL.

FILED APRIL 5, 1895. No. 6285.

1. **Witnesses:** EMINENT DOMAIN: EVIDENCE OF DAMAGE. While it is not competent to show the price at which other property has been sold for the purpose of proving the value of that taken for railroad purposes, yet if, on cross-examination of witnesses for the adverse party, the railroad company adopts that line of inquiry, error will not be presumed from a re-examination confined to such line followed on cross-examination.
2. **Eminent Domain:** EVIDENCE OF DAMAGE: REVIEW. Error cannot be predicated upon the mere fact that witnesses under examination as to the value of several lots in the same immediate

neighborhood in arriving at their value estimated that of one class, then, having considered wherein that class differed from another, qualified their estimates of the value of the latter class by taking into consideration the cost of removing such difference when such removal was by such witnesses deemed practicable and advisable.

3. **Review: AFFIDAVIT FOR NEW TRIAL: BILL OF EXCEPTIONS.** An affidavit in support of a motion for a new trial, to be available on error, must be embodied in a bill of exceptions, and alleged errors not excepted to will not be considered.

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

The facts are stated by the commissioner.

L. W. Billingsley and *R. J. Greene*, for plaintiff in error:

The measure of damages is the market value of the land at the time and in the condition it was taken. Testimony in conflict with this rule is inadmissible. (*Blakeley v. Chicago, K. & N. R. Co.*, 25 Neb., 207; *Republican Valley R. Co. v. Arnold*, 13 Neb., 485; *Harris v. Schuylkill R. E. S. R. Co.*, 21 Atl. Rep. [Pa.], 590; *Louisville & N. R. Co. v. Ingram*, 14 S. W. Rep. [Ky.], 534; *Louisville & N. R. Co. v. Asher*, 15 S. W. Rep. [Ky.], 517; *San Francisco & N. P. R. Co. v. Taylor*, 24 Pac. Rep. [Cal.], 1027; *Central P. R. Co. v. Pearson*, 35 Cal., 247; *Spokane & P. R. Co. v. Lieuallen*, 29 Pac. Rep. [Idaho], 854; Lewis, Eminent Domain, sec. 499; *Omaha B. R. Co. v. McDermott*, 25 Neb., 715; *Marsh v. Snyder*, 14 Neb., 237; *State Historical Association v. City of Lincoln*, 14 Neb., 336; *First Nat. Bank v. Carson*, 30 Neb., 108; *McCartney v. Territory of Nebraska*, 1 Neb., 121; *McGean v. Manhattan R. Co.*, 22 N. E. Rep. [N. Y.], 957; *Lawrence v. Metropolitan E. R. Co.*, 8 N. Y. Sup., 326; *Sherlock v. Chicago, B. & Q. R. Co.*, 130 Ill., 403.)

There is no presumption that a witness is competent to

give a reliable estimate of the market value of land. There should be a showing of his knowledge of values. (*Missouri P. R. Co. v. Coon*, 15 Neb., 233; *Republican Valley R. Co. v. Arnold*, 13 Neb., 485; *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb., 587.)

Adams & Scott, contra, as to the measure of damages and the methods of determining the amount, cited: *Boom Co. v. Patterson*, 98 U. S., 403; *Providence & W. R. Co. v. City of Worcester*, 26 N. E. Rep. [Mass.], 59; *Commissioners of Parks & Boulevards v. Moesta*, 51 N. W. Rep. [Mich.], 903; *Colorado M. R. Co. v. Brown*, 15 Col., 193; *Louisville, N. O. & T. R. Co v. Ryan*, 64 Miss., 399; *Watson v. Milwaukee & M. R. Co.*, 57 Wis., 332; *King v. Minneapolis U. R. Co.*, 32 Minn., 224; *St. Louis, J. & S. R. Co., v. Kirby*, 10 Am. & Eng. R. Cases [Ill.], 214; *Kansas City & S. W. R. Co. v. Baird*, 21 Pac. Rep. [Kan.], 227; *Fremont, E. & M. V. R. Co. v. Meeker*, 28 Neb., 97.

As to admissibility of evidence and examination of witnesses the following authorities were cited: *Somerville & E. R. Co. v. Doughty*, 22 N. J. Law., 495; *Jaspers v. Lano*, 17 Minn., 296; *Schlencker v. State*, 9 Neb., 241; *Carr v. Moore*, 41 N. H., 131; *Blewett v. Tregonning*, 3 Ad. & El. [Eng.], 554; *Greville v. Chapman*, 5 Q. B. [Eng.], 731; *Donnelly v. State*, 26 N. J. Law., 463; *Wyman v. Lexington & W. C. R. Co.*, 54 Mass., 316; *Spring Valley Water-Works v. Drinkhouse*, 28 Pac. Rep. [Cal.], 682; *Northeastern N. R. Co. v. Frazier*, 25 Neb., 53; *Burlington & M. R. Co. v. Schluntz*, 14 Neb., 421; *Sioux City & P. R. Co. v. Weimer*, 16 Neb., 272.

Affidavits used in evidence below will not be considered in the appellate court when not preserved by a bill of exceptions. (*City of Plattsmouth v. Boeck*, 32 Neb., 299; *Strunk v. State*, 31 Neb., 119; *McCarn v. Cooley*, 30 Neb., 552; *Burke v. Pepper*, 29 Neb., 320; *Ray v. Mason*, 6 Neb., 101; *Barton v. McKay*, 36 Neb., 632.)

RYAN, C.

Error proceedings in this case are prosecuted to reverse a judgment of the district court of Lancaster county. Originally, on the application of the plaintiff in error, there was an award of damages caused by taking certain lots of the defendants in error situated in Saulsbury Addition to the city of Lincoln. This award was unsatisfactory to the defendants in error, and they appealed to the aforesaid district court, wherein, upon a trial had, the award was considerably increased. Such errors only as are deemed essential will receive consideration, and these as briefly as possible.

A. K. Griffith, one of the defendants in error, in his testimony described the property in Saulsbury Addition which had been appropriated by the railroad company, as well as its location, and gave his estimate of its value before its appropriation. This was limited to such lots as were owned by the defendants in error. On cross-examination this witness testified as follows:

Q. Before the railroad was projected through there, and before its coming had any influence upon the market value of property there, do you know of any sales being made in that neighborhood?

A. Oh, yes.

Q. Where?

A. On Seventeenth street there.

Q. North of Vine?

A. North of Vine; yes, sir.

Q. How far from your property?

A. About 100 feet—something over 100 feet.

Q. How far did these lay from Vine street?

A. I don't know exactly which lots it was. I knew of a couple of lots selling in there, probably 300 or 400 feet from Vine.

Q. Who sold them?

A. Tom Beach sold one, and I forget who else.

Q. What month did Tom Beach sell?

A. I don't know the month.

Q. Will you swear it was in 1892?

A. No, I would not.

Q. Will you swear it was in 1891?

A. I feel pretty sure, but I wouldn't swear.

Q. What was the size of that lot?

A. Those lots were 50 by 175 feet.

Q. Was the lot you speak of Beach selling a vacant lot?

A. Yes, sir.

Q. What did he get?

A. I don't know exactly; about a thousand dollars, I think.

Q. That was 50 by 175?

A. I would not say positively, I think it was though.

Q. That is the size you gave?

A. That is the size I think it was.

On redirect examination there was answered the following question under objections as indicated, to-wit:

Q. In answer to some questions of Mr. Wilson's, Mr. Griffith, you said you knew of some other lots selling over there—Beach's lots. What did they sell for, if you know?

Objected to, as incompetent, irrelevant, and immaterial, and the evidence now shows that the Beach lots were purchased by the defendant for the purpose of the location of their railroad. Overruled. Exception.

A. The lowest price and lot sold for on that alley, 25 by 95 feet they were, was $300 from that up.

When this question and answer were first considered it appeared to us that the court erred in its ruling, for it was immaterial what had been paid for other lots, and evidence to that effect seemed incompetent. The fact that this testimony was elicited on re-examination was not alone suffi-

cient to render it competent, for it was directed to the establishment of an essential fact, upon the existence of which plaintiff's right of recovery depended; that is, the value of the land of plaintiffs which had been appropriated to the use of the railroad company. What was the market value of the particular property taken from defendants in error was an important question in this case. (*Blakely v. Chicago, K. & N. R. Co.*, 25 Neb., 212; *Omaha Belt R. Co. v. McDermott*, 25 Neb., 715.) The question asked and answered had reference to the value of other property, —a consideration entirely foreign to that just stated. A more critical analysis of the cross-examination of Mr. Griffith, however, disclosed the fact that therein he had been asked what Mr. Beach got for a lot, and he had answered $1,000. It is possible that this use of the word "lot" may have been with reference to a tract as distinguished from a technically designated city lot. On cross-examination the price received by Mr. Beach was described as $1,000. On re-examination the lowest price of any lot sold was given as $300; "they were from that on up," said the witness. Thus the railroad company had shown a valuation of $1,000 on a single lot, while by the re-examination of Mr. Griffith no sale had been shown for a figure given in excess of $300. If, as has been already suggested, this $1,000 for a vacant lot referred to a tract (perhaps greater in area than a city lot), we are not at all justified thereby in assuming that the admission of the evidence noted on re-examination was prejudicial to the railroad company. The existence of such prejudice is rendered still more problematical by a consideration of the cross-examination of Mr. Griffith, which followed his re-examination above noted, which cross-examination was as follows:

Q. You say the lowest of them was sold for $300?

A. That is the lowest price I heard.

Q. Why didn't you state that all that sold above $300 had improvements on?

A. All that sold above $300 did not have improvements on.

Q. Which one did not?

A. Those on the south side—Prof. Little's lots.

Q. You were not asked about Little's lots. You were asked about Beach's lots. Why didn't you say all the rest of Beach's lots had improvements on them? You were willing for this jury to think, from your testimony, that some of Beach's lots, without improvements on them, sold for more than $300?

A. Yes, sir.

Q. Where are they?

A. I pointed them out as near as I could.

Q. On the Beach addition?

A. Maybe I didn't understand your question.

Q. Were any lots in Beach's addition sold for more than $300 without improvements on them?

A. No.

Q. Then why did you say $300 was the lowest price?

A. I will tell you why. There were several sold in there that had what they called improvements on them. They had a shanty on them that he couldn't sell for $1. They sold for $500.

In view of the confusion as to the sale of these Beach lots, as illustrated by all of the above quotations from the testimony of Mr. Griffith, we cannot now say that his re-examination was prejudicial error.

In regard to other evidence of Mr. Griffith there is presented a question quite similar to that just considered. On his cross-examination he was asked by counsel for the railroad company what he paid in 1889 for the property appropriated. His answer was as follows:

I gave as good a quarter section as is in the county, and they got $500 to boot, and since that I have paid out over $2,000.

Q. With whom did you trade?

A. Billy McLaughlin, and I thought I got it awful cheap.

On redirect examination Mr. Griffith testified that the $2,000 expended was to get Eighteenth street through; that is, was paid for property necessary to give him an outlet. He was then asked what was the value of the quarter section above referred to when he made the exchange for the property appropriated by the railroad company. This was objected to as incompetent, irrelevant, and immaterial, and because no foundation had been laid for its introduction. These objections were overruled, and exceptions taken thereto, after which the witness answered that it was worth $45 per acre. In the first instance it would not have been competent for Mr. Griffith to show what he paid for this property as furnishing a basis for an estimate of its value. (*Dietrichs v. Lincoln & N. W. R. Co.*, 12 Neb., 225; *Omaha S. R. Co. v. Todd*, 39 Neb., 818.) It was, however, proper for counsel for the railroad company to ask this, for the purpose of showing that while Mr. Griffith now claimed its value to be very great, he had in fact but recently obtained it for a comparatively small consideration. The tendency of the evidence of the character elicted on cross-examination was to dispute the claims of Mr. Griffith and discredit his testimony as to the real value of the property which he had acquired. The mere fact that he had exchanged property of an uncertain value for that appropriated left it open to argument as to whether or not his present claims and testimony were inconsistent with the actual consideration really paid. To remove this uncertainty it was proper to show on a re-examination of this witness after this aforesaid cross-examination what was the actual value of that part of the consideration paid in property. This did not sanction the introduction of testimony of this character for the purpose of reinforcing the direct evidence of this party in making his case originally. It was admissible solely because an

opening, and, perhaps necessity for it, had been created by cross-examination.

There appears in the transcript of the pleadings in this case an affidavit of J. E. Philpott, who acted as counsel for the railroad company, to the effect that while affiant was in the court room the jury in this case came in and, in the language of the affiant, "asked the court to have the reporter read that part of the evidence in said case as to whether Griffith paid $500 in the trade of the farm for the lots in question, or the purchaser paid Griffith $500 in the trade, and such part of the evidence was by order of the court read to the jury and the jury thereupon retired to the jury room." From the fact that the reading of evidence by the reporter to the jury relative to payment of $500 was the subject-matter of the twenty-seventh ground urged for a new trial we are at liberty to assume that this affidavit may have been attached to said motion. It is not now available, for two sufficient reasons, one of which is that no exception was taken to this action of the court by Mr. Philpott; the other is that this affidavit was not made part of a bill of exceptions. The judge who presided at the trial certified that the bill of exceptions presented by the railroad company's attorney contained all the evidence offered. The above affidavit not appearing in it, must therefore be assumed not to have been used for any purpose.

It was shown by the evidence that a portion of the lots appropriated were quite level, and that through others there was a draw, or a depression of a portion of the surface, by reason of which fact alone those in the latter class were not as valuable as those in the former. Different witnesses for the defendants in error, in the course of their examination, gave their estimates of the value of those lots which were level, and in speaking of those not in that class said they were as valuable if the draw or depression referred to was filled up, and in this connection there was given testimony as to what would be the probable cost of

this filling. It is quite evident that the means of knowledge of some who made estimates of this kind were quite limited. It might not have been improper to exclude their estimates, and yet we cannot say that this was the imperative duty of the district court. This method of comparison was not improper, for it is probable that very few pieces of property will be found the exact counterparts of others. Where the witnesses explain, as they did in this case, wherein the difference lies, and give their estimates of what it would cost to make one like the other when they deem this advisable and practicable, we see no impropriety in permitting this to be done. The trial court is not bound to do this, indeed there might be such an abuse of this method of making comparative estimates that prejudicial error must be inferred. In this case no such condition of affairs exists, for the witnesses, having first given their estimates of the value of the property, on further examination showed merely how they made their estimates. As is usual, where the real value of property is under consideration, there was a want of uniformity in valuations placed upon the property appropriated. The verdict, however, had the support of sufficient evidence to sustain it and will not be disturbed as lacking support of proof, sanctioned as it has been by the overruling of a motion for a new trial in which was presented that question. The judgment of the district court is

AFFIRMED.

JOHN H. FELBER, APPELLEE, V. BEDFORD B. BOYD, APPELLANT.

FILED APRIL 5, 1895. NO. 7378.

Alteration of Transcript: DISMISSAL OF APPEAL. The motion of appellee to strike from the files of this court the transcript filed herein sustained, because it appears (1) that the appellant has not brought to this court and filed here a certified transcript of the proceedings in the district court as the same appear of record in the office of the clerk of said court; (2) that the certificate of the clerk of the district court attached to the record brought here has been materially altered since it was made, with the evident intention of misleading and deceiving this court.

MOTION by appellee to quash the transcript of appeal from a decree of the district court of Cedar county on the ground that the certificate of the clerk has been altered. *Motion sustained.*

No briefs filed.

J. C. Robinson and *Wilbur F. Bryant*, for the motion.

Bedford B. Boyd and *William Leese, contra.*

RAGAN, C.

This case is before us on three motions. The first is to quash the bill of exceptions. There is no merit in this motion and it is accordingly overruled without discussion. The second motion suggests a diminution of the record. It would subserve no useful purpose to set forth the grounds on which this motion is based, nor our reasons for denying it, and it is accordingly overruled. The third is a motion to strike from the files of this court what purports to be a certified copy of the record of this case made by the clerk of the district court of Cedar county, where the case was

tried and from which it has been appealed. The ground on which the motion is based is that the certificate made and attached to the record brought here by the clerk of the district court of Cedar county, since such certificate was made, has been changed.

The facts alleged in the motion are established by affidavits filed in support thereof. The certificate of the clerk, as originally made, was in words and figures as follows:

"CERTIFICATE OF TRANSCRIPT.

"THE STATE OF NEBRASKA, } ss.
THE COUNTY OF CEDAR. }

"I, John J. Goebel, clerk of the district court in and for said county and state, do hereby certify that the within and foregoing is a true and correct copy of all of the pleadings in the case of John H. Felber against Bedford B. Boyd, as the same are on file and of record in my office, and all of the journal entries, except a copy of the last journal entry included in the transcript, which is not recorded, but only one of the files of the case, for, according to the rules of said court, the same was not accepted by the plaintiff and could not be recorded.

"Given under my hand and official seal, this 23d day of November, in the year of our Lord one thousand eight hundred and ninety-four.

"[SEAL.] JOHN J. GOEBEL,
"Clerk of the District Court."

It appears from the evidence introduced in support of the motion to quash this transcript that rule 16 of the district court of Cedar county provides: "An attorney who drafts a journal entry shall submit the same to an attorney of the opposite party for approval, rejection, or modification before the clerk places the same on the journal. If such attorneys cannot agree upon the journal entry to be made, the same shall be settled by the judge."

There has also been transmitted here and used in the hearing of this motion a duly certified transcript of the de-

cree rendered and all the orders made by the district court in this action, as the same are of record on the district court journals of said Cedar county. From this certified transcript we take the following from the decree of the court:

"It appearing that the counsel cannot agree upon a journal entry for last term, under the rules of the court, and the defendant having drawn a journal entry unsatisfactory to the court, it is ordered that the counsel for the plaintiff prepare a journal entry to be submitted to the judge of this court for approval. W. F. NORRIS,
"*Judge.*"

It appears that in accordance with that order that counsel for the plaintiff (the appellee) prepared the journal entry or decree in the case and submitted it to the judge. It was approved by him and made by the clerk a part of the complete record of the case. It also appears that counsel for the appellant filed with the clerk or placed among the files in this case in the clerk's office the "unsatisfactory journal entry" mentioned above by the judge, and that a copy of this "unsatisfactory journal entry" or decree is the one which the appellant has incorporated into the record brought here, and is the journal entry or decree alluded to by the clerk in his certificate in this language, "except a copy of the last journal entry included in the transcript, which is not recorded, but only one of the files in the case, for, according to the rules of said court, the same was not accepted by the plaintiff and could not be recorded." The alteration of the certificate of the clerk complained of consists of interlineations and erasures as follows: In that part of the certificate last above quoted some one has erased with a pen and ink the following words, "but, only, one, of the, for, rules, of said court, the same was not accepted by the plaintiff and could not be recorded," and has interlined with a pen and ink the following words: "only one of the." So that the certificate now reads as follows: "The

within and foregoing is a true and correct copy of all the pleadings in the case, * * * as the same are on file and of record in my office, and of all the journal entries, except a copy of the last journal entry included in the transcript, which is not recorded; only one of the files in the case according to the rules." In other words, the clerk certified that the transcript brought here by appellant contained a correct copy of all the pleadings in the case on appeal and of record in his office and a correct copy of all the journal entries, except that which purported to be the decree in the case, was, under the rules of the court, not the decree, had not been accepted as such, and was not of record; and the certificate, as changed, makes the clerk certify that this record contains a certified copy of all the pleadings in the case except that the decree in the transcript had not been recorded and remained a file in the case according to the rules of the court. To sum up the matter, it appears: (1) that the appellant has not brought to this court and filed here a certified transcript of the proceedings of the district court of Cedar county in this case, as the same appear of record in the office of the clerk of the district court of said county; (2) that the certificate of the clerk of the district court attached to the record brought here has been materially changed, since it was made with the evident intention of misleading and deceiving this court. We cannot tolerate conduct like this. The motion is sustained, the transcript quashed, and the entire proceeding is dismissed out of this court.

APPEAL DISMISSED.

CITY OF HASTINGS V. JOSEPH H. HANSEN.

FILED APRIL 5, 1895. NO. 6123.

1. **Municipal Corporations:** BOUNDARIES. What the boundaries of a municipal corporation are, where they are, and whether a particular piece of territory lies within or without the corporate limits of a municipality, are all matters for judicial determination; but the power to create municipal corporations and the power to enlarge or restrict their boundaries is a legislative one.
2. ———: ———: POWER OF COURTS. In the absence of express statutory authority, the courts of this state possess no jurisdiction to disconnect by decree any part of the territory of a municipal corporation at the suit of the owner of such territory.
3. ———: DISCONNECTION OF TERRITORY: CONSTRUCTION OF STATUTE. Section 101, chapter 14, Compiled Statutes, construed, and *held*, that the provisions of said section are not applicable to cities of the first class having less than twenty-five thousand inhabitants.

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

Tibbets, Morey & Ferris, for plaintiff in error:

The power of the legislature over municipal boundaries is absolute and no inferior body has power to act, unless specially delegated by the legislature. (15 Am. & Eng. Ency. Law, 1002, 1003, 1023; Boone, Corporations, sec. 285; Dillon, Municipal Corporations [4th ed.], secs. 182, 183, 185; *City of Wahoo v. Dickinson*, 23 Neb., 430; *Maddrey v. Cox*, 11 S. W. Rep. [Tex.], 541.)

F. P. Olmstead, contra.

RAGAN, C.

On the 28th day of May, 1892, Joseph H. Hansen brought suit in equity in the district court of Adams

county against the city of Hastings. In this petition he alleged, in substance, that he was the sole owner and occupant of a sixty-acre tract of land included within the corporate limits of said city, and situated upon the border and within the boundary of said city; that said land had been within said city limits since the year 1886; that no part of said tract of land had ever been laid out into lots; that said land was too remote to be of use for city residence lots, and could not be used profitably for any other purpose than that of farming; that he had continuously occupied and cultivated said tract of land as his homestead since the year 1872, on which last date he pre-empted it under the laws of congress; that no public convenience or advantage, either of police, sanitary, or commercial interest, required that the corporate limits of said city should extend over said land, and that it was inequitable that said real estate should be subject to city taxes. The prayer of the petition was for a decree disconnecting said tract of land from the corporate limits of said city. To this petition the city interposed a general demurrer, which the district court overruled. The city electing to stand on its demurrer, the court entered a decree as prayed for in the petition, and the city has prosecuted error.

This action is based on section 101, chapter 14, Compiled Statutes, 1893, which reads as follows: "Whenever a majority of the legal voters of any territory within any city or village, and being upon the border and within the boundary thereof, shall petition the district court of the county in which said city or village is situated, praying to be disconnected therefrom, such petition shall be filed with the clerk of the court at least ten days prior to the first day of the term at which it is proposed to be held, and like proceedings shall be had thereon," etc. This section is section 101 of an act entitled "An act to provide for the organization, government, and powers of cities and villages," and which went into effect on the 1st day of September, 1879.

By the first section of that act all cities, towns, and villages in the state which contained more than fifteen hundred and less than fifteen thousand inhabitants were denominated cities of the second class. This first section was amended by the legislature February 14, 1881, so as to make all cities, towns, and villages containing more than fifteen hundred and less than twenty-five thousand inhabitants cities of the second class. The act of 1881 was again amended by the legislature on March 5, 1885, making all cities, towns, and villages containing more than one thousand and less than twenty-five thousand inhabitants cities of the second class. The plaintiff in error is not and was not governed by the said act of 1879 and its amendments at the time of the bringing of this action, and the provisions of said section 101 are applicable, and applicable only, to cities, towns, and villages containing more than one thousand and less than twenty-five thousand inhabitants which are denominated by said act of 1879 cities of the second class.

The legislature, by an act passed and approved March 14, 1889, created all cities in the state containing less than twenty-five thousand and more than eight thousand inhabitants into cities by the name "cities of the first class having less than twenty-five thousand inhabitants." By virtue of this act and its amendments the appellant became a city of the first class having less than twenty-five thousand inhabitants, and was such a city at the time of the bringing of this action. The said act of 1889 provided that the corporate limits of the new class of cities created thereby should remain as they existed theretofore, and neither said act, nor any of its amendments, contains any provision by which territory within the corporate limits of any such city can be disconnected by a decree of court at the suit of the owner or owners of such territory. What the boundaries of a municipal corporation are, where they are, and consequently whether a particular piece of territory lies within

or without the corporate limits of a municipality, are all matters for judicial determination; but the power to create municipal corporations and the power to enlarge or restrict their boundaries are legislative powers; and it has been doubted if the legislature can pass a valid act giving the courts jurisdiction to disconnect by decree any part of the territory of a municipal corporation of the state merely at the suit of the owner thereof. However this may be, it is quite clear that the courts possess no such power independently of express statute. Since the statute on which this action is based is not applicable to cities of the class to which plaintiff in error belongs, it follows that the court was without jurisdiction to enter a decree disconnecting the property of the defendant in error from the territory of the plaintiff in error. The decree of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

ELIZABETH ELLSWORTH V. ELMER E. MCDOWELL, ADMINISTRATOR.

FILED APRIL 5, 1895. No. 5340.

Vendor and Vendee: CONTRACTS: DEFAULT-POSSESSION: TRESPASS: REPLEVIN: BUILDINGS. By the terms of a written contract between Champlin and Tschannen the former agreed to sell and convey certain real estate to the latter on his making certain payments. The contract provided that Tschannen's failure to make any one of the payments at its maturity should entitle Champlin to the immediate possession of the real estate. Tschannen took possession of the premises and built a frame house thereon, in which he and his family took up their residence. Tschannen made default in the payments promised. At a time when Tschannen was absent from home, but while his family and household goods were in the house, Champlin caused a workman to go upon the premises, without the knowledge or

consent of Tschannen, and erect a foundation under the house. Tschannen then sold the house to his mother-in-law, then residing with him therein, and she removed it to an adjoining lot, and with her family was residing therein when Champlin replevied the house and called the sheriff to remove it back to the lot on which it was originally erec'ed, the mother-in-law and family remaining therein during and after the transit. *Held*, (1) That Champlin, in causing the workman to go upon the premises and put a foundation under the house, did not by such act acquire possession of said house; (2) that by said act Champlin was guilty of trespass, and whatever possession of the house he acquired thereby was wrongful; (3) that possession of property obtained by trespass cannot be made the basis of an action of replevin for the possession of such property; (4) that Tschannen's default in making the payments promised did not authorize Champlin to retake possession of the premises with force and arms; (5) that the provision in the contract that if Tschannen made default in his payments Champlin should be entitled to the immediate possession of the premises meant no more than that such default should confer a right of action on Champlin for the possession of the premises; (6) that the relation of vendor and vendee created between Champlin and Tschannen by the contract was not changed by Tschannen's default into that of landlord and tenant; (7) that at the time Champlin brought this suit he had no such possessory rights to the property replevied as would enable him to maintain an action of trespass against Tschannen's vendee for her interference with such property, and therefore he could not maintain this action.

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

The facts are set out in the opinion.

Charles B. Rice, for plaintiff in error:

A mortgagee, or vendor under contract for deed, prior to foreclosure of the equity of redemption, has no right of possession sufficient to maintain replevin for chattels severed from the realty by one rightfully in possession.

A dwelling house, severed from the realty by one rightfully in possession, and affixed to other realty by being placed on stone pillars, and occupied as a residence, is real

estate, and not subject to replevin. (Cobbey, Replevin, 12, 136, 354, 364; *Johnson v. Elwood*, 53 N. Y., 431; *Riley v. Boston Water Power Co.*, 11 Cush. [Mass.], 11; *Shields v. Lozear*, 5 Vroom [N. J.], 496; *Anderson v. Hapler*, 34 Ill., 426; *Fryatt v. Sullivan Co.*, 5 Hill [N. Y.], 116; *Kircher v. Schalk*, 39 N. J. Law, 335; *Northrup v. Trask*, 39 Wis., 515.)

S. N. Lindley and *A. H. Moulton, contra:*

The property involved is a proper subject of replevin. (*Rogers v. Arnold*, 12 Wend. [N. Y.], 30; *Pangburn v. Patridge*, 7 Johns. [N. Y.], 140; *Commissioners of Rush County v. Stubbs*, 25 Kan., 322; *Western Union Telegraph Co. v. Burlington & S. W. R. Co.*, 11 Fed. Rep., 1; *Mills v. Redick*, 1 Neb., 437; *Roberts v. Randel*, 3 Sanf. [N. Y.], 707; *Waters v. Reuber*, 16 Neb., 99.)

RAGAN, C.

Lewis C. Champlin brought action in replevin in the district court of Jefferson county against Elizabeth Ellsworth. Pending the action Champlin died and the suit was revived in the name of Elmer E. McDowell, his administrator, who had a verdict and judgment, and Ellsworth brings the case here for review.

On the 4th day of April, 1887, Champlin owned certain real estate in the city of Fairbury, in said county, and on that date entered into a written contract with one J. H. Tschannen, in and by which he sold and agreed to convey said real estate to Tschannen when Tschannen should make the following payments: October 4, 1887, $25; April 4, 1888, $100; April 4, 1889, $100; April 4, 1890, $100; April 4, 1891, $100. The contract contained this provision: "It is further agreed that in case any payments, either of principal or interest, remaining unpaid for the space of thirty days after the same shall become due, then, in that case, the whole amount unpaid on this contract shall be-

come due and payable without further notice. And the said party of the second part [Tschannen] further agrees that any such delinquency in payment or the failure in other respects by the party of the second part to perform the stipulations of this contract, or any of them, shall entitle the party of the first part [Champlin] to the immediate possession of the premises described herein, and all equitable and legal interests in the premises, hereby contracted, with all the improvements and appurtenances, shall revert to and revest in said first party without any right of said second party of reclamation or compensation for moneys paid, as absolutely as if this contract had never been made." Tschannen at once took possession of this real estate and erected thereon a frame building, or dwelling house, in which he and his family resided. It seems also, though this is not entirely clear from the evidence, that the father and mother of Tschannen's wife resided with them in the house on said premises. In November, 1888, Mrs. Ellsworth, the plaintiff in error, purchased this house of Tschannen and caused it to be moved from the lot on which Tschannen erected it to another lot. At the time of this removal Mrs. Ellsworth and her husband and the Tschannen family resided in the house. Champlin then brought this action in replevin for the house and caused the sheriff to remove it from the lots on which Mrs. Ellsworth had placed it back to the lot on which it was built; the plaintiff in error and the Tschannen family, during the time of said removal and afterwards, residing in the house.

Several cases in replevin have been decided in this court in which a house was the subject-matter of the suit. Such are *Mills v. Redick*, 1 Neb., 437; *Riewe v. McCormick*, 11 Neb., 261; *McCormick v. Riewe*, 14 Neb., 509; *Waters v. Reuber*, 16 Neb., 99; *Oscamp v. Crites*, 37 Neb., 837; *McDaniel v. Lipp*, 41 Neb., 713. But an examination of these cases will show that in each case where the plaintiff was permitted to recover his possessory rights and rela-

tions to the property replevied were such that he could have maintained an action of trespass against the party made defendant to the replevin action. In the case at bar Champlin had no such possessory rights or claims to the property replevied as would have enabled him at the time of the bringing of this suit to maintain an action of trespass against Mrs. Ellsworth, or against her vendor, Tschannen, and, therefore, he cannot maintain this action. (*Stockwell v. Phelps*, 34 N. Y., 363; *Rich v. Baker*, 3 Denio [N. Y.], 79; *Johnson v. Elwood*, 53 N. Y., 431; *Oscamp v. Crites*, 37 Neb., 837; *Kircher v. Schalk*, 39 N. J. Law, 335.)

It is argued by counsel for the administrator that prior to the bringing of this action Champlin was in the actual possession of the real estate which he had sold to Tschannen and of the house thereon. If the evidence in the record sustained this assertion, then, of course, Champlin, being rightfully in possession of the real estate and the house thereon, could maintain an action of trespass against Mrs. Ellsworth for removing the house or maintain an action of replevin to recover it; but the evidence does not sustain this contention. The record shows that some time prior to the removal of this house by Mrs. Ellsworth, and while Tschannen was absent from home, Champlin hired a workman to go upon the premises and put some stones and bricks as a foundation under the house. The day this was done, it would seem from the evidence, Mrs. Tschannen and the other members of the family were also absent from the premises, but Tschannen's household goods were in the house and it was fastened. This is all the evidence in the record as to Champlin's actual possession of this house and the lot on which it was located. This was not possession. Champlin, in causing the workman to go upon these premises without the knowledge or consent of Tschannen, was guilty of trespass, and possession of property obtained by trespass cannot be made the basis of an action of replevin

for the possession of such property. Champlin's possession, if it can be called such, was not only wrongful, but it continued no longer than the workman was engaged on the day mentioned in putting the stones and bricks under the house. The Tschannen family continued to reside in the house, as already stated, until it was removed by Mrs. Ellsworth and until after the officer, under the writ of replevin issued in this action, moved the house back to the lot on which it was erected.

Counsel for the administrator also argue that since the contract of sale between Champlin and Tschannen contained the provision that in case Tschannen should make default in the terms of his contract that such default should entitle Champlin to the immediate possession of the premises, and as Tschannen had made default in the payments promised to be made, that, therefore, the contract was at an end, all rights of Tschannen thereunder destroyed, and the real estate and the house thereon belonged both legally and equitably to Champlin, and that Tschannen occupied the property from the time of his default as tenant at will. In other words, that Champlin had constructive possession of the property through his tenant, Tschannen. This argument is not tenable. After Tschannen made default in his promises Champlin had either one of several remedies. He could tender Tschannen a deed for the premises and sue him at law for the entire contract price. He could have brought an action in equity to foreclose the contract as a mortgage and had the real estate sold for the payment of the amount remaining due thereon. (*Gardels v. Kloke*, 36 Neb., 494.) He could have maintained an action in ejectment. Because Tschannen had made default in his contract Champlin was not thereby authorized to take possession of the premises with force and arms; nor was the relation of vendor and vendee created between the parties by the contract altered by Tschannen's violation thereof into that of landlord and tenant. The expression in the

contract, that Tschannen's default should entitle Champlin to the immediate possession of the premises, meant and means no more than that Champlin, by reason of the contract, might make the default of Tschannen the basis of an action for the recovery of the possession of such real estate.

On the trial the administrator introduced evidence tending to disparage or impeach the title of Mrs. Ellsworth to the house in controversy, and the counsel argue here that the evidence in the record would not sustain a finding that Mrs. Ellsworth purchased this house from Tschannen. Mrs. Ellsworth purchased this property, if at all, with actual knowledge of the existence and terms of the contract between Champlin and Tschannen. She, therefore, has no greater rights to this house than Tschannen had. But Champlin cannot maintain an action of replevin for this house as against Tschannen, because, as already seen, at the time the action was brought he, Champlin, was not entitled to the immediate possession of the house. "To allow replevin to be maintained under such circumstances as these makes the writ in effect a writ of restitution for land, an office which it cannot be permitted to fulfill." (IRVINE, C., in *Oscamp v. Crites, supra.*) The question at issue here is not whether Mrs. Ellsworth at the commencement of this action had good title to this house, as the plaintiff in a replevin action must recover, if at all, upon the strength of his own title to the property involved, and not upon the weakness of the defendant's title to such property. (*Kavanaugh v. Brodball,* 40 Neb., 875.) In *Northrup v. Trask,* 39 Wis., 515, it is said: "If one who is rightfully in possession of land under a contract of sale, after default in payment, but before any foreclosure of his equity, dispose of a house attached to such land, (as by removing it to other land,) the vendor in the land contract, having no possessory title to the house, cannot maintain replevin or trover therefor."

The finding of the district court in favor of the admin-

istrator is wholly unsupported by the evidence. The administrator must return the house to the plaintiff in error or pay her its value. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

SCHOOL DISTRICT NUMBER FORTY-NINE, ADAMS COUNTY, V. JAMES COOPER.

FILED APRIL 5, 1895. NO. 4986.

1. **Transcripts for Review: PROCEEDINGS DEFINED.** Section 586 of the Code of Civil Procedure construed, and *held*, the word "proceedings" in this section includes duly certified copies of the pleadings on which an action was tried. If tried on pleadings filed originally in the district court, then the record brought here must contain certified copies of those pleadings. If tried in the district court without original pleadings and on proceedings certified upon appeal, then the record here must contain certified copies of such proceedings.

2. ———: ORIGINAL RECORDS. This requirement of the statute is jurisdictional and cannot be waived by the parties; and the filing in this court of the original pleadings used in the district court will not answer the requirements of the statute. *Moore v. Waterman*, 40 Neb., 498, followed.

3. ———: STIPULATION TO USE ORIGINAL PAPERS UPON REVIEW. Even though the parties should so stipulate, the original pleadings, files, or proceedings of the case cannot be examined in reviewing such case, either on appeal or error.

4. **Bill of Exceptions: AUTHORITY OF CLERK TO SIGN: STIPULATION.** The mere stipulation of counsel in a case that the clerk of the court may sign and allow a bill of exceptions is not sufficient to confer authority upon him to do so. To confer authority upon the clerk of a district court to sign and allow a bill of exceptions it must appear that the judge is dead, or that he is prevented by sickness, or absence from his district, from signing and allowing the bill; or, the parties or their counsel

must agree upon the bill of exceptions and attach thereto their written stipulation to that effect. *Scott v. Spencer*, 42 Neb., 632, followed.

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

C. H. Tanner, for plaintiff in error.

Batty & Dungan, contra.

RAGAN, C.

James Cooper recovered a judgment in the district court of Adams county against school district No. 49 of said county, to reverse which the school district prosecutes to this court a petition in error.

It appears from the briefs of counsel that the school district had caused an acre of land belonging to Cooper to be taken and appraised for school purposes, and from the appraisal so made Cooper appealed, or attempted to appeal, to the district court, where the case was tried to a jury and the verdict rendered on which the judgment sought to be reversed was based. We find ourselves unable to review the errors, or any of the errors, assigned by counsel for the school district for the following reasons:

1. The record filed here, purporting to be a transcript of the record of the case from the district court, begins by citing that the case came on for hearing upon the special appearance of the school district objecting to the jurisdiction of the court; that this objection was overruled and Cooper was granted leave to file an appeal bond *nunc pro tunc;* that the case then came on for hearing on the motion of Cooper to suppress certain depositions, which motion the court sustained; the calling and swearing of a jury, the submission of the case to it, their verdict, and the judgment of the court thereon; and this is all that the record here contains. In other words, there are in the record

none of the appraisement and condemnation proceedings out of which this action grew, nor any pleadings on which the action was tried. The case was probably not tried on pleadings filed originally in the district court, nor does it seem that in a case like this one such pleadings were at that time necessary; but in order for us to review this judgment the plaintiff in error must bring here a duly certified transcript of all the proceedings had in the district court. Section 586 of the Code of Civil Procedure provides: "The plaintiff in error shall file with his petition [in error] a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified." The word "proceedings" in this section includes duly certified copies of the pleadings on which the action was tried. If tried on pleadings filed originally in the district court, then the record here should contain certified copies of those pleadings; if tried in the district court without original pleadings and on the proceedings certified upon appeal, then the record here should contain certified copies of such proceedings. In the case at bar, if this action was tried in the district court on the appraisal and condemnation proceedings had, then the record here, in order for us to review the judgment pronounced, should contain certified copies of such appraisal and condemnation proceedings. Accompanying the record in this case are what is generally denominated the original files of the action belonging to the district court of Adams county. The record shows that counsel for the parties to this suit stipulated that these original files might be used in this court on the hearing of this petition in error. Notwithstanding the stipulation of counsel the court is without authority to consider these filings, or any of them, on this hearing. The statute provides, as already seen, that the plaintiff in error shall file with his petition in error a transcript of the proceedings containing the final judgment sought to be reviewed. A transcript does not mean

the original papers, but copies of them duly certified. This requirement of the statute is jurisdictional and cannot be waived by the parties; and the filing in this court of the original pleadings used in the district court does not take the place of such transcript. (*Moore v. Waterman*, 40 Neb., 498.) Parties may use in this court the original bills of exceptions instead of a transcript thereof. (Sec. 587*a*, Code of Civil Procedure.) But the original pleadings, files, or proceedings of a case cannot be examined by this court in the hearing of such case, either on appeal or error.

2. We are unable to review this judgment for another reason. The record does not show that a motion for a new trial was made in the court below. It has been so many times decided by this court that in order for it to review the judgment of a district court, or the proceedings on the trial on error, that a motion for a new trial must be made and filed in and brought to the attention of that court, that it is unnecessary to cite the cases. Counsel for the parties to this action stipulated in writing as follows: "It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that J. H. Spicer, clerk of the district court of Adams county, shall sign and settle the within bill of exceptions and make the same a part of the record in this case, etc." In pursuance of this stipulation the clerk of the district court signed and settled the bill of exceptions. This stipulation is almost identical with the stipulation in *Scott v. Spencer*, 42 Neb., 632, and it was there held that the mere stipulation of counsel in a case that the clerk of the court may sign and allow a bill of exceptions is not sufficient to confer authority upon him to do so. That to confer authority upon the clerk of a district court to sign and allow a bill of exceptions it must appear that the judge is dead, or that he is prevented by sickness or absence from his district from signing and allowing the bill; or the parties to the litiga-

tion or their counsel must agree upon the bill of exceptions, and attach thereto their written stipulation to that effect. In the case at bar counsel do not stipulate that what purports to be the bill of exceptions is in fact such; they simply stipulate that the clerk may sign and allow the bill. If the record before us, then, contained a certified transcript of the pleadings or proceedings had in the district court we would still be unable to examine the evidence.

Almost the entire argument of counsel for the plaintiff in error is directed to the point that the district court had no jurisdiction of the subject-matter of the action in which it pronounced the judgment sought to be reviewed. From counsel's statement of the facts it would seem that this contention is correct; but this court can know nothing of a case except what it gathers from the record before it; and since we do not know from the record what the original controversy between the school district and Cooper was, what was done in that controversy prior to the time it reached the district court, nor what the district court had before it and on which it acted, we are unable to say whether or not counsel's contention is correct. We have here simply the judgment of the district court, a court of general jurisdiction, and every reasonable presumption must be indulged as to the correctness of that judgment. It follows, therefore, that the judgment of the district court must be and is

AFFIRMED.

JAMES F. MARTIN V. FILLMORE COUNTY.

FILED APRIL 5, 1895. No. 6195.

1. **Bill of Exceptions:** AUTHENTICATION OF DOCUMENTS. In order to authenticate a document attached to a record as the bill of exceptions settled in the district court there must be a certificate of the clerk of the court to that effect. *Moore v. Waterman*, 40 Neb., 498, followed.

2. ———: AUTHORITY OF CLERK TO SIGN: STIPULATION. The mere stipulation of counsel that the clerk of the court may sign and allow a bill of exceptions is not sufficient to confer authority upon him to do so. In order to confer such authority it must appear that the judge is dead; that he is prevented by sickness or absence from signing and allowing the bill; or the parties or their counsel must agree upon the bill of exceptions and attach thereto their written stipulation to that effect. *Scott v. Spencer*, 42 Neb., 632, followed.

3. **Eminent Domain:** COUNTIES: DRAINAGE: DAMAGES. Where land is appropriated for public use the owner thereof is entitled to recover the value of the land appropriated without any deduction for benefits. In addition thereto he should recover any damages sustained by that portion of the land not appropriated and, as against the latter item, special benefits but not general benefits may be set off. (*Wagner v. Gage County*, 3 Neb., 237.)

4. ———: ———: ———: ———. The foregoing is a rule interpreting that clause of the constitution providing that the property of no person shall be taken or damaged for public use without just compensation therefor, and it is beyond the power of the legislature to change the rule.

5. ———: ———: ———: ———. To constitute an appropriation of land it is not necessary that the owner be deprived of the fee. Land is appropriated when it is so taken as to deprive the owner of the use thereof. It is only when the owner is not deprived of the occupancy of the land, but merely suffers an incidental damage thereto because of the proximity of the improvement, that benefits may be set off against such damage.

6. ———: ———: ———: ———: PLEADING. Therefore, where the petition alleged that a county ditch had been constructed through and across the plaintiff's land and the answer admitted that fact, no payment being pleaded, a verdict allowing the plaintiff no damages is contrary to law.

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

J. D. Hamilton and *John D. Carson*, for plaintiff in error.

Charles H. Sloan, contra.

IRVINE, C.

The plaintiff in error was plaintiff in the district court and alleged in his petition, in brief, that he was the owner of certain land in Fillmore county; that a petition in due form had been filed with the board of supervisors praying that a county ditch be constructed, in its course crossing the plaintiff's land; that no sufficient notice was given of the filing and pendency of such petition, but without such notice the prayer of the petitioners was granted; that the plaintiff had no notice of such proceedings; that the ditch was constructed across his land; that he filed a claim of damages before the board of supervisors, which was allowed to the extent of $50; that this proceeding was an appeal from the order making such allowance; that his land was damaged to the amount of $1,000, for which sum he prayed judgment. The petition had attached thereto as exhibits certified copies of the proceedings of the supervisors concerning said ditch. The county answered denying all allegations not specifically admitted, then alleging affirmatively that the ditch ran through the plaintiff's land, and while it caused some damage the benefits therefrom to said land exceeded the damage, and that the plaintiff was therefore entitled to recover nothing. The answer further alleged that due notice had been given, and that the plaintiff neglected to file his claim within the time provided by law. There was a trial to a jury and a verdict for the defendant, on which judgment was entered, and the plaintiff prosecutes error.

It is urged that the verdict is not sustained by sufficient evidence, and one other assignment relates to a matter occurring on the trial. There is attached to the transcript what purports to be a bill of exceptions, but there nowhere appears any certificate of the clerk authenticating this document as the original, or as a copy of the bill. Such a certificate is necessary for the authentication of the record. (Code Civil Procedure, sec. 587*b*; *Moore v. Waterman*, 40 Neb., 498.) Furthermore, what purports to be a bill of exceptions purports also to be settled by the clerk of the court under a stipulation precisely similar to that set out in the opinion in *Scott v. Spencer*, 42 Neb., 632. It was in that case held that the mere stipulation of counsel that the clerk of the court may sign and allow a bill of exceptions is not sufficient to confer authority on him to do so. To confer such authority it must appear either that the judge is dead; that he is prevented either by sickness or absence from his district from signing and allowing the bill; or the parties or their counsel must agree upon the bill and attach thereto their written stipulation to that effect. A stipulation that the clerk may settle the bill without a stipulation that the bill submitted is agreed to is insufficient to confer authority upon the clerk in the premises. We cannot, therefore, examine either of the assignments of error referred to.

Error is assigned upon the giving of instructions 8, 9, 10, 11, and 12. The language of the assignment is the same as in *Hiatt v. Kinkaid*, 40 Neb., 178. The twelfth instruction states the familiar rule that in such cases general benefits may not be set off against damages sustained. This instruction was undoubtedly correct. (*Schaller v. City of Omaha*, 23 Neb., 325.) This instruction being correct the whole assignment must be overruled.

Another assignment is to the giving of instruction No. 2 asked by the defendant. The record contains an instruction numbered 2, but it does not appear whether it was

given by the court of its own motion or at the request of one of the parties. The record also shows that the instruction was modified and only a portion thereof given, and we cannot ascertain how much was given. Error, therefore, does not appear in this respect.

While we are thus precluded from examining many of the questions presented, we still think that the judgment must be reversed. One assignment is that the verdict is contrary to law. The petition alleges and the answer expressly admits that the ditch was constructed through and across the plaintiff's land. The verdict was absolute for the defendant. Under no possible state of the evidence could this verdict be right. The court instructed the jury, and we must presume correctly, that no proceedings had been taken which would preclude the plaintiff from maintaining his action. Payment of compensation was not pleaded. The plaintiff was, therefore, entitled as one item of damages to recover the value of the land actually appropriated for the construction of the ditch. Against this item of damages no benefits could be set off. In addition thereto he was entitled to recover any damages sustained by the land not appropriated, and as against the latter item special benefits, but not general benefits, might be set off, provided that the use for which the appropriation was made was a public use and within the power of eminent domain,—a question not here raised and not decided. (*Wagner v. Gage County*, 3 Neb., 237; *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb., 585; *Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb., 542; *City of Omaha v. Howell Lumber Co.*, 30 Neb., 633.) The foregoing is a rule interpreting that clause of the constitution providing that the property of no person shall be taken or damaged for public use without just compensation therefor. Whether the act providing for the construction of such ditches (Comp. Stats., ch. 89) contemplates an assessment of damages in accordance with this rule is immaterial to the case. It is beyond the power

of the legislature to change it. The district court seems to have proceeded upon the theory that no land was actually appropriated, but this is contrary to the pleadings. To constitute an appropriation of land it is not necessary that the owner be divested of the fee. Land is appropriated when its *corpus* is seized and devoted to the improvement so as to deprive the owner of the use of the land. The nature of the estate in the land which is appropriated may possibly affect the amount of recovery, but does not affect the right to recover. It is only when the owner is not deprived of the occupancy of the land, but merely suffers an incidental damage thereto owing to the proximity of the improvement, that benefits may be set off against such damage. Wherever the owner by the seizure of his land is deprived of the occupancy thereof he is entitled to recover absolutely the value of the land so taken or of such estate therein as is appropriated. The ditch could not have been constructed across plaintiff's land without an appropriation of some part thereof and under the pleadings, therefore, the plaintiff was entitled to a verdict in some amount.

Counsel attempt, in their briefs, to draw a distinction between the measure of damages in the case of condemnation proceedings and in a case where the county has entered without instituting any such proceedings. As the case must be remanded for a new trial it may be well to say that we do not conceive this distinction to be well founded. The rule of damages, as above stated, applies to every case of the appropriation or damage of property for public use without regard to the nature of the proceedings in which recovery is sought.

REVERSED AND REMANDED.

DANIEL MONDAY V. WILLIAM O'NEIL.

FILED APRIL 5, 1895. No. 6167.

Landlord and Tenant: RIGHT OF TENANT TO CROP GROWN DURING FORECLOSURE OF MORTGAGE. A tenant for years of mortgaged land planted a crop after the rendition of a decree foreclosing the mortgage, the tenant having been a defendant in the foreclosure suit. The land was sold under the decree and the sale confirmed while the crop was growing and before it matured. The purchaser did not obtain possession of the land, but permitted the tenant to retain possession, merely notifying him that he, the purchaser, would expect from the tenant rent in money or in kind. *Held*, That as between the tenant and purchaser the former was entitled to the crop.

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

Frick & Dolezal, for plaintiff in error, cited: *Jones v. Thomas*, 8 Black. [Ind.], 428; *Smith v. Hague*, 25 Kan., 246; *Beckman v. Sikes*, 35 Kan., 120; *Scriven v. Moote*, 36 Mich., 64; *Lane v. King*, 8 Wend. [N. Y.], 584; *Shepard v. Philbrick*, 2 Den. [N. Y.], 174; *Simers v. Saltus*, 3 Den. [N. Y.], 219; *Gillett v. Balcom*, 6 Barb. [N. Y.], 370; *Jewett v. Keenholts*, 16 Barb. [N. Y.], 193; *Gardner v. Finley*, 19 Barb. [N. Y.], 320; *Howell v. Schenck*, 24 N. J. Law, 89; *Pitts v. Hendrix*, 6 Ga., 452; *Sherman v. Willett*, 42 N. Y., 146; *Borrell v. Dewart*, 37 Pa. St., 134; *Tripp v. Hasceig*, 20 Mich., 254; *Lathrop v. Nelson*, 4 Dill. [U. S.], 194; *Taylor v. Cooper*, 10 Leigh [Va.], 317; *Wagner v. Cohen*, 6 Gill. [Md.], 102; *Taylor v. Courtnay*, 15 Neb., 197; *Day v. Thompson*, 11 Neb., 128.

C. Hollenbeck, contra, cited: *Sornberger v. Berggren*, 20 Neb., 399; *Whitmarsh v. Cutting*, 10 Johns. [N. Y.], 361; *Cassilly v. Rhodes*, 12 O., 88; *Houtz v. Showalter*, 10 O. St., 124.

IRVINE, C.

This case was tried in the district court on a stipulation of facts. The court instructed the jury to return a verdict for the defendant, and from the judgment rendered thereon the plaintiff prosecutes error.

The action was one in the nature of trover for eighty acres of corn grown and a part thereof standing on the west one-half of the northwest quarter of section 13, township 18, range 5, in Dodge county. The essential facts, as disclosed by the stipulation, are as follows: On the 14th day of January, 1889, one Stanford, who was then the owner of the land described in the petition, executed a mortgage thereon to the J. T. Robinson Notion Company. On the 3d of January, 1891, an action was brought to foreclose this mortgage, the parties defendant being Stanford and wife and O'Neil, the defendant in this case, the petition alleging that O'Neil claimed a leasehold interest in the premises, but that such interest was inferior to the interest of the plaintiff. All the defendants made default, and on April 23, 1891, a decree of foreclosure was rendered. On June 26, 1891, the land was sold under the decree of foreclosure to the plaintiff. On the 27th of June the sale was confirmed and a deed executed, which was the same day recorded. O'Neil was the tenant of Stanford for one year from March 1, 1891, and the corn in question was planted by O'Neil in May, 1891, and was growing at the time of the sale and confirmation. No lease was made by the plaintiff to O'Neil, but O'Neil continued in possession after the sale, and Monday made no effort to obtain possession except that at different times during the summer of 1891 he notified O'Neil not to pay rent to Stanford and that he would insist on either the rent or a portion of the crops.

The question presented is, therefore, whether under the foregoing state of facts Monday or O'Neil was the owner of

the crops growing on the land, but not matured at the time the sale was confirmed. Since the briefs were filed the cases of *Yeazel v. White*, 40 Neb., 432, and *Foss v. Marr*, 40 Neb., 559, have been decided. Their effect is to limit the inquiry here to a much narrower field than that covered by the briefs. In *Yeazel v. White* it was decided that the owner of land sold upon execution retains the right of possession and is entitled to the usufruct of such land until confirmation of the sale, and that therefore the judgment debtor is not accountable to the purchaser for hay cut upon the land after sale and before confirmation. In *Foss v. Marr* it was held that a mature crop of corn standing upon land sold at judicial sale and not taken into account by the appraisers did not pass to the purchaser but remained the property of the mortgagor who had planted and cultivated it. In the latter case some stress was laid upon the fact that the crop was matured, and the language of the supreme court of Iowa in *Hecht v. Dettman*, 56 Ia., 679, wherein a distinction is drawn between a growing crop and one already matured but not severed, was quoted as confirming the conclusion reached. The language used in *Hecht v. Dettman* was, however, employed to distinguish that case from *Downard v. Groff*, 40 Ia., 597, holding that the right to growing crops passes to the purchaser at a judicial sale. *Downard v. Groff* followed the general current of authority and recognized that *Cassilly v. Rhodes*, 12 O., 88, was opposed to the conclusion reached, stating truly that *Cassilly v. Rhodes* was based upon a construction of the Ohio appraisement law. *Foss v. Marr*, was based upon the doctrine of *Cassilly v. Rhodes*, our appraisement law being similar to that of Ohio, and the reasons given by the Ohio court for departing from the general rule because of the effect of the appraisement law being deemed sound and applicable to this state. The court did not, in *Foss v. Marr*, undertake to decide that growing crops do pass to the purchaser; on the contrary, in the last para-

graph of the opinion it is expressly stated that that question was neither presented nor decided. *Cassilly v. Rhodes*, was a case where the crop involved was one which had not matured, and the language of the opinion refers to it throughout as a growing crop. The reason of the decision was that the value of the annual crops is not included in the appraisement made prior to the sale, and that the debtor's rights therein can be saved only by regarding such crops as personalty requiring a separate levy. This reasoning, which is approved in *Foss v. Marr*, is equally applicable to a growing crop as to one matured. In *Houts v. Showalter*, 10 O. St., 125, *Cassilly v. Rhodes* was reaffirmed, and the crop there in controversy was also a growing crop. It will be remembered that Monday, after he obtained title to the land, did not enter into possession thereof, but suffered O'Neil to remain in possession, merely notifying him that Monday would expect either rent or a portion of the crop; that is, he treated O'Neil as his tenant, demanding rent either in money or in kind. O'Neil's conduct is not sufficiently disclosed to establish whether or not there was an attornment by him to Monday. Assuming that there was not, it would seem that he was holding adversely; and if so, it is not apparent how Monday could obtain the crop. If he were not holding adversely, then his relationship to Monday would seem to be that of a tenant at will. At the common law, when a tenancy is uncertain so that the tenant cannot know that his estate will terminate before the crop can ripen, the tenant is entitled to re-enter and harvest the crop at maturity. This is the law in this state. (*Sornberger v. Berggren*, 20 Neb., 399; *McKean v. Smoyer*, 37 Neb., 694.) Under this principle it would seem clear that O'Neil was entitled to the crop.

In opposition to this view it is argued that the foreclosure suit had been begun, and, indeed, a decree of foreclosure rendered before the crop was planted, but we do not

think this fact material. O'Neil knew, of course, that a sale might be made and confirmed before his crop would mature, but he could not know that such would be the case. We do not think that he was obliged to abandon the land or permit it to lie uncultivated merely because there was a possibility or a probability that his estate would be determined before the crop would mature. Public policy requires that the law should be so construed as to encourage rather than discourage the tillage of lands under such circumstances. The language of the supreme court of Ohio in *Houts v. Showalter*, *supra*, is peculiarly applicable: "Under our system, frequent advertisements and offers for sale, and, occasionally, revaluations are necessary, before a sale can be effected. When an appraisement is made, it cannot be foreseen when a sale will be effected. It is not for the interest of any party, nor for the public interest, that the land should thenceforth lie waste; then there may have been no crop sown or planted; but when the sale comes to be made, there may be growing crops put into the ground in the meantime." This language was used with reference to the period between appraisement and sale, but it applies with all the more force to the period between decree and sale. We are not determining in this case what the rights of the parties would be had Monday secured possession and evicted O'Neil before the crop matured. What we hold is that following the reasoning in *Cassilly v. Rhodes* and *Foss v. Marr*, the tenant should be protected in his crop unless before it is matured something happens to deprive him of the right thereto, and that, therefore, where the purchaser permits the tenant to remain in possession until the crop is harvested, the title thereto remains in the tenant and does not pass to the purchaser. We have referred to O'Neil as the tenant, but what has been said is applicable to the mortgagor himself. We have treated O'Neil as if he were himself the mortgagor because, without inquiry as to

whether he would otherwise have any higher rights, having been made a defendant in the foreclosure suit, a decree having there been rendered barring his estate, it is clear that in this proceeding he stands in no better position than had he been the mortgagor instead of the mortgagor's tenant. Under the view of the law above presented the plaintiff was not, under the stipulation, entitled to recover and the peremptory instruction given by the trial court was correct.

JUDGMENT AFFIRMED.

EUGENE YOUNKIN, ADMINISTRATOR, APPELLEE, V. HOWARD YOUNKIN, APPELLANT.

FILED APRIL 5, 1895. No. 5600.

1. **Res Adjudicata:** ACCOUNTING. Where a decree has been rendered determining certain issues in a case and reserving the case for further proceedings to carry out the first decree, as for an accounting, the supplemental proceedings cannot be made the means of relitigating any issues determined by the first decree.
2. **Accounting:** REVIEW. Evidence examined, and *held* sufficient to sustain the finding of the trial court.

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

F. I. Foss, for appellant.

Halleck F. Rose and *M. H. Fleming, contra.*

IRVINE, C.

This action was originally commenced by Eva M. Gillaspie against Howard Younkin, her son, alleging that dur-

ing her son's minority she had purchased a farm in Saline county and procured the title to be taken in the name of the defendant for the sole purpose of preventing her second husband, Gillaspie, from whom she was then separated, from asserting any interest therein; that she had made improvements upon the farm and placed certain personal property thereon; that she removed with her family, including the defendant, to said farm; that the defendant refused to convey the farm to her or to account to her for the personal property thereon; that she had been compelled to remove therefrom, leaving him in possession. She offered to pay the reasonable value of his services upon the farm since his majority, and prayed for a conveyance and an accounting. To this petition an answer was filed placing the material allegations in issue. There was a trial before Morris, J., resulting in a decree finding substantially for the plaintiff, decreeing a conveyance to her, and referring the case for an accounting between the parties. There has been no appeal from this decree, but subsequently thereto the plaintiff executed a lease of the farm to the defendant under an agreement that if on the accounting anything should be found due from the plaintiff to the defendant, then the rent should be applied in payment thereof. The order of reference was afterwards set aside and an accounting had before Hastings, J., who found due the defendant on account of services and for advancements made by him $1,261.60; that there was left in the hands of the defendant property of the plaintiff to the value of $969.50; that there was due for rent $320, leaving a balance in favor of the plaintiff of $27.90, for which judgment was entered. Pending these supplemental proceedings the plaintiff had died and the action was revived in the name of the administrator, who appeals from this decree.

It is claimed by the appellant that the court restricted the accounting to too narrow a field and should have admitted certain evidence which was rejected. One question

asked the appellant was as follows: "Please tell the court the items which you have paid out for and on behalf of the place, either personal property or the real estate, and then credits that you give from sales which have come from the same." An objection to this question was sustained. A sufficient reason for doing so is found in the fact that it called for a statement of moneys paid for the land itself. This issue had already been determined adversely to appellant by the interlocutory decree, and was not open in the accounting to reinvestigation. Again, certain questions were objected to, seeking to elicit proof that two out of four horses placed on the farm when it was first bought belonged to appellant, he having acquired them from his father's estate. The petition distinctly alleged that these four horses belonged to the plaintiff. The answer, among other things, alleged a subsequent agreement whereby, together with other promises, the plaintiff was to give defendant the stock upon the farm. The decree found against the defendant on this issue. The decree also finds "that the farm had upon it stock and farming machinery, the character and value of which I do not find." There is no distinct finding that these horses were the property of plaintiff, but if that question were put in issue at all, which is doubtful under the allegations we have referred to, we think that the first decree, reserving the case, as it does, solely for an accounting as to the appellant's services and impliedly of the value of the stock and farming machinery, determined the issue in favor of plaintiff. Where a decree has been rendered determining certain issues in a case, and reserving the case for further proceedings to carry out the first decree, as for an accounting, the supplemental proceedings cannot be made the means of relitigating any issues determined by the first decree. (*Santa Maria*, 10 Wheat. [U. S.], 442; *Sibbald v. United States*, 12 Pet. [U. S.], 491.) All the other questions argued are purely questions of fact. The evidence is conflicting and might sustain a finding either more or less

favorable to the appellant than that contained in the decree. That finding, therefore, cannot be disturbed.

JUDGMENT AFFIRMED.

WESTERN UNION TELEGRAPH COMPANY v. BRIDGET MULLINS.

FILED APRIL 5, 1895. No. 6246.

1. **Pleading.** Where a petition states a case entitling the plaintiff to judgment for any amount, it is good against demurrer, or an objection to the introduction of evidence on the ground that it does not state a cause of action.
2. **Master and Servant.** A master is not liable for the acts of his servant committed outside the line of his duty and not connected with the master's business.
3. **Telegraph Companies:** ERRONEOUS DIRECTIONS OF AGENT: DAMAGES. At the instance of the plaintiff one P. sent a telegraphic message to the chief of police at Seattle, Washington, inquiring whether plaintiff's husband was there employed by a certain company. P. left orders to deliver the answer to the plaintiff. The telegraph company delivered to the plaintiff a message dated Aspen, Colorado, and saying: "H. is here. Come at once. Will meet you at Glenwood Springs. Answer here if coming." In fact this message was not an answer to the plaintiff's and had no relation thereto. The plaintiff went to the telegraph office and asked the clerk to write a message in reply. The clerk asked where it should be sent. Plaintiff replied to Seattle. The clerk said, "This is from Glenwood Springs." Plaintiff inquired, "Is not this the answer to the dispatch which P. sent to Seattle?" The clerk said, "Certainly it is the answer. They have got him at Glenwood Springs and want you to meet him there." Plaintiff then asked if Glenwood Springs was on the route to Seattle and if it was far from Seattle. The clerk said it was on the route and he did not think it was very far from Seattle. Plaintiff then went to Seattle, but did not find her husband. The expense of the trip to Seattle and the loss of time caused thereby were the damages allowed by the jury.

Held, (1) that the clerk's statement that Glenwood Springs was on the route to Seattle and not far therefrom was not within the line of his duty or the apparent scope of his employment, and the company was not liable for the consequences of that statement; (2) that plaintiff's going to Seattle was not a consequence reasonably to be considered as arising according to the usual course of things from the delivery to plaintiff by the telegraph company of the wrong message and that, therefore such damages could not be recovered.

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

Harwood, Ames & Pettis, for plaintiff in error, cited: *Western Union Telegraph Co. v. Foster*, 64 Tex., 220; *Cincinnati, H. & I. R. Co. v. Carper*, 112 Ind., 26.

Davis & Hibner, contra.

IRVINE, C.

The defendant in error, as plaintiff in the district court, recovered judgment against the plaintiff in error for $167.20 damages which she claimed to have sustained because of the telegraph company's delivering to her, as an answer to a message by her sent, one which was not in fact an answer thereto. The petition alleges, in brief, that on or about the first day of October, 1891, the plaintiff employed one Pound to employ the telegraph company to transmit a message to Seattle, Washington, inquiring as to the whereabouts of plaintiff's husband, and the plaintiff paid in advance the charges for transmitting said message; that Pound instructed the telegraph company to deliver to plaintiff the answer; that the defendant negligently and carelessly delivered to plaintiff a telegram, claiming that the same was in answer to the message sent by her when in fact it was not in answer thereto, and had no relation thereto; that the plaintiff paid the telegraph company the charges on the second message; that by reason of the

premises the plaintiff was subjected to expense, loss of time, and annoyance, to her damage, etc. A general demurrer was filed to this petition and overruled, whereupon the defendant answered, and on the trial again raised the question of the sufficiency of the petition by objecting to the introduction of any evidence for the reason that the petition did not state a cause of action. This objection was overruled, and the overruling thereof is assigned as error. On this point the district court ruled correctly. The telegraph company contends that the petition was defective in that it did not aver what the messages were and how the damage arose. The petition does aver, however, that a message was delivered to the plaintiff purporting to be an answer to her message; that in fact it was not an answer thereto, and that plaintiff paid the charges on the latter message. The plaintiff, therefore, stated a cause of action at least for the recovery of the amount so by her paid. Indeed, the answer admits these facts and admits liability for the charges on the second message, in language more courteous than technical, as follows: "The amount of which payment, if plaintiff will kindly designate it in her petition, will be cheerfully refunded by said defendant, who hereby tenders the same in court and confesses judgment for the same." The averments referred to were, therefore, sufficient to protect the petition against a general demurrer or an objection on the trial to the introduction of evidence on the ground that no cause of action was stated.

At the close of the plaintiff's testimony the defendant asked the court to instruct the jury to return a verdict for the defendant. This motion was bad for the same reason as the objection to the evidence. A cause of action for some amount was pleaded and confessed.

Complaint is made in the briefs of the giving of two instructions. The only assignment of error relating thereto is directed *en masse* against instructions from 1 to 8 inclusive. Most of these are manifestly correct, the third

being merely a quotation of the statute in regard to the liability of telegraph companies for mistakes in transmitting messages. The assignment of error referred to is therefore bad. There are several assignments of error not referred to in the briefs and these must therefore be deemed waived.

The only assignments remaining for notice are that the verdict was not sustained by sufficient evidence and that the damages allowed were excessive. The evidence is brief and discloses no conflict. In 1891 the plaintiff's husband ceased writing to her and she employed A. L. Pound, a detective, to make search for him. Pound sent by the defendant company a message to the chief of police at Seattle, Washington, inquiring if Daniel P. Mullins was employed by the Seattle Dry Lumber Company. Pound directed the clerk of the telegraph company to deliver any answer which might be received to the plaintiff. The next day a message was delivered to the plaintiff as follows (omitting printed heading and check marks):

"Dated ASPEN, COLO., —— 21.

"*To A. L. Pound:* H. is here. Come at once. Will meet you at Glenwood Springs. Answer here if coming.

"P. H. FITZPATRICK."

The following day the plaintiff went to the telegraph office and requested a person she calls the "operator" to write a message she wished to send in answer to the one received. What then occurred she relates as follows: "The operator asked me the question, 'Where do you wish to send it?' I said, 'To Seattle.' He replied, 'This is from Glenwood Springs.' I replied, 'How is that? Is not this the answer to the dispatch which Mr. A. L. Pound sent to Seattle?' He said, 'Certainly it is the answer.' I said, 'I don't understand it.' He said, 'Why, they have got him at Glenwood Springs, and want you to meet him there.' I then asked him if that was on the route to Seattle, and he said, 'Yes.' I asked him how far Glenwood

Springs was from Seattle, and he said he did not know exactly, but that it was not very far." The plaintiff then started for Seattle, but before arriving there learned that Glenwood Springs was not on the route. She went on to Seattle and remained there some time. The damages and only damages which were proved consisted of her traveling expenses to and from Seattle, her hotel bill, and thirty-five days' lost time, the value of which she places at $1 per day. The foregoing is all the material evidence. Nearly all the remainder arose from a quibble as to her stating that her conversation was with the operator. The evidence leaves it quite clear that her conversation was really with the counter clerk, and that the use of the word "operator" by her was the result merely of carelessness or ignorance. Does this evidence sustain the verdict rendered? There can be no doubt that had the plaintiff gone to Glenwood Springs on a fruitless errand the company would have been liable for the expenses thus incurred. The telegram delivered to her was of such a nature as on its face to apprise the company that the natural and probable consequences of its delivery would be such a journey on her part. But it is equally clear that a trip to Seattle on the delivery to the plaintiff of a message from Aspen, Colorado, directing her to go to Glenwood Springs would not be a consequence which might fairly and reasonably be considered as arising according to the usual course of things from the wrong of the telegraph company, nor could it reasonably be supposed to have been in the contemplation of the parties as the probable result of the telegraph company's act. In order to connect the trip to Seattle as a result of the delivery of the Aspen message it is necessary to treat the statements to the plaintiff by the counter clerk as binding upon the company. It is familiar law that a master is not liable for the acts of his servant unless those acts have been done in the line of the servant's duty and in furtherance of the master's business, or, as sometimes

expressed, the acts must be within the servant's apparent scope of employment. We have no doubt that the clerk's assurance to the plaintiff that the message delivered to her was an answer to that sent on her behalf might be said to have been within the scope of the clerk's employment; but this statement could not have induced her to go to Seattle. Such action, if induced by the transaction at all, must have been due to the clerk's statement that Glenwood Springs was on the route to Seattle and not very far therefrom. Had this statement been made by the clerk in regard to the sending of the message, and had it induced her to send a message which thereby went astray, or otherwise caused damage, the clerk's act might probably be charged to the company. Had she, instead of inquiring at the telegraph office, gone to a railway ticket agent and bought a ticket to Seattle on the faith of the statement that Glenwood Springs was on the route and not far therefrom, the railroad company might be liable, because the giving of directions of such a character would be connected with the sale of railroad tickets; but it could not be any part of the telegraph clerk's business to give instructions in geography to a person contemplating a trip by rail, and we cannot see how the telegraph company can be charged with the consequence of misinformation thus given.

The general principle governing the case is well settled; the application of the principle is not always easy. In *South & North Alabama R. Co. v. Huffman*, 76 Ala., 492, it was held that a railroad company was liable for erroneous advice and directions given by a ticket agent in regard to the train which the plaintiff should take. The doctrine of that case seems sound and would govern the case we have supposed of a misdirection by the telegraph clerk resulting in missending a message, or of a ticket agent in sending a passenger astray. The Alabama case cites a large number of cases, only three of which, however, are at all in point. Two of these are cases where it was held that a railroad was liable for

injuries sustained by a passenger in alighting from a moving train by the direction of the conductor. (*Lambeth v. North Carolina R. Co.*, 66 N. Car., 494; *Georgia Railroad & Banking Co. v. McCurdy*, 45 Ga., 288.) The third is the case of *Burnham v. Grand Trunk R. Co.*, 63 Me., 298, where a railroad company was held liable for ejecting a passenger from a train because his ticket was good only for the day issued where the passenger had stopped over on his route, relying on a statement of the ticket agent that the ticket permitted him to do so. This case also illustrates the hypothetical cases we have proposed. In all the cases we have cited the act was one clearly within the servant's line of employment and had direct reference thereto. On the other hand, in *Western Union Telegraph Co. v. Foster*, 64 Tex., 220, it was held not to be within the line of employment of a telegraph company's receiving clerk to correct at the request of the sender a mistake the latter made in writing a message, and that the company was, therefore, not liable for the consequences of sending the message as written without the correction. This is a much stronger case than that we are considering, and we would hesitate, perhaps, to follow it entirely; but it well illustrates the general principle that when an agent performs acts entirely outside the line of his employment the principal is not liable therefor. We think that the information given by the clerk that Glenwood Springs was not far from Seattle and on the way thereto, was wholly foreign to the master's business, and as this is the only evidence connecting plaintiff's trip to Seattle as a consequence of the misdelivery to her of the Aspen message, it follows that there was not sufficient evidence to establish the damages on which the verdict must have been grounded.

REVERSED AND REMANDED.

RAGAN, C., dissenting.

WALLACE WILBER ET AL. V. WILLIAM G. WOOLLEY.

FILED APRIL 16, 1895. No. 6415.

1. **School Buildings:** RELOCATION. A school-house cannot be changed at a special election of the voters of a district, but can be relocated at any annual meeting by a vote of two-thirds of those present, except where the original location is three-fourths of a mile from the geographical center of the district, in which case the site may, by a majority vote, be changed to a point nearer such center.

2. **Injunction:** PUNISHMENT FOR DISOBEDIENCE. A party is not punishable for contempt of court for disregarding a void order of injunction; but when an injunction is legally granted in a case where the court has jurisdiction of the subject-matter and of the parties, it must be respected until set aside by the court allowing it, or it is reversed in the appellate court by some appropriate mode of direct review.

3. ———: ———. Where one knowingly disobeys an injunction which is not void, he is liable to punishment for contempt, though he would have been entitled to a vacation of the order upon a motion to dissolve, or upon a trial upon the merits of the bill.

4. **Contempt:** INJUNCTION BY COUNTY JUDGE. The disobedience of an injunction allowed by a county judge in an action brought in the district court is a contempt against such court. *Johnson v. Bouton*, 35 Neb., 898, followed.

ERROR from the district court of Antelope county. Tried below before ALLEN, J.

Robertson, Wigton & Whitham, for plaintiffs in error:

An attempt to prevent an election by injunction amounts to nothing. Parties are not guilty of contempt for refusing to obey such an injunction. (2 High, Injunctions [2d ed.], 1286; *Guebelle v. Epley*, 28 Pac. Rep. [Col.], 89; *Smith v. McCarthy*, 56 Pa. St., 361; *Walton v. Develing*, 61 Ill., 201; *Darst v. State*, 62 Ill., 306; *Dickey v. Reed*, 78 Ill., 262; *Harris v. Schryock*, 82 Ill., 119.)

Where a court acts without jurisdiction of the subject-matter, as in attempting to prevent a person from doing a lawful act, its action is absolutely void, and one is not guilty of contempt in ignoring an injunction granted under such circumstances. (3 Am. & Eng. Ency. Law, 788; *State v. Milligan*, 28 Pac. Rep. [Wash.], 369; *Ex parte Fisck*, 113 U. S., 713; *In re Ayers*, 123 U. S., 443; *In re Sawyer*, 124 U. S., 200; *Smith v. People*, 29 Pac. Rep. [Col.], 924.)

O. A. Williams, contra.

NORVAL, C. J.

This is a petition in error to review an order made by the district court by which the plaintiffs in error were adjudged to be in contempt of court for violating an order of injunction. It appears from the record that at a special election held in school district No. 19, of Antelope county, on the 28th day of March, 1892, for the purpose of changing the location of the school-house site, a majority of the qualified voters present voted in favor of such removal. On May 31 William G. Woolley, a resident elector and taxpayer of the district, instituted an action in the district court of the county against the plaintiffs in error, all of whom being officers of said school district, to restrain the removal of the school-house to the new site selected at said special meeting. An order of injunction was duly allowed by the county judge of the county, bond was given by the plaintiff as required by statute, and the injunction order was personally served upon the plaintiffs in error on June 1. No steps were ever taken to vacate said injunction, and on the 28th and 29th days of June, 1892, the plaintiffs in error disobeyed the said order of injunction granted by the county judge, by removing the school-house from the northwest corner of section 8, the point where it had been located for six years, to the southeast corner of sec-

tion 5. Subsequently an affidavit was filed in the cause by Woolley, setting up the breach of the injunction by the plaintiffs in error, upon which an order to show cause was issued by the district court, and an answer thereto was filed. Upon the hearing, the court found the plaintiffs in error guilty of a contempt of court, and imposed a fine of $1 on each, and ordered a return of the school-house to the place from which it had been taken. The plaintiffs in error, in their answer to the order to show cause why they should not be punished for contempt, set up as justification for disobeying the injunction that at a general election held in said school district on June 27, 1892, the question of changing the school-house site was submitted to the qualified voters present, and, by a majority vote of said electors, such site was changed from the northwest corner of section 8, in township 27, range 5 west, to the southeast corner of section 5, in said township, and that in pursuance of said vote the plaintiffs in error, as the officers of said school district, caused the school-house to be moved to the point last above mentioned.

Section 8, subdivision 2, chapter 79, Compiled Statutes, provides: "The qualified voters in the school district, when lawfully assembled, shall have power to adjourn from time to time, as may be necessary, to designate a site for a school-house, by a vote of two-thirds of those present, and to change the same by a similar vote at any annual meeting; *Provided*, That in any school district where the school-house is located three-fourths of one mile or more from the center of such district, such school-house site may be changed to a point nearer the geographical center of the district by a majority vote of those present at any such school meeting." It will be observed that under the foregoing statute a school-house site, when once established, can be changed only at an annual school district meeting. There is no authority of law for changing such site at a special election. Therefore, the vote on the question of lo-

cation taken on March 28 was illegal and void, and conferred no power or authority whatever upon the officers of the school district to move the school-house in question.

A large portion of the brief of plaintiffs in error is devoted to the discussion of the proposition that a court of equity has no power or jurisdiction to restrain the holding of an election which is authorized by law, and that a party is not liable for contempt of court for disobeying an injunction order enjoining an election legally called for a lawful purpose, for the reason that such order is absolutely null and void. The authorities cited in the brief fully sustain the proposition for which counsel contend, but the doctrine stated has no application to the case under consideration. Here there was no attempt to interfere with, or to restrain, the holding of an election in the district for the relocation of the school-house site. Nor were the plaintiffs in error adjudged guilty of contempt on account of any vote taken in the district upon the question of relocation, but because they removed the school-house contrary to, and in defiance of, the order of the district court. It is one thing to prevent an authorized election by enjoining the election officers, and it is quite another and different thing to test the validity of an election, after the same has been held, by restraining a public officer from carrying into effect the will expressed by the electors. A court of equity has jurisdiction in the latter case, while in the former it is powerless to interfere by injunction.

The plaintiffs in error insist that the site for the school-house was legally changed by the district at the annual election, and it, therefore, became their duty to move the building to the new location, notwithstanding the order of injunction. Whether the school-house site was lawfully located at the election held on June 27 depends upon whether the northwest corner of section 8, the place where the building has stood for years, was three-quarters of a

mile, or more, from the geographical center of the district, since, if that be a fact, a majority vote of the qualified voters present at such election was sufficient to change the site to a place nearer the center of the district; otherwise it was necessary that the proposition should have received the affirmative vote of two-thirds of the electors of the district who participated at the meeting. There is a dispute between counsel for the respective parties as to how far the original site is from the geographical center of the district, and it is not an easy matter to decide owing to the irregular shape of the district. Assuming, for the purposes of this case, that the site for the school-house was relocated in the manner provided by law at the annual election, nevertheless that did not justify the plaintiffs in error in moving the building in violation of the writ or order of injunction theretofore granted, although the fact that the site was legally changed by the district, subsequent to the granting of the injunction, would have been sufficient ground for the vacation or dissolution of the injunction by the court had application therefor been made. The authorities agree that a party need not obey a void injunction order, but if the order is valid it must be respected, though irregular or erroneously issued, until it is vacated by the court allowing it, or reversed in the appellate tribunal by some appropriate method of direct review in the same action. The rule is thus stated in 2 High, Injunctions, sec. 1416: "With whatever irregularities the proceedings may be affected, or however erroneously the court may have acted in granting the injunction in the first instance, it must be implicitly obeyed as long as it remains in existence, and the fact that it has been granted erroneously affords no justification or excuse for its violation before it has been properly dissolved. And the party against whom an injunction issues will not be allowed to violate it on the ground of want of equity in the bill, since he is not at liberty to speculate upon the intention or decision of the court, or upon the equity of the bill, or to

question the authority of the court to grant relief upon the facts stated, except upon application to dissolve the injunction. So if defendant is in doubt as to the scope or extent of the injunction he should not willfully disregard or violate it with a view of testing such questions, but should apply to the court for a modification or construction of its order. And upon proceedings for contempt in this class of cases the only legitimate inquiry is whether the court granting the injunction had jurisdiction of the parties and of the subject-matter, and whether it made the order which has been violated, and the court will not, in such proceedings, consider whether the order was erroneous."

In the case under review the court below had jurisdiction of the subject-matter and of the plaintiffs in error. The injunction was properly granted and personally served upon them. They knowingly disregarded the mandate of the court, and are, therefore, liable to punishment for contempt, notwithstanding, under the showing made, they would have been entitled to a dissolution of the injunction upon a motion filed for that purpose, or upon a trial upon the merits. (*State v. Pierce*, 32 Pac. Rep. [Kan.], 924; *Forrest v. Price*, 29 Atl. Rep. [N. J.], 215; *Erie R. Co. v. Ramsey*, 45 N. Y., 637.) That they were actuated by the best of motives in doing what they did affords no warrant or excuse for disobeying the injunction, nor does it relieve them from punishment for its violation. The court doubtless, and properly so, took the facts in the case into consideration in fixing the penalty. True, the injunction order was allowed by the county judge, yet the breach of its terms was a contempt against the district court, and not the county judge. This was held in *Johnson v. Bouton*, 35 Neb., 898. The decision of the court below is right, and is

AFFIRMED.

PHENIX INSURANCE COMPANY OF BROOKLYN, NEW YORK, v. JOHN A. ROLLINS.

FILED APRIL 16, 1895. No. 5964.

1. **Insurance:** PREMIUM NOTES: DEFAULT: SUSPENSION OF POLICY: WAIVER. A clause providing that an insurance policy shall be suspended during the time the premium note shall remain unpaid after maturity is for the benefit of the company, and may be waived by the insurer.

2. ———: ———: ———: ———: ———. A fire insurance policy for the term of five years at a gross premium for the entire time, the insured giving his note for such premium, due in one year from date, contained a stipulation to the effect that the failure by the insured to pay the premium note when due suspended the policy during such default, but that a subsequent payment of the premium in full revived the policy for the remainder of the term. The defendant made default in the payment of such note, and in an action thereon it was *held* that the company was entitled to recover the full amount of the note.

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

The facts are stated in the opinion.

A. G. Greenlee, for plaintiff in error:

The provision for suspending the policy in case of default in payment of the premium note is not unreasonable. (*Phenix Ins. Co. v. Bachelder*, 32 Neb., 490; *St. Paul Fire & Marine Ins. Co. v. Coleman*, 43 N. W. Rep. [Dak.], 693; *Williams v. Albany City Ins. Co.*, 19 Mich., 465.)

The judgment of the court below is in violation of the principle that parties have the right to make their own contract, and that where one party does all he agreed to do, and gives all that he agreed to give, he has a right to enforce the contract against the other party. (*Fleetwood v. Dorsey Machine Co.*, 95 Ind., 491; *St. Paul Fire & Marine Ins.*

Co. v. Coleman, 43 N. W. Rep. [Dak.], 693; *Williams v. Albany City Ins. Co.*, 19 Mich., 451; *Minnesota Farmers Mutual Fire Ins. Association v. Oleson*, 44 N. W. Rep. [Minn.], 672.)

The plaintiff is entitled to recover the full amount of the note. (*American Ins. Co. v. Klink*, 65 Mo., 78; *Phœnix Ins. Co., v. Lansing*, 15 Neb., 494; *American Ins. Co. v. Henley*, 60 Ind., 515; *Shimp v. Cedar Rapids Ins. Co.*, 16 N. E. Rep., [Ill.], 229; *Robinson v. German Ins Co.*, 11 S. W. Rep. [Ark.], 686; *Williams v. Albany City Ins Co.*, 19 Mich., 451; *Blackerby v. Continental Ins. Co.*, 15 Ins. L. J. [Ky.], 756.)

Davis & Hibner, contra:

The insurance company can only recover the amount of premium actually earned. (*Yost v. American Ins. Co.*, 39 Mich., 531; *Mathews v. American Ins. Co.*, 40 O. St., 135; *American Ins. Co. v. Stoy*, 41 Mich., 385.)

NORVAL, C. J.

This suit is on a promissory note for the sum of $40, bearing date July 10, 1887, due in one year, made by the defendant in payment of the premium upon a policy of fire insurance issued to him by the plaintiff. Upon the trial the court rendered judgment against the defendant for the sum of $19.28. To review this judgment is the object of this proceeding. The only contention here is that the verdict is contrary to the law and the evidence. The cause was tried and decided in the court below upon the following stipulation of facts:

"It is admitted that the defendant executed the note hereto attached, and that the consideration for said note was the execution and delivery to the defendant by plaintiff of a policy of insurance, a copy of which is hereto attached, and marked 'Exhibit B;' that the defendant duly received said policy, and has at all times since said day re-

tained possession of the same; never offered to surrender it to the plaintiff, or to any one for it, nor has it ever been demanded from the defendant by the plaintiff; that the defendant, at the time of the execution and delivery of the said note and the receipt of the said policy, was fully advised as to the provisions and conditions of the said papers.

"It is further stipulated that the usual, customary, and reasonable price of the insurance mentioned in the policy, if taken for one year only, would be $13.33, but that in the consideration of the defendant taking the policy for five years the plaintiff agreed to insure said defendant for five years for the amount of three years' premium if taken for a single year.

"It is further stipulated that the plaintiff duly issued the said policy and delivered the same to the defendant; has never canceled the same, but at all times since the said note became due has endeavored to collect the same, and that if the defendant has not had insurance for the full term of five years, as stated in said policy, it is wholly due to the fact of the failure of the defendant to pay the said note, taken in connection with the conditions in said note and policy."

The note, which is the foundation of the suit, contained this clause: "If this note is not paid at maturity, said policy shall then cease and determine, and be null and void, and so remain until the same shall be fully paid and received by said company."

The following condition appears upon the face of the policy of insurance: "In case the assured fails to pay the premium note or order at the time specified, then this policy shall cease to be in force, and remain null and void during the time said note or order, or any part thereof, remains unpaid after its maturity; and no legal action on the part of this company to enforce payment shall be considered as reviving the policy; the payment of the premium in full, however, revives the policy and makes it good for the balance of its term."

If we correctly understand the argument of counsel for defendant it amounts to this: That by virtue of the foregoing provision contained in the policy and the stipulation in the note, the insurance terminated upon default being made in the payment of the premium note, and the insurance having ceased in favor of the plaintiff at the maturity of the note, the premium likewise ceased to accrue against the defendant. This is, doubtless, the view adopted by the trial court. If this is the proper construction to be placed upon the clauses quoted above, when read in the light of the facts in the case, the decision is right, otherwise the judgment must be reversed. By the terms of the contract the policy was voidable upon the defendant making default, but voidable merely at the option of the company. The condition declared the insurance suspended during default of payment of the premium note. The provision was inserted in the policy for the sole benefit of the insurer and not the insured, and is valid and binding. This stipulation could be waived by the company. This was decided in *Phenix Ins. Co. v. Bachelder*, 32 Neb., 490, and the same doctrine is held by other courts. (*Zinck v. Phœnix Ins. Co.*, 60 Ia., 266; *Mehurin v. Stone*, 37 O. St., 58; *Palmer v. Sawyer*, 114 Mass., 13.) It appears that this defendant has retained the policy and never offered to surrender it, and that plaintiff has at all times since the maturity of the note endeavored to enforce the collection of the note, and brought this action for that purpose. As to what acts have been construed as a waiver of conditions in a policy similar to the one in this case, see *Johnson v. Southern Mutual Life Ins. Co.*, 79 Ky., 403; *East Texas Fire Ins. Co. v. Perkey*, 24 S. W. Rep. [Tex.], 1080; *Brady v. Prudential Ins. Co.*, 29 N. Y. Sup., 44; *Western Horse & Cattle Ins. Co. v. Scheidle*, 18 Neb., 495; *Nebraska & Iowa Ins. Co. v. Christiensen*, 29 Neb., 572; *Phenix Ins. Co. v. Dungan*, 37 Neb., 469. In the last case the stipulations in the premium note and policy were the same as in the case be-

fore us. After the maturity of the note a payment was made thereon and the note was left with an agent for collection. Before the note had been fully paid, the property covered by the policy was destroyed by fire. In an action to recover for the loss it was held (we quote from the syllabus): "That the policy was voidable only at the election of the insurance company, and that by receiving and retaining the part payment after the default and retaining the note for collection it waived the right to insist upon a forfeiture thereof." Whether had a loss occurred after the maturity of the note in question, and an action had been brought to recover upon the policy, the company could have interposed as a defense that the note had not been paid it is unnecessary to now decide, as the determination of such question adversely to the company would not defeat its action upon the note. As elsewhere stated, the clause contained in the policy was intended for the protection of the company merely. To permit the defendant to insist that the contract of insurance terminated by his own failure to pay the note would allow the insured to take advantage of his own laches or wrong, which the law will not sanction. The defendant contracted to pay the plaintiff $40 for carrying the risk on his property for the full period of five years, with the contingency, thoroughly understood at the time, that the insurance might be suspended by the failure of the insured to pay the premium when due. There is no stipulation releasing the defendant from the payment of any portion of the note in case he should fail to comply with the contract. The company has furnished and the defendant has received all the contract required. The insured could have continued the policy in force for the five years, had he chosen to do so, by paying the note according to its terms. The company acquired a present vested right in the premium as an entirety immediately upon the execution and delivery of the note and policy. The failure of the assured to pay the note did not

render the policy absolutely void, but merely suspended it during the continuancy of the default. A voluntary or enforced payment of the premium would have the effect to revive the policy for the remainder of the original term of the risk. We are fully satisfied that plaintiff is not restricted to a recovery of such part of the premium as equaled the customary short rates for one year's insurance, but it was entitled to collect the full amount of the note. The construction we have placed upon the stipulations of the parties is sustained by the following authorities: *American Ins. Co. v. Klink*, 65 Mo., 78; *Robinson v. Insurance Co.*, 51 Ark., 441; *American Ins. Co. v. Henley*, 60 Ind., 515; *St. Paul Fire & Marine Ins. Co. v. Coleman*, 43 N. W. Rep. [Dak.], 693; *Continental Ins. Co. v. Boykin*, 25 S. Car., 323; *Continental Ins. Co. v. Hoffman*, 25 S. Car., 327; *Minnesota Farmers Mutual Fire Ins. Association v. Oleson*, 44 N. W. Rep. [Minn.], 672.

The defendant relies upon three cases to justify his position, namely, *Yost v. American Ins. Co.* 39 Mich., 531, *American Ins. Co. v. Stoy*, 41 Mich., 385, and *Matthews v. American Ins. Co.*, 40 O. St., 135. These cases are not like the one under consideration. In each a note payable in annual installments was given for the premium, each installment being a premium for a distinct year's insurance. The policy stipulated that, if any installment was not paid at maturity, the policy should be null and void until payment was made. It was held that the insurance was not for a term of years, but as an annual insurance renewable each year for a period not exceeding such term, the policy was void so long as there was any default in the payment of any installment, and that no recovery could be had for successive installments of the premium. In the case before us the defendant agreed to pay a gross sum as premium for the carrying of the risk for the full period of five years, subject to the provisions of the policy. In the Ohio case two of the judges dissented, and the Michi-

gan court in *Williams v. Albany City Ins. Co.*, 19 Mich., 451, and *Canfield v. Continental Ins. Co.*, 47 Mich., 447, in continuing an insurance policy purporting to be for five years containing a stipulation that upon the non-payment at maturity of any installment note given for the premium the policy should be void until revived and the whole amount of installments remaining unpaid should be considered earned, decided that the insured was liable upon the installment notes, thereby recognizing the law as we have stated it to be.

The findings and judgment of the district court are reversed, and the cause remanded.

REVERSED AND REMANDED.

ALBERT BUSHNELL V. CHARLES M. CHAMBERLAIN ET AL.

FILED APRIL 16, 1895. NO. 6368.

1. **Action for Value of Goods Sold: JUDGMENT FOR DEFENDANTS: EVIDENCE.** Evidence *held* to support the verdict and judgment.
2. **Instruction.** The refusal to give an instruction is not reversible error where the court has already stated substantially the same principle of law in another instruction.

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

S. P. Davidson, for plaintiff in error.

T. Appelget, contra.

NORVAL, C. J.

This action was instituted in the court below by the plaintiff in error against Charles M. Chamberlain, James

R. Tober, and Charles M. Wilson, formerly partners under the firm name of the Cook Lumber Company, to recover the price and value of two cars of oak lumber alleged to have been sold and delivered by the plaintiff to the Cook Lumber Company. There was a trial to a jury, with a verdict and judgment in favor of the defendants.

It is contended that the evidence fails to support the verdict. Plaintiff resides at, and is engaged in the lumber business in, Kansas City, Missouri. For more than a year subsequent to April, 1890, the firm of Munson & Walker owned a lumber yard in the city of Lincoln, and during that time the plaintiff sold the firm on an average of about two cars of lumber per week, and the Cook Lumber Company also purchased a few car loads of lumber of Munson & Walker during the same period. The last named firm went out of business prior to February, 1892, but the members of the Cook Lumber Company were not aware of that fact until several weeks thereafter. In February, 1892, the last named company sent an order to Munson & Walker for two car loads of oak lumber, and some two weeks later, without further correspondence, the Cook Lumber Company received the same, believing that the order had been filled, and the shipment made, by Munson & Walker. The Cook Lumber Company held a note against said firm, and credited thereon the price of the lumber before the company had been apprised of the dissolution of the firm of Munson & Walker, or that the plaintiff claimed to have furnished the lumber in dispute. The testimony introduced on behalf of the plaintiff tends to show that during the last of February, 1892, he made arrangements with C. C. Munson, late of the firm of Munson & Walker, to act as his agent in the sale of lumber in Nebraska upon commission; that thereafter Mr. Munson placed an order with the the plaintiff for two car loads of oak lumber to be shipped to the Cook Lumber Company, which order was filled and the lumber shipped about the

4th of March following; that neither Walker nor Munson had any interest in said lumber, but in making out the invoice a mistake was made in having it billed to the Cook Lumber Company as sold by Munson individually, instead of by him as agent for plaintiff. It is undisputed that plaintiff has not received pay for any part of the shipment, excepting the freight on each car, which was deducted from the invoice. There was testimony on the part of the defendants conducing to show that they never ordered or purchased any lumber of the plaintiff or Mr. Munson, and that they never knowingly received any lumber from either of them. The invoice for the shipment was made out and dated in Lincoln, instead of Kansas City, the point from which it is claimed the lumber was shipped. There is no explanation given of this, or how the alleged mistake in the invoice occurred. No bill was ever rendered the defendants by the plaintiff for the material in dispute. While the evidence is not of the most satisfactory character, we cannot say that the verdict is clearly wrong, although we would have been as well content had the jury found for the other party.

Error is assigned because the trial court suppressed from the depositions of the plaintiff and Munson the evidence relating to the assignment by the latter to the former of the account for the lumber in controversy. We are unable to discover any prejudicial error in the ruling. The issue to be tried was whether the lumber was sold and delivered by plaintiff to the defendants. If it was, and by mistake the material was billed as having been sold by Munson, it required no formal assignment of the account to Mr. Bushnell by Munson in order to entitle the plaintiff to recover in the action. Therefore, the fact that there was a written assignment of the account is not important or material.

Complaint is made of the giving of this instruction: "If you find from the evidence that the defendants pur-

chased the bill of lumber charged in the petition from some other person or firm other than the plaintiff, and before receiving any knowledge of the claim of plaintiff in this lumber, and in good faith paid for the same to the person from whom they purchased, before they had any knowledge of plaintiff's claim in the lumber, then defendants would not be liable to plaintiff for said lumber." The vice imputed to this instruction is that it is not based upon the evidence—is not well taken. It assumed no fact not fairly within the testimony.

Exceptions were taken to the refusing of the plaintiff's first and second requests to charge, which are as follows:

"1. The court instructs the jury that if you believe from the evidence that the plaintiff sold the defendant, the Cook Lumber Company, the lumber mentioned in his petition through C. C. Munson, as agent, and that said lumber has not been paid for to the plaintiff, then the mere fact that said agent by mistake billed the lumber to the Cook Lumber Company as though it had been sold by him individually and not by plaintiff is no defense to this action. The further fact, also, that said Cook Lumber Company supposed they were buying the lumber from said C. C. Munson individually and not from the plaintiff through him as agent is no defense in this action.

"2. The court further instructs the jury that if they believe from the evidence that the plaintiff, being the owner of the lumber and the materials mentioned in the petition, sold the same to the Cook Lumber Company through his agent, C. C. Munson, and that said Cook Lumber Company has not paid for the same to said plaintiff and that said lumber was delivered to the said Cook Lumber Company as alleged, then you will find for the plaintiff and assess his damages at what you believe from the evidence he is entitled to recover."

Although not couched in the same language, the court, by the first instruction substantially covered the same

ground. In that instruction the court told the jury, in effect, that if they found from the evidence that the plaintiff by himself, or his duly authorized agent, delivered to the defendants the two cars of lumber and they used the same, the verdict should be for the plaintiff. The court having already stated the law of the case as enunciated in the plaintiff's requests, it was not reversible error to refuse to reiterate the same. (*Kopplekom v. Huffman*, 12 Neb., 95; *Binfield v. State*, 15 Neb., 484; *Bradshaw v. State*, 17 Neb., 147; *Hodgman v. Thomas*, 37 Neb., 568; *Murphy v. Gould*, 40 Neb., 728.) The judgment is

AFFIRMED.

SHADE SCOTT V. ALEXANDER BURRILL.

FILED APRIL 16, 1895. No. 5929.

1. **Appeal from Justice of the Peace:** PROCEDURE IN APPELLATE COURT. Where a party to a judgment rendered by a justice of the peace files an undertaking for an appeal within ten days after the date of the judgment, but fails to file a transcript of the proceedings in the district court within thirty days next following the rendition of the judgment, the appellee may file such transcript, and have the cause docketed; and the district court is authorized, on his motion, either to dismiss the appeal, or enter judgment in his favor similar to that rendered by the justice. *Wilde v. Preuss*, 33 Neb., 790, followed.

2. ———: ———: REPLEVIN. The above rule applies to actions of replevin before a justice of the peace, as well as to all other civil causes determined in justice courts.

3. **Replevin:** JUDGMENT: HARMLESS ERROR. Where judgment is entered in favor of the defendant in an action of replevin merely for damages for withholding the property and costs, the plaintiff cannot complain that no judgment was rendered against him either for a return of the property, or for the value thereof, in case a return cannot be had, or the value of the possession of the same. In such case the failure to render an alternative judgment is error without prejudice to the plaintiff.

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

Miller & Ready, for plaintiff in error.

John Bridenbaugh, contra.

NORVAL, C. J.

Plaintiff in error brought replevin before a justice of the peace to recover possession of seven head of cattle. The property was taken under the writ and possession thereof delivered to plaintiff. Upon the trial, which was held on March 30, 1892, the justice found the issues against the plaintiff and assessed the defendant's damages in the sum of $5, for which amount, with costs of suit, judgment was rendered. Within ten days the plaintiff entered into and filed with the justice an appeal undertaking, but failed to perfect his appeal by filing the transcript of the proceedings in the district court of the county within the time prescribed by law. More than thirty days after the entry of the judgment the defendant filed a transcript, had the same docketed in the district court, and at the first term of the court held thereafter, on motion of the appellee, a judgment was entered in his favor similar to that rendered by the justice, in accordance with the provisions of section 1011 of the Code of Civil Procedure.

The petition in error contains but a single assignment, namely, that the district court erred in sustaining the motion of the defendant to enter up the judgment in his favor. There is no error in the decision. The proceedings in the district court were in strict compliance with the provisions of said section 1011 of Civil Code and the decisions of this court thereunder. (*Wilson v. Wilson*, 23 Neb., 455; *Slaven v. Hellman*, 24 Neb., 646; *Wilde v. Preuss*, 33 Neb., 790.) The appellee was entitled, at his option, either to a judgment of dismissal, or one similar to that rendered by

the justice. Section 1011 applies to actions in replevin tried before justice courts.

The point is urged that the judgment entered by the justice was not in the alternative, for a return of the property, or the value thereof, in case a return could not be had, as required by section 191*a* of the Code. No judgment was rendered for either the value or for a return of the property, but merely for damages for the withholding of the property, therefore the plaintiff was not prejudiced by the failure to render an alternative judgment. Had a judgment been entered in favor of the defendant for the value of the property, or the value of the possession of the same, without making provision for returning the property in lieu of the value, it would have been erroneous.

Again, the plaintiff did not prosecute error to the district court, but appealed, which cured all errors in the proceedings before the justice. The judgment of the district court is

AFFIRMED.

LYNDON A. GEORGE V. STATE OF NEBRASKA.

FILED APRIL 16, 1895. No. 7540.

1. **Criminal Law:** REVIEW: SUFFICIENCY OF EVIDENCE: OPINION OF ATTORNEY GENERAL. Ordinarily, a judgment of conviction in a criminal prosecution will be reversed whenever the attorney general, after an examination of the record, declines to submit a brief in behalf of the state on the ground that such judgment is not supported by the evidence.

2. **Rape:** SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* not to sustain a conviction on the charge of rape.

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

Stearns & Strode, for plaintiff in error.

A. S. Churchill, Attorney General, for the state.

POST, J.

The plaintiff in error, Lyndon A. George, was, at the January, 1895, term of the district court for Lancaster county, convicted of the crime of rape, and which judgment is presented for review by the petition in error addressed to this court.

The prosecutrix, Amelia Barth, a young woman, twenty-seven years of age, and of average strength and intelligence, was, on the night in question, a visitor at the home of the accused in the village of College View, one of the suburbs of the city of Lincoln. On her departure the accused started to accompany her to the street car by which it was her purpose to return to the city. When about eighty rods from the street car line she discovered that the car which she was intending to take had started. The accused then offered to accompany her to the Fourteenth street line at a point near the penitentiary, nearly, if not quite, two miles distant, and most of the way across the open prairie. This offer the prosecutrix readily accepted, instead of waiting for the next car from College View to the city, and during this walk the alleged rape was committed. The sexual act is not denied by the accused, the only point of difference between the parties concerned relating to the degree of force, if any, which was used by him.

The attorney general, with a frankness highly to be commended, assures us that he is unable, after a diligent examination of the record, to discover any sufficient evidence upon which to sustain the conviction, and has accordingly declined to submit a brief in behalf of the state. A judgment of reversal would under the circumstances be fully warranted without a reference to the record, but out of

abundance of caution we have read over all of the evidence in the bill of exceptions and are quite satisfied with the conclusion of the attorney general. To set out the nauseous details as testified to by both the prosecutrix and the accused is entirely unnecessary. It is sufficient to say that after being ravished as she claims the former requested the accused to take her back to his house, as she preferred to stay over night with his daughter to going into the city, and that she accepted from him the sum of seventy-five cents, apparently as the price of her virtue, which sum he by request carried for her until they reached the street car line, when it was returned to and retained by her. There is evidence tending to sustain the allegations of the information, but when viewed in connection with the facts above narrated must be held insufficient upon which to base a judgment of conviction. The judgment is accordingly reversed and the cause remanded for further proceedings in the district court.

REVERSED AND REMANDED.

MARY L. WANSER ET AL. V. ROBERT LUCAS.

FILED APRIL 16, 1895. NO. 6447.

1. **Fraudulent Conveyance:** DEED FROM HUSBAND TO WIFE: CONSIDERATION. A conveyance of real property from a husband directly to his wife, although void at common law, may be sustained if resting upon equitable grounds, such as a sufficient money consideration.

2. ———: ———: ———: EVIDENCE. Evidence examined, and the advancement of money to the husband by the wife out of her separate estate *held* a sufficient consideration for the conveyance to her by the former of all his property, real and personal.

3. **Ejectment:** DEFENSE. The defendant in an action of ejectment may interpose any defense, legal or equitable, the effect of which is to negative the plaintiff's right of possession.

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

O. J. Frost and *Wigton & Whitham*, for plaintiffs in error.

H. C. Brome, contra.

POST, J.

This is a petition in error and presents for review a judgment from the district court of Pierce county. The essential facts as they appear from the pleadings and proofs are as follows: On the 29th day of September, 1876, R. S. Lucas, late of said county, conveyed by warranty deed to his wife, Ada W. Lucas, the south half of the northwest quarter and the north half of the southwest quarter of section 34; the north half of the northwest quarter and the north half of the northeast quarter of section 35; the undivided one-half of the north half of the northeast quarter, and the south half of the southeast quarter of section 27; the undivided north half of the southeast quarter of section 34; the undivided half of the north half of section 26, and a half interest in the townsite of Pierce, all situated in township 26, range 2 west, in said Pierce county, beside the grantor's personal property of every description, including moneys and credits, for the expressed consideration of $100. The value of the property above described, including a balance in bank of about $500 and some $1,200 in county warrants, was from $12,000 to $15,000. Said Lucas, who died in the month of November, 1877, left surviving him ten children, the fruits of his marriage with the said Ada W., ranging from two to twenty years of age. His widow was soon thereafter married to Amos W. Seeley, who died some time prior to the 29th day of December, 1884, the exact date of his death not being shown by the record, leaving one child the fruit of said marriage. On the day last named said widow, by written lease, conveyed a por-

tion of the premises above described to the defendant in error Robert Lucas, who is one of the children and heirs at law of R. S. Lucas deceased, for the period of ten years from and after said date. This action was subsequently brought by the plaintiffs, as tenants in common, to assert their rights to said property as heirs of R. W. Lucas, claiming that the conveyance first above mentioned and also the said lease are void and ineffectual for the purpose of passing title or conferring any right of possession as against them.

The cause as presented to the district court involved several interesting and important questions which are not necessarily included in the present investigation, and will not, therefore, receive more than a passing notice.

It is argued by the plaintiffs: (1.) That the deed from R. S. to Ada W. Lucas was never delivered in such manner as to give effect thereto as a conveyance of real estate. (2.) It was made in lieu of a will to take effect, if at all, after the death of the grantor. (3.) If delivered as claimed, it was made with intent to provide for the grantor's wife by conveyance of all his property, with nothing reserved for his children, a provision unreasonable and, therefore, void. Mr. Lucas, at the date of the deed, was contemplating a visit to the Centennial Exposition at the city of Philadelphia, and there is evidence strongly tending to prove that he was possessed by a morbid fear, amounting almost to a conviction, that he would not live to return. There is also evidence which would warrant the inference that the conveyance was originally intended rather as a testamentary disposition of the property therein mentioned, to take effect after the death of the grantor. Mrs. Lucas, it should be remarked, died some time previous to the commencement of this action, and the question of the understanding between herself and her husband at and before the execution of the deed is left in doubt. The defendant, who was then a member of his father's family, testified as follows: "I

think the day before my father started to the Centennial he handed the deed over to my mother and said, 'Here, Ada, is the deed. I have turned everything over to you, and in case I die, or anything happens to me, you will have no trouble.' * * * Mother took the deed, saying: 'O, there is not going to anything happen to you.'" But whatever may have been the intention of the grantor at the time to which we have referred, there is evidence of a subsequent delivery with intent to invest the grantee with the legal and equitable title to the property in controversy. To Mr. Frady, who accompanied him on his visit to Philadelphia, he remarked after his return that he intended to leave the deed in force—that Mrs. Lucas should keep the family together; and about three weeks before his death he remarked to the witness, in the presence of Mrs. Lucas, that he had conveyed the homestead, together with the other property, to his wife, and that the details were all fixed. Mr. Hall, a neighbor and intimate acquaintance, testified that Mr. Lucas assured him during his last sickness, and about a month before his death, that everything (referring to his property) was fixed up in the event of his death, and that Mrs. Lucas, who was present at the time, got the deed and showed it to the witness. J. H. Brown, who had for several years been engaged with Mr. Lucas in business, and through whom the latter acquired title to most of the real estate conveyed, testified to a conversation with him, Lucas, a few days previous to the execution of the deed, in which he remarked to the witness that he was about to convey his property to his wife; that her money had paid for it, and that it in equity belonged to her. He testified further that the lands described, with the exception of the grantor's homestead, were paid for by the proceeds of drafts drawn in favor of Ada W. Lucas, and which, according to information derived from the husband of the latter, represented her interest in the estate of her father, who died some time previous thereto in the state of Iowa.

There is other evidence tending to prove the possession by Mrs. Lucas of property in her own right derived from the source above mentioned. It is also shown that after her removal with her husband to Pierce county, in the year 1871, she taught school a considerable part of each year, and that her earnings therefrom amounted to nearly, if not quite, $1,100, which, with the exception of about $200, was used to defray the expenses of the family. To Mr. Robertson, in a conversation two or three months before his death, Lucas stated that he had conveyed all of his property, real and personal, to his wife; that the purpose of such conveyance was to prevent a disposition thereof by the probate court, and that he preferred to dispose of it himself. The evidence of plaintiffs tends to sustain each of the propositions asserted by them, and would, it may be conceded, have supported a finding in their favor; but the district court having determined the issues in favor of the defendant, we can perceive no sufficient ground upon which to interfere.

The doctrine has been freely asserted by this court that the deed of a husband to his wife, although void at common law, will be upheld whenever equitable grounds exist therefor, such, for instance, as a valuable consideration. (*Smith v. Dean*, 15 Neb., 432; *Johnson v. Vandervort*, 16 Neb., 144; *Furrow v. Athey*, 21 Neb., 671; *Ward v. Parlin*, 30 Neb., 376; *Hill v. Fouse*, 32 Neb., 637.) In *Furrow v. Athey*, a case quite similar to the one before us, the court, by REESE, J., after holding the money received by the grantor from his wife's separate estate to be a sufficient consideration for the deed to her, says: "But aside from this we can see no reason why the decree of the district court is not correct. It appears that in 1868 Charles Furrow, the husband, now deceased, purchased the land in question from the United States. At that time he with defendant, his wife, settled upon it and resided there together until his death, which occurred in 1880. In 1879, while in

poor health, he conveyed the premises to her. It was their home. They had a family of children, the plaintiffs, and the deed was evidently executed to her in order that she might be enabled to rear and educate the family, in which she was as much interested as the husband, and which he fully understood at the time he made the conveyance. If it had been made to a third party as a trustee, and by him conveyed to defendant, it perhaps would never have been questioned. It is just as good without such intervention." The foregoing language is quite as applicable to the facts of the case as found by the district court, and must be regarded as decisive of the question under consideration.

It is alleged by defendant, and not seriously disputed, that 160 acres of the premises in controversy, to-wit, the south half of the northwest quarter and the north half of the southwest quarter of section 35, was in the deed of R. S. Lucas by mistake described as the corresponding subdivision of section 34. Plaintiffs' counsel treat the answer as an application for a reformation of said deed, although we find no prayer therefor, and argue that such relief should be denied for two reasons: (1.) The conveyance from R. S. Lucas was purely voluntary and will accordingly not be corrected by a court of equity without the consent of all parties interested. (2.) The defendant's claim comes too late after an interval of thirteen years. Referring to the first contention, it is sufficient to say that the district court, as we have seen, evidently found that the money received by Lucas from his wife's separate estate was a sufficient consideration for the conveyance, and that it cannot be regarded as voluntary within the meaning of the authorities to which we are referred by counsel. As to the second contention, it may be said that Mrs. Lucas took possession of the 160 acres in question soon after the death of her said husband, and asserted title thereto continuously until the time of her death, more than ten years later. In the year 1884, in an action in the district court of Pierce

county in which the said Ada W. Lucas, then Seeley, was plaintiff and Woods Cones, administrator of the estate of the said R. S. Lucas, was defendant, a decree was entered correcting said deed so as to include the property above described in section 35. It is claimed, and may be conceded, that the decree mentioned is void as against the heirs of the said R. S. Lucas. The fact of the decree is, however, material, as bearing upon the contention that said claim is now too stale for cognizance by a court of equity. *Johnson v. Vandervort*, *supra*, relied upon by plaintiffs in this connection, is not in point: (1.) Because there was therein no consideration or other equitable grounds upon which to sustain the conveyance. (2.) There was no attempt by the wife to assert any claim of title or otherwise under the deed for more than seventeen years after its execution. We have no doubt that Mrs. Lucas, had she survived, might successfully interpose her equitable title as a defense to an action of like nature by these plaintiffs. (*Dale v. Hunneman*, 12 Neb., 221; *Staley v. Housel*, 35 Neb., 160.) And her title at the date of the lease is available to the defendant in this action.

There is a further contention, viz., that the defendant failed to perform the conditions of the lease by the furnishing of vegetables and other provisions to Mrs. Lucas as stipulated therein, and that he must therefore be "deemed holding over his term." (Civil Code, sec. 1021.) It does not appear, however, that any complaint was ever made by the party most concerned during her lifetime, and the terms and conditions of the lease or the manner of their performance cannot, for the purpose of this action, be of interest to the plaintiffs, since they claim through their father, R. S. Lucas, and in effect disclaim any title derived through their mother. The judgment must, for reasons stated, be

AFFIRMED.

MAGNUS WEBER V. FREEMAN P. KIRKENDALL ET AL.

FILED APRIL 16, 1895. NO. 5050.

1. **Review:** FINDINGS OF COURT: MOTION FOR NEW TRIAL. A motion for a new trial is as essential to a review in this court by petition in error, where the judgment or order complained of is based upon findings of the court, as upon the verdict of a jury.
2. **Motion for New Trial.** Primarily the office of a motion for a new trial is to afford the court an opportunity to correct errors in its own proceedings without subjecting parties to the expense and inconvenience of appeal or petition in error.
3. **Courts:** POWER TO CORRECT ERRORS. The power to correct errors in their own proceedings is inherent in all courts of general jurisdiction, and in the exercise of that discretion they are governed not alone by this solicitude for the rights of litigants but also by considerations of justice to themselves as instruments provided for the impartial administration of the law.
4. **Review:** DISCRETION OF TRIAL COURT. A stronger case will be required for interference by this court on account of an order setting aside a verdict resulting in a second trial on the merits of a cause than where the motion therefor is denied. (*Bigler v. Baker*, 40 Neb., 325.)
5. **Payment:** DURESS. Payments or concessions exacted from the owner of property unlawfully withheld, in order to obtain possession thereof, where the detention is accompanied by immediate hardship or irreparable injury, may be avoided on the ground of compulsion, although not amounting to technical duress. (*Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb., 463.)
6. ———: ———. But one threatened with civil process, unaccompanied by any act of hardship or oppression, is required to make his defense in the first instance to the merits of the claim, and cannot postpone litigation by paying the demand and afterward maintain an action therefor.

REHEARING of case reported in 39 Neb., 193.

Charles W. Haller, for plaintiff in error.

Montgomery, Charlton & Hall, contra.

POST, J.

A judgment of reversal was entered in this court at the January, 1894, term (see 39 Neb., 193); but a rehearing was thereafter ordered upon discovering that a material part of the record had been overlooked by us. The essential facts are as follows: At the May, 1890, term of the district court of Douglas county a trial was had to a jury upon the issues stated in the opinion heretofore filed, resulting in a verdict for the plaintiff in the sum of $813.02, the amount claimed by him, with interest. Afterwards, and within three days, a motion for a new trial was made by the defendants, in which the following grounds were assigned.

1. The verdict is not sustained by sufficient evidence.

2. The verdict is contrary to law.

3. Errors of law occurring at the trial, duly excepted to.

4. The court erred in giving certain instructions to which the defendants excepted.

5. The court erred in refusing to give certain instructions asked by the defendants, to which defendants duly excepted.

During the same term, but more than three days subsequent to the finding of the verdict, the defendants were permitted, over the objection of the plaintiff, to amend their motion for a new trial by specifically numbering the instructions referred to in the fourth and fifth specifications thereof. At the September, 1890, term an order was made sustaining the motion for a new trial and setting aside the verdict for the plaintiff. At the February, 1891, term the cause, again coming on for trial, was, by written stipulation, submitted to the court, a jury being waived, on the evidence taken at the previous trial, which had been preserved in the form of a bill of exceptions, duly authenticated by the trial judge. The second trial resulted in a judgment for the defendants, based upon certain findings of fact. The record shows neither a motion for a new trial,

nor exceptions to the findings of the court, and the errors alleged all relate to the former trial, viz.:

"1. The court erred in permitting the defendants to file the amended motion for a new trial.

"2. The court erred in granting a new trial.

"3. The court erred in entering said judgment and order."

It is true an exception was noted to the entering of the judgment on the findings, but that fact alone will not entitle the plaintiff to have said judgment reviewed in this proceeding. A motion for a new trial is just as essential as the basis of proceedings in error where the final judgment or order rests upon findings by the court as upon the verdict of a jury. (*Weitz v. Wolfe*, 28 Neb., 500; *Carlow v. Aultman*, 28 Neb., 672; *Gaughran v. Crosby*, 33 Neb., 34.) The plaintiff, from his failure to interpose proper objections thereto, is presumed to have been satisfied with the findings and judgment of the district court. But assuming what cannot be conceded, that the regularity of the order setting aside the verdict is presented by this record, we discover therein no error calling for a reversal of the judgment. It will be assumed, also, for the purpose of this investigation, that the second, or amended, motion for a new trial was without authority of law, and is in fact a mere nullity. Such being the case the inference is that the order complained of is based upon the original motion, which, as we have seen, is identical with the second, except that the instructions therein referred to are not specifically numbered. Our investigation is accordingly limited to a single inquiry, viz., were the specifications of the motion sufficient to entitle the defendants to an examination by the trial court of the questions thereby sought to be raised? The important distinction between the rules applicable to petitions in error and motions for new trials is frequently overlooked.

It is the settled rule of this court that alleged errors will

be disregarded unless specifically assigned in the petition in error. But the Code, section 317, as amended in 1881, provides: "It shall be sufficient, however, in assigning the grounds of the motion [for a new trial] to assign the same in the language of the statute without further or other particularity." Primarily, the office of a motion for a new trial is to afford the court an opportunity to correct errors in the proceedings before it without subjecting parties to the expense and inconvenience of appeal or petition in error. And for that purpose the fourth and fifth assignments of the motion appear to be quite sufficient. Indeed, we do not doubt the power of the trial court to re-examine its record and to set aside a verdict on account of prejudicial error on its own motion in the absence of a request by either party. Such was the rule of the common law in *Rex v. Holt*, 5 T. R. [Eng.], 438; *Rex v. Atkinson*, 5 T. R. [Eng.], 437, note *a*; *Rex v. Gough*, 2 Doug. [Eng.], 796. Nor has the rule been changed by statute. (*Williams v. State*, 5 Mo., 480; *Simpson v. Blunt*, 42 Mo., 544; *McCabe v. Lewis*, 76 Mo., 301; *E. O. Stanard Milling Co. v. White Line Central Transit Co.*, 26 S. W. Rep. [Mo.], 704; *State v. McCrea*, 3 So. Rep. [La.], 380; Thompson, Trials, 2411.) The rule thus recognized has not only the sanction of authority, but rests upon the soundest and most satisfactory reasons. The power is inherent in all courts of general jurisdiction to correct errors committed by them which are clearly prejudicial to the parties, and their power in that respect is exercised not alone on account of their solicitude for the rights of litigants, but also in justice to themselves as instruments provided for the impartial administration of the law. Lest our position be misunderstood, we repeat that for the purpose of review by petition in error, assignments in the language of the motion in this case would be disregarded by the reviewing court as too indefinite; but as an application addressed to the trial court for a review of its own record the motion is open to no such objection.

A stronger case will be required to warrant a reversal on account of an order setting aside a verdict resulting in a second trial on the merits of the cause than where the motion therefor is denied. (*Bigler v. Baker*, 40 Neb., 325.) Other courts have gone further and held that such an order is not reversible error unless the reviewing court can see beyond reasonable doubt that there is manifest and material error therein in a pure and unmixed question of law, and except for which it would not have been made. (*City of Sedan v. Church*, 29 Kan., 190.) In *Ryan v. Topeka Bridge Co.*, 7 Kan., 207, it was held that where error is alleged in the sustaining of a motion for a new trial it must appear affirmatively that none of the grounds of the motion are sufficient before the party complaining will be entitled to a reversal. So far as the record discloses the case presented is the ordinary one of a difference of opinion between the judge and jury regarding the effect to be given the evidence, and according to the established rule of the court the order sustaining the motion is not the subject of review. But looking further into the record we found therein sufficient ground for setting aside the verdict without regard to the sufficiency of the evidence. For instance, by paragraph No. 5, given at the request of the plaintiff, the jury were instructed as follows: "The threats to cause an attachment to issue against the property of a person when no ground for attachment exists is a threat to detain said property unlawfully." It has been frequently held, and may be accepted as sound law, that payments or concessions exacted from the owner of property unlawfully withheld, in order to obtain possession thereof, where the detention is accompanied by immediate hardship or irreparable injury, may be avoided on the ground of compulsion, although not amounting to technical duress. (See *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb., 463, and authorities cited.) But the mere apprehension of legal proceedings, unaccompanied by

any act of hardship or oppression, has never been held sufficient ground for the avoiding of a contract. The books, on the other hand, abound in cases holding that where the parties are on terms of equality towards each other, one threatened with civil process is required to make his defense in the first instance to the merits of the claim, and cannot postpone litigation by paying the demand and afterward maintain an action therefor. No court would be warranted in going further in protecting parties against unconscionable demands than did we in the opinion heretofore filed in this case; and yet the ground of our conclusion therein was not alone the threatened attachment, but also the detention of the plaintiff, amounting to physical restraint, and the alleged fraudulent representations with regard to his liability for the indebtedness claimed. In no possible view of the record can the order setting aside the verdict be regarded as reversible error, hence the judgment must be

AFFIRMED.

N. O. PETERSON V. ELIZABETH LODWICK ET AL.

FILED APRIL 16, 1895. No. 5914.

1. **Replevin:** PROOF. In an action of replevin it devolves upon the plaintiff to prove the ownership of the property in controversy, alleged in the petition, his right to immediate possession thereof, and that it is wrongfully detained by the defendants.
2. ———: ———. The facts necessary to be established to entitle a plaintiff in replevin to recover must be shown to have existed at the time the action was commenced.
3. ———: ———: DIRECTING VERDICT. The plaintiff in this case having failed to prove facts sufficient to entitle him to recover, it was not error for the court to direct the jury to return a verdict for defendants.

ERROR from the district court of Pierce county. Tried below before ALLEN, J.

Barnes & Tyler, for plaintiff in error.

Wigton & Whitham, contra.

HARRISON, J.

On the 24th day of May, 1887, the plaintiff in error commenced an action of replevin against the defendants in error in the district court of Pierce county to recover the possession of one brown mare, about eight years old, of the value of $125, of which he alleged in the petition filed he was the owner and entitled to the immediate possession, and also alleged the unlawful and wrongful detention of the property by the defendants. The answer of the defendants was a general denial, except as to the value of the animal, which was admitted to be $125, the value pleaded in the petition. During a term of the district court in Pierce county, and on March 22, 1892, a jury was impaneled for a trial of the issues and the plaintiff introduced his testimony, at the close of which the defendants moved the court to direct the jury to return a verdict in their favor, which motion was sustained and the court so directed or instructed the jury, in accordance with which instruction a verdict was returned for defendants. A motion for a new trial was filed on behalf of plaintiff, and on hearing was overruled and judgment rendered for the defendants. The plaintiff has removed the case to this court for review.

It appears that one F. C. Eldred, who was probably the former owner of the animal in controversy, executed and delivered to the Norfolk National Bank a chattel mortgage, in which it was claimed the animal in suit was included, and also made and delivered to the Farmers & Merchants Bank of Norfolk, Nebraska, a chattel mortgage, in which it was claimed this animal was also included, sub-

ject to the prior mortgage to the Norfolk National Bank; that the banks took possession of this and other property covered by the mortgages and subsequently sold it, the mare in dispute, to the plaintiff. During the trial the mortgage given by Eldred to the Norfolk National Bank, or a certified copy of it, was offered in evidence by the plaintiff and an objection was interposed for defendants that it was "incompetent, irrelevant, immaterial, and no proper and sufficient foundation has been laid; that the description of the property in the mortgage was too indefinite." The objection was sustained and the instrument offered excluded, to which ruling the plaintiff excepted, and one assignment of error refers to this action of the court. A similar objection was made to the offer to introduce the mortgage by Eldred to the Farmers & Merchants Bank, with a like result. Counsel for plaintiff state in their brief that the action of the court in excluding the mortgages was based upon their invalidity by reason of the indefiniteness of the description of the property contained in them. It is then assigned as error: "The court erred in excluding the written agreement of F. C. Eldred on the 9th day of March, 1887, on the back of said chattel mortgage. Said agreement being marked 'Exhibit C.'" The agreement referred to was as follows: "For value received I hereby relinquish all right and claim in and to any and all the within described property, and hereby authorize the owner of the mortgage, and the owner of the second mortgage given to Farmers & Merchants Bank of Norfolk, Nebraska, on same property, to sell and convey absolute title to said property at private or public sale, as may to them or either of them seem best, without notice, by publication or otherwise, and that said property may be sold at Plainview, Nebraska, or in the town of Pierce, Nebraska. Signed March 9, 1887." And a further allegation of error is: "The court erred in excluding the chattel mortgage executed and delivered to the Farmers & Merchants Bank

by F. C. Eldred on the —— day of January, 1887, which is marked 'Exhibit B.' The property in controversy being described in said mortgage." And further that: "The court erred in excluding the parol evidence offered on the part of the plaintiff to show that the property in controversy in this cause was a part of the identical property described in the mortgage marked 'Exhibit B,' and for the further identification of said property." And also: "That thecourt erred in excluding the evidence of witness N. A. Rainbolt on plaintiff's part to show that the property in controversy was by F. C. Eldred on the 9th day of March, 1887, and in the forenoon of said day, sold and delivered to him and turned out to him as agent for the mortgagors, which was a *bona fide* pre-existing debt due from said Eldred to said banks."

It is contended by counsel for defendants that this being an action of replevin, the defendants' plea of general denial threw upon the plaintiff the burden of proving his right to immediate possession of the animal in controversy, and also the unlawful and wrongful detention of it by the defendants, and that he failed to do so, and that the actions of the court in excluding the evidence indicated in the assignments of error as hereinbefore quoted, if erroneous, which they claim they were not, could not and did not prejudice the rights of plaintiff. The only testimony adduced to show ownership and right to property in the plaintiff was contained in the evidence of George L. Iles, a portion of which was in relation to a sale made by him of the property taken under the mortgages of the banks, and of the mare in dispute, to the plaintiff. He stated as follows:

Q. Mr. Iles, you may state—do you know the horse in controversy in this suit—did you ever see it?

A. Yes, sir.

Q. And you may state when and where and under what circumstances you first saw the animal.

A. The total amount of property taken under both mortgages was turned over to Owen Carrabine. Owen Carrabine remained at Plainview some days, protected the sheep by shed and made arrangements for the care of the horses, and piled up the machinery and got all the property in shape, and then came to Norfolk, and with both mortgages in my possession I went to Plainview shortly after they were taken, and at a private sale and at auction, I sold off the property.

Q. To whom did you sell the horse in controversy in this case?

A. To a young man by the name of Phillips.

Q. Do you know what became of the horse then?

A. I turned it over to him.

Q. Do you know whether he sold the horse to Peterson, the plaintiff in this suit?

A. I may be mistaken in the name. I sold to a young man.

Q. You sold to the plaintiff in this case?

A. Yes, sir.

Q. What did he pay for it?

A. To the best of my recollection he gave $105.

Q. And you delivered to him the horse?

A. Yes, sir.

* * * * * * *

Q. You state that the animal in controversy in this case, which was sold to Peterson, the plaintiff, was taken possession of by him?

A. By who?

Q. By Peterson, the plaintiff in this case.

A. After I sold it; yes, sir.

This evidence tended to prove that at a date subsequent to the 9th of March, 1887, and very near in point of time to that date, the mare in dispute was sold and delivered to the plaintiff, but did not establish that on the date of the 24th of May, 1887, the plaintiff was either the owner of

the property or entitled to its possession, or its wrongful detention by the defendants. Under the issues as joined by the pleadings, the petition, and the general denial of the answer it devolved upon the plaintiff to show, first, that he was the owner of the property replevied; second, that he was entitled to immediate possession of it; and third, that it was wrongfully detained by the defendants. (*Moore v. Kepner*, 7 Neb., 291; *Blue Valley Bank v. Bane*, 20 Neb., 294; *Gillespie v. Brown*, 16 Neb., 458; *Wilson v. Fuller*, 9 Kan., 176.) The facts necessary to be established must be shown to have existed at the date when the action was instituted. The evidence introduced on behalf of plaintiff was insufficient to prove the facts which it was necessary for him to establish, as hereinbefore outlined, in order to entitle him to recover in the action, and the evidence which was excluded would not have aided him or made the proof any stronger in the portions where it was defective or lacking, as it was wholly directed to showing that the parties of whom the plaintiff purchased the mare had the right to make the sale, and it was not error to exclude it at the time during the trial when the offer to introduce it was made. It was not then competent or material. We can imagine a condition of the case which might have arisen had the defendants produced evidence by which an attack was made upon plaintiff's title as derived by the purchase of the property by a showing that there was no right or title in the party from whom he purchased, then the testimony which was offered might have been quite pertinent and proper to be admitted, but no such attack was made. The plaintiff having failed in his proof, it was not error for the trial court to direct the jury as it did, to return a verdict for defendants. The judgment of the district court is

AFFIRMED.

FRED STEINKRAUS ET AL., APPELLANTS, V. RICHARD KORTH ET AL., APPELLEES.

FILED APRIL 16, 1895. No. 5915.

1. **Fraudulent Conveyances:** TRANSACTIONS BETWEEN RELATIVES: EVIDENCE. Where property is conveyed from one relative to another as a payment of an alleged past due indebtedness, and thereby creditors of the party making the conveyance are deprived of their just dues and claims, the transaction will be scrutinized or examined very closely, and its *bona fides* must be clearly established. *Plummer v. Rummel*, 26 Neb., 147, followed.
2. **Review:** CONFLICTING EVIDENCE. The finding of a trial court based upon conflicting evidence will not be disturbed on appeal to this court unless clearly wrong.
3. **Fraudulent Conveyances:** EVIDENCE. The evidence in this case examined, and *held* sufficient to sustain the findings of the district court.

APPEAL from the district court of Pierce county. Heard below before Allen, J.

Barnes & Tyler for appellants.

W. W. Quivey and *Powers & Hays, contra.*

HARRISON, J.

March 21, 1890, the appellees instituted this action in the district court of Pierce county. There was alleged in the petition then filed the recovery of judgments in favor, respectively, of Richard Korth, Henry Holly, D. R. Alexander & Co., George A. Brooks, the Fidelity Oil Company, Farrell & Co., Jacob Meyer & Co., Tolerton-Stetson Co., C. A. Morrell & Co., King Bros., E. P. Pickenbrock, and Herman Bros. against one F. Steinkraus, and the issuance of execution on each of them and the return thereof in-

dorsed no property found. There was also pleaded the transfer of certain property, including some real estate, from the judgment debtor to Herman Steinkraus of appellants, the transfer of the real estate being by warranty deed and, it was further stated, without consideration and with the intent to hinder, delay, and defraud these and other creditors, and with the knowledge on the part of the grantee of Herman Steinkraus of such fraudulent intent and purpose of the grantor. There was a further allegation of a transfer by assignment of a contract of purchase of certain other real estate by F. Steinkraus to the Farmers State Bank of Plainview with fraudulent intent, but it seems that this branch of the case was, during the progress of the action, abandoned, and we need give it no further notice. The relief sought as against the appellants F. and Herman Steinkraus was the setting aside of the conveyance from the former to the latter and to subject the real estate described in the deed, or the proceeds derived from the sale thereof, to the payment of the judgment set forth in the petition. The appellants F. and Herman Steinkraus filed separate answers, in each of which it was admitted that at the time stated in the petition F. Steinkraus was the owner of the real estate described therein, and that he conveyed the same by deed of general warranty to Herman Steinkraus and each and every allegation of the portion of the petition in which the fraudulent character of such transfer was pleaded was denied. A trial of the issues resulted in a decree in favor of the judgment creditors of the amount due to each, and vacating and annulling the conveyance of the real estate from F. to Herman Steinkraus, and ordering the property sold, from which the last mentioned parties have appealed to this court.

The sole contention of appellants is that the evidence was insufficient to sustain the finding that the charge of fraud was proved, or to sustain a decree based upon such finding The testimony in the case discloses that F. Steinkraus and

Herman were father and son, and that the father, being engaged in business at Plainview, Pierce county, this state, and heavily indebted, on or about the 20th day of December, 1889, conveyed all of his property to the son, including the real estate in controversy in this action. It further appears that prior to and during the year 1876, F. Steinkraus was engaged in business in Norfolk, Nebraska, and that his son Herman, who was living with his father and assisting him in conducting the business, at some time during the year 1876, reached the age of manhood, and at the request of the father remained with him in the store, assisting him as before and making his home with the father. There does not appear to have been any definite arrangement or agreement with reference to what the son was to receive for his services except his board and clothing, which he did receive, and it is also shown that he probably also received at times during the continuance of this arrangement a little money. After the lapse of about three and one-fourth years the son left home and soon afterwards, or during the year 1881, removed to and resided upon some land in Pierce county. May 25, 1881, some business property in Norfolk, owned by the father, was conveyed to the son, the consideration stated in the conveyance being $1,200. This, it is claimed by appellants, was the amount due the son for services he had performed in the store during the three and one-fourth years after he was twenty-one years of age, and that the father, not having money to pay the amount, and the son asking for a settlement, it was agreed that this property should be conveyed to him in payment of the claim. The father remained in possession and occupancy of the premises subsequent to the transfer, and the son received no rents or benefit of them. The father paid for repairs and insurance and also paid the taxes. The appellants testify that he made these payments as a consideration for his use of the property. In 1883, or about two years after the Norfolk property was conveyed

to Herman Steinkraus, it was sold to O. Hirsch for the sum of $5,000, the negotiation which resulted in this disposal being conducted by the father, the son being consulted once or twice in regard to it. Two thousand five hundred dollars of the five thousand dollars was paid, and to secure the balance Hirsch gave a mortgage on the premises purchased by him. The $2,500, of the amount paid, was received by the father and retained by him, the son getting none of it. The appellants testify that it was loaned by the son to the father. Default was made by the purchaser in the payment of the amount secured by the mortgage and the mortgage was foreclosed, and at the sale of the premises in the foreclosure proceedings the son purchased them, but the evidence does not disclose whether he paid any other or further consideration for it than the amount due upon the mortgage which he was foreclosing. This was in 1887. Very soon afterward, and during the same year, the property was again sold, the amount realized being $4,000. The father in this as in the prior sale appears as the party actively engaged in the transaction of sale of the property and received and retained the money, $4,000, paid, it being claimed by appellants that it was loaned to him by the son. The fact of the father being the one who apparently effected these sales of this property is explained by the appellants in their testimony, in the statement that the son was on his farm at some considerable distance from Norfolk, and the father being in the first instance in possession of the property and managing it, and in the second instance in business in Plainview, where he was more likely to meet probable purchasers, attended to the sales as agent for the son. The $2,500 derived from the first sale of the Norfolk property, subsequent to its transfer to the son, and the $4,000 from the second sale, aggregating $6,500, and the interest, although it is nowhere stated from when to when the interest was calculated or at what rate, form the consideration, $7,050, as stated in it, for the conveyance

made from the father to the son during the month of December, 1890, and which was declared void by the decree in this case. We will now revert to the original transfer of the Norfolk property to the son. There is testimony in the record which tends to show that at the time of this transaction the father was having or expecting a controversy, and probably a lawsuit, with some party in Chicago, and several witnesses testify to conversations with the father or son when both were present, in which it was stated that the original transfer of the Norfolk property was made to the son because of the difficulty with the man who lived in Chicago, and the title was to be allowed to remain in the son's name until it was settled. This evidence is denied by the appellants. It further appears that during the year 1884 the son concluded to engage in the lumber business in the town of Plainview and it was necessary that he should have about $2,500 in money to put into the enterprise. This amount was, as appellants testify, furnished and loaned to him by the father, and repaid a few months subsequent to the time loaned. It will be remembered that at the time this transaction of loan, etc., occurred between the father and son the father was indebted to the son for money derived from the sale of the Norfolk property and stated to have been used by the father as a loan from the son. In December, 1890, when the conveyance was executed, which was set aside by the court in the present action, the father was indebted to various creditors, the sum of such indebtedness being in the aggregate about $7,000, and was unable to pay, and it may be fairly inferred from the testimony that the son had knowledge of these facts in relation to the father's financial circumstances.

The foregoing statement, we think, may be said to be a summary of the majority of the salient facts or points developed in the testimony adduced during the trial of the cause in the district court. There were some other and further facts shown which tended to support the position

of one or the other of the parties litigant, but, as we view them, they were of minor importance, although corroborative of the other and prominent facts, and we do not deem it necessary to quote them. We have carefully read, examined, and considered all the testimony and record, and it presents one of a class of cases where there is a conveyance of property from one relative to another, in this case from father to son, the party making the transfer being involved financially or in debt beyond his ability to pay, and the apparent consideration for the transfer an indebtedness for service rendered or a loan made at some time in the more or less distant past, as the case may be, and of which there is generally, as in the case at bar, no other evidence than such verbal proof as may be obtainable of the facts and circumstances of the transactions which have occurred between the parties, and from these, combined with the facts and circumstances attendant upon the transfer, which is the subject of attack, its character, whether fraudulent or otherwise, must be established and determined. In this case it was clear that if the transaction of December, 1890, between the father and son was valid, its effect must necessarily be to hinder and delay the appellees in the collection of the debts due them from the father, and in fact to deprive them of their just dues. The rule in this state as to such transactions has been established as follows: Where property is conveyed from one relative to another as a payment of an alleged past due indebtedness, and thereby creditors of the party making the conveyance are deprived of their just dues and claims, the transaction will be scrutinized or examined very closely, and its *bona fides* must be clearly established. (*Fisher v. Herron*, 22 Neb., 185; *Bartlett v. Cheesbrough*, 23 Neb., 771; *Plummer v. Rummel*, 26 Neb., 147; *White v. Woodruff*, 25 Neb., 803.) Applying the directions of the foregoing rule to the facts developed in the trial of the case at bar, and searching closely into all the circumstances of the transfer from the father to the son

and its consideration and its source, and all the facts and circumstances shown by the testimony in any manner affecting it and tending to establish its good faith or lack of it, we reach the conclusion that there was sufficient evidence to sustain the finding of the court that it was fraudulent and invalid, and to warrant the court in annulling it. It is true that the testimony on many points was conflicting, but as we have determined that there was sufficient evidence to support the finding, the case is within the rule of this court that where the finding of the trial court is founded upon conflicting testimony, it will not be disturbed unless clearly wrong. The decree of the district court is

AFFIRMED.

C. A. KISSINGER v. M. V. STALEY.

FILED APRIL 16, 1895. NO. 6334.

1. **Review of Rulings on Evidence.** In order to render the error, if any, in the admission of testimony by a trial court available, where the evidence was given before any objection was made to its introduction, it must appear that a motion was made to strike such evidence from the record, a ruling of the trial court obtained thereon and exception taken thereto.
2. **Taxation of Costs.** "In all actions, motions, and proceedings in the supreme, district, or justice's courts the costs of the parties shall be taxed and entered on the record separately." (Sec. 30, ch. 28, Compiled Statutes, 1893.)
3. ———: JUSTICE OF THE PEACE. A judgment of a justice of the peace was as follows: "It is therefore considered by me that the plaintiff recover from the defendant the sum of $7.48 and his costs herein expended, taxed at $37.55, as follows: See margin." *Held*, To be correct in form in its reference to costs, as it only allowed the recovery by plaintiff of his costs expended in the suit; and further, that separately stating or entering the costs in itemized tables on the margin of the record was a suffi-

cient compliance with the requirements of the law in regard to separate taxing and entering the costs on the record.

4. ———: PRESUMPTION OF REGULARITY. Where from statements in the record it appears certain items of the costs as taxed are proper charges, in the absence of any showing to the contrary they will be presumed to be correct.

5. **Justice of the Peace: TRIAL: FEES OF CONSTABLE.** No fee is allowable by law to a sheriff or constable for attendance during the trial of a civil case before a justice of the peace.

ERROR from the district court of Pierce county. Tried below before JACKSON, J.

H. F. Barnhart, for plaintiff in error.

C. B. Willey, contra.

HARRISON, J.

January 18, 1893, the defendant in error commenced an action before a justice of the peace in Pierce county, against the plaintiff in error, claiming in his bill of particulars the sum of $42.50, and praying judgment therefor. After summons served, etc., the plaintiff in error appeared and on his application a continuance of the cause was granted for thirty days, at the expiration of which time plaintiff in error filed an answer, or, as stated in the entries on the docket made by the justice, "parties appeared and defendant filed counter-claim asking for judgment of $11.36." Plaintiff in error demanded a jury, which was called, and as a result of a trial of the issues, the defendant in error recovered a verdict, upon which judgment was rendered in his favor. Plaintiff in error presented a motion to retax the costs, which was overruled, and to correct the alleged error in the ruling on the motion, and other errors claimed to have been committed by the justice during trial, the case was removed to the district court of Pierce county, where, on hearing, the rulings and judgment of the justice of the peace were affirmed and the case has been brought

to this court to obtain a review of the decision of the district court and rulings of the justice of the peace. In the bill of exceptions, in which were preserved portions of the proceedings during the trial before the justice, appears the following:

"Be it remembered that on the trial of this cause by a jury before me, J. B. Short, a justice of the peace in and for Pierce precinct, Pierce county, Nebraska, at my office therein, on the 23d day of February, 1893, the plaintiff, to maintain the issues on his part, called as a witness Charles E. Staley, who being sworn as required by law testifies as follows: 'That at some time before he [witness] and Attorney Moyer were to see Kissinger at Osmund, Nebraska, and prior to bringing this action, that in a conversation between them and Kissinger at the time, he, Kissinger, said that he had offered prior to that time to pay Staley, the plaintiff, some six or eight dollars in settlement of his claim.' To which testimony the defendant objected, for the reason that the same was incompetent, irrelevant, and immaterial, and for the further reason that if said offer was made at all it was made for the purpose of avoiding a lawsuit, which objection was overruled by the court; to which ruling of the court the defendant then and there duly excepted."

It is argued that the evidence which was admitted by the justice, as stated in the foregoing quotation from the bill of exceptions, contained an offer of compromise and settlement and should have been excluded. It will be noticed that, so far as the record discloses, this evidence was given in a narrative form and not in answer to any question which preceded it. If there was a question asked the witness to which this testimony was responsive, such fact is not shown by the record. Nor did the plaintiff in error, so far as is disclosed by the record before us, move to have the testimony, the reception of which it is claimed was objectionable and prejudicial to his interests, stricken

out. If the testimony, of the admission of which complaint is made, was erroneous, it cannot avail the plaintiff in error, for the reason that the record is not in such condition as to raise or present the question of the correctness of its admission. If it was given in response to an interrogatory, there should have been a proper objection to the interrogatory and a ruling obtained thereon, and, if adverse, an exception taken. If the evidence claimed to be objectionable was recited in a narrative form or volunteered by the witness, or if given in answer to a question and being as an answer in its entirety, or as a portion of it, not responsive to such question, there should have been a motion to strike it out and, if overruled, an exception taken. (*Palmer v. Witcherly*, 15 Neb., 101; 1 Thompson, Trials, secs. 716, 718; *Clanin v. Fagan*, 24 N. E. Rep. [Ind.], 1044; *Hangen v. Hachemeister*, 5 L. R. A. [N. Y.], 137.)

It is urged that the justice erred in the portion of the judgment rendered which referred particularly to the costs, in that they were not taxed separately. The judgment in the case was in words and figures as follows: "It is therefore considered by me that the plaintiff recover from the defendant the sum of $7.48 and his costs herein expended, taxed at $37.55, as follows: See margin." And on the margin the costs were itemized and tabulated, such as were made by the parties respectively being stated separately under the appropriate heading. The judgment in form was correct, as it only allowed the recovery by the plaintiff from defendant of his costs expended in the suit. (*Cooper v. Hall*, 22 Neb., 171.) Section 30 of chapter 28, Compiled Statutes, 1893, (Consolidated Statutes, sec. 3030,) is as follows: "In all actions, motions, and proceedings in the supreme, district, or justice's courts the costs of the parties shall be taxed and entered on the record separately." Inasmuch as the costs in this action were arranged in separate itemized tables and designated in such a manner as to show which were made by either party to the suit, we are

satisfied that the requirements of the section of the statutes on that subject were sufficiently fulfilled, and the fact that in the judgment there appeared a statement of the entire costs was not such error, if erroneous, as to call for a reversal of the ruling on the motion to retax the costs.

It is claimed that the sheriff charged twenty-five cents for serving each subpœna and a like amount for each copy, and his returns to the writ show that there was personal service, and that it is only when personal service of a subpœna issued from justice court cannot be made that the use of a copy becomes necessary. Sections 962 and 963 of the Code of Civil Procedure are as follows:

"Sec. 962. Any justice may issue subpœnas to compel the attendance of witnesses to give evidence on any trial pending before himself or for the purpose of taking depositions, or to perpetuate testimony.

"Sec. 963. A subpœna may be served by a constable or any other person, and shall be served by reading the same or stating the contents thereof to the witness, or by leaving a copy thereof at his usual place of residence."

There is nothing in the record presented here, however, from which we can determine whether the service of the subpœnas was personal or not. All that we have is the statement made in the list of the costs, and from them it appears that a charge has been made for service and for copies, and in the absence of anything to the contrary in the record we must presume that these statements were taken from the returns and were correct, and if so there was no error in so entering them, or overruling the motion to retax them.

It is further stated that the officer charged $1.85 for serving the venire for the jury; that this was not the correct amount which should have been charged, according to facts stated in the returns of such service. The return is not in the record in this court, and we have and are furnished with no other means of arriving at a conclusion as

to the correctness of the charges made by the sheriff and must be governed by the record and cannot presume it to be erroneous.

It is further alleged that the justice charged fifteen cents for filing a motion, and that the charge should have been but ten cents. By the only entry we can discover where a charge is made for filing a motion, the charge stated is ten cents; hence this objection must be held to have no force.

It is also stated that there appears a charge by the justice for a "record," for which there is no warrant in law. We have been unable to discover any provision for any such fee or charge by the justice of the peace and are satisfied that this portion of the costs was incorrect and should not have been taxed. The officer (in this case the sheriff) was allowed the sum of $2 for two days' attendance before the justice, presumably for one day on the date the application for continuance was made and granted and for one day when the trial occurred. Counsel for plaintiff in error contends that there is no provision in our law for the allowance of any fee to the officer for his attendance at a trial in a civil case before a justice of the peace. Section 976 of the Code of Civil Procedure, which applies to justice court, states that he shall attend. It reads as follows: "The constable or sheriff shall be in attendance on the court at and during the progress of the trial," etc. In regard to the compensation to be received by the officer for such service, the law-makers have not apparently at all times been of the same opinion. In section 5 of the fee bill as it existed in 1886 (see Rev. Stats., p. 163, ch. 19, sec. 5.) the sheriff was allowed $1.50 for opening court and attending thereon. This referred, presumably, to the district court, as we find the further statement in section 6: "The sheriffs of the several counties of this territory, for performing the duties required by law to be performed by them in the probate or justice court, shall receive the same fees as are allowed for similar service in the district court, to be taxed against

the proper party or parties by the probate judge or justice." In 1871 section 5 was amended, but not in the particular portion now under consideration. (See Session Laws, 1871, p. 108.) In 1875 (see Session Laws, 1875, p. 80) section 5 of the fee bill was amended; although the act purported to amend section 5 of chapter 22, chapter 19 was evidently intended (see *Lancaster County v. Hoagland*, 8 Neb., 38); and it is further enacted, "Opening and attending on probate and justice's court, one dollar and fifty cents, to be taxed as other costs in such courts." (Session Laws, 1875, p. 82, sec. 1.) In 1877 (see Session Laws, 1877, p. 40) sections 5 and 6 of chapter 19 of the Revised Statutes of 1866 were amended, and section 5, as amended, contained no statement in regard to fees of the sheriff in either county or justice's courts, and section 6 was amended to read as follows: "For performing the duties required by law to be performed by them in the county court, sheriffs shall receive the same fees as are allowed for similar services in the district court, except for attendance on the county court, to be taxed against the proper party or parties by the county judge." Neither, as will be noticed, containing anything in relation to a fee for attendance of the officer in a justice's court, the provision for such fee being entirely omitted from the last amendatory act. This act of 1877 also repealed the act to amend section 5 of chapter 22, approved February 25, 1875, to which reference was heretofore made, and also repealed all acts and parts of acts inconsistent with its provisions. From this it seems that there is no law in force which allows the sheriff any fee for attendance during the trial of a civil action in a justice's court, and the taxation of the sum of $2 as a part of the costs in the case at bar for such attendance was erroneous. This completes the consideration of all the points argued by counsel for plaintiff in error in the brief filed in this court, and it follows from the conclusions reached that the ruling of the district court affirming the judgment of the justice of the peace upon the merits of

the case must be affirmed, and the order in relation to the motion to retax the costs must be reversed and the case remanded for further action. (*Wallace v. Flierschman*, 22 Neb., 203; *Cooper v. Hall*, 22 Neb., 171.)

JUDGMENT ACCORDINGLY.

A. W. MCCREADY V. THOMAS J. PHILLIPS.

FILED APRIL 16, 1895. No. 6162.

1. **Instructions:** ISSUES. An instruction in which the court states to the jury the issues in the cause should not contain a statement of material matter not pleaded as being of the questions litigated.
2. ———: ———. An instruction by which the jury are informed that they may base their finding and verdict upon something not put in issue by the pleadings, is erroneous, and if calculated to mislead the jury, or prejudicial to the rights of a litigant, will be sufficient to work a reversal.
3. **False Representations:** DECEIT: DAMAGES: BURDEN OF PROOF. In an action to recover damages for alleged false representations or fraud and deceit practiced upon plaintiff, by reason of which it is claimed he was induced to part with property (in this case a farm) at a price greatly below its real value and thus damaged, it devolves upon the party pleading the fraud and deceit to show that he was influenced by the deceit and thereby induced to make such disposal of his property.
4. **Conversion:** MEASURE OF DAMAGES. Where personal property, including live stock, is left with a party to be cared for, fed, and sold, and after deducting expenses the proceeds to be delivered to the owner of the property, and after disposing of it the party with whom such property was left appropriated the proceeds to his own use, in an action against him to recover for the conversion, the measure of damages would be the amount of such proceeds.

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

Marquett, Deweese & Hall, for plaintiff in error:

A party to a contract who has facilities and opportunities for examining and ascertaining the true state of affairs, has no right to rely upon the representations of the other party. (*Parker v. Moulton*, 114 Mass., 99; *Mooney v. Miller*, 102 Mass., 217; *Poland v. Brownell*, 131 Mass., 138.)

To avoid a contract on the ground of false representations it must be shown that the representations were relied upon, and that damage resulted. (*Stout v. Merrill*, 35 Ia., 47; *Stafford v. Maus*, 38 Ia., 133; 1 Story, Equity Jurisprudence, secs. 195, 197; *Phillips v. Duke of Bucks*, 1 Vern. [Eng.], 227; *Dawson v. Graham*, 48 Ia., 378; *Gee v. Moss*, 68 Ia., 318; *Abbott v. Abbott*, 18 Neb., 505.)

Cornish & Lamb, *contra*, cited: *Converse v. Meyer*, 14 Neb., 192; *Porter v. Fletcher*, 25 Minn., 493; *Olson v. Orton*, 28 Minn., 36; *Nolte v. Reichelm*, 96 Ill., 425; *Morgan v. Dinges*, 23 Neb., 271; *Thomas v. Beebe*, 25 N. Y., 244.

HARRISON, J.

The defendant in error (hereinafter referred to as plaintiff) commenced an action in the district court of Lancaster county to recover of the plaintiff in error (hereinafter designated as defendant) the sum of $5,500 and some interest thereon, stating in his petition two causes of action, as follows:

"The plaintiff for cause of action states that on the —— day of February, 1887, the plaintiff was the owner and in the possession of the following described property, to-wit: Twenty head of calves, ten head of milch cows, one yearling bull, one span of mules, four mares, from seven to ten years old, twenty head hogs, two lumber wagons, three sets double harness, one self-rake reaper, two riding plows, one harrow, four hundred bushels oats, fifty bushels wheat, one

cook stove, one cupboard, one flour chest, one horse rake, one mowing machine, in the value of twenty-five hundred ($2500) dollars; that on the said date the defendants, without the consent of this plaintiff, unlawfully converted said property to their own use, to the damage of this plaintiff in the sum of twenty-five hundred ($2500) dollars.

"For the second cause of action plaintiff alleges that on or about the first day of December, 1886, the plaintiff was the owner and in the possession of the following described property, to-wit: The east one-half (½) of section twenty-five (25), township twelve (12) north, range four (4) east, Seward county, state of Nebraska; that on and subsequent to that date and up to and including the —— day of February, 1887, the plaintiff resided in Lake county, Dakota, a long distance removed from said land; that on or about the 1st day of December, 1886, the plaintiff employed the defendant A. W. McCready to go to Seward, Seward county, state of Nebraska, to investigate the incumbrance upon said land and report to plaintiff the result of said investigation; that the said A. W. McCready, in pursuance with said employment, went to Seward county, state of Nebraska, for the purpose of making said investigation, and thereafter returned to Lake county, Dakota, and falsely and fraudulently represented to this plaintiff that a judgment was rendered against plaintiff, to-wit, in the sum of eight hundred ($800) dollars, and that the same was a lien upon said land, and that the holders of the mortgages of twenty-three hundred ($2300) dollars had commenced foreclosure proceedings against said land, and thereafter, to-wit, on the —— day of February, 1887, the said defendants A. W. McCready and Sarah A. McCready renewed said representations to this plaintiff and stated to this plaintiff unless he sold said land that the same would be taken under the foreclosure proceedings, and that the plaintiff would realize nothing from the sale of said real estate, and thereupon the said defendants A. W. McCready and Sarah Mc-

Cready urged this plaintiff to dispose of said real estate to said defendants, and by reasons of said false representations and relying upon the same this plaintiff was induced to part with said real estate and dispose of the same to the defendant Sarah A. McCready; that said representations were false in every particular, and in truth and in fact no foreclosure proceedings had been commenced upon said mortgages, and said judgment would in truth and in fact not exceed the sum of five hundred ($500) dollars, and no measures had been taken to enforce said judgment against said real estate, and that said real estate was reasonably worth, up to said date, the sum of sixty-five hundred ($6500) dollars, and the said defendants, by means of said representations, induced the plaintiff to sell the same to defendant Sarah A. McCready for about the sum of thirty-five hundred ($3500) dollars, whereby the plaintiff was damaged in the sum of three thousand ($3,000) dollars; that the said Sarah A. McCready and A. W. McCready were and are wife and husband.

"By reasons of the causes of actions heretofore set forth, plaintiff asks judgment in his favor and against defendants for the sum of fifty-five hundred ($5500) dollars and interest thereon at the rate of seven (7) per cent per annum from the —— day of February, 1887, and costs of this action."

It appears that no service was obtained upon Sarah A. McCready. A. W. McCready filed the following answer:

"Now comes A. W. McCready, one of the defendants herein, and for his separate answer admits that the plaintiff was at one time the owner and in possession of the personal property described in plaintiff's petition, and further alleges that on the 25th day of February, 1887, said Thomas L. Phillips and his wife, Sarah Phillips, gave to this defendant a power of attorney in writing, by which this defendant was authorized, instructed, and empowered to sell and dispose of all the personal property described in plaintiff's first cause of action for and on behalf of said plaintiff,

in which said power of attorney this defendant was authorized and empowered to do the best he could in connection with the sale and disposition of said property, and said plaintiff agreed that he would find no fault whatever nor make any objections to anything that defendant might do in connection with said property and that the plaintiff would consider that said defendant had done the very best that could be done in connection with the sale and disposition of said property.

"This defendant further says that he sold said property under and by virtue of said power of attorney for the best possible price that he could obtain and on the most favorable terms for the sum of $1,190.

"Defendant further answering says that the proceeds arising from said sale were to be applied as far as they would go to the payment of three promissory notes of $500 each, and on the $602 note, all of which were executed and delivered by the said Thomas L. Phillips to this defendant and the proceeds arising from said sale were thus applied, leaving a balance still due and owing from the plaintiff to this defendant of $912, together with interest thereon, no part of which has been paid, but all of which is long past due.

"Defendant, in answer to the second cause of action in plaintiff's petition, says that he admits that plaintiff was the owner of the east half of section 25, township 12 north, of range 4 east, Seward county, Nebraska, and that he sold the same to said defendant, and that she paid to the plaintiff the purchase price of said land in full, and that all questions of every kind touching the sale and deeding of said property was had between said defendant and the plaintiff on the 23d day of December, 1886, and on said date defendant paid to the plaintiff as the balance of the purchase price of said real estate, and it was agreed that said defendant should assume six mortgages on said real estate of $2,700, together with the taxes of $111; also the interest on said mortgages from September 1, 1885.

"Defendant further answering denies each and every other allegation in said petition contained not hereinbefore specifically admitted.

"Defendant for the purpose of obtaining affirmative relief files his counter-claim or cross-bill and says that on the 23d day of December, 1886, that being the time on which the plaintiff and the defendant had a full and final settlement, the said plaintiff and his wife, Sarah Phillips, executed and delivered to Mrs. Sarah A. McCready their three promissory notes of $500 each, payable as follows, to-wit: The first one on the 1st day of October, 1887, with interest at the rate of ten per cent per annum from date; the second one, for $500, on the 1st day of October, 1888, with interest at the rate of ten per cent per annum from date; and the third one, of $500, on the 1st day of October, 1889, with interest at the rate of ten per cent per annum from date; that on the 25th day of February, 1887, the said Thomas L. Phillips executed and delivered to Sarah A. McCready, defendant herein, his promissory note in writing for $602, which was due and payable on the 1st day of January, 1888, with interest at the rate of ten per cent per annum from date; that this defendant is now the owner and holder of the three $500 notes given by said plaintiff and his wife to the said Sarah A. McCready, having purchased the same in due course of business before maturity; that all of said notes are long past due and the plaintiff has not paid the same, or any part thereof, except the sum of $1,190; that there is still due and owing to this defendant from said plaintiffs upon said promissory notes the sum of $912, together with interest from date at the rate of ten per cent per annum, for which amount this defendant prays judgment against said plaintiff.

"Wherefore this defendant prays that plaintiff's petition may be dismissed and that this defendant may recover a judgment against the plaintiff for $912 and interest and costs."

To which reply was made as follows:

"For reply to defendant's answer herein plaintiff denies the allegations therein contained, or if plaintiff did sign the power of attorney described in said answer, his signature was procured through the fraud and the false representations of said defendant. Plaintiff believes that he did not sign said instrument, and denies as aforesaid the other allegations in said answer contained."

There was a trial of the issues before the court and a jury, which resulted in a verdict and judgment in favor of the defendant in this court in the sum of $2,801.05, and to secure a review of the proceedings during the trial in the district court the defendant has brought the case to this court.

One assignment of error urged by counsel for defendant is: "The court erred in refusing to grant to the plaintiff herein a new trial for newly discovered evidence material to the plaintiff, as shown by the affidavits of C. L. Graves, Ed. Graves, and others submitted herewith, which evidence the plaintiff herein was unable after reasonable diligence to discover and produce on the trial." It will be noticed that this assignment refers to certain affidavits as submitted in support of the application for new trial on the ground of newly discovered evidence, and counsel in their brief quote from the statements contained in the affidavits, but we have been unable to discover these papers in any portion of the record filed in this court and must conclude that they were not made a part of it by being incorporated in the bill of exceptions, and not having the evidence before us which was considered by the district court in passing upon this portion of the motion, we cannot determine the correctness of its ruling thereon, and the presumption being in favor of its correctness, in the absence of anything tending to show to the contrary, it must be affirmed.

The first and second points which are argued in the brief

of counsel for defendant refer to alleged errors of the trial court in the instructions 1 and 7¼, given to the jury, and may be considered together. The portion of the first instruction, which was a summarized statement of the cause of action set forth in the petition, of which the defendant complains is as follows: "That defendant McCready, having been employed by the plaintiff to examine into the condition of 320 acres of land in Seward county, Nebraska, falsely and fraudulently represented that a judgment for $800 had been taken against the plaintiff and execution thereon levied upon said land;" and number 7¼, which it appears was number 4 of instructions requested for defendant in error, but designated by the court in regular order of instructions given as 7¼, read as follows: "If you find from the evidence that the defendant McCready falsely and fraudulently represented to the said plaintiff the mortgages upon said land in controversy were being foreclosed; that there was a judgment against the said plaintiff for $800, which was a lien upon said land, and upon which judgment execution had been issued and levied upon the land and the same was about to be sold, and the said defendant made such representations falsely and fraudulently with the intention of inducing plaintiff to make a contract of sale for said described property, and the said plaintiff, reposing faith and confidence in the said defendant, relied upon such representations and did make the trade of said land, and in that event you are instructed that the defendant in making the representations as aforesaid is liable in this action for the fraud and deceit so practiced and would be liable to the plaintiff for any injury he may have received thereby." Counsel for defendant contend that it was error on the part of the court to inform the jury that there was any question of false representations on the part of the defendant in relation to an execution having been issued and levied upon the plaintiff's land, included in the issues presented in the case for their consideration, inas-

much as no allegation of any such representation appeared in the petition, and for the same reason it was error and prejudicial to defendant's rights to instruct the jury on this same subject as the court did in instruction No. 7½, hereinbefore quoted, that as an element upon which a finding and verdict for plaintiff might be based, was the false statement of defendant that execution had been issued upon the judgment, levied on the land, and a sale of it about to be made, if shown by the evidence. It will be remembered, or a reference to the allegations of the petition herein quoted will disclose, that there is no statement in the pleadings of any representations by defendant in regard to an execution or any active measures instituted for the enforcement of the judgment; all that was claimed to have been said was that a judgment had been rendered in the sum of $800, and that the same was a lien upon the land. Counsel for plaintiff say that the fact of an execution and levy must have been in the pleader's mind; it is stated by implication. It is doubtless true that it may have been and was in his mind, but counsel might have further said that, following the usual and ordinary course of procedure or practice, it should not have been allowed to remain stored in the mind, but should have been written in and made part of the allegations or statements of the causes of action in the petition if it was desired to present it for the consideration of the court and jury. It will scarcely suffice, we think, to rely upon implication to supply a statement of such a material portion of a pleading in an action as this would have been in the case at bar. Furthermore, it appears from the testimony that the plaintiff had full knowledge in relation to this judgment, except as to its exact amount, which was about $500 instead of $800, the amount alleged to have been represented by defendant. Inasmuch as it was not pleaded that the defendant had falsely represented that an execution had been issued to enforce the judgment and levied

upon the land, and the same was about to be sold, it was error for the court to instruct the jury that this constituted one of the issues of the trial; and further, that if the evidence disclosed that such representation had been made by defendant and its falsity, etc., it might be made a constituent of a basis for a finding in favor of plaintiff. But it is urged that notwithstanding it was an erroneous action of the court to thus charge the jury in reference to matters which were not of the issues of the action, yet, since the portion of the instruction which was objectionable was not alone the subject of the instructions, but was in each of them, No. 1 and No. 7¼, combined with the further element of fraud and deceit, viz., an alleged false representation of defendant in regard to the foreclosure of the mortgages, and the two as a whole stated to be of the issues and for the examination and determination of the jury, if, eliminating the objectionable portion from the charge of the court there remained sufficient, if proved and believed by the jury, upon which to predicate a finding and verdict for the plaintiff as to this branch of the case, then the error in the charge was not prejudicial. It is a rule, which we believe is sustained by both precedent and reason, that in cases where fraud and deceit are the basis of a prayer for relief, the court will not measure with particularity to ascertain what portion of the alleged fraud and deceit has been established, or as to what effect it should have exercised upon the parties upon whom it was practiced, but the issue will be, was any portion of it used as alleged and for the purpose stated, and was it sufficient to effect the purpose? Did it in such a case as the one under consideration excite the complaining parties and cause such fear and apprehension in their minds of a loss of their property as to induce them to dispose of it to the party making the representations at a sacrifice, or far below its real value and on terms and conditions disadvantageous to them and to the advan-

tage of the other party? If so, relief will be granted. (See Bigelow, Fraud, 88, 89, and cases cited; Kerr, Fraud & Mistake, 75.)

A question which it seems proper to consider at this time is, did the representations, if proved to have been made by defendant and to have been false in relation to the foreclosure of the mortgages, so operate upon and influence the minds of plaintiff and his wife in causing them to fear the loss of the farm as to induce them to part with and convey it to defendant or some one designated by him, for such a reduced consideration as compared with its value as to constitute it a fraud upon their rights in the premises. To determine this we turn to the testimony of the plaintiff and his wife. He stated that the land was worth $20 per acre, or the whole farm of 320 acres $6,400, and a number of times he said he wanted $6,000 for it, and in stating, during cross-examination, his understanding of the sale to defendant, testified as follows:

Q. Now is not this a fact, that when you purchased this $3,000 worth of personal property from McCready, you gave him your notes for $3,000 and you also gave him a deed to your farm, and you told him that the incumbrance on the farm was $2,300, and he was to give you credit upon this $3,000 that you owed him for the puchase price of the farm after deducting the $2,300 incumbrance.

A. No, sir; that was not the transaction.

Q. How do you know?

A. There was nothing said about that.

Q. How did you happen to fix the consideration? What was the consideration you gave him in that deed at that time?

A. Six thousand dollars.

Q. How much was the consideration for the farm when you sold it to him the last time or second time?

A. He gave me so much for it.

Q. Well, how much? Four thousand five hundred dollars, was it not?

A. He gave me the stock and $800, and assumed all the mortgages.

Q. He gave you the stock and $800, and assumed all the mortgages?

A. Yes, sir; he took out the horses and some other things, I do not recollect; that was assigned to S. A. McCready, the same stock.

Q. That is, you turned back part of the stock?

A. Yes, sir; I did not have any use for it.

Q. You turned back stock, the difference between $2,300 and $3,000.

A. I cannot just tell how much I turned back.

Q. You are not very clear on that transaction, are you? Do you remember pretty distinctly the whole transaction?

A. Yes, sir; I do.

* * * * * * *

Q. How much were you to get for this farm when you made this final deed?

A. Two thousand four hundred dollars worth of cattle and stock and $879 in money.

Q. That was the full consideration for the place, was it?

A. Yes, sir.

Q. That was your understanding of the transaction, was it?

A. Yes, sir.

And during the redirect examination:

Q. In the final sale of the place, the farm for $2,400 worth of stock and $879 in money, what was done with the incumbrance,—the mortgages and judgments upon the land?

Objected to; that this has all been gone over and it is not proper redirect examination. Overruled. Exception.

A. He assumed the $2,300 and the judgments. He claimed the mortgages to be $2,700.

Q. He assumed that and agreed to pay that?

A. Yes, sir.

Q. And that made up a part of the consideration?

A. Yes, sir.

And again during recross-examination:

Q. Now tell the jury how much he was to give you for the land and the manner in which it was to be paid. Tell the jury how much you sold the farm for.

A. As I said before, I would not take less than $6,000 for it.

Q. How much did Mr. McCready agree to pay you for it?

A. He was to give me $2,400 worth of stock and $800 in money and assume the indebtedness.

Q. How much was the indebtedness?

A. There was a $500 judgment, $507 is what the record shows, and there was $2,300 in three mortgages, one of $800, one of $1,000 and one of $500, and there was taxes of $35, and he claimed there was another tax of about $70 for the next year, the year following.

Q. So the agreement between you and Mr. McCready at that time was, that you were to have $6,000 for the farm?

A. That is what I wanted for it.

Q. Was that the agreement?

A. I understood it so.

Q. Will you answer my question—was the agreement between you and Mr. McCready that you should have $6,000 for your farm, that he was to give you $2,400 in cattle, $870 in money, and he was to pay off the incumbrance? Was that the agreement between you and Mr. McCready?

A. Yes, sir; that is the way I understood it.

Q. That is the way you understood it?

A. Yes, sir.

Mrs. Phillips, wife of plaintiff, testifies on this subject, during direct examination, as follows:

Q. What did Mr. McCready say about your farm?

A. Mr. Phillips did not do much talking. My husband never done much talking. Mr. McCready done the talking. We let him do the talking—what talking there was done. He explained how the place was to be sold under the mortgage on it. What there was upon the place was to be foreclosed; that we were back so much; that he was to give $878 and we were to have the cattle and he was to assume the indebtedness against the place and we were to have the stock and $878 difference in money.

Q. What stock do you mean?

A. We were to have the cattle and horses.

During cross-examination she states:

Q. Now you say at that time that this conversation you have been speaking about took place that you sold your farm for $6,000.

A. Yes, sir.

Q. And that he was to pay $2,400 in stock?

A. Yes, sir.

Q. And $878 in money?

A. Yes, sir.

Q. And he was to assume the incumbrance upon the place?

A. Yes, sir; that is the way I understood it.

These statements of the plaintiff and his wife show that at the time he sold his land, the contract for it, as they understood it and made it, gave them for it as much as the plaintiff asked for it, and any representations made by defendant did not influence them, according to their own statements or version of the affair, to dispose of the land at a sacrifice. From any view of the plaintiff's case as presented by the petition and testimony, we must conclude that the instruction numbered 7½ was not applicable to the issues or evidence and should not have been given; and further, that there was no testimony to sustain a finding that the mind of plaintiff had been so operated upon by false representations of defendant as to induce him to sell his

farm for a price far below its value, or even less than what he considered it worth, or wanted for it.

Another branch of plaintiff's action was the alleged conversion by defendant of personal property of the value of twenty-five hundred dollars. The evidence discloses that the plaintiff had been living in Dakota with the defendant, or on his farm, and a large portion of this personal property which it is stated the defendant converted consisted of the stock which was sold by defendant to plaintiff, or, as it will be remembered the plaintiff and his wife testified, became theirs as a part of the consideration for the sale of their farm to defendant. During the month of February, 1887, the plaintiff removed with his family from Dakota to Omaha, Nebraska, and it was agreed that defendant should care for this personal property, make a sale of it, and, the plaintiff says, send the proceeds to him at Omaha. Defendant claims that the proceeds were to be applied on some notes which he then held and which he further claims evidenced an indebtedness of the plaintiff to him arising out of the land and stock deal which are the subjects of the whole controversy in this action. The court, at the request of plaintiff, instructed the jury as follows on this part of the case:

"You are instructed that if you find from the evidence that the said plaintiff was the owner of the chattel property described in plaintiff's petition, having purchased the same from the defendant McCready, and that the said plaintiff left the said property in the possession and under the care and control of the said defendant with an understanding and agreement with the said defendant McCready that he should sell and dispose of the same and remit the proceeds thereof to this plaintiff; and if you further find from the evidence that the said McCready did dispose of and sell the said described property, but failed to comply with said agreement and understanding, and failed to remit the said proceeds to the plaintiff, but appropriated the same to

his own use and failed to account therefor, then and in that event you are instructed that such appropriation of the proceeds from said sale would constitute a conversion and the plaintiff herein would be entitled to recover at your hands a verdict for the market value of said property at the time so converted."

This, it is contended by counsel for defendant, was erroneous, in so far as it stated that the measure of damages would be the market value of the property at the time converted.

In further charging the jury the court stated in instruction number 10, as follows:

"The plaintiff cannot be heard to complain at this time as to the prices received for said property, and as to the matter of caring for and disposing of the said property, provided the jury find that the defendant used ordinary care and prudence in caring for, selling, and disposing of said property, and would only be obliged to account to the plaintiff for the proceeds arising from said sale after paying the expenses of feeding and caring for said property."

This latter instruction, we think, was correct, and, in view of all the evidence relating to the subject involved, stated the true rule of damages or measure of recovery. The plaintiff was allowed to testify in regard to the value of this property (defendant objecting) as follows:

Q. You may state what was the value of the personal property that you purchased at that time from McCready.

Objected to, as incompetent and immaterial, and not the proper foundation laid, and not admissible under the issues.

Q. What was the value of that personal property?

Objected to, as incompetent and immaterial, and not the proper foundation laid. Overruled. Exception.

A. It was thoroughbred stock—young cattle. It was worth the money he represented it to be.

Q. What did he represent it to be worth?

A. Two thousand four hundred and seventy dollars is what he had upon the book.

This surely could not be accepted as furnishing information from which the jury should assess the amount of recovery, if any, directed as it was to the time of the purchase of the property, and, under the guidance of the language used in instruction numbered 1, in reference to their branch of the case, the jury were liable to be misled in adopting this value as the amount to be recovered. The defendant stated, while testifying on this point, that he realized from the sale of the personal property, having sold part at auction and part at private sale, after paying expenses, etc., the sum of $1,190. The verdict in the case was a general one in the sum of $2,801, and not directed or confined to any particular branch of the case, nor any statement made by which we are able to say whether it was in whole or in part given as damages for the alleged fraud and deceit practiced in inducing the sale of the farm to defendant or in whole or in part for the damages claimed to have resulted from the alleged conversion. Were it not so, we might accept the amount of the proceeds of the sale of the personal property as stated by defendant as being the amount which plaintiff should recover, and require a remittitur on his part from the amount of the verdict as rendered to make it meet this view, but the two were parts of the same transaction, and necessarily so closely connected that it seems, with all the information which can be derived from the record before us, that they must stand or fall together. This being the conclusion reached, it follows from what has been hereinbefore said in relation to portions of the proceedings during the trial that the judgment of the district court must be reversed and the case remanded.

REVERSED AND REMANDED.

GEORGE WARNICK, APPELLEE, V. SILAS LATTA, APPELLANT.

FILED APRIL 16, 1895. No. 5514.

Quieting Title: CANCELLATION OF CONTRACT: REVIEW: SUFFICIENCY OF EVIDENCE. On this appeal the only question presented being the sufficiency of the evidence to sustain the decree of the district court, and a full consideration of all the proofs being found to justify such decree, it is affirmed.

APPEAL from the district court of Phelps county. Heard below before BEALL, J.

C. H. Roberts and *E. M. Palmer*, for appellant.

J. R. Patrick, contra.

RYAN, C.

In the district court of Phelps county this action was begun for the purpose of removing from the title of plaintiff to certain land a cloud alleged to exist from the records of that county disclosing the following contract, to-wit:

"We, L. D. Vanderhoof and J. H. Johnson, being duly appointed and authorized agents of Mrs. B. Bartlett to sell N. W. ¼ of sec. 28, town 6 north, of range 18 W., having been appointed by Mrs. Bartlett in writing, and after request to sell the same for thirty-eight hundred dollars, we have sold the said tract of land to S. A. Dravo and Silas Latta on the first day of June, 1887, for thirty-eight hundred dollars, all cash, and payments to suit Mrs. Bartlett, having received from Dravo and Latta fifty dollars and their agreement to settle the rest as soon as a deed is delivered to Vanderhoof & Johnson, Dravo and Latta assuming mortgage, but mortgage to be deducted from the original purchase price; and the said Dravo and Silas Latta agree to purchase said land upon the terms heretofore mentioned

and pay said sum of thirty-eight hundred dollars, assuming said mortgage as a part thereof.

"MRS. B. BARTLETT,
"By VANDERHOOF & JOHNSON,
"*Her Agents.*
"S. A. DRAVO & SILAS LATTA.

"Dated June 1, 1887."

There were filed separate answers by S. A. Dravo and Silas Latta. In substance, the answer for S. A Dravo was a disclaimer of any interest in himself by reason of having received a promissory note for two hundred dollars from Mrs. Bartlett in consideration of releasing her from the above contract. In addition to the above averments of the answer of Dravo, he, at considerable length, disclaimed that in settling and receiving the $200 note, he in any way represented or concluded Mr. Latta. By the answer of Latta it was admitted that the contract was made in the terms above set out and had been filed for record in the county clerk's office of Phelps county, and that plaintiff had received a warranty deed from Mrs. Bartlett, but it was alleged that the deed was received with actual and constructive notice of the rights of Latta. There was also an offer to pay $1,900 to Mrs. Bartlett, and a prayer for a decree requiring conveyance to Silas Latta. There was a decree in favor of George Warnick as against Latta, who alone appeals.

There is no room for question that the decree quieting all claim of the appellant was right, for it was satisfactorily shown that Warnick purchased without actual notice of the existence of the above copied contract. It is scarcely necessary to observe that, without being witnessed or acknowledged, this instrument should not have been recorded, and that if, nevertheless, the county clerk did record the same, the mere fact that without authority it was placed upon the record would not constructively impart notice of its contents. It scarcely admits of doubt that the payment of

the $200 consideration to Dravo by note was made and received in settlement of the claims made both by Dravo and Latta, and that the present litigation is due solely to the fact that Dravo now retains as his own the entire proceeds of the note turned out to him. In effecting the transfer of title from Mrs. Bartlett to Mr. Warnick, Dravo made out the necessary deed and, in advance, passed upon the title which thereby would be vested in Mr. Warnick. The existence upon the records of the above contract he regarded as of little consequence, for, before this time Latta had withdrawn the earnest money which he had paid to Mrs. Bartlett's agents above named, and as Dravo assumed, the rights of Latta thereby ceased to exist. After this action was begun Dravo withdrew his proportion of the earnest money deposited with the agents of Mrs. Bartlett, and thenceforward he has done all he could to enable Mr. Latta to obtain an amount equal to that which he himself had received. In view of all the facts disclosed in evidence, we are at a loss to understand why any portion of the costs was taxed against Warnick. In this court he has not complained, doubtless because he wished to avoid delays, yet this omission precludes relief. When the case is remanded to the district court for further proceedings it will not be inappropriate, neither will it be too late, to move for a retaxation of costs, if such course is deemed advisable. The judgment of the district court is

AFFIRMED.

LOUIS EHRLICH V. STATE OF NEBRASKA.

FILED APRIL 16, 1895. NO. 5807.

Oral Instructions: CRIMINAL LAW. Under the provisions of sections 52 to 56, chapter 19, Compiled Statutes, the giving of oral instructions in either civil or criminal cases, without a waiver of the statutory requirement that they be given in writing, is reversible error. An oral instruction, over proper objections, having been given in this case in disregard of the above statutory provisions, the judgment of the district court is reversed.

ERROR to the district court for Seward county. Tried below before MILLER, J.

Norval Bros. & Lowley, for plaintiff in error.

George H. Hastings, Attorney General, contra.

RYAN, C.

This case was submitted for our determination on April 5, 1895, and in accordance with the practice of this court in criminal cases is decided at the earliest practicable moment. The plaintiff in error was convicted in the district court of Seward county of an attempt to commit the crime of rape upon the person of a female child under the age of fifteen years. The case of *Hall v. State*, 40 Neb., 320, will probably be found instructive as to several propositions discussed, hence they shall not receive special consideration. Among other instructions one was given to the effect that if the accused at any time administered drugs to the complaining witness in furtherance of his criminal design, such use of drugs would constitute an assault, whether successful or not. On the day following that upon which the case was submitted, the jury returned into court and by a communication signed by their foreman asked "further information" in regard to the subject-matter of the above in-

struction. The court thereupon, in the absence of the accused, notwithstanding objections of counsel for the accused, orally instructed the jury as follows: "Gentlemen of the jury: By the using of the word 'may' in this instruction means that the offense can be committed by the defendant laying a hand upon a female child by a male person over eighteen years of age; or, in other words, that if from the testimony you should find that the defendant indecently handled or fondled the complaining witness in this case, that such would be an offense under the statute." By an act of the legislature of this state approved February 19, 1875, now embodied in chapter 19 of the Compiled Statutes as sections 52 to 56 inclusive, it is required that all instructions, whether in criminal or civil cases, in the absence of an express waiver in open court entered of record, shall be written, and that they must be read to the jury. Section 56 of said chapter contains the following provisions: "No oral explanation of any instruction authorized by the preceding sections shall in any case be allowed, and any instruction or charge, or any portion of a charge or instructions given to the jury by the court and not reduced to writing as aforesaid, * * * shall be error in the trial of the case and sufficient cause for the reversal of the judgment rendered therein." There is under this statute no alternative, and the judgment of the district court is

REVERSED.

NORVAL, C. J., not sitting.

KATHARINE VAUGHN V. WILLIAM H. CRITES ET AL.

FILED APRIL 16, 1895. No. 6130.

1. **Misconduct of a Juror:** HARMLESS ERROR. Misconduct of a juror, urged by a party whom such misconduct, if established, could not have injured, is not available in error proceedings in the supreme court.

2. **Instructions:** BILL OF EXCEPTIONS: ARRANGEMENT. An instruction to find for plaintiff—the party asking it—was properly refused, where the effect to be given certain evidence was therein misstated and made subordinate to propositions of fact with which, logically, it had no relation.

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

John Patterson, for plaintiff in error.

W. T. Thompson and *J. W. Sparks, contra.*

RYAN, C.

This action of replevin was brought by Katharine Vaughn against William H. Crites for the possession of certain personal property by him, as sheriff, levied upon for the satisfaction of two executions. In the petition it was asserted that Mrs. Vaughn was the absolute owner, and by her proofs she sought to show that she had purchased it from Morgan L. Wright, her son-in-law, before it had been levied upon by virtue of the judgments against him for the satisfaction of which said execution was issued. The existence and good faith of this transfer as against the aforesaid judgments were the questions litigated between the plaintiff and the defendant above named. During the pendency of the action Isaac V. Traver, as administrator of the estate of Margaret T. Wright, the deceased wife of Morgan L. Wright, was permitted to intervene and assert

that the ownership and right of possession of the disputed property was in himself as such administrator. Issues having been duly joined between all the parties, a trial was had, which resulted in a verdict in favor of the intervenor, on which judgment was duly rendered. The errors complained of are assigned by Katharine Vaughn, as plaintiff in error.

In support of the motion for a new trial there seems to have been filed several affidavits, met by counter-affidavits, between which the issue was whether or not a juror had been guilty of misconduct such as would justify setting aside the verdict afterwards reached. It is unnecessary to consider this proposition for two reasons: The first of these is that the verdict was against the sheriff and the misconduct alleged was with the judgment creditor, for whom the sheriff was acting in the levies sought to be defeated. The other reason is, that the district court of Merrick county, wherein this case was tried, has found adversely to the alleged misconduct as a question of fact on conflicting evidence, and, under such circumstances, its finding of that character is conclusive. That the filing of these affidavits may not be entirely without result, however, this opportunity is taken for saying that a bill of exceptions should have some definite point of commencement. In this case, immediately following the certificate of the clerk to the transcript, there is met, without any warning, a succession of original affidavits in which the chirography is of various styles. On a cover attached to these affidavits is this inscription: "Affidavits used by deft's upon the hearing of the motion for a new trial." In the midst of the entire bundle of affidavits there is a like inscription upon one affidavit, the only difference being the substitution of the word plaintiff for defendant. Among these latter affidavits two are marked "Exhibit A" and one is marked "Exhibit B." Following all these affidavits there succeeds first a copy of two "schedules of personal property" marked Ex-

hibit No. 2, then a copy of a petition of above twelve pages of what, by a stretch of courtesy, might be called written matter, which is marked "Exhibit A;" then, in cheerful and confusing succession, there follows a copy of a deed, marked "'Exhibit B,' received in evidence upon the trial of said cause, as shown upon page 32 of said bill of exceptions," after which is "a list of hotel furniture and fixtures sold to Katharine Vaughn, July 10, 1891," indorsed "Exhibit A, received in evidence on the trial of said cause, as shown on page 14 of this bill of exceptions." Perhaps it may serve to extenuate these offenses to remark that in some instances the descriptive words quoted were written in red ink. Following the affidavits and exhibits just described there is a page containing neat, type-written lists of witnesses, each with proper descriptive headings. On the page following this there is found the title of the case, immediately after which are the words "Katharine Vaughn, sworn by the plaintiff; examined in chief by Mr. Patterson." Then follow in good type-written copy alternate questions and answers of different witnesses, with objections, the rulings of the court and exceptions thereto and admissions of facts, until finally there is reached the certificate of the reporter. It is within the knowledge of the writer hereof that the above hodgepodge method of presenting affidavits very nearly led to their being entirely disregarded in one instance, owing to circumstances which might exist in any case. There is, therefore, a real necessity that the bill of exceptions should begin with a proper caption, and that within such bill, or attached to it and identified by the judge settling the same, there should be such reference to exhibits as will preclude the possibility of any mistake.

It is urged that the court erred in its refusal to give the fourth instruction requested by the plaintiff, in which was this language:

"4. The jury are further instructed that, although you

may find from all the evidence in the case that the property in controversy was in the year 1890 listed for taxable purposes in the name of Margaret T. Wright, the wife of said Morgan L. Wright at said time, still, if you further find from all the evidence in the case that the said property was the fruits of the joint earnings and accumulations of the said Morgan L. Wright and the said Margaret T. Wright during coverture and during the time they lived together as husband and wife, and that the said Morgan L. Wright had not transferred the title to the said property to the said Margaret T. Wright during her lifetime by gift, settlement, sale, conveyance, or otherwise, then you should find for the plaintiff, Katharine Vaughn," etc.

The above instruction concludes with a proviso as to the rights of creditors as against the title of Katharine Vaughn being dependent upon the good faith of the transfer,—a proposition which need not be discussed, since, in this court, parties who might be interested in that question have no contention with each other. The only part of the instruction requested, therefore, with which we are concerned is that which laid down the proposition that if, in 1890, the property was listed for taxation in the name of Mrs. Wright, and the same had been earned by herself and her husband jointly, and Morgan L. Wright during the lifetime of his wife had not transferred it to her, then that the jury should find for the plaintiff. The legal proposition assumed to be asserted in this instruction was stated in such terms that it was really dependent in no way upon the manner in which the listing for taxation took place in 1890. The evidence of the assessor was that in 1890 Morgan L. Wright stated to him that the property belonged to Mrs. Wright and that she would have to give it in for assessment, and in 1891 plaintiff told witness that Dr. Whittaker was in possession of the personal property as trustee for the children of Mr. and Mrs. Wright. The schedule for 1890 was accordingly verified by Mrs. Wright

and the property was therein described as individually her own. The evidence as to the assessment of this property was therefore important, as tending to contradict that of Morgan L. Wright, and the court very properly refused the requested instruction which ignored the bearing of this testimony in that direction.

As to the remaining assignments of error, that the verdict was not sustained by the evidence and was contrary to law, it is merely necessary to say that we do not agree with counsel for plaintiff as to either of these propositions. The judgment of the district court is

AFFIRMED.

NEW HOME SEWING MACHINE COMPANY V. ADONIRAM J. BEALS.

FILED APRIL 16, 1895. No. 6153.

Attachment: LIEN OF LEVY: PURCHASE MONEY NOTES. The levy of a writ of attachment creates a priority over rights reserved or created by conditions contained in unrecorded notes given by the attachment debtor for the purchase price of the personal property levied upon.

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

F. B. Donisthorpe, for plaintiff in error.

Charles H. Sloan, contra.

RYAN, C.

This action was brought to recover fifty dollars, the alleged value of a Prescott organ. There was a verdict and judgment in favor of the defendant. The defendant, by

virtue of a writ of attachment in his hands against George W. Chapman, as a constable of Fillmore county, levied upon the above described organ, which he afterwards sold under authority of an execution issued in the same cause as that wherein the levy of the above writ of attachment had been made. It was a disputed fact whether or not the organ, when taken under the writ of attachment, was locked in a room wherein it had been left by George W. Chapman when in the night-time he rather suddenly left Geneva. On behalf of the plaintiff it was testified that the musical instrument in question had been left locked in the room of which the key was given to his cousin, J. W. Kennedy; that George W. had instructed this cousin, a drayman at Geneva, to deliver the organ to Mr. Daley, the resident agent for the plaintiff, but that, being delayed by other matters, this request was not at once complied with, and meanwhile that the levy complained of had been accomplished, the required entrance therefor having been forcibly made. On the part of the defendant the evidence was that the organ was left in the room by Chapman; that there was no door locked, though there were several through either of which an entrance could be effected; that under these circumstances the levy of the writ of attachment was made. It was testified by two witnesses, without contradiction, that after the levy Mr. Kennedy came after certain articles left by Mr. Chapman in the room where the organ was, and his attention being called to the organ, that he disclaimed having any directions with regard to it. Afterwards there was served upon the defendant a notice that the plaintiff was the owner of the organ upon which the writ of attachment had been levied. Since the above disputed questions of fact were settled by the jury in favor of the defendant, there remains but one phase of the case for consideration.

The plaintiff was the assignee of two notes made by Chapman to E. H. Daley, its agent, and claims that by

virtue of the terms of said notes it was entitled to the organ or to its value. These notes, on which there was due $5 per month, were given for the organ, and each contained the following provisions immediately following the dates whereon the respective five-dollar payments should become due, to-wit: "For value received, I, or we, the undersigned, do hereby sell and mortgage unto the payee hereof one Prescott organ, No. ——, now in my possession, provided that if the undersigned shall pay the said debt, then this mortgage shall be void. In case of default, I, or we, authorize the said mortgagee to seize and sell said property and pay said debt with expenses incurred; or if the said mortgagee shall at any time feel unsafe or insecure, then he may seize and sell the property." It was admitted in open court that the notes which contained the above provisions were never filed for record. The district court very properly instructed, under these circumstances, that the levy of the writ of attachment was entitled to priority over rights reserved or created by the above conditions. The judgment of the district court is

AFFIRMED.

GUS SCHRAGE ET AL., APPELLEES, V. L. N. MILLER ET AL., APPELLANTS.

FILED APRIL 16, 1895. No. 6419.

Landlord and Tenant: REPAIR OF BUILDINGS: MECHANICS' LIENS. A requirement in a lease, that the lessee shall to a specified amount "put cash in repairs" upon the leased premises, confers no right of charging such repairs when made against the landlord or his property.

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

Frick & Dolezal, for appellants, cited: 15 Am. & Eng. Ency. Law, 19; *Knapp v. Brown*, 45 N. Y., 207; *Muldoon v. Pitt*, 54 N. Y., 269; *Hickmann v. Pinkney*, 81 N. Y., 216; *Cornell v. Barney*, 94 N. Y., 394; *Boteler v. Espen*, 99 Pa. St., 313.

Fred W. Vaughn, *contra*, cited: *O'Neil v. St. Olaf's School*, 26 Minn., 329; *Meyer v. Berlandi*, 40 N. W. Rep. [Minn.], 513; *Laird v. Moonan*, 32 Minn., 358; *Hill v. Gill*, 42 N. W. Rep. [Minn.], 295; *Bohn Mfg. Co. v. Kountze*, 30 Neb., 719; *Henderson v. Connelly*, 123 Ill., 98; *Millsap v. Ball*, 30 Neb., 728; *Pomeroy v. White Lake Lumber Co.*, 33 Neb., 243.

RYAN, C.

The defendants Edwin L. and Josephine A. Eno, on the 4th day of November, 1888, leased their hotel known as the Eno Hotel to A. F. Diver for a term of three years, to begin on January 1, 1889. The lessee agreed to take the property leased in the condition in which he should find it when it should be vacated at the commencement of his lease "and not ask of said first parties, the lessors, any money or outlay for repairs during the continuance of said lease, except for such damages as might be caused by the elements." Furthermore, the lessee agreed to put the sum of $1,200 cash in repairs on said premises, such as painting, papering, kalsomining, etc., but particularly to immediately paint veranda and front of hotel three coats, to be of lead and oil, and first-class work and material, such expense to be included in said outlay of $1,200. On the 5th day of July, 1889, the lessee assigned his interest in the above lease to Louis N. and Katie C. Miller, by whom, thenceforward, the conditions thereof were assumed. The theory upon which the right to an affirmance of the judgment of the district court of Dodge county enforcing a mechanic's lien against the above property must be founded,

if at all, must be circumscribed by the statements of the affidavit filed by the appellees. The portion which has any bearing on this question was in this language: "Gus Schrage, being first duly sworn, says that affiant and C. H. Stoner, under and by virtue of a verbal contract entered into with L. N. Miller and Katie C. Miller, lessees and proprietors of the Eno Hotel, in the city of Fremont, Nebraska, held and occupied by them under and by virtue of a contract and lease executed and made by Edwin L. Eno and Josephine A. Eno with A. F. Diver, and which lease and contract was sold and assigned by said A. F. Diver to said L. N. Miller and Katie C. Miller, by and with the consent of said Edwin L. Eno and Josephine A. Eno, whereby the said lessees were bound and compelled to make repairs upon said Eno Hotel for a given sum as part rent and consideration of said lease, that, under and by virtue of said contract, this affiant and said C. H. Stoner furnished material, consisting of wall paper and paint, and performed work and labor in connection with said wall paper and paint in repairing and fixing said rooms of said Eno Hotel to the amount of one hundred and sixty-seven $\frac{58}{100}$ ($167.58) dollars, upon which there has been paid and credited the sum of one hundred and sixteen $\frac{40}{100}$ ($116.40) dollars, leaving a balance due this affiant and C. H. Stoner of the sum of fifty-one $\frac{18}{100}$ ($51.18) dollars." The decree was for the amount just stated with costs.

It is very clear that the plaintiffs were not entitled to a lien because of having furnished material and performed labor under a contract therefor with the lessees as such. (*Waterman v. Stout*, 38 Neb., 396.) Probably this was not so much hoped for, as that, under the requirement of payment for repairs, it should be assumed that the lessee was impliedly constituted the landlord's agent in respect thereto. The language above quoted from the affidavit seems to countenance this theory, and it is urged in the brief for the appellees. By the terms of the lease, however, it was

agreed that the lessee would not ask of the lessors the outlay for repairs of the kind described in the above mentioned affidavit. Aside from this, the terms of the lease were not as indicated in the above affidavit, for the requirement was not that the lessee should make repairs of the value of $1,200, but that he should put the sum of $1,200 cash in repairs; in other words, that a part of the consideration for the three years lease was the payment of $1,200, which should be made for repairs, which repairs would inure to the benefit of the lessee until the expiration of his term. This was not a requirement to make repairs, requiring payment to be made, perhaps, by the lessors. It was an authority solely to pay cash to the extent and for the purposes indicated. Under such conditions the estate of the lessors was not bound. (*Hoagland v. Lowe*, 39 Neb., 397; *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207; *Pickens v. Plattsmouth Investment Co.*, 37 Neb., 272; *Holmes v. Hutchins*, 38 Neb., 601; *Sheehy v. Fulton*, 38 Neb., 691.) It follows, therefore, that the judgment of the district court subjecting the property of the appellants to the payment of the indebtedness found due from other parties was without warrant, and it is therefore

REVERSED.

JOHN J. O'ROURKE V. JOHN N. BURKE ET AL.

FILED APRIL 16, 1895. No. 6373.

1. **Guaranty:** BUILDING CONTRACT. In a building contract it was provided, in effect, that a part of the compensation might be paid on the pay-roll every two weeks as the work progressed, and furthermore, that in case of payment a certificate should be obtained from the architect, among other things, to the effect that he considered the payment due. *Held*, That to the amount of payments of the pay-rolls made without the required certificate

the guarantor of compliance with the terms of his agreement by the contractor was discharged.

2. **Building Contracts.** The reservation of the right at his own option to make payments by assuming lumber bills, of necessity excluded the inference therefrom that the proprietor assumed payment of lumber bills, of the existence of which he had no knowledge.

3. ———. The reservation of the right to make changes in the plans to be followed in the erection of a building implies, as against a mere guarantor of performance by the contractor for the erection of such building, that the changes shall be such as reasonably might be considered as within the contemplation of the parties principal at the time such building contract was entered into.

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

The facts are stated by the commissioner.

Charles Offutt and *Charles S. Lobingier*, for plaintiff in error:

The surety was released by Burke's failure to retain the two-hundred-dollar reserve. (*Bell v. Paul*, 35 Neb., 240; *Simonson v. Thori*, 31 N. W. Rep. [Minn.], 861; *Calvert v. London Dock Co.*, 2 Keen [Eng. Ch.], 638; *Board of Commissioners v. Branham*, 57 Fed. Rep., 179.) He was also released by the failure to require certificate from the architect or to make payments "on the pay roll" to the laborers. (*Hayden v. Cook*, 34 Neb., 677.) A further ground of release is found in the unreasonable changes which were made in the plans without the consent of the surety and which materially increased the cost beyond the contract price. (*Consaul v. Sheldon*, 35 Neb., 247; *McLeod v. Genius*, 31 Neb., 6.) Whether the changes were unreasonable and the increase material were questions of law for the court. (*Oliver v. Hawley*, 5 Neb., 439; *Memphis Branch R. Co. v. Sullivan*, 57 Ga., 240; *Mispelhorn v. Farmers Fire Ins. Co.*, 53 Md., 473; *Pemberton v. Dooley*,

43 Mo., App., 176; *Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill., 116; *Penn Mutual Life Ins. Co. v. Crane*, 134 Mass., 56; *Gallon v. Van Wormer*, 21 S. W. Rep. [Tex.], 547; *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 642.) All the provisions of the contract are to be construed most strictly in favor of O'Rourke. (*Miller v. Stewart*, 9 Wheat. [U. S.], 638; *Crane Co. v. Specht*, 39 Neb., 123, annotated, 38 Cent. L. J., 387.)

Francis A. Brogan, contra, cited as to the retention of the reserve: *Foster v. Dohle*, 17 Neb., 631; *Irish v. Pheby*, 28 Neb., 231; *Consaul v. Sheldon*, 35 Neb., 247.

RYAN, C.

This action was brought in the Douglas county district court by John N. Burke against D. A. Way, the principal, and John J. O'Rourke, his surety, on a building contractor's bond which had been executed to Mr. Burke. There were alleged in the petition several failures of the principal to perform according to the terms of his contract, followed by a prayer for judgment for $1,500, the penal sum named in the bond sued upon. There was a verdict for the sum of $950, on which the judgment now complained of was duly rendered against O'Rourke, who alone defended. The contract for the faithful performance of the terms of which the above bond was entered into was dated May 12, 1891. It required D. A. Way, on or before June 24, 1891, to build to completion a certain hotel and hand ball court according to the requirements of certain plans and specifications therein referred to. The principal contentions which we shall consider were as to the manner in which payments of the amounts due under such contract should be made. The contract itself was prepared for signature by filling out the blanks in a printed form. This was done by an architect in such a manner as to render applicable Mrs. Quickley's description of bad language as an

"abusing of God's patience and the king's English." It is a well recognized rule that where a printed form has been filled out the written language controls that which is printed. The difficulty of determining just what was agreed can be illustrated only by quoting the exact written language with its defective orthography, its misplaced capital letters, and absence of punctuation, just as they exist. The provisions as to payments were in the following partly printed and partly written language, that which was written being indicated by the use of italics:

"*John Burke* * * * will well and truly pay, or cause to be paid unto the part— of the first part or unto *D. A. Way* heirs executors administrators or assigns the sum of $2143.80 *cents* Dollars lawful money of the United States of America in manner following: On —— 1891, *$2143.80 cents—the first payment in 2 weeks or the pay Role Every two weeks as the work progresses and John Burk Reserves the wright to asomes the lumber Bills But to keep Back two hundred dollars untill the work is all complete and excepted* when the building—is all complete and after the expiration of *10* days when all the Drawings and Specifications have been returned to J. W. Boileau Architect:

"Provided that in each case of the said payments a certificate shall be obtained from and signed by J. W. Boileau Architect to the effect that the work is done in strict accordance with Drawings and Specifications and that he J. W. Boileau considers the payment properly due," etc.

In the petition it was alleged "that during the progress of said work the plaintiff paid to the said Daniel A. Way, upon the written certificate of plaintiff's architect, the sum of seven hundred and sixty-eight dollars and five cents ($768.05)." In the answer there was pleaded an entire failure to require a certificate of the architect showing that the work had been done in the manner required, or, that J. W. Boileau considered payments properly due. By reply the plaintiff denied that he was required by the terms

of the contract to make said payments to the plaintiff for the purpose of paying the pay-roll only upon the production of a certificate from the architect, and alleged the fact to be that no certificate was by the terms of said contract required to be obtained from the said architect for the payment of the amount necessary for the pay-roll every two weeks during the progress of the said work, and that each and every payment made to the contractor during the progress of said work was made upon orders signed by the architect. At random from the bill of exceptions, we quote some of the orders on which payments were made, to-wit:

"Mr. John Burke, please pay to the contractor, D. A. Way, the sum of $100.00, as estimate on building.

"J. W. BOILEAU."

"Mr. John Bork, please pay to J. C. Pottinger the sum of $25.40. J. W. Boileau, Superintendent. Charge the same to plaster account."

"Mr. John Bork, pay D. A. Way five dollars on account O. K. J. W. BOILEAU, *Superintendent.*"

"John Bork, please pay to D. A. Way the sum of $246.90. J. W. BOILEAU on building, *Superintendent.*"

The above are samples of such orders as were in evidence, and from the testimony of witnesses and the averments of the reply above referred to it is quite evident that whatever else was issued by Mr. Boileau precedent to payments were in the same style. It must therefore be accepted as beyond question that each payment on the pay-rolls was made without obtaining a certificate from the architect as to how the work had been done and that he considered the said payment properly due. As we understand the written language quoted from the contract, the terms were that the first payment was to be in two weeks to D. A. Way, or the pay-roll (to be paid D. A. Way) every two weeks as the work progressed; in other words,

Mr. Burke was to make payment according to the pay-rolls at intervals of two weeks as the work progressed. By the printed proviso it was further required that as evidence that each pay-roll showed correctly what was payable, there should be obtained a certificate of the architect that he considered the sum shown by the pay-roll as at the time properly due. If at the time this suit was brought the plaintiff had in his hands money due for labor done under the above contract he could not recover from the surety the amount withheld from the principal. If that money was at one time in his hands and he paid it to the principal he must, to entitle himself to a recovery as against the surety *pro tanto*, be able to show that the payment to the principal was not in disregard of the terms of the contract as to which the surety sustained the relation of guarantor. As was said in *Brennan v. Clark*, 29 Neb., 385: "The rule is well settled that a surety is bound in the manner and to the extent provided in the obligation executed by him, and no further." See, also, *Bell v. Paul*, 35 Neb., 240, wherein it was held under a contract restricting payments to eighty-five per cent of the amounts of work done as shown by estimates of the architect, that payments in excess of eighty-five per cent without consent of the surety or estimate by the architect discharged such surety. The same principle was recognized in *Hayden v. Cook*, 34 Neb., 670. In the case at bar it was not shown that there was ever made by the architect a certificate which would justify payment of the amount of any fortnightly pay-roll. Payment without such certificate was, as against the surety, as though there was no payment whatever. As it is undisputed that the verdict was reached upon the assumption that such payments as were made upon the pay-rolls were properly made, the judgment of the district court must be reversed.

As to the construction to be given to the language whereby Mr. Burke reserved the right to assume the lumber bills, we are of opinion that the district court properly

held that the lumber bills contemplated were such as were known to Mr. Burke, for it could hardly have been expected that he would undertake to exercise a right of option as to that of the existence of which he was ignorant. The amount of the pay-rolls and of the lumber bills in the aggregate assumed, however, should not have been in excess of $1,943.80; that is to say, there should have been held back by Burke the sum of $200. On his theory, as we understand it, this was done. In the contract between Mr. Way and Mr. Burke was the following provision: "Third —Should the proprietor at any time during the progress of the said works require any alterations of, deviations from, additions to, or omissions in the said contract, specifications, or plans, he shall have the right and power to make such change or changes, and the same shall in no way injuriously affect or make void the contract, but the difference for work omitted shall be deducted from the amount of the contract by a fair and reasonable valuation; and for additional work required in alterations the amount based upon the same prices at which the contract is taken shall be agreed upon before commencing additions as provided and hereinafter as set forth in article No. 6, and such agreement shall state also the extension of time (if any) which is to be granted by reason thereof." In the construction of the building changes were made which involved greater cost than was originally contemplated, but these changes in advance were arranged for between Mr. Way and Mr. Burke, consistently with the provisions of their contract in respect thereto. The surety nevertheless contends that the departure from the plans and specifications operated to relieve him of liability. The instruction of the court, very aptly defining the rights of the surety in this respect, was in the following language: "You are instructed that under the contract the parties thereto had a right to agree to alterations, additions, or changes in the building without avoiding the contract, but that, in such

case, if such changes or additions increased the cost of the building, the amount thereof should be added to the contract price and the plaintiff would become liable to pay for such increased cost; provided, however, that if such changes unreasonably increased the cost of the building beyond what might reasonably be within the contemplation of the parties at the time of making the contract, such unreasonable changes would have the effect of discharging the surety. It is for you to say whether the changes and additions shown by the evidence were unreasonable or such as would not ordinarily in a building contract of this character be considered as likely or probable. If you believe from the evidence that such changes and additions were unreasonable, you should find for the defendant O'Rourke. If, however, you believe, considering all of the circumstances, that they were reasonable and such as would be likely to arise in contracts of this nature, the defendant, O'Rourke would not on that account be discharged. In considering whether the changes were reasonable or not you may, in connection with all the circumstances, take into consideration the relative cost of the building, as originally planned, and of the amount of the changes made in the plans." The surety could not properly ask, in the face of express provisions admitting of changes being made, that he should be protected against such changes, so long as they were reasonable and such as when the contract was made might have been contemplated as falling within the reservation of the right to make changes as above expressed. For the reasons hereinbefore stated the judgment of the district court is

REVERSED.

M. A. BLACHFORD v. PETER FRENZER.

FILED APRIL 16, 1895. NO. 5779.

1. **Forcible Entry and Detainer:** CONSTRUCTION OF STATUTE. Section 1023 of the Code of Civil Procedure construed. The legislature designed by the enactment of this statute to provide a summary remedy by which the owner of real estate might regain possession of it from one who had unlawfully and forcibly entered into and detained possession thereof, or one who, having lawfully entered, then unlawfully and forcibly detained possession.
2. **Justice of the Peace:** JURISDICTION: FORCIBLE ENTRY AND DETAINER: PLEADING. Justices of the peace have original jurisdiction of this class of cases; and it was not the intention of the legislature that the rule which requires the pleader to state the facts constituting his cause of action or defense should be applied to complaints in forcible detainer actions.
3. **Forcible Entry and Detainer:** PLEADING. The complaint of unlawful and forcible detention, to be good under this section, need not aver facts which show that the defendant unlawfully and forcibly detains possession of the premises. The complaint is sufficient if it is in the language of the statute.
4. **Landlord and Tenant:** LEASE: NOTICE. A subtenant is charged with notice of the existence of the tenant's lease and bound by its terms and conditions.

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

Hall, McCulloch & English, for plaintiff in error.

Howard B. Smith, contra, cited: *Lee v. Stiles*, 21 Conn., 500; *Ladd v. Dubroca*, 45 Ala., 421; *Barto v. Abbe*, 16 O., 408; *Brown v. Burdick*, 25 O. St., 260; *Grant v. Marshall*, 12 Neb., 488.

RAGAN, C.

This is a petition in error prosecuted to this court by Mrs. M. A. Blachford to reverse a judgment of the district court

of Douglas county rendered against her in favor of Peter Frenzer. The action was forcible detainer and brought by Frenzer against one C. E. Ham and the plaintiff in error. The jury in the district court found Mrs. Ham not guilty, and a judgment to go hence without day was by the district court pronounced in her favor. The jury found a verdict of guilty against Mrs. Blachford, on which the judgment was pronounced, which she seeks to reverse by this proceeding.

1. The first contention is that the complaint filed in the action before the justice of the peace, and on which complaint the action was tried in the district court, does not state facts sufficient to constitute a cause of action; or, as counsel for the plaintiff in error put it, such complaint was so defective as to render the action of the district court, in admitting any evidence under it on behalf of Frenzer, error. The complaint was as follows: "Peter Frenzer, the plaintiff herein, complains of the defendants C. E. Ham and M. A. Blachford, * * * for that the plaintiff is seized in fee-simple of the following described premises, to-wit: [Here follows description of premises.] That on or about the 15th day of December, 1889, the plaintiff leased the said premises to the defendant C. E. Ham for the term of one month at $110 per month, payable in advance, and that the said period has since elapsed; that the plaintiff has repeatedly demanded the rent of said premises for the month beginning March 15, 1890, which was refused, yet the said defendant Mrs. M. A. Blachford, who is the actual occupant of the said premises, unlawfully and forcibly detains possession of said premises and unlawfully and forcibly holds over the term of said lease; that on the 19th day March, 1890, the said plaintiff served on the said defendant a notice in writing," etc. Section 1023 of the Code of Civil Procedure provides: "The summons [in an action of forcible detainer] shall not issue until the plaintiff shall have filed his complaint in writing with the

justice, which shall particularly describe the premises so entered upon or detained, and shall set forth either an unlawful and forcible entry and detention, or an unlawful and forcible detention after a peaceable or lawful entry of the described premises." The defect said to exist in this complaint is that it contains no allegation of facts as to how or when or under what circumstances Mrs. Blachford obtained possession of said premises; that it contains no averment of fact showing that she was the tenant of Frenzer; in other words, that the language of the complaint, that Mrs. Blachford "unlawfully and forcibly detains possession of said premises and unlawfully and forcibly holds over the term of said lease," states mere conclusions, and that there is in the complaint no statement of facts which shows that Mrs. Blachford unlawfully and forcibly detains possession of the premises or unlawfully and forcibly holds over her term. A complaint of unlawful and forcible detention, to be good under this section, need not aver facts which show that the defendant unlawfully and forcibly detains possession of the premises. The complaint is sufficient if it is in the language of the statute. The legislature designed by the enactment of this statute to provide a summary remedy by which the owner of real estate might regain possession of it from one who had unlawfully and forcibly entered into and detained possession thereof; or one who, having lawfully entered, then unlawfully and forcibly detained possession. Justices of the peace have original jurisdiction of this class of cases, and it was not the intention of the legislature that the rule which requires a pleader to state the facts constituting his cause of action or defense should be applied to complaints in forcible detainer actions. (*Barto v. Abbe*, 16 O., 408; *Brown v. Burdick*, 25 O. St., 260.) The complaint states a cause of action; and the assignment of error that the district court erred in admitting any evidence under it on behalf of Frenzer must, therefore, be overruled.

2. That the verdict of guilty rendered against Mrs. Blachford is not supported by sufficient evidence. The evidence shows that Frenzer made a verbal lease of these premises to Mrs. Ham about the 15th of December, 1889. By the terms of this verbal lease she was to pay $110 a month rent, payable in advance. At the time of this contract of Mrs. Ham she told Frenzer that Mrs. Blachford was to occupy the premises with her; that Mrs. Blachford and Mrs. Ham both moved into the premises about that date; that within a week from that date trouble arose between Mrs. Ham and Mrs. Blachford and the former left the premises, Mrs. Blachford remaining; that the rent which was paid on the 15th of December, 1889, was paid by Mrs. Blachford; that she paid the rent of the premises on the 15th of January, 1890; that she paid the rent on the 15th of February, 1890; that she paid the rent up to the 15th of March, 1890. About the 15th of March, 1890, Frenzer demanded of Mrs. Blachford another month's rent, and "she promised that she would go and get it right off and pay." She said: "I will go and get it ready and pay you. I will go and get it right off and pay you." On the 17th or 18th of March, Frenzer again demanded of Mrs. Blachford his rent, and she answered that "she would go and get it down town;" but the rent was never paid. This evidence, we think, shows that Mrs. Blachford was occupying these premises as the tenant of Frenzer from the 15th of January, 1890, and that at the time this action was brought she was unlawfully and forcibly holding over her term. The evidence in the bill of exceptions before us does not show or tend to show that Mrs. Blachford was a subtenant of Mrs. Ham, nor do we think it would make any difference in the result if it did. So far as the evidence shows, Mrs. Blachford entered into the possession of these premises lawfully. If she entered as a tenant under Mrs. Ham, then she was bound by the terms of Mrs. Ham's lease, of the existence and terms of which she was

bound to take notice; and if she held possession of the premises, as tenant under Mrs. Ham, or otherwise, after the rent matured by the terms of the lease, she was guilty of unlawfully and forcibly detaining possession of the premises. The verdict and judgment are the only ones that could have been rightfully rendered under the pleadings and evidence of the case, and the judgment of the district court is

AFFIRMED.

IRVINE, C., not sitting.

JAMES PEARSALL, APPELLEE, V. COLUMBUS CREAMERY COMPANY, APPELLANT.

FILED APRIL 16, 1895. No. 5757.

Mechanics' Liens: EVIDENCE: REVIEW. This case involves no disputed question of law. The evidence examined, and *held* to support the finding and decree of the district court, and the judgment appealed from is accordingly affirmed.

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

Whitmoyer & Gondring, for appellant.

J. G. Reeder, contra.

RAGAN C.

James Pearsall brought this action in the district court of Platte county against the Columbus Creamery Company. The object of the action was to have established and foreclosed a lien for labor and materials which Pearsall alleged he had furnished the Creamery Company for the erection of an improvement on certain real estate belonging

to it. Pearsall had a decree and the Creamery Company has appealed. A large part of the claim of Pearsall was for extras. The defenses of the Creamery Company were that Pearsall had not completed the building within the time agreed under his contract, by which the Creamery Company had been delayed in the manufacture of butter and thereby damaged; that the building was not constructed of proper material and in the proper manner; and that it was not liable to Pearsall for the extras claimed. The evidence on all the litigated issues was conflicting. The appeal presents no question of law. The evidence sustains the finding and decree of the district court, and it must, therefore, be and is accordingly

AFFIRMED.

CENTRAL LOAN & TRUST COMPANY, APPELLANT, V. MARY O'SULLIVAN ET AL., APPELLEES.

FILED APRIL 16, 1895. No. 6180.

1. **Mechanics' Liens:** HUSBAND AND WIFE: SEPARATE CONTRACTS: CLAIM FOR LIEN: EVIDENCE. A material-man claimed a lien against the real estate of a married woman for material which he alleged he had furnished for the erection of improvements on said real estate in pursuance of an oral contract with the woman's husband. The items of material for which a lien was claimed were furnished as follows: 1890, February 11, 17; March 3, 6, 8, 17, 19, 22, 25, 26, 31; April 3, 10, 29; May 10, 20, 27; August 20; September 6, 16. *Held*, (1) That the evidence justified the finding of the district court that the items of material furnished between February 11 and May 27 were furnished under and in pursuance of one contract; and that the material furnished from August 20 to September 16 was furnished in pursuance of a separate and independent contract; (2) that the material-man, by filing in the office of the register of deeds of the county where the real estate was situate a verified account of the items of all this material within four months

after September 16, did not thereby acquire a lien against the wife's real estate for any of the material furnished prior to August 20; (3) that the evidence sustained the finding of the district court that the items of material furnished on and after August 20 were sold and furnished by the material-man to the husband individually, and not as agent of his wife, nor on the faith and credit of her real estate.

2. ———: CONSTRUCTION OF STATUTE: CONTRACTS: TACKING. The mechanics' lien law of the state should not be so construed as to enable a material-man to tack one contract to another and procure a lien for all the material furnished under all the contracts by filing in the office of the register of deeds an itemized account of such material within four months of the date of furnishing the last item of material furnished in pursuance of the last contract.

APPEAL from the district court of Hall county. Heard below before HARRISON, J.

Abbott & Caldwell, for appellant, cited: *Bradford v. Peterson*, 30 Neb., 98; *Howell v. Hathaway*, 28 Neb., 807; *Scales v. Paine*, 13 Neb., 521; *McCormick v. Lawton*, 3 Neb., 449; *Studebaker v. McCargur*, 20 Neb., 500; *Webb v. Hoselton*, 4 Neb., 308; *Kuhns v. Bankes*, 15 Neb., 92.

Charles G. Ryan, contra, cited: *Baker v. Wiswell*, 17 Neb., 52; *Goodman v. White*, 26 Conn., 317; *Ritter v. Stevenson*, 7 Cal., 388; *Donahy v. Clapp*, 12 Cush. [Mass.], 440; *Rogers v. Dickey*, 6 Ill., 636; *St. John v. Hall*, 41 Conn., 522; *Ballou v. Black*, 17 Neb., 396; *Dearie v. Martin*, 78 Pa. St., 55; *Wendt v. Martin*, 89 Ill., 139; *Bradford v. Higgins*, 31 Neb., 196.

RAGAN, C.

The Central Loan & Trust Company brought this suit in the equity side of the district court of Hall county to foreclose a mortgage upon certain real estate situate in said county. The mortgage was executed by Mary O'Sullivan

and Michael O'Sullivan, her husband, who were made defendants to the action. One Spooner R. Howell was also made a defendant to the action, for the reason that he had of record in the office of the register of deeds in said county a verified account of items of certain material which he alleged he had furnished to the O'Sullivans for the erection of improvements upon the real estate covered by the mortgage, and on which real estate he claimed a lien. Howell appeared in the case and filed a disclaimer, and also set out that he had assigned his "lien" to the First National Bank of Chicago, Illinois. This bank was made a defendant to the action, and filed its answer in the nature of a cross-petition, as the assignee of Howell, and claimed a lien against the real estate, the title to the property being in the said Mary O'Sullivan. There were several other parties to the action, but as the only question litigated in the court below was whether said bank was entitled to a mechanic's lien upon the real estate, the connection of other parties to the suit will not be further noticed. The district court found and decreed that the bank had no lien upon the real estate and dismissed its cross-petition, from which decree it has appealed.

1. The items of material which Howell alleges he furnished to the O'Sullivans, and for the value of which he claims a lien upon the real estate, appear, by the verified account of items filed for the purpose of obtaining a lien, to have been furnished as follows: 1890, February 11, 17; March 3, 6, 8, 17, 19, 22, 25, 26, 31; April 3, 10, 29; May 10, 20, 27; August 20; September 6, 16. The total amount claimed was $143.94; and Howell's contention is that all these items of material were furnished in pursuance of one contract made with Michael O'Sullivan at or about the 11th of February, 1890. The evidence shows that on the 11th of February, 1890, and at all times since then and before that time, Mrs. O'Sullivan was the owner of the real estate in controversy; that Michael O'Sullivan was her husband;

that on that date, prior to that time and until some time prior to the July following, O'Sullivan and his wife resided in the village of Wood River on property there owned by the husband; that the real estate in controversy was a farm some miles distant in the country from the village of Wood River; that about the 11th of February, 1890, Howell's agent made a verbal contract with O'Sullivan, the husband, to furnish him certain material, and that in pursuance of that contract Howell furnished to O'Sullivan, the husband, the items of material from February 11 to May 27, both inclusive; that part of this material was used by Michael O'Sullivan, the husband, in making improvements on the farm of the wife in the country; that Howell had no contract or conversation whatever with Mrs. O'Sullivan in reference to this material; that Howell did not know, at the time of furnishing any of this material between the dates of February 11 and May 27, that Mrs. O'Sullivan was the owner of the farm; that Howell did not extend this credit on the faith and strength of Mrs. O'Sullivan being the owner of this farm. About the 27th of May an accounting was had between Howell and O'Sullivan, the husband, and on that date O'Sullivan, the husband, gave his note to Howell for the amount due him for all material furnished to him up to that time, and O'Sullivan's account was "squared." We reach the conclusion, then, that all the material furnished by Howell to O'Sullivan, the husband, between the dates of February 11 and May 27, 1890, was furnished under one contract made between them about February 11, and that all the material for which Howell claims a lien subsequent to the 27th of May was furnished under a separate and independent contract from the one under which the first group of material between February 11 and May 27 was furnished. The verified account of items claiming a lien was not filed in the office of the recorder of deeds of Hall county until the 16th day of December, 1890, or more than four months

after the 27th day of May, 1890. We have no doubt, then, of the correctness of the finding and decree of the district court denying Howell or his assignee a lien on these premises for the material furnished on the 27th of May, 1890, or at any time prior thereto. We must not be misunderstood in what we are here deciding. We do not decide that Howell, by taking the note of O'Sullivan, the husband, on the 27th of May, 1890, waived his right to a lien against this real estate; but what we do decide is that the evidence justifies the conclusion that even if the material so furnished was furnished to O'Sullivan, the husband, as the agent of his wife, then none of the material furnished subsequently to May 27, 1890, was furnished in pursuance of the original contract made between Howell and O'Sullivan, the husband; or, to express it differently, that the last item of material which Howell furnished in pursuance of his contract made on the 11th of February with O'Sullivan was furnished on May 27, and that to entitle Howell to a lien for such material he must have filed in the office of the recorder of deeds of Hall county a verified account of items of such material and claimed a lien on said premises within four months of May 27. The mechanics' lien law of this state has ever been liberally construed by this court, but it will not be so construed as to enable a material-man to tack one contract to another and procure a lien by filing in the office of the register of deeds an itemized account of the material furnished under all the contracts within four months of the date of furnishing the last item of material under the last contract made.

2. The items in the second group of material are dated: 1890, August 20, $3.40; September 6, $2.90; September 16, $2.80; or a total of $9.10. At the time this material was furnished by Howell to O'Sullivan, the husband, O'Sullivan and his wife were residing on a farm. The material appears to have been used in making an improvement of some kind upon the farm. Was this material

furnished by Howell in pursuance of a contract between him and O'Sullivan, the husband, the latter then and there acting as the agent of the wife? The record does not disclose that at or before the time of furnishing the last three items of material that Howell ever had any conversation or dealing whatever with Mrs. O'Sullivan; nor is there any evidence in the record that the wife knew that her husband had purchased, or was purchasing or using the three items of material in the erection of improvements upon her real estate, further than such knowledge might be inferred from the fact that during the months of August and September she and her husband were residing on the farm. We think the fair inference is that the wife's real estate received the benefit of these last three items of material, and as they were used in making improvements on the real estate and she was living thereon at the time, that she had actual knowledge that the material was so used. But we are still unable to say that the district court was wrong in finding that these items of material were not furnished by Howell to Mrs. O'Sullivan in pursuance of a contract made with her husband as her agent. The conduct of Howell, throughout his dealings with O'Sullivan from the 11th of February, justifies the conclusion of the district court that he contracted with the husband not as the agent of the wife and not on the faith and credit of her separate property; or rather the evidence is such as will not justify us in saying that the district court reached the wrong conclusion. The appellant called O'Sullivan as a witness and some attempt was made to prove that he was acting as his wife's agent in and about the conduct of the farm and its management, and in buying the items of material under consideration. In so far as this evidence of O'Sullivan militated against the wife, it was incompetent, and we must presume that the district court did not consider it. It is so well settled in this state that, with certain exceptions not material here, a husband cannot be a witness against his

wife, nor the wife against the husband, that it is unnecessary to cite the authorities; and in an equity case, in which a husband or wife is interested as plaintiff or defendant, if one testify to matters against the interest of the other, the district court should not consider such evidence. Aside from the statement of O'Sullivan on the witness stand as to his acting as agent for his wife in the purchasing of the material under consideration, there is practically no evidence in the record to sustain such contention. Counsel cite us to *Howell v. Hathaway*, 28 Neb., 807, where it is said that where a husband erects a dwelling house on land, the title to which is in the name of his wife, and she is aware that such building is being erected, and, in some cases, gives direction to the workmen, the agency of the husband will be presumed and the property will be subject to a mechanic's lien. If Howell had filed his claim for a lien within four months of the 27th of May, 1890, for the material which he furnished between that date and the 11th of February of that year, and which he alleges was used in the erection of an improvement upon the wife's real estate, the case stated might be an authority in point. A wife is not liable to have her real estate charged for a pound of nails or a board purchased by her husband for a material-man, though such nails or such board may be used in the erection or reparation of some improvement upon her real estate; but her property will be subject to the lien of a material-man when it appears not only that her husband, in buying the nails or the board for the purpose of such improvement, was acting as her agent and not buying on his own credit, but also that the material-man parted with the nails and board, not on the credit of the husband, but on the faith and credit of the wife's ownership of the real estate. We think the district court was justified in finding that the last three items of material were not furnished by Howell to Mrs. O'Sullivan through the agency of her husband, but that Howell sold the last

items of material to Mr. O'Sullivan individually, gave him credit for them, trusted to him to pay for them, relied upon his credit and not upon the wife's property. The judgment of the district court must be and is

AFFIRMED.

HARRISON, J., not sitting.

DORA SWINDELL, ADMINISTRATRIX, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED APRIL 16, 1895. No. 6239.

Action by Administratrix against a Railroad Company for Negligently Causing the Death of her Husband. THE EVIDENCE examined, and *held* to sustain the finding of the jury (1) that the proximate cause of the deceased's death was not the negligence of the railroad company; or (2) that the proximate cause of the deceased's death was his own negligence; and the judgment is affirmed.

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

Davis & Hibner, for plaintiff in error.

T. M. Marquett, J. W. Deweese, and *F. M. Hall, contra.*

RAGAN, C.

Dora Swindell, administratrix of the estate of Frank Swindell, her deceased husband, sued the Chicago, Burlington & Quincy Railway Company (hereinafter called the Railway Company) in the district court of Lancaster county for damages for negligently causing the death of her intestate husband. The Railway Company had a verdict and

judgment, and the administratrix prosecutes to this court a petition in error.

In September, 1890, the state fair was being held on what are known as the fair grounds, some distance north of the Railway Company's passenger station in the city of Lincoln. These grounds were immediately on the main line of the Railway Company, extending from Lincoln to the city of Omaha. During the week of this fair the Railway Company ran special trains between its railway station in Lincoln and the fair grounds for the purpose of carrying persons to and fro between the city and the fair. A train left the station every fifteen minutes for the fair grounds. This train was pulled down to the fair grounds by an ordinary engine. A train also left the fair grounds every fifteen minutes for the station. This train was backed up from the fair grounds to the station. These special trains running between the station and the fair grounds crossed at grade Tenth, Eleventh, and Twelfth streets in the city of Lincoln. The grounds of negligence imputed by the administratrix to the Railway Company are thus stated in her petition: "On or about the 9th day of September, 1890, while said defendant was so operating said trains, as aforesaid, over, upon, and across the streets and alleys of the city of Lincoln, the said Frank Swindell, deceased, was walking upon or near X street near Eleventh, in said city of Lincoln, and the defendant was in a negligent and careless manner running a train of passenger cars backwards upon said street, and near to and over and across said streets, at an unlawful and unnecessary rate of speed, * * * and while so negligently, carelessly, and unlawfully running said train, did run said passenger train against, upon, and over the said Frank Swindell," etc. The undisputed evidence in the case is that on the afternoon of the 9th of September, 1890, the deceased was walking between the rails on the railway track between the railway station and the fair grounds and walking towards the station; and while thus walking one

of these special trains backing up from the fair grounds to the station struck him and killed him. There is no evidence in the record that at the time he was struck he was on Tenth, Eleventh, Twelfth, or any other street of the city of Lincoln, and there is not the slightest pretense that at the time he was killed he was crossing, or attempting to cross, the track of the Railway Company. It will be observed that the negligence charged to the Railway Company, which it is alleged caused the death of Swindell; was the running of the train backwards at an unlawful and unnecessary rate of speed. The evidence is undisputed that the train which struck Swindell was at the time backing up to the station, or, as expressed in the pleadings, running backwards. The evidence as to the speed with which the train was running at the time is conflicting. Some witnesses place the rate of speed as high as twenty-five miles per hour, while others place it at eleven. The court left it to the jury to say from the evidence whether the Railway Company's train at the time it struck Swindell was running at an unlawful and unnecessary rate of speed, whether the Railway Company was guilty of negligence in running the train at the rate of speed it did run it, and whether the rate of speed at which the train was running was the proximate cause of Swindell's death. The court charged the jury: "If you find from the evidence that at the time the accident occurred the train was running at an unusual and unwarranted rate of speed, and that the said Swindell, at the time immediately preceding the accident, and while walking upon the tracks, exercised due and proper care to detect and get out of the way of any train that was running at a usual and warranted rate of speed, and if you further find from the evidence that this unusual and unwarranted rate of speed was the direct and proximate cause of the accident complained of, * * * then you are instructed that the plaintiff could recover in this action."

It is not specifically pleaded in the petition, but it is

argued here by counsel for the plaintiff in error, that the Railway Company's servants, after they discovered that Swindell was upon the track in front of the approaching train, could, by the exercise of proper care, have avoided running the train over him. If we consider this argument as one of the grounds of negligence on which this action is based, we then have three things imputed as negligence to the Railway Company which it is alleged contributed to the death of Swindell: The running of the train backwards, the unusual rate of speed of the train; and the failure of the Railway Company, after discovering Swindell's presence on the track in front of the train, to bring it to a stop before it struck him. There was evidence before the jury that at the time the Railway Company put on these special trains between the fair grounds and its station it stationed a flagman or watchman at each of the streets crossed by these trains and kept these flagmen or watchmen there on duty while the trains were running; that Swindell was seen by one of these flagmen walking on the track between the rails on the day he was killed and told not to walk there as it was not safe; that the conductor of the train which struck Swindell at the time was standing on the platform of the rear car of the train backing towards the station; that he had his hand upon the lever used for applying the air brakes; that he saw Swindell walking by the side of the track going towards the station; that Swindell, without looking around, stepped on the track when the train was within some fifty feet of him; that the conductor applied the air and called to Swindell, but that the latter paid no attention to him; that the train was stopped as soon thereafter as possible. If the jury predicated its verdict upon findings that the Railway Company, in running its train backwards and at the speed at which it was running, was not by either of said acts guilty of negligence which caused or contributed to the death of Swindell, the evidence supports that finding. Assuming for the purposes of this case that the running of

the train backwards was some evidence of negligence, and that the evidence introduced on behalf of the administratrix that the train at the time it struck Swindell was running at a speed of twenty-five miles an hour was also evidence of negligence on the part of the Railway Company, still the jury had before it the evidence as to the precautions taken by the Railway Company in placing flagmen at each of the street crossings over which these trains passed, and that the conductor was on the rear platform of the coach next to the station towards which the train was backing at the time the accident occurred, and the other evidence as to the speed of the train. This evidence and these circumstances were sufficient to authorize the jury to find that, the time, the place, the circumstances, and all the conditions under which this train was being operated considered, the running of the train backwards and the running it at the rate of speed it was running was not negligence on the part of the Railway Company. There is some conflict in the evidence as to how far Swindell was from the end of the coach which struck him at the time he was discovered by the conductor standing on the platform of that coach. Some of the evidence is that Swindell stepped on the track in front of the coach approaching him when fifty feet from it. There is also evidence that he stepped on the track not more than twenty feet from the train. There is some conflict in the evidence as to whether the train was brought to a stop in as short a time as could have been done by the exercise of proper care. It was for the jury to say from all the evidence in the case whether the Railway Company, after it discovered Swindell on this track in front of the approaching train, made use of all proper efforts to stop the train and avoid the injury. The jury has found by its verdict that the Railway Company was guilty of no negligence in this respect, and the evidence sustains this finding. There is in this case no claim that Swindell was on the track before he was seen by the men in charge of the train;

in other words, it is not claimed that the Railway Company's employes were guilty of negligence in not keeping a proper lookout and in not discovering Swindell's presence on the track before they did. There seems to be no doubt whatever from the evidence in the record that Swindell was walking from the fair grounds towards the station, was walking by the side of the the track, was seen walking there by the conductor who stood on the rear platform of the rear car of the train, and was seen by the conductor on the track between the rails. The question litigated here, like the one involved in all other cases of this character, was: By whose fault or neglect did Swindell lose his life? The jury by its verdict has said at least that the death of this man was not the result of the negligence of the Railway Company, and this finding is supported by sufficient competent evidence.

Complaint is made by counsel for plaintiff in error because the court refused to give a number of instructions requested by them. We have carefully examined all these instructions, and the instructions given by the court, and we find that the court in its charge to the jury gave the substance of all the instructions requested by the plaintiff in error to which she was entitled. Some criticisms are also made by counsel for plaintiff in error upon the instructions given by the court on its own motion. After a careful study of the evidence in this case we have reached the conclusion that the plaintiff in error was not prejudiced by any instruction given by the trial court. Indeed, the charge of the learned judge is a clear and comprehensive statement of the law applicable to the facts in this case. There is no error in the record and the judgment of the district court is

AFFIRMED.

CARRIE WILL v. WILLIAM A. ELWOOD, SHERIFF.

FILED APRIL 16, 1895. No. 6399.

Review: SUFFICIENCY OF EVIDENCE. There is no question of law involved in this case. The evidence examined, and *held* to support the finding of the jury; and the judgment of the district court pronounced thereon is affirmed.

ERROR from the district court of Antelope county. Tried below before ALLEN, J.

O. A. Williams, for plaintiff in error.

M. B. Putney, contra.

RAGAN, C.

W. A. Elwood, the sheriff of Antelope county, had in his possession certain executions issued on judgments rendered against one Frederick Will, which executions he levied upon certain personal property and sold the same and applied the proceeds towards the satisfaction of said judgments. Ferdinand Will, the minor son of Frederick Will, by his next friend, Carrie Will, brought this action in the district court of said county against Elwood to recover the value of the property seized by the latter on said executions, claiming that he, Ferdinand Will, was at the time of the seizure of said property the owner thereof. There was a trial to a jury with a verdict in favor of the sheriff, and Carrie Will, as next friend of Ferdinand Will, has prosecuted to this court a petition in error.

The issue litigated before the jury was whether the property seized by the sheriff at the time of its seizure belonged to Frederick Will, the defendant in execution, or to the plaintiff here, Ferdinand Will. The evidence sustains the finding made by the jury. A careful examination of

the pleadings, the instructions of the court, and its rulings on the admission and rejection of evidence, leads us to the conclusion that there is in the record not one single error prejudicial to the rights or claims of the plaintiff in error. The judgment of the district court is, therefore,

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. HORACE C. METCALF.

FILED APRIL 16, 1895. No. 5803.

1. **Railroad Companies:** PUBLIC CROSSINGS: SIGNALS. Section 104, chapter 16, Compiled Statutes, requiring that a bell shall be rung or a steam whistle sounded by a locomotive at a distance of at least eighty rods from the place where a railroad shall cross any other road or street, etc., applies as well to roads in fact used by the public though not dedicated as public highways as to those so dedicated.

2. ———: ———: ———: CONSTRUCTION OF STATUTE. The object of that statute is not merely to protect persons intending to cross the track from collisions, but also to protect all persons lawfully at or near the crossing from any danger naturally to be apprehended from the sudden approach without warning of a train at such a place.

3. ———: ———: ———: DAMAGES. Therefore, where a crossing had been provided at a railway station to afford access to the depot, one whose team had been driven to a car upon a side track near the depot for the purpose of unloading the car was within the protection of the statute.

4. ———: ———: ———: ———. In such a case it was erroneous to instruct the jury that the railroad company was liable if it failed to give the signal required by statute, provided the injury was caused in consequence of such omission. *Union P. R. Co. v. Rassmussen*, 25 Neb., 810, in so far as it states a contrary doctrine, overruled.

5. **Damages:** NEGLIGENCE: INJURY TO CHATTELS. Where chattels are injured by the negligence of another, but not wholly de-

stroyed, the measure of damages is the difference between the value of the chattels immediately before the injury and immediately thereafter.

6. ——: ——: ——. One whose chattels are injured by the negligence of another cannot, by voluntarily abandoning what remains, charge that other with the total value of the chattels; and where there was evidence tending to show that the destruction was not total and that the plaintiff had so voluntarily abandoned what remained, it was error to instruct the jury that the measure of damages was the market value of the chattels before the injury.

ERROR from the district court of Hamilton county. Tried below before WHEELER, J.

The facts are stated by the commissioner.

A. W. Agee, for plaintiff in error:

The signals required by statute to be given when a train is approaching a public street or highway is exclusively for the benefit of persons traveling along such street or highway, and about to cross the railroad at the highway crossing. (*Clark v. Missouri P. R. Co.*, 11 Pac. Rep. [Kan.], 134; *Illinois C. R. Co. v. Phelps*, 29 Ill., 447; *Bell v. Hannibal & St. J. R. Co.*, 72 Mo., 50; *Hodges v. St. Louis, K. C. & N. R. Co.*, 71 Mo., 50; *Holmes v. Central Railroad & Banking Co.*, 37 Ga., 593; *Randall v. Baltimore & O. R. Co.*, 109 U. S., 478; *Rosenberger v. Grand Trunk R. Co.*, 8 Ont. App., 482; *East Tennessee, V. & G. R. Co. v. Feathers*, 10 Lea [Tenn.], 103; *St. Louis & S. F. R. Co. v. Payne*, 29 Kan., 166; *Cordell v. New York C. & H. R. R. Co.*, 64 N. Y., 535; *Byrne v. New York C. & H. R. R. Co.*, 94 N. Y., 12; *Alabama G. S. R. Co. v. Hawk*, 72 Ala., 112; *Harty v. Central Railroad Company of New Jersey*, 42 N. Y., 471; *People v. New York C. R. Co.*, 25 Barb. [N. Y.], 199; *Elwood v. New York C. & H. R. R. Co.*, 4 Hun [N. Y.], 808; *Philadelphia & R. R. Co. v. Spearen*, 47 Pa. St., 300; *O'Donnell v. Providence & W. R. Co.*, 6

R. I., 211; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S., 697.)

The seventh and eighth instructions are erroneous. (*St. Louis & S. F. R. Co. v. Payne*, 29 Kan., 166; *Byrne v. New York C. R. Co.*, 104 N. Y., 362; *Harrison v. North Eastern R. Co.*, 29 L. T., n. s. [Eng.], 844; *Sutton v. New York C. & H. R. R. Co.*, 66 N. Y., 243; *Nicholson v. Erie R. Co.*, 41 N. Y., 526; *Hodges v. St. Louis, K. C. & N. R. Co.*, 71 Mo., 50; *Bauer v. Kansas P. R. Co.*, 69 Mo., 219; *Wabash, St. L. & P. R. Co. v. Neikirk*, 15 Brad. [Ill.], 172; *Bennett v. Grand Trunk R. Co.*, 13 Am. & Eng. R. Cas. [Can.], 627; *Thomas v. Delaware, L. & W. R. Co.*, 8 Fed. Rep., 728; *Hill v. Portland & R. R. Co.*, 55 Me., 438; *Johnson's Administrator v. Louisville & N. R. Co.*, 13 Am. & Eng. R. Cas. [Ky.], 623; *Cordell v. New York C. & H. R. R. Co.*, 6 Hun [N. Y.], 461; *Paducah & M. R. Co. v. Hoehl*, 12 Bush [Ky.], 41; *Bauer v. Kansas P. R. Co.*, 69 Mo., 219; *Hickey v. Boston & L. R. Co.*, 14 Allen [Mass.], 432; *Smith v. Savannah & F. W. R. Co.*, 11 S. E. Rep. [Ga.], 455; *Ely v. City of Des Moines*, 52 N. W. Rep. [Ia.], 475; *Pittsburg S. R. Co. v. Taylor*, 104 Pa. St., 306; *City of Erie v. Magill*, 101 Pa. St., 623; *Fleming v. City of Lock Haven*, 15 W. N. C. [Pa.], 216; *Carey v. Chicago, M. & St. P. R. Co.*, 61 Wis., 71; *Courson v. Milwaukee & St. P. R. Co.*, 32 N. W. Rep. [Ia.], 8; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S., 697; *Miner v. Connecticut River R. Co.*, 26 N. E. Rep. [Mass.], 994; *Gonzales v. New York & H. R. Co.*, 38 N. Y., 440.)

The evidence does not support the verdict, because the only allegation of negligence which it is claimed contributed to the injury is that the signals required by statute to be given at public crossings were not given, and this allegation is not supported by the evidence. (*Fleming v. City of Lock Haven*, 15 W. N. C. [Pa.], 216; *Chicago & A. R. Co. v. Gretzner*, 46 Ill., 74; *Chicago, B. & Q. R. Co. v. Dickson*, 88 Ill., 431; *Chicago, B. & Q. R. Co. v. Stumps*,

55 Ill., 367; *Frizell v. Cole*, 42 Ill., 362; *Wabash, St. L. & P. R. Co. v. Hicks*, 13 Brad. [Ill.], 407; *Chicago & A. R. Co. v. Robinson*, 106 Ill., 142; *Seibert v. Erie R. Co.*, 49 Barb. [N. Y.], 583; *Chicago & R. I. R. Co. v. Still*, 19 Ill., 500; *Cleveland v. Chicago & N. W. R. Co.*, 35 Ia., 220; *Merz v. Missouri P. R. Co.*, 14 Mo. App., 459; *Evans v. St. Louis & S. F. R. Co.*, 17 Mo. App., 624; *Hanlon v. South Boston H. R. Co.*, 129 Mass., 310; *St. Louis & S. F. R. Co. v. Payne*, 29 Kan., 166; *Chicago & N. W. R. Co. v. Clark*, 2 Brad. [Ill.], 116; *Goldstein v. Chicago, M. & St. P. R. Co.*, 1 N. W. Rep. [Wis.], 37; *Whitney v. Maine C. R. Co.*, 69 Me., 208; *Deville v. Southern P. R. Co.*, 50 Cal., 383; *Baltimore & O. R. Co. v. Whitacre*, 35 O. St., 627; *Carroll v. Minnesota Valley R. Co.*, 13 Minn., 30; Shearman & Redfield, Negligence, 281, and note 1; *Rothe v. Milwaukee & St. P. R. Co.*, 21 Wis., 256; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich., 274; *Hickey v. Boston & L. R. Co.*, 14 Allen [Mass.], 429.)

Marquett & Deweese, also for plaintiff in error.

Whitmore & Carr, *contra*, in their argument upon the legal duty or obligation of the company to the defendant in error, cited the following cases: *Sweeney v. Old Colony & N. R. Co.*, 10 Allen [Mass.], 368; *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill., 132; *Texas & P. R. Co. v. Best*, 66 Tex., 116; *McKone v. Michigan C. R. Co.*, 51 Mich., 601; *Davis v. Chicago & N. W. R. Co.*, 58 Wis., 646; *Virginia M. R. Co. v. White*, 84 Va., 498; *Barry v. New York C. & H. R. R. Co.*, 92 N. Y., 289; *Erickson v. St. Paul & D. R. Co.*, 43 N. W. Rep. [Minn.], 332; *Lonergren v. Illinois C. R. Co.*, 49 N. W. Rep. [Ia.], 852; *New York, L. E. & W. R. Co. v. Leamon*, 15 L. R. A. [N. J.], 426; *Chicago, B. & Q. R. Co. v. Daugherty*, 110 Ill., 521; *Grippen v. New York C. R. Co.*, 40 N. Y., 34; *South & North Alabama R. Co. v. Thompson*, 62 Ala.,

499; *Finklestein v. New York C. & H. R. R. Co.*, 41 Hun [N. Y.], 34; *Shaber v. St. Paul, M. & M. R. Co.*, 28 Minn., 107; *Macon & W. R. Co. v. Davis*, 18 Ga., 686; *Norton v. Eastern R. Co.*, 113 Mass., 366; *Dyson v. New York & N. E. R. Co.*, 57 Conn., 23; *Union P. R. Co. v. Rassmussen*, 25 Neb., 810; *Omaha, N. & B. H. R. Co. v. O'Donnell*, 22 Neb., 475.

As to the rate of speed of the train and the failure to ring the bell the following authorities were cited: *Rockford, R. I. & St. L. R. Co. v. Hillmer*, 72 Ill., 935; *Chicago, B. & Q. R. Co. v. Cauffman*, 38 Ill., 425; *City of Plattsmouth v. Mitchell*, 20 Neb., 228; *Stevens v. Howe*, 28 Neb., 547; *American Water-Works Co. v. Dougherty*, 37 Neb., 373; *McKean v. Burlington, C. R. & N. R. Co.*, 55 Ia., 194; *Knowles v. Mulder*, 74 Mich., 202.

E. J. Hainer, also for defendant in error:

To persons who are lawfully upon the grounds of the company engaged in necessary business the company owes a duty of active vigilance. (*Haley v. New York C. & H. R. R. Co.*, 7 Hun [N. Y.], 84; *Barton v. New York C. & H. R. R. Co.*, 56 N. Y., 660; *Goodfellow v. Boston, H. & E. R. Co.*, 106 Mass., 461; *Schultz v. Chicago & N. W. R. Co.*, 44 Wis., 638; *Newson v. New York C. & H. R. R. Co.*, 29 N. Y., 383; *Emery v. Minneapolis Industrial Exposition*, 57 N. W. Rep. [Minn.], 1132; *Union P. R. Co. v. Sue*, 25 Neb., 772; *Cassida v. Oregon R. & N. Co.*, 14 Ore., 551; *McKimble v. Boston & M. R. Co.*, 139 Mass., 542; *Texas P. R. Co. v. Brown*, 78 Tex., 397; *Collins v. Toledo, A. A. & N. M. R. Co.*, 80 Mich., 390.)

The statutory requirement for signals at the crossings applies to persons whose property is lawfully on the highways or grounds of the company. (*Cosgrove v. New York C. & H. R. R. Co.*, 87 N. Y., 88; *Rosenberger v. Grand Trunk R. Co.*, 8 Ont. App. [Can.], 482; *Ransom v. Chicago, St. P., M. & O. R. Co.*, 62 Wis., 178.)

The omission to give the signals at crossing was negligence. (*Wakefield v. Connecticut & P. R. R. Co.*, 37 Vt., 330; *Hart v. Chicago, R. I. & P. R. Co.*, 56 Ia., 166; *Western & A. R. Co. v. Jones*, 65 Ga., 631; *Lonergren v. Illinios C. R. Co.*, 49 N. W. Rep. [Ia.], 852.)

IRVINE, C.

Metcalf sued the railroad company to recover damages for injuries done to a team of mules, a wagon, and set of harness which had been struck by a train of the company near the station at Hampton. There was a verdict and judgment for the plaintiff for $365.42, to reverse which the railroad company prosecutes error.

The evidence upon which the verdict is evidently based tends to show that at Hampton the plaintiff in error's railroad passes through the village in an easterly and westerly course, nearly all of the inhabited portion of the village lying north of the tracks. There is a side track, with switches at either end, lying north of the main line. The station is situated between the main line and the side track at a point not far from the west switch. Two highways cross the tracks, one being Third street, or, as the witnesses designate it, Main street, about 275 feet east of the depot. The other, a section line road at the east boundary line of the village, about 1,000 feet from the depot. In addition to these crossings there are two others, one immediately east and one immediately west of the depot platforms. These crossings are not on public highways, but were placed by or at least with the consent of the railroad company for the purpose of affording access to its depot and platforms. The main line, the side track, and the depot platform outline a triangle west of the depot, and one of the crossings referred to affords an entrance to the space thus inclosed. The primary object of this crossing was to afford access for teams to the west platform. In unloading and loading cars standing on the side track to the west of the depot it

is practicable either to drive a wagon north of the side track close to the cars or south of the side track by means of this crossing into the triangular space referred to. Metcalf owned a mill situated some distance south of the tracks. His manager had been notified that a car load of coal consigned to him had arrived, and a servant named Dixon was instructed to take the mules and wagon and unload this coal. The car stood upon the siding a short distance west of the depot. Dixon drove over the Main street crossing to the north side of the car and from that side took one wagon load of coal. Returning for the second load he testifies that he found the Main street crossing blocked by cars and therefore drove by the depot, and over what we have called the west crossing, into the triangular space, and approached the car from the south side. He applied the brake to the wagon, wrapped the lines around the brake handle, and, mounting the car, was engaged in shoveling coal into the wagon when a freight train approached from the east frightening the mules, which ran towards the crossing and were there struck by the train. One mule was killed, the other severely injured, and the harness and wagon were torn to pieces. The negligence alleged is that the train was behind its schedule time, that it was running at a dangerous rate of speed, and that no signals were given by bell or whistle of the approach of the train.

Of the errors assigned it will be necessary to consider only those relating to the instructions. Complaint is made of the refusal of each of the instructions numbered 4, 5, 6, 7, 10, and 11 asked by the defendant. Of these the refusal of the tenth is the only assignment noticed in the briefs, and the others must, therefore, be deemed waived. The record does not contain any instruction numbered 10, so that we are unable to consider whether or not its refusal was erroneous. The seventh instruction given by the court is as follows:

"No. 7. The jury are instructed that if the evidence

shows that the crossings immediately east and west of the depot at Hampton, were placed there by the railroad company for the use of persons having business at or about the depot in either loading or unloading cars, and such crossings were in fact so used generally, then it was the duty of the person in charge of the engine in question to sound the signal provided by law, precisely the same as for any other crossings, and as elsewhere explained in these instructions."

Section 104, chapter 16, Compiled Statutes, is as follows: "Sec. 104. A bell of at least thirty pounds weight, or a steam whistle, shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said railroad shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer and the other half to this state, and also be liable for all damages which shall be sustained by any person by reason of such neglect." It is argued that a proper construction of this section limits its application to public highways, and that the crossing where the accident occurred is not within the purview of the law, and that the instruction was, therefore, erroneous. We do not think the statute should be given so narrow an application. Some courts have held that such a statute is in derogation of the common law, and, therefore, the subject of strict construction, but we think in most of the cases where such statutes have been confined in their application to public highways, the language of the statute was such as to evidently call for such restriction. The object of the law was plainly to afford ample warning to persons near the railroad at points where they might lawfully cross, and where they were probably about to cross as trains approached. These crossings were expressly designed to afford access

to the depot of the railroad company, and the exigency for warnings was probably as great there as at highway crossings on the prairie. Therefore, we think that when the court instructed the jury that the duty to sound signals applied to this crossing, provided the jury should find that the crossings were placed there by the railroad company for the use of persons having business about the depot; and that such crossings were in fact so used generally, the law was stated as favorably to the railroad company as could be required. The language of the statute is, "where the said railroad shall cross any other road or street," and we hold that it applies as well to roads in fact used by the public, though not legally dedicated to public use, as to those so dedicated. The instruction was, therefore, correct.

The eighth instruction is as follows:

"No. 8. The court instructs the jury that by the laws of this state, every railroad company is required to have a bell of at least thirty pounds weight, and a steam whistle, placed and kept on each locomotive engine, which shall be rung or whistled at the distance of at least eighty rods from the place where the said railroad shall cross any other road or street, and be kept ringing or whistling until it shall have passed said road or street, and that the company shall be liable for all damages resulting by reason of a neglect to comply with such law. Now if the jury believe from the evidence that the persons in charge of the engine in question omitted to sound a whistle or ring a bell continuously for the distance of eighty rods before reaching the crossing at which the team in question was struck, and you further believe from the evidence that the team was struck as charged in the petition in consequence of the omission to ring the bell or sound the whistle while the person in charge of the team was in the exercise of all reasonable care and caution in the matter, then the defendant railroad company is liable to the plaintiff for the loss and damage sustained by him by reason of such injury, if any such has been proven."

It will be observed that this instruction charges the railroad company with the same duty toward the plaintiff as if the plaintiff's team, as the train approached, had been approaching the crossing with the intention of using the same, and the criticisms made upon the instruction raise the following questions: First—Does the statute impose any duty upon the railroad company except in favor of those on the road and about to cross the tracks? Second—If any duty is imposed in favor of others, does a violation of the statute as to such persons merely afford evidence of negligence, or does it constitute negligence as a matter of law, provided the injury be the proximate result of the violation of the statute?

On the first question suggested the authorities may be grouped in three classes. It has been sometimes held that the object of such a statute is solely to warn persons on a highway approaching and about to cross the tracks, and that, therefore, where the injury was sustained by any other person the failure to obey the statute was no evidence of negligence. Among the cases so holding are: *St. Louis & S. F. R. Co. v. Payne*, 29 Kan., 166; *Missouri P. R. Co. v. Pierce*, 33 Kan., 61; *Neeley v. Charlotte, C. & A. R. Co.*, 33 S. Car., 136; *O'Donnell v. Providence & W. R. Co.*, 6 R. I., 211. The case of *St. Louis & S. F. R. Co. v. Payne, supra*, was one very similar to this in its facts. It may here be observed that, in many cases where the rule has been stated in language similar to the above, the injury was suffered by someone on the tracks at a place other than a lawful crossing, and the language was not used to distinguish between persons about to cross and persons lawfully on the highway at or near the crossing, but not intending to cross. This distinction seems to have presented itself to Judge Brewer in *St. Louis & S. F. R. Co. v. Payne*, and he says that he concurred solely upon the ground that the plaintiff was not upon the highway. In another class of cases it is said that where the injury was

suffered by someone crossing or attempting to cross on the highway, the violation of the statute is negligence in law, but where the injury is to another person claiming to be so situated that he had a right to rely on the giving of the signals, the failure to give them is evidence of negligence, to be submitted to the jury with the other facts in the case. Among such cases are *Maney v. Chicago, B. & Q. R. Co.*, 49 Ill. App., 105; *Western & A. R. Co. v. Jones*, 65 Ga., 631. In the third class of cases it is held that the object of the statute is not solely to protect persons intending to cross the track from collisions, but that its object is to protect all persons lawfully at or near the crossing from any danger naturally to be apprehended from the sudden approach without warning of a train at such a place. *Harty v. Central Railroad Co. of New Jersey*, 42 N. Y., 468, is a case usually cited in support of the rule announced in the first group of cases above cited; but an inspection of the case convinces us that the case really belongs in the last class. In that case the injury was sustained by a person walking upon the track at some distance from the crossing, and it was held that the statute did not protect such person; but the language of Allen, J., in *People v. New York C. R. Co.*, 25 Barb. [N. Y.], 199, was quoted with approval as follows: "The hazards to be provided against were twofold: (1) the danger of actual collision at the crossing; and (2) that of damage by the frightening of teams traveling upon the public highway near the crossing." In *Ransom v. Chicago, St. P., M. & O. R. Co.*, 62 Wis., 178, it was held that the statute was intended to guard against the danger of injury to teams traveling upon the highway near the crossing as well as the danger of actual collision at the crossing, and that a railroad company was, therefore, liable for injuries caused by a failure to obey the statute to persons traveling on a highway parallel with the railroad and not intending to cross the track. In *Lonergren v. Illinois C. R. Co.*, 49 N. W.

Rep. [Ia.], 852, the facts were similar to those in the case before us, and the court held that the plaintiff was within the protection of the statute. A rehearing was allowed and the first decision adhered to. (52 N. W. Rep., 236.) In the opinion on rehearing the court reviews the authorities at length, and to our mind conclusively demonstrates that the rule illustrated by the third class of cases is correct. The plaintiff was lawfully upon the company's land, having reached it by a means provided for the purpose. Whether or not he exercised due care in going where he did, in the care of his team and in watching for trains, was submitted to the jury and found in favor of the plaintiff. He claims that his driver had a right to rely on the giving of the statutory signals, and that had the company given them the driver would have been warned of the approach of the train in sufficient time to protect the mules from fright. Whether or not any signals were given is a question upon which the evidence was conflicting. We think that so far as the first question is concerned the instruction stated the law correctly and was applicable to the evidence.

The second question presented by the instruction under consideration is also one upon which courts in different states have reached different conclusions. In some states it is held that the violation of a statute or ordinance is negligence in law, while in others it is held that it is merely evidence of negligence. We think a consideration of the decisions of this court compels a solution of the question here without regard to authorities elsewhere. In the *City of Lincoln v. Gillilan*, 18 Neb., 114, it was held that even where the facts are undisputed, if upon such facts different minds may honestly draw different conclusions as to whether or not such facts establish negligence or the absence thereof, the question as to the conclusion to be arrived at is for the jury and not for the court. The rule there laid down, stated in those words, stated in equivalent language, or assumed without definite statement, has formed

the basis of all decisions in negligence cases, at least since the decision cited. Among the more recent cases following this rule may be cited: *Chicago, B. & Q. R. Co. v. Laudauer*, 36 Neb., 642, 39 Neb., 803; *American Water-Works Co. v. Dougherty*, 37 Neb., 373; *Missouri P. R. Co. Baier*, 37 Neb., 235; *Omaha Street R. Co. v. Craig*, 39 Neb., 601; *Omaha & R. V. R. Co. v. Brady*, 39 Neb., 27; *Omaha & R. V. R. Co. v. Morgan*, 40 Neb., 604; *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb., 645; *Chicago, B. & Q. R. Co. v. Wilgus*, 40 Neb., 660; *Chicago, B. & Q. R. Co. v. Oleson*, 40 Neb., 889; *Union P. R. Co. v. Erickson*, 41 Neb., 1. In several cases it has been said that it was improper to state to the jury a circumstance or group of facts and instruct that such facts or group of facts amounts to negligence *per se*. (*Missouri P. R. Co. v. Baier, supra; Omaha & R. V. R. Co. v. Morgan, supra.*) This rule, so well settled and so generally adhered to, should not be departed from without sound and conclusive reasons for the exception. It is everywhere agreed that a jury may infer negligence from the single fact of the violation of a statute, providing the injury was the direct result of such violation; therefore, where the violation of a statute is shown, and where from that fact and from the other facts in evidence there can be no ground for a reasonable difference of opinion as to the negligence of the defendant, it might be proper to give such an instruction as the one we are considering, but we do not know that the obligation of a statute is any greater than that of the unwritten law, and all negligence must consist in the disregard of one or the other. We cannot see that any distinction in kind arises between a case where the defendant has violated a statutory obligation and one where he has violated the common law obligation to conduct himself for the safety of others in such a manner as one of ordinary prudence would conduct himself under similar circumstances. We see no reason for carving out an exception to the general rule of negligence in

such a case as this, and the current of decisions of this court compels a result in accordance with that reached by adopting a general rule. In *Omaha, N. & B. H. R. Co. v. O'Donnell*, 22 Neb., 475, the negligence alleged was, as here, the failure to give the statutory signal for a crossing while running at a high rate of speed and behind schedule time. The rule was there stated in the syllabus to be that such facts were to be considered in deciding whether the company was guilty of negligence, and the opinion uses this language: "If it be true that the train was running at the rate of speed described by the witnesses through the village, and that no signal of any kind was given,—the train being one hour and a half later than its usual and regular time,—these facts would be proper to be considered by the jury in ascertaining whether the employes of plaintiff in error were negligent or not, the law requiring the signals to be given." This would seem to be a clear declaration that the violation of the ordinance, while sufficient evidence of negligence, is not conclusive and does not amount even to a presumption of law. An instruction to the same effect was quoted with approval in *Omaha Street R. Co. v. Loehneisen*, 40 Neb., 37. And in *Omaha Street R. Co. v. Duvall*, 40 Neb., 29, in discussing an ordinance limiting the speed of street cars, the court said: "If, therefore, the privilege granted is exercised in a manner forbidden by ordinances enacted for the safety of the general public and injuries result, these facts afford reasonable grounds for inferring negligence prejudicial to the rights of those in whose interests and for whose protection such municipal regulations were adopted. These principles were embodied in instruction No. 1, requested by plaintiff, and that instruction was, therefore, properly given." We are aware that in *Union P. R. Co. v. Rassmussen*, 25 Neb., 810, an instruction to the effect that where a railroad company runs its trains through a city at a greater rate of speed than the ordinance permits, negligence will

be presumed, was held correct; but in the opinion in that case it was said: "If the train was greatly exceeding the fixed rate, this was competent for the jury to consider as tending to prove negligence;" and in the syllabus the doctrine of the case was stated to be that the ordinance of the city limiting the speed of trains to six miles an hour within the corporate limits is proper evidence to go to the jury on the question of negligence, and that a failure to discharge the duty imposed by ordinance may be considered by the jury in determining whether the railroad company was guilty of negligence. In view of the general and well established rule, and in view of the other cases on the subject, and also in view of the fact that the opinion in *Omaha, N. & B. H. R. Co. v. O'Donnell, supra,* was written by the same judge who wrote the opinion in *Union P. R. Co. v. Rassmussen,* we must conclude that the last cited case does not correctly state the law, in so far as it approves the instruction to the effect that a violation of the ordinance would raise a presumption of negligence. We conclude, therefore, that the district court erred in stating to the jury that the railroad company was liable as a matter of law, if the injury resulted from a failure to sound the signals, and that the court should not have gone further than to have instructed the jury that they might infer negligence from that fact.

As to the measure of damages, the court instructed the jury that if they found for the plaintiff, his damages should be assessed "in the reasonable market value of the property at the time either destroyed or injured, and afterwards taken into its possession by the defendant company," together with interest. This instruction assumed a state of facts not borne out by the evidence. The plaintiff's manager refused to take away the living mule and the remnants of the harness and wagon, whereupon the station agent caused the mule to be cared for, and the two collars, which seem to have been the only portion of the harness left in-

tact, to be stored at a livery stable. The plaintiff afterwards obtained these collars. The plain inference from the evidence is that the retention of the mule by the railroad company was due solely to the plaintiff's refusal to receive it into his possession. Had the proof shown that the property was entirely destroyed, or had it shown without contradiction that the railroad company converted what was not destroyed to its own use, the instruction would have been correct. But it has often been decided that one who has been injured by the negligence of another must exercise reasonable precautions to render the injury as light as possible, and that he cannot recover for increased damages due to his own negligence. The company cannot be charged as for a total destruction of the property merely because the plaintiff elected not to retain such portion as was not destroyed. The measure of damages under the evidence in this case was the difference between the value of the property immediately before its injury and its value thereafter.

REVERSED AND REMANDED.

KILPATRICK-KOCH DRY GOODS COMPANY V. HENRY J. BREMERS ET AL.

FILED APRIL 16, 1895. No. 6128.

1. **Estoppel:** ATTACHMENT: PLEADING. An attachment having been issued against a defendant, the plaintiff claiming to have acquired a lien by virtue of a garnishment founded upon averments that the garnishee had property of the defendant in his possession, cannot be heard to insist that the defendant is without standing to move a discharge of the attachment because in fact he had no interest in the property.

2. **Chattel Mortgages:** CONSTRUCTION: VOLUNTARY ASSIGNMENTS. Instruments in the form of chattel mortgages will not be held to constitute an attempted assignment for the benefit of

creditors because of the contemplated reciprocal trusts imposed on each mortgagee in favor of the others; because the mortgages provide that they shall prorate one with another; because at the time the mortgages were made the mortgagor was unable to redeem, conveyed all his property by the mortgages to secure debts greater than the value of the property; and because the parties contemplated that the mortgagees should take immediate possession,—nor does the fact that the mortgages contained a power of sale in accordance with the statutory provisions for foreclosure render the transaction an assignment.

3. **Voluntary Assignments**: CHATTEL MORTGAGES. The act in regard to voluntary assignments refers only to assignments intended as such; that is, when a debtor undertakes to make an assignment under the statute he must make it in accordance with it, otherwise it is no assignment and is void. But the rules relating to the construction of mortgages and other instruments somewhat akin to assignments, but not intended as such, remain unchanged.

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

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

Loomis & Abbott and *Munger & Courtright, contra.*

See opinion for citations.

IRVINE, C.

The plaintiff in error brought this action against Henry J. Bremers to recover $2,742.86 for goods sold and delivered. An attachment was issued on an affidavit assigning several grounds, the only one which any attempt was made to support being that the defendant had assigned and disposed of his property with intent to defraud his creditors. No property was seized under the writ, but process of garnishment was served on the First National Bank of Fremont, J. H. Meyer, and upon persons alleged to be agents of Joel J. Bailey & Co., and Kirkendall, Jones &

Co. The First National Bank and Meyer answered as garnishees. The defendant Bremers moved to discharge the attachment, the plaintiff moved for an order requiring the garnishees to pay the amount of plaintiff's claim into court. The district court overruled the latter motion and discharged the attachment. Judgment was entered in favor of plaintiff against Bremers, and the plaintiff instituted proceedings in error against Bremers, the First National Bank, and Meyer, seeking to reverse the two orders referred to.

The evidence showed that Bremers, who was engaged in trade at Fremont, was on the 21st of January, 1893, indebted as follows: To J. H. Meyer, $3,425; to the First National Bank, $1,497.62; to Kirkendall, Jones & Co., $333.03; to Joel J. Bailey & Co., $1,174.27; to Kilpatrick-Koch Dry Goods Company, $2,742.86. The indebtedness to the first two was for borrowed money; to the last three for goods sold and delivered. He was possessed of a stock of goods which was valued by persons who took an inventory thereafter at $8,000. Bremers testifies that it was worth not more than $6,500. Meyer was pressing him for payment or security. He agreed to give this security, but desired to protect other creditors at the same time, giving a preference to those whose demands arose from the loan of money. Accordingly, five chattel mortgages were executed by Bremers, one to each of the creditors. The mortgage to Meyer was made to secure a note dated January 21, 1893, and due one day after date; that to the bank secured three notes, two of which were already held by the bank and were not yet due; and the third was given for an overdraft and was payable one day after date. Each of these mortgages contained a provision that it was to prorate with the others. The three mortgages to wholesale dealers were each made to secure notes dated one day after date. Each provided that it should be subject to the mortgages to Meyer and to the bank, but that the three

junior mortgages should prorate with one another. These mortgages were in the usual form and contained a power to sell at public auction after twenty days' notice. The mortgages were all upon Bremers' stock of goods, together with the furniture and fixtures, but that to Meyer excepted from the goods mortgaged "boots, shoes, slippers, and rubber goods." The three junior mortgages were made without the solicitation or knowledge of the mortgagees. Bailey & Co. and Kirkendall, Jones & Co. seem to have accepted their mortgages, but the plaintiff refused to accept its, and began this action. Before the motion was filed to discharge the attachment the goods were sold in bulk by the two senior mortgagees, realizing $5,277.50. This was sufficient to satisfy the two senior mortgages and the cost of keeping and selling the property and left a small balance which an attorney retained for the benefit of the junior mortgagees. Possession had been taken by the senior mortgagees the evening the mortgages were executed and was retained by them until the sale.

The plaintiff in error contends that Bremers had no standing in court to move for the discharge of the attachment and that the judgment should be for that reason reversed. This contention is based upon the fact that the goods had been sold before the motion was filed and had not realized sufficient to pay the mortgages; that, therefore, no interest was left in Bremers, residuary, contingent, or otherwise. It must be remembered, however, that the plaintiff did not attach these goods. It suffered them to remain in the possession of the mortgagees and contented itself with garnishing the latter. This garnishment was founded upon the allegation that the mortgagees had property of Bremers in their possession. If, therefore, no interest remained in Bremers, then the plaintiff gained nothing by this garnishment. In other words, the plaintiff, relying upon its garnishment to reach the proceeds of the sale of the goods, cannot be heard to urge, contrary

to the jurisdictional facts necessary to support the garnishment, that Bremers was without interest therein. A similar point was passed upon in *Grimes v. Farrington*, 19 Neb., 44, where it was said: "It is next contended that defendants in error have no standing in court which will permit them to question the attachments. That according to their own theory they were not in possession of the goods at the time of the levy and are not entitled to the possession of them. This might perhaps be sufficiently answered by saying that since plaintiffs in error have levied upon the property as the property of defendants in error and insist that it does belong to them, they might not be heard now to say that plaintiffs in error have no such interest in it as would permit them to defend against the attachment." Interesting questions are suggested by the contention referred to as to the right of the plaintiff to attack the validity of the mortgages by virtue of its garnishment, and as to the position the plaintiff would be placed in should it be held that Bremers had no standing to move a discharge of the attachment. These questions are not, however, argued, and we mention them merely in order to affirmatively disclaim the intention of inferentially ruling thereon. On the merits of the motion to dissolve the attachment there is no contention that Bremers, in making the mortgages, was moved by any actual fraudulent intent. There is not the slightest evidence to that effect; but plaintiff bases its contention solely upon the ground that the conveyances, while in the form of mortgages, amounted in fact and in law to an irregular assignment for the benefit of creditors, which not complying with the requirements of the statute, was void. The writer is aware that it is a commonly accepted doctrine that if a debtor makes a conveyance which the law declares void generally or as against creditors, an intent to defraud is presumed and that an attachment will lie. Speaking for himself the writer conceives that a distinction exists between attacking such a conveyance for the purpose

of avoiding it as against the grantee and merely using the fact of the conveyance in evidence in support of an attachment directed against the grantor. To support such an attachment on the ground of a conveyance of property the statute requires that the conveyance must be made with the intent to defraud creditors. (Code Civil Procedure, sec. 198.) And it has been several times said that whether the grantor was actuated by such a fraudulent intent is a question of fact. (*Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb., 800; *Hewitt v. Commercial Banking Co.* 40 Neb., 820; *Meyer v. Union Bag & Paper Co.*, 41 Neb., 67.) This is certainly true, unless the fraud is disclosed by an inspection of the instrument of conveyance itself. (*Houck v. Heinzman*, 37 Neb., 463.) But it may be remarked that the case last cited was a proceeding in which the validity of the mortgage as between a creditor and a mortgagor was involved, and the issue was not as to the intent of the debtor alone. The foregoing statement is made merely as an expression of the writer's views and for the purpose of preventing an inference to the contrary to be drawn; but the case was not presented upon that ground and the decision will be based on the questions argued.

The real question presented, to-wit, the test to distinguish between mortgages given by way of security and an attempted assignment for the benefit of creditors, is one which has been much discussed in former decisions. The many authorities, which, as counsel for plaintiff say, "are very numerous, very conflicting, and hardly one in ten has been decided upon principle," have been several times reviewed. We shall not here undertake to again review them, nor shall we, except in so far as the special argument advanced in this case requires, renew the discussion of the broad question. Suffice it to say that an uncertainty in the decisions, occasioned by the apparent conflict of *Grimes v. Farrington*, 19 Neb., 44, and the case of *Bonns v. Carter*, 20 Neb., 566, has, we think, been removed by the uniformity

of later decisions, beginning with *Hershiser v. Higman*, 31 Neb., 531. These are all contrary to the logic of the majority opinion in *Bonns v. Carter*. Indeed, *Hamilton v. Isaacs*, 34 Neb., 709, expressly disproves of *Bonns v. Carter*, and *Jones v. Loree*, 37 Neb., 816, and *Smith v. Phelan*, 40 Neb., 765, explicitly announce that *Bonns v. Carter* is overruled. Counsel for the plaintiff, in a fair and very able brief, filed before the decision in *Jones v. Loree*, while basing their argument to some extent on the doctrine announced by the majority in *Bonns v. Carter*, recognize *Hamilton v. Isaacs* as the definitive expression of the court's views, and concede that unless this case is distinguishable from that their position cannot be maintained. In *Hamilton v. Isaacs*, one Denning was in failing circumstances and made separate mortgages upon his stock of merchandise to six creditors. The mortgages were made and delivered at the same time, and they contained a provision that they should prorate with one another. The case was distinguished from *Bonns v. Carter*, upon the ground that the conveyance was not to a trustee for creditors. It was held that the transaction was not void as a prohibited assignment; that the contemplated trust reposed in each mortgagee in favor of the others did not constitute it an assignment, nor did the fact that the mortgagor was insolvent, nor the fact that there was an agreement that the mortgages should prorate. The plaintiff undertakes to distinguish that case from the present upon the grounds, first, that there was not in *Hamilton v. Isaacs* a transfer to one creditor of goods upon which another creditor had no lien, with a provision that the latter should share in the proceeds of such goods; and secondly, that it was assumed in *Hamilton v. Isaacs* that the instruments were made to secure an indebtedness, while in this case it was evidently not the purpose to give security, but that it was the purpose to make an absolute disposition of the property for the benefit of creditors. The plaintiff's first argument is, we think,

based upon a misconstruction of the two senior mortgages. The argument is that the "boots, shoes, slippers, and rubber goods" not included in Meyer's mortgage were by the prorating clause in the bank's mortgage devoted to the payment of Meyer's debt as well as the bank's. We think a proper construction of the mortgages is that Meyer obtained no lien on these excepted goods, and that the stipulation that the two mortgages should prorate applied only to such goods as were included in both mortgages. On the second question the argument is based largely on the language used by Judge POST in the statement of the case of *Hamilton v. Isaacs*, to-wit: "Said mortgages were all given to secure the *bona fide* debts of the mortgagor." But this language was not used in stating a conclusion reached from a consideration of the question as to whether the mortgages were given by way of security or by way of absolute disposition. The court merely made use of the customary phrase by which such transactions are described, and no stress can be laid upon the use of the word "secured." The argument of the plaintiff is, in short, that in making the mortgages in the manner in which they were made, relative or reciprocal trusts were created against each mortgagee in favor of the others; that the mortgagor was insolvent; that the parties did not contemplate that he would redeem the mortgages; that the goods were not worth enough to pay them all; that the mortgagor had not the ability to redeem; that he placed in the mortgages a power of sale with the intention that it should be immediately exercised; that from these facts it was evident that he contemplated an absolute disposition of his property in order that it should be sold and a fund created to pay debts without reserving any interest in himself. Do these facts create any distinction in principle between this case and the cases of *Hershiser v. Higman*, *Hamilton v. Isaacs*, and *Jones v. Loree?* We think not. The fact that the mortgagor was insolvent is not important. An insolv-

ent debtor has the right to prefer one or more of his creditors to the extent, if necessary, of devoting all his property to that purpose. (*Hershiser v. Higman, supra; Hamilton v. Isaacs, supra; Costello v. Chamberlain*, 36 Neb., 45; *Kilpatrick-Koch Dry Goods Co. v. McPheely, supra.*) So far as the plaintiff's argument is based upon the doctrine that relative trusts were created against each mortgagee on behalf of the others the case is precisely similar to that of *Hamilton v. Isaacs.* So far as the argument is based upon the ground that the defeasance was not inserted in good faith and that the debtor intended the transaction to be an absolute disposition of his property, this must be inferred, if at all, from the facts that the mortgaged property was probably insufficient to pay the debts secured; that the parties contemplated that the mortgagees should immediately take possession and proceed to realize on the security, and from the fact that the mortgagor gave an express power of sale. If we should hold that the taking or giving of inadequate security constituted the transaction fraudulent we would practically hold that a debtor could never safely secure his creditor. The argument has always been the other way, and it has often been said that the giving and taking of security in value greatly in excess of the debt is evidence tending to prove fraud. It would not do to say that because a debtor cannot give adequate security he must refrain from giving any or leave the transaction open to attack as constituting a fraud in law. So, too, of the fact that the parties contemplated that the creditors should immediately take possession and that thereafter the debtor should not continue in business. Our statute makes a chattel mortgage presumptively fraudulent unless the mortgagee does immediately take and continuously retain possession of the mortgaged property. If it is a badge of fraud not to take immediate possession, it cannot be a badge of fraud to do so. As to the power of sale, it was for a sale in the manner provided

by statute for the foreclosure of chattel mortgages. (Compiled Statutes, ch. 12.) If no such provision had been contained in the mortgage, the statute referred to would have supplied it, and we cannot hold that the instruments were not mortgages because they provided for foreclosure in the very manner which the statute requires for the foreclosure of mortgages. We repeat that we can see no distinction in principle between this case and *Hamilton v. Isaacs* and the recent decisions of this court. The rule announced in these later cases is now well settled and must be adhered to. In order that the position of the court may not be misunderstood we take this occasion to say that the result of the later cases is an approval of the views of Judge REESE in the dissenting opinion in *Bonns v. Carter*, 22 Neb., 495, in which this language was used: "I am inclined to think that the statute refers only to assignments when intended as such; that is, when a debtor undertakes to make an assignment under the statute, he must make it in accordance with it, otherwise it is no assignment, and is void; and the rules relating to the construction of mortgages and other instruments somewhat akin to assignments, but not intended as such, remain unchanged; and, therefore, this mortgage is not an assignment, in the sense referred to in the first and twenty-ninth sections of the assignment law, and is not, for that reason, void." It follows that the district court properly discharged the attachment and, therefore, did not err in discharging the garnishees at the same time.

JUDGMENT AFFIRMED.

F. L. BLUMER v. GEORGE A. BENNETT ET AL.

FILED APRIL 16, 1895. No. 6175.

1. **Trial**: EXCEPTIONS. The taking of an exception is the act of parties or counsel in court. The notation of the exception on the record is merely evidence of the fact.
2. **Review**: RECORD OF INSTRUCTIONS. Instructions given and refused are a part of the record and need not be and should not be embodied in a bill of exceptions.
3. **Trial**: EXCEPTIONS TO INSTRUCTIONS. The notation of the words "given" or "refused," as required by statute, on the margin of the instructions, is also a portion of the record, indicating the court's ruling on the instruction, and an exception is properly noted by a memorandum on the margin of the instructions.
4. ———: ———. Where counsel, when instructions were given, indicated in open court their desire to except thereto, and afterwards themselves noted their exceptions by a memorandum on the margin of the instructions, *held*, that the court, in overruling a motion to strike from the record such memorandum, adopted and ratified the notation, and such notation being in accordance with the facts, there was no error in the court's ruling.
5. **Fraudulent Conveyances**: BURDEN OF PROOF. Where the vendee or mortgagee of chattels takes immediate possession and continuously retains possession, in a contest between such vendee or mortgagee and creditors of the vendor or mortgagor the burden of proof is on the creditors to show both a fraudulent intent on the part of the vendor or mortgagor and participation therein on the part of the vendee or mortgagee.

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

Estelle & Hoeppner, for plaintiff in error, cited: *Sloan v. Coburn*, 26 Neb., 607.

W. W. Morsman, contra, cited: *Goodrich v. Downs*, 6 Hill [N. Y.], 438; *Barney v. Griffin*, 2 N. Y., 365; *Leitch v. Hollister*, 4 N. Y., 214; *Sukeforth v. Lord*, 25 Pac. Rep.

[Cal.], 497; *Brigham v. Jones*, 29 Pac. Rep. [Kan.], 309; *Beels v. Flynn*, 28 Neb., 575; *Hedman v. Anderson*, 6 Neb., 399; *Tallon v. Ellison*, 3 Neb., 75; *Montieth v. Bax*, 4 Neb., 170; *Cleveland Paper Co. v. Banks*, 15 Neb., 20; *Cadwallader v. Blair*, 18 Ia., 420.

IRVINE, C.

The defendants in error have presented a cross-petition in error to reverse an order of the district court overruling their motion to strike from the record notations of exceptions on the margin of the instructions. Inasmuch as most of the assignments in the plaintiff's petition in error relate to the instructions it is necessary to consider and decide upon the questions presented by the cross-petition before reviewing the case on the principal petition in error. The record filed with the cross-petition consists of the motion to strike from the record the notation of exceptions and an order overruling the same without any specific findings. There is also attached, duly settled and authenticated, a bill of exceptions embodying the affidavits used on the hearing of this motion, the judge's certificate to this bill of exceptions containing specific findings of fact and the reasons of the court for overruling the motion. The reasoning of the court is not properly a part of the record in any place, and the special findings, to be available, should be embodied in the record and not in the bill of exceptions. The record filed with the plaintiff's petition in error shows on the margin of each instruction given or refused a notation to the effect that plaintiffs except. After this notation appear, in some instances, the words "Scott, Judge," and from the affidavits filed and used on the hearing of the motion to strike, it appears that immediately after the court charged the jury and refused the instructions which were refused, counsel on both sides arose before the jury had left the box and indicated their desire to take exceptions; that one of plaintiff's attorneys stated that he intended to take

exception to the instructions given and to the refusal to give those by him requested, and that the court remarked that no formal exceptions need be taken at that time, but might be taken any time within three days after the verdict; that counsel acquiesced in that ruling, and very soon after the verdict was returned one of plaintiff's attorneys went to the clerk's office and himself made the notations referred to on the margin of the instructions.

The defendant in error, in support of his cross-petition, argues that the notation of the exceptions by counsel was unauthorized and of no avail; that the instructions should be incorporated in the bill of exceptions and are not part of the record, or, if the instructions themselves are a part of the record, that the exceptions thereto are not and must appear by bill of exceptions and not by the transcript. In order to come to a consideration of these points it is necessary to refer to the statutes. Chapter 19, section 52, Compiled Statutes, makes it the duty of the judges to reduce their charges to writing unless the same be waived in open court "and so entered in the record of said case." Section 53 provides for the modification of instructions requested by the use of such characterizing words as "'changed thus,' which words shall themselves indicate that the same was refused as demanded." Section 54 requires the court to read the instructions given to the jury, to announce them as given, and to announce as refused all those which are refused and to write the word "given" or "refused," as the case may be, on the margin of each instruction. Section 55 requires all instructions to be filed by the clerk, and provides that "such instructions shall be preserved as part of the record of the cause in which they were given." Section 307 of the Code of Civil Procedure defines an exception as "an objection taken to a decision of the court upon a matter of law." Section 308 requires the party objecting to the decision to except at the time the decision is made. Section 310 provides that where the de-

cision objected to is entered on the record and the grounds of objection appear in the entry, the exception may be taken by the party causing to be noted at the end of the decision that he excepts. In *Eaton v. Carruth*, 11 Neb., 231, it was said that the instructions are properly matters of record in this state and should not be embodied in a bill of exceptions. Practically the same language was used in *Cleveland v. Banks*, 15 Neb., 20. It may be conceded that the expressions in both cases were mere *dicta;* but they have been followed in practice for many years, and having become a rule of practice, should not be departed from without the gravest reasons for so doing. We do not think such reasons exist. On the contrary, we are clearly convinced that the rule announced in those cases is correct. The sections from chapter 19 referred to make it too plain for construction that the instructions on being filed become a part of the record. If so, they need not be, and should not be, embodied in a bill of exceptions, because the office of the bill of exceptions is to bring into the record what otherwise would not there appear. So, too, section 54 of chapter 19 requires the court to write the word "given" or "refused," as the case may be, on the margin of instructions. This is made the more manifest by the provision of section 53, whereby the use of characterizing words in modifying an instruction requested is made equivalent to the use of direct words showing that the instruction as requested was refused. We, therefore, hold that construing these sections the instructions given and refused are a part of the record, and that the marginal notes by the judge indicating his ruling thereon become also a part of the record, as much so as a journal entry embodying a ruling of the court, and that, therefore, neither the instructions nor the action of the court thereon need be, or should be, embraced in the bill of exceptions. Passing on to the requirements of the Code in regard to exceptions, we note, first, that it is not required that in objecting or excepting to a ruling on the instructions

any specific reason need be given. Therefore, the instruction and the decision of the court in giving and refusing it appearing of record, it is sufficient, under section 310, in order to note an exception thereto that the party excepting should cause it to be noted at the end of the decision. We do not think that this section is important so far as it applies to the mere place of notation, but even if the notation must be at the end of the decision and nowhere else, in the case of instructions the end of the decision would be the court's marginal note. The exception is the act of the party at the time of the ruling complained of, the notation is merely the evidence of such action—the exclusive evidence it is true, but still merely evidence and not the main fact. Now it appears from the proof offered that counsel did as much as could be done when the court ruled upon the instructions. Counsel arose and announced their desire to take exceptions, and apparently before they were permitted to make the exceptions specific the court stopped them. The allowance of an exception is not within the discretion of the trial judge. A party is entitled to an exception as a matter of right. The court cannot refuse it, nor can the court by indirection, as by refusing to listen to counsel, deprive a party of the benefit of exception. The trial judge in this case did not undertake to prevent the noting of exceptions. He merely resorted to a practice which the writer knows to be in general use and which has strong points in its favor of delaying the noting of exceptions until after the jury retires. We think counsel must be considered as having done what they stated they desired to do and what they had a right to do at the time the court interposed, and that the notation of the exceptions after the verdict was returned was merely entering of record the evidence of what had been done at the time of the court's rulings. Nor do we think that in this case the fact that the notations were made by counsel was important. The court might have made the notations

at the time counsel stated their exceptions. The court might have made the notations afterwards, or directed the clerk so to do in order that the record might disclose the exceptions which had actually been taken. It was irregular for counsel themselves to make the notation, but inasmuch as the court might have made them or might have directed their making, when the court overruled the motion to strike off these notations it in effect ratified and adopted the act of counsel. The record as it stands now is in this respect in accordance with the facts as disclosed by the bill of exceptions. The court did not err in overruling defendant in error's motion and its action is in that respect affirmed.

We now come to a consideration of the plaintiff's petition in error. The action was one in replevin by Blumer against the sheriff of Douglas county to recover the possession of a stock of merchandise which had been levied upon by the sheriff under a writ of attachment sued out by the Kilpatrick-Koch Dry Goods Company against one Luchsinger. The plaintiff claimed under an instrument executed by Luchsinger in form of a bill of sale containing the following provision: "The said F. L. Blumer agrees to take immediate possession of the said property, to sell the same at retail in the usual course of trade and to account to the said Fred Luchsinger for any sum or surplus there may be over the said amount of money first above named, and the expenses of keeping said property and selling the same as aforesaid." This instrument was given ostensibly to secure the payment of a debt from Luchsinger to Blumer, and there is evidence tending to show that Blumer took immediate possession under the bill of sale and retained possession until the levy of the attachment. The sheriff and the Kilpatrick-Koch Dry Goods Company, which was allowed to intervene, contended that the conveyance to Blumer was in fraud of creditors.

The court instructed the jury in the first instruction given

that the burden of proof was upon the plaintiff to establish by a preponderance of the evidence that he was entitled to the possession of the property, and that in determining that question the jury should determine under the evidence, first, the purpose for which the instrument already described was given and accepted, and second, whether it was given to secure a *bona fide* debt. The instrument was in all respects similar in form to that under consideration in *Sloan v. Coburn*, 26 Neb., 607. It was held in that case that such an instrument was in effect a chattel mortgage, and that it was not void on its face. The fact of the execution and delivery of the instrument was admitted of record, and, as we have said, there was proof tending to show that Blumer took immediate possession thereunder. There was established a conveyance in fact and in form, and if immediate possession was taken by Blumer, the presumption was that the conveyance was in good faith. Fraud is never presumed, but must be proved by the party alleging it. The burden is on one attacking the validity of a transaction to establish its invalidity. (*Clemens v. Brillhart*, 17 Neb., 335.) To this rule, in such cases as the present, our statute (ch. 32, sec. 11, Compiled Statutes) creates one exception, to-wit, that where a conveyance of chattels or mortgage thereon is not accompanied by an immediate change of possession and followed by continued possession in the grantee, such conveyance or mortgage is presumably fraudulent as against creditors and throws upon the grantee the burden of showing that it was made in good faith and without intent to defraud. There could be no inference from the instruction quoted except that, regardless of the evidence tending to show a change of possession, the burden of proof was put on plaintiff to establish his good faith.

The second instruction is open to the same objection.

The fifth instruction is as follows:

"5. The burden is cast on the plaintiff to satisfy you by a preponderance of the evidence that he paid a considera-

tion for the execution of the instrument under which he claims the right to the possession of the goods and chattels in controversy. If the plaintiff has satisfied you by a preponderance of the evidence in the case that the instrument under which he claims possession of the property was based upon a valuable consideration, then the burden of proof is cast upon the defendant to show by a preponderance of the evidence that the instrument was given by Luchsinger for the purpose of cheating and defrauding his other creditors; and if the testimony does so satisfy you by a preponderance of the evidence, then it becomes incumbent on the plaintiff to satisfy you by a preponderance of the evidence that he, the plaintiff, did not participate in or have knowledge of such fraudulent intent and purpose of said Luchsinger and that he, the plaintiff, took the instrument in good faith and for the purpose of securing a *bona fide*, then existing, debt from Luchsinger to him."

It is doubtful whether the direct instructions in the first and second paragraphs, that the burden was on plaintiff to show good faith, could be corrected by a subsequent instruction stating the rule correctly, but even if they could, this fifth paragraph did not state the rule correctly. It is not the law that the burden of proof of fraud depends solely upon the existence of a valuable consideration, nor is it the law that when a creditor has established a fraudulent intent on the part of the debtor, the burden shifts and the grantee is required to show that he did not participate in such fraudulent intent. On the contrary, except in cases where the burden is on the party claiming under the conveyance to establish his good faith, a creditor attacking the conveyance must show by a preponderance of the evidence both that the grantor was actuated by a fraudulent intent and that the grantee participated therein or had notice thereof. For the errors referred to the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

OSCAR DILLON v. NELLIE D. STARIN.

FILED APRIL 16, 1895. No. 6209.

1. Divorce: PUBLICATION OF NOTICE: ALIMONY. In an action for divorce, where the husband is a non-resident served only by publication of notice and he does not appear, the court has no jurisdiction to render a personal judgment, as for alimony.
2. ———: DISPOSITION OF PROPERTY. Section 18, chapter 25, Compiled Statutes, providing that on dissolution of a marriage the court may make a decree restoring to the wife personal estate that shall have come to the husband by reason of the marriage or awarding to her the value thereof, refers to property which the law gives the husband by reason of the marriage and not to property obtained by the husband from the wife by gift or contract.
3. ———: ———: PLEADING AND PROOF. A petition alleging that a certain sum had come to the husband by reason of the marriage and praying restitution thereof is not supported by proof of money voluntarily advanced by the wife to the husband after the marriage.

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

M. L. Hayward and *P. C. Jessen*, for plaintiff in error.

John C. Watson, *contra*.

Good & Good, *amici curiæ*.

See opinion for citations.

IRVINE, C.

The record in this case discloses that the parties were married in Missouri in 1875. In 1879 they took up their residence in Kansas. Some time thereafter the defendant in error came to the home of her mother in Nemaha county, in this state, and, after residing with her mother for some-

thing more than two years, brought action in the district court of Nemaha county for a divorce and for alimony, or rather for a divorce and the restitution to her of the value in money of personal property which it was averred had come to the possession of Dillon by reason of the marriage. No personal service was had on Dillon. He was not in the state, nor was he a resident of the state. Constructive service was had by publication, and a decree allowed granting the defendant in error a divorce and giving her judgment for $1,000, which the court found the plaintiff in error had received from the defendant in error because of the marriage. After the rendition of this decree the defendant in error married one Starin and removed to Minnesota. The plaintiff in error has also married, and at the time the present action was begun, resided in Arkansas. Dillon's father died in Otoe county, and Dillon, having temporarily come into that county because of his father's death, the present action was there instituted by Mrs. Starin. The theory of the action will best appear by a summary of the petition. It alleged the divorce proceedings in Nemaha county and set out *in extenso* the petition in that case. It then reasserted the truth of the allegations of that petition. It pleaded the decree, that the judgment allowed therein was not paid; averred the death of Dillon's father, and that Dillon had, as his father's heir, become seized of certain real estate in Otoe county, described in the petition. The prayer was for a judgment of $1,000, with interest from the date of first decree, and that such judgment be charged upon said real estate as a lien thereon. Dillon, in answer, denied the truth of the allegations upon which the divorce was granted; denied that he had any knowledge of those proceedings; averred that he never received from the plaintiff any sum except $300, of which he had repaid $165, the remainder having been consumed for the maintenance of the family; denied the jurisdiction of the court to grant the relief prayed, and averred that the

judgment for money in the divorce case was void. The case was tried to the court without a jury, the court finding that defendant had used of plaintiff's separate property the sum of $600, for which sum, with interest, amounting to $1,049.50, judgment was rendered against the defendant and made a lien on defendant's interest in the land of his father. To reverse this judgment or decree the defendant instituted these proceedings.

Some of the assignments of error are directed against the admission of evidence. These assignments will not be noticed, for the reason that the case was tried to the court, and the admission of improper evidence was, therefore, not in itself reversible error. The assignment that the finding and judgment are not supported by sufficient evidence presents the questions which have been argued by counsel.

Our statute (ch. 25, sec. 10, Compiled Statutes) provides that in all cases of divorce, alimony, and maintenance, when personal service cannot be had, service by publication may be made as provided by law in other civil cases under the Code of Civil Procedure. This statute is wholly ineffectual to sustain a judgment for alimony or maintenance based upon service by publication against a non-resident who does not appear in the action. It has been many times decided in this state and elsewhere that a judgment for alimony is a judgment *in personam*. It is perfectly clear upon principle, and thoroughly settled by the authorities, that while a state may provide for constructive service in a divorce case, so that the decree rendered will be valid as affecting the status of the parties, it is beyond the power of the legislature to confer jurisdiction to render a personal judgment against a non-resident in this manner, and that a judgment for alimony based on such service is void. (*Bunnell v. Bunnell*, 25 Fed. Rep., 214; *Rigney v. Rigney*, 127 N. Y., 408; *Beard v. Beard*, 21 Ind., 321; *Lytle v. Lytle*, 48 Ind., 200; 1 Am. & Eng.

Ency. of Law, 468, and cases there cited.) The same rule has been announced in this state in *Johnson v. Johnson*, 31 Neb., 385. *Johnson v. Johnson* was an action in the nature of a creditor's bill supplemental to a decree similar to that rendered in the case in Nemaha county, by which it was sought to subject land belonging to the husband, but the title to which stood in the name of another, to the payment of the judgment. The husband appeared in the latter proceedings, and a judgment in favor of the wife was affirmed; but this was upon the ground that Johnson's appearance had conferred upon the court in these supplemental proceedings jurisdiction to try anew and determine the question of alimony. The decree was not based on that in the divorce case, which was considered aud treated as void so far as it was *in personam*. The character of the pleadings and the precise nature of the proceedings do not appear from the report of the case. The court, however, laid stress upon the fact that the proceedings were supplemental to the divorce and in the same court which granted it. The judgment for $1,000 in the district court of Nemaha county was, therefore, without jurisdiction, and could not be made the foundation of an action. Mrs. Starin, in her petition in this case, clearly counted upon this judgment, but she evidently endeavored to aver at the same time facts constituting a separate cause of action by reasserting the averments of her petition in the divorce case. It is quite clear that the district court considered the first judgment void and proceeded upon the theory that this was an original action, because its finding was that the defendant had received of the plaintiff's separate property $600 instead of $1,000, as found in the divorce case. In *Earle v. Earle*, 27 Neb., 277, it was held that courts of equity have power to enforce the duty of a husband to support his wife in an action for that purpose without reference to a divorce. In *Cochran v. Cochran*, 42 Neb., 612, it was held that after a husband has obtained a divorce upon

constructive service the wife may maintain an independent action for alimony. It would seem, therefore, that the court granting the divorce having had no jurisdiction to to pass upon the property rights of the parties, Mrs. Starin might maintain a separate action to determine those rights, even to the extent of suing for alimony as such, unless her subsequent marriage defeated the right,—a question argued in the briefs, but one which it is not necessary to decide. Was this a case of that nature; and if so, does the evidence support the judgment? No objection having been made to the double aspect of the petition, it is quite probable that the district court was justified in treating it as an original action. If so, it must stand solely upon the averment that "personal property to the amount of more than $3,000, the sole property of this plaintiff, has come to the said defendant by reason of the said marriage." This averment was evidently made to bring the case within chapter 25, section 18, Compiled Statutes, providing that upon the dissolution of a marriage the court may make a further decree restoring to the wife the whole or such part as it shall deem just and reasonable of the personal estate that shall have come to the husband by reason of the marriage, or awarding to her the value thereof to be paid by the husband in money. This section immediately follows a section providing that when a decree of divorce shall be granted, the wife shall be entitled to the possession of her real estate in like manner as if her husband were dead. This act was passed prior to the enactment of the married woman's act, and it is very evident that the two sections referred to have reference to the property rights of a husband as they existed at common law, and that their object was to restore the wife to her property rights on dissolution of marriage and prevent the husband from retaining the personal property and possession of the real estate thereafter. The language, "personal estate that shall have come to the husband by reason of the marriage," means,

therefore, personal property, the right to which the law casts upon the husband because of the marriage. The property for which this judgment was rendered was not property of this character. It was money which came to the wife as the proceeds of land inherited from her father. The marriage gave the husband no right to it. The evidence shows that the wife, of her own volition, paid a debt of the husband therewith. It therefore came to the husband by reason of a gift or a loan, we do not determine which, and not by reason of the marriage. The distinction is important. Questions of property may arise between husband and wife in this state in three ways: First—Because of the legal obligation cast upon the husband to maintain his wife. Because of that obligation the courts, in a proper action, may require the husband to pay money to the wife for her support regardless of any business transactions between them. Such an allowance may properly be described as alimony. Second—Under sections 17 and 18, above referred to, where the law by reason of the marriage has conferred upon the husband property belonging to the wife, the court, when the marriage is dissolved, may restore such property to the wife. Third—Under the married woman's act, Compiled Statutes, chapter 53, the wife is practically emancipated and may now enter into contractual relations with her husband. Such relations may give rise to claims precisely of the character existing under similar circumstances between strangers. (*Skinner v. Skinner*, 38 Neb., 756.) Treating the petition in this case in the light most favorable to the plaintiff, it stated a cause of action under the second class, while the proof tended to establish a cause of action under the third class. The *allegata et probata* must agree, and under a petition charging a cause of action based purely on marital rights, proof of purely contractual obligations is irrelevant.

REVERSED AND REMANDED.

CONSOLIDATED TANK LINE COMPANY V. BENDIX PIEN ET AL.

FILED APRIL 16, 1895. No. 6364.

1. **Ejectment:** EVIDENCE. The declarations of a former owner of land are not admissible as against those claiming under him when made after he has conveyed the land.
2. ——: ——. The evidence *held* sufficient to sustain the verdict.

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

W. H. Platt, for plaintiff in error.

W. A. Prince, contra.

IRVINE, C.

This was an action of ejectment by the plaintiff in error against Bendix Pien and Johann Frederick Wiese for a small tract of land adjoining the city of Grand Island. The plaintiff, in 1888, purchased a tract including that in dispute. Bendix Pien had been the owner of a tract immediately north of this for many years and in 1887 conveyed it to Wiese by warranty deed. The tract, as fenced and occupied by the defendants, included a portion of that claimed by the plaintiff, and this portion was the land in in controversy. The contest was practically centered upon the plea of adverse possession interposed by defendants. There was a verdict and judgment for defendants.

Plaintiff in error argues but two assignments. One of these relates to the exclusion of evidence, and the other is that the verdict is not sustained by the evidence. Of the latter assignment it is sufficient to say that the evidence has been examined and that it discloses a conflict in some par-

ticulars rather remarkable. We are satisfied that there was sufficient to sustain the verdict of the jury. The other assignment is that the court erred in excluding the evidence of an admission made by Pien. It would be inferred from the evidence that Pien continued, after his conveyance to Wiese, to reside on the land with Wiese. The nature of his residence does not appear. The admission referred to, according to the offer made by plaintiff, must have been made in 1889, two years after Pien had conveyed his whole estate to Wiese, and was to the effect that Pien knew his fence was beyond his line. It has been held in this state, in accordance with the general rule, that the declarations of a person in possession of property as to his title are admissible against him and all persons claiming under him (*Cunningham v. Fuller*, 35 Neb., 58); but we do not think that this rule extends so far as to authorize the admission in evidence of declarations by a grantor of land made after the conveyance in disparagement of the title conveyed. To admit such evidence would open the door to fraud, and would permit the grantee's estate to be divested by the statements of his grantor contrary to the terms of his deed. The reasons given for admitting in evidence the declarations of a former owner are that the declarant was so situated that he probably knew the truth, and that the declaration in disparagement of his title, being against his interest, was probably true. The latter reason fails altogether when the former owner has parted with his interest before making the declarations. (*Chadwick v. Fonner*, 69 N. Y., 404.) That such admissions are not receivable in evidence when made after the grantor has parted with his title see *Christie v. Bishop*, 1 Barb. Ch. [N. Y.], 105. There was no error in excluding this evidence.

JUDGMENT AFFIRMED.

HARRISON, J., not sitting.

JOHN H. BOUGHN V. STATE OF NEBRASKA.

FILED APRIL 16, 1895. No. 6439.

1. **Limitation of Actions: INDICTMENT AND INFORMATION.** Under section 256 of the Criminal Code, an indictment must be found or information filed within the time fixed by that section. It is not sufficient that the prosecution be instituted by complaint, arrest, or preliminary examination within such period.
2. **Criminal Law: PLEA: STATUTE OF LIMITATIONS.** The defense of the statute of limitations may in a criminal prosecution be availed of under a plea of "not guilty."

ERROR to the district court for Cedar county. Tried below before NORRIS, J.

Wilbur F. Bryant, for plaintiff in error:

A defendant in a criminal case may avail himself of the statute of limitations under a plea of the general issue. (Bishop, Statutory Crimes, 264; 1 Starkie, Criminal Pleading & Practice [2d ed.], 339; Wharton, Criminal Pleading & Practice, 317; Maxwell, Criminal Procedure, 4; *White v. State*, 4 Tex. App., 490.)

George H. Hastings, Attorney General, for the state, cited: *State v. Yates*, 36 Neb., 287.

IRVINE, C.

An information was filed May 1, 1893, in the district court of Cedar county charging the plaintiff in error with assault and battery committed May 16, 1891. One defense was that the prosecution was barred by the statute of limitations. The plaintiff in error sought to present this defense by objecting to the introduction of any evidence on the ground that the information on its face showed that the prosecution was barred; second, by a request for an instruction to find "not guilty" on that account; third, by

presenting in the motion for a new trial the question of the sufficiency of the evidence; and fourth, by a motion in arrest of judgment. The rulings on all these points were adverse to the plaintiff in error. Some of the rulings have not been preserved for review by proper exceptions and assignments of error, still if the prosecution was in fact shown to be barred the verdict was not sustained by the evidence, and the conviction must be, for that reason, reversed unless the defense cannot be presented under a plea of "not guilty." Two questions are therefore presented: Did it appear that the prosecution was barred by the statute, and did the plea of "not guilty" present such defense?

Section 256 of the Criminal Code is as follows: "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 to a fine not exceeding one hundred dollars, and to imprisonment not exceeding three months; *Provided*, That nothing herein contained shall extend to any person fleeing from justice; *Provided, also*, That where any suit, information, or indictment for any crime or misdemeanor is limited by any statute to be brought or exhibited within any other time than is hereby limited, then the same shall be brought or exhibited within the time limited by such statute; *And provided, also*, That where any indictment, information, or suit shall be quashed, or the proceedings in the same set aside or

reversed, on writ of error, the time during the pendency of such indictment, information, or suit so quashed, set aside, or reversed, shall not be reckoned within this statute, so as to bar any new indictment, information, or suit for the same offense." It is conceded by the state that by this section the action must be instituted within one year after the commission of the offense; but it is contended that the punishment provided by law being at the time the offense was committed a fine of not exceeding one hundred dollars or imprisonment not exceeding three months, or both, the case was not within the jurisdiction of a magistrate to try (*State v. Yates*, 36 Neb., 287); that, therefore, the action must have been instituted by a complaint and preliminary examination before the magistrate, and that the institution of the action in that manner, and not the filing of the information, must determine whether the prosecution was begun within time, and that it does not appear from the record that the action was not so instituted within one year from the commission of the offense. We cannot accept this construction of the statute. The word "instituted" evidently refers back to the clause "for any fine or forfeiture under any penal statute." Where the action is of such a character, it must be instituted within the time fixed by the statute, but where the prosecution is for a misdemeanor, the indictment must be found or the information filed within the statutory period. So construing the statute, it is undisputed that the offense was committed almost two years before the information was filed and that the prosecution was in fact barred. As to whether it is necessary to specially plead the statute of limitations, or whether, on the other hand, it may be availed of under the general issue, the authorities are in conflict. We think, however, that the later cases, and those best based upon principle, are to the effect that the statute of limitations may be availed of under a plea of "not guilty." (*Hatwood v. State*, 18 Ind., 492; *State v. Carpenter*, 74 N. Car., 230; *White v. State*, 4 Tex.

App., 488; Wharton's Criminal Pleading & Practice, sec. 318.) In *United States v. Cook*, 17 Wall., 179, Mr. Justice Clifford, while holding that where any exceptions are included in the statute the defense cannot be raised by demurrer, says that the rule in *Hatwood v. State* is undoubtedly correct. The reason for this rule is that the general issue in a criminal prosecution is broader than in a civil action and casts upon the state the burden of proving every element of the offense, including the fact that it was committed within the period of limitations. Under our Code there exist special reasons for adopting this rule, because the Code expressly provides (sec. 449) what offenses must be specially pleaded in bar, and the statute of limitations is not one of them.

REVERSED AND REMANDED.

H. M. POLLARD ET AL. V. E. T. HUFF ET AL.

FILED APRIL 30, 1895. NO. 6402.

1. **Negotiable Instruments:** INDORSEMENTS: GUARANTY. An agreement in the following form: "For value received we hereby guaranty payment of the within note at maturity, or any time thereafter, waiving protest and notice of non-payment," *held*, not a mere guaranty, but an indorsement with an enlarged liability.
2. ———: ACCOMMODATION NOTE: CONSIDERATION. An accommodation note or bill, within the meaning of the law merchant, is one which is made or accepted not upon a consideration, but for the purpose of enabling the payee or holder to raise money on credit.
3. ———: EVIDENCE. Evidence examined, and *held* not to sustain the verdict and judgment in favor of the defendants as makers of the notes in controversy.

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

Atkinson & Doty, for plaintiffs in error.

Davis & Hibner, J. E. Philpott, and *Field & Holmes, contra.*

POST, J.

This is an error proceeding from the district court of Lancaster county. It appears from the transcript filed with the petition in error that two actions were commenced in the court below by the plaintiffs in error as assignees of D. W. Haydock, insolvent, to recover from the defendants therein, who are also defendants in error, on three promissory notes, bearing date of August 24, 1891, each for $1,407.78, due in three, six, and nine months, and bearing interest at the rate of eight per cent per annum from date. Said causes were by order of the court consolidated for trial, and will, for the purpose of this proceeding, be treated as one action. The transactions out of which the controversy arose are exceedingly complicated, and have required repeated examinations of a voluminous transcript, and also of a bill of exceptions so inartistically prepared as to impose upon this court much additional labor. The undisputed facts as disclosed by the pleadings and proofs, may be summarized as follows:

1. In the year 1890 the Lawrence Implement Company, a Nebraska corporation, whose place of business was in the city of Lincoln, was indebted to D. W. Haydock, of St. Louis, Missouri, for merchandise in the sum of $5,263.

2. September 24, of that year, said corporation, by its president, F. P. Lawrence, one of the defendants, executed in favor of E. S. Hawley, also a defendant, its promissory note for $2,500, payable January 1 after date, with interest at ten per cent, the consideration therefor being the corporate indebtedness aforesaid to Haydock. At the same time said note was indorsed by the defendants as follows:

"For value received we hereby guaranty payment of the within note at maturity, or at any time thereafter, waiving protest and notice of non-payment.

"F. P. LAWRENCE.
"E. T. HUFF.
"E. S. HAWLEY."

3. December 15, following, said company executed its note to the said D. W. Haydock for the sum of $2,622.60, due May 3, 1891, with interest at eight per cent, which note was at the same time indorsed by the defendant as follows:

"For value received I hereby guaranty the payment of the within note and any renewal of the same, and hereby waive protest and notice of non-payment and suit against the maker, and consent that the payment of this note may be extended from time to time without affecting my liability thereon. FRANK P. LAWRENCE.
"E. T. HUFF.
"E. S. HAWLEY."

4. March 3, 1891, said implement company executed its note in favor of said Haydock for $4,500, due one day after date, and on the 9th day of the same month it executed a note in favor of the same payee for $763.61, due one day after date, without consideration other than the indebtedness above mentioned.

5. March 9, 1891, suit was brought on the note of $4,500, aided by attachment, and on March 11 the implement company, by its president, F. P. Lawrence, answered, admitting all the allegations of the petition, and authorizing judgment against it for the amount claimed, which was rendered accordingly, accompanied by an order for the sale of the property seized under and by virtue of the order of attachment. Judgment was subsequently recovered on the note for $763.71, although nothing has been realized on either, and both judgments, as well as the original indebtedness, are wholly unsatisfied.

6. March 12, 1891, action was brought by Haydock, as holder, against these defendants on the note of $2,500, dated September 24, 1890, and an order of attachment procured against Hawley and Huff, on an affidavit charging that they were about to convert their property into money with intent to defraud their creditors, and had assigned, removed, and disposed of their property with like fraudulent intent, and on May 14, following, suit was brought by Haydock on the note of $2,622.60, dated December 15, 1890.

7. April 24, 1891, the attachment last mentioned having been discharged as to Huff on the ground that the statements of the affidavit therefor were untrue, the latter commenced an action against Haydock on the bond given to secure said order.

8. August 24, 1891, the three actions then pending were settled and subsequently dismissed, the order of dismissal in each case being based upon a written stipulation, substantially in the following form, varying only with the titles of the several causes, and the signatures of the parties:

"DANIEL W. HAYDOCK
v.
FRANK P. LAWRENCE, E. S. HAWLEY, AND E. T. HUFF.

"It is understood and agreed that the assignees of Daniel W. Haydock, being H. M. Pollard and John M. Camp, shall, and do, hereby dismiss the above entitled suit and pay the costs of the same for certain valuable considerations."

The considerations, to which reference is therein made, were first, the allowance by the plaintiffs of a credit in the sum of $1,260, as damage in the suit by Huff on the attachment bond given by Haydock; second, the execution by defendants of the three notes in suit, which represent the amount of Haydock's claim on the prior notes, less the credit thus allowed.

9. On and prior to March 3, 1891, said Haydock and the several defendants were stockholders of, and desirous of promoting the success of, the Lawrence Implement Company, and the notes of September 24 and December 15, 1891, were executed by said defendant as sureties for the accommodation of said corporation.

In addition to the foregoing facts, it is alleged by the defendants that the consideration for the $4,500 note executed by the implement company March 3, 1891, was the express promise and agreement of Haydock, the payee thereof, to surrender the two notes last described. Their contention with respect to the notes in suit will be understood from the following quotation from the separate answer of Huff, which does not differ essentially from the other answers: "That on the said 24th day of August, 1891, this defendant, then not knowing that the said two notes in this answer described were the same notes which the said D. W. Haydock had so promised to return, and for the payment of which he had so taken the note for $4,500, and upon which last note the said D. W. Haydock had taken judgment, the defendant then and there paid to the plaintiffs on the said two notes sued upon the sum of $1,260, and in the further settlement of the said two cases, then and there believing that said two notes sued upon in the said two suits was other and different indebtedness, and founded on other considerations than hereinbefore set forth, under and by reason of the statement of fact herein stated, did execute and deliver the said note sued on in this action." In a second defense of each answer it is alleged that the defendant, on the 24th day of August, 1891, believing himself liable as guarantor upon the notes therein sued on, paid to plaintiffs the sum of $1,260 in partial satisfaction of said notes. And each prays for judgment in the amount so paid. The $1,260 therein mentioned is, it should be remarked, conceded to be the amount allowed by plaintiffs in settlement and satisfaction of the suit by Huff

on Haydock's attachment bond. These allegations are all denied by plaintiffs, who contend that the note of March 3, 1891, was executed at the suggestion of Lawrence, and that the attachment suit thereon, which immediately followed, was brought at the request of the latter for the protection of these defendants as against other creditors of the implement company, which was then insolvent.

From this analysis it is evident that the entire controversy must turn upon the construction to be given the transaction of August 24, to which that of March 3 is merely an incident, and important only in so far as it tends to characterize the former. From a more careful scrutiny of the defendants' position regarding the occurrence of March 3 their contention may be thus stated: Haydock, who in September and December, 1890, was unwilling to accept the notes of the implement company without security, in March, 1891, at a time when said corporation was hopelessly insolvent, agreed to exchange its secured notes, aggregating $5,122.60, exclusive of interest, for its unsecured obligations. Viewed in the light of the evidence, such a claim appears, to say the least, altogether unreasonable. In the first place the secured notes were not surrendered, but, on the other hand, suit was brought thereon a few days later; second, although the files and records of those cases were introduced in evidence, we cannot discover that such a defense had ever been interposed by either of the parties, at or prior to the date of the settlement, to-wit, August 24. It is possible that the judgment in this case, if resting upon the finding with respect to that issue alone, might be sustained, but when we take into consideration the transactions on the last named day as disclosed by the undisputed evidence, we are unable to perceive for it any foundation whatever. Aside from the documentary evidence above set out, the proofs with respect to the settlement in question is confined to the testimony of Mr. Philpott, who appeared as counsel for Hawley and Huff in the actions then

pending, and who represents the last named defendant in this proceeding, and of Mr. Doty, attorney for the plaintiffs herein. The first named witness, referring to the settlement, testified in chief for the defendants:

I proposed to Mr. Pollard [one of the plaintiffs], or Mr. Pollard proposed to me, an adjustment of the two suits that had been begun on the notes, and after talking the matter over part of one day, probably the 23d or the 24th, we came to a conclusion on which the two cases were to be dismissed, and Huff was to be allowed $1,260 on the damage suit, and he was to dismiss that. Then I suggested the notes sued on. There were three of them, and the amount of the $2,500 note with interest and the $2,600 note with interest were added up, making a total of about $5,483, and this $1,260 was to be taken from that, leaving about $4,100, and three notes were drawn up, payable in three, six, and nine months after date. I informed Mr. Huff of what I had done, and suggested to him that he should sign them, all the notes being really for the amount of the judgment already taken, and he did so. Mr. Lawrence, I suppose, signed. Mr. Hawley was not in the city. I was informed that he was in Nebraska City, and wrote him recommending him to sign them.

Q. During this time you also represented Hawley?

A. Yes.

Q. Under your advice he gave the note now sued on?

A. Yes; and on the faith of this it was under my and depending on the understanding that there was no indebtedness for anything before. Under that I advised them both to sign.

Neither defendant was examined with respect to the transaction under consideration. We will, however, adopt the foregoing version thereof as the most favorable to their contention. There is, it will be observed, an entire failure of proof tending to sustain the allegation that the notes in suit are the result of a mistake on the part of the defend-

ants, or any of them. It would certainly be discrediting their intelligence to admit that they did not fully comprehend the terms and conditions of the settlement or the precise nature of the obligation they were assuming. They knew that the prior notes had not been surrendered, but that, on the contrary, actions were pending thereon against them, in which Haydock or his assignees were seeking to charge them as indorsers. They knew that the three notes in suit represented the exact amounts claimed in those actions, less the credit agreed upon in favor of Huff, and the claim that they executed said notes in the belief that they were to apply upon other or different indebtedness of the implement company is unworthy of consideration.

Much is said in the charge of the court and in the brief of counsel for defendants about the original notes being accommodation paper. True, they were accommodation notes in one sense, and one only. They were executed by defendants in order to accommodate, or, in other words, as surety for the implement company. An accommodation note or bill within the meaning of the law merchant is one which is made or accepted not upon a consideration, but for the purpose of enabling the payee or holder to raise money on credit. (Randall, Commercial Paper, 472; Byles, Bills, 131.) The liability of the defendants was not that of guarantors merely, but of indorsers, with an enlarged liability. (*Heard v. Dubuque County Bank*, 8 Neb., 10; *Bloom v. Warder*, 13 Neb., 476; *Helmer v. Commercial Bank*, 28 Neb., 474; *Weitz v. Wolfe*, 28 Neb., 500; *Buck v. Davenport Savings Bank*, 29 Neb., 407.) It requires no argument to prove that such a liability is a sufficient consideration for the note of a surety given and accepted as a renewal of the original obligation. The judgment is not merely wrong, but there is an entire failure of proof, for which a verdict should have been directed in favor of the plaintiffs. This conclusion renders unnecessary an examination of the other questions presented.

REVERSED.

MARSHALL FIELD ET AL. V. R. H. MAXWELL ET AL.

FILED APRIL 30, 1895. NO. 6210.

1. **Attachment:** ACTION ON BOND: SET-OFF. In an action upon an attachment undertaking, a claim due the principal in such bond from the plaintiff is a proper subject of set-off.
2. **Attorneys' Liens:** SET-OFF. An attorney's lien for services performed in prosecuting an action is not measured by the amount which his client claims to be his due, but cannot exceed the amount in the hands of the adverse party belonging to his client or the amount owing to him, and is not paramount to any proper set-off or other available defense in such action.

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

See opinion for statement of the case.

Montgomery, Charlton & Hall, for plaintiffs in error:

In an action upon an undertaking for an attachment, a claim due from the obligee in favor of the principal may be made the subject of set-off. (*Raymond v. Green*, 12 Neb., 215.)

The decree below was erroneous in the disposition of the claim for an attorney's lien. (*Tiffany v. Stewart*, 60 Ia., 207; *Watson v. Smith*, 63 Ia., 228; *Griggs v. White*, 5 Neb., 467; *Ward v. Watson*, 27 Neb., 769; *Rice v. Day*, 33 Neb., 205; *People v. New York C. P.*, 13 Wend. [N. Y.], 649; *Nicoll v. Nicoll*, 16 Wend. [N. Y.], 446; *Noxon v. Gregory*, 5 How. Pr. [N. Y.], 339; *Hill v. Brinkley*, 10 Ind., 102; *Mosely v. Norman*, 74 Ala., 422; *Simmons v. Almy*, 103 Mass., 33.)

R. D. Stearns and *Wooley & Gibson, contra:*

The attorneys were entitled to a lien. (*Reynolds v. Reynolds*, 10 Neb., 579; *Oliver v. Sheeley*, 11 Neb., 521; *Sayre*

v. Thompson, 18 Neb., 33; *Boyer v. Clark*, 3 Neb., 161; *Abbott v. Abbott*, 18 Neb., 503; *Elliott v. Atkins*, 26 Neb., 403.)

The right of set-off cannot defeat an attorney's lien. (*Stratton v. Hussey*, 62 Me., 288; *Currier v. Boston & M. R. Co.*, 37 N. H., 223; *Johnson v. Ballard*, 44 Ind., 270; *Ward v. Watson*, 27 Neb., 768.)

Where the action is founded upon a negotiable instrument or a contract in writing which is in the attorney's possession, the lien attaches to the contract before judgment, and his client can make no settlement or assignment of the action without discharging the attorney's fees. (*Reynolds v. Reynolds*, 10 Neb., 574; *Coughlin v. New York C. & H. R. R. Co.*, 71 N. Y., 443; *Kusterer v. City of Beaver Dam*, 56 Wis., 471; *Dennett v. Cutts*, 11 N. H., 163; *Schwartz v. Jenney*, 21 Hun [N. Y.], 33.)

HARRISON, J.

July 20, 1891, plaintiffs in error commenced an action in the district court of Lancaster county against the defendants in error, upon a guaranty, to recover the sum of $1,513.45 and interest, and also in connection with the action instituted attachment proceedings, in which an order issued and a levy was made. The attachment was dissolved of date September 21, 1891, and on October 1, 1891, the defendants in error commenced an action against plaintiffs in error in justice court of Lancaster county, upon the bond which had been given in the attachment proceedings, and claimed damages in the sum of $200. On October 6, 1891, the plaintiffs in error filed an answer in this suit in justice court, consisting of a general denial and an affirmative defense, alleging the liability of defendants in error upon the guaranty, and asking that any amount found due the defendants in error upon the bond as damages should be credited on their claim by reason of such contract of guaranty, and on the same day attorneys for defendants in

error filed in the justice court notice of attorney's lien in the sum of $100. A trial of the cause in justice court resulted in a judgment in favor of defendants in error, and an appeal was perfected by plaintiffs in error to the district court, and after petition and answer were filed, a motion was made on behalf of plaintiffs in error for the consolidation of the appeal case with their action against defendants in error upon the guaranty, then still pending in the district court. This motion was sustained and the causes were consolidated. A jury was waived and a trial of the action had to the court and the following judgment rendered:

"This cause, having been heretofore on a former day of this term of court, to-wit, February 8, 1893, tried and submitted to the court, now comes on for final determination, and after due consideration, and being fully advised in the premises, the court finds that there is due the plaintiffs Marshall Field & Co. upon the cause of action set forth in their petition from the defendants R. H. Maxwell, Frank Sharpe, and Thomas Ross the sum of $1,513.45 principal and $317.80 interest thereon, making a total sum of $1,831.25.

"The court further finds that there is due the defendants R. H. Maxwell, Frank Sharpe, and Thomas Ross the sum of $100 by reason of the wrongful attachment proceedings set forth in their answer and counter-claim and for attorneys' fees in procuring a dismissal of said attachment, and the court further finds that the said plaintiffs Marshall Field & Co. and the defendant H. R. Nissley are liable to said defendants R. H. Maxwell, Frank Sharpe, and Thomas Ross for said sum upon their undertaking for said attachment.

"It is therefore considered and adjudged by the court that the said plaintiffs Marshall Field & Co. do have and recover of and from the said defendants R. H. Maxwell, Frank Sharpe, and Thomas Ross the sum of one thousand

eight hundred thirty-one and $\frac{25}{100}$ ($1,831.25) dollars, as above found due them, with interest thereon at the rate of seven per cent per annum from this date until paid, together with the costs of this action, taxed at $38.95.

"And it is further considered and adjudged by the court that the said defendants R. H. Maxwell, Frank Sharpe, and Thomas Ross do have and recover of and from the said plaintiffs Marshall Field & Co. and H. R. Nissley the sum of one hundred and $\frac{00}{100}$ ($100.00) dollars damages sustained by them as above set forth, with interest thereon at the rate of seven per cent per annum from this date until paid, together with the costs of this proceeding, taxed at $41.30.

"The court further finds that Messrs. Wooley & Gibson and R. D. Stearns have an attorney's lien upon said judgment of R. H. Maxwell, Frank Sharpe, and Thomas Ross, and against the said Marshall Field & Co. and H. R. Nissley in the sum of $100, and it is considered and decreed by the court that said attorney's lien is prior and paramount to the claim and set-off of the said plaintiffs herein, or the said defendants R. H. Maxwell, Frank Sharpe, and Thomas Ross."

The second and third assignments of error refer to the right of plaintiffs in error to have the amount due them set off as against any sum ascertained to be due defendants in error as damages upon the attachment bond. In the case of *Raymond v. Green*, 12 Neb., 215, it was held by this court that in an action upon an undertaking in attachment, a claim due from the plaintiff in such action to the principals in the bond was a proper subject of set-off, and this seems decisive of the question raised in regard to the set-off in the case at bar, and in accordance with the rule then announced the claim of plaintiffs in error was a competent set-off.

The only further point raised by the assignments of the petition in error, which is argued, is in relation to the action

of the court by which it declared and established the lien of the attorneys for the defendants in error paramount and superior to the set-off of plaintiffs in error. The lien of an attorney for compensation is provided for in section 8, chapter 7, Compiled Statutes, 1893, as follows: "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party." This court considered the right to a lien conferred upon attorneys by the section of our statutes just quoted, in the case of *Boyer v. Clark*, 3 Neb., 161, cited by counsel for defendants in error in support of their position in this case. The case referred to was an action to set off a judgment in favor of Boyer against one in favor of Clark. McCandless, who, as attorney for Clark, had obtained the judgment in his favor involved in the action, claimed a lien on the judgment for the compensation for his services in securing it, and also its assignment to him. In relation to the lien of an attorney it was then stated as a general rule of law that "the lien of an attorney upon a judgment obtained by him, to the extent of his reasonable fees and disbursements, is paramount to any rights of the parties in the suit, or to any set-off;" and, in support of the rule announced, the learned judge who wrote the opinion cited the case of *Shapley v. Bellows*, 4 N. H., 353, in which the parties had executions upon judgments in the hands of the sheriff, the rights relative to the executions being such that under a statute of the state of New Hampshire either party was entitled to have one execution set off against the other by the officer. An attorney had a lien upon one of the judgments, the basis for one of the executions, for his fees and disbursements in the suit in which it was obtained. It was held in respect to

the lien of the attorney: "An attorney has a lien upon a judgment to the extent of his fees and disbursements in the suit in which it was obtained, and this right of lien is paramount to any right of the parties in the suit to have mutual executions against each other set off one against the other." The rule established by this court in *Boyer v. Clark* has been followed in *Ward v. Watson*, 27 Neb., 768, *Griggs v. White*, 5 Neb., 467, and *Rice v. Day*, 33 Neb., 204, and quoted with approval in some other cases in this court, but they have been causes in which it was sought to have one judgment set off against another, and as to one of which judgments the lien of an attorney for fees had attached, or where the rights of an attorney in an action, to a lien for compensation due him for services therein on money in the hands of the adverse party and which was the subject of the litigation and who had given the proper notice of his lien for his fees in the action, under certain circumstances to be permitted to become a party to the suit and continue the litigation to final determination or judgment, so that the amount due his client might be ascertained and his lien be enforced, was to be determined, and in none of the cases presented in this court in which the right of an attorney to a lien for his fees was considered and adjudicated was the question in the case at bar discussed or settled. By our statute an attorney is accorded a lien "for a general balance of compensation * * * upon money * * * in the hands of the adverse party, in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party." What money is in the hands of the adverse party is the subject-matter of the litigation and to be ascertained by the final determination of it and the court's judgment. The amount apparently or which it is claimed is in the hands of the adverse party must be liable to be lessened by any and all proper and available defenses in the action. It can be no more than is truly owing by the adverse liti-

gant, for no more than this can be said or claimed to be in his hands belonging to the other party, and in this case, having determined that the claim of the plaintiffs in error was a proper matter of set-off in the pending action, it was available as a defense for them, and so long as any part of it remained unextinguished in this suit, there could be no money in the hands of plaintiffs in error to which the lien of the attorneys could attach. "In an action which is subject to a set-off, and which is so barred, the attorney's claim for services must, like the plaintiff's demand, yield to the set-off as it would to any other available defense to the action." (*Robertson v. Shutt*, 9 Bush [Ky.], 660.) "The statute (Code, sec. 214) provides that an attorney, by giving the proper notice, may have a lien for his compensation upon money due his client in the hands of the adverse party, in an action or proceeding in which the attorney claiming the lien was employed. * * * The spirit and meaning of the law is that the attorney may have a lien upon the amount which is ultimately found to be due his client. Any other construction of the statute would be obviously inequitable and unjust." (*Tiffany v. Stewart*, 14 N. W. Rep. [Ia.], 241.) See, also, *Nicoll v. Nicoll*, 16 Wend. [N. Y.], 443; *Popplewell v. Hill*, 18 S. W. Rep. [Ark.], 1054.) The judgment of the district court was erroneous and must be reversed and the cause remanded.

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4. Mental and bodily suffering is incapable of measurement by any fixed rule, and the damages must depend largely upon the judgment of the jury under the circumstances of each case. *St. Joseph & G. I. R. Co. v. Hedge* 450
5. Verdict for $3,000 for personal injuries *held* not excessive under the evidence. *Id.*
6. The wrong done and the injury sustained must bear toward each other the relation of cause and effect, and the damages must be the natural and proximate consequence of the act complained of. *Fitzgerald v. Fitzgerald & Mallory Construction Co* 464
7. A land owner who is negligent in making improvements which cause surface water to flow upon land of an adjoining proprietor is liable for damages. *Lincoln & B. H. R. Co. v. Sutherland* 526
8. A person who takes up trespassing animals and holds possession under the herd law is liable for damages resulting from negligence in caring for them. *Richardson v. Halstead* 606
9. Where a petition against a county for damages alleges that a county ditch has been constructed through and across plaintiff's land, and the county in its answer admits that fact without pleading payment, a verdict for defendant is contrary to law. *Martin v. Fillmore County*, 719
10. Where chattels are injured by the negligence of another

Damages—*concluded.*

but not wholly destroyed, the measure of damages is the difference between the value of the property immediately before and immediately after the injury. *Chicago, B. & Q. R. Co. v. Metcalf* 848

11. One whose chattels have been injured by the negligence of another cannot charge the latter with the total value of the property by abandoning it. *Id.* 849

Death by Wrongful Act. See RAILROAD COMPANIES, 4.

Deceit.

1. In an action for deceit, the plaintiff must show that a direct and actual loss to him resulted from justifiably relying upon the false representations of defendant. *Lorenzen v. Kansas City Investment Co* 99

2. Where plaintiff alleges in an action for damages that he disposed of his property below its value through false representations, the burden is on him to show that he was influenced by deceit and thereby induced to part with his propery. *McCready v. Phillips* 790

Deeds. See TAX DEEDS.

Depositions.

Correctness of adverse ruling on a motion to strike from a deposition, during trial, an answer not previously objected to, on the ground that it stated a conclusion of the witness as to the effect of a conversation, instead of repeating the language used. *Woodworth v. Thompson* 311

Discrimination. See TELEGRAPH COMPANIES, 7.

Dismissal.

The right of plaintiff to dismiss the action at any time is not absolute, and the court may impose payment of costs as a condition precedent. *Sheedy v. McMurtry* 499

Distribution. See EXECUTIONS.

District Courts. See JUDGES.

Divorce.

1. The court has no jurisdiction to render a judgment for alimony against a non-resident husband who did not appear, where the only service upon him was by publication of notice. *Dillon v. Starin* 881

2. The provision of sec. 18, ch. 25, Comp. Stats., for restoring to the wife her property when she obtains a divorce, refers to property the law gives the husband by reason of the marriage and not to that obtained by him from her by gift or contract. *Id.*

Drainage. See COUNTIES, 2. EMINENT DOMAIN, 2.

Duress.

1. Where money is necessarily paid in order to obtain property illegally withheld, the transaction may be avoided on the ground of compulsion though not amounting to technical duress. *Fitzgerald v. Fitzgerald & Mallory Construction Co*..... 465
   Weber v. Kirkendall..... 766
2. Threats of prosecution and immediate imprisonment of a husband, which overcome the mind and will of himself and wife and induce them to sign a mortgage which they would not voluntarily have executed, constitute duress, and avoid the mortgage. *Hargreaves v. Korcek*..... 660

Ecclesiastical Courts. See RELIGIOUS SOCIETIES.

Ejectment.

1. Objections to appraisers' report made under the occupying claimants act (ch. 63, Comp. Stats.), should be filed on or before the second day of the term of the district court next after the filing of the appraisement, where such report is made and filed in vacation. *Lothrop v. Michaelson*... 633
2. The court may permit such objections to be filed out of time, but it is not reversible error to refuse so to do where no abuse of discretion is shown. *Id.*
3. The improvements must be appraised from a view of the premises. Appraisers have no authority to take the testimony of witnesses. *Id.*
4. The measure of recovery of an occupying claimant is the amount the real estate increased in value by reason of the improvements, and not the cost of making the same. *Id.*
5. Defendant may interpose any legal or equitable defense which negatives plaintiff's right of possession. *Wanser v. Lucas*..... 759
6. The declarations of a former owner of land are not admissible as against those claiming under him when made after he has conveyed the land. *Consolidated Tank Line Co. v. Pien*..... 887

Election. See MORTGAGES, 1.

Elections.

1. A student who resides at the seat of a university may vote there if otherwise qualified. *Berry v. Wilcox*..... 82
2. Voting places of university students. *Id.*
3. Residence of students of a university. *Id.*

Elections—*concluded.*

4. An officer charged with the preparation of official ballots is allowed some discretion in the arrangement of party names. *Woods v. State* 430

Eminent Domain. See HIGHWAYS.

1. Competency of evidence of a witness who based his estimate of the value of land taken for railroad purposes on the value of other land, taking into consideration the cost of removing the difference in conditions. *Chicago, R. I. & P. R. Co. v. Griffith* 690
2. The owner of land appropriated by a county for a drainage ditch is entitled to recover the value of the land taken and any damage to the land not appropriated less special benefits to the latter. *Martin v. Fillmore County*, 719
3. To constitute an appropriation of land it is not necessary that the owner be deprived of the fee. *Id.*
4. Land is appropriated when it is so taken as to deprive the owner of the use thereof. *Id.*
5. It is only when the owner is not deprived of the occupancy of land, but merely suffers an incidental damage thereto because of the proximity of an improvement, that benefits may be set off against such damage. *Id.*

Equity. See DURESS. INJUNCTION. INSURANCE, 5. LACHES. PARTNERSHIP, 2, 7. SET-OFF, 1.

Discussion of petition for an accounting in equity against a defaulting county treasurer and the sureties on his official bonds during two terms of office, and right of sureties to a jury trial. *Kuhl v. Pierce County* 584

Error Proceedings. See REVIEW.

Estoppel. See INSURANCE, 7, 31.

1. An employe of a railroad company who accepts from the relief department benefits for an injury, under an agreement of membership releasing the company from liability in case of such acceptance, is estopped from suing for damages. *Chicago, B. & Q. R. Co. v. Bell* 45
2. In an action on an appeal bond the signers are estopped from making the defense that the appeal was not perfected. *Flannagan v. Cleveland* 58
3. A plaintiff who levies an attachment on property as that of defendant, cannot deny the latter's title. *Standard Stamping Co. v. Hetzel* 105
4. An attachment having been issued against a defendant, the plaintiff claiming to have acquired a lien by virtue of a

Estoppel—*concluded.*

garnishment founded upon averments that the garnishee had property of the defendant in his possession, cannot be heard to insist that the defendant is without standing to move a discharge of the attachment because in fact he had no interest in the property. *Kilpatrick-Koch Dry Goods Co. v. Bremers*..... 863

5. The facts constituting an estoppel *in pais* must be pleaded. *Erickson v. First Nat. Bank of Oakland*..... 622

6. To create an estoppel *in pais* the party in whose favor the estoppel operates must have altered his position in reliance upon the words or conduct of the party estopped. *Lingonner v. Ambler*..... 316

7. A county will not be permitted to urge a state of facts, brought about by the neglect of the legal duties of its county board, to deprive the sureties on the county treasurer's official bond of their right to a jury trial. *Kuhl v. Pierce County*..... 584

Evidence. See ATTACHMENT, 1. CONFLICT OF LAWS. CORPORATIONS, 4. DAMAGES, 4. EJECTMENT, 6. EMINENT DOMAIN, 1. FRAUDULENT CONVEYANCES, 9, 10. INSURANCE, 5, 6, 28. LANDLORD AND TENANT, 1. NEW TRIAL, 1. PARTNERSHIP, 12. PLEADING, 9. RAPE. RATIFICATION. REPLEVIN, 1. USURY. WILLS, 2–4.

1. A letter identified as being in the handwriting of a party to the action may be admitted in evidence though the signature thereto is denied by the person charged with writing it. *Burgess v. Burgess*..... 16

2. In an action against a guarantor to recover the purchase price of goods, the terms of the written guaranty cannot be varied by parol evidence that the credit had been limited to a certain fixed period. *Maxwell v. Burr*..... 31

3. Whether a warrant of attorney is sufficient under the laws of another state to authorize the appearance entered thereunder, is a question to be determined from the evidence as to the laws of that state. *Snyder v. Critchfield*..... 66

4. The admission of a party sought to be charged that, at a certain time, he had a conversation in given terms by telephone, renders immaterial the objection that independently of such admission there was no direct evidence of the scope of such conversation. *Nebraska Nat. Bank v. Burke*..... 234

5. A certified copy of the record of a case in an appellate

Evidence—*concluded.*

court is admissible to prove trial and judgment therein where those facts are in issue in another case. *Morrison v. Boggs*..... 248

6. Sufficiency of evidence to constitute abandonment of homestead where claimant voted while absent. *Corey v. Schuster*..... 270

7. The production of expert testimony is unnecessary in proving that a railroad company negligently constructed an embankment across a draw, causing surface water to flow upon farm lands to the damage of the owner. *Lincoln & B. H. R. Co. v. Sutherland*..... 526

Exceptions. See BILL OF EXCEPTIONS. TRIAL, 9, 12.

Executions. See APPEAL BONDS, 3. FACTORS AND BROKERS, 2. HOMESTEAD, 1. PARTNERSHIP, 4.

1. The proceeds of a sale of a defendant's goods under several executions, issued during the term of the district court at which the judgments were rendered therein, or within ten days thereafter, should be distributed *pro rata* among the execution creditors, though the writs were delivered to the sheriff on different days. *Moores v. Peycke*, 405

2. Where two or more executions against a debtor are delivered to the sheriff on the same day the proceeds of sale should be distributed *pro rata* among the execution creditors. *Id.*

3. In other cases the execution first delivered must be first satisfied. *Id.*

Exemplifications. See JUDGMENTS, 1.

Exemptions. See HOMESTEAD.

Factors and Brokers.

1. The relation of a factor for the sale of goods is that of a trustee for his principal. *National Cordage Co. v. Sims*..... 148

2. Property in the possession of a factor, to be sold for the benefit of his principal, is not liable to execution or attachment in satisfaction of the debts of the factor. *Id.*

3. Where a consignment is made to a commission merchant without instructions, the consignee's authority cannot be delegated, and must be exercised at the place to which the consignment was made. *Burke v. Frye*..... 223

False Representations. See DECEIT. INSURANCE, 28.

Fees. See COSTS. TAX DEEDS, 2.

Forcible Entry and Detainer.

1. Where a judgment of restitution is affirmed the signers of defendant's appeal bond are liable for costs, and the reasonable rent of the premises during the wrongful possession. Sec. 1030 of the Code fixes the measure of damages for which the signers of the bond are liable. *Morrison v. Boggs*..... 248
2. Sec. 1023 of the Code was enacted to provide a summary remedy to obtain possession of realty from one who unlawfully and forcibly entered and detained possession, or from one who, having lawfully entered, unlawfully and forcibly detained possession. *Blachford v. Frenzer*..... 829
3. The complaint need not aver facts which show that the defendant unlawfully and forcibly detains possession of the premises, but is sufficient when in the language of the statute. *Id.*

Foreign Judgments. See JUDGMENTS, 1–3.

Foreign Laws. See EVIDENCE, 3. STATUTES, 3, 4.

Forgery.

Variance between copy of instrument in the information and copy in the complaint. *Coffield v. State*..... 417

Frauds. See FRAUDULENT CONVEYANCES.

Fraudulent Conveyances.

1. An insolvent partnership may pay part of its creditors in full to the exclusion of others where such payment is made with an honest purpose. *Richards v. Leveille*..... 38
2. In an action by an attaching creditor to vacate a mortgage for fraud, evidence that it was not delivered until after levy of attachment is irrelevant where plaintiff alleges, and the answer admits, that the mortgage was delivered before the writ was levied. *First Nat. Bank of Wymore v. Myers*..... 306
3. In a contest between a vendee and vendor's creditors the burden is on the latter to show a fraudulent intent on part of the vendor and participation therein by vendee, where the vendee took immediate possession of goods under the conveyance and retained it. *Blumer v. Bennett*, 873
4. Where a sale of goods is not followed by a change of possession, the presumption is that it was made to hinder, delay, or defraud creditors of the seller, and in a contest with such creditors the burden is on the purchaser to prove that he purchased in good faith for value. *Snyder v. Dangler*..... 601

Fraudulent Conveyances—*concluded.*

5. A conveyance of goods for the purpose, on the part of the seller with knowledge of the buyer, of hindering, delaying, or defrauding creditors is void as to them, though the seller be solvent. *Id.* 602

6. All creditors of a seller, at any time the goods remained in his possession or under his control, are within the protection of the statute against fraudulent conveyances. *Id.*

7. A conveyance of land from a husband to his wife may be sustained when resting upon a sufficient money consideration. *Wanser v. Lucas* 759

8. Advancement of money to a husband by his wife out of her separate estate, *held*, under the evidence, to be a sufficient consideration for a conveyance of land. *Id.*

9. Where the effect of a conveyance from one relative to another is to deprive the vendor's creditors of their just dues, the transaction will be closely scrutinized. *Steinkraus v. Korth* 777

10. Evidence *held* sufficient to sustain a finding that a conveyance to a relative was made in fraud of the rights of vendor's creditors. *Id.*

Garnishment. See ESTOPPEL, 4. RECEIVERS.

Guaranty. See ALTERATION OF INSTRUMENTS EVIDENCE, 2. NEGOTIABLE INSTRUMENTS, 12.

1. Right of obligee to terminate a contract on account of default of the principal guarantor without notice, where the guaranty provides that the obligee may terminate the contract by giving sixty days' notice of an intention to annul the same for any reason other than the failure of the principal to perform any prescribed condition. *Korty v. McGill* 517

2. Under a building contract providing for certain payments on certificates of the architect as the work progresses, the contractor's guarantor is discharged from liability to the extent of payments made without the certificate of the architect. *O'Rourke v. Burke* 821

Herd Law. See ANIMALS.

Highways. See MUNICIPAL CORPORATIONS, 2. RAILROAD COMPANIES, 5–7.

The damages of a land owner for location of a highway should not be paid out of the county road fund, but must be paid from the fund of the road district where the highway is situated. *Palmer v. Vance* 348

Homestead. See INJUNCTION, 1.

1. A judgment at law against the owners of a homestead is an apparent lien upon the exempt premises and the cloud thereof may be removed in a suit by them for that purpose, though there has been no threat of execution. *Corey v. Schuster*..... 269
2. To constitute abandonment it must be shown that the parties removed from the homestead with the intention of not returning, or that they formed the intention of remaining away after the removal. *Id.*
3. Sufficiency of evidence to show abandonment where one removed from the homestead with the intention of returning and voted while absent. *Id.*
4. A two-story frame building may be a "dwelling-house" within the meaning of the homestead law where the claimant resides on the second floor and occupies the first floor for mercantile purposes. *Id.*

Horse Railways. See STREET RAILWAYS.

Husband and Wife. See FRAUDULENT CONVEYANCES, 7, 8. MECHANICS' LIENS, 10. NEGOTIABLE INSTRUMENTS, 2.

A petition alleging that a certain sum had come to the husband by reason of the marriage and praying restitution thereof is not supported by proof of money voluntarily advanced by the wife to the husband after the marriage. *Dillon v. Starin*..... 881

Improvements. See EJECTMENT, 1, 4.

Incorporation. See VILLAGES.

Indemnity. See PRINCIPAL AND SURETY, 9.

Indictment and Information. See CRIMINAL LAW, 3. LIMITATION OF ACTIONS, 4.

Indorsements. See NEGOTIABLE INSTRUMENTS, 12.

Informations. See CRIMINAL LAW, 3.

Injunction. See RELIGIOUS SOCIETIES, 3.

1. An injunction to restrain judgment creditors from selling a homestead on execution should not be made perpetual for the reason that the claimants may abandon it or the premises may increase in value to an amount in excess of two thousand dollars. *Corey v. Schuster*..... 270
2. An action on a bond for a temporary injunction cannot be maintained until final adjudication of the case on its merits. *Browne v. Edwards*..... 361

Injunction—*concluded.*

3. Evidence in an action on an injunction bond *held* not to show termination of the suit. *Id.*
4. One not guilty of laches may invoke the aid of a court of equity to restrain the collection of a void tax. *Morris v. Merrell*..... 424
5. The collection or transfer of a note materially altered without the consent of the maker should not be enjoined by a court of equity. *Erickson v. First Nat. Bank of Oakland*..... 622
6. The fact that a maker is apprehensive that a witness by whom the former expects to establish a defense to a note may die or move away is not sufficient ground for enjoining the negotiation of the note. *Id.*
7. An injunction legally granted in a case where the court has jurisdiction must be respected until set aside by that court or reversed by an appellate court. *Wilber v. Woolley*, 739
8. One who knowingly disobeys an injunction which is not void, is liable to be punished for contempt, though the injunction ought to be set aside on motion to dissolve. *Id.*

Insanity. See WILLS, 2–4.

Insolvency. See PARTNERSHIP. PRINCIPAL AND SURETY, 7. SET-OFF, 1.

Instructions. See CRIMINAL LAW, 1, 2, 10. RAILROAD COMPANIES, 8. REVIEW, 8, 9.

1. An instruction stating a correct rule of law applicable to a certain class of testimony will be presumed upon review to be without error in the absence of a bill of exceptions. *Nelson v. Johnson*..... 7
2. An instruction that the jury may consider the interest of defendants in the result of the suit and give to their testimony only such weight as in the judgment of the jury it is entitled to, is not erroneous. *Barmby v. Wolfe*..... 77
3. Instructions must be considered together and not by detached paragraphs. *Stein v. Vannice*..... 132
4. The giving of an instruction on a matter not in issue which imposed upon the successful party an unnecessary burden is not ground for reversal where the party complaining was not prejudiced. *McClary v. Stull*..... 176
5. It is not required that each instruction shall state the different theories upon which the liability of the defendant may depend. *Nebraska Nat. Bank v. Burke*..... 234
6. An assignment of error in the supreme court as to giving

Instructions—*concluded.*

a group of instructions will be considered no further than to ascertain that one of them was correctly given. *Houston v. City of Omaha* 65
Schelly v. Schwank 504

7. An assignment of error in the supreme court as to refusing a group of instructions asked will be considered no further than to ascertain that one of them was properly refused. *Id.*
8. The refusal to give an instruction requested cannot be reviewed in the absence of an exception. *Omaha Fire Ins. Co. v. Berg* 522
9. Error in an instruction which misstates the law is not cured by another instruction stating it correctly. *Richardson v. Halstead* 607
10. An obscure instruction may not be prejudicial where a clear one is given on the same subject. *Bingham v. Hartley* 682
11. The refusal to give an instruction requested is not reversible error where the principle of law stated therein has already been given. *Bushnell v. Chamberlain* 751
12. An instruction stating the issues should not contain a statement of matter not pleaded. *McCready v. Phillips* ... 790
13. An instruction informing the jury that it may base a finding upon something not pleaded is erroneous. *Id.*
14. Oral instructions are erroneous unless written instructions are waived. *Erhlich v. State* 810
15. An instruction to find for plaintiff should be refused where the effect to be given certain evidence is therein misstated and made subordinate to propositions of fact with which it has no relation. *Vaughn v. Crites* 812
16. The statutory notation of "given" or "refused" on the margin of an instruction is part of the record, indicating the court's ruling; and an exception may be noted by a memoradum on the margin of the instruction. *Blumer v. Bennett* 873
17. Instructions given and refused are a part of the record and should not be embodied in a bill of exceptions. *Id.*

Instruments. See ALTERATION OF INSTRUMENTS.

Insurance. See CONTRACTS, 3.

1. Construction of the charter and by-laws of the National Masonic Accident Association of Des Moines, Iowa. *National Masonic Accident Association v. Burr* 256

Insurance—*continued.*

2. Under the circumstances stated in opinion it was *held* to be a question for the jury whether the evidence established the fact that an assessment remitted to a mutual accident association by a member was received before he was injured. *Id.* 257

3. The failure of a member of such a mutual accident association to pay an assessment when due does not oust him from membership, but suspends his right to claim indemnity for an injury received during the time he was in default. *Id.* 258

4. The retention by such an accident association of an assessment received after default in payment is not evidence of a waiver of the member's default. *Id.*

5. In a suit to reform an accident policy so as to make it conform to a verbal contract requiring insurer to pay one-third of the principal sum in case of the loss of a foot by the insured, circulars issued by the insurer before the policy was written, and brought to the attention of insured, are admissible in evidence where they show that the insurer issued policies containing such a provision. *Pacific Mutual Life Ins. Co. v. Frank* 320

6. In such a case the plaintiff may show by the circulars that the insurer held out its agent as authorized to write such policies to all persons. *Id.*

7. Where the insurer holds out its agent as authorized to write a policy it is estopped from denying his authority. *Id.*

8. A clause in a policy providing that the insurance shall be suspended during the non-payment of a premium note after maturity may be waived by the insurer. *Phenix Ins. Co. v. Rollins* 745

9. After default by the insured, the company is entitled to recover the full amount of a premium note due in one year and given for a five-year policy containing a provision that the insurance shall be suspended during the non-payment of the note after maturity, but that a subsequent payment of the premium in full shall revive the policy for the full period. *Id.*

10. A misdescription, in a policy, of the land upon which insured personalty is situate does not release the insurer from liability for a loss, and reformation of the policy is not a condition precedent to suit. *Omaha Fire Ins. Co. v. Dufek,* 241

11. Where an insurer takes a risk with knowledge of other insurance on the same property, it is estopped from denying

Insurance—*continued.*

liability on the ground that there was no memorandum of other insurance endorsed on its policy. *Home Fire Ins. Co. v. Hammang* 567

12. The provision of a policy prohibiting additional insurance may be waived by the insurer. *Eagle Fire Co. v. Globe Loan & Trust Co.* 380

13. Procuring additional insurance in violation of the provisions of a policy does not render the first policy void, but voidable. *Id.*
Home Fire Ins. Co. v. Hammang 567

14. An insurer may waive a provision prohibiting additional insurance by submitting to arbitration after loss. *Eagle Fire Co. v. Globe Loan & Trust Co* 380
Home Fire Ins. Co. v. Hammang 568

15. An agent's knowledge of facts which render the contract voidable at the insurer's option, is knowledge of the company. *Eagle Fire Co. v. Globe Loan & Trust Co.* 381
Home Fire Ins. Co. v. Hammang 568

16. A statement by the insured to the insurer's agent that the former intends to take out additional insurance is not notice of such additional insurance. *Id.*

17. Sufficiency of affidavit set out in opinion to show proof of loss. *Rochester Loan & Banking Co. v. Liberty Ins. Co.* 537

18. Sufficiency of proof of loss set out in opinion. *Home Fire Ins. Co. v. Hammang* 566

19. Refusal of insurer to pay loss and denial of liability on the ground that the policy was not in force at the time of the fire, constitute a waiver of proofs of loss. *German Ins. & Savings Institution v. Kline* 395
Rochester Loan & Banking Co. v. Liberty Ins. Co 537
Home Fire Ins. Co. v. Hammang 568

20. A defect in proofs of loss is waived where the company fails to return them within a reasonable time with a statement pointing out the defect. *Home Fire Ins. Co. v. Hammang* 568

21. Where the insurer's adjusting agent, with knowledge of a loss, goes upon the grounds, examines into the circumstances of the fire, takes possession of the books and invoices of the insured, and helps to estimate the amount of damages, the provisions of the policy as to proofs of loss are waived. *Id.*

22. The question as to whether the insured at the date of the issuance of the policy was the owner of the insured prop-

Insurance—*continued.*

erty is for the jury. *Rochester Loan & Banking Co. v. Liberty Ins. Co* 538

23. To sustain a finding that a building destroyed was a total loss, it is not necessary for the evidence to show that the material was entirely consumed by fire. *Ins. Co. of North America v. Bachler* 550

24. Where there has been a total loss of insured realty, a provision of the policy limiting the amount of recovery to a sum less than that written is invalid. *Id.* 551

25. Sec. 45, ch. 43, Comp. Stats., providing for taxation of attorneys' fees, where judgment is entered against the insurer, is valid. *Id.* 550

26. If, by a loss, the holder of an interest in property is deprived of the possession, enjoyment, or profit thereof, or a security or lien resting thereon, or other certain benefits growing out of or depending upon such property, he has an insurable interest therein. *Rochester Loan & Banking Co. v. Liberty Ins. Co* 538

27. A company issuing a policy without an application or an inquiry as to title, and accepting and retaining the premium, waives the right of forfeiture on account of the condition of the title to the property where the insured has an insurable interest. *German Ins. & Savings Institution v. Kline* 395

28. Where there is a lien on the property and no inquiries are made as to the condition of the title, acceptance of the policy by the insured is not a representation that the property is free from incumbrance. *Ins. Co. of North America v. Bachler* 550

29. Where insured is not questioned as to liens on the property, and does not intentionally conceal the facts, the existence of a mortgage does not invalidate the policy. *Id.*

30. Where a policy is issued to one who holds the legal title to the realty, no inquiries being made as to the interest of others therein, and the insured's only representation is that he owns the premises, it is not a defense in an action on the policy that the insured is a mere trustee for an undisclosed beneficiary. *Rochester Loan & Banking Co. v. Liberty Ins. Co* 537

31. Where a company insures property with knowledge that it is vacant, it is estopped after loss from denying liability under a provision invalidating the policy for such vacancy. *Id.*

Insurance—*concluded.*

32. Knowledge of an agent that the property was vacant when insured is knowledge of the company. *Id.*
33. Failure of insured to comply with an arbitration clause is not a defense in an action on a policy to recover for a loss. *National Masonic Accident Association v. Burr* 258
Ins. Co. of North America v. Bachler 550
34. The validity of a provision of a policy requiring an officer's certificate of insured's moral character and financial standing to be furnished as a condition precedent to suit, is doubtful. *Home Fire Ins. Co. v. Hammang* 565

Interest.

1. Rate allowable to plaintiff on foreclosure of a valid tax sale certificate. *Osgood v. Grant* 350
2. Where plaintiff recovers in an action against his co-sureties to enforce contribution, he is entitled to interest on the amount paid by him from the date of payment. *Smith v. Mason* 610

Intervention. See APPEAL, 5.

Intoxicating Liquors.

1. Where it was shown *inter alia* that a section foreman drank whiskey at a saloon, became intoxicated, started home on his hand car, and was run down and killed by a train, it was *held* proper to submit to the jury the question whether the liquor furnished by the saloon-keeper contributed to the fatal result so as to render the latter liable in an action by the widow of deceased. *Cornelius v. Hultman* 441
2. On the evidence adduced under proper pleadings in the case, it was *held* that the drunkenness of deceased was the primary cause of the fatal accident, and that the court did not err in refusing to submit to the jury the question of the negligence of the railroad company. *Id.* 442
3. Evidence *held* sufficient to sustain a judgment against the saloon-keeper. *Id.*

Judges.

1. A judge of the district court has no power at chambers except that conferred by statute. *Browne v. Edwards* 361
2. A judge of the district court at chambers has no authority to enter a final order in an injunction suit. *Id.*

Judgments. See APPEAL BONDS, 3. COSTS, 3. HOMESTEAD, 1. REPLEVIN, 3. RES ADJUDICATA.

1. A judgment of a court of another state, authenticated ac-

Judgments—*concluded.*

cording to the act of congress is conclusive upon the subject-matter of the suit. *Snyder v. Critchfield*..... 66

2. An action on a foreign judgment properly authenticated can only be defeated on the ground that the court was without jurisdiction, that there was fraud in procuring the judgment, or by defenses based on matters arising after entry of judgment. *Id.*
3. A foreign judgment entered on a warrant of attorney in a state where such a judgment is authorized, has the same force, when sued on, as a judgment on adversary proceedings. *Id.*
4. The power of a district court to modify its judgments after term is limited to the grounds enumerated in sec. 602 of the Code. *Barnes v. Hale*..... 355
5. The filing and docketing of transcriptive judgments of inferior courts in the district court do not make them judgments of that court. *Moores v. Peycke*..... 406
6. Upon the record discussed in opinion the judgment was *held* to be one against a firm and not against the individual members thereof. *Broatch v. Moore*..... 640

Judicial Sales.

1. Objections to confirmation must be specifically assigned in the motion to vacate the sale. *Ecklund v. Willis*..... 129
2. The appraised value of the property can only be assailed for fraud. *Id.*
3. Objection that the property was appraised too high should be made and filed with a motion to vacate the appraisement before the land is sold. *Id.*

Jurisdiction. See COURTS. DIVORCE, 1. JUSTICE OF THE PEACE, 3. MORTGAGES, 4. REMOVAL OF CAUSES.

Jury. See NEW TRIAL, 3–5. REVIEW, 4.

Jury Trial. See REFERENCE.

Justice of the Peace. See APPEAL, 6.

1. A justice of the peace has no authority to settle a bill of exceptions. *Vlasek v. Wilson*..... 10
2. No fee is allowable to a sheriff or constable for attendance during the trial of a civil case before a justice of the peace. *Kissinger v. Staley*..... 784
3. A justice of the peace has jurisdiction in an action to recover possession of realty under sec. 1023 of the Code. *Blachford v. Frenzer*..... 829

Laches.

Mere lapse of time will not bar the right to rescind a voidable transaction. *Fitzgerald v. Fitzgerald & Mallory Construction Co* 465

Landlord and Tenant. See VENDOR AND VENDEE.

1. Where a tenant is not obligated by his lease to make repairs, a subsequent parol agreement, whereby repairs are agreed upon, the landlord promising to pay the cost thereof above a certain sum, is valid. *Woodworth v. Thompson* ... 311
2. In such a case, the making of the repairs by the tenant, and his promise to pay a portion of the cost, constitute a sufficient consideration for the landlord's promise. *Id.*
3. A requirement in a lease that the lessee shall make cash repairs to a specified amount confers no right of charging the landlord or his property with the cost of such repairs. *Schrage v. Miller* 818
4. A subtenant is charged with notice of the existence of the tenant's lease and is bound by its terms and conditions. *Blachford v. Frenzer* 829
5. A landlord by accepting without objection the possession of leased premises waives his right to insist upon thirty days' notice of the tenant's intention to quit. *Elgutter v. Drishaus* 378
6. As between a tenant for years and the purchaser of the land at sheriff's sale, the former is entitled to a crop grown pending mortgage foreclosure and harvested after confirmation of the sale, where the tenant remained in possession and was notified that the purchaser expected a money rent or a portion of the crop. *Monday v. O'Neil* 724

Larceny.

Where the owner of the property is examined as a witness, his testimony that the property was taken without his consent is indispensable to a conviction. *Perry v. State* ... 414

Lease. See LANDLORD AND TENANT, 4.

Letters. See EVIDENCE, 1.

Libel and Slander.

1. An action for slander may be maintained against one who falsely said of plaintiff that she is a prostitute, without allegations or proof of special damages. *Barr v. Birkner*, 197
2. Where defendant pleads that he uttered the words charged but denies that they were intended to convey the meaning averred in the petition, his answer is not a denial that the words imputed the meaning alleged by plaintiff. *Id.*, 198

Libel and Slander—*concluded.*

3. Under the evidence introduced a direction to find for defendant was *held* erroneous. *Id.*

Liens. See ATTACHMENT, 4. ATTORNEYS' LIENS. JUDGMENTS. MORTGAGES. PARTNERSHIP, 6. REPLEVIN, 1.

Limitation of Actions. See APPEAL, 2. LACHES. TELEGRAPH COMPANIES, 2.

1. An action on a judgment of a court of Pennsylvania entered on a warrant of attorney cannot be defeated on the ground that the statute had run upon the original cause of action before entry of judgment. *Snyder v. Critchfield*..... 72
2. Under sec. 21, Code, an action is barred in Nebraska when defendant has resided in another state for the full period of limitation under the laws of that state, though the cause of action arose in Nebraska, where defendant resided at the time it arose. *Webster v. Davies*..... 301
3. The statute of limitations relating to the foreclosure of tax liens is no bar to the recovery of taxes under the provisions of the occupying claimants' act. *Lothrop v. Michaelson*..... 633
4. Under sec. 256, Criminal Code, an indictment or information must be filed within the statutory period. Complaint, arrest, and preliminary examination do not prevent the running of the statute. *Boughn v. State*..... 889

Live Stock. See ANIMALS.

Mandamus.

1. *Mandamus* proceedings are actions at law and can only be reviewed on error. *State v. Affholder*..... 497
2. *Mandamus* will not lie to control the discretion of a county clerk in the arrangement of party names upon official ballots. *Woods v. State*..... 431

Manufacturing Companies. See CORPORATIONS, 1–3.

Master and Servant.

A master is not liable for the acts of his servant committed outside the line of his duty and not connected with the master's business. *Western Union Telegraph Co. v. Mullins*, 732

Measure of Damages. See DAMAGES.

Mechanics' Liens. See LANDLORD AND TENANT, 3.

1. Right of a material-man, who agreed not to assert a claim for a lien, to purchase and enforce the claim of another. *Hines v. Cochran*..... 12
2. Decree establishing a mechanic's lien for sinking a well

Mechanics' Liens—*concluded.*

reversed because of a failure on the part of the contractor to show full performance of his contract. *Omaha Consolidated Vinegar Co. v. Burns*..... 30

3. The question as to the right of a mechanic to a lien for sinking a well is not decided. *Id.*

4. Sufficiency of claim for a lien and right of a subcontractor who painted two houses under one contract to have a separate lien on one house. *Hines v. Cochran*..... 12

5. One who furnishes material for all the buildings on several lots, under one contract, cannot make the entire debt a charge upon a portion of the land, but may make it a charge upon all. *Badger Lumber Co. v. Holmes*..... 244

6. One who furnishes material for all the buildings on several lots under one contract cannot have a separate lien on a portion of the land without showing the value of the material actually used in the buildings on such portion. *Id.*

7. Where a mortgage was recorded August 21, 1890, and it was alleged in a claim for a mechanic's lien on the same property that the material was furnished between August 21, 1890 and January 22, 1891, the mortgage was *held* to be the superior lien. *Weir v. Thomas*..... 507

8. A material-man should not be allowed to tack one contract to another and thereby procure a lien for all the material furnished under both by filing an itemized account within four months of the date of furnishing the last item of material under the last contract. *Central Loan & Trust Co. v. O'Sullivan*..... 835

9. The evidence justified a finding that material was furnished under separate contracts in a case where part of the items was delivered on or prior to May 27, and the balance was not furnished until August 20, or later. *Id.*, 834

10. Evidence *held* to sustain a finding that material for which plaintiff claimed a lien against a wife's property was furnished to the husband individually, and not as agent for the wife or on the faith and credit of her real estate. *Id.*, 835

11. Affirmance of decree establishing plaintiff's lien where the evidence was conflicting and the defense was that plaintiff used improper material and failed to complete the building within the time fixed by the contract. *Pearsall v. Columbus Creamery Co.*..... 833

Metropolitan Cities. See ANIMALS, 1.

Misconduct of Jury. See NEW TRIAL, 3–5. REVIEW, 23.

Mortgages. See JUDICIAL SALES. LANDLORD AND TENANT, 6. MECHANICS' LIENS, 7. NEGOTIABLE INSTRUMENTS, 9. PRINCIPAL AND AGENT, 4.

1. A mortgagee may either sue at law for the recovery of the debt or foreclose the mortgage, but when he elects as to his cause of action he must exhaust the remedy chosen before resorting to the other. *Meehan v. First Nat. Bank of Fairfield*..... 213
2. A mortgagee, pending foreclosure or after judgment, cannot, without consent of the court of equity, enforce payment of the debt in an action at law on the obligation of a person other than mortgagor. *Id.*
3. In such an action at law plaintiff should allege and prove his authority to bring the suit. *Id*..... 214
4. A mortgagee who indorsed the notes secured is liable for payment. He is a proper party to a foreclosure suit and cannot be sued at law as an indorser pending foreclosure or after judgment without permission of the court of equity. *Id.*
5. Evidence of plaintiff's title to security under indorsements and a will, in an action to foreclose a mortgage. *Stark v. Olsen*..... 647
6. Sec. 39, ch. 73, Comp. Stats., providing that the recording of an assignment of a mortgage shall not be deemed notice to the mortgagor so as to invalidate payments made by him to the mortgagee, has no application to the holder of negotiable secureties whose title was acquired before maturity for value in the usual course of business. *Id*... 648
7. Sufficiency of evidence to show that a mortgage was executed by a husband and wife under duress. *Hargreaves v. Korcek*..... 660

Municipal Corporations. See VILLAGES.

1. The herd law applies to cultivated lands within a metropolitan city, though there is a city ordinance providing for impounding animals. *Lingonner v. Ambler*..... 316
2. The provision of sec. 49, ch. 14, Laws, 1889, providing that the road taxes collected from property in cities of the first class shall be paid to the city treasurer and expended as the council may direct, has reference merely to such taxes as are by general law collected for the use of the city as a road district. *State v. Cobb*..... 434
3. Whether a particular piece of land lies within or without the corporate limits of a municipality is a question for judicial determination. *City of Hastings v. Hansen*..... 704

Municipal Corporations—*concluded.*

4. The power to create municipal corporations and enlarge or restrict their boundaries is legislative. *Id.*
5. In the absence of statutory authority courts have no jurisdiction to disconnect by decree any part of municipal territory at the suit of the owner thereof. *Id.*
6. Sec. 101, ch. 14, Comp. Stats., providing a means for disconnecting municipal territory does not apply to cities of the first class having less than twenty-five thousand inhabitants. *Id.*

Mutual Accident Associations. See INSURANCE, 1-4.

Negligence. See CARRIERS. DAMAGES, 3, 7-11. INTOXICATING LIQUORS. RAILROAD COMPANIES. TELEGRAPH COMPANIES, 3, 4.

1. The question of negligence was *held* to be for the jury in a case where a passenger was forced, by the pressure of the crowd, from the front step of a street railway car and injured. *Pray v. Omaha Street R. Co.* 167
2. Sufficiency of evidence in an action against a street railway company to recover for personal injuries. *Omaha Street R. Co. v. Baker* 511

Negotiable Instruments. See ALTERATION OF INSTRUMENTS, 5. INJUNCTION, 5, 6. MORTGAGES, 4, 6. USURY.

1. In Pennsylvania the assignee of a note containing a warrant of attorney may have judgment entered in his favor. *Snyder v. Critchfield* 67
2. In an action on a note against a husband and wife, involving the question of his authority to sign her name, the evidence was *held* sufficient to sustain a verdict against the husband, but insufficient to sustain a verdict against the wife. *Barmby v. Wolfe* 77
3. Where a note is valid as between the original parties, a pledgee may recover the whole amount thereof, retaining any surplus as trustee for the party beneficially entitled to it. *Id.*
4. Where a note is invalid as between the original parties, a *bona fide* pledgee may only recover the amount of his advances, provided there is no other party in interest. *Id.*
5. In an action by the endorsee of a negotiable note transferred before maturity, the maker, in order to avail himself of the defense of payment before endorsement, must plead and prove that plaintiff had notice of the payment

Negotiable Instruments—*concluded.*

before the note was transferred. *Yenney v. Central City Bank*..... 402

6. In an action on a promissory note by an alleged indorsee thereof, a denial of the indorsement and plaintiff's ownership is a good defense. *Central City Bank v. Rice*..... 594

7. Evidence in such a case *held* sufficient to support a verdict for defendant. *Id.*

8. The maker's ratification of a note after a material alteration must be pleaded when relied upon by the holder of the note. *Erickson v. First Nat. Bank of Oakland*..... 622

9. Where a mortgage of land in Nebraska is there executed and delivered to secure a note appearing from its face to have been twelve days previously executed in Iowa to a loan broker of that state, the presumption is, in the absence of explanatory evidence, that payment of the proceeds of the loan and delivery of the note and mortgage were contemporaneous acts, and that the note is not an Iowa contract. *Stark v. Olsen*..... 647

10. A note is not rendered non-negotiable by a provision for payment of an attorney's fee in case suit is brought to enforce collection. *Id.*

11. A note is not rendered non-negotiable by a provision allowing the holder to declare the debt due in case of default in a payment of interest. *Id.*

12. The agreement, "For value received we hereby guaranty payment of the within note at maturity, or any time thereafter, waiving protest and notice of non-payment," is not a mere guaranty, but an indorsement with an enlarged liability. *Pollard v. Huff*..... 892

13. An accommodation note or bill is one not made or accepted upon a consideration, but for the purpose of enabling the payee or holder to raise money on credit. *Id.*

New Trial. See REVIEW, 13, 17, 23.

1. Where a motion for a new trial is made on behalf of a person on the grounds that he was not made a party and that counsel appeared for him without authority and failed to make a proper defense, the court in passing upon the motion may consider matters of record which occurred during the trial. *Spotswood v. Nat. Bank of Commerce*..... 1

2. An attorney who is unprepared for trial when his case is called will not be permitted to urge on motion for a new trial matters of which he had knowledge and failed to

New Trial—*concluded.*
present in support of his application for a postponement. *Corbett v. Nat. Bank of Commerce*..... 230

3. Where members of a jury discuss among themselves the merits of the case, express opinions before the final submission, and, during deliberation, communicate with one of the attorneys, their verdict may be set aside. *Edney v. Baum*..... 294

4. It will usually be presumed that prejudice results from communication, during deliberations of jury, between an attorney in the case and a juror. *Id.*

5. The existence of an opportunity and inclination among jurors to communicate with those outside the jury room may be sufficient to vitiate a verdict. *Id.*

6. Primarily the office of a motion for a new trial is to afford the court an opportunity to correct errors in its own proceedings. *Weber v. Kirkendall*..... 766

Notes. See INSURANCE, 9. NEGOTIABLE INSTRUMENTS.

Notice. See INSURANCE, 31. TRUSTS, 2.

Objections. See TRIAL, 9–13.

Occupying Claimants. See EJECTMENT, 1–4.

Opening and Closing. See TRIAL, 2.

Overruled Cases. See TABLE, *ante*, p. lvii.

Parties. See MORTGAGES, 4. PARTNERSHIP, 7. QUO WARRANTO.

1. Objection on account of the absence of parties not indispensable to a determination of a controversy should be made by answer or demurrer, otherwise the court may determine the rights of the parties before it. *Fitzgerald v. Fitzgerald & Mallory Construction Co*..... 465

2. Only such persons as are bound by a judgment are necessary parties to a proceeding in error. *Kuhl v. Pierce County*... 584

Partnership. See ATTACHMENT, 1.

1. Accounting. *Richardson v. Doty*..... 73

2. A court of equity, in a proper case, may apply the assets of an insolvent copartnership to the payment of the firm debts to the exclusion of the debts of the individual partners. *Richards v. Leveille*..... 38

3. A partnership is a distinct entity, having its own property, debts, and credits. For the purposes for which it is created it is a person, and as such is recognized by law. *Id.*

Partnership—*concluded.*

4. Partnership assets may be levied upon and sold for the payment of the debts of all the individual members of the partnership, and such sale will not be invalid because the debt was that of the individual members of the firm. *Id.*

5. The assets of a partnership, though insolvent, are not held in trust by the members of the firm for the payment of partnership debts. *Id.*

6. The firm creditors, as such, are not given a lien by law upon the assets of the partnership, whether the firm be solvent or insolvent. *Id.* 39

7. It is only in a proper action, by a member of an insolvent firm or a creditor thereof, that the assets are first applied by a court of equity to the payment of partnership debts. *Id.*

8. On dissolution of an insolvent partnership, its assets will, in a court of equity, be treated as a trust fund for payment of partnership debts. *Perkins v. Butler County.* 110

9. An assignment of partnership funds, made by one member of an insolvent firm to secure his individual debt, is subject to the payment of the partnership debts, and in the distribution of the fund the partnership creditors will be first paid, notwithstanding such assignment. *Id.*

10. Where defendant denies liability as a partner, plaintiff, in order to recover against him as such, must prove a partnership in fact, or that defendant permitted himself to be held out as a partner. *McDonald v. Jenkins.* 163

11. Evidence *held* not to sustain the allegation of partnership. *Id.*

12. Mere statements of one claiming to act for, and as a member of, a firm are not competent to establish a disputed partnership relation. *Weeks v. Palmer Deposit Bank.* 684

13. On the record discussed in the opinion the judgment was *held* to be one against the firm and not against the individuals. *Broatch v. Moore.* 640

Payment. See DURESS, 1. NEGOTIABLE INSTRUMENTS, 5. PRINCIPAL AND AGENT, 4. PRINCIPAL AND SURETY, 6.

1. A debt will not be extinguished by the payment of a less sum than the amount actually due, unless based upon a new and sufficient consideration. *Fitzgerald v. Fitzgerald & Mallory Construction Co.* 464

2. One threatened with civil process, unaccompanied by any act of hardship or oppression, is required to make his de-

Payment—*concluded.*

fense in the first instance to the merits of the claim, and cannot postpone litigation by paying the demand and afterward maintain an action therefor. *Weber v. Kirkendall*... 766

Penalty. See BONDS.

Personal Injuries. See DAMAGES. NEGLIGENCE. TORTS.

Pleading. See CONTRACTS, 5. CORPORATIONS, 4. HUSBAND AND WIFE. LIBEL AND SLANDER, 1, 2. MORTGAGES, 2, 3. NEGOTIABLE INSTRUMENTS, 8. PRINCIPAL AND SURETY, 8. USURY.

1. The *allegata et probata* must agree. *Omaha Consolidated Vinegar Co. v. Burns*..... 21
2. Sufficiency of allegation to admit proof of defective braking apparatus of a car in an action for personal injuries. *St. Joseph & G. I. R. Co. v. Hedge*..... 449
3. Courts should refuse to direct what language must be employed in drafting pleadings. *Omaha Fire Ins. Co. v. Berg*... 523
4. Error does not appear in an order overruling a motion to strike out portions of a petition unless prejudice results. *Id*..... 522
5. Sufficiency of petition for an accounting in equity in an action by a county against a defaulting county treasurer and the sureties on his official bonds. *Kuhl v. Pierce County*, 584
6. Amendment of a pleading to conform it to the facts proved may be allowed where it does not change the cause of action or defense. (Code, sec. 144.) *Scott v. Spencer*.... 93
7. Amendments should not be allowed after judgment where they change the nature of the action or defense. *Id.* *First Nat. Bank of Wymore v. Myers*..... 307
8. Amendments will not be allowed when to do so would prejudice the rights of the adverse party. *Id.*
9. Where an amended pleading has been filed the original loses its force and the adverse party should not read it to the jury or comment upon it in argument without first offering it in evidence. *Woodworth v. Thompson*..... 311
10. Rulings on motions for leave to amend pleadings will not be reversed except for an abuse of discretion where prejudice results. *Central City Bank v. Rice*..... 594
11. Where a petition states a case entitling the plaintiff to judgment for any amount, it is good against demurrer, or an objection to the introduction of evidence on the ground that it does not state a cause of action. *Western Union Telegraph Co. v. Mullins*..... 732

Pleading—*concluded.*

12. The rule requiring the pleader to state the facts constituting a cause of action or defense should not be applied to complaints in forcible detainer actions under sec. 1023 of the Code. *Blachford v. Frenzer* 829

Pledges. See NEGOTIABLE INSTRUMENTS, 3, 4.

Possession. See TRESPASS.

Powers. See TRUSTS.

Practice. See APPEAL, 6. ATTACHMENT, 3. CRIMINAL LAW, 12. DISMISSAL. EJECTMENT, 1, 2. JUDICIAL SALES, 3. REMOVAL OF CAUSES. REVIEW, 18.

Preliminary Examination. See CRIMINAL LAW, 4–7.

Principal and Agent. See INSURANCE, 5–7, 15, 32. MECHANICS' LIENS, 10.

1. Where a contract provides that a consignee shall receive goods for sale on commission and return periodically to the consignor the proceeds at prices charged by the latter, the former guarantying payment, the relation the law implies is that of agency. *National Cordage Co. v. Sims* 148
2. The fact of agency cannot be established by the mere declarations of one assuming to act as agent. *Burke v. Frye*, 223
3. Acquiescence by a principal in the fraudulent or unauthorized act of his agent is in effect a new agreement made with an intent to condone the wrong done and will not be inferred from doubtful evidence. *Fitzgerald & Mallory Construction Co.* 465
4. Agency with power to satisfy a mortgage before maturity will not be presumed, as against a *bona fide* holder, from the mere fact that the mortgagee, who sold the security, forwarded to his correspondent, at whose office it was payable, funds for the satisfaction of interest coupons. *Stark v. Olsen* 648

Principal and Surety. See GUARANTY, 2.

1. The liability of the signers of an appeal bond, as between them and the judgment creditor, is that of principal debtors. *Flannagan v. Cleveland* 62
2. A principal in a proposed bond, by a statement to the proposed obligee's agent as to the necessity of paying a debt, for which the proposed sureties are liable to a third person, before requesting them to again become sureties, does not make such payment an indispensable condition precedent to the acceptance of the proposed bond by the obligee named therein. *Kotly v. McGill* 516

Principal and Surety—*concluded.*

3. Where the principal has paid for all goods bought before execution of a bond guarantying payment of all purchases by him, purchases before execution of the bond are immaterial to the liability of the sureties for goods sold the principal after they sign the bond. *Id.*

4. A bond of guaranty for payment of goods purchased requiring the obligee to give the principal a credit of sixty days, is not inoperative against the sureties because the obligee takes notes without reference to the limitation of sixty days, where the taking of such notes is, in general terms, authorized by the bond. *Id.* 517

5. Right of sureties on the bond of a defaulting county treasurer to a jury trial. *Kuhl v. Pierce County* 584

6. A surety who discharges the debt by giving his note for the amount due may enforce contribution from his co-sureties without payment of the note where it is accepted by the creditor. *Smith v. Mason*..... 610

7. In an action by a surety against his co-sureties for contribution, the burden must be distributed equally among the solvent sureties, excluding those who are insolvent. *Id.*

8. Allegations and proof of insolvency of the principal debtor are unnecessary in order to recover contribution. *Id.*..... 611

9. The mere refusal of a surety to accept property from the principal as indemnity will not defeat his right to contribution where he has paid the original debt. *Id.*

10. In an action for contribution plaintiff is entitled to interest on the amount paid by him from the date of payment. *Id.*

11. Failure to sue the principal debtor when the debt becomes due, or an agreement without consideration between a creditor and the principal debtor for an extension of time for payment, does not release the sureties. *Id.*

Probate. See WILLS.

Public Policy. See CONTRACTS, 6.

Validity of contract discussed in opinion. *Fitzgerald v. Fitzgerald & Mallory Construction Co*..... 464

Quieting Title. See HOMESTEAD, 1.

1. Case where an effort was made to cancel a claim for a mechanic's lien for sinking a well. *Omaha Consolidated Vinegar Co. v. Burns*..... 21

2. Where plaintiff's title is put in issue by the answer, he must show that he owns the legal or equitable title, or that

Quieting Title—*concluded.*

he has an interest in the land superior to that of defendant. *McCauley v. Ohenstein*..... 89

3. Question relating to the sufficiency of evidence to entitle plaintiff to a decree canceling a contract of sale as being a cloud on plaintiff's title. *Warnick v. Latta*..... 807

Quo Warranto.

The owner of agricultural lands illegally included within a city or village, who is not a voter therein, may proceed by *quo warranto* to test the validity of the incorporation. *State v. Dimond*..... 155

Railroad Companies. See CORPORATIONS, 4. INTOXICATING LIQUORS, 1, 2. STREET RAILWAYS.

1. Sufficiency of evidence to show that a railroad company negligently constructed an embankment across a draw and that damage to farm land resulted from the flow of surface water. *Lincoln & B. H. R. Co. v. Sutherland*..... 526

2. In an action under sec 3, art 1, ch. 72, Comp. Stats., to recover for injuries received while plaintiff was a passenger on a railroad, it is sufficient for him to prove that the injuries resulted from the operation and management of the road. *St. Joseph & G. I. R. Co. v. Hedge*..... 448

3. In such a case the law infers negligence from the fact of the injury and imposes upon defendant the burden of proving that the injury resulted from plaintiff's negligence, or a violation of a rule of the company. *Id.*

4. In an action by an administratrix against a railroad company for negligently causing the death of her husband, the evidence was *held* sufficient to sustain a finding that the proximate cause of the death of deceased was his own negligence. *Swindell v. Chicago, B. & Q. R. Co*..... 841

5. Sec. 104, ch. 16, Comp. Stats., requiring railroad companies to ring a bell or sound a whistle at public crossings applies to roads used by the public, though not dedicated as such. *Chicago, B. & Q. R. Co. v. Metcalf*..... 848

6. Sec. 104, ch. 16, Comp. Stats., requiring railroad companies to give signals at public crossings, was intended to protect all persons lawfully at or near a crossing from any danger naturally to be apprehended from the sudden approach without warning of a train. *Id.*

7. A person with a team, unloading a car at a station near a crossing, is within the protection of the statute requiring signals at crossings. *Id.*

Railroad Companies—*concluded.*

8. In an action to recover damages resulting from the failure of a railroad company to ring a bell or sound a whistle at a crossing, it is error to instruct the jury that the company is liable if it failed to give the signal required by statute, provided the injury was caused in consequence of such omission. *Id.*

Rape.

1. Evidence that prosecutrix was but sixteen years of age, simple-minded, and had suffered a physical injury partially depriving her of strength, may be considered by the jury in determining whether the resistance by her was sufficient to show non-consent. *Thompson v. State* 366
2. Evidence in the case *held* sufficient to sustain a conviction. *Id.*
3. Evidence *held* insufficient to sustain a conviction. *George v. State*..... 757

Ratification. See NEGOTIABLE INSTRUMENTS, 8. PRINCIPAL AND AGENT, 3.

1. Evidence as to whether a wife ratified the act of her husband in signing her name to a note. *Barmby v. Wolfe* 81
2. Ratification of a loan of corporate bonds by receiving them and paying interest thereon. *Fitzgerald v. Fitzgerald & Mallory Construction Co*..... 464
3. The failure of the injured party to object after knowledge of the wrong is evidence of ratification. *Fitzgerald v. Fitzgerald & Mallory Construction Co*..... 465

Real Estate. See EJECTMENT.

Receivers.

It is no objection to the appointment of a receiver of a corporation, in an action by a stockholder for an accounting in its behalf against a corporation indebted to it, that the debtor corporation was summoned as garnishee of the first named corporation in an action against it by attachment, where the attachment proceeding has been abandoned and judgment entered for damages only, without any reference to the garnishee. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*..... 465

Records. See EVIDENCE, 5.

Reference.

A legal action cannot be referred except by consent of parties. *Kuhl v. Pierce County*..... 584

Reformation of Instruments. See INSURANCE, 10.

Register of Deeds.

It is the duty of the register of deeds to record tax deeds when presented for that purpose, accompanied by the lawful fee. *Burnham v. State* 438

Registration. See MORTGAGES, 6. SALES, 2.

Release and Discharge.

1. In absence of fraud or mistake an employe of a railroad company who accepts from the relief department benefits for an injury under an agreement of membership releasing the company from liability in case of such acceptance, cannot recover in an action against the company for damages resulting from the injury. *Chicago, B. & Q. R. Co. v. Bell* 45

2. An arbitrary refusal to pay, based on the mere pretense of the debtor, made for the purpose of exacting terms which are inequitable and oppressive, is not such a dispute as will of itself support a compromise resulting in a reduction of the amount of the indebtedness. *Fitzgerald v. Fitzgerald & Mallory Construction Co.* 463

Relief Departments. See CONTRACTS, 3.

Religious Societies.

1. A church which is a member of an association of congregations governed by the same rules, is bound by the decisions of the association relating to church government and discipline. *Pounder v. Ashe* 672

2. Civil courts will not review the proceedings of church tribunals relating to organization, government, and discipline. *Id.*

3. Where the highest church tribunal has deposed a clergyman and expelled him from membership, the judgment may be enforced by a court of equity, and the clergyman may be enjoined from performing his ministerial functions. *Id.*

Removal of Causes.

A state court should not examine the proceedings of the circuit court of the United States to determine whether an order remanding a cause for want of jurisdiction is in accordance with the practice of the circuit court. *Fitzgerald v. Fitzgerald & Mallory Construction Co* 465

Replevin.

1. Allegation of general ownership is not supported by proof of a mere lien. *Sharp v. Johnson* 165

2. Direction of verdict for plaintiff *held* proper under the evi-

Replevin—*concluded.*

dence in an action to recover some oats. *Mawhiney v. Green*..... 688

3. Where defendant recovers judgment for the withholding of the property and costs, plaintiff cannot complain that judgment was not rendered against the latter for a return of the property or the value thereof. *Scott v. Burrill*..... 755
4. Discussion of question as to vendor's right to replevy a house moved from a lot sold by him, where vendee made default under a contract authorizing the vendor to take immediate possession in case the vendee failed to make a payment when due. *Ellsworth v. McDowell*..... 707
5. The plaintiff must prove ownership, right of immediate possession thereof, and wrongful detention by defendant. *Peterson v. Lodwick*..... 771
6. It must be shown that the facts necessary to plaintiff's recovery existed at the time suit was brought. *Id.*
7. The court may direct a verdict for defendant where plaintiff fails to prove sufficient facts to entitle him to recover. *Id.*

Res Adjudicata.

1. Damages resulting from negligence of a lienor in caring for stock taken up by him under the herd law are not barred by a statutory arbitration, assessment of damages and payment of award. *Richardson v. Halstead*..... 606
2. Where issues have been determined by a decree and the case reserved for an accounting, they cannot be relitigated in the supplemental proceedings. *Younkin v. Younkin*... 729

Residence. See ELECTIONS, 1–3.

Review. See APPEAL. BILL OF EXCEPTIONS. CONTINUANCE, 1. COSTS, 1. CRIMINAL LAW. INSTRUCTIONS. JUDGMENTS, 4. PARTIES, 1. PLEADING, 4, 10. RELIGIOUS SOCIETIES, 1, 2. TRIAL. WITNESSES, 2, 3.

1. Every presumption is in favor of the correctness of the rulings of the trial court. *Spotswood v. Nat. Bank of Commerce*..... 6
2. Where plaintiff's right to recover below was not affirmatively established by the proofs a judgment for defendant will be affirmed. *Windsor v. Thompson*..... 228
3. A verdict should not be set aside because of inadequacy of damages awarded, when on one issue, if found for plaintiff, they would be inadequate, but when the verdict

Review—*continued.*

may have been based on other issues calling for a smaller recovery. *Edney v. Baum* 294

4. Misconduct of a juror, not prejudicial to the party complaining, is not available error on review. *Vaughn v. Crites*, 812

5. A judgment in a *mandamus* proceeding can only be reviewed on error. *State v. Affholder*..... 497

6. Only such persons as are bound by a judgment are necessary parties to a proceeding in error. *Kuhl v. Pierce County*, 584

7. Admission of testimony of a disqualified witness in a case tried to the court is not ground for reversal where there is sufficient competent evidence to support the judgment. *Lihs v. Lihs*..... 143

8. A slight error in an instruction is not ground for reversal where the complaining party is not prejudiced. *Stein v. Vannice*..... 132

9. Applicability of instructions to evidence and rulings as to testimony will not be considered in absence of a bill of exceptions. *Nelson v. Johnson*..... 7

10. Error in the judgment of a justice of the peace cannot be shown by a bill of exceptions settled by him. *Vlasek v. Wilson*..... 10

11. The character of the evidence introduced below can only be shown in the supreme court by a properly authenticated bill of exceptions. It cannot be shown by affidavits filed in the appellate court. *Scott v. Spencer*..... 93

12. The ruling upon a motion for a new trial will not be reviewed where the evidence considered upon the hearing has not been preserved by a bill of exceptions. *Spotswood v. Nat. Bank of Commerce*..... 1

13. An affidavit in support of a motion for a new trial, to be available on error, must be embodied in a bill of exceptions. *Chicago, R. I. & P. R. Co. v. Griffith*..... 691

14. Where it appears from the bill of exceptions that important testimony has been omitted therefrom, an assignment that the verdict is not sustained by the evidence cannot be considered. *Omaha Fire Ins. Co. v. Berg*..... 522

15. A motion for a new trial is a necessary part of a record to review by petition in error a judgment based on the findings of a court. *Weber v. Kirkendall*..... 766

16. In reviewing a decision on a motion for a new trial, a stronger showing will be required to justify a reversal where the motion is sustained than where it is overruled. *Id.*

Review—*continued.*

17. The ruling of a trial judge in refusing to set aside a verdict on the ground that it is not sustained by the evidence will not be interfered with unless clearly wrong. *Central City Bank v. Rice*..... 595

18. A transcript of the proceedings below may be stricken from the files and the appeal dismissed where it appears that the certificate of authentication has been materially altered with the intention of misleading the appellate court. *Felber v. Boyd*..... 700

19. In sec. 586 of the Code, relating to transcripts for review, the word "proceedings" includes duly certified copies of the pleadings on which an action was tried. *School District v. Cooper*..... 714

20. Where a certified transcript of the proceedings is required for review, a case cannot be heard in the appellate court on the original pleadings, though the parties should so stipulate. *Id.*

21. A judgment supported by sufficient evidence will be affirmed where no question of law is involved on review.
Van Etten v. Edwards..... 57
Schelly v. Schwank..... 504
Will v. Elwood..... 847

22. Judgment on conflicting evidence will be affirmed unless clearly wrong. *Lihs v. Lihs*..... 143
Brown v. Cleveland..... 239
Younkin v. Younkin..... 729
Steinkraus v. Korth..... 777

23. A petition in error alleging misconduct of the jury must state the conduct complained of, and affidavits in support of the motion for a new trial on that ground must appear of record. *Houston v. City of Omaha*..... 63

24. "Irregularity in the proceedings of the court and jury, by which plaintiff was prevented from having a fair trial," is insufficient as an assignment of error in a reviewing court. *Id.*

25. An assignment in a petition in error, "errors of law occurring at the trial," presents nothing for review. *Id.*

26. Rulings on evidence cannot be reviewed in the supreme court under an assignment, "Error of law occurring at the trial, duly excepted to." *Schelly v. Schwank*..... 504

27. An assignment of error that the verdict is against the weight of evidence is not good. It should allege that the verdict is not sustained by sufficient evidence. *Barmby v. Wolfe*... 77

Review—*concluded.*

28. An assignment of error as to overruling a motion for a new trial must specify to which of several grounds it applies. *Stein v. Vannice*..... 132

29. Assignments of error as to giving or refusing a group of instructions are insufficient. *Schelly v. Schwank*..... 504

30. An assignment of error that the evidence of a witness was erroneously admitted will be overruled if any of his evidence is competent. *Eagle Fire Co. v. Globe Loan & Trust Co.*..... 381

31. Assignments that the verdict is not supported by sufficient evidence and that the judgment is contrary to law cannot be sustained on the ground certain evidence admitted without objection was irrelevant. *Ins. Co. of North America v. Bachler*..... 550

32. Rulings on evidence will not be reviewed unless they are specifically assigned in the petition in error. *Edney v. Baum*..... 294
Smith v. Mason..... 611

33. Assignments by plaintiff in error not argued in his brief will be deemed waived. *Madsen v. State*..... 631

Road Funds. See HIGHWAYS.

Road Taxes. See MUNICIPAL CORPORATIONS, 2.

Sales. See ATTACHMENT, 4. EXECUTIONS. FACTORS AND BROKERS, 3. FRAUDULENT CONVEYANCES. JUDICIAL SALES. PRINCIPAL AND SURETY, 2–4.

1. Agreement, set out in opinion, *held*, not a conditional sale but a *del credere* agency. *National Cordage Co. v. Sims*..... 148

2. Sec. 26, ch. 32, Comp. Stats., requiring conditional sales of personalty to be in writing and filed with the county clerk, has no application where the relation of vendor and vendee does not exist. *Id.*

3. Where a vendee refuses to perform, the vendor may keep the property and sue for the difference between the contract price and the actual value of the property at the date of vendee's breach of contract, or the vendor may tender the property to vendee and sue for the contract price. *Lincoln Shoe Mfg. Co. v. Sheldon*..... 280
Lincoln Shoe Mfg. Co. v. Seifert..... 536

Schools and School Districts.

A school-house site cannot be changed at a special election of the voters of a district, but may be relocated at any annual meeting by a vote of two-thirds of those present,

Schools and School Districts—*concluded.*
except where the original location is three-fourths of a mile from the center of the district, in which case the site may be, by a majority vote, located nearer the center. *Wilber v. Woolley*..... 739

Seals. See TAX DEEDS, 1.

Set-Off.
1. The insolvency of a party against whom a set-off is claimed is a sufficient ground for a court of chancery to allow it in cases not provided for by statute. *Richardson v. Doty*..... 73
2. In an action upon an attachment bond, a claim due the principal from plaintiff is a proper subject of set-off. *Field v. Maxwell*..... 900

Settlement. See COMPROMISE AND SETTLEMENT.

Sheriffs and Constables. See EXECUTIONS. JUSTICE OF THE PEACE, 2.

Slander. See LIBEL AND SLANDER.

Special Findings. See ATTACHMENT, 3.

Spiritualism. See WILLS, 2.

Statute of Frauds. See SALES, 2.

Statute of Limitations. See LIMITATION OF ACTIONS.

Statutes. See CONSTITUTIONAL LAW. TABLE, *ante*, p. lxi.
1. When two independent statutes are not necessarily in conflict, the latter will not be construed as creating an exception to the operation of the earlier. *Lingonner v. Ambler*..... 316
2. Sec. 49, ch. 14, Laws, 1889, does not repeal sec. 76 of the general road law. *State v. Cobb*..... 434
3. Where the legislature adopts the statute of another state, the judicial construction thereof in that state is also adopted. *Coffield v. State*..... 418
4. The statutes of another state are unavailing unless pleaded and proved. *Smith v. Mason*..... 611

Street Railways.
1. It is evidence of negligence on the part of the company to carry passengers greatly in excess of the seating capacity of the train, and to permit them to stand on the platforms and steps of the cars. *Pray v. Omaha Street R. Co.*..... 167
2. A passenger who is unable to secure a seat or standing room, and remains on the step of the car, is presumed to

Street Railways—*concluded.*

be there with the consent of the servants in charge of the train. *Id.*

3. Street railway companies are common carriers, and are presumptively liable for the concurrent negligence of their servants and third persons, resulting in personal injury to passengers. *Id.*

4. Standing on the front steps of a moving, crowded, street car is not such negligence as will prevent a passenger from recovering for injuries resulting from the negligence of persons in charge of the car. *Id.*

5. Evidence *held* insufficient to sustain a judgment for plaintiff in an action against a street railway company to recover for personal injuries resulting from defendant's negligence. *Omaha Street R. Co. v. Baker* 511

Students. See ELECTIONS, 1-3.

Subscription. See CORPORATIONS, 1, 3.

Summons.

Broatch v. Moore..... 640

Supersedeas. See BONDS.

Suretyship. See PRINCIPAL AND SURETY.

Surface Water.

A land owner may defend his premises against surface water by dike or embankment, but is liable for damages where he negligently and unnecessarily constructs an embankment and overflows the land of an adjoining proprietor. *Lincoln & B. H. R. Co. v. Sutherland*..... 526

Tacking. See MECHANICS' LIENS, 8.

Tax Deeds.

1. Valid tax deeds cannot be executed under the revenue law of 1879, because the legislature failed to provide for official seals for county treasurers. *McCauley v. Ohenstein*, 90

2. Payment of registration fee to county treasurer cannot be demanded as a condition precedent to execution and delivery of a tax deed. *Burnham v. State*..... 439

Taxation. See ATTORNEYS' FEES, 2. COUNTIES, 2. LIMITATION OF ACTIONS, 3. MUNICIPAL CORPORATIONS, 2. TAX DEEDS.

Rate of interest allowable to plaintiff on foreclosure of a valid tax sale certificate. *Osgood v. Grant*..... 350

Telegraph Companies.

1. Sec. 12, ch. 89*a*, Comp. Stats., prohibiting telegraph companies from limiting, by printed agreement on message-blanks, their liability for mistakes and non-delivery, is not inequitable, but binding upon the companies. *Western Union Telegraph Co. v. Kemp*..... 194
2. A printed statement on a message-blank that the company will not be liable for damages unless the claim is presented in writing within sixty days is not binding upon the sender of a message. *Id.*
3. A statement of a servant in an office as to the location of a certain town in answer to an inquiry is not within the apparent scope of his employment, and the company is not liable for the damages resulting from an error in such a statement. *Western Union Telegraph Co. v. Mullins*..... 732
4. Liability of a company for damages where it delivered the wrong message and the recipient took a useless journey in consequence of the mistake. *Id.*
5. A telegraph company is a public carrier of intelligence with rights and duties analogous to those of a public carrier of goods or passengers. *Western Union Telegraph Co. v. Call Publishing Co*..... 326
6. Under like conditions a telegraph company must render its services to all patrons on equal terms. *Id.*
7. In order to constitute an unjust discrimination by a telegraph company there must be a difference in rates under similar conditions as to service. *Id.*
8. It is not undue preference to make to one patron a less rate than to another, where there exist differences in conditions affecting the expense or difficulty of performing the service. *Id.*
9. Where it is shown that a difference in rates exists, but that there is also a difference in conditions affecting the difficulty or expense of performing the service, no cause of action arises without evidence to show that the difference in rates is disproportionate to the difference in conditions. *Id.*

Telephonic Conversations. See EVIDENCE, 4.

Time. See APPEAL, 2.

Torts.

1. Where it is shown that subsequent to the alleged wrongful act a new and independent cause has intervened, sufficient to stand for the cause of the injury, the former

Torts—*concluded.*

is too remote to be made the basis of a recovery. *St. Joseph & G. I. R. Co. v. Hedge* 448

2. Where the evidence discloses a succession of intermediate events, each dependent upon the one immediately preceding it and all depending upon the original act, the latter is the primary cause of the resultant injury. *Id.*..... 449

3. Whether the natural connection of events is maintained or interrupted by a new and independent cause is usually a question of fact. *Id.*

Transcripts. See APPEAL, 2. JUDGMENTS, 5.

1. Where the appellant fails to bring up a copy of the proceedings below as they appear of record the transcript may be stricken from the files. *Felber v. Boyd*..... 700

2. Original pleadings cannot be used in an appellate court where the statute requires a certified copy. *School District v. Cooper*..... 714

Treasurers' Seals. See TAX DEEDS, 1.

Trespass.

Where one buys a lot, erects a house thereon, and occupies it, the vendor is guilty of trespass in attempting to take possession forcibly during the former's absence, though the vendee made default under a contract of purchase authorizing vendor to take immediate possession in case of a failure to make a payment when due. *Ellsworth v. McDowell*..... 707

Trial. See DEPOSITIONS. EVIDENCE. INSTRUCTIONS. INSURANCE, 2. NEW TRIAL. PLEADING, 2, 9. REFERENCE. REVIEW, 7. WITNESSES, 3.

1. Prejudicial error does not result from introducing in evidence a petition verified by oath of plaintiff where he testified to the same statements during the trial and was cross-examined. *Burgess v. Burgess*..... 16

2. A party who takes the burden of proof during the trial, without objection from his adversary, should not be deprived of the right to open and close. *Id.*

3. The order of trial should be left largely to the discretion of the presiding judge. *Id.*..... 20

4. It is not reversible error to receive a general verdict without an answer to a special interrogatory where an answer in favor of the party complaining would not be inconsistent with the general verdict. *McClary v. Stull*..... 175

5. Recalling jury for instructions is so far within the discre-

Trial—*concluded.*

tion of the trial court as not of itself to present a subject for review. *Id.* 176

6. Where a case is regularly called for trial and one of the attorneys for defendant orally announces that another attorney for defendant is unavoidably absent but will return soon in case of postponement, for a short time, and attend to the trial, it is not an abuse of discretion for the judge to insist that the case be dismissed, continued, or tried. *Corbett v. Nat. Bank of Commerce* 230

7. Under sec. 281*a* of the Code, an action in which the issues have been joined during the term may be placed upon the trial docket and tried at that term. *Osgood v. Grant* 350

8. Causes should be tried in the district court in their order upon the trial docket, unless otherwise ordered by the court in the exercise of sound discretion. *Id.*

9. Testimony admitted without objection will not be eliminated from the record because a timely objection to its admission would have been sustained. *Brown v. Cleveland* ... 239

10. The ruling sustaining an objection to a question cannot be reviewed where there was made no tender of evidence which an answer, if permitted, would disclose. *Omaha Fire Ins. Co. v. Berg* 522

11. Error in admitting evidence given before objection has been made to its introduction cannot be shown in absence of a ruling on a motion to strike it out. *Kissinger v. Staley* 783

12. The taking of an exception is the act of parties or counsel in court. The notation of an exception on the record is merely evidence of the fact. *Blumer v. Bennett* 873

13. Where counsel excepts to an instruction when given and subsequently notes his exception on the margin, the court may properly ratify the notation by overruling a motion to strike it from the record. *Id.*

Trover and Conversion. See CONVERSION. LANDLORD AND TENANT, 6.

Trusts. See CORPORATIONS, 7. PARTNERSHIP, 5.

1. Where a trustee is invested with apparent title to property, persons dealing with him are not chargeable with undisclosed limitations upon his power with respect to the subject of the trust. *Stark v. Olsen* 648

2. Where a trustee's powers are clearly defined by a registered instrument creating the trust, persons dealing with him in respect to the trust property must at their peril take notice of the extent of his powers. *Id.*

Ultra Vires. See CORPORATIONS, 4.

University Students. See ELECTIONS, 1-3.

Usury.

1. To constitute a plea of usury there must be a statement of the contract, with whom it was made, its terms and character, and the amount of interest agreed to be reserved, taken, or received. *Bell v. Stowe* 210
2. In an action on a note it is error to admit, over plaintiff's objection, evidence of usurious transactions where the plea of usury is insufficient. *Id.*
3. Insufficiency of evidence to support judgment for defendant. *Id.*

Valued Policy Act. See INSURANCE, 23-25.

Vendor and Vendee. See FRAUDULENT CONVEYANCES. SALES.

1. A provision in a contract for the sale of land, authorizing the vendor to take immediate possession in case the vendee fails to make a payment when due, means no more than that a default shall confer a right of action upon vendor for possession of the premises. *Ellsworth v. McDowell* 708
2. Where the purchaser makes default in such a case the relation of vendor and vendee is not thereby changed to landlord and tenant. *Id.*

Villages.

1. The provision of sec. 40, ch. 14, Comp. Stats., for the incorporation of villages was not intended to clothe large rural districts with extended municipal powers, or subject them to special taxation for purposes to which they are in no wise adapted. *State v. Dimond* 154
2. Lands adjacent to a village may be incorporated therewith, provided they are in such close proximity thereto as to be suburban in character and have some unity of interest with the platted portion in the maintenance of municipal government. *Id.*
3. The statute for the incorporation of villages does not contemplate the incorporation of remote territory having no natural connection with the village and no adaptability to municipal purposes. *Id.*
4. The provision of sec. 101, ch. 14, Comp. Stats., for disconnecting territory from a city or village by petition is available only to legal voters of the territory sought to be detached. *Id.*

Voluntary Assignments.

A voluntary assignment is void unless made according to the provisions of the statute. *Kilpatrick-Koch Dry Goods Co. v. Bremers*..... 863

Voters. See ELECTIONS.

Waiver. See CRIMINAL LAW, 4-7. DAMAGES, 1. INSURANCE, 4, 8, 12-14, 19, 21. LANDLORD AND TENANT, 5.

Warrant of Attorney. See JUDGMENTS, 3.

Wills.

1. A probate court should not reject a will containing a valid bequest on the ground that the beneficiary under another bequest is incapable of taking or holding the property bequeathed. *McClary v. Stull*..... 175
2. A belief in spiritualism is not conclusive evidence of want of testamentary capacity where the testator is not affected with any delusion respecting matters of fact connected with the making of the will or the objects of his bounty. *Id.*
3. Where the testator's mind is not so controlled by his peculiar views as to prevent the exercise of a rational judgment touching the disposition of his property, the will should be sustained. *Id.*
4. Where it is claimed that the testator was controlled by insane notions with respect to a particular subject, the question to be determined is, whether he was the victim of such delusions as rendered him insensible to the ties of blood and kindred. *Id.*
5. Counsel fees in a will contest are not allowed as a matter of right, but are within the discretion of the court, and should be denied unless there appears to be a reasonable ground for the controversy. *Id.*..... 176
6. Attorneys who contract with contestant for twenty per cent of the fund in case of success should not be allowed fees out of the estate where they are defeated in the contest. *Id.*

Witnesses. See CRIMINAL LAW, 3. DEPOSITIONS. EVIDENCE, 7. INSTRUCTIONS, 2. LARCENY.

1. A wife cannot testify against her husband, over his objection, in an action to cancel a deed from him to his son. *Lihs v. Lihs*..... 143
2. A judgment will not be reversed on the ground that the trial court permitted leading questions, unless there was an abuse of discretion. *St. Joseph & G. I. R. Co. v. Hedge*, 450

Witnesses—*concluded.*

3. In showing the value of land taken for railroad purposes, error will not be presumed from the re-examination of a witness as to the price other land sold for, where the adverse party, on cross-examination, adopted that line of inquiry. *Chicago, R. I. & P. R. Co. v. Griffith*..... 690

Words and Phrases.

1. "Between." *Weir v. Thomas*..... 507
2. "Dwelling house." *Corey v. Schuster*..... 269
3. "Proceedings." *School District v. Cooper*..... 714
4. "Scope of authority." *Fitzgerald v. Fitzgerald & Mallory Construction Co.*..... 463

Writs. See EXECUTIONS.

Written Instruments. See ALTERATION OF INSTRUMENTS.