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HOME FIRE INSURANCE COMPANY OF OMAHA V. JOHN C. ARTHUR.

FILED MAY 19, 1896. No. 6650.

1. **Recovery for Commissions and Attorney's Fees.** Evidence examined, and *held* to sustain the judgment complained of.
2. **Pleading: FAILURE TO ATTACH EXHIBIT.** The failure to attach an exhibit, to which reference is made in a pleading, is not of itself ground for a demurrer, provided the matters alleged in such pleadings amount to a cause of action or defense.
3. ———: ———. A pleading in which the only cause of action is for "money due, as per account hereto attached, and marked Exhibit B," but which is accompanied by no exhibit or allegation showing the nature of the alleged indebtedness, fails to state a cause of action.

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

John F. Talbott, for plaintiff in error.

T. M. Franse, contra.

POST, C. J.

The judgment complained of in this proceeding is the result of two causes, one of which originated before a justice of the peace and the other before the county judge of Thurston county. In the district court, to which one cause had been removed by petition in error, and the other by appeal, they were by consent of parties consolidated for trial. The defendant in error, who was designated as plaintiff in the consolidated action, by his petition claimed the sum of $12.45, being a balance of $7.25 due as commissions upon premiums for insurance written by him while acting as agent for the defendant company, and the further sum of $5.20 for services rendered as an attorney at law. The answer, which puts in issue the material allegations of the petition, is accompanied by a

counter-claim in the following language: "At the commencement of this action the plaintiff was and now is indebted to this defendant in the sum of $11.55 by account which is here attached and marked Exhibit 'A.' Wherefore it prays judgment," etc. There is, however, no exhibit accompanying the answer, or allegation of any kind indicating the nature of the defendant's claim. Upon a trial of the issues thus joined to the court, a jury being waived by the respective parties, there was a finding and judgment for the plaintiff therein for the full amount of his claim, and which has by means of the petition in error of the defendant company been removed into this court for review.

There is no dispute respecting the amount of insurance written by the defendant in error, the controversy being confined to the rate of commission he is entitled to charge therefor. Evidence was introduced tending to prove that the service for which he claims was rendered under and by virtue of a written agreement, which is made a part of the bill of exceptions. If computed in accordance with the terms of said agreement, his commissions have been paid in full and there is due from him to the plaintiff in error a balance on account of premiums received. On the other hand, he had, according to his own testimony, for reasons not material to this controversy, quit the service of the plaintiff in error under said agreement previous to the time in question, and the insurance claimed for was written by him under a subsequent special agreement. Upon that issue the evidence is conflicting, but sufficient to sustain the finding of the district court. What has been said respecting the charge for commissions applies as well to the claim for service of the defendant in error as an attorney at law in securing judgment in behalf of the plaintiff in error upon a note payable to the order of the latter. It is not disputed that the commissions provided by the agreement mentioned were intended as compensation in full for all service rendered by the defendant in error in making

collection of notes taken by him for premiums; but according to the finding of the district court, which upon the evidence adduced must be accepted as conclusive, the service claimed for was performed in pursuance of a special contract subsequent to the abrogation of the agreement relied upon as a defense.

Exception was taken to the exclusion of evidence in support of the counter-claim above set out. We are, however, unable to say that the court erred in the ruling complained of. The alleged counter-claim stated no cause of action, and the evidence offered was responsive to no issue raised by the pleadings.

We quite agree with counsel for plaintiff in error that the failure to attach an exhibit, to which reference is made in a pleading, is not of itself ground for a demurrer, provided the matters alleged, when liberally construed, constitute a cause of action or defense (*Pefley v. Johnson*, 30 Neb., 529); but in this instance, as will be observed from an inspection of the pleading under consideration, there is no allegation of fact whatever, and by no reasonable construction can it be said to state a cause of action. There is no error in the record and the judgment will be

AFFIRMED.

FRANCIS SCHOONOVER V. JOSEPH SAUNDERS ET AL.

FILED MAY 19, 1896. No. 6623.

1. **Appeal to District Court: DISMISSAL.** In an appeal from justice or county court to the district court, if the appellant fails to perfect an appeal in the requirement of filing a transcript of the proceedings of the lower court within thirty days of the rendition of the judgment, and a transcript is procured and filed by appellee as is provided by statute, or one has been filed by appellant out of time, it is proper practice, under the provisions of section 1011 of the Code of Civil Procedure, to make a motion to dismiss the appeal.

2. ———: LACHES: DISMISSAL: EVIDENCE. The evident finding of the

trial court on the showing made in regard to the laches of appellant in the failure to perfect an appeal, *held* to be the true and correct one.

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

S. R. Smith, for plaintiff in error.

Rittenhouse & Boyle, contra.

HARRISON, J.

In this case there was a trial of the issues to the county court of Red Willow county, resulting in a judgment for defendants. For the plaintiff, in the course of an attempted appeal of the action to the district court, there was filed a transcript of the proceedings in the county court, which, it is conceded, was not so filed within the time prescribed by statute. A motion was filed on behalf of defendants to dismiss the appeal on the ground that the transcript of the proceedings in county court was not filed in the appellate court within thirty days from the rendition of the judgment in the lower court. This motion was sustained and the appeal dismissed. The case has been removed to this court by error proceedings.

Counsel for plaintiff claims that the defendants, by the motion to dismiss, entered a general appearance in the cause, and could not complain that the transcript was not filed in time; that the defendants should have confined their action to questioning, by proper pleading, the jurisdiction of the appellate court. In section 1011 of the Code of Civil Procedure, in relation to failure to perfect appeal, applicable to actions in county court, it is provided as follows: "If the appellant shall fail to deliver the transcript and other papers, if any, to the clerk, and have his appeal docketed as aforesaid within thirty days next following the rendition of said judgment, the appellee may, at the first term of the district

court after the expiration of thirty days, file a transcript of the proceedings of such justice, and the said cause shall, on motion of said appellee, be docketed, and the court is authorized and required, on his application, either to enter up a judgment in his favor, similar to that entered by the justice of the peace, and for all costs that have accrued in the court, and award execution thereon, or such court may, with the consent of such appellee, dismiss the appeal at the cost of the appellant and remand the cause to the justice of the peace, to be thereafter proceeded in as if no appeal had been taken." The appellant in the case at bar had filed a transcript, but without the statutory time. It was not necessary for the appellee to file another. (*Muldoon v. Levi*, 25 Neb., 457.) It is proper practice for the appellee who desires to take advantage of such a failure to perfect an appeal, to move the court to enter up a judgment in his favor similar to that from which the appeal was attempted, or to dismiss the appeal. The right to make the motion for either is conferred by statute, and the appearance may be in the manner indicated by the statute on the subject. An affidavit was filed on the part of plaintiff, by which it was sought to establish that it was not because of any laches of plaintiff or counsel that the transcript had not been filed in time, and a counter-affidavit was placed of record for the defendants. From an examination of the facts shown by these affidavits as attendant upon the procurement of the transcript, we must conclude that the evident finding of the district court on this point was true and correct, and it will be sustained. No other alleged errors are argued in the brief of counsel for plaintiff, and it follows, from the conclusions reached on those presented and considered, that the judgment of the district court will be

AFFIRMED.

JOSEPH B. WEST V. CITY OF OMAHA.

FILED MAY 19, 1896. No. 6589.

1. **Municipal Corporations:** CONDEMNATION PROCEEDINGS: WAIVER: INTEREST ON AWARD. A petition filed with and acted upon by the proper authorities of the city of Omaha was as follows: "We, the undersigned owners of the lots below described set opposite our respective names, do hereby petition your honorable body to cause to be opened and extended Twenty-second street from the south line of E. V. Smith's Addition south to Charles street, said city. In consideration of such action we hereby waive all right and claim to prepayment or tender of damages which may accrue to us by the appropriation of any of our real estate therefor, or otherwise. Our damages to be duly ascertained and paid to us as the fund therefor may accrue from the payment of assessment or special taxes as by law provided, or through the judgment of the courts. Said street so to be opened to be sixty-two (62) feet wide, the width of the lots below described." *Held*, That the parties who signed the petition each waived the right to have the damages awarded to him by the appraisers in condemnation proceedings of his property taken in the course of the improvement asked by the petition, paid at the time the property was taken, and was not entitled to collect interest on the amount of the award from the date of the appropriation of the property to the time of its payment from funds derived from the collection of the taxes levied for its payment.

2. ———: ———: VALUE OF HOUSE: EVIDENCE. Evidence in regard to the value of a house removed by plaintiff from premises appropriated by the city in the course of the extension of a street and converted to his own use examined, and *held* insufficient to sustain the finding of the trial judge on this point.

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

Edward W. Simeral, for plaintiff in error.

E. J. Cornish, *contra*.

HARRISON, J.

It appears that the proper authorities of the city of Omaha, on or about the 12th of September, 1889, in the course of a proposed extension of Twenty-second street,

appropriated lot 12, in Godfrey's Addition to Omaha, on which there was then a dwelling house, a barn, and certain other improvements. The city authorities had caused the property to be appraised in what may be termed condemnation proceedings, in the manner provided by law, and the committee of appraisers made the following report:

"We, the undersigned committee duly appointed by the mayor and confirmed by the city council of Omaha city, and having qualified for the duty as required by law to assess any damages that may arise by appropriating land for the opening of Twenty-second street from E. V. Smith's Addition to Charles street, do find the following persons entitled to the amount of money as placed, to-wit:

* * * * * * *

Joseph B. West, for lot 12, Godfrey's Addition.. $3,720
And all improvements thereon except the barn
(the barn to be removed by J. B. West)..... 1,450

* * * * * * *

"Respectfully submitted, with plat signed and attached, also waiver of notification.

"W. J. KENNEDY.
"E. M. STENBERG.
"W. H. ALEXANDER."

The plaintiff, and other parties, filed an acceptance of the assessment by the committee, which read as follows:

"We, the undersigned, whose property has been declared by the city of Omaha necessary to be appropriated for the opening of Twenty-second street south from E. V. Smith's Addition to Charles street, hereby agree to accept the assessment made by W. R. Kennedy, E. V. Stenberg, and Alexander, appraisers appointed by the council to make such assessment of damages, as satisfactory.

"J. M. MARSTON,
"*Pres. Board Trustees Seward St. M. E. Church*
"J. B. WEST,
"*Sect. Board of Trustees.*
"E. G. HUMPHREY.
"J. B. WEST.
"THOS. MELDRUM."

After appraisement had been made and the plaintiff had abandoned the property and the improvements thereon to the use of the city in making the proposed extension of the street, he removed the house to another part of the city, and after placing it on a lot and repairing it, sold it. It appears that he had consent of one or two members of the city council and city attorney to remove the house, but it is conceded that this permission was not sufficient and that his removal of the house was without any authority or right. The city, when it paid plaintiff for his property, retained of the amount assessed in his favor by the appraisers the sum of $750, as the value of the house taken by him. The payment was not made until about eighteen months subsequent to the time of the appropriation of the property by the city, and the payment of interest on the sum adjudged to be his damages, for the time stated, was refused by the city. This action was brought by plaintiff to recover the amount he claimed to be due him for the house, and also interest on the amount awarded him by the appraisers from the date his property was taken by the city to the time of the payment of the award. In regard to the claim for interest, the defense pleaded and urged in behalf of the city was that the plaintiff had, by written instrument filed with it and acted upon, waived the right to recover any interest. The law relating to the appropriation of property, as was this by the city, contemplates that when the property is taken a tender or payment of the damages awarded shall then be made. In order to a compliance with this requirement, after the improvement has been decided upon and the appraisement made, reported, and approved, an assessment must be made and a fund realized therefrom to make the tender or payment. This necessitates some delay in the commencement of the projected improvement, and so it would have been in this instance, but the plaintiff and others, asking for the extension of the street, filed with the city authorities the following petition:

"June 11, 1889.

"*To the Honorable the Mayor and Council of the City of Omaha:* We, the undersigned, owners of the lots below described set opposite our respective names, do hereby petition your honorable body to cause to be opened and extended Twenty-second street from the south line of E. V. Smith's Addition south to Charles street, said city. In consideration of such action we hereby waive all right and claim to prepayment or tender of damages which may accrue to us by the appropriation of any of our real estate therefor, or otherwise. Our damages to be duly ascertained and paid to us as the fund therefor may accrue from the payment of assessment or special taxes as by law provided, or through the judgment of the courts. Said street to be opened sixty-two (62) feet wide, the width of the lots below described.

"Name. Lot. Block. Addition.
"J. B. West.... 12..... Godfrey's Add."

The action of the city in respect to the extension of Twenty-second street was in compliance with the above request, and the improvement was made, taxes levied, and when collected the amount was paid.

Conceding that if property is taken by condemnation proceedings before payment or tender of damages is made that the owner would be entitled to interest on the principal sum, his due, from the time of the appropriation of the property to the date of the payment of such sum, the right to collect interest may be waived. The only question urged here is, Did the instrument signed by the plaintiff constitute a waiver of interest, or was the construction that it was such waiver given it by the trial judge a correct one? This must be answered in the affirmative. The instrument, by its terms, does not delay the time of payment beyond what it would otherwise have been, but says: "Proceed with the improvement. Take the property now and we will wait for the money until the time elapses necessary for the as-

sessments and their collection." Nothing became due the parties under it until such time as the funds were collected. No enforceable claim existed in their favor until the time stated in the instrument. The right to tender or payment at the time of the appropriation of the property was waived in direct terms. If it be said that this was a forbearance of payment of the awards for the necessary length of time, it may be answered that it was a forbearance or delay, not at the instance of the debtor; was one which, of the debtor's own volition, would not have been created or existed, but was of the creation of the creditors, was at their instance and request. The trial judge did not err in holding that the plaintiff was not entitled to collect interest.

It is urged that the judge before whom the cause was tried in the district court erred in finding that the value of the house removed from the premises by the plaintiff was the sum of $750, and that the city authorities did right in retaining of the award of the appraisers to plaintiff the sum of $750. The plaintiff had no right to the house. It did not belong to him, but to the city, and he had no permission to remove it and treat it as his own, and by his so doing the city became entitled to recover of him its fair value, what it would sell for under the existing conditions, standing on a lot from which the buyer must remove it, and if no more than this had been retained from the amount of the award, it is conceded that the judgment in this case may be affirmed as right. The highest salable value, all the conditions being considered and entering into the estimation placed upon the house by any witness, was $600. This being true, there was no sufficient evidence to warrant or sustain the finding of a value of $750, and the judgment for defendant, predicated in part on such finding, was wrong. It follows that the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

DANIEL J. DAVIS ET AL., APPELLANTS, V. RAVENNA CREAMERY COMPANY ET AL., APPELLEES.

FILED MAY 19, 1896. No. 6486.

1. **Contracts:** CONSTRUCTION. Where a contract is ambiguous, a practical construction placed upon it by the parties thereto should prevail over any mere technical interpretation.
2. ———: ———. In case a contract is partly written and partly of printed form, the writing controls in case of inconsistency of provisions.
3. **Subscriptions:** CONSTRUCTION OF CONTRACT. The contract set out in the opinion, between plaintiffs and various subscribers for the erection and equipment of a butter and cheese factory, construed, and *held* to be several, and not joint, and that each subscriber was liable to the plaintiffs to the amount of his subscription only.
4. **Corporations:** SUBSCRIPTIONS. The subscribers, in pursuance of said contract, incorporated under the laws of this state. *Held*, That such corporation was not liable on the contract, and that plaintiffs cannot enforce a mechanic's lien on the property for the amount of the unpaid subscription.

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

Dryden & Main, for appellants.

Calkins & Pratt and *Marston & Nevius, contra.*

NORVAL, J.

This is an action by Daniel J. Davis and T. J. Rankin, a firm doing business under the name and style of Davis & Rankin, against the Ravenna Creamery Company and Erastus Smith and forty-four other subscribers to the stock of said company, to foreclose a mechanic's lien. There was a decree for the defendants, and plaintiffs appeal.

It appears from the record that on the 24th day of August, 1889, Davis & Rankin entered into a written

agreement with the individual defendants to erect and equip a butter and cheese factory at Ravenna according to certain specifications. The following is a copy of the contract, excepting the parts not material to the present inquiry:

"We, Davis & Rankin, parties of the first part, hereby agree with the undersigned subscribers hereto, parties of the second part, to build, erect, complete, and equip for said parties for the second part a combined butter and cheese factory, at or near Ravenna, Nebraska, as follows, to-wit: * * * Said building shall be constructed and finished in substantial accordance with the specifications herein, in a thorough and workmanlike manner, the engine, boiler, and all the machinery and fixtures shall be properly set up, and shall be in good running order before the parties of the second part shall be required to pay for said factory.

"The parties of the second part hereby agree to furnish, at their own expense, suitable land for said building, together with sufficient water on said lot, for the use of said building, and they shall be credited therefor, as payment on said contract, the sum of $300; and it is further understood that in case the said second party shall fail to furnish said land and water within ten days after the execution of this contract, then said Davis & Rankin, at their option, may furnish said land and water. * * *

"Said Davis & Rankin agree to erect said butter and cheese factory as set forth by the above specifications, for the sum of sixty-eight hundred and fifty dollars ($6,850), payable half cash when completed, balance in four months from time the creamery is completed, by giving secured notes at the rate of ten per cent per annum. And it is hereby understood that subscribers are liable only for amount and number of shares signed by them, shares to be for one hundred and fifty dollars each.

"We, the subscribers, agree to pay the above amount

for said butter and cheese factory when completed, payment as above, and we, the said subscribers, agree to accept the same as soon as completed according to said specifications. Said building to be completed within ninety days, or thereabout, after the above amount, $6,850, is subscribed.

"As soon as the above amount of $6,850 is subscribed, or in a reasonable time thereafter, the said subscribers agree to incorporate under the laws of the state, as therein provided, fixing the aggregate amount of stock at not less than $6,850, to be divided into shares of $150 each. Said share or shares as above stated to be issued to the subscribers hereto in proportion to their paid up interest herein.

"It is hereby understood that Davis & Rankin will not be responsible for any pledges or promises made by their agents or representatives that do not appear in this contract, and a part thereof, either in print or writing.

"For a faithful performance of our respective parts of the above contract, we bind ourselves, our heirs, executors, administrators, and assigns.

"Executed and dated this 24th day of August, 1889."

The contract was executed by the plaintiffs, represented by a duly authorized agent, and was also signed by each of the individual defendants in the following form:

Name of Subscriber.	No. of Shares.	Amount of Stock after Incorporation.
Erastus Smith	3	$450
C. E. Davis	1	150

The signature of Mr. Davis is followed by the names of forty-three others, making the aggregate amount of subscriptions $6,850. The factory was constructed and equipped by the plaintiffs in accordance with the terms of the contract upon the lot furnished by the subscribers to the scheme, and plaintiffs have collected, in cash and notes from various subscribers, $5,552.76, leaving $997.24 of the contract price, with interest, unpaid and unse-

cured, after deducting $300 for the value of the site. For this balance, plaintiffs filed, within the statutory period, a statement claiming a mechanic's lien. Which of the subscribers have failed to pay or secure their subscriptions the petition does not allege. It also appears that shortly after the execution of the contract, and in pursuance of its provisions, the Ravenna Creamery Company was incorporated by the subscribers, and said company has ever since been in possession of, and operated, the plant, as owner. Upon the trial the district court made findings that the contract created a several liability on the part of each subscriber to the amount of his individual subscription only, and that plaintiffs have no lien on the factory for the balance due them for its erection.

This case hinges upon the construction to be placed upon the contract above set out. If a joint and several obligation is imposed upon the subscribers to pay the whole contract price, then the decree of the lower court cannot stand. On the other hand, if their undertaking was several only, binding them to pay the amount set opposite their respective names, which sum varies from $75 to $450, the plaintiffs are not entitled to a lien. The contract is partially printed and a portion in writing. The first sentence thereof is printed, and reads that "We, Davis & Rankin, parties of the first part, hereby agree with the undersigned subscribers hereto, parties of the second part," etc. There are the following printed clauses in the agreement: "The parties of the second part hereby agree to furnish, at their own expense, suitable lands for said building," etc., and "We, the subscribers, agree to pay the above amount for said butter and cheese factory when completed, payment as above, and we, the said subscribers, agree to accept the same as soon as completed according to said specifications." If these clauses were construed by themselves, without regard to other provisions relating to the character of the obligation assumed by the several subscribers, we would

not hesitate to say that their undertaking was a joint one, binding them to pay the full sum of $6,800; but there is another stipulation, which was written into the printed form used in preparing the agreement, which must not be overlooked in determining the purport of the contract. It declares that "it is hereby understood that subscribers are liable only for the amount and number of shares signed by them, shares to be for one hundred and fifty dollars each." This, taken in connection with the manner in which the contract was signed by the individual defendants, and the provision relating to the incorporation, shows that it was not the intention that each should alone be liable for the subscriptions of all, but rather that each person signing agreed to pay the sum subscribed by himself, and no more. Manifestly this was the intention of all the parties to the agreement, and was so understood by them at the time. This must have been the construction placed upon the contract by plaintiff's agent, D. F. Gibbons, who was sent by them to Ravenna to make settlement after the factory was completed. He testifies: "I began the work of collecting and was requested by plaintiff to collect from each individual; this I endeavored to do, although it was much more trouble and expense to me. I proceeded in my work of collecting until, in cash and notes, I had received about $5,500, and there I stuck,—couldn't get any more; the parties claiming that those who had already paid did not owe any more, and parties who had not paid had their own pretexts or reasons for not paying, or were worthless." It was also shown by this witness' testimony that he accepted of some of the subscribers unsecured notes, while the contract called for them to be secured. He says he did this "simply as an evidence of indebtedness, * * * and as an accommodation to the various subscribers." It was after he had failed to collect the full contract price that, for the first time, the responsible subscribers were told that they must make up the deficit; whereupon Mr. Gibbons

was by them informed "that each person was only holden for what he signed." The evidence discloses that both parties regarded the liability of the subscription as several merely, up to the time it was discovered that the whole sum was not collectible, and we would be justified in adopting the practical construction placed upon the contract by the parties themselves; but we need not rest our decision upon that ground alone. It is a familiar canon of interpretation that a contract must be considered as an entirety in order to ascertain the true intention of the parties. There is another well recognized rule of construction that a written stipulation in a contract will prevail over a printed provision therein. Applying these laws of construction to the case at bar, we are persuaded that the contract was several and not joint, and that each subscriber is liable only for the amount he agreed to pay. While it is true the printed portion of the contract contains some language which would admit of a construction that the obligation was joint, still, reading the whole agreement, the intention is manifest that each subscriber did not intend to bind himself individually to pay the entire contract price of the factory, else he would not have written after his name the amount subscribed by him, nor would it have been expressly stipulated that each subscriber should be liable for his own subscription alone.

In Clark, Contracts, p. 604, the author, in discussing joint and several contracts, observes: "In all cases the intention of the parties is to be sought, and must govern. Wherever the debt is payable by two or more persons, as where the words, 'we promise,' etc., are used, the liability is *prima facie* joint, and not several, nor joint and several; but the use of such expressions will not make the promise joint if, from the whole instrument, a contrary intention appears. * * * In the case of subscriptions by a number of persons to promote some common enterprise the promises, though joint in form, are held to be several. Each subscriber is held to promise

severally to pay the amount of his subscription, and an action against all subscribers jointly will not lie. It clearly appears from the character of such a contract that each subscriber only intends to bind himself for his own subscription, and this intention must prevail, notwithstanding the joint form of the promise." The text is sustained by numerous authorities, and our conclusion is in harmony therewith.

Contracts in form and essential features almost identical with the one before us have been similarly construed in the following cases: *Davis & Rankin Building & Mfg. Co. v. Barber*, 51 Fed. Rep., 148; *Davis & Rankin Building & Mfg. Co. v. Jones*, 66 Fed. Rep., 124; *Davis & Rankin Building & Mfg. Co. v. Hillsboro Creamery Co.*, 37 N. E. Rep. [Ind.], 549; *Davis & Rankin Building & Mfg. Co. v. Booth*, 37 N. E. Rep. [Ind.], 818; *Davis & Rankin Building & Mfg. Co. v. McKinney*, 38 N. E. Rep. [Ind.], 1093; *Davis v. Belford*, 70 Mich., 120; *Gibbons v. Grinsel*, 79 Wis., 365; *Frost v. Williams*, 50 N. W. Rep. [S. Dak.], 964; *Gibbons v. Bente*, 53 N. W. Rep. [Minn.], 756; *Davis & Rankin Building & Mfg. Co. v. Murray*, 60 N. W. Rep. [Mich.], 437; *Davis & Rankin Building & Mfg. Co. v. Cupp*, 62 N. W. Rep. [Wis.], 520.

The only case directly in point that has been called to our attention which holds that a contract like the one at bar imposed a joint liability is *Davis v. Shafer*, 50 Fed. Rep., 764, which decision the circuit court of appeals for this circuit declined to follow in *Davis & Rankin Building & Mfg. Co. v. Jones*, 66 Fed. Rep., 124, and it was expressly disapproved in some of the other cases cited above.

In *Davis & Rankin Building & Mfg. Co. v. Knoke*, 57 N. W. Rep. [Minn.], 62, it was held that the defendant assumed a joint obligation to pay the contract for the erection and equipment of a creamery. It is distinguishable from this case. The contract there construed was materially different from the one under consideration. It contained a provision to the effect that the subscribers, after paying twenty-five per cent in cash, should settle the balance

"by good approved joint notes." Clearly they jointly assumed the payment of the contract price.

In *Davis v. Bronson*, 50 N. W. Rep. [N. Dak.], 836, cited to support plaintiff's interpretation of the contract, there is this resemblance to the case before us: The same parties were plaintiffs in both suits, and each contract was for the erection and equipment of a creamery. In the case alluded to the defendants stipulated to pay $5,000 for the plant, and there was a general agreement on the part of all to pay the sum, which was not varied or modified by any other clause in the agreement. The promise being a joint and not a several one, it was correctly decided that each subscriber was holden not only for the amount of his own subscription, but for that of the others as well.

In *Holt v. Field*, 25 Fed. Rep., 123, the question here involved did not arise and was not passed upon. The decided weight of authority, as well as better reason, sustained the conclusion we have reached. The contract being a several one, and plaintiffs having agreed to accept the individual obligation of the several subscribers, no personal judgment can be recovered against them for the balance due.

Is the Ravenna Creamery Company liable for the unpaid contract price, and can a lien be enforced against the plant in its hands? Counsel for plaintiffs argue for the affirmative of the proposition. To us it seems that the conclusion reached as to the character and scope of the contract, in effect, settles these points adversely to the contention of counsel. If the corporation is personally liable it is not because of any contract it entered into with plaintiffs, for it made none. No intent to bind the corporation is disclosed by the agreement set out in this opinion, nor does it appear from the record that it ever assumed the payments of the several subscribers. The contract being several, plaintiffs were not entitled to a mechanic's lien on the joint property for the unpaid contract price. Whether a lien can be enforced upon the

separate interests of the delinquent subscribers does not arise in this case, since the petition is framed upon the theory that the contract was joint, and not several, and it does not aver which subscribers have failed to pay. To hold that plaintiffs can enforce a lien on this property would indirectly require each paying subscriber to pay more than he expressly promised. The conclusion is irresistible that the corporation defendant cannot be subjected to a personal judgment, nor can a mechanic's lien be enforced on its property for the unpaid contract price. (See authorities already cited.) The decree is

AFFIRMED.

M. E. BEALL, APPELLEE, V. C. F. MARTIN ET AL., APPELLANTS.

FILED MAY 19, 1896. NO. 6522.

1. **Reformation of Deed.** A court of equity may reform a deed so as to comply with the intention of the parties.
2. ———: EVIDENCE. *Held,* That the decree in this case is sustained by sufficient evidence.

APPEAL from the district court of Harlan county. Heard below before BEALL, J.

John Everson, for appellants.

C. C. Flansburg, contra.

NORVAL, J.

This is an appeal from a decree reforming a deed. September 27, 1892, the plaintiff, M. E. Beall, being the owner of the northeast quarter of section 12, town 1, range 19 west, conveyed the same by warranty deed to C. F. Martin, one of the defendants herein, the wife of the

plaintiff joining in said conveyance. At the time of the transfer, one J. C. Black was in possession of, and cultivating, the land and the crops thereon, as Beall's tenant, his lease not expiring until March 1, 1893. Plaintiff contends that the agreement and understanding between the vendor and vendee was that the sale was made subject to the lease of said Black, and that plaintiff should retain the landlord's share of the crops, and that through the omission of the person who prepared the deed and took the acknowledgment of the grantors thereto, it failed to contain any reservation in regard to the lease or the growing crops. Upon plaintiff's discovering the mistake in the deed, and learning that Martin claimed the right to gather the crops, this action was instituted to reform the deed to conform to the true and actual contract of the parties, and a temporary injunction was also granted restraining defendants from gathering the rent corn, which injunction was subsequently dissolved by the court.

Complaint is made of the allowing of the injunction. If it was wrongfully issued, that question cannot be now litigated, since the injunctional order was subsequently vacated by the court, which cured the error, if any, in the original granting of the writ. If defendants were damaged by reason of the issuance of the temporary order of injunction, their remedy is upon the bond given by the plaintiff, in order to obtain the writ.

That a court of equity has the power to decree the reformation of a deed so as to make it express the true intention of the party is clear. (*Cox v. Ellsworth*, 18 Neb., 664; *Palmer v. Windrom*, 12 Neb., 494; *Hilton v. Crooker*, 30 Neb., 707.) The evidence introduced by plaintiff tends to establish that Beall reserved the corn; that the real agreement was not expressed in the deed; but that through mistake the scrivener who prepared the instrument for execution did not insert in said deed a reservation in favor of the plaintiff of his share of the crops and the possession of the premises until the expiration of

Black's lease, in accordance with the terms of the contract of the vendor and vendee. The testimony introduced by the defendants squarely contradicts that given on behalf of the plaintiff. We are fully persuaded the evidence adduced was sufficient to support the decree, and it is accordingly

AFFIRMED.

ENOS COREY, APPELLEE, V. PLUMMER, PERRY & COMPANY, APPELLANTS.

FILED MAY 19, 1896. No. 6520.

1. **Homestead: VALUE OF CLAIMANT'S INTEREST: LIENS.** The extent of a homestead is to be determined by the claimant's interest in the land, and not by the fee-simple value of the premises. In determining his homestead interest, valid mortgages and other liens are to be deducted from the value of the land, and not from the $2,000 homestead exemption. (*Hoy v. Anderson*, 39 Neb., 386; *Prugh v. Portsmouth Savings Bank*, 48 Neb., 414.)

2. ———: ———: ———: PURCHASER'S TITLE. When a homestead does not exceed the value of the statutory exemption of $2,000, a purchaser takes it free from any judgment against the vendor obtained subsequent to the acquiring of the homestead, unless based upon a debt secured by a mortgage, mechanic's, laborer's, or vendor's lien. *Corey v. Schuster*, 44 Neb., 269, followed.

3. ———: PROCEEDS OF SALE. The proceeds arising from the voluntary sale of a homestead, not exceeding $2,000, are protected for the period of six months thereafter against legal process to the same extent as the homestead itself. *Prugh v. Portsmouth Savings Bank*, 48 Neb., 414, followed.

4. ———: PURCHASER'S TITLE: JUDGMENT LIENS. When the homestead of less value than $2,000 is conveyed, a judgment recovered against the vendor, after the filing of the contract of sale and before the payment of the remainder of the purchase price and the execution and delivery of the deed, upon a debt for the payment of which such homestead is not liable, is not a lien upon such land or the unpaid purchase money. *Schribar v. Platt*, 19 Neb., 625, followed.

5. **Judgment Liens: HOMESTEAD.** *Courtnay v. Parker*, 16 Neb., 311, 21 Neb., 582, and *Olander v. Tighe*, 43 Neb., 344, distinguished.

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

A. G. Greenlee and *Marquett, Deweese & Hall*, for appellants.

E. E. Hairgrove and *Frank B. Hawk, contra.*

NORVAL, J.

This was an action by Enos Corey against Plummer, Perry & Co. to have a judgment decreed not to be a lien upon eighty acres of land owned by the plaintiff, by reason of the same being a homestead. There was a decree for plaintiff, and defendants appeal.

Upon the facts there is no dispute. Alonzo A. Corey, on the 5th day of July, 1886, by a patent from the United States acquired title to the south half of the southwest quarter, and the south half of the southeast quarter of section 24, township 8 north, of range 5 west, under and by virtue of the act of congress "to secure homesteads to actual settlers on the public domain," approved May 20, 1862. From the date of said patent, continuously, until the 13th day of March, 1888, said Alonzo A. Corey, together with his wife and children, resided upon and occupied said tract as a homestead. On the date last aforesaid said Alonzo A. Corey and his wife sold the said south half of the southwest quarter to their son, Enos Corey, the plaintiff herein, for the agreed consideration of $1,300, payable as follows: One hundred dollars cash, four hundred dollars March 1, 1889, four hundred dollars March 1, 1891, and four hundred dollars on March 1, 1893, with interest on all deferred payments. The contract, after being reduced to writing, was duly executed and acknowledged by all parties, and was recorded in the office of the county clerk of Clay county on the 17th day of May, 1888. In March, 1891, plaintiff paid in full the unpaid purchase price, and the vendors thereupon executed to him a deed of general warranty for said eighty

acres as in said contract provided, which was duly recorded in Clay county on the 16th day of March, 1891. The value of the entire quarter section did not exceed the sum of $2,000 over and above the mortgage liens thereon at the time the sale was made to the plaintiff. The defendants Plummer, Perry & Co., on the 7th day of June, 1888, obtained a judgment against said Alonzo A. Corey, in the county court of York county, for the sum of $286, besides costs, upon a debt due for merchandise sold and delivered, which judgment was transcripted to the district court of Clay county, and entered upon the execution docket of said court, so that the same was apparently a lien on the premises in controversy, inasmuch as the legal title of record to the property at that time appeared to be in said Alonzo A. Corey, although as a matter of fact the land had theretofore been sold to the plaintiff, who was in possession of the premises when the judgment was obtained. Plaintiff had no knowledge of the existence of said judgment until long after he paid the remainder of the consideration for the land. Under the foregoing undisputed facts, it is obvious that the said judgment of the defendants was not a lien upon any portion of the 160 acres so long as the same was owned by plaintiff's grantors. (*Hoy v. Anderson*, 39 Neb., 386; *Corey v. Schuster*, 44 Neb., 269.) Where a judgment debtor sells and conveys his homestead of less value than $2,000, the purchaser takes it unaffected by any judgment against the vendor obtained during the existence of the homestead right, unless based upon a debt secured by a mortgage, mechanic's, or vendor's lien. (*Corey v. Schuster*, 44 Neb., 269.) Where the contract of sale to this plaintiff was made, the premises in question constituted the homestead of his grantors, and defendants' judgment was not then in existence. The legal title remained in Alonzo A. Corey until the deed was executed, and he had a vendor's lien upon the land by virtue of said contract until the purchase money was paid. The judgment having been obtained, and the transcript filed between the date of

the sale and the delivery of the deed, the defendants insist that the judgment became a lien upon the land to the extent of the purchase money then unpaid, and to support the proposition the following cases are relied upon: *Courtnay v. Parker*, 16 Neb., 311, 21 Neb., 582; *Olander v. Tighe*, 43 Neb., 344. Those decisions, it is true, hold that a judgment recovered in the district court against a vendor of real estate who had not executed a deed therefor and had not received the entire consideration is a lien upon the interest of the vendor for the unpaid purchase price; but those cases are not in point here, and are clearly distinguishable from the case at bar. In every one of the authorities relied upon as precedents an execution had been levied upon the land, and the real estate at the time of the contract of sale was entered into was not the homestead of the vendor, while in this case no execution has ever been issued upon the judgment, and the premises, at the time of the purchase, were occupied by Alonzo A. Corey as a homestead, and the same was not subject to forced sale on execution issued against him. The land being exempt as a homestead, the purchase money was likewise exempt, for the period of six months after the receipt thereof, under section 16, chapter 36, Compiled Statutes, which provides: "If the homestead be conveyed by the claimant, * * * the proceeds of the sale, * * * not exceeding the amount of the homestead exemption, shall be entitled, for the period of six months thereafter, to the same protection against legal process and the voluntary disposition of the claimant which the law gives to the homestead." The same construction was recently placed upon the foregoing provision, in *Prugh v. Portsmouth Savings Bank*, 48 Neb., 414. The statute exempts the proceeds of the sale of the homestead for six months without imposing a single condition, not even that they should be held for the purpose of investing in another homestead. Whether such proceeds are received in cash, notes, or property, they are alike within the protection of the statute for the

period specified. Only a small portion of the purchase money was paid at the time of the sale of the homestead, and the remainder was not received until March, 1891, long after the filing of the transcript of the judgment. It was exempt for six months, not from the date of the sale, but from the time it was paid. To hold otherwise would not only violate the liberal rule of construction of exemption laws in favor of the debtor which has always obtained in this state, but would be a violation of the letter and spirit of the statute. Plaintiff's grantor had no interest in the lands or the proceeds arising from their sale to which the lien of the judgment could attach. (*Schribar v. Platt*, 19 Neb., 625.) The decree is clearly right, and it is accordingly

AFFIRMED.

FRED O'CHANDER V. CHRISTIAN HANSEN.

FILED MAY 19, 1896. No. 6619.

1. **Criminal Law**: APPEAL FROM COUNTY COURT. The right of appeal from the county to the district court in a criminal prosecution is restricted to the defendant. An appeal will not lie in favor of the complaining witness against whom a judgment for costs has been rendered.
2. ———: COSTS. The constitutionality of that portion of section 322 of the Criminal Code which provides for the rendering of judgment for costs against the complainant not considered or decided.

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

Jay & Beck, *J. B. Barnes*, and *Mockett & Polk*, for plaintiff in error.

R. E. Evans, *contra*.

NORVAL, J.

Fred O'Chander filed a complaint in the county court of Dakota county charging Christian Hansen with un-

lawfully, wantonly, and maliciously cutting and throwing down a fence on complainant's land. Hansen was arrested, tried, and found not guilty, and the costs, amounting to $113, were taxed to the complaining witness. He thereupon filed with the county judge an appeal undertaking, which was approved by the latter, and the cause was docketed as an appeal in the district court of that county. Subsequently, on motion of the county attorney, the appeal was dismissed for the reason that an appeal will not lie, and to reverse this order O'Chander prosecutes a petition in error to this court.

The judgment for costs was rendered in accordance with section 322 of the Criminal Code, which declares: "Whenever the defendant, tried under the provisions of this chapter, shall be acquitted, he shall be immediately discharged, and if the magistrate or jury trying the case shall state in the finding that the complaint was malicious or without probable cause, the magistrate shall enter judgment against the complainant for all costs that shall have accrued in the proceedings had upon such complaint, and shall commit such complainant to jail until such costs shall be paid," etc. In *State v. Ensign*, 11 Neb., 529, that part of the foregoing provision which provides for imprisonment of the complainant for failing to pay the costs taxed against him by the magistrate was held to be unconstitutional and void. And it is now insisted that so much of said section as authorizes the rendering of judgment for costs against a complaining witness in a criminal case contravenes section 3, article 1, of the state constitution, which declares: "No person shall be deprived of life, liberty, or property without due process of law," and the reasoning and argument of the opinion in *State v. Ensign*, *supra*, is invoked to support the contention of counsel. The invalidity of the judgment cannot be questioned in this proceeding, or properly considered and determined by us at this time, unless the court below obtained jurisdiction by reason of the appeal. If it did not, it is obvious that the court had no

authority to pass upon the constitutionality of the provision of the statute quoted, and consequently no greater power is conferred upon this court to do so.

Whether jurisdiction was acquired by the appeal depends upon whether the complainant had the right to prosecute an appeal or have the cause reviewed in that mode. That he has no such right was asserted in the opinion of *State v. Ensign*, 11 Neb., 529. It must be conceded that there is no right of appeal unless given by some constitutional or statutory provision. Turning to the constitution of this state, section 17, article 6, we find: "Appeals to the district courts from judgments of county courts shall be allowed in all criminal cases, on application of defendant; and in all civil cases, on application of either party, and in such other cases as may be provided by law." The framers of that instrument have authorized the accused alone to remove a criminal action from the county court to the district court by appeal. The constitution and the statute alike authorize appeals from the county court, in civil actions, by either party. By section 324 of the Criminal Code the right of appeal from a judgment rendered before a magistrate in a criminal prosecution, imposing a fine or imprisonment, or both, is allowable; but such right is restricted to the defendant. It is not conferred upon either the state or the complainant. That the judgment for costs was rendered in a criminal and not a civil case is plain enough, so that it is unnecessary to refer to the statutory provisions relating to appeals in civil cases, since they are not applicable. It is not improbable that O'Chander was entitled to have the judgment of the county court reviewed by petition in error, under section 580 of the Code of Civil Procedure, but whether so or not, it is very evident no right to appeal has been given him either by the statute or the constitution. The conclusion reached precludes a consideration of the validity of section 322 of the Criminal Code, or the judgment rendered thereunder.

The judgment of the district court dismissing the appeal was right and is

AFFIRMED.

STATE OF NEBRASKA, EX REL. ANNA E. STEWART, V. WILLIAM T. HENTON, TREASURER, ET AL.

FILED MAY 19, 1896. No. 6535.

1. **School-Land Lease: FORFEITURE: NOTICE.** The provision in relation to the forfeiture of school-land leases held by non-residents, found in section 16, chapter 80, article 1, Compiled Statutes, that "the forfeiture may be entered by said board after ninety days from the date of such published notice," *held* to have the same meaning as though it had read after ninety days from the completion of the publications required by the statute.
2. ———: ———: ———. The forfeiture of a school-land lease upon notice published for less time than required by the statute for that purpose *held* ineffective.

ORIGINAL application for *mandamus*.

W. S. Morlan and *J. A. Cordeal*, for relator.

A. S. Churchill, Attorney General, George A. Day, Deputy Attorney General, and *R. T. Hendershot, contra.*

RYAN, C.

This proceeding was allowed to be brought originally into this court for the reason that it is a matter of public importance, involving as it does the duty of a public officer as an agent of the state. The prayer of the petition was that a writ of *mandamus* should issue commanding William T. Henton, the county treasurer of Red Willow county, to receive from the relator the sum of $175 as the full amount of rentals, interest, and costs due upon certain school-land contracts held by the relator, and to issue a receipt accordingly showing all delinquencies and

costs on account of said contracts to have been paid, and that the commissioner of public lands of this state and the said county treasurer be required to allow the relator to redeem said lands and to recognize the validity of said contracts. Upon the issues joined a referee, by agreement of parties, was appointed, and reported the evidence and the facts thereby established. To this report no exception has been filed. We therefore deem it safe to accept these findings of fact as correct. It is not essential that all the facts found should be considered, and we shall therefore restrict our attention to controlling considerations. The relator, with her husband, during the ownership of the leases above referred to, has been a resident of Easton, Pennsylvania. On the 9th of May, 1892, the relator's husband wrote the following letter, which was duly received by the officer to whom it was addressed, to-wit:

"*To the Treasurer of Red Willow County, Nebraska*—DEAR SIR: My wife, Mrs. Anna E. Stewart, is the owner of the Burtless Tract, about six miles from McCook in your county. To that tract has been added recently by purchase the Wickwire 160 acres. I have a letter from Frank Albrecht, her farmer, reminding me that the taxes are due. Will you please send me a statement and Mrs. S. will send you her check on a McCook bank for the amount of her taxes. There are about $13 back taxes due of the Wickwire tract, and if you will send statement of them and the accrued interest from last August or September she will remit for them. Your attention will oblige. Mr. Albrecht in writing me did not speak about receiving my notice about the taxes—did not say how much they were, only reminded me of their being due—perhaps thought I had received notice from you."

The county treasurer, on receipt of the above described letter, on May 14, 1892, made a memorandum on the sheet of paper on which the above letter had been written, of the amount of taxes due upon nineteen different descriptions of land which Mrs. Stewart owned in fee and which

constituted the part of her ranch of which she held full title, but made no note of the lease rental due upon the other portion of her ranch which were held by virtue of contracts of lease with the privilege of purchase, as provided by the laws of this state with reference to school lands. From the foregoing statements it is very clear that there has been no such bad faith as was reprobated in *State v. Scott*, 18 Neb., 597, or in *Richardson v. Pratt*, 20 Neb., 196. Immediately upon being advised of the above amount Mrs. Stewart sent it supposing it covered all she was required to pay, whether in the form of ordinary taxes or in the form of school-land rentals. On the 10th, 17th, and 24th days of June, 1892, the commissioner of public lands and buildings caused to be published in a newspaper in general circulation a notice that the interest and rentals upon the contracts of sale and lease held by Mrs. Stewart were then delinquent, and that if said delinquency was not paid within ninety days said contracts would be declared forfeited by the board of educational lands and funds, and that said forfeiture would be entered of record in the manner provided by law. Of this notice Mrs. Stewart had no knowledge. On September 14, 1892, the board of educational lands and funds adopted the following resolution: "*Resolved*, That all leases and contracts of sale of all school, university, normal, and agricultural college lands, that were delinquent in the following named counties on January 1, 1892, which remain due and unpaid, are hereby declared canceled; *Provided, however*, That this order shall not be held to include any such lease or sale contract, where showing has been made that the owner of any such lease or sale contracts is making a *bona fide* effort to improve the premises described in his lease or sale contracts and to make the payments agreed upon within a reasonable time." Following the above language in the foregoing notice was a description of the lands involved in this controversy.

It is provided in section 16, chapter 80, article 1, Com-

piled Statutes, that if any lessee or purchaser shall be in default for one year the commissioner of public lands and buildings may cause notice to be given that if such delinquency is not paid within a certain time prescribed with reference to distinct classes of delinquents, the lease or sale will be declared forfeited by the board of educational lands and funds. This section contains also the language: "In case the owner of such contract of sale or lease be a non-resident of this state, or his address be unknown, the notice herein contemplated shall be published three weeks in some newspaper published or of general circulation in the county where the land is situated." The third publication of the preliminary notice was on June 24, the resolution of forfeiture was adopted on September 14 following. Instead of allowing ninety days for redemption from completed service, this resolution declared a forfeiture in eighty-two days. But this is not the worst feature of this notice, for by its own terms it was provided that "If said delinquency is not paid within ninety days from the date of this notice said contract will be declared forfeited by the board of educational lands and funds and said forfeiture will be entered of record in the manner provided by law." The provision in section 16, chapter 80, article 1, that "the forfeiture may be entered by said board [of educational lands and funds] after ninety days from the date of such published notice," was by that board construed as conferring power upon the commissioner to date the notice arbitrarily as of any date he saw fit, no matter though such date preceded the first publication. In this instance the date placed upon the notice was June 1, 1892, and the first publication thereof was on June 10, immediately following. If this course can be tolerated to the extent of ten days, we can see no good reason why antedating ninety days might not as well be resorted to, and in the latter event publication would be a mere idle ceremony, and the right to notice guarantied to a non-resident by the statute and recognized by this court in *State v. Clark*, 39

Neb., 899, would be practically denied. A construction which leads to such an absurdity, and to the sacrifice of property rights without an opportunity for a hearing, should not be adopted unless there is no escape from it. It seems to us that the mere word "date" should not have received so restricted a meaning as was given it by the state authorities, for no requirement exists by statute that the notice be authorized by the action of any board, or that even a record shall be made by the commissioner of public lands and buildings, of the issuance of a notice. The word "date" should therefore be construed with reference to the qualifying words which follow it. The language of the statute is, "ninety days from the date of such published notice." In Webster's International Dictionary, the word "date" is defined: "1. That addition to a writing, inscription, coin, etc., which specifies the time (as day, month, and year) when the writing or inscription was given, or executed, or made," etc. "2. The point of time at which a transaction or event takes place, or is appointed to take place." If the latter of these two definitions is adopted, the word "date" may be qualified by the succeeding words, "of such published notice," and the result will be that the provision in effect is that the forfeiture may be entered by said board after ninety days from the point of time when there is published notice. Thus construed, the statute is quite like that in relation to service of notice for the commencement of actions, and the case of *Scarborough v. Myrick*, 47 Neb., 794, is quite instructive. The time required by this section for the publication of notice is three weeks as against non-residents, so that the board had no power to declare a forfeiture until ninety days from the last day of the publication; that is, from June 24, 1892. There was, therefore, no binding forfeiture, and the relator is still entitled to redeem and to the relief prayed. A writ accordingly will therefore issue.

WRIT ALLOWED.

GRAND ISLAND & WYOMING CENTRAL RAILROAD COMPANY V. PRICE B. PHIPPS.

FILED MAY 19, 1896. No. 6569.

Railroad Companies: INJURY TO HORSE: RECOVERY BY PLAINTIFF: EVIDENCE. The evidence in this case examined, and *held* not to sustain the verdict.

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

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

W. B. Mathews and *H. M. Sullivan, contra.*

RYAN, C.

In the district court of Grant county the defendant in error recovered a judgment against plaintiff in error in the sum of $150, the value of a horse fatally injured by a locomotive owned by plaintiff in error and operated by its employes. There is argued but one question, and that is as to the sufficiency of the evidence to sustain the verdict. The injury was inflicted at the intersection of a street in the village of Hyannis with the railroad line of the plaintiff in error. The evidence adduced by the defendant in error was that between 9 and 10 o'clock in the forenoon the train of plaintiff in error ran into the village of Hyannis at a speed of eighteen or twenty miles an hour without whistling for a crossing and without a bell being rung; that a horse of defendant in error which was tied to a stake on the prairie south of the railroad line pulled up the stake and ran eastward to a street, thence, thereon, turned and ran northward at full speed until it reached the planked railroad crossing, when it turned somewhat toward the west, facing the incoming train, which came alongside the horse, which suddenly, thereupon, turned its head toward the east and jumped

across the pilot of the engine, by which one of its hind legs was broken and the horse by this injury was rendered worthless. The engine in question was pulling a freight train. According to the testimony adduced by the defendant in error, the crossing was a short distance east of the depot platform, both the platform and the depot building being on the north side of the railroad track. Along the west side of the street over which the horse reached the railroad track there were houses so situated that the engineer in charge of the engine could not see the swiftly approaching horse until about the time the engine reached the west end of the depot platform, which was six to eight rods westward from the aforesaid railroad crossing. It was testified by the engineer on behalf of the railroad company that immediately upon seeing the horse he made the best use possible of the air brakes to stop the train before it should reach the crossing and had reduced the speed to ten miles per hour when the horse was struck. The witnesses for the defendant in error, who were looking at the engine at this time, testified that there was noted by them no decrease in the rate of speed. Ordinarily, this statement, in view of the verdict of the jury, should be accepted as true; but this assumption involves us in another difficulty, and that is to reconcile this fact with another fact apparently conceded on all sides, and that is, that the horse turned westward from the crossing so as to allow the forepart of the engine to come alongside and was then able to turn so as to face about and jump over the pilot of the engine moving at the rate of eighteen to twenty miles per hour.

The negligence charged in the petition was made up of different elements, the first of which was the alleged faulty construction of the railroad with such embankments on each side of the crossing that the horse by being hemmed in was prevented from escaping from the engine. There was no proof to support this; indeed, the evidence, as above indicated, was that the horse was able

to and actually did leave the side of the highway crossing. It was furthermore charged that the engine was run at a reckless rate of speed through the village of Hyannis and that this amounted to such negligence as rendered the company liable for the damage caused by injuring the horse. There was no showing that the rate of speed when the accident happened was reckless. It was shown that the horse was struck by the train moving at the rate at which this was moving, and from this the deduction claimed reasonably to follow is that the collision would have been avoided if the train had been moving at a slower rate. This is, as a matter of fact, probably correct, and equally so is the assumption that if the train had been moving with much greater velocity the crossing would have been cleared before the horse reached it. It was said in the majority opinion in this court in *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 642, that the inference of negligence against a railroad company must be a reasonable inference, and in *Kilpatrick v. Richardson*, 40 Neb., 478, and in *Kearney Canal & Water Supply Co. v. Akeyson*, 45 Neb., 635, it was held that a verdict for negligence may be supported by inference when such inference is the logical, probable, and reasonable deduction from proved or conceded facts. It does not seem quite logical or reasonable to assume that the engineer in charge of this train should necessarily have moved it faster or slower than he did to free himself from the imputation of negligence simply because by reason of such accelerated or retarded speed an uncontrolled horse would probably have been able to cross the track uninjured by the train. This would require the question of negligence to be considered as a mere conjecture, and not a question of fact to be established by proof. Another ground for charging negligence was that there was no bell rung within the village of Hyannis, neither had there been a whistle sounded within sixty rods of the station. Under the provisions of section 104, chapter 16, Compiled Statutes, the liability of a railroad

company by reason of failure to ring a bell or sound a whistle is restricted to "all damages which shall be sustained to any person by reason of negligence." As has already been stated, the liability of a railroad company for negligence may be predicated upon an inference, but that inference must be logical and probable from proved or conceded facts. The assumption that this horse would not have attempted to cross this railroad track as it did, if, within sixty rods of the station, a whistle had been sounded, or while the train was within the village if a bell had been kept ringing, is neither logical nor probable. These were all the grounds of negligence alleged in the petition and in support of neither was there, in our opinion, sufficient evidence to justify a finding that any of the railroad company's employes by his negligence caused or was accountable for the accident. The judgment of the district court is therefore

REVERSED.

HARRISON, J., not sitting.

COMMERCIAL STATE BANK OF NELIGH V. ANTELOPE COUNTY.

FILED MAY 19, 1896. No. 8409.

1. **Parol Evidence: WRITTEN AGREEMENT: CONTRADICTION: ESTOPPEL.** Parol evidence of prior or contemporaneous conditions modifying a written proposition afterwards submitted and acted upon cannot be received in evidence to vary the terms of the writing.
2. **Counties: RELEASE OF DEPOSITORIES: CONTRACTS.** A county has sufficient authority to raise money otherwise, and an agreement of its treasurer that if money is advanced by a bank for certain county purposes, such bank shall be relieved to a certain extent from liability to the county as a depository is not enforceable.

ERROR from the district court of Antelope county. Tried below before ROBINSON, J.

James H. Macomber and *N. D. Jackson*, for plaintiff in error.

Herman Freese and *M. F. Harrington, contra.*

RYAN, C.

By error proceedings, plaintiff in error seeks to reverse a judgment rendered against it, in the sum of $3,641.14, by the district court of Antelope county. There were admitted by the answer in said court the averments of the petition of the county of Antelope that the Commercial State Bank of Neligh, the defendant, from December 1, 1891, till September 26, 1894, was an incorporated bank, doing business as such in Antelope county; that from the 7th day of January, 1892, to the 4th day of January, 1894, J. D. Hatfield was the duly elected, qualified, and acting treasurer of Antelope county, and that on or about January 10, 1892, the Commercial State Bank of Neligh applied in writing for the privilege of keeping the funds belonging to said county and controlled by said county treasurer. The application, which it was denied by the answer was accepted, was in the following language:

"NELIGH, NEB., January 1, 1892.

"*To Hon. J. D. Hatfield, County Treasurer, Antelope County:* The Commercial State Bank of Neligh, Nebraska, hereby agrees to comply with all the rules and regulations governing county depositories provided by the laws of the state of Nebraska, as set forth in the Session Laws of 1891, and to pay to Antelope county, Nebraska, interest at the rate of five per cent per annum, interest payable monthly, on all county funds deposited with said Commercial State Bank by the county treasurer; provided the Commercial State Bank is made the depository of all funds controlled by the county treasurer by virtue of his official position. The Commercial State Bank further agrees to pay all Antelope county warrants at par

upon presentation during the time that the said funds are kept on deposit with the said bank.

"W. T. WATTLES,
"President.
"K. T. RICHARDS,
"Cashier."

In the answer there was also a denial of the averment in the petition that there was filed with the county clerk of Antelope county a bond in the following language:

"Know all men by these presents, that we, the Commercial State Bank of Neligh, Nebraska, as principal, and G. W. Wattles, of Carroll, Iowa, Sumner Wallace, of Rochester, New Hampshire, and W. T. Wattles, K. T. Richards, W. G. Galloway, C. Fisher, W. E. Relf, H. H. Jurgling, Wm. Campbell, Carl Roben, H. M. Cox, and J. H. Mills, of Neligh, Nebraska, as sureties, are held and firmly bound unto J. D. Hatfield, county treasurer of Antelope county, Nebraska, and unto Antelope county, Nebraska, in the sum of one hundred and fifty thousand dollars ($150,000), lawful money, to be well and truly paid to the said J. D. Hatfield, treasurer of Antelope county, Nebraska, or his successor in office. For the faithful performance of such obligation, we bind ourselves, our heirs, administrators, and assigns forever.

"The condition of the above obligation is such that whereas, the said the Commercial State Bank of Neligh, Nebraska, has been designated as a depository of the funds of Antelope county, Nebraska, which shall come into the possession of said J. D. Hatfield as treasurer of said county: Now, therefore, if the said Commercial State Bank shall well and truly pay to the said J. D. Hatfield, treasurer of Antelope county, Nebraska, or his or their order, all sums of money they receive on deposit from treasurer aforesaid, then this obligation to be null and void, otherwise to be in full force and effect."

To this bond was affixed the names of the sureties therein described. There were in the answer denials of the averments of the petition that said bond was ap-

proved by the county board of supervisors of said Antelope county; that thereupon the several current funds of said county were by J. D. Hatfield, its treasurer, deposited with said Commercial State Bank, amounting to the sum of $37,746.78; that said county treasurer, between January 7, 1892, and January 4, 1894, collected the sum of $165,182.77 belonging to the several current funds of said county, all of which was by said county treasurer deposited in said bank; that said bank failed and refused to render, at the end of each and every month, to said treasurer a statement in duplicate showing the several daily balances and the amount of money of the county of Antelope held by it during the month as county depository, and the amount of accretions thereof; that the average daily balances belonging to the several current funds so on deposit between January 7, 1892, and January 4, 1894, was $60,000; that thereon the said bank had failed and refused to pay the interest, amounting to the sum of $6,000, which latter sum, except $275.03, had never been paid.

It is not deemed essential to consider whether or not the bond above given was in strict compliance with the provisions of section 8, chapter 50, Laws, 1891, for a demurrer of all the parties who signed it was sustained, and thenceforward the action proceeded alone against the bank under the statute upon its written proposition. The bond, therefore, serves no purpose in this action, except in so far as its presentation to, and approval by, the proper county authority qualified the bank to be a depository. We find in the records of the board of supervisors of Antelope county a report of a committee of the board reciting that the county treasurer had selected the above named bank as a county depository, and had accepted the bid of the bank. In this report there was a recommendation that the bond of the bank be approved. There is in the bill of exceptions no transcript of the record of the board of county supervisors showing that this report was acted upon. The county treasurer,

however, made deposits in the bank which tendered the bond, and such bank received such deposits and paid interest to certain limited amounts, as though the bond had been regularly accepted. Under these circumstances the bank should not be permitted to assert that it was released from the obligations which arose out of its written proposition, in view of the oral evidence and reports of the bank, which show conclusively that all parties concerned acted upon the assumption that the bank was in fact a regularly constituted and approved depository of county funds.

The bank, however, insists that there was error in the refusal of the court to permit the filing of a certain amended answer tendered after the trial was concluded. In addition to the issues presented by the original answer, which have been fully described, this amended answer denied that a bond had been filed, and of new matter contained the following averments: "At the time of making the application set out in the petition, it was assumed and believed by J. D. Hatfield, then county treasurer of said plaintiff, and by defendant, that the said county treasurer had the right and authority to designate the depository for the funds of the county, subject to legal deposit under the law and to draw interest, to-wit, the soldiers' fund, the county general fund, the county bridge fund, the county poor fund, and a court house fund; that none of the other funds of the county could be loaned or deposited under the law; that acting under such understanding and agreement the defendant could only obtain the said funds for deposit, and could only apply for those said funds, the defendant made the application to said county treasurer set out in paragraph three of said petition; that in making said application on the part of said defendant, and in accepting said application on the part of said treasurer, it was mutually understood and agreed that said application was made to include only said named funds; that, acting on said understanding and agreement, the said county treasurer

deposited under said agreement, and the defendant accepted under such understanding and agreement, the money belonging to said funds, and no others; the defendant kept account of said funds, and allowed accretions of interest thereon as understood and agreed under said applications, and made monthly reports thereof to said treasurer showing the condition and amount of said several funds on deposit, and allowed and paid all of said funds and interest thereon; that said reports continued the whole time that said defendant had said funds on deposit, and allowed and paid all such funds and interest to the said county treasurer strictly according to the mutual agreement and understanding of the intention and meaning of the application made; that for the full space of about two years from January 7, 1892, to January, 1894, defendant made and filed said reports with said treasurer under said application; that in pursuance of said application so made and so understood, the defendant executed the bond set out in the petition. * * * The defendant further alleges that at the time said application was made to become the depository of said funds of the plaintiff there was not money enough on hand in the treasury of said county to pay the warrants that were necessarily issued by the said county, and as a part of the agreement the defendant was to protect the warrants of the county so as to keep them at par in value, and in pursuance of such agreement and understanding the defendant did pay all Antelope county warrants at par, upon presentation, during the time that said funds were so kept on deposit with it in its bank."

The above quotation discloses that the bank's claim was that the written agreement should be controlled by a prior or contemporaneous oral agreement limiting the liability to pay interest upon certain funds. The parol evidence tendered to show this fact was, upon objection, excluded by the court. This amendment was offered after the evidence had been introduced, and was not to conform the pleadings or proceedings to the fact proved.

It was tendered on the theory on which the defense was attempted to be made, and consequently embodied the same proposition as was contained in the instructions which the bank asked, and which the court refused to give. The amendment has, therefore, been quoted at length herein, that the question apparently relied upon by the bank might be considered as a legal proposition, once for all. It cannot have escaped notice that the bank nowhere pretended to describe what funds were intrusted to it upon which, as it claimed, it was not liable for interest. The written proposition was to pay interest "on all county funds deposited with said Commercial State Bank of Neligh, Nebraska, by the county treasurer; provided said Commercial State Bank is made a depository of all funds controlled by the county treasurer by virtue of his official position." It need not be determined whether or not this proviso could be enforced by a depository, for the proofs in this case show that all county funds were deposited in accordance therewith. The sole proposition with which we are now concerned is whether or not the bank should be held to the terms of its written offer. The bank, as has been said, did not describe what other funds than those enumerated in its proffered amended answer had been deposited by the treasurer during his term of office. Mr. Hatfield testified that his deputies, as he understood it, deposited all the money in bulk, and at the end of the month they would figure up how much there was of the different funds and strike an average of it to make the daily balance. H. J. Spencer, one of the deputies referred to by Mr. Hatfield, testified that all the funds were deposited at the Commercial State Bank as they were collected. W. T. Wattles, the president of the bank, when called as a witness for the county, testified as follows:

Q. Have you brought with you, in obedience to subpœna, the books of the bank showing deposits of J. D. Hatfield, treasurer of Antelope county?

A. I have not.

Q. Where are they?
A. They are not in my possession.
Q. Where did you see them last?
A. At the depot.
Q. What depot?
A. Neligh.
Q. When?
A. Last winter some time.
Q. What time in the winter?
A. Shortly after the consolidation of the two banks.
Q. Before or after the service of the subpœna?
A. I don't remember the date.
Q. You remember you were served with a subpœna to bring these books?
A. Yes, sir.
Q. Did you have the books in your possession at that time?
A. I don't know.
Q. Don't you know whether you had the books at the time you were served with a subpœna to produce the books?
A. I don't know.
Q. What became of them?
A. They were shipped to the stockholders.
Q. Your brother?
A. To the Rochester Loan & Banking Company, of which he is agent.
Q. At Omaha?
A. Yes, sir.
Q. You are not prepared to say whether that was before or after you were served with the subpœna?
A. Not without looking up the date of the shipment and date of the subpœna.
Q. You can find that by morning?
A. I think so.

No further mention of these books was made during the trial, and, as they were not produced, the bank deprived the court and jury of what might have assisted

in arriving at the condition of the different funds in the bank during Mr. Hatfield's term as treasurer. The cash books of the county official just named were offered in evidence, as were also the report of the finance committee of the board of supervisors and several reports of the aforesaid county treasurer. Whether or not independent evidence of this character was competent for the purpose of showing the amounts deposited by the county treasurer we are not called upon to determine, for that proposition is not presented by the petition in error. Neither is there thereby raised a question as to the verdict and judgment being excessive, so that we are justified in assuming, without going through the voluminous bill of exceptions to make an exact computation, that this amount was not in excess of what was justified by the proofs. This desultory consideration of collateral questions has been necessary to relieve the main proposition of foreign matter, and thus laid bare, this question is a very simple one, and that is, whether or not a written proposition, accepted and acted upon, can be varied by evidence of a prior or contemporaneous oral contract between the parties thereto, in respect to the same subject-matter, and this question, without the necessity of invoking authority, must be answered in the negative. From this it should not be inferred that we admit the right of a county treasurer by a written agreement to relieve a depository of a liability imposed by law, for it is not necessary to our present purpose to consider that question. In the proposed amended answer were recitations that the bank maintained the warrants of the county at par, and that, therefore, it should be relieved of liability beyond paying interest on the funds in said proposed amended answer described. It has been provided by statute how the necessary expenses of counties are to be provided for, and how, if a loan is necessary, such loan shall be obtained. Any provision of a contract with respect to a deposit by which it is attempted to supersede the provisions of the statute in respect to raising

money for county expenses should be viewed with but little favor, and certainly can furnish no sufficient consideration for a release from liability as a depository.

We cannot summarize our views of this case more satisfactorily than by merely quoting the first instruction given by the court, in the following language: "You are instructed in this case to find for the plaintiff, and you are to assess the amount of plaintiff's recovery at what would be the interest on the county funds of Antelope county deposited with the defendant, the Commercial State Bank, by J. D. Hatfield, while county treasurer of Antelope county, Nebraska, at the rate of five per cent per annum, interest payable annually, less the amount of $273, which is admitted to have been received by said county from said bank, from the first day of January, 1892, till the first day of January, 1894, together with seven per cent interest thereon from said first day of January, 1894." The judgment of the district court is

AFFIRMED.

ALEXANDER CALMELET, APPELLANT, V. JACOB SICHL, APPELLEE.

FILED MAY 19, 1896. No. 6574.

1. **Party Walls:** RIGHT OF ONE PARTY TO INCREASE HEIGHT. An agreement for the construction of a wall in common by joint property owners to the height of three stories on the land of one does not justify the assumption that the other party may, of his own motion, and for his own sole benefit, extend said wall upward still another story, irrespective of a therefrom threatened easement ripening, or of injury likely to result to the property adjacent.

2. **Injunction:** PARTY WALL. The adjacent property owner, whose rights and estate are threatened by the proposed erection about to be made by the other, as above indicated, is entitled to the protection afforded by an injunction.

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

The facts and issues are stated by the commissioner.

Edwin F. Warren, for appellant:

The defendant used the wall, to the height of three stories, for about twenty years. If there was no special contract between the owners, this would give him the right to continue its use; but the extent and mode of user define the right. That right, as so defined, was the right to use the wall for three stories only. The right cannot be changed or enlarged. (*Ballard v. Dyson*, 1 Taunt. [Eng.], 278; *Atwater v. Bodfish*, 11 Gray [Mass.], 152; *Holsman v. Boiling Spring Bleaching Co.*, 1 McCar. [N. J.], 246; *Burnham v. Kempton*, 44 N. H., 95; *Richardson v. Pond*, 15 Gray [Mass.], 390; *Clayton v. Corby*, 5 Ad. & El., n. s. [Eng.], 422; *Jones v. Percival*, 5 Pick. [Mass.], 485; *Brice v. Randall*, 7 Gill & J. [Md.], 349; *Holmes v. Seeley*, 19 Wend. [N. Y.], 507; *City of Hartford v. Hartford County*, 49 Conn., 554; *Carlisle v. Cooper*, 19 N. J. Eq., 256; *Horner v. Stilwell*, 35 N. J. Law, 307; *Hazard v. Robinson*, 3 Mason [U. S.], 272; *Manier v. Meyers*, 4 B. Mon. [Ky.], 514; *Davidson v. Fowler*, 1 Root [Conn.], 358; *Charles River Bridge v. Warren Bridge*, 7 Pick. [Mass.], 449; *Wright v. Moore*, 38 Ala., 593; *Atkins v. Bordman*, 20 Pick. [Mass.], 291; *Postlewaite v. Payne*, 8 Ind., 104; *Jones v. Tapling*, 11 C. B., n. s. [Eng.], 283; *Wood v. Cooper Miners Co.*, 14 C. B. [Eng.], 428; *Sharpe v. Hancock*, 7 Man. & G. [Eng.], 354; *St. John v. Sweeney*, 59 How. Pr. [N. Y.], 175; *Milne's Appeal*, 81 Pa. St., 54; *Sullivan v. Graffort*, 35 Ia., 531; *Price v. McConnell*, 27 Ill., 255.)

The height of the wall could not be increased with safety or without injury to plaintiff. Conceding it to be a party wall, defendant had, therefore, no right to increase its height. (*Brooks v. Curtis*, 50 N. Y., 639; *Matts v. Hawkins*, 5 Taunt. [Eng.], 20; *Price v. McConnell*, 27 Ill.,

255; *Vollmer's Appeal*, 61 Pa. St., 118; *Ogden v. Jones*, 2 Bosw. [N. Y.], 685.)

Plaintiff is entitled to an order requiring defendant to take down the wall. (*Earl v. De Hart*, 12 N. J. Eq., 286; *East India Co. v. Vincent*, 2 Atk. [Eng.], 83; *Carlisle v. Cooper*, 21 N. J. Eq., 581.)

John C. Watson, contra:

A party wall may be created by user as such for the prescriptive period, for from such user a contract between the parties is presumed, in the absence of evidence that the user was presumptive only. (*Brown v. Werner*, 40 Md., 15; *McLaughlin v. Cecconi*, 5 N. E. Rep. [Mass.], 261; *Schile v. Brokhahus*, 80 N. Y., 614; *Dowling v. Hennings*, 20 Md., 179.)

Either of the owners of a party wall may increase its height when it can be done without injury to the adjoining building, and the wall is sufficiently strengthened to safely bear the additions. (*Brooks v. Curtis*, 50 N. Y., 639; *Andrae v. Haseltine*, 17 N. W. Rep. [Wis.], 18; *Dauenhauer v. Devine*, 51 Tex., 480; *Musgrave v. Sherwood*, 54 How. Pr. [N. Y.], 338.)

When the law and the facts permit either owner to increase the height of the party wall, he cannot be restrained from so doing by injunction. (*Quinn v. Morse*, 130 Mass., 317; *McLaughlin v. Cecconi*, 5 N. E. Rep. [Mass.], 261.)

Reference was also made to the following cases: *Miller v. Brown*, 33 O. St., 547; *Western Bank's Appeal*, 102 Pa. St., 171; *Henry v. Koch*, 80 Ky., 391; *Roger v. Sinsheiner*, 50 N. Y., 646; *Orman v. Day*, 5 Fla., 392; *Montgomery v. Masonic Hall*, 70 Ga., 38; *Rankin v. Charless*, 19 Mo., 490.

RYAN, C.

Plaintiff is the owner of a parcel of ground in Nebraska City having a north frontage on Main street of twenty-two feet, from whence said parcel extends south-

ward sixty feet. The land of defendant is contiguous to the west and south sides of this sixty-foot tract. Originally a remote grantor, through whom plaintiff derived title, built a one-story building on the west side of the tract above described as being owned by the plaintiff. The west wall of this building was entirely within and contiguous to the west line of said tract. Subsequently, in 1868, the defendant's grantor, who owned the land that was along the west and south sides of said parcel now owned by the plaintiff, but which at that time was owned by Marks Bros., remote grantors of the plaintiff, made use of the west wall along plaintiff's present property in the construction of the Watson House to the height of three stories. Still later, plaintiff having acquired his present parcel of land, replaced the one-story building thereon with another building two stories in height, for this purpose making use of the wall which had constituted the west side of his one-story building, and the required portion of this wall extended upward by defendant to make the Watson House three stories high. This change from a one to a two-story building necessitated the closing with brick of eight windows in the prolonged upward wall of the Watson House. As the owner of the Watson House refused to pay for, or even to contribute to the expense of, closing these windows, plaintiff was compelled to pay the entire amount. There seems, however, to have been no objection interposed to this closing of these openings in the wall other than would naturally be expected by reason of the inconvenience caused. There was certainly no attempt to assert adverse conflicting rights, or as between Mr. Lindsay, the defendant's grantor, and Marks Bros., who then owned plaintiff's present parcel of land, there does not appear from the evidence to have been any written contract under which the three-story wall of the Watson House was built, at least no one attempts to give the contents of such a contract or account for its whereabouts, nor even to say that such a writing was ever seen

or in existence. In 1891 the defendant was desirous of extending upward the walls of the Watson House to the height of an additional story, and was carrying his design into execution, when the plaintiff procured an injunction by which the completion of the work was stayed. It is claimed by plaintiff that before the commencement of this work he caused to be served upon the defendant a written notice to desist, but as no one testified to this service, and the defendant denied it, we must assume that it was never given. After hearing on a motion to dissolve the injunction said motion was sustained, and of this fact the defendant, having obtained the first knowledge, pushed his wall to completion before any further steps could be taken by plaintiff to prevent this being done. This was on June 13, 1891. On the 10th day of January, 1893, there was had a trial to the court, and on June 19, following, there was entered a decree dismissing plaintiff's petition, because, as the court found, it contained no equity. From the dismissal of his action and the taxation of costs against him the plaintiff appeals.

The petition recited plaintiff's title and all the above described facts, which, as he claimed, entitled him to prevent the placing of a fourth story upon the wall of which his west side constituted the first story. There were averments of the insufficient thickness of the wall already in existence to sustain another story, but these we do not feel called upon to describe or discuss at great length. The answer contained a general denial, followed by these averments: "Second—The said defendant * * * alleges that this defendant and his grantors have for twenty years last past been in open, notorious, peaceable, exclusive, and adverse possession of the property known as the Barnum House, or Watson Hotel, claiming the same as owners against the plaintiff and his grantors and all persons whomsoever. Third—The said defendant * * * further * * * alleges that during the spring of 1868 this defendant's grantor,

Lindsay, for a full and valuable consideration, and in pursuance of a written agreement between Marks Bros. and said Lindsay, became a part owner of the division wall between this defendant and said plaintiff, and under and in pursuance of said agreement re-enforced and strengthened the foundation of said wall and entered at that time into the undisputed use and possession thereof, building the same two stories higher and putting windows in the said wall for the use of his hotel building on said premises, which said Lindsay was at that time enlarging and rebuilding; that the defendant is informed and believes that by and under the terms of said agreement said Lindsay became the owner of one undivided half of said wall, but that this defendant is unable to state the terms and conditions of said agreement, the same never having come into defendant's possession; that said Marks and Lindsay are both dead and defendant knows of no one by whom he can establish the contents of said agreement; but this defendant then alleges that his grantor alleges that his grantor, Lindsay, entered into possession of said wall as a joint owner of the same in the year 1868, and ever since, until he sold said premises to said defendant, used and occupied the same as the division and party wall between plaintiff and defendant, and that plaintiff has so used and occupied this said wall ever since his purchase of said premises from Lindsay, purchasing and paying for the same, and that this defendant is the owner of an undivided one-half of said wall entitled to all the rights and privileges of an equal owner of a party or division wall. Wherefore defendant prays that this action may be dismissed and that plaintiff recover nothing by his writ." There was a reply in which was denied each of the above copied averments of the answer.

The issues presented by the general denial contained in the answer have already been sufficiently covered for general purposes by the statement of the facts hereinbefore made. There are questions of law incidental to

these of fact which, however, can scarcely be considered profitably, independently of other fact propositions stated in the answer. From the facts already stated it is evident that the averments that the defendant and his grantors have for more than twenty years been in the undisputed adverse possession of the Watson House have no bearing upon the right to increase the height of the wall having its foundation upon the plaintiff's land. The fact that this wall was built to a height of three stories in pursuance of a written agreement founded upon a sufficient valuable consideration, a part of which was the strengthening and re-enforcement of the foundation, would be very pertinent if the plaintiff was now seeking to procure the removal of that particular portion of the wall. (*Barr v. Lamaster*, 48 Neb., 114.) By the averments of the answer, however, this agreement was limited to the erection of the wall to the height of three stories; as to the proposed fourth story, the rights of the parties were as though no such written agreement had ever been made. The remainder of the answer was devoted to allegations showing a tenancy in common of the already constructed wall as between the plaintiff and the defendant. If by a liberal construction the averments as to possession of the Watson House for more than twenty years should be construed as a claim of title by virtue of the statute of limitations, the operation of this statute could not be possible as between tenants in common, for the rule as between tenants in possession is as stated in section 296, Buswell on Limitations and Adverse Possession, that each of them has the entire possession as well of every part as of the whole, and the seisin and possession of one being *prima facie* the seisin and possession of the other, or others, one cannot be disseised by another without an actual ouster. This rule was applied by this court in *Smith v. Hitchcock*, 38 Neb., 104. The averments that in 1868 the defendant's grantor became a joint owner of the wall and that said ownership has ever since continued in the plaintiff, were limited to the wall three stories in height.

From the foregoing review of the answer it is clear that the defendant claimed and could assert no right except such as is necessarily implied by law from his interest in the three-story wall. As to the fourth story, this statute of limitations, as we have seen, is unavailable, and equally foreign is the plea that the defendant is the joint owner or tenant in common of the wall already constructed. The arrangement under which the wall was constructed, if, as alleged in the answer, it was under a written agreement, gave each party in the building of the other a cross-easement in respect to which he was entitled to protection. (*Barr v. Lamaster, supra.*) That courts have no power, however, to enlarge contract rights of parties requires no citation of authority to establish. It is, moreover, very clear that an easement for one purpose established by mere user cannot, by legal intendment, be extended to another purpose. (*Ballard v. Dyson*, 1 Taunt. [Eng.], 279; *Atwater v. Bodfish*, 11 Gray [Mass.], 150; *Holsman v. Boiling Spring Bleaching Co.*, 1 McCar. [N. J.], 335; *Burnham v. Kempton*, 44 N. H., 78; *Richardson v. Pond*, 15 Gray [Mass.], 387; *Holmes v. Drew*, 7 Pick. [Mass.], 140; *Wright v. Moore*, 38 Ala., 593; *Atkins v. Bordman*, 20 Pick. [Mass.], 291; *Price v. McConnell*, 27 Ill., 255.) Each of these cases was decided upon the assumption of a grant, either express or implied, and from them the principle deducible which is applicable to the case at bar is that the right to erect a fourth story cannot be implied from plaintiff's acquiescence in the erection upon the ground of the first, second, or third stories. Another application of the same principle is that the erection of the first three stories having been jointly by agreement between the parties, whereby, as defendant alleged, they were constituted joint owners of the wall to the height of three stories, this did not justify one of these parties in putting up the fourth story in his own right, for his own benefit, and in open hostility to the wishes of the other joint partners. (*Omaha & R. V. R. Co. v. Rickards*, 38 Neb., 847; *Gatling v. Lane*, 17 Neb., 80; *Haywood v.*

Thomas, 17 Neb., 237.) In any view which can be taken of this case the defendant, upon the facts pleaded in his answer, could not justify his right to build the fourth story above the three stories already erected on plaintiff's lot. The attempt to do this was an invasion of the plaintiff's legal rights, and if consummated would constitute a continuing trespass upon his property, which eventually would ripen into an easement, which consideration alone was deemed a sufficient ground for an injunction in *McCloskey v. Doherty*, 30 S. W. Rep. [Ky.], 649; citing *Poirier v. Fetter*, 20 Kan., 47; *Musselman v. Marquis*, 1 Bush [Ky.], 463; *Peak v. Hayden*, 3 Bush [Ky.], 125.

In *Mendenhall v. Harrisburgh Water-Power Co.*, 39 Pac. Rep., 399, the supreme court of Oregon held that an injunction would lie to prevent the widening of a ditch for a water-course through plaintiff's land and the erection of a dam which would destroy plaintiff's ford, defendant having no legal right to either. The ground upon which this seems to have been placed was that from the nature of the excavation an injury to plaintiff's easement was likely to result. In support of the conclusion reached there were cited *Smith v. Gardner*, 12 Ore., 221; *Chicago, B. & Q. R. Co. v. Porter*, 72 Ia., 426. In the case at bar it was shown that the original foundation wall had been of the thickness of fifteen inches; that this had been re-enforced afterward by a wall twelve inches in thickness, and that from the top of the re-enforced wall the prolongation to the height of two stories was twelve inches in thickness, and from thence upward, inclusive of the fourth story, the wall is of the thickness of nine inches, and, by much evidence adduced by plaintiff, it was shown that from the fourth story being erected upon its narrow foundation as described, there are grounds for apprehending serious injuries to the property of the plaintiff. If the evidence is sufficient to sustain this contention, there can be no doubt that plaintiff is entitled to an injunction against the erection and continuance of the fourth story of the wall in question which threatens the

safe enjoyment of his property. The judgment of the district court is reversed and this cause is remanded to said district court for further proceedings.

REVERSED AND REMANDED.

JOHN A. HORBACH, APPELLEE, V. SARAH J. TYRRELL ET AL., APPELLEES, IMPLEADED WITH JULIA M. SCHENCK ET AL., APPELLANTS.

FILED MAY 19, 1896. No. 6231.

1. **Acknowledgment of Deed.** The functions of an acknowledgment to a deed are twofold: (1) To authorize the deed to be given in evidence without further proof of its execution; (2) to entitle it to be recorded; and unless the real estate conveyed or incumbered the homestead of the grantors, an acknowledgment is not essential to the validity of the conveyance.

2. **Homestead: DEED: ACKNOWLEDGMENT.** A conveyance of real estate, such real estate being the homestead of the grantors, is, unless acknowledged, absolutely void.

3. **Acknowledgment: ACT OF OFFICER.** In this state the act of an officer in taking the acknowledgment of the grantor to a conveyance of real estate is a ministerial one.

4. **Corporations: OFFICERS.** The fact that one is shown to be secretary and treasurer of a corporation will not authorize the presumption that he is a stockholder of such corporation.

5. **Acknowledgment: DISQUALIFICATION OF OFFICER.** What relationship or what interest possessed by an officer disqualifies him from taking an acknowledgment must be determined from the facts and circumstances of the case in which the question is presented, rather than by any general rule.

6. ———: ———. A notary public is not disqualified from taking an acknowledgment of a mortgage made to a corporation, merely because it is shown that he was at the time secretary and treasurer of the mortgagee, it not appearing that he was a stockholder in such corporation or otherwise beneficially interested in having the mortgage made.

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

See opinions for references to authorities.

Kennedy & Learned and *W. H. Crow*, for appellants.

Howard B. Smith and *Elmer E. Thomas, contra.*

Blair & Goss, for plaintiff.

RAGAN, C.

John A. Horbach brought this suit in equity in the district court of Douglas county to foreclose a real estate mortgage executed and delivered to him by Isaac Tyrrell and Sarah J., his wife. The mortgage conveyed the east fifty feet of the west four hundred feet of lot 2, in Bartlett's Addition to the city of Omaha, and lot 21, in block 23, Sheridan Place, city of Omaha. The mortgage bore date May 2, 1890, and was filed for record in the office of the register of deeds of Douglas county May 5, 1890. Prior to the bringing of this suit Isaac Tyrrell died intestate. His widow and heirs and George L. Wass, his administrator, were made defendants to this action. On the trial the court appointed Elmer C. Thomas, an attorney of the court, guardian *ad litem* for the minor children. Julia M. Schenck and the O. F. Davis Company, a corporation, were also made parties to the action and filed cross-petitions. Julia M. Schenck sought to foreclose a mortgage bearing date May 16, 1887, executed by Tyrrell and wife to the O. F. Davis Company on the said east fifty feet of the west four hundred feet of lot 2, in Bartlett's Addition, she being the assignee of the O. F. Davis Company. This mortgage was recorded in the office of the register of deeds of Douglas county on the 18th of May, 1887. The O. F. Davis Company sought to foreclose a mortgage dated May 16, 1887, and recorded May 23, 1887, executed by Tyrrell and wife to it on the same premises described in the mortgage assigned by the O. F. Davis Company to Schenck. If all these mortgages are valid, the mortgage of Julia M. Schenck is a first and

the mortgage of the O. F. Davis Company a second lien upon all the real estate described therein, and the mortgage of Horbach a third lien upon the property described in the Schenck and O. F. Davis Company mortgages, and a first lien on lot 21, block 23, Sheridan Place. By the decree of the district court the mortgage of Horbach was held to be valid, and the mortgages sought to be foreclosed by Schenck and the O. F. Davis Company were adjudged void. From this decree the O. F. Davis Company and Julia M. Schenck have appealed.

1. The O. F. Davis Company, to whom the mortgages adjudged void were made and delivered, was at the time a domestic corporation. The real estate conveyed by the mortgages was the homestead of Tyrrell and wife, and the notary public who took the acknowledgment of Mr. and Mrs. Tyrrell to the mortgages was, at the time, the secretary and treasurer of the O. F. Davis Company, mortgagee. The learned district court was of opinion that the notary public, by reason of his relation to the mortgagee, was disqualified from taking the acknowledgment of Mr. and Mrs. Tyrrell, and that therefore the mortgages were absolutely void. Conveyances of real estate in this state, except leases for one year or for a less time, if executed in this state, are required by the statute to be signed by the grantor, being of lawful age, in the presence of at least one competent witness and to be acknowledged or proved. (See sec. 1, ch. 73, Compiled Statutes, 1895.) By section 2 of said chapter it is provided that the grantor must acknowledge the instrument to be his voluntary act and deed. In *Burbank v. Ellis*, 7 Neb., 156, *Harrison v. McWhirter*, 12 Neb., 152, *Buck v. Gage*, 27 Neb., 306, and *Connell v. Galligher*, 36 Neb., 749, it was held: The functions of an acknowledgment to a deed are twofold,—(1) to authorize the deed to be given in evidence without further proof of its execution, and (2) to entitle it to be recorded. It was further held that the acknowledgment of a deed to real estate was no part of the deed itself. We must not be understood as ques-

tioning in the slightest degree the correctness of these decisions. But the real estate described in the conveyances considered in those cases was not the homestead of the parties making the conveyances, and the decisions had no reference to the acknowledgment of conveyances affecting the homestead of the grantors. In 1879 the legislature passed an act entitled "Homesteads." This is now chapter 36, Compiled Statutes of 1895. Section 4 of this chapter is as follows: "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." The obvious purpose of this statute is to render all conveyances or incumbrances made of a homestead absolutely void unless such conveyances are not only signed and witnessed but acknowledged by both the husband and the wife. It therefore follows that the mortgages of the appellants Schenck and the O. F. Davis Company are void, even as between the parties thereto, if those mortgages were not duly acknowledged; that is, if the officer who took the acknowledgment of the grantors therein was disqualified from taking such acknowledgment.

2. In what character or capacity does an officer act in taking the acknowledgment of a grantor to a conveyance of real estate? Is the act judicial or ministerial? Section 2, chapter 73, *supra*, only requires the grantor to acknowledge the instrument to be his voluntary act and deed; and the requirement of section 3 of said chapter is that he may make such an acknowledgment before a judge or clerk of any court or some justice of the peace or notary public. No statute of which we are aware declares that the act of taking an acknowledgment is or shall be held to be a judicial one, and section 1, article 6, of the constitution of the state declares: "The judicial power of this state shall be vested in a supreme court, district courts, county courts, justices of the peace, police magistrates, and in such other courts inferior to the district courts as may be created by law for cities and in-

corporated towns." Judicial power, it would seem, is the authority of some person or tribunal to hear and determine a controversy and to reduce such determination to a judgment or decree binding the parties thereto; but the acknowledgment by a grantor that he executed a conveyance is merely his voluntary admission that he has done so. The officer taking the acknowledgment has no power to compel a grantor to attend before him and no power to coerce an answer as to whether he did execute a conveyance; and upon the theory that the act of an officer in taking an acknowledgment is a ministerial one the supreme court of Massachusetts held in *Learned v. Riley*, 14 Allen, 109, that the acknowledgment of a deed might be taken by a justice of the peace out of the county in which he resides. The cases in which the question has been considered are, however, by no means harmonious. They are collated in 1 American & English Encyclopedia of Law, second edition, at pages 487, 488, and it is there said that the weight of authority is that the act of an officer in taking an acknowledgment of a real estate conveyance is a ministerial one. Following are some of the authorities there collated which hold such act to be judicial: *Griffith v. Ventress*, 91 Ala., 366; *Wedel v. Herman*, 59 Cal., 514; *Stevens v. Hampton*, 46 Mo., 404; *Long v. Crews*, 113 N. Car., 256; *Cover v. Manaway*, 115 Pa. St., 338; *Bowden v. Parrish*, 86 Va., 67; *Pickens v. Knisely*, 29 W. Va., 1; *Johnston v. Wallace*, 53 Miss., 331.

In *Wasson v. Connor*, 54 Miss., 351, the court said: "It is evident that the taking of an acknowledgment of a grantor is a *quasi*-judicial act. * * * The officer who takes an acknowledgment acts in a judicial character in determining whether the person representing himself to be * * * the grantor named in the conveyance actually is the grantor. He determines further whether the person thus adjudged to be the grantor does actually and truly acknowledge before him that he executed the instrument."

In *White v. Connelly*, 105 N. Car., 65, it was held that the

clerk of a superior court, in adjudicating a certificate of acknowledgment and admitting the instrument to probate and ordering registration, acts judicially.

The following are some of the authorities which hold that such an act is a ministerial one: *Elliott v. Peirsol*, 1 Pet. [U. S.], 338; *Hill v. Bacon*, 43 Ill., 477; *Beuley v. Curtis*, 92 Ky., 505; *Gibson v. Norway Savings Bank*, 69 Me., 579; *Scanlan v. Wright*, 13 Pick. [Mass.], 523; *Bank of Benson v. Hove*, 45 Minn., 40; *Truman v. Lore*, 14 O. St., 144; *Williamson v. Carskaden*, 36 O. St., 664; *Lewis v. Waters*, 3 Har. & McH. [Md.], 430.

The conflict in the authorities is probably due to the peculiar statutes of the various states on the subject of acknowledgments. In *Calumet & Chicago Canal & Dock Co. v. Russell*, 68 Ill., 426, and *Kerr v. Russell*, 69 Ill., 666, the supreme court held that an officer in taking the acknowledgment of a married woman acted judicially; but when the acknowledgments considered in those cases were taken the statute of Illinois required of an officer taking the acknowledgment of a married woman to make her acquainted with and explain to her the contents of the conveyance; to examine her separate and apart from her husband as to whether she executed the conveyance voluntarily, freely, and without the compulsion of her husband, and to make a certificate accordingly. (See sec. 17, ch. 24, Statutes of Illinois, 1856.) Subsequently the legislature repealed this statute and enacted another providing, in effect, that if a married woman should join with her husband in the execution of a conveyance of real estate, she should be bound and concluded by the same in the same manner as if she were *sole;* that the acknowledgment of a married woman to a conveyance of real estate might be taken the same as if she were a *feme-sole* and have the same effect. (See Session Laws of Illinois 1869, p. 359.) After the passage of the statute quoted above the supreme court of Illinois, in *People v. Bartels*, 138 Ill., 322, held that the taking of an acknowledgment of a married woman to a conveyance of real estate was a

ministerial act. Magruder, C. J., speaking for the court, said: "The doctrine that the taking of an acknowledgment is a judicial act had its origin in the consideration of acknowledgments by married women, where the officer is required to make the privy examination herein referred to; and as applied to such cases the doctrine is sound." He then cites *Calumet & Chicago Canal & Dock Co. v. Russell* and *Kerr v. Russell, supra*, and remarks that in these cases "the acknowledgments were by married women, and the certificates stated that they were examined separate and apart from their husbands, * * * as required by the statute then in force. * * * In those cases the taking of the acknowledgment was correctly held to be a judicial act. But the present statute of this state no longer requires the separate examination of a married woman in order to relinquish her dower or convey her separate estate. She is treated as though she were a *feme sole*." The statutes of this state require nothing more of a married woman than is required of her husband to make effectual a conveyance of her real estate or effectual a conveyance of her dower interest in the real estate of her husband. All that is required of either a husband or wife is that they shall sign the conveyance; that it shall be witnessed, and that they shall acknowledge the signing of the instrument to be their voluntary act and deed. If the real estate described in the conveyance is a homestead, then it must be not only signed and witnessed, but it must be acknowledged, in order to be good even between the parties; and if not a homestead, the conveyance, if signed, witnessed, and delivered, will pass the title between the parties. We think that the weight of authority is to the effect that the act of an officer in taking the acknowledgment of a grantor to a conveyance of real estate is a mere ministerial act.

3. This brings us to the precise question in this case, namely: Was the acknowledgment of Mr. and Mrs. Tyrrell to the mortgages on their homestead, taken by the notary public, void because of the fact that such notary

public was then and there the secretary and treasurer of the mortgagee? There is no evidence in the record that this notary public had any interest whatever in the corporation mortgagee. No law of this state requires that a secretary or treasurer of a corporation shall be a stockholder thereof; and simply because the evidence shows that a person is secretary and treasurer of a corporation, the court ought not to presume that he was therefore a stockholder in such corporation. (*Florida Savings Bank & Real Estate Exchange v. Rivers*, 18 So. Rep. [Fla.], 850.) What interest and what relationship possessed by an officer disqualifies him from taking an acknowledgment of a conveyance of real estate? We have not been cited to any authority, nor have we been able to find one, which lays down, or attempts to lay down, any rule which will afford in all cases a safe test for determining whether an officer is disqualified by reason of his relationship or interest from taking an acknowledgment in any particular case. Whether such disqualification exists in any case must be determined from the peculiar facts and circumstances of that case. No statute exists in this state which prescribes what relationship or interest of an officer shall disqualify him from taking an acknowledgment in any given case; but it would seem that on grounds of public policy an officer should be disqualified from taking an acknowledgment whose direct and beneficial interest would be subserved in having the conveyance made which he acknowledged. And perhaps it may be said, as a very general proposition, that an officer who is a party to a conveyance or interested therein is disqualified from taking the acknowledgment of the grantor. What relationship and what interest disqualifies an officer from taking an acknowledgment has been many times considered by the courts, as an examination of the following authorities will show:

In *Hammers v. Dole*, 61 Ill., 307, it was held that the acknowledgment of a mortgage taken before a justice of the peace, who was also the mortgagee, is void as to third

parties, notwithstanding the fact that he is the only justice in the township qualified to take acknowledgments.

In *Brereton v. Bennett*, 25 Pac. Rep., 310, the supreme court of Colorado held: "The fact that the officer taking the acknowledgment of a chattel mortgage was the partner of the mortgagee and negotiated the loan secured by the mortgage does not render the mortgage fraudulent and void as to other mortgage creditors, when it is not shown that he was a party in interest to either the lien or the note."

In *Stevenson v. Brasher*, 90 Ky., 23, the court of appeals of Kentucky held that where only the county clerk and his deputies are authorized to take acknowledgments of deeds, the clerk may take the acknowledgment of a deed in which he is grantee.

Chapter 37, section 2, of the Code of North Carolina permits a deputy clerk to take the probate of a deed. In *Piland v. Taylor*, 113 N. Car., 1, it was held that the fact that the clerk was grantee did not invalidate the probate taken by the deputy.

The statutes of Michigan provide that a judicial sale shall be made by the sheriff or under sheriff and the deed executed by the officer making the sale. In *Cook v. Foster*, 96 Mich., 610, the supreme court of that state, in construing this statute, held that a deed executed by an under sheriff might be acknowledged by the sheriff, he being a notary public.

In *Ewing v. Vannewitz*, 8 Mo. App., 602, it was held that the acknowledgment of a deed of foreclosure made by a sheriff as trustee under a deed of trust may be taken by a notary who is also deputy sheriff.

In *Fredericksburg Nat. Bank v. Conway*, 1 Hughes [U. S. C. C.], 37, it was held "a notary, who was one of the beneficiaries under a deed of trust, might take the grantor's acknowledgment."

In *Withers v. Baird*, 7 Watts [Pa.], 227, it was held that an officer who is bound to make title through third persons is so far interested in the conveyance as to be dis-

qualified to take the acknowledgment of the wife of the grantor.

In *Sample v. Irwin*, 45 Tex., 567, it was held that a notary who identifies himself with the transaction by placing his name on the face of a deed of trust, as the avowed agent of one of the parties, cannot acknowledge the instrument.

In *Nichols v. Hampton*, 46 Ga., 253, it was held that a notary who is also attorney for the mortgagor cannot take his client's acknowledgment of the mortgage; but in *Bierer v. Fretz*, 32 Kan., 330, it was held that an acknowledgment of a mortgagor was good although taken by an attorney for the mortgagee.

In *Penn v. Garvin*, 56 Ark., 511, it was held that a notary, who acted as agent of a mortgagor in obtaining the loan secured by the mortgage, is not so interested as to be disqualified to take the acknowledgment of the mortgage.

In *Kutch v. Holley*, 77 Tex., 220, it was held that a married woman's acknowledgment taken by a notary, who was the attorney of her husband, but not beneficially interested in the deed, is valid.

In *City Bank of Boone v. Radtke*, 87 Ia., 363, it was held that "the acknowledgment of a chattel mortgage made to a partnership before a notary who is one of the partners is void" as to third parties without actual notice.

In *Long v. Crews*, 113 N. Car., 256, it was held that the acknowledgment of a trust deed before a notary who is a preferred creditor therein is a nullity.

In *Lynch v. Livingston*, 6 N. Y., 422, it was held that a commissioner of deeds may take the acknowledgment of a deed, although so related to the makers as to be disqualified to act as judge or juror in a trial where they are parties.

In *Remington Paper Co. v. O'Dougherty*, 81 N. Y., 474, it was held that a justice of the peace may take the acknowledgment of a deed in which his father is grantor and his wife grantee.

In *Jones v. Porter*, 59 Miss., 628, it was held that if the officer is beneficially interested his taking the acknowledgment of a relative would be void on that ground, and that the acknowledgment of a deed before the husband of the grantee therein was void.

In *Kimball v. Johnson*, 14 Wis., 734, it was held: "The acknowledgment of a mortgage made to a married woman is not invalid because taken before the husband of the mortgagee who was a justice of the peace."

In *First Nat. Bank of Helena v. Roberts*, 9 Mon., 323, it was held that a notary who is the attorney and nephew of the party to the deed is not so interested as to be disqualified to take the acknowledgment of the deed.

In *Sawyer v. Cox*, 63 Ill., 130, it was held that an officer of a corporation whose duty it is to countersign and register its deeds is not thereby disqualified from taking acknowledgment thereof as a notary, his signature not being necessary to the validity of the instrument.

These are not all the cases, by any means, in which this question has been considered, but they serve to show the futility of any attempt to lay down any general rule upon the subject. We reach the conclusion that a notary public is not disqualified from taking an acknowledgment of a mortgage made to a corporation of which he is secretary and treasurer, it not appearing that he was a stockholder in such corporation or otherwise beneficially interested in having the conveyance made. The decree appealed from is reversed and the cause remanded to the district court for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

IRVINE, C., having presided on the trial in the court below, took no part in the consideration here of the case.

RYAN, C., dissenting.

I cannot concur in the opinion prepared by Commissioner Ragan, and, avoiding needless repetition, as far as

possible, I shall submit my views upon the facts stated by him.

I regard it as of no importance whether the act of a notary public in taking and certifying to an acknowledgment is to be deemed a ministerial or a judicial act. For me, it is sufficient that the homestead can be conveyed or incumbered only by an instrument not merely executed, but which, as well, must be acknowledged. (Compiled Statutes, ch. 36, sec. 4.) The acknowledgment being by statute constituted a substantive requirement to the existence of a conveyance or a mortgage; it matters not whether this substantive requirement is classified as a ministerial or as a judicial act. In the case under consideration the notary public who took and certified the acknowledgment was at the same time the secretary and treasurer of the mortgagee, a corporation. The opinion in which I cannot concur holds that this officer was not disqualified to certify to the acknowledgment because there is found in the record no evidence that he had any interest in the corporation mortgagee. It is fair to assume that the interest referred to is a pecuniary interest, for, in the same connection in the opinion, it is said: "No law of this state requires that a secretary or treasurer of a corporation shall be a stockholder thereof; and simply because the evidence shows that a person is secretary and treasurer of a corporation, the court ought not to presume that he was therefore a stockholder in such corporation. * * * What interest and what relationship possessed by an officer disqualifies him from taking an acknowledgment of a conveyance of real estate? We have not been cited to any authority, nor have we been able to find one, which lays down, or attempts to lay down, any rule which will afford in all cases a safe test for determining whether an officer is disqualified by reason of his relationship or interest from taking an acknowledgment in any particular case. Whether such disqualification exists in any case must be determined from the peculiar facts and circumstances of

that case." (*Horbach v. Tyrrell*, 48 Neb., 514.) Following the above, and other language to the same effect, twenty cases were reviewed to illustrate and enforce the proposition that courts of last resort are irreconcilably at conflict as to what particular relationship to the parties or subject-matter should be held to disqualify a notary public to take an acknowledgment. From this the conclusion seems to be reached that no court should attempt to lay down a rule by which it will be bound, and thereupon, without further reasoning, the conclusion is that, in this particular case, the mortgage, though of a homestead, is valid.

In so far as this court seems at all willing to commit itself, it is to the doctrine that only a pecuniary interest in a corporation mortgagee could disqualify one of its officers to act as a notary public in taking the acknowledgment, which gives validity to the incumbrance of a homestead. A corporation, as defined by Marshall, C. J., in *Trustees of Dartmouth College v. Woodward*, 4 Wheat. [U. S.], 518, is "an artificial being, invisible, intangible, and existing only in contemplation of law." It requires no citation of authorities to prove that a corporation can only act through its officers or agents. Indeed, the very definition of the word "corporation" implies the necessity of agency. It must therefore be that what are ordinarily described as the acts of a corporation are simply the acts of its officers, and this proposition is rendered none the less correct by the consideration that such officers may employ special agents, such as attorneys at law and the like, to act for the corporation. In relation to a homestead, there is required to be shown both the execution and the acknowledgment of the conveyance or mortgage. Section 347 of the Code of Civil Procedure provides: "Every private writing, except a last will and testament, after being acknowledged or proved and certified in the manner prescribed for the proof of acknowledgment of conveyance of real property, may be read in evidence without further proof." In *Phillips v. Bishop*,

35 Neb., 487, it was held by the court that a certificate of acknowledgment of a deed or mortgage in proper form could be impeached only by a clear, convincing, and satisfactory proof that the certificate is false and fraudulent, and this holding was reaffirmed in *Barker v. Avery*, 36 Neb., 599. Furthermore, in *Phillips v. Bishop*, *supra*, it was said: "As a general rule, the unsupported testimony of the party purporting to have made the acknowledgment is insufficient to overcome the officer's certificate." The opinion to which I cannot subscribe holds that a notary public sustaining the relation of secretary and treasurer to the mortgagee, a corporation, may nevertheless take and certify the acknowledgment of the mortgagors, almost conclusive though such certificate be under the section of the Code of Civil Procedure and the adjudicated cases just cited. I desire briefly to recapitulate that the result of this holding may more clearly appear. In the first place, a corporation must act by its officers, and from this it results that its officers' acts in the performance of their corporate duties are the acts of the corporation. In the second place, the officer of such corporation may take and certify the acknowledgment of the mortgagors and, "as a general rule, the unsupported testimony of a party purporting to have made such an acknowledgment is insufficient to overcome the officers' certificate." In the third place,—and this is the holding in the opinion from which I dissent,—each case must be determined from the peculiar facts and circumstances of that case; *ergo*, this acknowledgment was free from objection. When it is taken into consideration that the corporation, in the only manner in which it could act,—that is by its officers,—took an acknowledgment of a mortgage to itself, there is, to my mind, an exquisite suggestion of irony in the general proposition gravely laid down, that "each case must be determined from the peculiar facts and circumstances of that case."

But there is another view which may properly be taken of the relation of the secretary and treasurer to the cor-

poration, mortgagee, which arises out of the fact that the official positions named imply the same obligations as result from any other agency. This secretary and treasurer, being its agent, owed to the corporation of which he was an officer, the duty of caring for its interests to the exclusion of every other consideration. (*Rockford Watch Co. v. Manifold*, 36 Neb., 801; *Jansen v. Williams*, 36 Neb., 869; *Oliver v. Lansing*, 48 Neb., 338.) With the obligation resting upon him, it is too much to expect of an agent, designated an officer, that when by a simple certificate as to an acknowledgment he can practically conclude parties dealing with his principal as to the execution of a mortgage to such principal, this irresponsible power will not oftentimes be abused. It can make no difference in principle whether the agent can be financially benefited or not, the requirement of interest in the success of his principal equally exists. Speaking of the rule which makes this requirement, it is said in Story, Agency, section 210: "This rule is founded upon the plain and obvious considerations that the principal bargains in the employment, for the exercise of the disinterested skill, diligence, and zeal of the agent for his own exclusive benefit." For my own part I cannot see that it makes any difference in the requirement of fidelity whether or not the agent partakes in the profits of the business of his principal, and this participation is what, for the most part, is implied from the fact of being a stockholder.

If the foregoing discussion has served no other purpose it is hoped that, at least, it has called attention to the fact that in the opinion already prepared there has been no attempt made to formulate a general rule as to what disability on the part of the notary public will vitiate his certificate of acknowledgment, though it is intimated that peculiar facts and circumstances may accomplish that result. In this situation there are all the disadvantages which attend upon the possible effects of an unsettled rule of law. The requirement that a mort-

gage of the homestead must be acknowledged, as has already been noted, is substantive in its nature, and does not merely extend to entitling the instrument to be admitted to record. In this respect the law as to the necessity of the separate examination of a married woman being shown by the certificate of acknowledgment to make hers a binding execution of a deed affords, to my mind, a striking analogy, and I shall therefore review the decisions upon this subject at some length.

A deed of a married woman, the acknowledgment of which does not show that she was examined separate from her husband, as provided by Revised Statutes, 1865, chapter 100, sections 13 and 14, in force at the time the deed was executed, is void. (*Krieger v. Crocker*, 24 S. W. Rep. [Mo.], 170.)

In *Long v. Crews*, 18 S. W. Rep., 499, the supreme court of North Carolina had under consideration a deed in which one of the trustees named took the acknowledgment as a notary public. Following a review of a line of decisions in that state the following language occurs: "It is true these were all cases where the registration and probate were insufficient because the acknowledgment was made before an officer by reason of his locality not authorized or acting outside of his local jurisdiction, and the ruling is sustained by ample authority elsewhere. * * But exactly the same principle still applies where the officer taking the acknowledgment is disqualified, not (as above) by not acting within the authorized locality but by reason of his interest in the deed, either as party, trustee, or *cestui que trust.* (1 Devlin, Deeds, sec. 476, and cases there cited.) In both cases alike, the acknowledgment is taken, so to speak, *coram non judice*, and cannot authorize probate by the clerk and registration. (*Beaman v. Whitney*, 20 Me., 413; *Groesbeck v. Seeley*, 13 Mich., 329; *Davis v. Beazley*, 75 Va., 491; *Bowden v. Parrish*, 86 Va., 67; *Brown v. Moore*, 38 Tex., 645; *Wasson v. Connor*, 54 Miss., 351; *Withers v. Baird*, 32 Am. Dec. [Pa.], 754, and notes 1 Am. & Eng. Ency. Law, 145, and note 6, 16

Am. & Eng. Ency. Law, 775.)" The opinion from which was taken the above quotation began with the following statement: "In this state it is settled law that an acknowledgment of a deed by the husband and privy examination of the wife, taken before a justice of the peace, commissioner, or notary, is a judicial, or at least a *quasi*-judicial act, and, if such officer is not authorized to take it, the probate upon it by the clerk and registration are invalid against creditors and purchasers."

In *Louden v. Blythe*, 27 Pa. St., 22, Black, J., said: "A married woman may convey or mortgage her land by joining with her husband in a deed for that purpose. But to make such a deed valid, it is necessary to show by legal evidence that no fraud was practiced upon her, but that she executed it with a full knowledge of its meaning, purpose, and intent. It must also be shown that her will was perfectly free and that her mind accorded with the act. If he uses his influence and power in such manner as to control her unduly, or so as to make her act under his will and not her own, the deed is void. I do not say that it will be vitiated, by the mere fact that she yields to his persuasion, even when she does so against her better judgment. But there must be no imprisonment of her mind, and no unfair advantage taken of her weakness. She must act voluntarily and not by compulsion, moral or physical. These facts are to be proved in one way only—that is, by the certificate of a judge or justice that he examined her, not in the presence of her husband, but separately; that he made the contents of the deed fully known to her; that she declared her execution of it to be voluntary and free from every sort of coercion."

In *Withers v. Baird*, 7 Watts [Pa.], 228, Baird had agreed to convey to Withers a tract of land by warranty deed subject to all demands of the commonwealth. Prior to the agreement, a verbal understanding existed between Baird and Baxter, to the effect that they should exchange six acres of the tract to which this contract related for four acres owned by Baird. The agreement

therefor provided that unless this agreement was rescinded, Baird should convey the four acres, instead of the six for which they were exchanged, to Withers. The understanding was not rescinded, and to simplify matters it was agreed that Baxter should convey directly to Withers. In pursuance of this agreement Baxter and wife executed a deed of the land to Withers, and delivered it to Baird. Baird, who was a magistrate, also took Mrs. Baxter's separate acknowledgment. Upon tender of this deed to Withers he refused to accept it. Gibson, J., in delivering the opinion of the court, said: "But the acknowledgment was palpably insufficient to bar the dower of Baxter's wife. The office of a magistrate in respect to private examination is a judicial and a delicate one. Intrusted with the business of inspecting the wife's knowledge and will, he should be superior to all exception on the score of impartiality. When he is bound to procure her concurrence, his inducement to abuse his trust is as strong as if the conveyances were made to himself; and it would not be pretended that his judicial functions could be exercised in his own case. His responsibility for the conveyance, whether through himself or directly to the defendant, made him equally a party in interest, and no consent, short of an agreement by the vendee to take a defective title, which is not pretended, could supply the place of a separate examination."

In *National Bank of Fredericksburg v. Conway*, 1 Hughes [U. S. C. C.], 37, Hughes, J., says: "If the act be judicial, such as taking the acknowledgment, after privy examination of a married woman, an interested person cannot take it." Just following this proposition there were cited several authorities. The abstract value of this statement is, however, greatly impaired by the fact that just preceding the above quotation its author had said that "The teaching of the cases cited at bar seems to me plainly to be that an interested person may take the acknowledgment of a deed when the act is merely minis-

terial." In the same case, however, Waite, C. J., dissenting, said: "It has been frequently decided that an acknowledgment before a grantee named in the deed was of no effect. (*Beaman v. Whitney*, 20 Me., 413; *Wilson v. Traer*, 20 Ia., 233; *Stevens v. Hampton*, 46 Mo., 404; *Groesbeck v. Seeley*, 13 Mich., 345.) It has also been held that a party interested in a deed cannot take and certify the acknowledgment of a married woman requiring a privy examination. (*Withers v. Baird*, 7 Watts [Pa.], 228.) The taking of such an acknowledgment is in some respects a judicial act, and not ministerial only; but in case of an ordinary acknowledgment, it is purely a ministerial act. *Truman v. Lore*, 14 O. St., 144; *Lynch v. Livingston*, 2 Seld. [N. Y.], 434.)"

In *Stevenson v. Brasher*, 90 Ky., 23, the county clerk was held not disqualified to take an ordinary acknowledgment of a deed in which he had an interest, but it was said by Bennett, J., in delivering the opinion of the court: "He, being one of the parties to whom the conveyance was made, and one of the beneficiaries of the wife's acknowledgment, may show that her acknowledgment was not taken as the law directs. The fact that he was innocent in this omission of duty makes no difference, for the wife cannot convey away her right of dower, unless the requirements of the statute are pursued in every particular, and that she shall be examined separately and apart from her husband is one of the requirements which is indispensable, the performance of which devolves upon the clerk taking the acknowledgment; and if he in taking the acknowledgment for his own benefit, fails to perform said duty, he and his co-vendee should not be permitted to profit by such failure, but they should be considered to have failed to get the wife's dower by the fraud or laches of said clerk, and for that reason not entitled to it."

In *Brown v. Moore*, 38 Tex., 645, the entire opinion of the court, delivered by Walker, J., was as follows: "James W. Moore and Mary E., his wife, to secure the

payment of $1,100 to Eliza A. Brown, executed a deed of trust to Oscar Farish over lots 12, 13, and 14, in block 136, in the city of Galveston, together with two slaves. The trustee took the acknowledgment of the wife to the deed. The property mortgaged was her separate property. The trustee was interested in the conveyance to the extent of his commission and was therefore incompetent as an officer to take an acknowledgment of the deed. Authorities are sufficiently referred to in the able briefs of counsel to this point. We think the law is well settled; and though there are other questions raised in this record of a deeply interesting character, we will decide this case upon the point already stated, referring to our opinions in other cases for the settlement of all other questions involved."

In *Parks v. Barnett*, 16 So. Rep. [Ala.], 136, there was presented to the supreme court of Alabama the validity of a deed under which the title of the grantors to their homestead was claimed to have passed to the grantee therein named. This deed had been signed by both the grantors, but was not acknowledged by the wife, who was one of the grantors, until after the death of her husband, the other grantor. The court said in discussing the facts of this case: "The evidence is without conflict, that the lot sued for at the time of the attempted conveyance by said Hart and wife to the defendant, Coltart, was their homestead, in their actual occupancy and possession as such, and had been for many years before. Their deed was without the acknowledgment of the wife as required by section 2508 of the Code, to make a valid conveyance by the husband of the homestead. By the repeated decisions of this court, as well as by the terms of the statute itself, such conveyance is void. It is said of such a deed that it is a nullity to all intents and purposes, and confers no rights, present or prospective, is totally insufficient as a muniment of title to support an action of ejectment, and is incapable of passing any estate or interest whatever in the homestead." In this connection there were cited

ten Alabama cases, following which it was said: "We have also held, more than once, that such a conveyance acknowledged by the wife after the death of the husband with certificate thereof in proper form, does not defeat or affect the title of his heirs. (*Richardson v. Woodstock Iron Co.*, 90 Ala., 266, 94 Ala., 629; *Hodges v. Winston*, 95 Ala., 514.)"

In *Bowden v. Parrish*, 9 S. E. Rep. [Va.], 616, it was held that the interest of a trustee, merely to the extent of his commission, was such as disqualified him to act as a notary public in taking an acknowledgment in Virginia, in which state the taking of any acknowledgment is held to be a judicial act.

These facts have been illustrated by the foregoing citations and the quotations therefrom, first, that the value of an acknowledgment of a married woman as to the execution of a deed was dependent entirely upon whether the officer performed his duty in strict compliance with the requirements of the statute; and, second, that the failure by an officer in taking such acknowledgments, and evidencing the same by his certificate, not only precluded its being recorded so as to impart notice, but, as well, absolutely rendered the instrument null and void as a deed. Between this sort of an acknowledgment and one upon which entirely depends the validity of an incumbrance of a homestead there exists, so far as the functions and requirements of an acknowledging officer are concerned, a striking analogy, and the cases which have been cited and quoted from show that such officer must not be in such relation to the grantee or mortgagee that there shall exist a temptation to do his duty otherwise than impartially. On principle this is readily illustrated with reference to a homestead, for the requirement of the statute is that to convey or incumber the homestead the instrument must be executed, and must be acknowledged. As to the first of these two requirements the act of signing by the husband and wife is generally quite clear and unmistakable evidence. Of the

acknowledgment, which, equally with the execution, is imperatively required to constitute a conveyance or create an incumbrance, the sole evidence is the certificate of the officer taking such acknowledgment. Whether his act in this respect is styled judicial, *quasi*-judicial, or ministerial, counts for less than whether his *ex parte* certificate, which entitles the instrument to be received in evidence on the one hand, and complete its validity on the other, shall be accepted only when he has acted under such circumstances that the requirement of fairness in taking and evidencing the acknowledgment is not in conflict with his obligations toward the grantee. Whenever a deed has been placed upon record, third parties are entitled to rely upon the facts thereby published, and those alone, and it is then too late to afford relief against its false recitations. The only safe course is to require that the evidence of the essential requirement of acknowledgment in conveying or incumbering a homestead shall be of such a nature that there shall be no danger that the officer who takes the acknowledgment shall be likely to misstate the truth. This was beneficent and practicable for a long time with reference to the privy examination of married women. It can scarcely be otherwise with respect to the conveyance or incumbrance of the homestead. It may be that the so-called emancipation of married women renders unnecessary any precautions against the improvident surrender of the control of the wife's property to her husband, and that, therefore, the law requiring her separate examination should be laid aside as an outgrown fiction, but this can never be assumed of helpless children, in whose interest and for whose benefit have mainly been enacted the humane provisions of the homestead law.

JOHN C. HAVEMEYER, APPELLEE, V. MARCUS DAHN ET AL., APPELLEES, IMPLEADED WITH STORZ & ILER, APPELLANTS.

FILED MAY 19, 1896. No. 6309.

1. **Homestead:** DEED: ACKNOWLEDGMENT. A conveyance of real estate, such real estate being the homestead of the grantors, is, unless acknowledged, absolutely void.
2. **Acknowledgment:** DISQUALIFICATION OF OFFICER. An attorney, who is a notary public, is not disqualified from taking an acknowledgment of a mortgage made to his client, merely because he holds for collection the claim secured by such mortgage, it not appearing that the attorney had any beneficial interest in having the mortgage made, nor that the amount of his compensation in any manner depended upon such mortgage being made. *Horbach v. Tyrrell*, 48 Neb., 514, followed.

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

Lake, Hamilton & Maxwell, for appellants.

William H. Crow and *Joseph Crow, contra.*

RAGAN, C.

John C. Havemeyer brought this suit in equity in the district court of Douglas county against Marcus Dahn and Barbara Dahn, his wife, to foreclose a real estate mortgage. A corporation known as the O. F. Davis Company and a copartnership known as Storz & Iler were also made defendants to the action. The latter two filed cross-petitions, by which they also sought to foreclose mortgages held by them upon the real estate of Dahn. By the decree of the district court Havemeyer and the O. F. Davis Company were given liens upon the real estate as prayed for in their petition and cross-petition; but the district court denied the prayer of the cross-petition of Storz & Iler and dismissed the same and from this decree they have appealed.

It appears from the special findings of the district court that one Kopald was indebted to Storz & Iler, and as an evidence of this indebtedness he executed to them his note and this note was signed by the appellee, Marcus Dahn, and a note secured by a mortgage upon the homestead of Dahn and wife to Storz & Iler. The notary public who took the acknowledgment of this mortgage was an attorney at law, and the attorney and agent of Storz & Iler for the purpose of collecting the debt owing to them from Kopald, and procured Dahn and his wife, as they alleged, by fraud and false representations, to execute the mortgage. The learned district court was of opinion that because the notary public who took this acknowledgment was the agent and attorney of the mortgagee, he was therefore disqualified to take the acknowledgment, and the mortgage being upon a homestead was void. In *Horbach v. Tyrrell*, 48 Neb., 514, handed down at this sitting of the court, we decided that a notary public was not disqualified from taking an acknowledgment of a mortgage made to a corporation of which he was secretary and treasurer, it not appearing that he was a stockholder in such corporation or otherwise beneficially interested in having the conveyance made. In the case at bar it is not found that the notary and attorney who took the acknowledgment of Dahn and his wife had any beneficial interest in having the mortgage made. It is true that he was agent and attorney for Storz & Iler, but it does not appear that the amount of his compensation in any manner depended upon his procuring this mortgage or collecting the debt which it represented. Following *Horbach v. Tyrrell*, the decree appealed from is reversed and the cause remanded to the district court for further proceedings.

REVERSED AND REMANDED.

IRVINE, C., not sitting.

RYAN, C., dissents.

CLOSSA E. BROWN ET AL., APPELLEES, V. E. L. ENO ET AL., APPELLANTS.

FILED MAY 19, 1896. No. 6595.

1. **Estoppel.** Where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. *Cain v. Boller*, 41 Neb., 721, and cases there cited followed.

2. **Principal and Agent.** The apparent authority of an agent which will bind his principal is such authority as an agent appears to have, by reason of the actual authority which he has. (*Creighton v. Finlayson*, 46 Neb., 457.)

3. **Estoppel: EVIDENCE.** The evidence examined, and *held* to sustain the finding of the district court, that the appellants had by their conduct estopped themselves from claiming or asserting a mortgage lien upon certain chattel property.

4. **Principal and Agent: EVIDENCE.** Evidence examined, and *held* to sustain the finding of the district court, that one of the appellants was the agent of the other, and acted within the scope of his authority in making certain representations set out in the opinion.

APPEAL from the district court of Hall county. Heard below before HARRISON, J.

W. H. Thompson, for appellants.

W. L. Hand and *Abbott & Caldwell, contra.*

RAGAN, C.

In June, 1890, E. L. Eno and W. D. Moulton sold to William Haynes the furniture and fixtures of the Palmer House, a hotel in the city of Grand Island. Haynes, in part payment of said furniture and fixtures, conveyed to Eno & Moulton certain real estate, the same being at the time incumbered by mortgages aggregating the amount of $6,420. These mortgages were at the time not due, but as they matured were to be paid off by Haynes. Haynes paid the balance of the purchase price of the

furniture and fixtures by executing and delivering to Eno & Moulton his promissory note for $7,500. He secured this last note by chattel mortgage upon the furniture and fixtures purchased of Eno & Moulton, and also executed and delivered to them another note at the same time for $6,420 and secured the same by a second mortgage upon said furniture and fixtures. This last note and mortgage were given to Eno & Moulton to secure Haynes' promise and agreement to pay off and discharge the mortgages existing upon the real estate which he had conveyed to them as part payment for the furniture and fixtures purchased. Clossa E. Brown and Elwood Brown brought this suit in equity in the district court of Hall county against Eno & Moulton, alleging in their petition, in substance, that in October, 1890, they had purchased of Haynes the furniture and fixtures of said Palmer House; that at the time of making said purchase there existed of record in Hall county against the furniture and fixtures purchased, in favor of Eno & Moulton, the two chattel mortgages above mentioned of $7,500 and $6,420, respectively; that part of the debt secured by these mortgages was at that time past due; that they had no knowledge as to how much of said mortgage debts, if any, had been paid; that they applied to Eno & Moulton for information as to how much of said debts secured by mortgages on said property remained unpaid, and that Eno & Moulton informed them that the total amount remaining unpaid on said mortgages did not exceed the sum of $10,000; that they believed in and relied upon this statement and purchased the furniture and fixtures from Haynes at a price exceeding $20,000; all of which consideration, except the sum of $10,000, they paid directly to Haynes; and that they paid said $10,000 to Haynes as follows: On the day they purchased the furniture and fixtures of Haynes they made a cash payment of $2,000, which, by an agreement between Haynes and Eno & Moulton, they, the Browns, paid directly to Eno & Moulton instead of to Haynes; and on the date of said purchase

they, the said Browns, executed to the said Haynes their notes aggregating $8,000, due at certain stated times, and by agreement between Haynes, Eno & Moulton, and the Browns, these notes, instead of being delivered to Haynes, were deposited in a bank in Grand Island, and as fast as they matured and were paid by the Browns the proceeds were to be paid over to Eno & Moulton in discharge of the balance due them on their debts secured by mortgages on the furniture and fixtures; that they, the Browns, paid the said $8,000 of notes as they matured and the same were paid over to Eno & Moulton as agreed; that but for the representations of Eno & Moulton that the total amount of their liens against the property and fixtures did not exceed the sum of $10,000, they, the Browns, would not have paid over to Haynes as much of the purchase price of the furniture and fixtures as they did; that they would have retained control of sufficient amount of the purchase price to have discharged the liens of Eno & Moulton against the property purchased; that Eno & Moulton, claiming that there was a balance of about $800 due to them from Haynes, which was secured by the chattel mortgages on the furniture and fixtures, had seized said furniture and fixtures under said mortgages, and were proceeding to advertise and sell them in pursuance of the statute to make and raise the sum claimed to be due them from Haynes. The prayer of the petition was for an injunction perpetually restraining Eno & Moulton from foreclosing their chattel mortgage against the furniture and fixtures. The court found the issues in favor of the Browns and rendered a decree as prayed, and Eno & Moulton have appealed.

1. The first argument relied on here for the reversal of this decree is that the finding of the district court is not sustained by sufficient evidence. The evidence on behalf of the appellees tends very strongly to support all the allegations of their petition. It tends to show that in June, 1890, they purchased the furniture and fixtures of the Palmer House from Haynes; that the purchase price

was something over $20,000; that they examined the records of Hall county and found there two mortgages existing against the furniture and fixtures which they were about to purchase, in favor of Eno & Moulton; these mortgages secured two debts, one for $7,500 and the other for $6,420; that thereupon they informed Mr. Moulton that they were negotiating for the purchase of the furniture and fixtures of the Palmer House from Haynes, and inquired of him what amount of the debts owing to Eno & Moulton by Haynes, and secured by mortgages on the furniture and fixtures, remained unpaid; that he informed them that the total amount remaining unpaid on said debts secured by said mortgages did not exceed $10,000; that the trade was then consummated with Haynes; the entire purchase price, except $10,000, paid over to Haynes; that by agreement between Moulton, the Browns, and Haynes the remaining $10,000 due Haynes on the purchase made by the Browns was paid to Eno & Moulton as follows: Two thousand dollars cash was paid to them and credited on the note held by them against Haynes. The Browns executed and delivered to Haynes their notes for various sums of money, but aggregating $8,000, and due at stated times in the future, and by an agreement between Haynes and Moulton and the Browns these notes were deposited in a bank in Grand Island and were to be paid there by the Browns as they matured, and the bank was to apply the proceeds of those notes to the discharge of the balance of the debt owing by Haynes to Eno & Moulton, and which debt was secured by the mortgages on the furniture and fixtures as already stated. At the time of this agreement Moulton extended the time of the payment of the debt due to him and Eno from Haynes so as to make it mature at the same time which the notes that the Browns had given to Haynes would mature; and that they, the Browns, relied upon the representations made by Moulton as to the amount due him and Eno on their mortgages against Haynes and acted upon such representations; that they

possessed no knowledge or information as to how much remained due to Eno & Moulton on their mortgages against Haynes, and that had they known that Eno & Moulton claimed more than $10,000 on said mortgages they would have retained out of what they agreed to pay Haynes for the furniture and fixtures a sum sufficient to have discharged the liens of Eno & Moulton against the property, as by the terms of the sale between the Browns and Haynes the latter was to furnish them a clear title to the furniture and fixtures. The testimony on behalf of Eno & Moulton tended to show that they made no representations to the Browns as to what was due them from Haynes. The evidence on which the district court acted was conflicting. It was not of the clearest or most satisfactory character, but it is sufficient to sustain its finding that Eno & Moulton represented to the Browns before they purchased the furniture and fixtures of Haynes that the amount of their claims against the furniture did not exceed $10,000; that the Browns, having no knowledge of the fact, relied upon this statement, purchased the furniture and fixtures, and paid all consideration therefor except $10,000 to Haynes. The case of the appellees is an invocation of the well-known doctrine of equitable estoppel. In *Grant v. Cropsey*, 8 Neb., 205, is a statement of the doctrine, as follows: "When one by his words or conduct willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." (See, also, *Newman v. Mueller*, 16 Neb., 523; *Blodgett v. McMurtry*, 34 Neb., 782; *Cain v. Boller*, 41 Neb., 721; *Viergutz v. Aultman*, 46 Neb., 141.)

2. All the representations which the appellees allege were made to them by Eno & Moulton were made by Moulton. The Browns had no conversation or dealings with Eno prior to the time they purchased the furniture

and fixtures in controversy from Haynes, and it is now insisted that the representations made by Moulton to the Browns were not binding upon Eno, and that the decree, as against him at least, must be reversed. The district court has found in effect that Moulton in all that he said and did was acting as the agent of Eno, and that the representations that he made to Brown were representations made within the scope of his authority as Eno's agent. The point is a very close one, but we think the district court was justified in finding and inferring from the evidence that the notes and mortgages of Moulton & Eno were their joint property; that Moulton & Eno were the joint payees of said notes and mortgages; that these notes and mortgages were in the possession or under the control and subject to the direction of Moulton, acting for himself and for Eno; and that Moulton in making the representation he did, as to the amount due on said notes and mortgages, did not transcend the scope of his authority as Eno's agent. "The apparent authority of an agent which will bind his principal is such authority as an agent appears to have by reason of the actual authority which he has." (*Creighton v. Finlayson*, 46 Neb., 457, and cases there cited.) It appears from the evidence that the notes and mortgages belonging to Moulton & Eno were in Moulton's possession, or under his control and subject to his direction; that he had authority to collect these notes and mortgages and to extend the time of their payment until the maturity of the notes given by the Browns to Haynes, so that those notes when paid should pay the notes of Moulton & Eno. This being Moulton's actual authority, we cannot say that the conclusion of the district court, that Moulton was acting within the scope of his authority when he made the representation to the Browns as to the amount unpaid on the Moulton & Eno debt, is unsupported by the evidence. The decree is

AFFIRMED.

HARRISON, J., not sitting.

ÆTNA INSURANCE COMPANY V. BANK OF WILCOX ET AL., APPELLEES, IMPLEADED WITH CHICAGO LUMBER COMPANY ET AL., APPELLANTS.

FILED MAY 19, 1896. No. 6593.

1. Partnership: PREFERRING CREDITORS. A copartnership has the right to prefer one of its creditors to the exclusion of another, provided the preference is made and accepted without any fraudulent purpose.
2. ———: RIGHTS OF CREDITORS. A copartnership does not hold its property in trust for its creditors, nor have creditors a lien upon copartnership property simply because they are its creditors.
3. ———: EVIDENCE OF MEMBERSHIP. The receipt by a party of a share of the profits of a venture merely as compensation for services, such party having no interest in the property made the subject of the venture, and no power in the management or control of such property, other than that of an ordinary retail salesman thereof, does not constitute such person a partner. (*Waggoner v. First Nat. Bank of Creighton*, 43 Neb., 84.)
4. Pledges: PARTNERSHIP: RIGHTS OF CREDITORS. So long as a debt remains unpaid the creditor has the right to hold all the property pledged to him to secure its payment, and equity will not award to other creditors a part of the property pledged solely on the ground that the remainder would probably be sufficient to pay the debt secured.
5. Garnishment: PARTNERSHIP CREDITORS. Unsecured creditors, by garnishment proceedings, may compel a secured creditor to account to them for the surplus that remains of property pledged after satisfying the debt to pay which the property was pledged.

APPEAL from the district court of Kearney county. Heard below before BEALL, J.

The facts are stated by the commissioner.

Switzler & McIntosh and *J. L. McPheely*, for appellants:

If a person contract with a partnership to contribute his services to the enterprise, for which he is to be compensated by a proportion of the profits, he becomes a member of the firm and liable for its debts, although he

does not stipulate to bear any part of the losses. (*Strader v. White*, 2 Neb., 349; *Gibson v. Smith*, 31 Neb., 354; *Harvey v. Childs*, 28 O. St., 319; *Wood v. Vallette*, 7 O. St., 173; *Leggett v. Hyde*, 58 N. Y., 272.)

Partnership creditors are entitled to preference as to partnership property. (*Tolerton v. McLain*, 35 Neb., 725; *Rothell v. Grimes*, 22 Neb., 526; *Caldwell v. Bloomington Mfg. Co.*, 17 Neb., 489; *Roop v. Herron*, 15 Neb., 74; *Bowen v. Billings*, 13 Neb., 439; *Powers v. Large*, 69 Wis., 621.)

Firm property is bound where a partnership claim is reduced to judgment against only known member of the firm. (*Martin v. Davis*, 21 Ia., 535.)

When credit is given to one member of a firm exclusively the partnership is not bound. The debt is an individual one of the partner to whom credit was given, even though consideration goes into the firm business. (*Sylvester v. Smith*, 9 Mass., 120; *Pollock v. Williams*, 42 Miss., 88; *Willis v. Rector*, 1 C. C. A. [U. S.], 611; Parsons, Partnership, sec. 104; Bates, Partnership, sec. 446.)

A bank is chargeable with notice of facts affecting a transaction of which an officer acting for it in the transaction had knowledge. (*Bank of New Milford v. Town of Milford*, 36 Conn., 100; *Brothers v. Bank of Kaukauna*, 54 N. W. Rep. [Wis.], 786.)

Statements to a commercial agency are binding upon the parties making the same when communicated to others. (*Genesee Savings Bank v. Michigan Barge Co.*, 17 N. W. Rep. [Mich.], 790.)

Garnishment notice may be served upon corporations, either foreign or domestic, by service upon chief officer or managing agent. (*Chicago, B. & Q. R. Co. v. Manning*, 23 Neb., 557; *Porter v. Chicago & N. W. R. Co.*, 1 Neb., 15; *Conahan v. Cullin*, 2 Dis. [O.], 1; *Hebel v. Amazon Ins. Co.*, 33 Mich., 400.)

G. Norberg and *A. H. Burnett, contra.*

Charles Offutt, for plaintiff.

RAGAN, C.

The Bank of Wilcox is a banking corporation created under the laws of the state and domiciled at Wilcox, Nebraska. For some years prior to 1890 Henry Wilcox was the cashier of said bank, and during the time he was such cashier he became indebted to it in about the sum of $30,000. In April, 1890, at said village of Wilcox, Henry Wilcox embarked also in the business of buying and selling lumber and such other material as is usually kept in a country lumber yard. The business was conducted and carried on under and by the name of the "Wilcox Lumber Company." Henry Wilcox furnished all the money that went into the business and owned the entire property embarked in the venture. D. C. Shetler had the supervision of the lumber yard, made sales, made collections, and looked after the business generally; but he did not own any part of the property embarked in the business; he was not responsible for any loss that the venture might suffer, nor any of its debts; he had no right to control or dispose of the property and venture, otherwise than as an ordinary retail salesman, and his only interest in the property or what it might earn was that he was to have one-half of the profits of the venture as compensation for his time and services. On the 8th of April, 1891, the Wilcox Lumber Company, as an evidence of a debt which it owed the Bank of Wilcox for money borrowed and invested in the lumber business, executed and delivered to said bank its note for $4,000, due in ninety days. On the 1st of January, 1892, Henry Wilcox was superseded as cashier of the Bank of Wilcox and one Hopkins was elected cashier in his place. The lumber and other material belonging to the Wilcox Lumber Company was insured against loss or damage by fire in the Ætna Insurance Company and another. On the 2d of February, 1892, the insured property was destroyed by fire. On the 3d day of February, 1892, Henry Wilcox delivered to the Bank of Wilcox the policies of

insurance which the insurance companies had issued to the Wilcox Lumber Company. The delivery of these policies to the Bank of Wilcox by Henry Wilcox was made and accepted for the purpose of securing the payment to the bank, out of the proceeds of said policies, of the note, and the interest thereon, which the lumber company had given to the bank on the 8th of April, 1891, said note being long past due and wholly unpaid. At the time that these policies were delivered by Henry Wilcox to the bank, and the latter authorized to collect the amount of the policies and apply the proceeds thereof on the payment of the note owing by the lumber company to the bank, no formal written assignment by the Wilcox Lumber Company was made on either of said policies, but on the 23d of February, 1892, the insurance policies were duly assigned and transferred in writing to the Bank of Wilcox by the Wilcox Lumber Company, by Henry Wilcox. Certain judgment creditors of Henry Wilcox claimed to be entitled to the proceeds of the insurance policies and the Bank of Wilcox also claimed to be entitled to said proceeds, and thereupon such proceedings were had that the insurance companies paid the amount of the policies, $4,000, into the district court of Kearney county and were discharged from any further liability in the premises. The Bank of Wilcox bases its claim to said fund on the deposit with and assignment to it of the insurance policies made on February 3 and 23, 1892, as already stated. It alleged in its pleadings that Henry Wilcox, doing business as the Wilcox Lumber Company, was on the 3d and 23d of February, 1892, indebted to it in the sum of $4,000 and a large amount of interest for money which the bank had loaned the Wilcox Lumber Company, and which it had used in its lumber business; that said debt was long past due and wholly unpaid, and that to secure it the payment of that debt the Wilcox Lumber Company (Henry Wilcox) had delivered and assigned to it the said insurance policies. The Chicago Lumber Company and a number of others having ob-

tained judgments against Henry Wilcox for lumber and other materials which they alleged they had sold and delivered to him while doing business under the name of the Wilcox Lumber Company, also claimed the fund in controversy. The district court found specially that on the 23d day of February, 1892, the Wilcox Lumber Company assigned the insurance policies in question to the Bank of Wilcox, with authority to collect the same and apply the proceeds thereof to the payment of the amount due to the Bank of Wilcox from the Wilcox Lumber Company, which at that time exceeded the sum of $4,000 and which at the time the decree was rendered had not been paid. There was a general finding in favor of the Bank of Wilcox and against the Chicago Lumber Company and other judgment creditors of Henry Wilcox, and a decree that the fund in controversy should be paid to the Bank of Wilcox. From this decree the Chicago Lumber Company and other creditors have appealed. Two arguments are relied upon to reverse the decree appealed from.

1. As already stated, while Henry Wilcox was cashier of the Bank of Wilcox he became largely indebted to the bank. This indebtedness was in addition to what he owed the bank under and by name of the Wilcox Lumber Company. On the 1st of March, 1892, he had an accounting or a settlement with the Bank of Wilcox. In this settlement an itemized statement was made of the debts which he owed the bank, and on that date he assigned to the bank, to secure the indebtedness, a large number of securities. In this statement the debt which he as the Wilcox Lumber Company owed the bank was also recited, and among the securities pledged to the bank to secure his debt was also recited the insurance policies in controversy, which had been previously delivered and assigned to the bank, as already stated. The first argument made here is that this assignment of certain securities and property on the 1st of March, made by Henry Wilcox to the Bank of Wilcox, was fraudulent and void,

and made and accepted for the purpose of hindering and delaying the other creditors of Henry Wilcox; and since the insurance policies were mentioned in said writing of the 1st of March, 1892, that therefore the assignment of the policies to the bank was fraudulent. There are two answers to this argument: (1.) As we have already seen, the title of the Bank of Wilcox to the insurance policies in no manner depends upon what was done on the 1st of March, 1892, between the Bank of Wilcox and Henry Wilcox. The writing entered into between the Bank of Wilcox and Wilcox on that day did not have the effect to validate the title of the bank to the insurance policies in controversy, if the bank's title to those policies was defective at that time; and as the bank at that time held possession of the insurance policies and it had a valid assignment of them, nothing that occurred between the Bank of Wilcox and Henry Wilcox on the 1st of March had the effect of invalidating the title of the bank to said insurance policies. The transaction between the Bank of Wilcox and Henry Wilcox on said March 1 did not have the effect, nor was it intended to have the effect, of transferring to the bank the insurance policies previously issued to the Wilcox Lumber Company. At that time, and long before that time, the bank had acquired the possession and assignment of those policies. The most that can be said of the transaction between the Bank of Wilcox and Wilcox on the 1st of March, so far as the policies in controversy are concerned, is that they were mentioned and scheduled as among the assets turned over by Wilcox to the Bank of Wilcox to secure his indebtedness to it. (2.) It was not necessary for the district court to pass upon the validity of the sale and assignment of securities made by Henry Wilcox to the Bank of Wilcox on the 1st of March, 1892, in order to reach the conclusion and render the decree it did in this case. The evidence abundantly sustains the finding of the court that the policies in controversy were delivered and assigned by the Wilcox Lumber Company

(Henry Wilcox) to the Bank of Wilcox to secure the payment to that bank of a debt of more than $4,000 which Henry Wilcox, under the name of the Wilcox Lumber Company, was owing the bank for money borrowed from it and used by him in the conduct of the lumber business; and there is not in all the record a single suggestion that either Henry Wilcox or the Bank of Wilcox was actuated with any fraudulent purpose whatever in and about the transaction of assigning these insurance policies to the bank. But if the district court made any finding whatever as to the good faith of the transaction between the Bank of Wilcox and Henry Wilcox on the 1st of March, it must have found that that transaction was in good faith. Whether the transaction was had with honest motives on the part of the bank and Wilcox, or whether it was for the purpose of hindering, delaying, or defrauding the creditors of Wilcox, was purely a question of fact and not of law. (See Compiled Statutes, ch. 32, sec. 20.) The evidence justified the district court in making a finding that that transaction was in all respects in good faith. Indeed, had the court found specially that the transaction between the bank and Wilcox on the 1st of March was made with a fraudulent purpose, it is very doubtful if the evidence would sustain such a finding. At the time of the transaction between the bank and Wilcox on the 1st of March, 1892, when Wilcox transferred to the bank certain securities, it is not pretended but that he was largely indebted to the bank.

2. A second argument relied on for a reversal of the decree is that the Wilcox Lumber Company was a copartnership, composed of Henry Wilcox and D. C. Shetler; that the debts of the appellants are copartnership debts; that the fund in court arising from the insurance policies is a copartnership fund, and that the debt owing to the bank by Wilcox was the individual debt of Henry Wilcox; and that, therefore, the appellants are entitled to have the fund in court paid upon their claims to the exclusion of the claim of the Bank of Wilcox. There are

several things to be said of this contention. (1.) If the Wilcox Lumber Company was a copartnership, then, of course, the claims of the appellants were copartnership debts; but if the Wilcox Lumber Company was a copartnership, then its debt to the bank was a copartnership debt; and the court has specially found that the fund in controversy was pledged by the Wilcox Lumber Company to pay its debt to the bank. (2.) If the Wilcox Lumber Company was a copartnership, it had a right to prefer one of its creditors to the exclusion of another, provided the preference was made and accepted without any fraudulent purpose. A copartnership does not hold its property in trust for its creditors, nor have creditors a lien upon the property of a copartnership simply because they have given it credit. Therefore, if we assume counsel's contention to be correct, that the Wilcox Lumber Company was a copartnership, composed of Henry Wilcox and Shetler, we do not see how that would help the appellants' case. (3.) The only interest Shetler had in the property, as has already been stated, was that, as compensation for his time and services in attending to the business, he was to have one-half of the profits of the business. He did not own any part of the property embarked in the venture; he had no right to control or dispose of the property, except as an ordinary retail salesman; and he was not responsible for any loss incurred in the business nor for any of the debts of the business. We think, therefore, that he was not a partner. "The receipt by a party of a share of the profits of a venture merely as compensation for services, such party having no interest in the property made the subject of the venture and no power in the management or control of such property, does not constitute such person a partner." (*Waggoner v. First Nat. Bank of Creighton*, 43 Neb., 84, and cases there cited; *Gibson v. Smith*, 31 Neb., 354.)

3. Counsel for the appellants insist that the evidence does not sustain the finding of the court that the insur-

ance policies were pledged to pay the debt which the Wilcox Lumber Company owed the bank. We think it does; but it is only fair to counsel to remark that if the evidence did not sustain that special finding of the court, and if the further contention of counsel be admitted, namely, that the bank had collected from property turned over to it by Wilcox a larger amount of money than Wilcox, under the name of the Wilcox Lumber Company, owed the bank, still the decree of the court would have to be sustained; because, as we have already seen, the Wilcox Lumber Company was simply Henry Wilcox, and whatever that lumber company owed the bank, he owed it; and if all the property pledged by Wilcox to the bank was a general pledge to pay his debts generally to the bank, then the appellants were not entitled to the fund in court, any more than they would have been entitled to any other part of the fund arising from the pledged property. So long as the debt of Wilcox to the bank remains unpaid, it has the right to hold all the property pledged to it to secure the payment of that debt, and other creditors of Wilcox cannot take a part of the fund pledged solely because the remainder would probably be sufficient to pay the debts of the pledgor. Of course the appellants may, if they desire, garnish the Bank of Wilcox and compel it to account to them for any surplus that may remain in its hands after the discharge of Wilcox' debt to it; but they are not entitled to a part of the pledged property simply because the remainder is probably sufficient to pay the debt for which the property is pledged. The district court was right in its conclusion and its decree is

AFFIRMED.

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY v. IDA L. KRAYENBUHL.

FILED MAY 19, 1896. No. 6384.

1. **Railroad Companies:** SPEED OF TRAINS. In the operation of a railway train outside of towns and villages, no rate of speed, however great, is alone sufficient evidence to establish negligence. *Burlington & M. R. R. Co. v. Wendt*, 12 Neb., 76, followed.
2. **Fellow-Servants:** EMPLOYES OF RAILROAD COMPANY. The foreman of a section crew and an engineer in charge of a locomotive drawing a train not connected with the work of the section men are not fellow-servants within the meaning of the rule forbidding a recovery for injuries caused by the negligence of a fellow-servant. *Union P. R. Co. v. Erickson*, 41 Neb., 1, followed.
3. **Witnesses:** FALSE TESTIMONY. The maxim, *falsus in uno, falsus in omnibus*, applies only where a witness has knowingly and willfully testified falsely as to a matter of fact. *Buffalo County v. Van Sickle*, 16 Neb., 363, followed.
4. **Railroad Companies:** SIGNALS. It is error to instruct a jury that it may consider whether or not statutory highway signals were given by an approaching train in determining whether the train was in other respects negligently operated.
5. ———: OBSTRUCTION ON TRACK: DUTY OF SECTION-HAND. A section man cannot be charged with contributory negligence because he remained upon the track for the purpose of removing an obstruction endangering an approaching train, when he might have saved himself by abandoning the track and leaving the train to its fate.

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

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

E. R. Dean, *A. J. Evans*, and *E. W. Hale*, *contra*.

IRVINE, C.

This was an action brought under chapter 21, Compiled Statutes, by Ida L. Krayenbuhl, as administratrix of the

estate of John Krayenbuhl, deceased, against the Omaha & Republican Valley Railway Company, to recover on account of injuries resulting in the death of said decedent. There is no necessity of reviewing the whole case in detail, because many questions presented in the district court have since the trial there been decided by this court in other cases. A brief statement of the evidence is, however, essential to a consideration of the questions which we deem it necessary to pass upon.

John Krayenbuhl, the deceased, was a section foreman in the employ of the railway company. During the forenoon of the 18th day of January, 1892, he was proceeding westward along the track of the railway company on a hand-car carrying a railway rail, and accompanied by one man under his direction and control. Snow was falling and a wind prevailed. The depth of snow and the velocity and direction of the wind are matters concerning which the evidence is conflicting; but these facts are not very material to the questions of law presented. The track, after pursuing a straight course to the westward for some distance, crossed a highway, and soon thereafter curved to the south, following in a general way the meanderings of a stream. In its course it passed through some cuts. Krayenbuhl and his companion, Martin, upon entering these cuts found that the track was obstructed by snow. Krayenbuhl sent Martin back toward the east with a flag to warn approaching trains, and proceeded to shovel snow from the track ahead of the hand-car, pushing the hand-car on as he progressed. When Martin, carrying the flag, had gone something over a hundred yards east of the hand-car, a train consisting of a locomotive and way car, running at a speed estimated by different witnesses at from eighteen to forty-five miles per hour, approached from the east. Martin signalled the train to stop and Krayenbuhl, evidently on hearing the train approach, removed the rail from the hand-car and was in the act of removing the hand-car from the track, when the train struck him, breaking his neck and

killing him. The negligence alleged was in running the train at a dangerous rate of speed, in failing to give warning of its approach, and in disregarding the signal given by Martin. There are some other allegations of negligence, but proof in support thereof was excluded by the district court, and these it is not necessary to state. The point where the accident occurred was not within any town or city, and it has been repeatedly held that no rate of speed is of itself negligence under such circumstances. (*Burlington & M. R. R. Co. v. Wendt*, 12 Neb., 76; *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb., 90; *Missouri P. R. Co. v. Hansen*, 48 Neb., 232.) The foundation of the action must therefore be in failing to give signals of the approach of the train and in the alleged failure to obey the signal of Martin to stop. A question much argued is as to whether the deceased and the engineer in charge of the train were fellow-servants. If they were so as a matter of law, a summary disposition of the case might be made; but the rules announced in *Union P. R. Co. v. Erickson*, 41 Neb., 1, are applicable to this case and determine the question adversely to the contention of the railway company. We are therefore required to consider the case more with regard to details than the principal arguments of the railway company, if well founded, would require.

There is a conflict in the evidence as to whether the statutory signals were given of the approach of the train to the highway east of the point where the accident occurred. Several witnesses testifying on behalf of the plaintiff say that they heard no such signals. The engineer and conductor both testify, however, that the statutory signal was given. The court instructed the jury in effect that the highway signals were for the benefit of persons traveling upon the highway, and that the failure to give them would not tend to charge the railway company in this case. In view of the decision, rendered since the trial, in *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb., 849, these instructions were too broad; but the error was prejudicial to the plaintiff rather than to the railway com-

pany. But the court followed these instructions by the following: "However, if you find from the evidence that the law governing railway trains on their approaching highway crossings was not complied with in this case, and that the whistle was not blown or the bell rung on the train in question, approaching Foxe's crossing, then such fact should be considered by you as affecting or touching the credibility of the witnesses for the defendant who testified on this point, and also in considering by you whether or not said train was being run and operated in a careful and proper manner or otherwise." This instruction was prejudicially erroneous as to the railway company in two respects: In the first place, it was a distinct direction to the jury to consider whether or not the signals had been given as affecting the general credibility of the witnesses for the defendant who testified on this point. Both engineer and conductor had testified that the signals were given. The engineer testified that it was a stormy day, with a strong wind, while other witnesses testified that it was reasonably clear and the wind not strong. The engineer testified that the engine was covered with snow; that snow was banked up against the front windows of the cab and that the only lookout that he could maintain was through a side window; that in keeping such lookout his face had been frozen; that the train passed from time to time through snow-banks which completely obstructed his view and compelled him to withdraw his head; that he had passed through such a snow-bank immediately before seeing Martin with the flag; that he saw Martin when the latter was not more than thirty feet from him, and immediately took all available steps to stop the train. Witnesses for the plaintiff had testified that no attention whatever was paid to Martin's signal, and that the train proceeded without apparent check until the accident occurred. The effect of giving the instruction complained of was that the jury should examine into the question whether a signal had been given on approaching Foxe's crossing, and upon that fact to de-

termine the engineer's credibility upon all other facts in the case; and this without regard to whether the engineer's testimony as to having given the signal was willfully false or otherwise. The maxim, *falsus in uno, falsus in omnibus*, applies only where a witness has knowingly and willfully testified falsely as to a matter of fact. (*Buffalo County v. Van Sickle*, 16 Neb., 363; *Stoppert v. Nierle*, 45 Neb., 105.) In the second place, the instruction was erroneous because by its last clause it directed the jury that they should consider whether or not the highway signal had been given, as determining whether or not the train was generally run and operated in a careful manner. As already indicated, under the circumstances the failure to give the highway signal may have been important in determining whether the railroad company's negligence in not giving it caused the injury; but it could have no possible effect in determining whether or not the railroad company had been negligent in other respects. The jury would have no right to infer a negligent operation of the train in other particulars from a failure to give this signal, but the instruction was that it might do so. For the error in this instruction the judgment must be reversed.

We cannot, however, let the case rest here without disposing of another question which is likely to arise upon a new trial. The railroad company, by its offers of evidence and by tendering instructions, contended that if Krayenbuhl could have saved his life by abandoning the car upon the track and stepping aside, he was compelled to do so by virtue of rules of the company and general principles of contributory negligence. Instructions to this effect were refused and their refusal is assigned as error. The court was undoubtedly right in refusing these instructions. To have given them would have been contrary to law and would have countenanced a doctrine closely bordering upon brutality. A hand-car with a railroad rail upon it, when struck by a rapidly moving train, might have caused a wreck costing the lives of

many people. Krayenbuhl did right in remaining upon the track, after he heard the train approaching, for the purpose of removing the rail and afterwards the car if possible. Such conduct was not negligence; it was heroism. No law should be announced which would tend to deter railway employes from acts of such a character, and, so far as this court is concerned, no such law will be announced.

REVERSED AND REMANDED.

ELIAS SAGE ET AL., APPELLEES, V. CITY OF PLATTSMOUTH ET AL., APPELLANTS.

FILED MAY 19, 1896. No. 8027.

1. **Municipal Corporations:** EXTENSION OF BOUNDARIES: TAXES: INJUNCTION. Where the officers in whom power is vested generally to define or extend the boundaries of a city have undertaken to extend its boundaries, the owner of land so incorporated cannot, at least after the lapse of a number of years, maintain an action for the purpose of restraining the collection of city taxes, on the ground that there was no authority to incorporate the particular land in question. *South Platte Land Co. v. Buffalo County*, 15 Neb., 605, followed.
2. **Review:** SUFFICIENCY OF PETITION. The sufficiency of the petition to state a cause of action may be challenged at any stage of the proceedings, even in this court on appeal.

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

John A. Davies, for appellants.

Beeson & Root, contra.

IRVINE, C.

The petition of Elias Sage and Caroline Sage, his wife, plaintiffs, against the city of Plattsmouth and Louis

Eickhoff, treasurer of Cass county, defendants, in brief alleged that the city of Plattsmouth was originally incorporated by a special act of the territory of Nebraska in 1855, which act defined the limits of the city and conferred no power to extend such limits; that this act was amended in 1866 so as to include certain other territory, but without conferring power upon the city to further extend its limits; that the plaintiffs are the owners of certain land described in the petition, occupied by them as a homestead, used as one tract for agricultural purposes alone; that neither said lands nor the plaintiffs receive any benefit from the city of Plattsmouth, and that the city affords them neither water nor gas or electric lights; nor does it afford them police protection; that the city, without the knowledge or consent of the plaintiffs, in March, 1887, passed an ordinance defining the limits of the city and including therein plaintiffs' land, and caused a copy of said ordinance to be recorded in the office of the register of deeds; that none of the said land had ever been laid out into lots or blocks; that city taxes had been assessed and levied upon said land from and after 1887 every year, casting a cloud upon the title thereof; that the defendant, the county treasurer, was about to advertise and sell said land for said city taxes. The prayer was that the ordinance of 1887 be declared null and void in so far as it attempts to include plaintiffs' land within said city; that the cloud cast upon plaintiffs' title by the passage of said ordinance be removed; that all city taxes levied upon said lands be declared void, and that the treasurer and his successors be enjoined from collecting any city taxes whatever upon said land. The treasurer answered by a general denial; the city by a general denial, coupled with an averment that the land described was lawfully incorporated within the city. There was also an issue raised as to the classification of the city, the plaintiff contending that it was a city of the second class having more than 1,000 inhabitants, and governed by chapter 14, article 1, Compiled Statutes, and

the defendants contending that it was a city of the second class having more than 5,000 inhabitants, and governed by chapter 14, article 2, Compiled Statutes. The court found that it was a city of the latter class, but found on other issues generally in favor of the plaintiffs, and entered a decree in accordance with the prayer of the plaintiffs' petition. The defendants appeal.

We cannot in this proceeding investigate and determine the principal question sought to be litigated. In *South Platte Land Co. v. Buffalo County*, 15 Neb., 605, it was sought to enjoin the collection of certain taxes levied on behalf of the city of Kearney upon certain land within the established limits thereof. The injunction was sought upon the ground that the land taxed was agricultural land which had not been surveyed and platted into lots. The court said: "There is no doubt the owners of land not platted may object to such land being included within the boundaries of the corporation, and in a proper proceeding for that purpose may have it excluded; but if the boundaries of a town are extended over agricultural lands on the petition of the owner, or with his tacit assent, and have included such lands without objection for ten or twelve years, there must be some equitable ground for an injunction aside from the mere fact that the lands were improperly included in the town site." The injunction was therefore refused. It is true that nothing appeared in that case except that the lands had not been platted into city lots; and the language quoted, taken by itself, implies that an injunction might be granted where other grounds for equitable relief appear. But in *McClay v. City of Lincoln*, 32 Neb., 412, the plaintiffs had paid certain city taxes under protest, and brought the action to recover back the money, alleging generally the same grounds for relief as are here alleged. The court said: "While it is probably true that the action of the commissioners in taking the ground into the boundaries of the town was unauthorized under section 40 of chapter 14, Compiled Statutes, and would not have been

conceded by the courts, at that day, as a legal proceeding, had a proper case been made and brought to issue, and while the commissioners themselves might have changed their action under an immediate protest of the owner or the agent of the land, it would now seem too late, from the lapse of time, incompetency of the courts, and from continuous usage and custom, to set aside their action in the present proceeding, collateral to it only in the assessment of taxes." *State v. Dimond*, 44 Neb., 154, was an action in the nature of *quo warranto* to test the legality of the incorporation of the city of College View. The court said: "An examination of the subject is necessarily incomplete which omits a reference to another aspect thereof, viz., that suggested by *South Platte Land Co. v. Buffalo County*, 15 Neb., 605, *McClay v. City of Lincoln*, 32 Neb., 412, and *Lancaster County v. Rush*, 35 Neb., 120. It was therein held that an action will not lie to enjoin the collection of taxes levied upon agricultural property within the boundaries of a city or village, or for the recovery of such taxes paid under protest. The validity of the incorporation, although apparently presented by the argument in each case, was not decided, the court holding that it could not be questioned in a collateral proceeding. * * * The views herein expressed are not only consistent with the doctrine of those cases, but a careful reading of them suggests the conclusion which we have reached." The cases cited control that before us. The effect of those cases is that the incorporation, although it may not have been authorized by the charter of the city or by general law, was not void and could not be attacked in a collateral proceeding. The case must be distinguished from *State v. Dimond, supra*, which was a direct proceeding by *quo warranto* to investigate the legality of the incorporation, as was also *State v. Uridil*, 37 Neb., 371. It must also be distinguished from *City of Wahoo v. Dickinson*, 23 Neb., 426, *Village of Hartington v. Luge*, 33 Neb., 623, and *City of Wahoo v. Tharp*, 45 Neb., 563. These were proceedings under section 99, article 1, chapter 14,

Compiled Statutes, relating to cities of the second class having less than 5,000 inhabitants and to villages. Under this section proceedings for annexation are begun by a resolution of the council declaring on the question of such annexation of territory, and if such resolution be adopted by a two-thirds vote the city or village presents to the district court a petition praying for the annexation. Notice is served on the owners of territory sought to be included. Issues are joined and the case tried on the question of annexation. Under the authorities cited this statute makes the annexation in such cases to a large extent a judicial question; and these cases were direct proceedings under the statute involving that question; but, as pointed out in *City of Hastings v. Hansen*, 44 Neb., 704, in the absence of statute the annexation of territory to a municipal corporation is a legislative and not a judicial proceeding; and section 99 above cited is not applicable to cities of the second class having more than 5,000 inhabitants. Whether Plattsmouth is governed by article 1 or article 2, chapter 14, Compiled Statutes, is immaterial to the case at bar. All the cases where the propriety of an incorporation has been inquired into have been cases relating to cities governed by article 1 aforesaid, or else they have been proceedings in *quo warranto* to test the legality of the incorporation. In *South Platte Land Co. v. Buffalo County*, *supra*, and in *McClay v. City of Lincoln*, *supra*, some stress was laid upon the length of time during which owners of land had acquiesced in the proceedings of the authorities attempting the incorporation. We do not undertake here to say whether or not that is a controlling feature, because in this case the incorporation was attempted in 1887, and suit was not brought until 1894. During all this time, according to the plaintiffs' own averments, during each of the intervening years, city taxes had been levied upon their land. So that if the former cases in any degree rested upon the ground of laches or estoppel, the same features apply to this case.

It is suggested in the brief of appellees that no question was raised in the district court as to the propriety of the relief sought or procedure adopted, and that therefore none can now be raised. We entertain no doubt that the question now presented was not called to the attention of the learned district judge; but it goes to the sufficiency of the petition, and this can be raised at any time. The incorporation of cities and the method of annexing territory is now governed by general law, so that the pleading of the special charters does not control the case. It is probable that the rule stated should be limited to cases where the annexation has been by the officers or body vested by such general law with the power of determining or extending the city's boundaries. Whether it would extend to other cases is a question not herein involved.

REVERSED AND DISMISSED.

ABIGAIL A. BROTHERTON, ADMINISTRATRIX, V. MANHATTAN BEACH IMPROVEMENT COMPANY.

FILED MAY 19, 1896. No. 6639.

1. **Negligence.** Negligence is the failure to exercise such care, prudence, and forethought as under the circumstances duty requires should be given or exercised. It may consist in the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do. *Foxworthy v. City of Hastings*, 23 Neb., 772, followed.

2. ———: PROXIMATE CAUSE. To establish a cause of action based on negligence it is not sufficient for the plaintiff to show that negligence existed, but he must also show that the negligence pleaded and proved was the proximate cause of the injury complained of.

3. ———: PRECAUTIONS AGAINST INJURY. A person owing a duty toward another may be liable for injuries resulting to the latter, although the former was in the first instance in nowise negligent and although the latter may, by his own negligence, have placed

himself in a position of danger, provided that after discovering the latter's danger the former failed to take reasonable precautions which, had they been taken, would have averted the injury.

4. ———: BATH-HOUSE COMPANY: LIABILITY FOR DEATH OF BATHER. A company maintaining a bathing resort and letting out its privileges to the public for hire is bound to take such precautions for the safety of bathers as a person of ordinary prudence would take under the circumstances; and whether or not proper precautions have been taken is ordinarily, like other questions of negligence, a question of fact.

5. ———: ———: ———. Accordingly, where such a company was notified of a bather's disappearance so soon after he had been seen as to warrant the inference that an immediate search in the water would have resulted in his rescue before death, and the company had no one present to watch bathers and rescue those in danger and such agents of the company as were present failed to make a search in the water for the missing man, it was erroneous to instruct the jury to return a verdict for the defendant.

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

The opinion contains a statement of the case.

B. G. Burbank, for plaintiff in error:

The court erred in instructing the jury to return a verdict in favor of the defendant in error. The questions of fact, as disclosed by the evidence upon the trial, were for the jury to pass upon, and it was not the province of the court to take the question of fact from the jury. Whether there was contributory negligence upon the part of Hiram S. Brotherton was a question of fact for the jury to determine, and not for the court. (*Dolby v. Tingley*, 9 Neb., 417; *Grant v. Cropsey*, 8 Neb., 209; *Deitrich v. Hutchinson*, 20 Neb., 55; *Nebraska City v. Rathbone*, 20 Neb., 294; *Williams v. Town of Clinton*, 28 Conn., 266; *Atchison & N. R. Co. v. Bailey*, 11 Neb., 336; *Sioux City & P. R. Co. v. Stout*, 17 Wall. [U. S.], 657; *Park v. O'Brien*, 23 Conn., 338; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich., 99; *Union P. R. Co. v. O'Hern*, 24 Neb., 777; *City of Plattsmouth v. Mitchell*, 20 Neb., 231; *City of Lincoln v. Gillilan*, 18 Neb.,

117; *Orleans Village v. Perry*, 24 Neb., 833; *City of Lincoln v. Beckman*, 23 Neb., 682; *Stevens v. Howe*, 28 Neb., 565; *Union P. R. Co. v. Mertes*, 35 Neb., 211.)

Gregory, Day & Day, contra.

References: *Murphy v. Hays*, 23 N. Y. Sup., 70; *Murphy v. Hays*, 68 Hun [N. Y.], 450; *Bradley v. Ft. Wayne & E. R. Co.*, 94 Mich., 35; *Western R. Co. of Alabama v. Mutch*, 11 So. Rep. [Ala.], 894.

IRVINE, C.

This was an action under chapter 21, Compiled Statutes, by Abigail A. Brotherton, as administratrix of her son, Hiram Brotherton, to recover damages on account of the death of her intestate, alleged to have been caused by the defendant's negligence. At the close of the evidence the district court directed the jury to return a verdict for the defendant. The correctness of this instruction is presented for review.

The evidence discloses that Brotherton, a youth seventeen years of age, together with one Campion, a youth of about the same age, both residing in Omaha, went together on the 8th day of August, 1892, to Lake Manawa, a summer resort in Pottawattamie county, Iowa. There is on the shore of this lake an establishment maintained by the defendant company for the purpose of affording facilities to bathers. There are bath-houses, toboggan slides in the water, a platform for diving, and it seems, also, certain other resorts on the shore, such as a restaurant, a photograph gallery, and a shooting gallery. The privileges of these facilities are let out to the public by the defendant company for hire. Brotherton and Campion arrived at the beach about 4 o'clock in the afternoon, paid the customary fee for bathing privileges, donned bathing suits, and entered the water. Campion seems to have been very expert as a swimmer; Brotherton was able to swim, but was not expert. They remained in the

water not less than half an hour and perhaps more than three-quarters of an hour, and were together most of the time. Finally Campion returned to the bath-house, believing that Brotherton had preceded him. Not finding him there, he made inquiry, and learning that he had not returned, went back to the lake and searched for him among the bathers. He was not found and his loss was again reported. This resulted in a search through which his dead body was discovered, about 10 o'clock that night, at the bottom of the lake. The plaintiff alleged negligence on the part of the defendant in failing to provide suitable guards and notices whereby the depth of the water should be indicated, in failing to provide proper management to superintend bathing, and in failing to provide means for resuscitating persons overcome by strangulation or otherwise while in the water; also, in failing to maintain appliances to avoid drowning and for the purpose of resuscitation. Further, that no person was present on behalf of the defendant to search for or recover Brotherton immediately upon his disappearance from the surface of the water. These averments of negligence are more specific in the petition than we have given them here; but what we have said in a general way covers the averments.

Except on one point, we think the facts were such as to fully warrant the action of the trial court. There is evidence tending to show that, proceeding from the shore outward, the water was for more than one hundred feet comparatively shallow. Through this shallow water extended the diving platform referred to. In it were also constructed two toboggan slides. A few feet beyond the end of the platform and the outer toboggan slide there is evidence tending to show that there was a sudden deepening of the water; so that in the course of a very few steps it deepened from five or six feet to fifteen or twenty. Brotherton's body was found in this deep water. There was on the outer toboggan slide a sign as follows: "Dangerous! Keep Off Unless You Can Swim!" This mani-

festly referred to the toboggan slide and to nothing else. There were no life lines and no other signs to warn swimmers of the depth of the water. In a proper case the failure of persons maintaining a public bathing place to protect their patrons by suitable lines or warnings might afford a ground of recovery in case of injury. But there is absolutely nothing in the evidence to show that Brotherton's death was in any manner due to the failure of the company to provide such safeguards. There is no evidence whatever touching the circumstances of his drowning. He and Campion had twice, at least, swam out from the outer toboggan slide into the deep water. There is nothing to show that Brotherton was not aware of the depth of the water. They had returned, and when Brotherton was last seen by any witness it was by Campion himself, who testifies that they were standing near the platform at a point where the water was about knee deep. Campion's attention was then distracted by a conversation among other bathers near by. He proceeded thence to the bath-house, thinking that Brotherton had preceded him. How Brotherton got back into the deep water and what occurred there is not revealed by any evidence. It is not sufficient to establish a case for the plaintiff that negligence should be proved on the part of the defendant, but it must also appear that the negligence proved was the proximate cause of the injury. So far we have nothing, unless we indulge in conjecture absolutely unfounded on any facts established, to show that the failure of the company to provide life lines at the boundary of the shallow water and danger signals beyond them had any connection whatever with Brotherton's death.

But we think that there was evidence relevant to the issues in regard to subsequent facts which should have been submitted to the jury. Even though the defendant had not been in anywise negligent in providing facilities for the bathers, and although the deceased by his own negligence may have placed himself in such a situation

that his life was in danger, still, if the company, after becoming aware of such facts, was guilty of negligence but for which Brotherton's life would not have been lost, it was still liable. One of the allegations of negligence is that the company did not have present any person or persons superintending the bathing, or to search for and recover Brotherton upon his disappearance from the surface. Campion's testimony is that after leaving Brotherton he went immediately to the bath-house on the shore, and on discovering that Brotherton had not preceded him he at once notified the person in charge of the bath-house of the facts. Instead of immediately instituting a search upon the water, this person advised Campion to look in the photograph gallery and in a saloon on the shore. Campion knew from Brotherton's habits that he would not be in the saloon. He did look elsewhere on the shore and then returned to the water and began diving, if his own testimony is to be believed, searching for the body; and for some time no effort was made by any of the company's employes to search in the water. Negligence is the failure to exercise such care, prudence, and forethought as under the circumstances duty requires should be given and exercised. It is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. (*Foxworthy v. City of Hastings*, 23 Neb., 772.) As has been repeatedly said, the existence of negligence is generally a question of fact. It is for the jury to determine, where the facts are disputed, or where from the undisputed facts different minds may reasonably draw different conclusions as to the existence of negligence. This company was engaged in the business of carrying on a bathing resort. It let out for hire the privileges of that resort. The evidence tends to show that for several years it was frequented during the bathing season by an average of ten thousand bathers a month. It is disclosed that the com-

pany kept at the beach a boat for the express purpose of use in case of accident to bathers; but there does not seem to have been any one whose duty it was to watch over the bathers or to rescue those in danger. In this case notice was brought home to an agent of the company, close to the shore, that a bather was missing, by Campion's inquiry upon entering the bath-house. Campion says that he told this man that he was unable to find Brotherton two minutes from the time he left the latter. Campion may have mistaken the time; but we have evidence other than his own estimate. From the testimony as to the depth of the water, coupled with the testimony of Campion that when he last saw Brotherton they were standing in water knee deep, it would seem that Brotherton must have proceeded out into the lake about seventy-five feet before he got beyond his depth. Campion must then have been on the way to the bath-house. Assuming Campion's testimony to be true, the proof rises to a moral certainty that when Campion first disclosed Brotherton's absence, the latter could not have been dead. Assuming again the truth of Campion's testimony, instead of at once taking measures to search for Brotherton in the water, where he was last seen and where the danger existed, no search whatever was made by the company, and their direction to Campion was to search on the shore, where no danger was to be apprehended. We think that it is a reasonable inference that persons of ordinary prudence conducting a bathing resort, frequented by ten thousand people a month, should in the exercise of ordinary care keep someone on duty to supervise bathers and rescue any apparently in danger; and if not, then it is certainly a reasonable inference that persons so situated should, on ascertaining that a person last seen in the water is missing, without a moment's delay exert every effort to search for that person in the water, and not merely advise a youthful companion of the missing person to search on the land and coolly watch the result of such search. We think in this aspect

of the case, and this only, the evidence presented an issue which should have been submitted to the jury, and for that reason the peremptory instruction was erroneous.

Out of abundance of caution it may be well to repeat that our comments on the evidence have been based upon that theory of it most favorable to the plaintiff, as is required by the manner in which the case is presented. The evidence upon the vital points was conflicting. It was for the jury, and no more for this court than for the district court, to pass upon; and we are expressing no opinion whatever in regard to the weight of conflicting evidence, or even as to the inference which the jury should draw from undisputed facts. We merely hold that the evidence, viewed in one light, justified an inference favorable to the plaintiff, should the jury draw such inference.

REVERSED AND REMANDED.

LEAMAN BRUCE V. STATE OF NEBRASKA.

FILED MAY 19, 1896. No. 8273.

1. **Statutes: EVIDENCE.** Printed copies of the statute laws purporting or proved to have been published under the authority of the state are presumptive evidence, and presumptive evidence only, of such laws. The original enrolled act bearing the certificates of the presiding officers of the two houses of the legislature and the approval of the governor, and deposited with the secretary of state, is the controlling evidence.

2. ———: **AMENDMENTS: RAPE.** Chapter 105 of the Session Laws of 1887 is a valid amendment of section 12 of the Criminal Code, although the repealing clause in the published act purports to repeal section 11 instead of section 12 as theretofore existing; the enrolled act disclosing that the legislature in fact repealed said original section 12.

3. **Evidence: WORDS: CRIMINAL LAW.** When a word used by a witness has a signification so generally known that it must have been understood by the triers of fact, an appellate court will not disre-

gard such signification or treat the word as unintelligible merely because from motives of decency and propriety lexicographers have ignored it.

ERROR to the district court for Burt county. Tried below before KEYSOR, J.

H. Wade Gillis, for plaintiff in error.

A. S. Churchill, Attorney General, and *George A. Day, Deputy Attorney General*, for the state.

References: *Redfield v. State*, 39 Neb., 192; *Edgar v. McCutchen*, 9 Mo., 448.

IRVINE, C.

The plaintiff in error was convicted upon an information charging him, being of the age of more than eighteen years, with having carnally known and abused a certain female child under the age of fifteen years, to-wit, of the age of fourteen, with her consent. The offense was alleged to have been committed May 9, 1893, and the information was filed March 26, 1894. There is an act of the legislature of 1895 (Session Laws, 1895, ch. 74), relating to this offense; but it will be observed that the dates stated are such that this act is without bearing on the case.

Of the errors assigned, those presented by the briefs relate to only two questions. The first, presented by several assignments of error, involves the constitutionality of chapter 105 of the Session Laws of 1887. In 1885 an act was passed (Session Laws, 1885, ch. 101) amending section 12, chapter 4, of the Criminal Code so as to fix what is loosely styled "the age of consent" at twelve years. Chapter 105 of the Laws of 1887 purports in its title and enacting clause to amend this section, and makes the so-called "age of consent" fifteen years, but the repealing clause in the published Session Laws of 1887 repeals not section 12, but section 11 of the Criminal

Code, relating to a different offense. The complaining witness in this case being fourteen years of age, the conviction could not be sustained if the act of 1887 was as it appears in the printed edition of the Session Laws. (*City of South Omaha v. Taxpayers' League*, 42 Neb., 671.) The enrolled act on file in the office of the secretary of state has, however, been examined, and it is found that the act as passed by the legislature and approved by the governor properly repealed section 12 of the Criminal Code as theretofore existing, and not section 11, as the printed laws, through a typographical error, indicate. Section 419 of the Code of Civil Procedure merely makes the printed laws published under authority of the state presumptive evidence of such laws. In case of conflict the original enrolled act, bearing the certificates of the officers of the two houses of the legislature and approval of the governor, and deposited with the secretary of state, is the controlling evidence.

The other question raised goes at once to the applicability of a certain instruction and the sufficiency of the evidence to sustain the conviction. The prosecuting witness, in describing the commission of the offense, made use of a word of generally known signification, but which has been ignored by lexicographers. The same considerations which have excluded such terms from the dictionaries forbid a frank discussion of the question presented in this opinion. When a word has a signification so generally known that it must have been understood by the triers of fact when used by a witness, an appellate court should not disregard such signification merely because, from reasons of decency and propriety, lexicographers have ignored it. We are satisfied that the evidence was sufficient and the instruction, of which no complaint is made as a statement of the law, was applicable to the evidence.

JUDGMENT AFFIRMED.

AMERICAN BUILDING & LOAN ASSOCIATION V. LIZZIE REES.

FILED MAY 20, 1896. No. 6500.

Contracts: CORPORATIONS: WITHDRAWAL OF STOCKHOLDERS: BUILDING AND LOAN ASSOCIATIONS.

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

Barnes & Tyler and *C. M. Cooley*, for plaintiff in error.

John S. Robinson and *Powers & Hays, contra.*

PER CURIAM.

The question suggested by the record of this case being identical with those presented in *American Building & Loan Ass'n v. Rainbolt*, 48 Neb., 434, and *American Building & Loan Ass'n v. Bear*, 48 Neb., 455, the judgment of the district court is reversed and the cause remanded for trial *de novo*.

REVERSED.

AMERICAN BUILDING & LOAN ASSOCIATION V. CHARLES EBLE.

FILED MAY 20, 1896. No. 6491.

Contracts: CORPORATIONS: WITHDRAWAL OF STOCKHOLDERS: BUILDING AND LOAN ASSOCIATIONS.

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

C. M. Cooley and *Barnes & Tyler*, for plaintiff in error.

George E. Pritchett, John S. Robinson, and *Powers & Hays, contra.*

PER CURIAM.

This cause is submitted upon substantially the same record as in *American Building & Loan Ass'n v. Rainbolt,* 48 Neb., 434, and *American Building & Loan Ass'n v. Bear,* 48 Neb., 455, and following those cases the judgment is reversed and the cause remanded for further action by the district court.

REVERSED.

HARVEY LINK V. WILLIAM J. CONNELL.

FILED MAY 20, 1896. No. 6524.

1. **Executions:** SALE UNDER DORMANT JUDGMENT: COLLATERAL ATTACK. A sale of real estate to satisfy a judgment which has become dormant under the provisions of section 482, Code of Civil Procedure, is voidable only, and cannot be assailed in a strictly collateral proceeding. (*Gillespie v. Switzer,* 43 Neb., 772.)

2. **Validity of Order Not Signed:** JUDGES: PRACTICE. Where the record discloses an order of the district court sufficient in form but omitting the name of the judge by whom it was made, the fact that the sole judge of the district named was at the date thereof disqualified to act in such proceeding by reason of having been attorney for one of the parties raises no presumption against the validity of such order in view of the statute authorizing judges to interchange and hold court for each other.

3. **Mortgages:** SALE BY SHERIFF INSTEAD OF MASTER: CONFIRMATION. Where a decree of foreclosure directs that the mortgaged property be sold by a master therein named, a sale by the sheriff to satisfy said decree under an order subsequently issued by the clerk is voidable at most, and such irregularity is cured by an order of confirmation regularly made.

4. **Deeds:** ATTESTATION. While it is customary to make use of the words "witness" or "witnessed" in attesting the execution of deeds and other instruments affecting the title to real estate, such practice is neither necessary nor universal. Any expression from

which it appears that the subscriber in fact witnessed the execution by the grantor sufficiently answers the requirement of section 1, chapter 73, Compiled Statutes.

5. **Mortgages:** DECREE OF FORECLOSURE. The pendency of a proceeding for foreclosure does not terminate with the entry of an order for the sale of the property bound by the lien, but continues as a rule, for the purpose of the enforcement of the decree, until confirmation of the sale and disposition of the proceeds thereof.

6. ———: PURCHASER OF LAND: NOTICE OF SALE AND CONFIRMATION. One who purchases property bound by a decree of foreclosure is, in the absence of equitable considerations resulting from the circumstances of the particular case, charged with such notice as the record imparts, and is not entitled to personal notice of sale and confirmation subsequently made in the enforcement of such decree.

7. **Adverse Possession.** Evidence examined, and *held* to sustain finding against the plaintiff in error upon the issue of adverse possession of property in dispute.

8. **Trial.** Verdict set out in opinion *held* sufficient to sustain the judgment complained of.

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

C. A. Baldwin and *W. R. Morris*, for plaintiff in error.

Connell & Ives and *O. H. Ballou, contra.*

POST, C. J.

This was an action of ejectment by Connell, the defendant in error, against the plaintiff in error, Link, in the district court for Douglas county, the subject of the controversy being the northwest quarter of section 2, township 14, range 11, in said county. A trial was had in the court below, resulting in a verdict and judgment for the plaintiff therein for the possession of the property in dispute and for $1,800 damage, the value of the rents and profits thereof, and which has by appropriate proceeding been removed into this court for review. Both parties claim through Emanuel H. Link, who acquired title to the land described by patent from the United

States. Connell, according to the evidence in the record, claims through certain *mesne* conveyances from Eliza K. Tarkington, to whom said property was conveyed by Henry Grebe, sheriff and master commissioner, March 17, 1873, while the plaintiff in error, Link, claims by virtue of a quitclaim deed from his brother, Emanuel H. Link, the patentee named, bearing date of June 13, 1870. As most of the questions discussed relate to the proceeding antecedent to the execution of the deed to Mrs. Tarkington, it is deemed proper to notice, in their chronological order, the steps which led to that event.

On the 10th day of August, 1857, Emanuel H. Link, being the owner of the property in controversy, by mortgage deed conveyed the same to F. M. Aiken, as security for the note of the mortgagor, of even date therewith, for $280. Subsequently the Bloomington Bank, as holder of said note and mortgage, instituted proceedings for foreclosure in the territorial district court for Douglas county, and which were prosecuted to final decree on the 7th day of July, 1860. Provision was by said decree made for the sale of the mortgaged property by James G. Chapman, master commissioner, in case the respondent therein, Link, failed to pay the amount adjudged due within twenty days from and after the date last mentioned. On the 23d day of December, 1872, George Armstrong, as clerk of the district court, issued an order of sale for the satisfaction of said decree directed to the sheriff of Douglas county. On February 11, 1873, said order of sale was returned by Henry Grebe, sheriff, showing a sale in due form of the property mentioned to Eliza K. Tarkington. On March 10, 1873, an order was, on motion of the complainant, made to show cause by the following day why the said sale should not be confirmed. On the day last mentioned, to-wit, March 11, there was a formal order of confirmation, with direction to the sheriff to execute a deed conveying said property to the purchaser above named, and on March 17, following, said property was, pursuant to the last mentioned

order, conveyed to Mrs. Tarkington, the purchaser, by deed, in which the said Henry Grebe is described as sheriff and master commissioner.

It is in the first place contended that the decree in question had become dormant prior to December 23, 1872, and not having been revived in the manner prescribed by law, the order of sale issued on that day for its enforcement was without authority, and the subsequent proceedings pursuant thereto, including the order of confirmation, were without jurisdiction and void. A question discussed at length by counsel is whether section 482 of the Code, providing that any judgment shall become dormant in case execution shall not be issued thereon within five years, is applicable to decrees of foreclosure; but that question, although presented by another assignment, will not be examined in this connection, for two reasons: First, because we are unable to determine from the record that there was in fact any such failure as to bring the case within the operation of the statute; and second, assuming the section above cited to apply as well to decrees of foreclosure as to judgments at law, an order of sale for the enforcement of a dormant decree would at most be voidable only, and cannot be assailed in a strictly collateral proceeding. Whatever doubts may be entertained by other courts respecting the proposition last stated, it is no longer the subject of controversy in this jurisdiction. The precise question was presented in the recent case of *Gillespie v. Switzer*, 43 Neb., 772, in which, after conceding for the purpose of the argument that decrees of foreclosure are within the provisions of the statute, it was held, quoting from the syllabus, that "a sale on an execution issued upon a dormant judgment is merely voidable, and neither such sale nor the title acquired thereunder can be assailed in a purely collateral proceeding."

The order of confirmation is assailed as void upon the further ground that Hon. Geo. B. Lake, the judge by whom it was entered, was solicitor for the Bloomington

Bank in the suit against Emanuel H. Link, and who, as such, secured the decree of foreclosure upon which said order depends; but a careful examination of the record discloses no foundation whatever for that contention. It is true that George B. Lake appeared as solicitor for complainant in the foreclosure proceeding. There is, however, nothing in the record to indicate the name of the judge who allowed the order of confirmation. Assuming, as we are asked to do, that the solicitor named was at the date in question, to-wit, March, 1873, sole judge of the district court for Douglas county, still we cannot indulge the presumption that he entered the order complained of. By statute then in force judges were permitted to interchange and hold court for each other. (General Statutes, ch. 14, secs. 19, 55.) And a judge was then, as now, disqualified from acting except by mutual consent of parties, in any case or proceeding in which he had been attorney for either party. (General Statutes, ch. 14, sec. 33.) We are bound to presume, in view of the provision cited, that the order of confirmation was entered by one of the other judges of the state, or, if made by Judge Lake, that it was done with the consent of the parties thereto.

It is next argued that by terms of the decree James G. Chapman, as master commissioner, was alone empowered to advertise and sell the mortgaged property; that the order of sale issued to the sheriff was a usurpation of authority by the clerk, and that the sale and deed made in pursuance thereof are void and insufficient to pass the title of the property therein described. The order of sale was, it may be assumed, irregularly issued, and that application should have been made to the court to so modify the decree as to authorize its enforcement by the sheriff instead of by the master named. The error is, however, not one which affects the jurisdiction of the court and was cured by the order of confirmation. The jurisdiction of the court over the person of Emanuel H. Link cannot be doubted, since the record affirmatively shows an appearance by him. Any mere error in the prosecution of the

cause should, therefore, have been corrected by means of a direct proceeding for that purpose, and cannot be made the subject of a collateral attack upon the decree or subsequent orders essential to its enforcement. (*Crowell v. Johnson*, 2 Neb., 146; *McKeighan v. Hopkins*, 14 Neb., 361; *Neligh v. Keene*, 16 Neb., 407; *Taylor v. Coots*, 32 Neb., 30.) It is said in *Neligh v. Keene*, *supra:* "Where the court has jurisdiction the confirmation of the sale cures all defects and irregularities in the proceedings and such order cannot be attacked collaterally." It is unnecessary to review the cases cited in this connection by the plaintiff in error. It is sufficient that they in nowise conflict with the foregoing.

On the production of the record of the deed to Mrs. Tarkington counsel for plaintiff in error objected to its admission as proof of title on the ground that it was not witnessed as required by law, which objection was overruled and the deed received in evidence, and which ruling is now assigned as error. To the left of and below the signature of Henry Grebe the grantor, and immediately preceding the certificate of acknowledgment, as shown by the copy accompanying the bill of exceptions, appear the following words:

"In presence of
the above erasure and
interlineation of said
court made before
signing.
"GEORGE ARMSTRONG."

It is not pretended that the signature of George Armstrong, the alleged witness, is a forgery, or that it was written at a time other than that of the execution of the deed. It is possible, as argued by counsel, that the words above quoted have reference to erasures and interlineation appearing upon the face of the conveyance rather than the execution thereof. While that argument would doubtless have been effective as a reason for demanding the production of the original deed instead of the record,

it is without force as applied to the objection actually made; nor, in the view we take of the record, is it material to inquire whether the words in question refer to erasures or interlineations appearing upon the face of the deed, or whether they are parts merely of the printed form made use of by the conveyancer, since the remaining words, to-wit: "In the presence of * * * George Armstrong," is a sufficient attestation to answer the requirement of the statute. By section 1, chapter 73, Compiled Statutes, it is provided that deeds of real estate, "if executed in the state, must be signed by the grantor or grantors, being of lawful age, in the presence of at least one competent witness, who shall subscribe his or her name as a witness thereto." While it is customary to make use of the expression "witness" or "witnessed" in attesting the execution of deeds and other instruments affecting the title to real estate, such practice is neither necessary nor universal. On the contrary, any recital from which it appears that the subscriber witnessed the execution of the deed by the grantor named is sufficient; for, as has been remarked, the reason of the rule is "the party to whose execution he is a witness is considered as invoking him, as the person to whom he refers, to prove what passed at the time of his attestation." (1 Greenleaf, Evidence, sec. 569.) The objection is without merit and was rightly overruled.

A proposition strongly relied upon by the plaintiff in error is that, as purchaser of the property in controversy, he was entitled to personal notice of the sale and motion to confirm, and that the order of confirmation, in the absence of such notice, is void for want of jurisdiction. The basis of that claim is the rule of the common law by which a terre tenant—*i. e.*, one in the actual possession of land by title derived from a judgment debtor during the existence of the lien—is entitled to notice of proceedings subsequently brought to revive the lien of the judgment by means of *scire facias.* (1 Black, Judgments, sec. 492.) But that doctrine can, we think, have no application

to the case at bar. Section 85 of the Civil Code provides: "When the summons has been served, or publication made, the action is pending, so as to charge third persons with notice of pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof, as against the plaintiff's title." And secs. 846 and 847, relating to the foreclosure of mortgages, read as follows:

"Sec. 846. Whenever a petition shall be filed for the foreclosure or satisfaction of a mortgage, the court shall have power to decree a sale of the mortgaged premises, or such part thereof as may be sufficient to discharge the amount due on the mortgage, and the cost of suit.

"Sec. 847. When a petition shall be filed for the satisfaction of a mortgage, the court shall not only have the power to decree and compel the delivery of the possession of the premises to the purchaser thereof, but on the coming in of the report of sale, the court shall have power to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in the cases in which such balance is recoverable at law; and for that purpose may issue the necessary execution, as in other cases, against other property of the mortgagor."

Although the precise question has not been determined by this court, the principle which must govern in its solution was distinctly recognized in *Day v. Thompson*, 11 Neb., 123. In the case cited, which was an action to quiet title, the land in controversy was in the year 1858 attached as the property of Underwood, the common source of title, and in the same year judgment was in said action entered against him by defendant without an order for the sale of the attached property. In 1859 said property was sold on execution, which was followed in the same year by an order of confirmation, but the sheriff's deed therefor was not executed until the year 1876. The plaintiff, who claimed by deed from Underwood, executed in 1866, contended that whatever rights the defend-

ant might have acquired as purchaser of the property, were lost through his laches in failing to demand a deed; but it was said, referring to section 77, Code of 1858 (which is identical with section 85, Code 1866, above quoted): "Under the provisions of this section the pendency of the attachment was notice to third persons from the time of the publication of the notice, and this notice continued during the pendency of the action. And the jurisdiction of the court continued until the deed was executed." In Ohio, under a statute identical with section 482 of our Code, it has frequently been held that the pendency of an action of foreclosure continues for the purpose of the enforcement of the decree until confirmation of the sale and disposition of the proceeds thereof. Hence the decree in such case does not become dormant although more than five years may elapse without the issuing of an order of sale. (*Beaumont v. Herrick*, 24 O. St., 445; *Moore v. Ogden*, 35 O. St., 430; *Rankin v. Hannan*, 37 O. St., 113. See, also, *Jackson v. Warren*, 32 Ill., 331.) In Bennett, Lis Pendens, p. 173, it is said: "When jurisdiction has attached to the *res*, the general rule should be that the suit will pend so long as it is not dismissed by the court *sua sponte*, or for want of prosecution, or upon the motion of the parties, or be brought to a close by reason of some statutory provision or rule of court having force of law. * * * When the elements of a valid *lis pendens* exist and the court, in the enforcement of its acknowledged jurisdictional power, shall proceed to judgment or decree and its execution, if it were permissible for the same, or another court in a collateral proceeding to say that there had not been a valid *lis pendens* binding upon the *res*, it would amount to the nullification of a judgment or decree where the court had acknowledged jurisdiction. Such a result would be most disastrous and ought never to occur." It will be conceded that the failure to prosecute may be for such time or accompanied by circumstances of such character as to raise a presumption of abandonment particularly in favor of one who has

purchased or otherwise in good faith acquired an interest in the *res* without notice other than such as is imparted by the record; but that rule, or, more accurately speaking, that exception to the rule, can have no application to the issues of this cause, there being no claim on the part of the plaintiff in error that he purchased without actual notice of the unsatisfied decree, or of other equities existing in his favor which should prevail as against the legal title. We conclude that the plaintiff purchased *pendente lite*, that the district court had jurisdiction of the *res* at the time of the sale and confirmation, and that by virtue of the deed executed pursuant to said order the grantee therein, Mrs. Tarkington, acquired such title to the premises as was held by Emanuel H. Link at date of the mortgage by the latter to Aiken.

The next proposition to which attention will be given is that the plaintiff in error had, previous to the commencement of this action in the court below, enjoyed the uninterrupted adverse possession of the premises in dispute, under his deed from Emanuel H. Link for more than ten years. At the date of the sheriff's deed in 1873, one Hollenbeck was, or claimed to be, in possession of said premises by virtue of certain tax deeds, and Mrs. Tarkington, the purchaser named, being unable to make a satisfactory adjustment of the alleged tax liens, proceeded to assert her right of possession by means of an action of ejectment in which Hollenbeck was named as the sole defendant. That action was prosecuted to judgment in favor of the plaintiff therein in the month of April, 1880, which judgment was removed into this court for review, although subsequently dismissed on motion of the defendant in error. (See *Hollenbeck v. Tarkington*, 14 Neb., 430.) A writ of restitution having been issued for the purpose of enforcing the judgment of the district court, a petition of intervention was filed by the plaintiff in error herein, in which he alleged possession of the premises since the date of his said deed, to-wit, June 13, 1870, adverse to both parties to that action. The contro-

versy thus occasioned resulted in an order for the execution of the writ of restitution against Hollenbeck, but denying relief as against the plaintiff in error on the ground that he was not made a party to that action, and which order was subsequently affirmed by this court. (See *Tarkington v. Link*, 27 Neb., 826.) The question of the plaintiff in error's title by adverse possession was, as will thus be seen, an open one, and was the principal subject of contention at the trial below. The evidence adduced by the defendant in error tends to prove that Hollenbeck took possession of a part of said tract of land in the year 1865 and cut hay thereon until 1871, in which year he broke "hedge strips" on three sides thereof; that he commenced breaking thereon in 1872, and in 1875 had 100 acres under cultivation, and that the land so broken was cultivated by him and his tenants continuously excepting the year 1882, during which it remained uncultivated until the decision adverse to him in the year 1883. It is further shown that he was permitted to harvest the crop for the year last named which had been sown previous to the judgment dispossessing him. There was, according to his testimony, no building of any kind upon said land prior to the decision by this court in *Hollenbeck v. Tarkington*, *supra*, but that the plaintiff in error, upon learning of the final disposition of that cause, immediately placed a house thereon, and which was the first assertion by the latter of an adverse claim to the premises. A material fact, as to which there is no controversy, is that the plaintiff in error, during the twenty years which intervened between the execution of the quitclaim deed in 1870 and the commencement of this action in 1890, paid no part of the taxes annually assessed against the land now claimed by him. It is true he claims to have made repeated efforts to pay the taxes, but upon inquiry learned they had been paid by others. We are, however, satisfied from a careful reading of the record that all efforts by him in that direction were subsequent to the abandonment of the premises by Hollenbeck in 1883, and

are no evidence of the assertion on his part of title anterior to that date. There was much testimony contradictory of the witnesses of the defendant in error respecting the issue of adverse possession, but the credibility of the witnesses, as well as the probative force of the evidence, were questions for the jury, and with the verdict we do not, upon the record before us, feel at liberty to interfere.

Among the assignments of error are the following:

"10. The court erred in giving instructions numbered 2, 3, 4, 5, 9, 9½, 11, and A on its own motion.

"11. The court erred in giving instructions marked 10 and 11 at the request of the plaintiff below.

"12. The court erred in refusing instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and A requested by the defendant below."

This method of assigning error, it has been often held, presents no question for examination, unless the error alleged applies to each of the paragraphs enumerated in a particular group. It is not at this time pretended that those given, in either of the foregoing assignments, are all erroneous, or that those refused should all have been given. The subject of the instructions might accordingly be dismissed without further comment, but having examined all of those to which reference is made in the brief of counsel before our attention was directed to the assignments of error, it may with propriety be observed that they present no ground of complaint on the part of the plaintiff in error. The tenor of those given is fairly indicated by the views expressed in this opinion, and are, for the most part, the antitheses of those refused.

Finally, it is alleged that the verdict is insufficient in form and substance, and a reversal of the judgment is asked upon that ground. Said verdict, omitting date and caption, is as follows:

"We, the jury, duly impaneled to try the issues joined in the above entitled cause, do find on said issues in favor of the said plaintiff, and that at the time of the commence-

ment of this action the said plaintiff was, and still is, the owner in fee-simple and entitled to the possession of the land described in said petition, to-wit, the northwest quarter of section 2, T. 14, R. 11 east, in Douglas county, Nebraska. * * * The plaintiff is entitled to recover for the rents and profits of the use and occupation of said land up to the present time. We assess his damages at $1,800.

WM. F. MANNING,
"Foreman."

The argument against the sufficiency of the above finding is obviously without merit and will not be further noticed. There is no error in the record and the judgment is

AFFIRMED.

JOHN REED, APPELLANT, V. JORELIAN L. RICE ET AL., APPELLEES.

FILED MAY 20, 1896. No. 6622.

1. **Bill of Exceptions:** REVIEW. When a bill of exceptions has been quashed, no question can be considered, a determination of which necessarily involves an examination of the bill of exceptions.
2. **Mortgages:** NOTICE OF JUDGMENT LIEN. A party purchased real estate and caused the title to be conveyed to his wife. It was subsequently conveyed to another party, and by this, by direction of the first party purchaser, to a third person who obtained a loan thereon, the proceeds of which were used in discharging liens and incumbrances existing against the property. Prior to the date the loan and the mortgage on the property evidencing it were made, creditors of the first party purchaser, who had obtained judgment against him, procured the issuance of an execution and its levy on the real estate in question, which was returned before the loan was made. *Held*, That the facts of the existence of the judgment against a party who had not, so far as the record disclosed, been an owner of the real estate, or interested therein, and the issuance of an execution on such judgment and its levy on the property, were not notice to the mortgagee of the rights or interest of the first party purchaser in the property, or any lien of his judgment creditors against it, the mortgagee being shown in all other respects to be an innocent or *bona fide* mortgagee.

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

David Van Etten, for appellant.

Charles A. Goss and *Albert Swartzlander*, *contra*.

HARRISON, J.

It appears that on or about the 24th day of September, 1888, Jorelian L. Rice, of appellees herein, purchased lots 12, 13, and 14 of block 3, in Redick's Park Addition to the city of Omaha, and had them conveyed to his wife, Althorosa Rice, and that on or about the 29th of July, 1889, the lots were conveyed to John T. Denney, subject to a mortgage which he assumed and agreed to pay; that during the time the title to the lots was in Denney, he caused to be erected thereon three houses, and not having paid for the material and labor, mechanics' liens for the sums due therefor were duly perfected against the property. Afterwards Denney, pursuant to an alleged sale to Rice, and by his direction, conveyed the lots incumbered by the mortgage and mechanics' liens to James E. Curtis, a brother-in-law of Rice. The principal of the incumbrances amounted at this time to between five and six thousand dollars. Application was made to Burney J. Kendall for a loan on the property, who, after obtaining an abstract of the title as it appeared of record, approved the application, and of date February 15, 1890, made a loan of $4,500, taking a mortgage on the property as security, and the amount thus obtained was expended in the payment of liens and incumbrances. Three notes of $550 each and a mortgage on the property securing their payment, the notes and mortgage running to Rice as payee, were executed by Curtis and delivered to Rice and, he alleged, were by him sold and the proceeds applied to the payment of the prior liens and incumbrances then on the property. John Reed, the appellant, at the September, 1888, term of the district court in Douglas

county, recovered a judgment against Rice for the sum of $1,744.92 and costs, and on June 17, 1889, an execution for the enforcement of the judgment was issued and delivered to the sheriff, who levied it upon the lots aforementioned, and after advertising and offering them for sale thereunder, the writ was returned, and among other statements indorsed thereon we find the following: "Not sold for want of bidders, and this writ is returned for want of time for further action." On the 12th day of May, 1890, the appellant filed the petition in this action, what is generally known as a creditor's bill, in which he alleged that all and singular the several transactions, including the one between Jorelian Rice and Burney J. Kendall, were parts of a scheme on the part of Rice to defraud his creditors, in which all the other parties defendants were participants. The main object sought by appellant in the action was to have the judgment declared a first lien on the property and to have the premises sold and the proceeds applied in payment of the judgment debt. Kendall, in his answer, pleaded his loan to Curtis of date February 15, 1890, in the sum of $4,500, and its good-faith character in all particulars, and the execution of the notes and the mortgage on the property evidencing the loan, and denied all participation on his part in, or knowledge of, any scheme or plan of Jorelian L. Rice to hinder, delay, or defraud his creditors. The other defendants answered, and it will not be necessary to particularly notice their several pleas here. After a trial of the issues, the judge who heard it entered the following findings and decree:

"On consideration whereof the court finds that the defendant Burney J. Kendall received the mortgages described in his answer in good faith and for value, and that the same are a valid, subsisting, and first lien on the real estate described in the pleadings and prior to the claim of any other party hereto. It is therefore considered by the court that Burney J. Kendall go hence without day and recover of said plaintiff his costs of suit, taxed to $——.

"And it appearing that the plaintiff and Jorelian L. Rice have during its pendency settled the subject-matter of this suit, plaintiff receiving a deed for certain lands and a note for $300 and Jorelian L. Rice confessing judgment for costs: It is therefore considered that the plaintiff have and recover of said Jorelian Rice his costs of suit, taxed to $——, and as to all other defendants this action be and the same is hereby dismissed and they go hence without day."

After the cause was removed here by appeal, a motion to quash the bill of exceptions was filed and submitted, and was sustained in favor of all the defendants except Burney J. Kendall, and as to him it was overruled. To determine the strength of the points argued in behalf of appellant in relation to the judgment in favor of appellees other than Kendall would require a reference to, and examination of, the evidence, or portions of it, as contained in the bill of exceptions, and as to them it has been quashed and hence cannot be examined for the purpose indicated, and the finding and judgment in their favor must be affirmed.

In regard to the rights of appellee Kendall, there was no evidence showing or tending to show that his mortgage was other than *bona fide;* that in the whole transaction of the loan on the property he was not at all times acting in good faith, but it is contended that the facts that an execution had been issued on the judgment against Jorelian L. Rice and levied upon these lots and afterwards returned the property not sold for want of bidders and because the life of the execution had expired, was notice to all the world and to Kendall of any interest, if any existed, of Jorelian L. Rice in the property. This position is not tenable. Rice was not the owner of the property of record. His name did not appear in the title as the owner and holder of any title in and to it at any time. The judgment against him was not a lien on the lots or notice of the rights of the judgment creditors to parties dealing with the person who,

according to the record, owned the lots or held the title to them. Neither could the mere fact that the execution had been issued and levied against them be any notice in and of itself. It is not contended that the evidence discloses that Kendall had any direct notice or knowledge of the existence of the judgment, the execution, or its levy. Before making the loan he obtained an abstract of the title, examined the title, and had it examined by an attorney, and it appearing to be in the party to whom he made his loan and of whom he received his mortgage, he cannot be charged with notice of the rights or interests of judgment creditors of a person who, so far as the record discloses, had never been the owner or holding any title to the property, because of the existence of a judgment in their favor and issuance and levy of an execution against the property thereon. The finding of the trial court that Burney J. Kendall was a mortgagee in good faith was according to the weight of the evidence, and the judgment by which the mortgage of Kendall was given priority as a lien was right and must be

AFFIRMED.

JOSEPH J. IMHOFF V. LYDIA W. RICHARDS.

FILED MAY 20, 1896. No. 6615.

1. **Continuance.** The ruling of the trial court in refusing an application for continuance examined, and *held* not erroneous.

2. **Amendment of Pleading: RECORD FOR REVIEW: TRIAL.** In relation to the amendment of a petition in an action, during the trial, the allowance of which was assigned for error, the only reference to which in the record was in a journal entry in which appeared the statement, "Now on this day came the parties hereto with their attorneys and leave is hereby granted the plaintiff to amend the petition herein by interlineation, to which the defendant duly excepts," *held*, too indefinite to present for review the question of the propriety of the action of the trial court, there being no state-

ment of what was embodied in the amendment; and furthermore, in order to make any error in such order available for review a statement of what was allowed to be done and the matter of the amendment should have been made a part of and preserved by the bill of exceptions.

3. ———: REVIEW. The propriety of granting or withholding leave to amend pleadings, to agree with the evidence in a case, is within the sound discretion of the trial judge, and unless there appears to have been an abuse of such discretion, no available error is presented.

4. **Trover and Conversion:** SALE: EVIDENCE. Evidence of the careful conduct of a sale, which, as to plaintiff's rights, was illegal, *held* properly excluded.

5. **Evidence:** NOTICE OF SALE. Evidence offered to show notice of the sale by advertisement *held* incompetent, and therefore rightly excluded.

6. **Trover and Conversion:** PRICE OF GOODS: EVIDENCE. As a general rule, the prices which goods brought at a public auction are admissible as evidence of their market value.

7. **Evidence:** MEMORANDUM: IDENTIFICATION. A memorandum made contemporaneously with the facts of which it purports to be a record, when supplemented by the oath of the party who made it, or otherwise properly identified, is admissible as independent evidence. No uniform rule can be announced to govern its reception, but its proper identification is an essential prerequisite.

8. **Admission of Evidence:** OBJECTION: REVIEW. It is not ground of reversal in favor of a party who complains of a ruling, by which a general objection to some offered evidence was sustained, that the objection was not specific, if the evidence which was objected to was for any reason properly excluded.

9. **Instructions:** REVIEW. Assignments of error in respect to the failure and refusal of the trial judge to give certain instructions *held* not tenable, and overruled.

10. **Assignments of Error.** An assignment in a petition in error of "Errors at law occurring at the trial and duly excepted to" is not sufficiently specific to raise and present questions pertaining to rulings of the trial judge in regard to the admission of evidence.

11. **Conversion:** VERDICT FOR PLAINTIFF. Evidence *held* sufficient to sustain the verdict.

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

Atkinson & Doty, for plaintiff in error.

R. D. Stearns, contra.

HARRISON, J.

This action was instituted in the district court of Lancaster county by defendant in error to recover of plaintiff in error the value of a stock of millinery and the fixtures of a millinery store which she alleged had been converted by plaintiff in error. It was stated in the petition, in substance, that on April 1, 1892, defendant in error was engaged in the millinery business in Lincoln and owned and was in possession of a stock of millinery and fixtures, appropriate for the storing and exhibition of a stock of the kind mentioned, all located in a room in what was designated the "Little Block," in the city of Lincoln, and that the stock and fixtures were of the value of $1,053.17; that on the date aforementioned she was indebted to plaintiff in error for the rent of the storerooms referred to, in the sum of $240, and executed and delivered to him an instrument in writing, which was in form what is denominated a bill of sale of the stock of goods and fixtures, the sum stated therein as a consideration being $240, the amount of rent which she then owed the plaintiff in error; that while on its face an absolute bill of sale, the instrument alluded to was given as security for the payment of the amount of its stated consideration, and was in fact a chattel mortgage; that on or about the 22d day of April, 1892, the plaintiff in error, under and by virtue of the said instrument, took possession of the goods and fixtures, and without the consent of defendant in error, and without first advertising or giving notice as required by law, sold them at public auction and converted them to his own use. Plaintiff in error, in his answer, pleaded that defendant in error had given a chattel mortgage on the goods and fixtures to her mother, and that this, on the 19th day of April, 1892,

was duly assigned to him; that on the 2d day of March, 1891, he leased, by written contract, to defendant in error the room in which she conducted the millinery business; that by the terms of the written lease, on default of payment of rent he was authorized to take possession of the stock, etc., and that on April 1, 1892, defendant in error had failed to pay rent when due, in the aggregate, in the sum of $240. "And the said defendant further says that upon the sale of the said goods under and by virtue of the bill of sale there was not realized more than $125, because most of the said goods were old, out of style, and were the cullings of purchases made on previous years, and were not salable." The answer also contained specific denials of the material allegations of the petition, and alleged the indebtedness of defendant in error to plaintiff in error in the sum of $400 unpaid rent, and demanded its recovery. The reply was a denial of each and every allegation of new matter pleaded in the answer. Of the issues joined there was a jury trial, and in the verdict there was a finding for defendant in error in the sum of $750, and of $400 in favor of the other party, and for the balance, $350, for defendant in error, and for this last sum she received a judgment, to reverse which error proceedings have been prosecuted to this court.

An application for continuance was made on behalf of plaintiff in error, which was overruled by the trial judge, and his action in this particular is assigned as an error. The motion for continuance was supported by an affidavit, one of the witnesses named therein, and as to whom and the evidence which it was expected to elicit from him there was the strongest showing, was afterwards present and sworn and testified on the part of the plaintiff in error; hence the error, if any, was not prejudicial to the extent it involved the attendance of this one witness. As to any others, the showing made in the affidavit was wholly insufficient, and this assignment must be overruled.

It is claimed that there was error in the allowance of

an amendment to the petition after the jury was called. All we can discover in the record in reference to this is the copy of a journal entry contained in the transcript, which is as follows: "Now on this day came the parties hereto, with their attorneys, and leave is hereby granted the plaintiff to amend the petition herein by interlineation, to which the defendant duly excepts." Of what the amendment consisted is not disclosed, consequently we are unable to determine whether leave should have been granted to make it. Furthermore, if it was expected that this portion of the proceedings of the trial would be assigned for error and relied upon, it should have been incorporated in and made a part of the bill of exceptions. As presented here it is not available. It is claimed that there was error in refusing to allow plaintiff in error to amend his answer, as it was urged, to agree with certain evidence introduced on his part, and which, it is claimed, showed an agreement between the parties that the goods should be sold at private sale and a waiver of advertisement and public sale. The question of granting or withholding leave to make the amendment rested in the sound discretion of the trial judge, and unless there was an abuse thereof, there was no error. A careful investigation of the evidence adduced, with particular reference to the determination of this point in the case, convinces us that the ruling on the subject of this complaint was correct. Evidence of a consent to a private sale, even if there had been sufficient to support a finding to that effect, which we do not believe there was, would have been immaterial, as the goods were sold at an auction, and such was the action in regard to them, on which the complaint in the cause was in part based.

It is of the errors assigned that the court erred in not allowing the plaintiff in error to show by witnesses cognizant of the facts that the sale of the goods was carefully conducted and duly advertised. As to the fact of the careful conduct of the sale it was not error to exclude the evidence. If the sale was made without the prelimi-

nary steps required by law, then, however carefully it may have been managed, it could not be material to the issues in this case. In relation to the refusal to receive evidence that notice was given of the sale by advertisement, suffice it to say that there was no offer of any competent evidence tending to show that there had been any such notice given or published.

Another assignment is that the court erred in not allowing the defendant, plaintiff in error, to show the prices the goods brought at public auction as evidence of their market value. If the sale was at or near the time of conversion, or, if any appreciable time had intervened, it be shown that there had been no change in the goods or market value, evidence of the prices for which they sold at auction is admissible on the question of their value. (*Campbell v. Woodworth*, 20 N. Y., 499; *Brigham v. Evans*, 113 Mass., 540; *Kent v. Whitney*, 85 Am. Dec. [Mass.], 739.) For the first offer of such evidence we are referred in the brief of plaintiff in error to page 211 of the bill of exceptions, but on turning to that page of the bill we can discover there nothing which bears in the slightest degree on the point of the prices the goods brought at auction, or any offer of any evidence on the subject. On page 212 appears the following: "Counsel for defendant here offers to show by this witness that the goods taken were sold at public auction and that they were put up to the highest bidder, and great care taken in securing the best possible prices for said goods." If this is what counsel alluded to in the brief, it is not an offer to show any prices for which any of the goods sold, and the refusal of this offer cannot be made available under the assignment of error now under consideration. We are also referred to page 237 of the record for another offer of evidence on the subject of the prices the goods sold for at the auction sale. This offer and objection thereto was as follows: "Defendant here offers in evidence a memorandum of the amount of cash received and the amount for which the goods were sold at the auction sale, for the purpose of

fixing in the minds of the jury the market and cash value of the said goods." To the introduction of the memorandum an objection was interposed, that it was incompetent, immaterial, and irrelevant, and that it did not tend to establish any of the issues in the case and was improper evidence. The objection was sustained. A memorandum may be received as independent evidence of the matters stated in it, although it may be said there is no very uniform rule governing the reception of such an instrument; and whether memoranda made by a witness contemporaneously with the event they purport to record, when supplemented by the statements of the witness under oath, may be admitted, is open to considerable doubt, elementary writers and courts being about equally divided upon the subject. (*Bates v. Preble*, 14 Sup. Ct. Rep., 278.) For instances of admission of evidence of this nature and that it may be done in this state see *Labaree v. Klosterman*, 33 Neb., 150; *Carstens v. McDonald*, 38 Neb., 858; but it is the invariable rule that the memorandum must be identified. A proper foundation must be laid for its introduction. Nothing of the kind was done or attempted in the case at bar. The record discloses that the memorandum was produced and offered without any preliminary proof. This being true it was properly excluded. That the objection was too general cannot now avail, since there was a reason for which the evidence was properly excluded. (*Hurlbut v. Hall*, 39 Neb., 889.)

It is urged that the court erred in failing to instruct the jury respecting the rights of the parties respectively under the terms of the contract of lease. Under the issue as made by the pleadings, this question was immaterial. In the answer the plaintiff in error states that the goods were taken and sold by virtue of the authority conferred by the bill of sale, and the right to take possession and sell, under the lease, was not of the issues.

It is claimed the trial judge erred in refusing to give instruction designated "1st" requested by plaintiff in

error. This instruction was in reference to an agreement which plaintiff in error asserted was made between the parties by which the stock of goods was to be disposed of at a private sale, and which, it was further contended, constituted a waiver of any right to have the sale advertised or made by public auction. We do not think there was any evidence requiring the submission of this question of waiver to the jury, consequently it was not error to refuse the charge presented and requested to be given.

Under the assignment of "errors at law occurring at the trial and duly excepted to" the counsel argue as erroneous two rulings of the trial court in the admission of evidence. This form of assignment in the petition in error was insufficient to raise the questions presented. Assignments in a petition in error, in regard to the admission of evidence, must be specific and point out the rulings of which complaint is made.

It is further urged that the verdict is contrary to the evidence. A number of the facts were undisputed; as to others the evidence was conflicting, notably as to whether the bill of sale was in fact a security for the payment of a debt and in effect a mortgage, and on the subject of the value of the goods and fixtures; but on these, as on all other essential points, there was sufficient evidence to sustain the finding of the jury. The judgment of the district court is

AFFIRMED.

ALBERT W. RISING ET AL. V. WILLIAM A. NASH.

FILED MAY 20, 1896. No. 6504.

Instructions: ISSUES. An instruction which gives undue prominence to subordinate elements of the issues and is calculated to mislead the jury, is erroneous and its giving may call for a reversal of the judgment.

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

Matt Miller and *George P. Sheesley*, for plaintiffs in error.

A. J. Evans and *Steele Bros.*, *contra.*

HARRISON, J.

In this action the defendant in error sought to recover of the plaintiffs in error the amount alleged to be due upon a promissory note, which it was further pleaded was made and delivered by plaintiffs in error to one Thomas Wolfe, and of which the defendant in error became the assignee by *bona fide* purchase before its maturity, for a valuable consideration and without notice. The plaintiffs in error answered and stated, in substance, the execution and delivery by them of a note to the First National Bank of David City, evidencing their indebtedness to the bank in the amount of a loan obtained of it, and the usurious nature of the contract of loan; the execution and delivery of another note in renewal of the first; the giving of a third note to Thomas Wolfe, president of the bank, as a renewal of the second, which had run in terms to the bank; also averred renewal notes succeeding this third note, leading up to and including the note in suit, which was the last of the series, and all of which were alleged to have been for the benefit of the bank, whether written in its favor or running in terms to its president, Thomas Wolfe, and each and all claimed to be tainted with the vice of usury, both by reason of the usurious character of the original loan and as separate and independent transactions. The note sued on was payable by its terms to Thomas Wolfe. It was further pleaded in the answer that at the inception of the transactions in which the several notes referred to in the answer were executed and delivered, and throughout the entire time of the course of such transactions, Thomas Wolfe was president of the aforementioned bank. A number of payments were pleaded to have been made at

various dates on the indebtedness, and all allegations of the petition in relation to the good-faith character of the purchase of the note in suit by defendant in error were denied. The reply admitted that Thomas Wolfe was president of the bank, and denied each and every other allegation of new matter contained in the answer. The defendant in error, in a trial, was awarded a verdict by the jury and a judgment thereupon by the court.

Two alleged errors are urged in behalf of plaintiffs in error as sufficient to work a reversal of the judgment, viz.: That the verdict was not supported by the evidence, and that the trial court erred in giving paragraph numbered 10 of its instructions to the jury. The paragraph of the instructions against which the complaint is made is as follows: "You are further instructed that if you find that the note in question is usurious, and is a renewal of another note or notes also usurious, and that the amount of money paid by the defendant on the series of notes renewed from time to time equalled or exceeded the whole amount of money actually received by the defendant on all of said notes, and if you further find from the evidence that the note sued upon was taken as a renewal in the name of Thomas Wolfe as a subterfuge or for the purpose of evading the usury laws, and that the same was transferred to this plaintiff also for the purpose of evading the usury laws, with his knowledge of that fact, then you will find for the defendant, as under the law all money paid on usurious contracts must be applied in payment of the amount of money actually received by the defendant." It will be noticed that the jury were informed that if from the evidence it reached a conclusion that the transactions in controversy were usurious, and further should find from the evidence that the note upon which this action was predicated was taken as a renewal in the name of Thomas Wolfe as payee as a subterfuge or for the purpose of evading the usury laws, and was transferred to the plaintiff (defendant in error) also for the purpose of evading the usury laws, to his

knowledge, then the finding should be for the defendants (plaintiffs in error). The foregoing imported or introduced into the issues of the case one matter which was not there specifically, either by pleading or the evidence, while it may be said that it was incidental to or elemental of the general issues on this subject, and required the jury to affirmatively find its existence from the evidence as a preliminary to or as a part of a general finding favorable to plaintiffs in error. This was that the making of the note to Thomas Wolfe as payee was a subterfuge, or for the purpose of evading the usury laws. The only controversy on this point was whether the note, apparently on its face to Thomas Wolfe, in reality belonged to the bank, or was it given for the benefit of the bank? While the instruction told the jury that if such a finding was arrived at from the evidence, joined with others it would warrant a verdict for plaintiff in error, and did not, as is urged by counsel for defendant in error, inform the jury that it would necessitate a general conclusion in favor of plaintiffs in error, yet it was calculated to mislead that body, or some of its individual members, and cause an inference to be drawn that this was one of the essential or preliminary findings, without which there could not be a verdict for plaintiffs in error. If it appeared in the case that the ownership of the note rested in the bank, the intent or purpose with which it was made to appear to belong to Thomas Wolfe, while it might have been inferred from the main fact, and that it was to evade the usury laws, was not material to the determination of the disputed points, but by this instruction it was forced to the front, being subordinate and unimportant, was made commanding and important, probably to the exclusion, in the minds of the jurors, of subject-matters which should have been governing ones. The further portion of the instruction, wherein it was stated if the jury determined that the note was transferred to defendant in error for the purpose of evading the usury laws, he knowing such fact, the jury should find for plaintiffs in error, was

as faulty as the prior statement which we have discussed. If the defendant in error had notice of the infirmity inherent in the contract embodied in the instrument transferred, then, whether assigned for the purposes set forth in the instruction or not, was wholly immaterial. The main question was ignored and the attention of the jury more than probably diverted from it to something which, although not a governing fact in the determination of the issues, from the prominence given it in this portion of the charge may have been considered so by some or all of the jurors, and although convinced by the evidence of the existence of the main fact,—*i. e.*, the knowledge of defendant in error, at the time of the transfer of the note, of the usurious character of the contract evidenced by it,—a number, or all, may have entertained the idea that unless it was further proven that it was with the purpose in view stated in the instruction, the proper conclusion did not follow. The paragraph of the instructions under consideration was erroneous and liable to mislead the jury, to the prejudice of the rights of the plaintiffs in error.

It is urged by counsel for defendant in error that in a prior instruction, numbered 9, the trial court correctly defined what constituted a person a *bona fide* purchaser or holder of a negotiable promissory note, and that numbered 10, when considered in connection with this immediately preceding one, and with the whole of the charge to the jury, is not erroneous. We have examined the instruction numbered 9, and, when construed in connection with it or with the charge as a whole, we cannot see wherein it cures the defects in paragraph 10, or relieves it of its tendency to mislead the jury.

As the judgment, because of the errors in the instruction, must be reversed and the case remanded for a new trial, we will not now discuss the assignment of errors in regard to the insufficiency of the evidence to support the verdict.

REVERSED AND REMANDED.

POST, C. J., not sitting.

JULIA C. VOSE V. JOHN MÜLLER.

FILED MAY 20, 1896. NO. 6556.

Replevin: RIGHT OF PLAINTIFF TO DISMISS ACTION. In replevin, where the property has been taken under the writ and delivered to the plaintiff, he cannot dismiss the action and thereby prevent the defendant from having the right to the possession determined in that suit.

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

Wilbur F. Bryant, for plaintiff in error.

Barnes & Tyler, contra.

NORVAL, J.

This is a suit in replevin to secure possession of "one red heifer, with scar on right hip, said heifer being about two and one-half years old." Before the final submission of the cause in the court below plaintiff filed a written dismissal, and the defendant having established that the heifer at the commencement of the action was of the value of $26, a finding to that effect was entered by the court, and that the defendant was entitled to a return of the animal; and a judgment was rendered in his favor in the alternative for such return or her value as aforesaid. Plaintiff has removed the cause into this court, alleging that there was error in entering judgment for the defendant after plaintiff had filed her dismissal of the case, and this is the only question presented for review.

Plaintiff insists that, after the filing of the dismissal, the court had no jurisdiction, and that defendant's sole remedy was to sue upon the bond. The right to dismiss is claimed under section 430 of the Civil Code, which provides: "An action may be dismissed without prejudice to a future action: First—By the plaintiff, before the final

submission of the case to the jury, or to the court, where the trial is by the court," etc. Doubtless, as a general rule, a plaintiff has the right under said provision to dismiss his own case before it has been submitted on the merits. But this rule does not obtain in actions of replevin. In such suits, after the delivery of the property to the plaintiff under the writ, as was done in the case before us, he cannot dismiss and thereby defeat the defendant of his right to the possession of the property, without trial. (*Aultman v. Reams*, 9 Neb., 487; *Moore v. Herron*, 17 Neb., 697; *Ahlman v. Meyer*, 19 Neb., 63; *Garber v. Palmer*, 47 Neb., 699.) Section 190 of the Code of Civil Procedure provides: "If the property has been delivered to the plaintiff, and judgment be rendered against him on demurrer, or if he otherwise fail to prosecute his action to final judgment, the court shall, on application of the defendant or his attorney, impanel a jury to inquire into the right of property and right of possession of the defendant to the property taken. If the jury shall be satisfied that said property was the property of the defendant at the commencement of the action, or if they shall find that the defendant was entitled to the possession only of the same at such time, then, and in either case, they shall assess such damages for the defendant as are right and proper, for which, with costs of suit, the court shall render judgment for the defendant." Section 191*a* provides: "The judgment in the cases mentioned in sections one hundred and ninety and one hundred and ninety-one * * * shall be for a return of the property or the value thereof in case return cannot be had, or the value of the possession of the same and for damages for withholding said property, and costs of suit." The dismissal of an action by a plaintiff is manifestly a failure to prosecute the same to final judgment, within the meaning of said section 190, and in such case, if the possession of the property has been delivered to the plaintiff by virtue of the order of replevin, the defendant has the undoubted right, under said sections 190 and 191*a*, to have

his title and the right of possession of the property replevied adjudicated and determined in that action. The filing of a dismissal by the plaintiff in replevin will not oust the court of jurisdiction to retain the cause and render the proper judgment upon the proofs taken. (See authorities cited above.)

It is urged that no proof was offered as to the value of the property. In the absence of a bill of exceptions it must be presumed that there was not only sufficient evidence upon that, but every other issue in the case. The judgment is clearly right and it is accordingly

AFFIRMED.

LEWIS INVESTMENT COMPANY, APPELLEE, V. BEDFORD B. BOYD ET AL., APPELLANTS.

FILED MAY 20, 1896. No. 6573.

1. **Transcript for Review.** The authenticated transcript of the record of the trial court imports absolute verity on appeal, and cannot be impeached by mere statements of counsel in the brief filed.
2. ———. Where the transcript of the record of the trial court shows that a reply was filed therein, the defendant will not be heard to insist in this court that the averments in his answer should be taken as true merely because of his failure to have the reply included in such transcript.
3. ———: PLEADINGS. Should a party desire to urge in the supreme court that he was entitled to a judgment in his favor upon the pleadings, they must be copied into the transcript.
4. **Usury:** COMPOUND INTEREST. A stipulation in a note providing for compound interest does not render the note usurious.
5. ———: ———. Interest, when stipulated for, may be allowed on coupon interest notes, after their maturity, when the amount of interest on both coupon and principal does not exceed the maximum legal rate of interest on the principal sum.
6. ———: ———. Interest will not be compounded when to do so would make the aggregate rate of interest exceed ten per cent per annum.

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

Bedford B. Boyd, for appellants.

John Bridenbaugh, contra.

NORVAL, J.

This is an appeal by the defendants from a decree foreclosing two real estate mortgages. It is contended that the decree was rendered in the absence from the court room of the defendant, Bedford B. Boyd; that it recites: "By agreement, amount due plaintiff $1,483.20, and $69.30 taxes;" and that within an hour after it was entered defendant orally moved the court to set aside said decree, which motion, it is stated in the brief, was immediately denied, and an exception was taken to the ruling. Unfortunately for the defendants, not one of the foregoing matters, if they in fact transpired, is disclosed by the record. On the contrary, so far as it speaks at all on the subject, the reverse is made to appear; hence no question having for its foundation the alleged action and decision of the court is presented for review. On appeal the authenticated transcript of the record of the trial court imports absolute verity, and cannot be impeached by mere statements of counsel in the briefs filed.

The answer filed, after admitting certain averments in the petition, pleads, or attempts to do so, two defenses: First, that plaintiff is not the owner of the notes and mortgages; and, second, usury. It is argued that the defendants were entitled to judgment upon the pleadings in their favor upon those two issues. This contention is based upon the fact that no reply to the answer is in the record. The uniform rule is that a failure to reply renders proof unnecessary of the averments contained in the answer; but this doctrine cannot be invoked in this case. The decree states that the cause was heard and submitted upon the petition, answer, reply, and the evidence, which

recitation shows that the plaintiff did reply to the answer. By its absence from the transcript we cannot presume that it failed to put in issue a single allegation of the answer. The transcript does not purport to be a full and complete copy of the entire record in the court below. The clerk of that court merely certifies that it contains true copies of the petition, answer, journal entries, trial docket entries, and certain enumerated papers on file in his office. Had the journalized decree made no reference to the reply, and had the certificate of the clerk attached to the transcript filed herein disclosed that such transcript was a complete copy of record and proceedings in the trial court, then the presumption might be indulged that plaintiff filed no reply, and in which case matters well pleaded in the answer would be taken to be true. When a party desires to insist in this court that he was entitled to judgment or decree upon the pleadings, he must see to it that such pleadings are included in the transcript brought here. There being no bill of exceptions in this case, we must assume that the evidence sustains the allegations of the petition.

It remains to be considered whether the decree was excessive, or for a larger sum than the petition disclosed was due. The first cause of action is upon a mortgage given to secure a note of $1,000, bearing date February 15, 1889, due in five years, with interest at seven per cent, payable semi-annually, according to ten interest coupons attached thereto, which coupons provide for ten per cent semi-annual interest after maturity. The note also contains a stipulation to the effect that it should bear interest at ten per cent after maturity, and that if any interest should remain unpaid for twenty days after due, the whole debt, at the option of the owner, should at once become due and collectible. The petition alleges that no part of the principal or interest has been paid, and that plaintiff, on April 15, 1892, declared the entire sum due and payable at once. The second cause of action is to foreclose a mortgage securing six unpaid notes of $12.50 each, dated

February 15, 1889, with ten per cent from maturity, one falling due every six months. It appears from the petition and the exhibits thereto attached that the notes and mortgages in both causes of action represent a single transaction, and were given to obtain a loan of $1,000, made by the plaintiff. The decree in this case was rendered on May 5, 1893, for $1,483.20. We have carefully computed the amount due on the notes described in both causes of action, allowing interest on each note at the rate, and compounding the same, according to its terms and stipulations, and find it to be $1,469.05, or $14.15 less than the decree, and $30.17 more than would have been due at the date of the decree, casting interest on the $1,000 loan from the date thereof at ten per cent per annum, the maximum rate allowed by statute. By another method of calculation, allowing interest on the principal note at seven per cent per annum until plaintiff exercised the option of declaring the whole sum due, and ten per cent thereafter, and adding thereto $75, the amount of the six commission or extra interest notes described in the second cause of action, the aggregate principal and interest due on the loan on May 5, 1893, is $1,402.21. So in any view of the case the decree is excessive. The question arises, which one of the several modes of computation above indicated should be adopted in this case? We are clear that it is the last one stated. The interest cannot be compounded, nor is interest upon interest collectible in this case, since it would be allowing plaintiff in excess of ten per cent, the highest rate provided for by law. This court has held that a holder of a note is not entitled to interest upon arrears of interest, although so contracted for, where by the compounding of interest it would make the rate exceed ten per cent per annum. (*Mathews v. Toogood*, 23 Neb., 536, 25 Neb., 99.) It has also been decided that interest, where stipulated for, may be collected on coupon interest notes when the amount of interest on both coupons and principal does not exceed the maximum legal rate. (*Murtagh v.*

Thompson, 28 Neb., 358; *Richardson v. Campbell*, 34 Neb., 181.) A stipulation in a note allowing interest to be computed on interest after it matures does not render the note usurious. (*Hager v. Blake*, 16 Neb., 12; *Richardson v. Campbell*, 34 Neb., 181.) Applying the foregoing decisions to the case before us, we hold that the contract or loan is not tainted with the vice of usury, and that plaintiff is not entitled to have the interest compounded. The decree should have been for the sum of $1,402.20, and it is modified accordingly.

JUDGMENT ACCORDINGLY.

PATRICK MURRY V. ELIZA HENNESSEY ET AL.

FILED MAY 20, 1896. No. 6598.

1. **Wills**: INTEREST OF CONTESTANTS: EVIDENCE. *Held*, That the evidence shows the contestants possessed such an interest as entitled them to resist the allowance of the instrument offered for probate as the last will and testament of the testatrix.
2. ———: TESTAMENTARY CAPACITY: BURDEN OF PROOF. The burden of proof is upon the proponent of a will to establish the execution of the will and the testamentary capacity of the testatrix. *Seebrock v. Fedawa*, 30 Neb., 424, followed.
3. ———: ———: EVIDENCE. *Held*, Upon conflicting evidence, that the jury was justified in finding that the testatrix did not possess sufficient mental capacity to make a valid will.
4. ———: EXECUTION. Under section 127, chapter 23, Compiled Statutes, a will, other than a nuncupative, to be valid must, in addition to other statutory requirements, be signed by the testator, or by some person in his presence and by his express direction.
5. ———: ———. Mere knowledge of the testator that his name is being signed by another, or that the signing was acquiesced in or assented to by the testator, does not meet the requirements of the statute.
6. **Trial**: REJECTION OF TESTIMONY: REVIEW. The rulings sustaining an objection made to the competency of testimony sought to be elicited by a question propounded by the complaining party's own

witness cannot be reviewed unless an offer to prove the facts sought to be introduced is made in the trial court and preserved by a bill of exceptions.

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

C. J. Garlow, *W. W. Slabaugh*, and *W. A. Hampton*, for plaintiff in error.

Albert & Reeder, *John S. Robinson*, and *W. E. Reed*, *contra.*

NORVAL, J.

On the 3d day of January, 1892, Bridget Murry, then about sixty-five years of age, died without issue, leaving her surviving, Patrick Murry, her husband, and four children and heirs at law of a deceased brother of the said Bridget Murry. Patrick Murry, subsequently, offered to the county court of Platte county for probate an instrument bearing date November 19, 1891, and purporting to be the last will and testament of Bridget Murry, and by the terms of which all her property, real and personal, was devised to the husband. The children of the deceased brother of Bridget Murry contested the probating of the will on two grounds: First, that it was not signed by Bridget Murry, or by any person by her express direction; second, that she did not at the time possess testamentary capacity to dispose of her property. From an order of the county court finding that the will was the last will of the testatrix, and admitting the same to probate, the contestants appealed to the district court, where the issues were tried to a jury, who returned a verdict "that the instrument, 'Exhibit A,' purporting to be the last will and testament of Bridget Murry, deceased, is not her last will and testament." Proponent's motion for a new trial was overruled, and a judgment was entered denying the probate of the will. He brings the record to this court for review by proceedings in error.

Contestants insist that no exception was taken to the denying of the motion for a new trial. In this they are not sustained by the record, because the journal entry of the trial court shows a proper exception to the order overruling the motion was taken and entered.

The first objection of the proponent is that the contestants failed to show that any property belonging to the testatrix was disposed of by the instrument offered as a will, and if the devise was declared invalid they would have some interest in the property. The instrument in question in express terms purports to give all the property of the testatrix, both real and personal, to the proponent. It is disclosed by the testimony that she was the owner of a farm of 160 acres in Platte county, and that the contestants are the children of a deceased brother of Mrs. Murry, and her only "near relatives living, except cousins." A sufficient interest is shown by this record to give the contestants a standing in court to protest against admitting said instrument to probate.

The second argument of proponent is that the verdict is not supported by the evidence. The evidence relating to the mental capacity of Mrs. Murry at the time of the alleged execution of the will is of the most conflicting character. The testimony of those who were examined on behalf of the proponent, including George A. Scott and Henry Hockenberger, the attesting witnesses to the will, tends to establish the testatrix's capacity to make a valid will; while about the same number of persons, some of whom were physicians, gave testimony, to the effect, that Mrs. Murry was mentally disqualified at the time from understanding the nature and purport of the instrument offered for probate. The character, standing, and intelligence of the witnesses called by the contestants, as well as the opportunities for judging of her mental condition, were of as high order as that possessed by those who testified for the other side. The burden of proof, under the statute of this state, is upon the proponent to establish that the testator possesses sufficient

mental capacity to make a will. This, upon a review of the authorities, was held in *Seebrock v. Fedawa*, 30 Neb., 424. But it is argued that the burden is upon the proponent only until a *prima facie* case is made out, when the burden of proof shifts to the contestants to prove mental incapacity. The contrary was held in the case referred to. In the opinion it is said: "It is the duty of the proponent in the first instance to offer sufficient testimony of the capacity of the testator to make out a *prima facie* case. The contestant will then introduce his proof to show the invalidity of the will; after which the proponent may introduce further testimony to sustain the will, as well as rebutting testimony. During the entire trial the burden of proof remains with the proponent. Unless the sanity of the testator be established by a preponderance of the testimony, the will cannot be admitted to probate and record." It was further decided in that case that this rule obtains on appeal to the district court. Applying the rule as to the burden of proof to the case at bar, the jury were justified in finding the will invalid.

The verdict is right for another reason. It was not established that Bridget Murry executed the instrument, at least in the mode provided by law. Section 127, chapter 23, Compiled Statutes, provides: "No will made within this state, except such nuncupative wills as are mentioned in the following section, shall be effectual to pass any estate, whether real or personal, nor to charge, or in any way affect the same, unless it be in writing, and signed by the testator, or by some person in his presence, and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses," etc. Thus it will be observed that the legislature, in unequivocal language, has made it imperative that a will, other than a nuncupative, when not signed by the testator himself, must, in addition to other requirements, be signed by some person in his presence and by his express direction, or the instrument will be invalid. Mere knowledge of the testator that his name

is being signed by another, or that the signing was acquiesced in, or assented to, by the testator will not be sufficient. The statute exacts more than this. It requires that the signing of a will by another must be done in pursuance of the previously expressed direction of the testator. The statute is meaningless if this is not its scope and purpose. The same construction has been placed upon similar statutes in other states. (*Waite v. Frisbie*, 45 Minn., 361; *Greenough v. Greenough*, 11 Pa. St., 489; *Asay v. Hoover*, 45 Am. Dec. [Pa.], 714; *Grabill v. Barr*, 47 Am. Dec. [Pa.], 420; *Snyder v. Bull*, 17 Pa. St., 60.) In the Minnesota case the testatrix's name was signed by another person without her express direction, and on being requested to make her mark, she placed her hand on that of the one who signed her name, and he made the mark. The court, in construing the statute of that state which declares that a will shall "be signed at the end thereof by the testator, or by some person in his presence, and by his express direction," held that the will was invalid for want of a proper execution. The case at bar is quite analogous to that. The will was prepared by Mr. Hockenberger, at the request and suggestion of Mr. Murry, the beneficiary. The person who drew the will signed Bridget Murry's name thereto, without being directed by her to do so. It is true her mark was made, but the evidence shows that it was made by Mr. Hockenberger, and that Mrs. Murry merely, at his suggestion, touched the pen while the mark was being affixed to the instrument. The signing not being at her express direction, the will was not executed as the law requires, and it is for that reason alone invalid.

Patrick Murry, the husband of the deceased, testified as a witness in his own behalf. During his examination the following questions were asked:

Q. Do you remember of having any conversation with Mrs. Murry on the 19th day of November, 1891 (which was the date of the will)?

A. When I was bringing Doctor Sanders back?

Q. On that day at any time.

A. Yes, sir; yes.

Q. State to the jury what that conversation was.

This question was objected to, "as incompetent, irrelevant, immaterial, and the further reason it seeks to disclose a communication between husband and wife while the marital relations existed, and the further reason that the husband is the sole devisee under the will." Sustained. Exception. Had the objection gone alone to the competency of the witness to testify, then the facts expected to be established by him need not, as counsel for proponent contend, be stated, because the ground urged for this rejection has no relation to the subject-matter of the testimony. Several grounds are stated in the objection as made, and the record does not disclose upon which one the trial judge placed his decision. Evidently it was not because the witness was incompetent to testify, since it appears from the bill of exceptions that five pages of his testimony had been taken before the objection was interposed, and thirteen pages afterwards. One of the objections urged went to the competency, relevancy, and materiality of the testimony of the witness, and no statement of the facts expected to be proved was made, hence we are unable to determine the materiality of the excluded testimony, and no foundation was laid for a review of the ruling. (*Masters v. Marsh*, 19 Neb., 458; *Mathews v. State*, 19 Neb., 330; *Yates v. Kinney*, 25 Neb., 120; *Burns v. City of Fairmont*, 28 Neb., 866.)

Complaint is made that the court erred in permitting Mary Flynn to testify on behalf of the contestants as to certain statements made by Mrs. Murry. No such question is raised by the assignments in the petition in error, and for that reason, under the uniform decisions of this court, it cannot be considered.

It is finally insisted that error was committed in refusing to instruct the jury that the question of fraud and undue influence was eliminated from the case. No request to so charge the jury was tendered by the proponent,

which alone is sufficient answer to this contention. Again, the record does not show that such issue was withdrawn. It is disclosed that the contestants, after they rested their case, with the permission of the court struck out the third paragraph of their objections to the probate of the will, but what issue was raised by this paragraph we are not advised, as the objections to the allowance of the will are not to be found in the transcript before us. No reversible error appearing, the judgment is

AFFIRMED.

POST, C. J., not sitting.

STATE OF NEBRASKA, EX REL. THOMAS WALTON, V. ALBERT J. CORNISH, JUDGE.

FILED MAY 20, 1896. No. 8452.

1. **Divorce:** ALIMONY: SUPERSEDEAS. A supersedeas bond for an appeal from a decree awarding alimony must be in double the amount of such decree, and conditioned as prescribed by the first subdivision of section 677 of the Code of Civil Procedure.
2. ———: ———: ———: PENALTY. Neither the district court, nor the judge thereof, has the power to fix the amount of the penalty of the bond to be given in such a case, since the amount is prescribed by statute.

ORIGINAL application for *mandamus* to compel respondent, a judge of the district court for Lancaster county, to fix the amount of the supersedeas bond to be given upon appeal from a decree granting relator's wife a divorce and alimony. *Writ denied.*

Ricketts & Wilson, for relator.

Field & Brown, contra.

NORVAL, J.

In the district court of Lancaster county, before the respondent, one of the judges of said court, on the 3d day of April, 1896, one Barbara S. Walton obtained a decree of divorce from Thomas Walton, the relator herein, and the allowance to her of $5,000 as permanent alimony, the further sum of $700 as attorneys' fees, and that the relator pay the costs of the action. Thomas Walton, desiring to appeal from said decree to this court, applied to the respondent, the judge who heard and decided said cause, to fix the amount of the supersedeas bond to be given by the relator to stay proceedings under said decree, pending his appeal now docketed in this court, which the respondent declined and refused to do. Thereupon relator applied to this court for a peremptory *mandamus* commanding respondent to fix the amount of the supersedeas bond in the cause. To the application the respondent has filed a general demurrer, which has been argued and submitted.

The question raised by the demurrer is one of statutory construction, namely, Has the respondent the power or authority to fix the amount of the supersedeas bond? Stated differently, Is the amount of such bond to be given to stay proceedings under a decree of divorce and alimony, pending a review thereof in this court, unalterably fixed by statute? That an appeal will lie from a decree granting a divorce and alimony is perfectly clear. (*Brotherton v. Brotherton*, 12 Neb., 72.) The statute relating to divorce and alimony (Compiled Statutes, ch. 25), while providing that decrees for alimony shall be liens upon the property of the husband in like manner, and may be collected and enforced in the same mode as other judgments recovered against him (secs. 4*a*, 26), yet it contains no provision for the superseding of such decrees; hence, if such authority exists, it must be found in that part of the Code of Civil Procedure which relates to appeals in equity cases. Section 675 of said Code provides for ap-

peals in all actions in equity, and section 677 authorizes the giving of a supersedeas bond to stay proceedings under decrees in such cases, in the following language: "No appeal in any case in equity, now pending and undetermined, or which shall hereafter be brought, shall operate as a supersedeas, unless the appellant, or appellants, shall, within twenty days next after the rendition of such judgment or decree, or the making of such final order, execute to the adverse party a bond with one or more sureties as follows: First—When the judgment, decree, or final order appealed from directs the payment of money, the bond shall be in double the amount of the judgment, decree, or final order, conditioned that the appellant, or appellants, will prosecute such appeal without delay, and pay all condemnation money and costs which may be found against him, or them, on the final determination of the cause in the supreme court. Second—When the judgment, decree, or final order directs the execution of a conveyance or other instrument, the bond shall be in such sum as shall be prescribed by the district court, or judge thereof in vacation, conditioned that the appellant, or appellants, will prosecute such appeal without delay, and will abide and perform the judgment or decree rendered, or final order which shall be made by the supreme court in the cause. Third—When the judgment, decree, or order directs the sale or delivery of possession of real estate, the bond shall be in such sum as the court, or judge thereof in vacation, shall prescribe, conditioned that the appellant, or appellants, will prosecute such appeal without delay, and will not during the pendency of such appeal commit, or suffer to be committed, any waste upon such real estate. Fourth—When the judgment, decree, or final order dissolves or modifies any order of injunction which has been or hereafter may be granted, the supersedeas bond shall be in such reasonable sum as the court, or judge thereof in vacation, shall prescribe, conditioned that the appellant, or appellants, will prosecute such appeal without delay,

and will pay all costs which may be found against him, or them, on the final determination of the cause in the supreme court; and such supersedeas bond shall stay the doing of the act or acts sought to be restrained by the suit, and continue such injunction in force, until the case is heard and finally determined in the supreme court. The undertaking given upon the allowance of the injunction shall be and remain in effect until it is finally decided whether or not the injunction ought to have been granted." The foregoing is broad and comprehensive in its scope and purpose, and the provisions of this section apply to decrees granting alimony, as well as to all other decrees or final orders made in suits in equity. Manifestly such was the intention of the legislature, and this view is not contested by either party to this application. It must be conceded that this case is governed and controlled by the first subdivision of the section quoted above, which requires that when the decree provides for the payment of money, the supersedeas bond shall be in double the amount of such decree. This particular provision of said section was under consideration in *Kountze v. Erck*, 45 Neb., 288, and in the opinion, on page 292, the following apposite language was used: "It requires no argument to show that where a party appeals from a judgment or decree for the payment of money, in order to supersede the same he must execute a bond to the adverse party with one or more sureties in double the amount of the judgment or decree, conditioned that he 'will prosecute such appeal without delay, and pay all condemnation money and costs which may be found against him, or them, on the final determination of the cause in the supreme court.' Such is the plain and obvious import of the statute."

Counsel for relator insist that the first subdivision of said section should be construed as if it read: "When the judgment, decree, or final order appealed from directs the payment of money *only*," etc. To do so would be to inject a word into the statute which is not there to be

found. Our duty is to construe and apply the laws as enacted. It is not our province to amend them, or to legislate; that responsibility and power is confided to the legislative branch of the state government. The statute, if we read it aright, in plain and unmistakable terms prescribes the amount of the penalty of a supersedeas bond to be given to stay a decree providing for the payment of money, to-wit, double the amount of such decree. The court or judge has nothing whatever to do with fixing the amount of the bond to be given under the first subdivision of said section 677, the legislature having determined the amount thereof. Under the other subdivisions of said section the court or judge, in the exercise of a sound discretion, fixes the penalty of the supersedeas bond required to be executed to stay proceedings. The provisions of section 26, chapter 20, Compiled Statutes, regulating appeals from the county to the district court in civil actions, as to the penalty of the undertaking required for that purpose, are quite similar to the provisions of the first subdivision of said section 677 in respect to the amount of the supersedeas bond, and we have never heard it contended that a county judge is required to fix the amount of the appeal bond necessary to be given to review a judgment rendered before him. There is no provision of statute requiring it in either case, and it is not necessary to do so. For respondent to name the amount of the penalty of the bond would be a mere idle ceremony, as no rights would be lost by his omission so to do. It follows that the respondent has not failed to discharge a duty imposed upon him by law, and the demurrer to the petition must be sustained and the proceeding

DISMISSED.

RICHARD H. BAYLIS, APPELLANT, V. CALVIN H. PARMELE ET AL., APPELLEES.

FILED MAY 20, 1896. NO. 6582.

Conflicting Evidence: REVIEW: LANDLORD AND TENANT: NOTICE. When made upon fairly conflicting evidence, the findings of the district court in support of its judgment must be sustained.

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

Hainer & Smith, for appellant.

Howard M. Kellogg and *John A. Davies, contra.*

RYAN, C.

This action was brought March 27, 1893, by the appellant in the district court of Hamilton county. Upon a trial afterwards had there was a judgment dismissing the petition and dissolving the preliminary injunction, which, at the commencement of this suit, had been allowed. Of this petition the averments in substance were that plaintiff is in the quiet and peaceable possession of certain real property described, by virtue of a written lease made March 9, 1891, by the then owner; that by the terms of said lease it does not expire until March 1, 1894; that plaintiff has paid the rent for the year 1892, notwithstanding which facts the defendants, who are now the owners of the said leased lands, are attempting forcibly to deprive plaintiff of his said possession, and the prayer was for an injunction to prevent such interference. In the lease, of which a copy was attached to the petition of plaintiff, there is this provision: "In case either party wishes to dissolve the within lease before expiration thereof, he shall serve notice on the other party at least three months prior to the expiration of the lease year." On November 26, 1892, W. H. Newell and

C. H. Parmele, who had purchased the leased land from Frank T. Ryan, the maker of the lease to appellant, in accordance with the terms of the lease, gave the notice required to terminate it on March 1, 1893. No objection was made to the right of these parties, as grantees of Ryan, to give the notice and terminate the lease as above described. Upon sufficient evidence the district court found that Newell and Parmele, at the time of the commencement of the action, were in possession of the leased premises, and that at said time plaintiff had no right of possession. The material issues presented as to which there was evidence involved solely the questions as to whether or not there was notice to terminate the lease as above described, and whether or not plaintiff, in compliance with the requirements of said notice, had peaceably yielded possession to the defendants. There could be no useful end subserved by reviewing the evidence. We must content ourselves with a general observation that in all respects it was sufficient to sustain the findings of the district court. The judgment is therefore

AFFIRMED.

MANUFACTURERS & BUILDERS FIRE INSURANCE COMPANY OF NEW YORK V. HELEN M. MULLEN.

FILED MAY 20, 1896. No. 6566.

1. **Principal and Agent:** EVIDENCE OF AGENCY. Authority to sign an agreement to arbitrate cannot be inferred from acts as special agent having no reference to such arbitration or the subject-matter therein contemplated.

2. **Arbitration:** CONSTRUCTION OF AGREEMENT: EVIDENCE. An agreement to submit a matter of difference to two arbitrators, by whom an umpire was to be chosen to act only upon matters of difference between the arbitrators, did not authorize one arbitrator and such umpire, without a showing of difference between the arbitrators, to return an award conclusive upon the parties concerned.

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

Bartlett, Baldrige & De Bord, for plaintiff in error.

Mahoney, Minahan & Smyth, contra.

RYAN, C.

In this action there was a judgment in the district court of Douglas county upon a verdict in favor of the defendant in error in the sum of $1,715.19 on account of defendant in error's total loss by fire of a building insured by plaintiff in error. The only error argued is that a so-called award of $1,261.04, pleaded by answer, was not admitted in evidence. The agreement to arbitrate was in writing and the name of the defendant in error was thereto signed as follows: "Helen M. Mullen, by John S. Mullen, Atty. in Fact." There was evidence submitted of certain acts performed by John S. Mullen as agent for his wife, Helen M. Mullen, such as collecting rent, etc. There was no direct evidence that he had authority to bind her by an agreement with reference to an arbitrament of any matter in which she had an interest, but this authority it was sought to imply merely from the collection of rent and like acts performed in her behalf. Under these conditions there was no such showing as would have bound the defendant in error even had the award been regularly made by the arbitrators named. (*Scarborough v. Reynolds*, 12 Ala., 252; *Huber v. Zimmerman*, 21 Ala., 488; *Michigan C. R. Co. v. Gougar*, 55 Ill., 503; *Trout v. Emmons*, 29 Ill., 433; *McPherson v. Cox*, 86 N. Y., 472; *Lowenstein v. McIntosh*, 37 Barb. [N. Y.], 251.)

Another objection to the award is that by the agreement therefor two arbitrators were named whose award should be binding, but it was provided that these two arbitrators, before entering upon the duties assigned to them, should choose an umpire to act only upon matters

of difference. The award was signed by this umpire and only one arbitrator, without any showing of difference between the two arbitrators named. If there was no other objection to this award this consideration was sufficient to render it invalid. The judgment of the district court is

AFFIRMED.

DEERE, WELLS & COMPANY V. GEORGE W. LOSEY ET AL.

FILED MAY 20, 1896. No. 6559.

1. **Voluntary Assignments:** VALIDITY OF DEED: GARNISHMENT. In an action to hold liable as garnishee the assignee of an insolvent firm with respect to property which has come into his hands by virtue of the assignment it is immaterial whether or not the deed of assignment was witnessed, and any ambiguity in such deed will not be so construed as to render it void.

2. ———: ———: FRAUD OF ASSIGNOR. The fraudulent disposition of a part of his property by one about to make an assignment for the benefit of his creditors will not operate to impair the title of the assignee to the remainder, when such assignment is afterwards made to, and acted upon by, the assignee in good faith.

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

Campbell & Wallis and *Harl & McCabe*, for plaintiff in error.

References: *Cowles v. Ricketts*, 1 Ia., 582; *Hutchinson v. Watkins*, 17 Ia., 475; *Van Patten v. Burr*, 52 Ia., 518; *Gray v. McAllister*, 50 Ia., 497; *Pierce v. Jackson*, 6 Mass., 242; *Williams v. Henshaw*, 11 Pick. [Mass.], 79; *Brinley v. Kupfer*, 6 Pick. [Mass.], 179; *Heelan v. Hoagland*, 10 Neb., 513; *Ruble v. McDonald*, 18 Ia., 497; *Kayser v. Heavenrich*, 5 Kan., 340; *Craft v. Bloom*, 59 Miss., 69; *Putnam v. Hubbell*, 42 N. Y., 114; *Main v. Lynch*, 54 Md., 658; *Adler v. Ecker*, 1 McCrary [U. S.], 256.

Robinson & Reed, contra.

References: *Thomas v. Talmadge*, 16 O. St., 433; *Klapp v. Shirk*, 13 Pa. St., 589; *Seibert v. Milligan*, 10 N. E. Rep. [Ind.], 931; *Lancaster County Bank v. Horn*, 34 Neb., 742; *Conlan v. Grace*, 30 N. W. Rep. [Minn.], 883; *Pearson v. Davis*, 41 Neb., 608; *Lord v. Meachem*, 32 Minn., 66; *Second Nat. Bank of St. Paul v. Schranck*, 44 N. W. Rep. [Minn.], 524; *Staples v. Schulenberg*, 64 N. W. Rep. [Minn.], 148.

RYAN, C.

This action was brought by Deere, Wells & Co. in the district court of Madison county on June 3, 1893. There were made defendants George W. Losey, the sheriff of said county, and the firm of Hollingshead & Young. It was alleged in the petition that in October, 1892, there was pending in said court an action wherein Deere, Wells & Co. was plaintiff and the aforesaid firm of Hollingshead & Young was defendant, in which a writ of attachment issued, and that thereunder George W. Losey was garnished and answered on June 3, 1893. It was further averred that Losey in his answer as garnishee had disclosed that he had in his possession money and book accounts to the amount of $1,021.85, less expenses to the amount of $34.65, and that a bank intrusted with collections had realized therefrom $50 to $100. The right of Deere, Wells & Co. as against Losey, as garnishee, was predicated upon averments that Losey had received the above property under and by virtue of a deed of assignment made by Hollingshead & Young for the benefit of firm creditors, and that the assignment was a nullity for the alleged reasons that said deed was not witnessed and that it purported to convey nothing except the firm property of Hollingshead & Young, whereas, by its express terms, said property was made liable to the individual debts of the members of said firm. The third ground upon which the assignment was attacked was because, as alleged, the assignment was of only a portion of

the property of the firm of Hollingshead & Young, which firm made said assignment with the fraudulent intent of hindering, delaying, and defrauding its creditors, among whom was the aforesaid plaintiff. The prayer of the petition was as follows: "Wherefore plaintiff avers that the said deed is a nullity, that no rights or interests were created by or have arisen under it, and the defendant is, and at all times has been, wrongfully in possession of the property conveyed to him, as he claims, and the plaintiff prays judgment against the defendant for the value thereof, to-wit, $2,000, and for such other relief as justice and equity may require."

Without referring to the subsequent pleadings, the above grounds of complaint will be considered in a general way in the light of the evidence, upon consideration of which the district court dismissed plaintiff's action. The deed of assignment was solely of all personal property which was owned by the firm of Hollingshead & Young. The firm had no real property. Whether or not the individual members possessed any real or personal property was not alleged in the petition, and hence any questions which might arise from the omission of the assignment deed to embrace property subject to the payment of the debts of the firm is not presented. The deed of assignment complained of was made on October 4, 1892, and within twenty-four hours was duly recorded. Under it the assignee immediately took possession of the property conveyed. It is required by section 3, chapter 6, Compiled Statutes, that the description of the property shall be in such manner as would be requisite in an ordinary deed of conveyance thereof. Even if this required that the execution should be in the manner essential to constitute a good conveyance of real property, the omission to have it witnessed would not render the instrument absolutely void in view of the acts above described. This is not an action to set aside this deed, but is one in which the nullity thereof is assumed to exist. The fact that the instrument is good as between the par-

ties thereto must be accepted as sufficient to negative the contention of the plaintiff upon this point.

The second objection urged in the petition against the validity of the assignment is that, while there was conveyed only the property of the firm, such property, by the terms of the instrument, was made liable for the debts of the individual partners. This argument is founded upon the fact that the clause directing how distribution shall be made is in this language: "Third—The balance to be divided equally among our creditors according to the amount of their said claims." The words "our creditors," it is insisted, refer to the creditors of the individual members of the firm, and that therefore the assignment entitled them to partake in the distribution. The deed of assignment begins with the recitations that "Milton Hollingshead and J. J. Young, partners doing business under the firm name and style of Hollingshead & Young, are indebted in sundry considerable sums of money and have become unable to pay and discharge the same with punctuality, or in full, and being desirous of making a fair and equitable distribution of all our property and effects, do hereby convey to the sheriff of Madison county, Nebraska, all our partnership personal property of every description whatever. This conveyance is made in trust for the use and benefit of all our creditors and in conformity with an act of the legislature entitled," etc. It does not seem to us that the construction contended for is the necessary construction in view of all the language of the deed. It was not pleaded in the petition that the members of the firm were at all indebted, and that therefore the provision criticised created a trust in favor of creditors of the individual partners. If this attack had been made upon the deed, for the purpose of having it set aside, it is quite probable that matters of this nature would have been pleaded. As has already been noted, however, the petition assumed the nullity of the deed as a necessary inference, hence there was no averment of the extrinsic facts which, if proved, would

justify setting it aside. If the deed had been regarded as merely voidable, these averments might possibly have been made; as the assumption was that it was absolutely void, they were omitted. We cannot, in a proceeding of this kind, assume that the words "our creditors" applied to a class of whose existence there was no averment.

The third and final ground on which this deed is assailed is that it was made to defraud certain creditors of the firm, among whom was plaintiff. It is not clear wherein this fraud consisted. It is probable, however, that these allegations were not made with reference to the deed alone. On the day before this deed was executed the firm of Hollingshead & Young sold to the Newman Grove State Bank notes held by said firm, for which said firm received credit in the sum of $1,652.50, which, added to the balance due from the bank, $484.45, credited said firm with $2,136.95. For this balance there was issued by this bank on that same day two drafts, one for $1,000 and the other for $1,136.95. The latter of these drafts was indorsed by the firm to the wife of J. J. Young, and on October 5, 1892, it was presented by her. Instead of taking cash she took a demand certificate of deposit payable to herself, and this certificate was paid to the First National Bank of Omaha on October 25, 1892. The draft for $1,000 was by the firm indorsed to the wife of Milton Hollingshead. In exchange for this she, on October 6, 1892, took a demand certificate of deposit, which on the 13th of the same month was paid to the Bank of Monroe. As we understand the contention of the plaintiff, it is that these transactions should be considered in connection with the making of the deed of assignment, which should be deemed but a part of the fraudulent scheme of these partners, and that in view of the whole transaction the deed was void. It is provided by section 30, chapter 6, Compiled Statutes, that if any assignor shall have made a fraudulent conveyance or disposition of his property, upon being duly authorized the assignee may commence proceedings to subject to the payment of

the assignor's indebtedness such property as he has attempted fraudulently to withhold for his own benefit. This clearly negatives the idea that fraudulent disposition of property by the assignor before making an assignment necessarily impairs its validity. It was shown by the evidence that the assignor had resorted to vigorous methods to recover the amounts received by each of the partners as above described, and that in a slight measure he was successful. In doing this he acted properly and according to the requirements of the statute. If the contention of the plaintiff should be sustained there would be presented a condition at least curious, and to the assignee very embarrassing. The statute requires him to try to reach the property of the assignor fraudulently withheld, if properly backed by the creditors. In his petition he would in such an event be required to plead the frauds whereby the rights of the creditors were sought to be impaired. The theory of the plaintiff would lead to the result that, by pleading these facts, the assignee would be furnishing proofs destroying his right, at all, to act in that capacity. In whatever light it is considered it leads to the same result, and that is that the alleged fraudulent acts of the firm of Hollingshead & Young did not affect the validity of the assignment as to such property as could be reached by the assignee. The judgment of the district court is

AFFIRMED.

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY V. JAMES B. TALBOT.

FILED MAY 20, 1896. No. 6579.

1. **Railroad Companies:** COLLISION AT CROSSING: INJURY TO OCCUPANT OF WAGON: NEGLIGENCE OF DRIVER. Two mechanics were riding in a wagon in which they were transporting their tools, one driving the team. The driver, without looking or listening for the approach of a train, drove on a railroad crossing where a collision

with a locomotive engine occurred injuring the other mechanic. It did not appear that the injured person was under any disability whatever, nor whether or not he looked or listened. *Held*, (1) That the conveyance being a private one the driver was the agent of the injured person; (2) if the act of the driver in going upon the crossing without looking and listening was negligence which contributed to the injury received, the injured person cannot recover.

2. ———: DANGER AT CROSSINGS: INJURY TO NEGLIGENT TRAVELER: RECOVERY. It is the duty of a traveler upon a public highway when approaching a railroad crossing to exercise ordinary care, and if he fails to do so and is injured at the crossing by a collision with an engine, and his failure to exercise ordinary care contributed to such injury, he cannot recover therefor.

3. ———: ———: NOTICE. A railroad crossing is a place of danger, and all persons, to whom negligence may be imputed, are bound to take notice of that fact.

4. ———: ———: FAILURE TO LOOK AND LISTEN FOR TRAIN. The act of a party in going upon a railroad crossing without first listening and looking for the approach of a train, without a reasonable excuse therefor, is such as permits of no other inference than that of negligence; and if such failure to look and listen contributes to the party's injury he cannot recover.

5. ———: TRAINS: SCHEDULE TIME: NEGLIGENCE. The mere running of a train behind its schedule time is not evidence which tends to prove negligence.

6. ———: SPEED OF TRAINS. Outside the limits of cities, villages, and towns, negligence cannot be imputed to a railroad company solely by reason of the speed of its train, however great.

7. ———: SIGNALS AT CROSSINGS: NEGLIGENCE. The failure of a railroad company to cause a bell to be rung or a whistle to be sounded as its engine approaches a crossing is evidence which tends to prove negligence on the part of the railroad company, but does not necessarily demand an inference of negligence.

8. ———: ———: INJURY TO TRAVELER: NEGLIGENCE: PROXIMATE CAUSE. To recover for an injury alleged to have been sustained at a railroad crossing by a collision with an engine on account of the neglect of the railroad company to cause a bell or whistle to be sounded as its engine approached such crossing, it is not enough for the injured person to show that he was injured at the crossing, and that no signal of a bell or whistle was given, and that such default of the railroad company was negligence; but, to recover, the injured person must further show that the default and negligence of the railroad company were the proximate cause of the injury sued for.

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

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

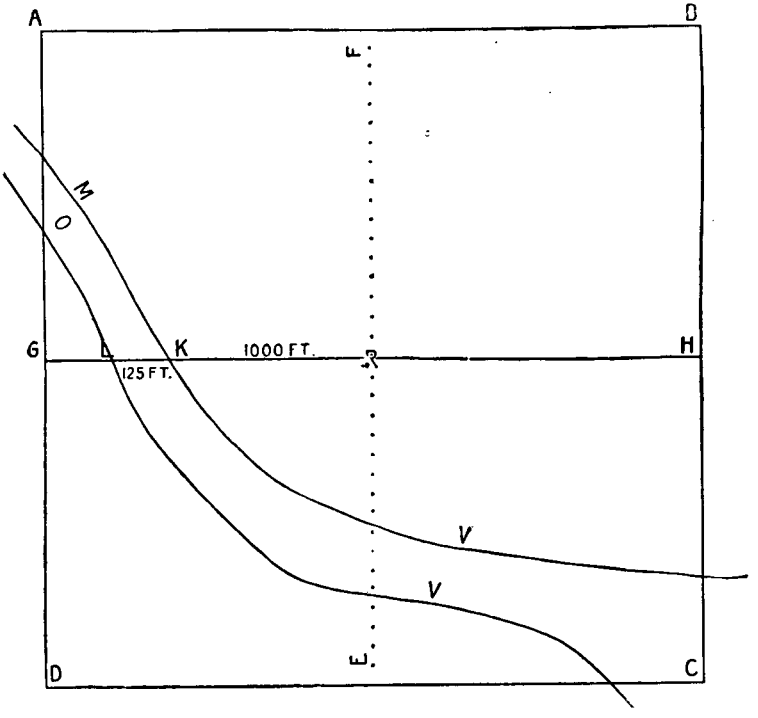
M. W. McGann and *M. F. Harrington*, *contra*.

References: *Piper v. Chicago, M. & St. P. R. Co.*, 46 N. W. Rep. [Wis.], 167; *Guggenheim v. Lake Shore & M. S. R. Co.*, 33 N. W. Rep. [Mich.], 161; *Breckenfelder v. Lake Shore & M. S. R. Co.*, 44 N. W. Rep. [Mich.], 957; *Hendrickson v. Great N. R. Co.*, 51 N. W. Rep. [Minn.], 1044; *Pennsylvania R. Co. v. Ogier*, 35 Pa. St., 71; *Cahill v. Cincinnati, N. O. & T. R. Co.*, 18 S. W. Rep. [Ky.], 3; *Ramsey v. Louisville, C. & L. R. Co.*, 20 S. W. Rep. [Ky.], 162; *Bates v. New York & N. E. R. Co.*, 22 Atl. Rep. [Conn.], 538.

RAGAN, C.

About 11 o'clock in the forenoon of the 20th of May, 1892, William Patten and James B. Talbot were riding in an uncovered spring wagon, drawn by two ponies, on a public highway in Boone county which crossed at grade the track of the Omaha & Republican Valley Railway Company, hereinafter called the "Valley Company." Patten handled the lines, or did the driving. At the time the wagon was passing over the railway tracks it was struck by a locomotive engine of the Valley Company pulling a passenger train bound northwest, and Talbot was injured. He brought this suit in the district court of Boone county against the Valley Company to recover damages for the injuries received as aforesaid. He had a verdict and judgment, to reverse which the Valley Company prosecutes to this court a petition in error.

1. We can better understand the locality where the accident occurred, and the facts and circumstances surrounding the same, by consulting the following diagram, roughly prepared from data in the evidence:



The figure, A, B, C, D, represents section 26, in township 20 north, and range 6, in Boone county. E, F is a line drawn north and south through the center of said section. G, H is a public highway running east and west through the center of said section. R represents the center of said section. The line M, V represents the track of the Fremont, Elkhorn & Missouri Valley Railroad Company, hereinafter called the "Elkhorn Company," as located across said section. The line O, V represents the track of the Valley Company, the plaintiff in error, as located across said section. K and L are the points where the highway, G, H, crosses the two railroad tracks aforesaid. The crossing K is about one thousand feet west of R, the center of the section. The crossings K and L are about one hundred and twenty-five feet apart. The crossing at K is about five feet higher than

the crossing at L. A row of trees extends north and south from R towards E. A part of the southeast quarter of said section lying immediately east of the line R, E is covered by a grove. The day the accident occurred Patten and Talbot had been out in the country doing some work in putting up or repairing windmills, and were returning in a wagon, in which they had their tools. They drove west along the highway, H, G, and the accident sued for occurred at the crossing L. Both men were sane, both had good hearing and good eyesight, and both of them were familiar with the road on which they were traveling, and with the railroad crossings above referred to. On the trial Talbot testified as follows:

Q. Tell the jury what use you made of your senses, if any, in approaching these two railroad tracks.

A. That is a question that it is impossible for me to answer. I suppose I used my senses as usual.

Q. Just state the facts—what you did.

A. I cannot state what I did, because I was—

Q. I want him to state why he cannot tell.

A. I remember everything distinctly until I came down near to the mill. I recollect everything that occurred that day; but from there my mind is blank. I cannot recollect it. It is a mystery to me. I have asked the physician why it is.

Q. Do you remember of seeing the train?

A. I do not. I have no remembrance of seeing the train at all.

Q. Do you remember the engine or anything?

A. No, sir.

Q. Was there anything to prevent you seeing an engine?

A. I would not say that there was or that there was not.

Patten testified as follows:

Q. Now, before crossing the Elkhorn track, you may state what, if anything, you did to ascertain whether there was any train approaching.

A. Well, before I got to the Elkhorn track I looked both ways for the train, but I saw none, and when I got up a little closer,—got up to the Elkhorn track,—to cross the track, I looked for the train coming from the other direction, from Albion,—that is, from the northwest.

Q. Now you may state whether you saw that train on the defendant's railroad that came up that day to Albion. Did you see it,—that is, the train going northwest?

A. I saw it when it hit me—hit us.

Q. About how far from the defendant's railroad track were you when you first got sight of the train, as near as you can tell? How far the horses' heads were from the train, as near as you can tell?

A. Well, they were not very far.

Q. How far south of the crossing were they when they first whistled?

A. I cannot say.

Q. Tell us about how far.

A. I should judge they were about 100 feet; something like that.

Q. After passing that row of trees [R, E] and looking towards the south, I will ask you if you cannot see clear down to where the Valley railroad track comes out of the grove—all the way, so as to see an engine and train coming from that direction?

A. Well, I expect you can.

Q. Well, don't you know that you can?

A. Yes, I guess we can see through there.

Q. Your best recollection is that you were in the neighborhood of that row of trees when you commenced looking?

A. I might have been by it and I might have been west of it. I did not take particular notice of that row of trees.

Q. You looked up and down the road both ways?

A. Yes, sir.

Q. Saw nothing; then you drove right on towards the railroad track, did you?

A. Yes, sir.

Q. When you were going on westward you came to the elevation going up on the Elkhorn track on your way, did you not?

A. Yes, sir.

Q. From that point looking east [southeast] I will ask you if you cannot see clear through the grove along the line of the Valley railroad track?

A. Yes, sir; you can from the Elkhorn track.

Q. As you went on that day, as you drove onto that grade of the Elkhorn track, I will ask you if you had looked to the east [southeast] if you could not have seen that train if it was anywhere within a mile of you?

A. Why, I did not look to the east [southeast].

Q. You know that country pretty well? Answer the question.

A. Oh, I might have seen it if I had looked from the Elkhorn track, but I was looking for a train coming from the other way.

Q. You did not look to the east at all, did you?

A. Not when I was on the Elkhorn track; I did not. I was looking the other way and was minding my horses, because I thought I was perfectly safe.

Q. You did not look to the east at all, did you, after you got onto the Elkhorn track?

A. No, sir.

Q. You had not looked to the east for a considerable distance before you drove up onto the Elkhorn track, had you?

A. Well, I do not know how far.

Q. Well, was it a quarter of a mile away that you had looked to the east?

A. No, sir; I do not think it was.

Q. Was it an eighth of a mile?

A. Well, it may have been, probably.

Q. Well, what is your best recollection?

A. About that, I should judge.

Q. Now then, you think it was about an eighth of a mile from the track where you looked to the east, do you?

A. Yes, sir.

Q. And not afterwards?

A. Not after that?

Q. Yes, not after that.

A. No, sir, I do not think I did, because I was looking the other way.

Q. When you were on the Elkhorn track, if you had looked east [southeast] from that point you could see the train coming from the east very easily, couldn't you?

A. Yes, sir.

Q. If you had looked from that point and saw the train coming you could have stopped the team all right, couldn't you?

A. Yes, sir.

Q. Your team was under perfect control at the time you came to the Elkhorn track?

A. Yes, sir.

Q. And after you had gone half way between the Elkhorn track and the Valley Company's track they were still under control?

A. Yes, sir.

Q. They were still under control when you were half way between the two tracks?

A. Yes, sir.

Q. And you looked towards the west to see if there was a train coming from that direction?

A. Yes, sir.

Q. And at that time, if there had been a train coming from the west [northwest] you could have stopped them safely?

A. Yes, sir.

Q. And if you had seen one coming from the east [southeast], you could have stopped them, couldn't you?

A. Yes, sir.

Q. Then at any time until you came upon the Valley track you could have stopped those horses in time to have avoided the injury, couldn't you?

A. Yes, sir, if I had seen the train.

It thus appears from the uncontradicted evidence that Patten and Talbot drove on the railroad crossing where this accident occurred without looking or listening for the approach of a train. We have not lost sight of the fact that Patten was doing the driving; but this was a private conveyance being used by Patten and Talbot for the transportation of their tools, and under the circumstances of the case it must be held that Patten was Talbot's agent; and since there is nothing in the evidence which shows that Talbot was sick, insane, or under any disability whatever,—and we cannot indulge any such a presumption,—it follows that if Patten's act of driving on the crossing without first looking or listening for the approach of a train was negligence, and contributed to the injury for which Talbot sues, the latter cannot recover. (*Prideaux v. City of Mineral Point*, 43 Wis., 513.)

It is the duty of a traveler upon a public highway, when approaching a railroad crossing, to exercise ordinary care. All men must take notice of the fact that a railway crossing is a place of danger. And we are of opinion that a person who goes upon a railway crossing without first listening and looking for the approach of a train, in the absence of a reasonable excuse therefor, does not exercise ordinary care. We further think that the act of a party in going upon a railroad crossing without first listening and looking for the approach of a train, in the absence of a reasonable excuse therefor, admits of no other inference than that of negligence, and if such failure to look and listen contributes to the party's injury he cannot recover. *Pennsylvania Co. v. Rathgeb*, 32 O. St., 66, is a case very much like the one at bar. In that case Rathgeb was injured while attempting to cross the railroad track in a wagon. Before going upon the track he looked in one direction only. The district court charged the jury: "I will not say to you that the plaintiff should have looked east along the track. I will only say that he was obliged to use his sense of sight in a reasonable manner, and it is for you to say whether he ought to have

looked to the east along the track or not before he attempted to cross." But the supreme court held that the district court should have charged the jury that it was Rathgeb's duty to look to the east as well as the west along the track before attempting to cross it. In that case the court also held: "Ordinary prudence requires that a person in the full enjoyment of the faculties of hearing and seeing, before attempting to pass over a known railroad crossing, should use them for the purpose of discovering and avoiding danger from an approaching train; and the omission to do so, without a reasonable excuse therefor, is negligence and will defeat an action by such person for an injury to which such negligence contributed." In the case at bar, Talbot did not look towards the southeast, the direction from which the train came which injured him. He alleges as a reason for not looking in that direction that he supposed the train bound northwest had already gone by, as it should have done if it was on time; but this supposition of Talbot will not excuse him for not exercising ordinary care in looking both ways for the approach of a train. A traveler approaching a railway crossing has no right to assume that cars are not approaching on the track, or that there is no danger therefrom. If a traveler approaching a railway crossing should see a train passing, this would not authorize him to presume that another train was not following close by. (*Calligan v. New York C. & H. R. R. Co.*, 59 N. Y., 651; *Nixon v. Chicago, R. I. & P. R. Co.*, 51 N. W. Rep. [Ia.], 157; *Elliott v. Chicago, M. & St. P. R. Co.*, 150 U. S., 245; *Schmalze v. Chicago, M. & St. P. R. Co.*, 83 Wis., 663.) The conduct of Talbot,—what he did and what he omitted to do,—at the time he sustained the injury sued for is shown by his own evidence and that of his agent, Patten; and we think that reasonable and unbiased men can draw but one conclusion from this conduct, and that is that he failed to exercise ordinary care when approaching this crossing; and that his conduct was the proximate cause of the injury of which he complains.

2. The negligence charged by Talbot to the Valley Company was that the train which injured him was behind schedule time; that it was running with great speed, and that no signal was given of its approach to the crossing. It is not possible that a train should always be on schedule time, and we do not think that the running of a train behind its schedule time is evidence which tends to prove negligence; and outside the limits of cities, villages, and towns no rate of speed of a railroad train, however great, is evidence of negligence. (*Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb., 90; *Missouri P. R. Co. v. Hansen*, 48 Neb., 232.) Railroad companies are organized and railroads are built and operated for speed. Commerce, business, and the busy world are in haste. The civilization and genius of the age demand haste, demand speed, and to require railroad companies to move their trains at so slow a rate of speed that they could be easily stopped when approaching ordinary highway crossings in the country would be to seriously impair their usefulness as carriers and take a step backwards towards the sailboat and the stage coach.

It was also charged as negligence that no whistle was sounded and no bell was rung by the Valley Company's servants as its engine and train approached the crossing where Talbot was injured. It is required by section 104, chapter 16, Compiled Statutes of 1895, that every locomotive engine running in this state shall be furnished with a bell or a steam whistle; that this bell shall be rung or whistle sounded at least eighty rods from the place where the railroad shall cross a highway; and that such ringing or whistling shall be continued until the engine shall have crossed the highway; and that if any railway company shall omit to give these signals, it shall be liable for all damages which any person shall suffer by reason of such default. But the failure of a railroad company to ring a bell or sound a whistle when approaching a crossing is simply evidence which tends to prove negligence on the part of the railroad company. It does not neces-

sarily demand an inference of negligence. (*Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb., 848.) In the case at bar the evidence as to whether any signal, by bell or whistle, was given as the engine which injured Talbot approached the crossing was conflicting, and we are bound to take the finding of the jury as conclusive, that no such signal by bell or whistle was given. But the fact alone that the railroad company neglected to give this signal by bell or whistle will not authorize a recovery in this action by Talbot. He, having shown that the signals were not given and that the failure of the company to give the signals was negligence on its part, in order to entitle him to recover, must further show that such default and negligence on the part of the railroad company were the proximate cause of the injury which he sustained. This he has not done. As we have already seen, the proximate cause of the injury sustained by Talbot was his going upon this railroad crossing without first looking and listening for the approach of an engine. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD COMPANY V. GEORGE W. FRENCH.

FILED MAY 20, 1896. No. 6630.

Carriers: INJURY TO PASSENGER: RECOVERY: EVIDENCE. It is only necessary to a right of recovery against a railroad company to show that the person injured was at the time being transported as a passenger over the defendant's line of railroad, and that the injury resulted from the management or operation of such railroad. A presumption thereupon arises that such management or operation was negligent, and can be met, only, by showing that the injury arose from the criminal negligence of the party injured, or that the injury complained of was the result of the violation of some express rule or regulation of such company actually brought to the notice of the person injured.

2. ———: ———: ———. By the statutes of this state a common carrier is made an insurer of the safety of its passengers, except as against the criminal negligence of such passenger or his violation of some rule of the carrier actually brought to such passenger's notice. (Compiled Statutes, ch. 72, art. 1, sec. 3.)

3. **Review:** NUMBER OF WITNESSES. The credibility of witnesses is for the jury, and this court cannot say that the finding of a jury is not supported by sufficient evidence because a greater number of witnesses testified against the finding than testified in its favor.

4. **Carriers:** RECOVERY FOR INJURIES: EVIDENCE. In a suit by a passenger against a common carrier for damages for an injury alleged to have been sustained while such passenger, when the passenger has shown that the defendant is a common carrier, that he was the carrier's passenger, and while such was injured, and the extent of such injury, he has made out his case. The carrier then, to escape liability, must show that the injury of the passenger was the result of his criminal negligence, or the result of a violation by him of some express rule or regulation of the carrier actually brought to the passenger's notice.

5. **Damages:** NEGLIGENCE. The law awards damages to a party injured through the negligence of another, not as a punishment of the negligent party, but as compensation for the pecuniary loss sustained and the pain and suffering endured by the injured party.

6. ———: CARRIERS: INJURY TO PASSENGER: CONTRACTS. The relation existing between a common carrier and a passenger is a contractual one, the undertaking of the carrier being to safely transport and deliver the passenger at his destination, and the violation of this contract by the carrier entitles the passenger to recover such damages as will fully compensate him for the injury and loss sustained; but the passenger is not entitled to damages that will put him in a better position than he would have been in had the carrier complied with its contract.

7. ———: ———: ———: REMITTITUR. The damages awarded a passenger in this case *held* to be excessive and a remittitur of $1,300 ordered.

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

John B. Hawley, B. T. White, and *William B. Sterling,* for plaintiff in error.

E. F. Gray and *D. B. Carey, contra.*

RAGAN, C.

George W. French sued the Fremont, Elkhorn & Missouri Valley Railroad Company in the district court of Brown county for damages for an injury which he alleged he had received while a passenger of the railroad company. French had a verdict and judgment and the railroad company prosecutes here a proceeding in error.

1. That the railroad company was a common carrier of passengers for hire, that French was a passenger on one of its trains and while such passenger was injured, there was no dispute on the trial of this case in the court below, nor is there any here. Section 3, article 1, chapter 72, Compiled Statutes, provides: "Every railroad company * * * shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." This statute was construed in *Missouri P. R. Co. v. Baier*, 37 Neb., 235, and it was there held: "It is only necessary to a right of recovery against a railroad company to show that the person injured was at the time being transported as a passenger over the defendant's line of railroad, and that the injury resulted from the management or operation of said railroad. A presumption thereupon arises that such management or operation was negligent, and it can be met only by showing that the injury arose from the criminal negligence of the party injured, or that the injury complained of was the result of the violation of some express rule or regulation of said railroad company actually brought to the notice of the party injured." This construction of the statute was adhered to in *Union P. R. Co. v. Porter*, 38 Neb., 226, and again in *Chicago, B. & Q. R. Co. v. Landauer*, 39 Neb., 803, and *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb., 448. The court in construing the statute said: "By the statutes

of this state a common carrier is made an insurer of the safety of its passengers, except as against the gross negligence of such passenger or his violation of some rule of the carrier brought to such passenger's notice." French's injury happened on the 4th day of February, 1891. On that day he was a passenger on the cars of the defendant railroad company from the city of Omaha to the city of Ainsworth, and was injured at the station of his destination. There was no claim in the court below, nor is there any here, that French's injury was the result of his violation of any rule or regulation of the railroad company. The defense of the railroad company interposed in the court below was that as the train on which French was a passenger was moving rapidly in front of the station platform at Ainsworth, French attempted to step or jump from the steps of the coach on which he was riding to the station platform, and fell and was thus injured. It will thus be seen that the railroad company assumed that the act of French in stepping or jumping from the moving train to the platform, if he did so step or jump, was criminal negligence on his part within the meaning of the statute quoted. We do not decide whether this assumption of the railroad company was correct or not. If French jumped or stepped from the moving train to the platform, the act may have been such as to permit of no other inference than that of negligence on his part, as in *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 642, 39 Neb., 803, and *Woolsey v. Chicago, B. & Q. R. Co.*, 39 Neb., 798; or the act of French may have been simply evidence which tended to prove negligence on his part, as in *Union P. R. Co. v. Porter*, 38 Neb., 226, *Chicago, B. & Q. R. Co. v. Hyatt*, 48 Neb., 161, and *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb., 448. But whether the act of French was evidence which merely tended to prove negligence, or demanded an inference of negligence on his part, depended under the peculiar facts and circumstances under which he stepped or leaped from the train. We are not concerned here with the question whether his act was negligence or

evidence which tended to prove negligence. The proposition presented to us is the correctness of the finding of the jury that French did not step or jump from the train while in motion. French's theory of the injury was that he did not leave his seat in the car until the train stopped at Ainsworth; that he then went out to the platform of the car and stepped down on the lower step and lifted one foot into the air for the purpose of stepping to the station platform,—the car in the meantime standing still,—and while he was thus in the act of stepping to the platform the train was suddenly jerked forward, throwing him to the ground and partly under the train; and that the train then moved up a short distance and stopped the second time. Some four or five witnesses testified to French's version of the accident, and some fifteen or sixteen witnesses contradicted his version of the accident, more or less directly and positively. Some of the circumstances in the case strongly corroborate French's theory. The first assignment of error argued here is that this finding of the jury in favor of French's theory of the accident is not supported by sufficient evidence. We think it is. We did not hear these witnesses testify; we have had no means of observing them or their demeanor. The credibility of these witnesses was for the jury; and because five witnesses testified directly that a thing did happen, and sixteen witnesses testified, more or less directly, that that thing did not happen, this court cannot say that the jury was wrong in believing the five witnesses instead of the sixteen. (*Omaha Street R. Co. v. Craig*, 39 Neb., 601.) But in addition to this, the learned district judge heard these witnesses testify, and he has put the seal of his approval upon their verdict on this question by overruling the motion for a new trial. This court cannot reverse the finding of the jury because a greater number of witnesses testified against the finding of the jury than testified in favor of its finding. French having shown that the railroad company was a common carrier of passengers for hire, that he was a passenger on one of its trains, and

while such passenger was injured, he had then made out his case; and the railroad company, to escape liability, was under the necessity of showing that the injury for which French sued was the result of his criminal negligence, or the result of a violation by him of some express rule or regulation of the railroad company actually brought to his notice. It was the opinion of the jury that the carrier had not done this, and we cannot say that the conclusion of the jury on that subject was wrong.

2. The next assignment of error which we notice is that the damages awarded French are excessive, and appear to have been given under the influence of passion and prejudice. The judgment in this case is for $6,300. We find nothing in the record which we think justifies us in concluding that the award of damages in this case was the result of passion or prejudice on the part of the jury. But are the damages excessive under the facts in evidence in the case? French when injured was a man twenty-four years of age, in good health. He was a farmer by occupation. The injury consisted of a cut made by the flange of a car wheel in the fleshy part of his heel, and the laceration and bruising of the muscles of his ankle and its being severely strained and twisted. No joints were dislocated and no bones broken. He was in bed some eleven weeks, during which time he suffered more or less pain. From the time he got out of bed until the autumn of the same year he was compelled to use crutches in moving about, and it would seem from the evidence that he lost as the result of the accident about a year's time. The case at bar was tried in November, 1892, and at that time he appears to have been on the high road to getting well, although at that time his ankle was slightly stiff and tender and somewhat sore. He was not permanently injured by the accident, as that term is generally understood; that is, he was not permanently and entirely disabled. He testified that he could not do as much work by about half since his injury as before. His physician testified that his ankle would be more or less weak always,

but in time could be used without pain or other inconvenience except the inconvenience of its stiffness; that the injured parts of his foot had been and were constantly improving and that he might almost entirely recover, and that he presented one of the best of subjects for a cure by reason of his youth and strength. The record contains no evidence showing what French was capable of earning either before or after the injury; nor does the evidence disclose that he suffered any great or excruciating pains for any very considerable time. He incurred an expense of $200 for medical attendance. The law awards damages to a party injured through the negligence of another, not as a punishment of the negligent party, but as compensation for the pecuniary loss sustained and the pain and suffering endured by the injured party. (*Fremont, E. & M. V. R. Co. v. Leslie*, 41 Neb., 159.) The relation existing between French and the railroad company was a contractual one, the contract of the railroad company being to safely carry French from Omaha to Ainsworth and safely deliver him at the latter place. The railroad company violated this contract, and French is entitled to such sum as damages as will fully compensate him for the injury and loss sustained and pain suffered; but he is not entitled to such damages as will put him in a better position than he would have been in had the railroad company not violated its contract. The amount of damages awarded French by the judgment under consideration, if invested at the rate of interest lawful in this state, would yield an annual revenue of $630. We think this amount excessive in view of the evidence. We think that $5,000 will reimburse French for the necessary and reasonable liabilities incurred by him for nursing and doctor's bills, and reimburse him for all time lost or that he will lose by reason of this injury, and amply recompense him for all pain and suffering which he has endured or may endure by reason of the injury. The judgment of the district court is therefore reversed, unless the defendant in error shall, within thirty days from this date, file with

the clerk of this court a remittitur of $1,300; if such remittitur is filed, the judgment for $5,000 will be affirmed.

JUDGMENT ACCORDINGLY.

IRVINE, C., dissenting.

I cannot concur in the conclusion of the court permitting an affirmance of this judgment on plaintiff's remitting $1,300. Where damages are wholly unliquidated, and necessarily determined on general considerations without definite rules of admeasurement, the jury is the body which should fix them, and verdicts should not be disturbed unless so clearly disproportionate to the injury sustained as to strike the mind as being manifestly excessive. My associates think this judgment to be of this character, and in this I agree with them; but I cannot see by what process they ascertain that $5,000 is reasonable, while $6,300 is so grossly excessive as to call for judicial interference. The difference between the two sums is too small to afford grounds for distinction where, as in this case, every basis of mathematical calculation is absent, and the elements for consideration are of so speculative a nature as mental and physical suffering and bodily inconvenience. I think, measured by verdicts which have been sustained in similar cases, a much larger remittitur should be required, but on a matter so much involved in speculation I would yield my individual opinion to the combined views of the jury, which found a verdict for $10,000, of the trial judge, who reduced it to $6,300, and of my associates, who think $5,000 a proper sum; but, conceding that their views are more nearly right, the difference between the judgment rendered and the estimate of my associates is, in my opinion, too slight to justify any interference with the judgment. Either the judgment is clearly excessive and a substantial remittitur should be required, or it should be affirmed as it stands.

NORVAL, J., concurs in the foregoing dissenting opinion.

E. A. CRAM ET AL., APPELLANTS, V. NATHAN B. COTRELL ET AL., APPELLEES.

FILED MAY 20, 1896. NO. 6588.

1. **Mortgages:** ASSIGNMENT OF ONE OF SEVERAL NOTES. The assignment of a debt secured by mortgage carries the mortgage with it without any assignment of the mortgage itself, and where there are several notes secured by the same mortgage, the assignment of one operates as an assignment of a proportionate interest in the mortgage. *Webb v. Hoselton*, 4 Neb., 308, and *Studebaker Bros. Mfg. Co. v. McCargar*, 20 Neb., 500, followed.
2. ———: ASSIGNMENT OF DEBT: RIGHTS OF PURCHASER. Where the mortgage debt has been assigned, a purchaser in good faith without notice of the assignment will be protected by a release of the mortgage executed by the original mortgagee. *Whipple v. Fowler*, 41 Neb., 675, followed.
3. ———: RIGHTS OF JUNIOR MORTGAGEE. A junior mortgagee who has not been made a party to a proceeding foreclosing a senior mortgage is entitled thereafter to redeem such senior mortgage from the purchaser at judicial sale. *Renard v. Brown*, 7 Neb., 449, followed.
4. ———: ———. Redemption is in such case a matter of right, and the court may not deny such right, because its exercise would be unprofitable.
5. **Improvements:** MORTGAGES: JUDICIAL SALES: RIGHTS OF PURCHASERS. For the purpose of redemption a purchaser in good faith at the judicial sale, believing he has a good title, will be entitled to credit for improvements made upon the property; but one who buys with notice of the facts is not a purchaser in good faith within the meaning of the rule, and is not entitled to such credit. *Higginbottom v. Benson*, 24 Neb., 461, distinguished.

APPEAL from the district court of Butler county. Heard below before WHEELER, J.

W. W. Stowell, for appellants.

A. J. Evans and *E. W. Hale, contra.*

IRVINE, C.

Prior to June, 1890, Nathan B. Cotrell was the owner of a certain lot in David City, upon which there was a

mortgage in favor of William Stoddar. In June, 1890, Cotrell conveyed the premises to Catherine Neihardt, she and her husband executing as part of the purchase price three notes, and a mortgage securing such notes upon the same premises. In August, Cotrell sold one of the notes to Cram and Myatt. In December, Catherine Neihardt sold the property to Sylvester Youker. In connection with this transaction the Neihardts executed a conveyance of the property to Youker, December 11. On the same day Cotrell entered a marginal release of his mortgage. Youker executed a mortgage for $1,500 to the Security Savings Bank, and Stoddar released his first mortgage and took another, junior to that of the savings bank, for $900. Cram and Myatt then began this action against Cotrell, Youker, Stoddar, and the savings bank, setting up that at the time of the transactions referred to Youker and Stoddar knew that the plaintiffs were the owners of one of the Cotrell notes and that Cotrell had no authority to release the mortgage, and praying that the release be canceled in so far as it affected the plaintiffs' interest, and for general relief. It is not contended that the savings bank had any notice of the plaintiffs' rights, and it was conceded that its mortgage was superior to plaintiffs'. A default was entered against all the defendants, but no decree rendered thereon. Subsequently Stoddar appeared, and on his motion the default as to him was set aside and he was permitted to answer. The answer put in issue the claim of the plaintiffs; denied that Stoddar had any notice of their interest in the mortgage, and alleged that Stoddar released his former mortgage and took the latter one relying upon Cotrell's release of record. Subsequently Stoddar filed a supplemental answer alleging that since the filing of his former answer his mortgage had been foreclosed and that he had purchased the mortgaged premises at the foreclosure sale and had later conveyed the same to his wife; that at the sale the premises did not bring enough to satisfy his mortgage; that the improvements had prior to the

foreclosure been destroyed by fire, and that since purchasing the property Stoddar had expended $2,000 in the erection of a hotel thereon; that the plaintiffs had notice of the pendency of said foreclosure proceedings and of said sale. There was a reply to this supplemental answer, but it is not necessary here to set it forth. The court found the issues in favor of Stoddar and dismissed the case. Plaintiffs appeal.

It is elementary law that the transfer of a note secured by mortgage transfers the mortgage security to the purchaser without any assignment of the mortgage itself, and that where there are several notes secured by the same mortgage the assignment of one of the notes is an assignment of a proportionate interest in the mortgage. (*Webb v. Hoselton*, 4 Neb., 308; *Studebaker Bros. Mfg. Co. v. McCargur*, 20 Neb., 500.) By the assignment of one of the three notes by Cotrell to the plaintiffs they therefore became entitled to the benefits of the mortgage, and Cotrell was, after the assignment, without any authority to release the mortgage so as to deprive plaintiffs of their security. Nevertheless, the entry of satisfaction by the original mortgagee will protect a subsequent mortgagee in good faith without notice of the fact that the debt was assigned or the release unauthorized. (*Whipple v. Fowler*, 41 Neb., 675; *Mathews v. Jones*, 47 Neb., 616.) In the case cited certain earlier cases which might be taken to imply a different rule were distinguished. In addition to those cases the case of *Bridges v. Bidwell*, 20 Neb., 185, seems to afford some color to a contrary rule; but in that case the mortgage remained of record unsatisfied, and a third person, with such mortgage standing unsatisfied of record, took a joint conveyance from the mortgagor and the mortgagee. It is quite evident that the case proceeded upon the ground that the purchaser was charged with notice of the assignee's rights from the fact that the mortgage appeared of record unsatisfied. We think, therefore, that the rule in *Whipple v. Fowler*, *supra*, is not in conflict with any other decisions and it should be ad-

hered to. The question whether Stoddar at the time he took his second mortgage did so in good faith, without notice of the plaintiffs' rights or Cotrell's want of authority, is, therefore, the controlling question as to the relative priority of his and plaintiffs' mortgage. The court found in favor of Stoddar, and while from a review of the evidence it seems to the writer that this finding was not in accordance with the preponderance of proof, still the evidence was conflicting, and in view of the superior facilities possessed by the trial court for weighing the evidence and the firmly established rule of this court, the finding cannot be disturbed. It does not follow, however, that the court was justified in dismissing the case. The plaintiffs' cause of action stood confessed by all the defendants except Stoddar, and it is quite clear that but for the facts set up in the supplemental answer the plaintiffs were entitled to a decree re-establishing the Cotrell mortgage as security to the plaintiffs' note, but junior to the Stoddar mortgage.

The plaintiffs complain that the court erred in permitting the supplemental answer to be filed. There was no error in this, because while the facts therein set up constituted no defense to the action, they did, as will now be stated, require the relief granted plaintiffs to be different from that which should have been granted in the absence of such facts. The plaintiffs urge that there was no proof offered in support of some of the averments of the supplemental answer; but the reply thereto, either by a failure to deny or by negatives pregnant, admits all the essential averments. The plaintiffs were not made parties to the foreclosure suit, and were not bound by those proceedings. The mere fact that they had notice of its pendency did not make them parties or bind them by the decree. This is elementary. The foreclosure and sale were therefore utterly ineffectual to bar plaintiffs' mortgage. A junior mortgagee who has not been made a party to the proceeding foreclosing the senior mortgage has thereafter a right to redeem from such senior mortgage.

(*Renard v. Brown*, 7 Neb., 449.) Therefore, when this foreclosure was properly pleaded in the present case, the facts demanded that the plaintiffs, instead of merely having their mortgage re-established, should be permitted to redeem the Stoddar mortgage. Why the court denied this relief and denied plaintiffs any relief the record does not inform us. It is, however, argued in support of the action of the trial court that the proof showed that the land had not sold for sufficient at the foreclosure sale to pay the Stoddar mortgage, and that in order to redeem the plaintiffs would not only be compelled to discharge this mortgage, but would also be compelled to reimburse Stoddar for the improvements made upon the land. To this argument there are at least two answers. In the first place the plaintiffs had a legal right to redeem, whether or not the exercise of that right would be profitable to them. It was for them to determine whether they should exercise the right, and not for the court to deny them the right, because in its opinion its exercise would not be profitable. In the second place, it is not true in this case that in redeeming Stoddar would be entitled to a credit for the improvements made by him. The case of *Higginbottom v. Benson*, 24 Neb., 461, relied upon by Stoddar as supporting that position, was a very different case. The rule there laid down was that where the purchaser at a judicial sale bought in good faith, believing he was getting a perfect title, he would be entitled to a credit for the improvements. Stoddar was not a purchaser in good faith within the meaning of this rule. If he did not know of plaintiffs' rights when he took the mortgage, he learned them within a very few days thereafter. At the time of the foreclosure sale this very suit was pending in which he is a party. He had full notice of all the facts. A mistake of law would not protect him.

The judgment of the district court is reversed and the cause remanded, with directions to take an account of the amount due upon the Stoddar mortgage and to permit the plaintiffs to redeem.

REVERSED AND REMANDED.

ELLIOT LOWE V. CHARLES E. VAUGHAN.

FILED MAY 20, 1896. No. 6213.

1. **Action to Recover Purchase Price of Cattle:** VERDICT FOR PLAINTIFF. Evidence examined, and *held* sufficient to sustain the verdict.
2. **Deposition:** WITNESSES. Where from the deposition of a witness it appears that he is a non-resident of the county, it is unnecessary for the party offering the deposition in evidence to prove that he is not present in court. *Sells v. Haggard*, 21 Neb., 357, followed.
3. **Sales:** EVIDENCE. Certain evidence examined, and *held* to be relevant to the issues.
4. **Instructions:** EXCEPTIONS: REVIEW. To present for review the propriety of instructions it is indispensable that it should appear affirmatively from the record that exceptions were taken to the giving of the instructions complained of.

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

C. C. Flansburg, for plaintiff in error.

James McNeny and *J. G. Thompson, contra.*

IRVINE, C.

This was an action by the defendant in error against the plaintiff in error to recover for certain cattle sold and delivered by the former to the latter. The chief defense was payment. A trial resulted in a verdict for the plaintiff below for $365. Judgment was rendered accordingly.

It is contended that the verdict is not sustained by the evidence. It would be useless to review the evidence at length. There is a controversy between the parties as to what were the terms of the original contract of sale. Both parties agree that after the cattle had been shipped to South Omaha and there sold, a further controversy arose in regard to the settlement, and that some arrangement was made whereby a settlement was to be effected, and Lowe gave Vaughan a check for what he computed

to be the amount. Afterwards Vaughan concluded the amount had not been correctly computed. Assuming that the argument on behalf of Lowe is well founded, to the effect that there is not sufficient evidence to show that the check given was not for the proper amount, in view of the settlement finally made, still there is a direct conflict as to the disposition made of this check. Vaughan testifies that after some effort to have the amount corrected he returned the check to Lowe and that the money was never paid him. Lowe testifies that Vaughan kept the check some time and then Lowe took it up, paying its amount to Vaughan at the time. This conflict in the evidence forbids our disturbing the verdict.

The deposition of one Blanchard was offered in evidence and received over the objection of Lowe. It is contended, first, that no foundation was laid for the use of the deposition. There was no direct independent evidence that facts existed permitting the use of a deposition; but it appears from the deposition itself, as well as from the testimony of witnesses in the case, that Blanchard was a commission man doing business and living in South Omaha. There was certainly no presumption that he was present in Harlan county at the time of the trial. The presumption is, on the contrary, that he was at the place of his residence and of his business. (*Sells v. Haggard*, 21 Neb., 357.) There is a further objection to the deposition on the ground that it was immaterial. This objection is directed to the whole deposition, and was not well taken if any portion of the deposition was relevant. Vaughn had testified that the settlement was effected upon the basis of the weight of the cattle at South Omaha. In his deposition Mr. Blanchard testified to such weights; and this became an important feature in ascertaining whether Lowe's check was for the price of the cattle as finally agreed upon.

In rebuttal, a witness was called and permitted to testify that on the trial of the case in the county court Lowe had testified that he had the check, referred to in

the testimony, at his home. When Lowe was cross-examined on this trial he was asked whether he had not so testified on the former trial. He practically admitted that he had done so. Counsel now argue that it was erroneous to permit this testimony in rebuttal after Lowe's admission in cross-examination. The testimony was admissible, however, for another purpose than impeachment. On this trial Lowe had testified that he left the check with his attorney and that it was lost. There was a dispute as to the precise amount of the check. Its production was of some relevancy for that reason, and had it been produced it might have thrown light upon the controverted point as to whether it had been returned as rejected or on payment of its amount. Therefore we think that Vaughan was entitled to show statements by Lowe as to its whereabouts as independent admissions of the adverse party, tending in some degree, however slightly, to disclose a concealment of evidence.

Complaint is made of the giving of one instruction. The record does not show that any exceptions were taken to the instructions, and for this reason they cannot be reviewed. It is true that there appears in the record a bill of exceptions containing evidence received on a motion to correct the record by making it show that proper exceptions were taken; and a motion for that purpose also appears; but there is no record of any order upon the motion and no exceptions were in fact entered.

JUDGMENT AFFIRMED.

KANSAS CITY & OMAHA RAILROAD COMPANY V. OLIVER C. ROGERS.

FILED MAY 20, 1896. No. 6601.

1. **Railroad Companies:** SETTING OUT FIRE: DAMAGES: EVIDENCE. In an action against a railroad company for setting out fire upon its right of way which spread to the lands of the plaintiff and de-

stroyed trees thereon the plaintiff testified as to the value of the trees. On cross-examination he said that in estimating their value he considered what they were worth to him as ornamental trees and as adding to the value of the land. *Held*, That a motion to strike out his testimony as to value was properly overruled.

2. **Fires.** Section 62 of the Criminal Code, making it a misdemeanor to set fire to woods and prairies, applies to fires set out on the lands of another, and not on one's own land.

3. **Instructions:** ISSUES. It is reversible error to state to the jury propositions of law not applicable to the issues or evidence, where such statements might have a prejudicial effect upon the losing party.

4. **Railroad Companies:** SETTING OUT FIRE: DAMAGES. In an action for negligently setting out fire destroying trees on the land of the plaintiff the measure of damages is the damages suffered by such trees. *Fremont, E. & M. V. R. Co. v. Crum*, 30 Neb., 70, followed.

5. ———: ———: ———. In ascertaining such damages the inquiry should be not alone as to the value of the trees before their injury, but should be as to the difference in value before and after the fire.

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

M. A. Hartigan, *John Hartigan*, and *M. A. Reed*, for plaintiff in error.

A. H. Bowen, *contra*.

IRVINE, C.

Rogers sued the railroad company, charging that in September, 1891, it negligently omitted to keep its right of way free from combustible materials, and permitted large quantities of grass and weeds to accumulate upon its right of way near the premises of the plaintiff, and that the servants of the railroad company negligently set fire to the grass, weeds, and combustible materials accumulated on the right of way and negligently permitted said fire to pass upon the lands of the plaintiff, whereby 204 forest trees, of the value of $300, were burned and destroyed. The answer amounted to a general denial. There was a verdict and judgment for the plaintiff for $200, which the railroad company seeks to reverse.

It was established, without contradiction, that two employes of the railway company were engaged in burning the grass and weeds from the right of way; the fire escaped from their control and spread upon plaintiff's land, burning his trees. The plaintiff was asked to state to the jury what, in his opinion, would be the fair and reasonable value of the trees immediately before the fire. An objection to this question was overruled, and he answered, "About a dollar apiece." On cross-examination he was asked to state the basis of this valuation, and he answered: "Because they were worth that to me as ornamental trees." "Q. What are the elements that enter into the estimate that you have made? A. Adding to the value of the land and the farm." The defendant then moved to strike out all his testimony in regard to value, because not based on proper considerations. It was held in *Fremont, E. & M. V. R. Co. v. Crum*, 30 Neb., 70, that in such a case the measure of damages is not the depreciation in the value of the land because of the destruction of the timber, but is the amount of damages suffered by the timber by reason of the fire. On the trial both sides proceeded upon the assumption that this rule of damages was correct. The only difference in the two cases is that in the Crum case the trees seem to have been of natural growth,while in the case at bar they had been planted and cultivated. It is suggested in the briefs that this difference may for some purposes mark a distinction in the rule, but we cannot perceive it. The contention of the defendant in regard to the evidence referred to is that the answers of the witness on cross-examination showed that his estimate of the value was not within the rule in the Crum case. It was, however, said in the Crum case that the inquiry should be as to the value of the trees as standing timber, and not the market price for transplantation as shade or ornamental trees. The reason given in the opinion was that the latter valuation would require an inquiry into the cost of transplanting and transporting, and would depend upon the existence of a

sufficient market for such trees. If the market value is not a proper test, and if their value must be determined as standing timber, then it follows that it is not only proper, but absolutely necessary to consider their value with reference to the land in the situation in which they stood, and, so viewed, the witness' testimony was material and competent, and the court properly refused to strike it out. If we should hold that the value must be estimated without regard to the market value for the purposes of transplanting, as the Crum case holds, and also without regard to the value of the trees as they stood with reference to the farm and as affecting its value, we would practically hold that no value could be established, and we should certainly be attempting to create distinctions imperceptible without the use of some instrument of high magnifying power. In the case of *Bailey v. Chicago, M. & St. P. R. Co.*, 54 N. W. Rep. [S. Dak.], 596, the supreme court of South Dakota follows the rule of damages laid down in the Crum case, and in the course of the opinion holds that evidence of a character similar to that here complained of is irrelevant, but the question was not presented by the record in such a manner as to permit a reversal, and Bennett, P. J., dissented upon this point in a forcible and, to my mind, a most convincing opinion.

The court, at the request of the plaintiff, gave the two following instructions:

"1. Section 62 of the Criminal Code of the state of Nebraska, at page 880 of the Compiled Statutes of 1887, makes it a misdemeanor to set fire to any woods, prairies, or other grounds whatsoever in this state. This statute reads as follows:

" 'Sec. 62. (Setting fire to woods and prairies.)—If any person or persons shall willfully and intentionally, or negligently and carelessly, set on fire, or cause to be set on fire, any woods, prairies, or other grounds whatsoever, in any part of this state, it shall be deemed a misdemeanor, and every person so offending shall be punished by a fine of not less than five (5) dollars nor more than

one hundred (100) dollars, and by imprisonment in the county jail for not less than one month nor more than six months; *Provided*, That this section shall not extend to any person who shall set on fire, or cause to be set on fire, any woods or prairies adjoining his or her own farm, plantation, field, or enclosure, for the necessary preservation thereof from accident by fire, between the first day of March and the last day of November, by giving to his or her neighbors two days' notice of such intention; *Provided, also*, That this section shall not be construed to take away any civil remedy which any person may be entitled to for any injury which may be done or received in consequence thereof.'

"You are further instructed that every one has a right to presume that no one will be guilty of a misdemeanor, and is, therefore, under no obligation to anticipate such negligence to guard against it; therefore, if you find that the defendant, or its agents or employes, negligently or carelessly set fire to the material upon its right of way, and that such fire destroyed plaintiff's property, the defendant will be liable for the damage.

"2. If you find from the evidence that the destruction of the plaintiff's trees was the result of fire set out by the agents or employes of defendant, then you will find for the plaintiff and assess his damage at such sum as may be warranted by the evidence. Modified by the court: Provided you find that said fire was set out negligently and carelessly."

The court should not have given the first instruction. The section referred to does not make it a misdemeanor for a man to set out fire upon his own land. To hold that it does so would require an interpretation of the proviso which would give him the privilege of setting out fire upon woods or prairies adjoining his land, within certain seasons, and upon giving notice thereof to neighbors, where he would not have any such right upon his own land. Therefore, the section had no application to this case. *Powers v. Craig*, 22 Neb., 621, was a case where fire

had been set out on lands of another. Even if the section did apply to such a case as this, its violation would only be evidence of negligence and would not create a liability as a matter of law. (*Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb., 848; *Omaha & R. V. R. Co. v. Talbot*, 48 Neb., 627.) The instruction was ostensibly given for the purpose of avoiding any inference as to contributory negligence; but contributory negligence was not pleaded, and it is not contended that any existed. If the court saw fit to cover this subject, it might very properly have done so by a peremptory instruction that the question of contributory negligence was not involved. But the recital of this statute was inapplicable to the case, and, without further explanation, was necessarily prejudicial to the defendant. The second instruction was free from error after it had been modified by the court. The objection made to it is that it directed damages to be assessed at such sum as "may be warranted by the evidence." The sixth instruction, given at defendant's request, defined the measure of damages, it is true not directly, but by such strong implication that it cured any error which may have existed independently thereof in the second instruction given at plaintiff's request.

The remaining assignments go, in effect, to the sufficiency of the evidence. We think the evidence was insufficient on the question of damages. If the damage to the trees, and not the injury to the freehold, is the proper measure, then it follows that the damages should be ascertained by deducting from the value of the trees before the fire their value thereafter. In *Fremont, E. & M. V. R. Co. v. Crum*, *supra*, there was evidence from which the latter value could be ascertained. It is contended that the evidence in this case shows that the trees after the fire were of no value; but we cannot view the evidence in this light. It appears that the trees were killed and that they were afterwards removed. The plaintiff took two wagon loads home for use as fire-wood, and gave the remainder to a neighbor as compensation for his

assistance in removing them. The argument, in effect, is that the trees were without value because the plaintiff received no money therefor, but this is a *non sequitur*. The fire-wood he obtained was presumably of some value, as was also the timber which he gave to his neighbor. The evidence affords no basis for permitting a remittitur, even if the error in giving the first instruction did not require a reversal.

REVERSED AND REMANDED.

JULIA D. STEPHENS, APPELLEE, V. CHARLES HARDING ET AL., APPELLANTS.

FILED JUNE 2, 1896. No. 6644.

1. **Pleading.** Under our system of pleading the nature of an action is determined not alone by the prayer for relief, but also from the character of the facts alleged.
2. **Vendor and Vendee:** ACTION FOR PURCHASE PRICE: PLEADING. Petition examined, and *held* to state a cause of action for the purchase price of land under a parol agreement to convey, upon performance thereof by the plaintiff.
3. ———: PAROL AGREEMENT: RECOVERY FOR PURCHASE PRICE. The rights and liabilities of parties to a parol agreement for the conveyance of real property are not necessarily reciprocal. One who enters into possession of land under a parol promise by the owner to convey, the latter subsequently fully performing by the tender of a good and sufficient deed, may be liable in an action for the purchase price, although such possession be not of itself such part performance as would entitle him to an action for specific performance of the contract.
4. **Parties:** DEFECT: WAIVER. Objections on the ground of a defect of parties must be raised by answer or demurrer; otherwise it will be deemed to have been waived.
5. **Recovery for Purchase Price of Land.** Evidence examined, and *held* to sustain the decree appealed from.

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

The facts are stated in the opinion.

H. Gilkeson and *Robertson, Wigton & Whitham*, for appellants:

The petition does not state a cause of action. (*Fowler v. Sutherland*, 9 Pac. Rep. [Cal.], 674; *Baker v. Wiswell*, 17 Neb., 52; *Wood v. Thornly*, 58 Ill., 469; *Clark v. Clark*, 13 N. E. Rep. [Ill.], 555; *Miller v. Zufall*, 6 Atl. Rep. [Pa.], 350; *Story v. Black*, 1 Pac. Rep. [Mont.], 7.)

There is a vital defect of parties defendant. (22 Am. & Eng. Ency. Law, pp. 1065-1068; Fry, Specific Performance, sec. 118; *Herrington v. Hubbard*, 1 Scam. [Ill.], 569.)

The evidence fails to show such acts of part performance as will take the case out of the statute of frauds. (*Poland v. O'Connor*, 1 Neb., 50; *Morgan v. Bergen*, 3 Neb., 209; *Baker v. Wiswell*, 17 Neb., 52; *Wood v. Thornly*, 58 Ill., 465; *Wooldridge v. Hancock*, 6 S. W. Rep. [Tex.], 818.)

A contract, to be capable of part performance, must be a completed one. The terms must all be agreed upon. An incompetent agreement cannot be enforced. (Fry, Specific Performance, secs. 394, 418; *Whaley v. Bagnel*, 1 Bro. P. C. [Eng.], 345; *Hunt v. Lipp*, 30 Neb., 469; *Wallace v. Rappleye*, 103 Ill., 229.)

M. B. Reese and *Clark & Allen, contra.*

POST, C. J.

This is an appeal by the defendants herein from a decree of the district court for Saunders county. The first proposition argued on this hearing is that the petition upon which the cause was heard in the trial court fails to state a cause of action. It is therein alleged (1) that the plaintiff, on or about September 20, 1889, being the owner of a tract of land in Saunders county, which is particularly described, and a certain creamery situated thereon, entered into a verbal agreement with the defendants as partners, doing business in the name of Harding Bros.,

whereby she promised and agreed to convey to said defendants the land described, together with the creamery mentioned, and trade incident thereto, in consideration whereof the defendants promised and agreed to pay to her $765 in merchandise, being part of a stock of goods then owned by them, and to assume and pay a mortgage, then a lien upon said real estate, amounting to $700. (2.) "In pursuance of said agreement the plaintiff gave possession of said premises, creamery, and traded to the defendants and discharged and dismissed her hands operating said creamery. The defendants are still in possession of said creamery and trade. (3.) On or about December 23, 1889, the plaintiff tendered to defendants a deed of said land, duly signed and acknowledged, and demanded said goods, but the defendants refused to deliver them. The sum of $765, with interest from the 23d day of December, 1889, the value of said goods, is therefore due the plaintiff from the defendants, no part of which has been paid. The plaintiff therefore prays judgment against the defendants for $765, with interest from the 23d day of December, 1889, and costs of suit; and in case said defendants fail to pay said judgment by a day to be named by the court, that said premises may be sold, and so much of the proceeds as are required may be applied to the payment of said judgment."

It should be here observed that the only objection interposed to the petition in the district court was by a general demurrer, upon which the record discloses no ruling; but, assuming that the objection is properly made for the first time in this court, it is, we think, without merit. Under our system of pleading the nature of an action is determined not alone by the prayer for relief, but also from the character of the facts alleged. (Pomeroy, Specific Performance of Contracts, sec. 480; Kinkead, Code Pleading, sec. 66; *Sternberger v. McGovern*, 56 N. Y., 12; *Missouri Valley Land Co. v. Bushnell*, 11 Neb., 193.) Tested by the allegations of the petition, which, for the purpose of this objection, must be taken as admitted, the agree-

ment appears to have been fully executed on the part of the plaintiff, while the defendants, who went into possession by virtue of said agreement, continued to hold, presumably, thereunder, and, having accepted the fruits of the contract, they should not now be heard to say that the plaintiff is without remedy for the breach thereof by them. The cause alleged differs essentially from an action for the specific performance of said contract, which, as conceded by plaintiff's counsel, would not lie, for the reason that the goods to be delivered to her were not separated from the stock owned by defendants, and could not, therefore, be identified. Nor is it material to inquire whether there has been such a part performance of the agreement as to remove it from the operation of the statute of frauds,—in other words, to determine whether the agreement for the conveyance of the land would, under the facts alleged, be enforced at the suit of the defendants. It is sufficient that they purchased the plaintiff's property, that they remain in possession thereof under their contract, and refuse to pay the consideration agreed therefor. Viewed as an action for damage on account of the breach of a contract by defendants, the petition certainly states a cause of action, and its designation by the district court as an action for specific performance is without significance.

Regarding defendants' second proposition, viz., that the contract alleged is, in view of the evidence adduced, void under the provisions of the statute of frauds, it may be said that they are shown to have taken possession under the contract with the apparent intention of performing all the conditions thereby imposed upon them. Among other facts elicited which tend strongly to sustain the findings of the district court are the following communications addressed to a bank at Valparaiso, and refer to the creamery in question:

"WAHOO, NEB., Sept. 24, 1889.

"*R. K. Johnson, Valparaiso, Neb.*—SIR: We have rented the creamery at this point and bought the one at your

place of Mr. Stephens, and expect to ship the cream here for the present, as the Valparaiso creamery is not in a condition to be run. Will probably not try to operate at your place before next spring. The farmers will naturally want to know who we are and whether or not we are responsible. Will you kindly take the trouble to look us up so we may refer them to you? * * *

"Yours truly, HARDING BROS."

"WAHOO, NEB., Oct. 4, '89.

"*R. K. Johnson, Valparaiso*—SIR: We enclose for credit at your bank, subject to check, Omaha draft for $118.60, and shall check this out in payment of the little cream bought during the last few days of September, that we had charge of creamery.

"Yours truly, HARDING BROS."

Defendants also drew checks against their account with the bank named, upon the margin of which was printed the following card: "Harding Bros. Valparaiso Creamery." According to the testimony of the plaintiff's husband, who conducted the transaction in her behalf, the defendants, a few days subsequent to the agreement alleged, sent a representative, Mr. Garten, to Valparaiso, with instructions to invoice the property belonging to the creamery, including cans, churns, engines, etc. On the completion of the inventory he, Garten, demanded the keys of the creamery, and being informed that the locks were broken he proceeded to nail up the doors. On November 14, 1889, defendants addressed plaintiff's husband as follows, referring to the creamery property:

"*J. R. Stephens, Valparaiso*—DEAR SIR: The following items are necessary to the perfecting of your title:

"No. 8, affidavit to show that Joel R. Stephens is the same as Joel Stephens in No. 9.

"No. 9, affidavit to show that Charles L. Pulver is the same person as Charles Pulver in No. 8.

"No. 9, quitclaim deed from Charles Pulver either to us or his grantee, J. R. Stephens.

"No. 13, quitclaim deed from wife of Charles L. Pulver.
"Yours truly, HARDING BROS."

On December 12, following, Mr. Stephens addressed defendants as follows:

"*Harding Bros., Wisner*—GENTLEMEN: After a great deal of trouble and vexation I have been able to obtain all the additional papers you require regarding title to creamery property. I cannot come myself on account of other business, and hereby authorize Mr. J. E. Saunders to settle with you for me, and I will accept as final any settlement that he may make.
"Yours truly, J. R. STEPHENS."

To which defendants replied, but without date, as follows:

"*J. R. Stephens*—SIR: Mr. Saunders presented your letter to-day. Not having heard anything from you, we concluded you had dropped the matter entirely, and we have accordingly made other arrangements. We cannot use your property.
"Yours truly, HARDING BROS."

It is not, as intimated, necessary to determine what acts of part performance are essential to satisfy the requirements of the statute. It may for the purpose of this discussion be assumed that the defendants could not upon the facts disclosed maintain an action for the specific performance of the contract. But of what avail is that fact to them in an action by the party who has fully performed? The plaintiff could do no more than deliver possession under the contract and make tender, as she did, of conveyances which would pass the title in fee-simple, subject to the mortgage lien. Having fully performed on her part, at the request of the defendants, she is entitled to recover for the breach of the contract, notwithstanding its subsequent repudiation by defendants.

It is next insisted that there is a defect of parties defendant, inasmuch as the representatives of George W. Harding, a member of the firm of Harding Bros., who

died since the cause of action accrued, are not joined as defendants herein. There is, however, no force in that objection, for the reason that it was not raised in the district court, either by answer or demurrer. Where the defect of parties does not appear upon the petition, objection on that ground must be raised by answer, otherwise it will be deemed to have been waived. (Code of Civil Procedure, sec. 96; *Maurer v. Miday*, 25 Neb., 575.)

Finally, it is contended that the plaintiff is not able to convey a complete and perfect title to the land which is the subject of the contract, for the reason that it was, prior to the date of said contract, sold for taxes and has not been redeemed; but, by the decree appealed from, credit is allowed for the amount required to redeem from the tax sale, which sufficiently answers the objection made. (Waterman, Specific Performance of Contracts, sec. 409.) The decree is right and is

AFFIRMED.

ANDREW J. HANSCOM, APPELLEE, V. VICTOR G. LANTRY ET UX., APPELLANTS.

FILED JUNE 2, 1896. No. 8453.

1. **Bill of Exceptions:** ALLOWANCE: EXTENSION OF TIME: TRIAL JUDGE. The Code, previous to 1877, required exceptions to be reduced to writing and allowed during the term at which they were taken. By amendment in the year named it was provided that the party excepting must reduce his exceptions to writing within fifteen days, or in such time as the court may direct, not exceeding forty days from the rising of the court. (Code of Civil Procedure, sec. 311.) In 1881 said section was so amended as to authorize an extension of time by the judge before whom the cause was tried, not exceeding forty days in addition to that allowed in the first instance, upon a showing of due diligence. *Held*, That the application under the amendment last mentioned should be addressed to the judge to whose ruling the exception was taken, and that an order by another judge of the same district extending the time within which to settle the bill of exceptions is ineffective for that purpose.

2. ———: ———. The duty of a judge with respect to the allowance of exceptions is, within statutory limitations, a continuing one and does not terminate with the qualification of his successor in office. (*State v. Barnes*, 16 Neb., 37; *Quick v. Sachsse*, 31 Neb., 312.)

3. ———. *Payne v. Jones*, 33 Neb., 260, distinguished.

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

Submitted on motion of appellee to quash the bill of exceptions. *Motion sustained.*

D. W. Merrow, for appellants.

George E. Pritchett, for appellee.

POST, C. J.

This is an appeal from an order of confirmation by the district court for Douglas county, and is submitted upon the motion of the appellee, Hanscom, to quash the bill of exceptions filed herein. It appears from the record that the order appealed from was entered by Hon. George W. Ambrose, one of the judges of the district court for said county, on the 26th day of October, 1895, and that on said day, exception being taken to the order mentioned, the court, on motion of appellants, fixed the amount of a supersedeas bond without extending the time within which to prepare and serve a bill of exceptions. On January 4, 1896, the term of court was adjourned *sine die*, and on January 8 Judge Ambrose's term of office expired. On January 13, 1896, appellants procured from Hon. C. R. Scott, one of the judges of said district, an order extending the time for settling their bill of exceptions until February 1. On February 5 a second order was made by Judge Scott, by which appellants were allowed fifteen days' additional time from and after the expiration of the time first allowed, and on February 5 Judge Ambrose allowed the bill of exceptions over the objection of the appellee, his certificate, otherwise in the usual form, con-

taining this recital: "I was present in Omaha on January 13, 1896. No application was made to me to extend the time for preparing and serving a bill of exceptions herein."

The question first suggested by the foregoing statement is that of the authority of Judge Scott to extend the time within which the appellants were required to prepare and serve their bill of exceptions. Section 308 of the Code, previous to the amendment of 1877, required exceptions to be reduced to writing during the term at which they were taken. (*Monroe v. Elburt*, 1 Neb., 174; *Heady v. Fishburn*, 3 Neb., 263; *City of Seward v. Klenk*, 27 Neb., 615.) Said section was in the year above named amended to read as follows: "The party objecting to the decision must except at the time the decision is made, and time may be given to reduce the same to writing as hereinafter provided." Section 311 was at the same time so amended as to provide that "the party excepting must reduce his exceptions to writing within fifteen days, or in such time as the court may direct, not exceeding forty days, from the rising of the court, and submit the same to the adverse party or his attorney of record for examination and amendment." (Session Laws, 1877, p. 11.) In 1881 the last named section was further amended by the addition thereto of the following provision: "In cases where the party seeking to obtain the allowance of a bill of exceptions has used due diligence in that behalf, but has failed to secure the settlement and allowance of the same as herein required, it shall be competent for the judge who tried the cause, upon showing of due diligence and not otherwise, to extend the time herein allowed, but not beyond forty (40) days additional to that herein provided, making such specific directions in that behalf as shall seem just to all parties." (Laws, 1881, ch. 27, sec. 1.) It seems clear that the foregoing provisions contemplate two distinct orders respecting the time within which to procure the allowance of bills of exceptions, viz., (1) such time as may in the first instance be prescribed by the court,

not exceeding forty days from the adjournment *sine die* of the term. (2) Such additional time, not exceeding forty days, as may upon proper showing be allowed by the judge before whom the cause was tried. It follows that appellants' motion for additional time within which to procure the allowance of their exceptions should have been addressed to Judge Ambrose, by whom the order of confirmation was made, and that the orders in that behalf by Judge Scott were ineffective for the purpose intended. Nor is the fact that the proceedings in question were had subsequent to the expiration of Judge Ambrose's term of office at all material, since, as held in *State v. Barnes*, 16 Neb., 37, and *Quick v. Sachsse*, 31 Neb., 312, the duty of a judge with respect to the allowance of exceptions, within statutory limitation, is a continuing one and does not terminate with the qualification of his successor in office.

We have been referred to *Payne v. Jones*, 33 Neb., 260, in support of the contention that Judge Scott was authorized to allow the extension of time; but that case is, we think, not in point for two reasons: (1.) Because the judge before whom it was tried below was, at the date of the order there mentioned, absent from the district, while Judge Ambrose was, as shown by the record before us, present in the city of Omaha and qualified to make such orders as were essential to preserve the rights of the parties. (2.) The report of the case cited does not disclose the date of the judgment complained of, whether any time was allowed by Judge Hamer, before whom it was tried, or whether the subsequent order by Judge Church was made during the same or another term, or in vacation. The conclusion drawn by counsel from that case is opposed to the express terms of the statute, and imputes to the court a meaning which is neither the necessary nor logical result of the language employed in the opinion. We prefer to regard what is there said as applicable to such orders only as are contemplated in the first instance, and which, in the exercise of the authority conferred upon

the court, may be made by any judge thereof during the term, rather than to subsequent orders authorized by the amendment of 1881, which must, in the language of the statute, be made by "the judge who tried the cause." (Laws, 1881, ch. 27, sec. 1, p. 202.) But assuming what cannot be admitted, viz., that there are to be found in the report of that case expressions in conflict with the conclusions here stated, they should be understood as *obiter* merely, and not decisive of the question under discussion.

Our attention is also directed to the affidavits submitted in support of the application addressed to Judge Scott. It is sufficient, without further reference to them, that they tend strongly to prove that the failure to secure a bill of exceptions within fifteen days from the adjournment of the term was in nowise attributable to the negligence of the appellants or their attorney. Such proof would, we must assume, had it been submitted to Judge Ambrose, have entitled appellants to the order sought; but, however meritorious their claim in that behalf, it cannot be successfully interposed in resistance of the motion to strike, since to the district court or judge, and not to this court, has been confided discretion with respect to the subject involved. As said by REESE, C. J., in *Greenwood v. Craig*, 27 Neb., 669, "the whole matter of the extension of time for the settling of bills of exceptions is regulated by statute, and in order to procure the settling of a bill of exceptions, parties desiring such settlement must bring themselves within the law upon the subject."

MOTION SUSTAINED.

MILTON HENDRIX V. WILLIAM A. KIRKPATRICK.

FILED JUNE 2, 1896. No. 6625.

1. **Account Stated.** An account stated is an agreement between persons who have had previous dealings determining the amount due by reason of such transactions. (*McKinster v. Hitchcock*, 19 Neb., 100.)

2. ———: PROMISE TO PAY: ACTION. The rendering of an account between parties and agreeing upon the amount due as appearing therefrom will support an action for the balance thereby shown without an express promise to pay.

3. ———: OBJECTION: EVIDENCE. The failure to object to an account rendered is admissible in evidence as tending to prove an acknowledgment of its correctness, its weight or sufficiency for such purpose being a question of fact for the consideration of the jury.

4. ———: EVIDENCE. Verdict for defendant in error, who sued to recover upon an account stated, *held*, from an examination of the evidence, to be warranted thereby.

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

James A. Powers, for plaintiff in error.

James Hassett, contra.

POST, C. J.

Counsel for the plaintiff in error frankly admits that the only question presented by the record of this case is whether the evidence is sufficient to sustain the finding that there was an account stated by the parties as alleged in the petition below, and upon which a recovery was allowed by the district court for Sarpy county. The specific allegation to the petition, to which the verdict and judgment are responsive, is that there is due from the defendant to the plaintiff therein a balance of $137.32 for work and labor as per settlement on or about January 27, 1892, and which sum the said defendant promised and agreed to pay.

It appears from the evidence submitted by the defendant in error, Kirkpatrick, that on quitting the employ of the plaintiff in error, Hendrix, some time prior to the date above named, he was requested by the latter to make out and furnish an account of his charges; that in response to such request he prepared and forwarded a statement of the account, showing the services rendered and balance in his favor, to which Mr. Hendrix responded objecting to one charge only, to-wit, for one day's labor with team. With respect to the subsequent transactions defendant in error testified: "I sent him back an itemized statement of the dates and work performed, and I heard nothing from him after that until the 27th day of January. Him and Mr. Ringo come to my place and told me if I would come back to the house he would give me a check for part of the money that was due me. I came back and he gave me a check and checked the statement I gave him and said there was no difference, and said if I would be in Omaha on the following Saturday he would give me my money in full for the account." The foregoing statement is corroborated by Mrs. Kirkpatrick, the wife of defendant in error, who was present during the interview mentioned, and who testified that Mr. Hendrix at that time acknowledged the itemized statement then in his possession to be correct. The foregoing evidence, although controverted by the plaintiff in error, was evidently accepted as true by the jury, and the verdict is conclusive upon that issue. The only question for determination is, therefore, whether the facts proved are sufficient in law to warrant the finding of a settlement between the parties.

An account stated is, as said by this court in *McKinster v. Hitchcock*, 19 Neb., 100, "an agreement between persons who have had previous transactions, fixing the amount due in respect to such transactions." In *Claire v. Claire*, 10 Neb., 54, it was said by Judge LAKE that "The simple rendering of an account between parties and agreeing upon the amount due are sufficient facts on which to

maintain an action." Although many cases go to the extent of holding that by the mere failure to object to an account rendered it becomes a liquidated and unimpeachable demand, the sound rule is believed to be that such fact is admissible as an acknowledgment of the correctness thereof, the weight or sufficiency of such proof being a question of fact to be determined by the jury. (*Chisman v. Count*, 2 M. & G. [Eng.], 307; *Toland v. Sprague*, 12 Pet. [U. S.], 300; *Guernsey v. Rexford*, 63 N. Y., 631; *Sharkey v. Mansfield*, 90 N. Y., 227.) But whichever view we may adopt, it is clear that the finding in this case is fully warranted by the evidence, and that the judgment should be

AFFIRMED.

EDWARD A. WARNER V. CYRUS HUTCHINS, TRUSTEE.

FILED JUNE 2, 1896. No. 6469.

1. **Bill of Exceptions: OMISSION OF TESTIMONY: REVIEW.** Where it is apparent from an inspection of a bill of exceptions that material evidence has been omitted therefrom, the judgment or order complained of will not be reversed on account of the insufficiency of the proof. (*Nelson v. Jenkins*, 42 Neb., 133.)

2. ———: CORRECTIONS. A motion to correct a bill of exceptions by supplying evidence omitted therefrom through inadvertence will not be entertained by this court. (*Bickel v. Dutcher*, 35 Neb., 761.)

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

N. V. Harlan, for plaintiff in error.

Sedgwick & Power, contra.

POST, C. J.

The defendant in error recovered judgment in the district court for York county against the plaintiff in error upon a promissory note of which the following is a copy:

"$263.16. YORK, NEB., Nov. 28, 1890.

"Sixty days after date, value received, I promise to pay to the order of J. C. Kingsley, trustee, two hundred sixty-three and 16-100 dollars, with interest at ten per cent per annum. E. A. WARNER."

It appears from the petition below that previous to the commencement of the action the plaintiff therein, Hutchins, succeeded Kingsley, the payee, and, as trustee, became the owner of said note. An answer was filed in which it was in substance alleged that the note sued on was given for the accommodation of the York Canning Company, a corporation; that said corporation being pressed for funds and about to lose valuable property by sale under a decree of foreclosure, it was agreed by the stockholders thereof, including the defendant, to advance the money necessary to discharge the said decree and that said property should be purchased and held by said Kingsley as trustee, for their benefit; that the note above set out was given in pursuance of said agreement and represents his, defendant's, advancement thereunder, and that the plaintiff below, as successor of the said Kingsley, afterward, without authority, sold and disposed of said property, then of the value of $5,000, realizing therefrom the sum of $1,850, and no more, to the defendant's damage in the sum of $160. It is further alleged that there was an error in the computation by which said note was executed, for $25.06, in excess of the amount which the defendant should have advanced by the terms of said agreement. There is also an allegation of payment to the amount of $138.58, and a prayer for judgment in the sum of $170. There was a reply, in which it was alleged that the advancements made by the stockholders, including the note of the defendant, having proved insufficient to discharge the indebtedness contemplated by the agreement, the property mentioned was sold in the execution of the trust thereby imposed and the proceeds applied in partial satisfaction of the balance then due upon said indebtedness, and denying the

other allegations of the answer. There are other issues made by the pleadings which do not require notice, since the foregoing statement will be found to sufficiently illustrate the rule which must govern in the disposition of this cause. The verdict returned in accordance with the direction of the court was for $129.08, the credit, as appears from statements of counsel, being on account of payments as to which there was no dispute.

The evidence, it is conceded, was largely documentary, consisting of the agreement above referred to as well as the records of the corporation, which, although shown to have been received without objection, are not included in the bill of exceptions. It is on the part of the defendant in error contended that the exceptions should, in view of such obvious omissions, be entirely disregarded. That contention has substantial foundation in the decisions of this court. Indeed, it may be accepted as the settled rule that where the bill of exceptions on its face reveals the fact that material evidence has been omitted therefrom, the judgment or order will not be reversed for want of sufficient proof. (*Missouri P. R. Co. v. Hays*, 15 Neb., 224; *Nelson v. Jenkins*, 42 Neb., 133.) Counsel for plaintiff in error, recognizing the soundness of the rule stated, has requested leave to attach to the bill of exceptions copies of all exhibits therein referred to, and the motion in that behalf is submitted in connection with the merits of the cause. We are, however, without authority to entertain the motion or to make the correction sought. Exceptions, when allowed and certified in the manner prescribed by law, become records of the trial court, which, like the records of all judicial proceedings, are subject to the control of the court or judge by whom they are made and can neither be corrected nor amended by an appellate tribunal. (*Bickel v. Dutcher*, 35 Neb., 761.)

JUDGMENT AFFIRMED.

L. S. WOODWORTH V. S. V. PARROTT.

FILED JUNE 2, 1896. No. 6704.

1. **Review:** CONFLICTING EVIDENCE. The finding of a jury upon conflicting evidence will not be disturbed where there is sufficient evidence to support it.
2. **Action for Price of Harvesting Machine:** BREACH OF WARRANTY: VERDICT FOR PLAINTIFF. The evidence examined, and *held* sufficient to sustain the findings of the jury.
3. **Instructions:** REVIEW. An assignment of error as to the giving or refusing to give a group of instructions will be considered no further than to ascertain that any one of such group was properly given or refused.
4. ———: ———. Objections to an instruction examined, and *held* not well taken.

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

Charles Riley and *J. S. Armstrong*, for plaintiff in error.

Spear & Mack and *F. S. Howell, contra.*

HARRISON, J.

On the date set forth in the instrument, L. S. Woodworth, the defendant in this action, executed and delivered to S. V. Parrott, the agent of Aultman, Miller & Co., at Albion, Nebraska, the following order:

"ALBION, 6—20th, 1892.

"I hereby order of Aultman, Miller & Co., through their agent, S. V. Parrott, one of their Buckeye harvesters and binders, to be shipped to Albion on or before harvest, 1892, for which I agree to pay the sum of $140, in manner as follows: One-half cash October 1, 1892, one-half November 1, 1893, and agree to make payment and give notes in settlement of deferred payments as above stated on delivery of machine, with seven per cent inter-

est from first day of August next. The warranty and agreement hereon indorsed are hereby made a part of this order.

"P. O. Albion, Neb. L. S. WOODWORTH."

On the back of this order appeared the following statements:

"WARRANTY AND AGREEMENT.

"The Buckeye machine, for which the within order is given, is warranted to be well made, of good material, and, if properly managed, to do good work. The purchaser shall have one day in the harvest field to give it a fair trial; and agrees to see that the machine is properly managed. In case the machine does not do good work, the purchaser is to give written notice both to the agent from whom he received the machine and to Aultman, Miller & Co., Akron, Ohio, stating wherein it fails, and shall allow reasonable time to get to it and remedy the defects, if any, and the purchaser shall render necessary and friendly assistance to the person sent to look after the machine, and shall furnish a suitable team for making further test of the machine, and if it cannot be made to do good work he shall return it to the place where he received it, free of charge, in as good condition as when received, excepting natural wear, and a new machine will be given in its place, or the money will be refunded. Continued possession of the machine or failure to give notice as above shall be conclusive evidence that the machine fills the warranty, and no one has any authority to change this warranty in any manner whatever. AULTMAN, MILLER & CO."

"In case anything happens my crop, I am not to take the binder. If I do not get enough to cut, this is also void; and if it does not cut and handle flax, it is void."

Pursuant to the above order, a harvester and binder, as therein designated, was shipped to Albion, and on arrival was taken from the car and loaded on the wagon of Mr. Woodworth and hauled to his farm. The tongue

of the machine, it appears, was under some other freight in the car, and could not be very readily taken from the car at the time the other parts of the machine were removed therefrom, and consequently it was not delivered to Woodworth at the time he received the other portions of the harvester. It is possibly true that there was another part or were parts of the machine contained in a box, which Woodworth did not get when the machine was taken from the car. Whether he did or not does not very clearly appear from the evidence on this point. It is not material except as its being the fact or not has a tendency to prove or disprove whether the harvester was delivered to Woodworth in Albion, or on his farm. During the next day after the one on which parts of the harvester were removed from the car and received by Woodworth and taken to his farm, the agent and a man in his employ took the tongue of the machine and possibly some other parts and went to Woodworth's place, and they and he set up the harvester and with it cut a short swath of green oats and commenced to cut some barley, one object being to try the machine and ascertain whether it would do "good work," as had been agreed that it should. After going a few times around the small field or patch of grain, probably not more than twice, they stopped for the day, and a brace to the reel, which it was thought was too long, was detached from the machine and by the agent and his employe taken to Albion, shortened, and the next morning taken back to the farm, readjusted in its place on the harvester, and the work of cutting the barley and testing the machine as a harvester and binder resumed. It also appears from the testimony of one witness that a third time he was sent and went to Woodworth's farm for the purpose of putting the harvester and binder in working order, which task was by him duly performed. Woodworth failed to pay for the harvester or to execute and deliver the promissory notes provided for and as agreed upon in the order for the machine, and the agent was compelled to pay for it and re-

ceived from Aultman, Miller & Co. an assignment of the order and claim against Woodworth and instituted this action thereupon. Woodworth has, at all times since the commencement of the suit, contended that the machine was not as warranted, that it did not do good work, would not properly elevate or bind the grain; that he was to receive a flax attachment, consisting of what was called during the trial and in the pleadings, a "flax dump," also a "smooth sickle" to be used in cutting flax; that these were never delivered to him; that the machine was not delivered to him at Albion, but on his farm; that the agent agreed that if it did not do good work and he did not make it work right, Woodworth was to leave it in the field and the agent would take it away. Woodworth cut the barley, about three acres, left the machine in the field and did nothing further with it until February or March, the succeeding year. After this suit was begun he took it to Albion and left it on a vacant block. A trial of the issues to a judge and jury resulted in a verdict and judgment for plaintiff, to review which is the object of error proceedings in this court.

It is claimed that by the contract of sale the defendant was to have delivered to him a flax attachment; that this was never done, and there being this failure, on the part of the party selling, to complete the contract, there existed no valid claim for the whole amount of the consideration. The jury, no doubt, believed from the evidence that there was no agreement to furnish the extra attachment, and the evidence was ample to warrant and sustain such a finding. In regard to each of the questions of whether the plaintiff agreed that the machine should be left in the field if rejected by defendant, and plaintiff would go and get it, whether it did good work or not, whether defendant gave notice subsequent to the machine being put in order the last time, a few days after it was set up, that he was dissatisfied with it, or that it did not work according to agreement, and whether the defendant refused to execute the note or settle the claim

for the machine, there was a direct conflict in the evidence, and the jury having resolved them in favor of plaintiff, and the evidence as to each being sufficient to sustain such findings, while it is true that the evidence would have sustained findings to the contrary, conforming to a well established rule of this court, they will not be disturbed, and what has been said of these questions applies with equal force to that of whether the machine had ever been tendered to the agent.

It is contended that the paragraph numbered 7 of the charge to the jury, given by the court on its own motion, was inapplicable to the facts of this case. A careful consideration of this instruction, in connection with all the evidence adduced on the trial, convinces us that it is not open to the complaint urged against it.

One assignment of the petition in error was in the following terms: "The court erred in giving the first, second, fourth, fifth, and seventh instructions asked by defendant in error." It is stated by counsel that, under the rule of this court, if any one of the instructions to which the above assignment refers is not erroneous, the assignment must fail as to all. By an examination of the instructions above included, we reach the conclusion that the one numbered 2 was applicable to the evidence and issues and not erroneous, when construed, as it must be, with all other portions of the charge, and its giving was proper. This being determined, this assignment must be overruled.

Another assignment of error reads as follows: "The court erred in refusing the fourth, fifth, and sixth instructions asked by plaintiff in error." As stated by counsel in the brief filed, if any one of these instructions was properly refused, the assignment must fail. The subject-matter embraced in the instruction numbered 4 referred to in the assignment just quoted herein was fully covered and embodied in the paragraph numbered 6 of instructions prepared and given by the trial judge on his own motion; hence its giving was properly refused.

This disposes of the assignment of error, adversely to the contention in regard thereto in behalf of plaintiff in error. There were no other alleged errors argued by counsel, and it follows, from the conclusions herein reached, that the judgment of the district court must be

AFFIRMED.

FREDERICK GEORGE V. JOHN MCCULLOUGH.

FILED JUNE 2, 1896. No. 6678.

Ejectment: PLEADING. In an action of ejectment under the provisions of the Code of Civil Procedure it must be alleged in the petition that the plaintiff is entitled to the possession of the premises sought to be recovered.

ERROR from the district court of Lincoln county. Tried below before NEVILLE, J.

George D. Mathewson and *M. A. Hartigan*, for plaintiff in error.

T. C. Patterson, contra.

HARRISON, J.

In this, an action of ejectment, the plaintiff was successful in the district court of Lincoln county, and the defendant has prosecuted error proceedings to this court. In the petition filed in the trial court it was averred "The plaintiff complains of defendant for that the said plaintiff has a legal estate in the following described premises, to-wit: [Here was given a detailed description of the property in controversy, which we omit], and said defendant, ever since the 1st day of July, 1887, has unlawfully kept, and still keeps, the plaintiff out of possession thereof." There were further allegations in regard to

rents and profits which it was stated defendant had received; also in respect to the removal and destruction by defendant of some timber, and a claim for damages arising therefrom. At the inception of the introduction of the evidence the defendant objected to any being received or allowed, on the ground that the petition did not state a cause of action. This was overruled and an exception noted on the part of defendant, and the action of the trial judge in this particular was made the subject of an assignment of error.

It is prescribed in section 626 of the Code of Civil Procedure, in reference to a complaint in a suit such as the one at bar, that "In an action for the recovery of real property, it shall be sufficient, if the plaintiff state in his petition that he has a legal estate therein and is entitled to the possession thereof, describing the same, as required by section one hundred and thirty-three, and that the defendant unlawfully keeps him out of the possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived." There was no allegation in the petition that the plaintiff was entitled to the possession of the real estate therein described, neither in the form of a conclusion in the words of the statute, nor in other apt words, nor were facts pleaded from which the inference might fairly arise or be drawn, and it is urged that this omission in the petition was fatal and rendered it insufficient. It will be gathered by referring to the quotations from the petition which we have hereinbefore embodied that it was therein stated that the defendant had, during a designated space of time, unlawfully kept, and still keeps, the plaintiff out of possession of the premises sought to be recovered. The appearance of this allegation, it is claimed by counsel for the party plaintiff in the district court, cured the omission to directly plead that the pleader was entitled to possession. The legislature, by the enactment of the section of the Code in respect to the statements which will render sufficient a complaint in an action of ejectment, have made the plead-

ing much simpler than was required in the old action of ejectment, and eliminated therefrom the technical allegations which formerly prevailed. Two of the main and important issues involved in the action are, in whom is the title, and who is entitled to possession, and by a fair application of the requirements of section 626 of the Code the pleader must, either in the words of the statute or in words of like import, state the conclusions that the plaintiff has a legal estate in the premises to recover which the action is instituted, and that he is entitled to the possession thereof, or must allege facts from which the conclusions appear. Nor does the appearance in the petition of the allegation that a defendant unlawfully withholds the possession from the plaintiff cure or supply the omission to set forth that the plaintiff is entitled to the possession. It was not contemplated nor intended by the law-makers that pleading the former should relieve from the necessity to set up the latter or be construed to take its place. (*Barclay v. Yoemans*, 27 Wis., 682; *Methodist Episcopal Church of Ashland v. Northern P. R. Co.*, 47 N. W. Rep. [Wis.], 190; *Dale v. Hunneman*, 12 Neb., 221.)

Counsel for the plaintiff in the trial court invoke the aid of section 121 of the Code, in which the rule is announced that "In the construction of any pleading for the purpose of determining its effects, its allegations shall be liberally construed with a view to substantial justice between the parties," and urge that giving it effect in its full purpose and meaning, we must hold that the petition in this case was sufficient as a pleading and fulfilled the demands of section 626 of the Code. We cannot give the rule stated in section 121 the force claimed for it by counsel. It does not exact that we shall disregard positive directions such as are contained in the section which specifically sets forth in terms what allegations will render a petition in an action to recover real property sufficient. The further allegations of the petition in regard to collection of rents and the removal and

destruction of the timber by defendant, and the damages to plaintiff resultant therefrom, were not independent of the allegations in ejectment, but were dependent thereon, or, to state it differently, the recovery of the real estate was the principal object of the suit and the others merely incidental thereto, and need not be considered independently therefrom. It follows, from the views expressed as to the sufficiency of the petition, that the judgment of the district court must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL. NELSON F. LOY, V. W. L. MOTE ET AL.

FILED JUNE 2, 1896. No. 6554.

1. **Villages:** ORDER OF INCORPORATION: RESIDENTS. To warrant an order by the county board incorporating certain territory as a village there must be two hundred or more actual residents of such territory.

2. ———: ———: ———. An actual resident within the meaning of the statute in relation to the incorporation of villages is one who is in a place with the intent to establish there his domicile or permanent residence, or has done so.

3. ———: ———: NUMBER OF RESIDENTS: EVIDENCE. Evidence examined, and *held* to show a less number than two hundred actual residents of the territory ordered incorporated as a village by the county board, at the date of such order.

4. ———: ———: TERRITORY. The law authorizing the incorporation of villages does not contemplate including in the corporate limits remote territory, or purely agricultural lands, not actually connected with the village and not adapted to municipal purposes. (*State v. Dimond*, 44 Neb., 154.)

5. **Quo Warranto:** VILLAGES. An owner of lands illegally included within the boundaries of a village can maintain proceedings by *quo warranto* to determine the validity of the order of incorporation. (*State v. Dimond, supra.*)

ORIGINAL action in the nature of *quo warranto* to oust respondents, who are exercising the powers of trustees of a village having no legal existence. *Writ allowed.*

A. E. Barnes and *A. G. Kingsbury*, for relator.

J. J. McCarthy, contra.

HARRISON, J.

On May 16, 1893, a petition was presented to the board of supervisors of Dixon county praying the incorporation of the territory therein described as a village, to be called the village of Allen. The petition had attached to it the signatures of thirty-six persons, who were said to represent and be a majority of the taxpayers within the bounds of the proposed village, and it was further made to appear by an affidavit accompanying the petition that there were 206 "actual inhabitants" of the territory which was to be included in the corporation boundaries of the village. On the same day the board of supervisors took action in the matter and made an order incorporating the territory described in the petition, naming the village "Allen" and appointing the respondents trustees for the village. The relator, who, it is claimed, at all times, when opportunity for so doing offered, objected to the incorporation, instituted through the attorney general of the state an action of *quo warranto* in this court, the object being to obtain a judgment of ouster against the defendants, the trustees of the village of "Allen." Issues were joined and on request of the parties, H. J. Porter, Esq., of Ponca, was appointed to take the evidence and report the same to the court, which has been done and the cause submitted.

The two main questions raised by the pleadings and presented for determination are (1) that a large tract of farming or agricultural land, which was not adjoining nor connected with the village proper, nor in any manner

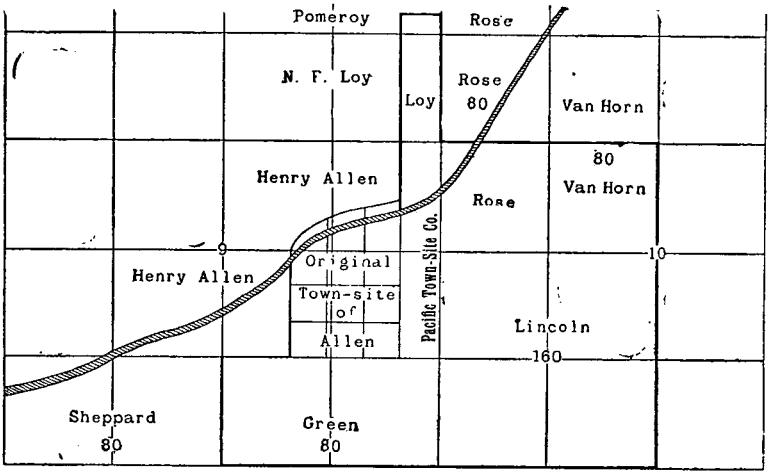
used for or adapted to village purposes, was included in the corporate limits by the order of incorporation, and (2) that on the 16th of May, the time the petition was presented to the board of supervisors and the order incorporating the village was made, there were not 200 actual residents within the boundaries of the municipality then erected. The portion of our statutes under which the incorporation was had was section 40, article 1, chapter 14, Compiled Statutes, which is as follows: "Any town or village containing not less than two hundred nor more than fifteen hundred inhabitants, now incorporated as a city, town, or village, under the laws of this state, or that shall hereafter become organized pursuant to the provisions of this act, and any city of the second class which shall have adopted village government as provided by law, shall be a village and shall have the rights, powers, and immunities hereinafter granted, and none other, and shall be governed by the provisions of this subdivision; *Provided*, That cities of the second class heretofore incorporated, and containing not more than fifteen hundred inhabitants, shall continue to be and exercise the powers of cities of the second class, and the officers thereof shall continue to exercise the powers conferred herein upon officers of such cities until the first general election held therein, and the qualifications of village officers elected at said election; *Provided further*, That whenever a majority of the taxable inhabitants of any town or village, not heretofore incorporated under any law of this state, shall present a petition to the county board of the county in which said petitioners reside, praying that they may be incorporated as a village, designating the name they wish to assume, and the metes and bounds of the proposed village; and if such county board or a majority of the members thereof shall be satisfied that a majority of the taxable inhabitants of the proposed village have signed such petition and that inhabitants to the number of two hundred or more are actual residents of the territory described in the petition, the said board shall de-

clare the said proposed village incorporated, entering the order of incorporation upon their records, and designating the metes and bounds thereof; and thereafter the said village shall be governed by the provisions of this act applicable to the government of villages. And the said county board shall, at the time of the incorporation of said village, appoint five persons having the qualifications provided in section forty-two of this act, as trustees, who shall hold their offices and perform all the duties required of them by law, until the election and qualification of their successors at the time and in the manner provided in this act."

We have carefully investigated the evidence, and while it is, in some particulars, apparently conflicting, the conflict in relation to the number of actual residents within the territory which was incorporated arises, to a large extent, out of the differing opinions entertained by the witnesses in respect to what constituted an actual resident. The largest number of actual residents of the village incorporated on May 16, 1893, testified to by any of the witnesses was 206, and several of these, it was shown, had homes elsewhere, and these, with others, were in the village temporarily and with no intention of remaining permanently or making it a home. All such persons were not actual residents as required by the statute. Construing the evidence in the light of the requirements of the law in regard to the number of actual residents, it fails to show that the requisite 200 were within the territory at the time of the incorporation, and this being true, the territory could not be incorporated as a village. (*State v. Uridil*, 37 Neb., 371.)

As to the first of the questions which we have outlined as litigated herein, the evidence showed that there were about 400 acres included within the village limits as incorporated; that of this one-half or more was farming land or "pasture land," and in use for the purposes indicated, and it was not shown how it would be benefited in any manner by being made a part of the municipality

and subject to its government. The land owned by the relator, it was stated, was, at its nearest point, about forty rods from the platted portion of the village and was a portion of his farm and in use for farming purposes. A glance at a copy of the plat of the village as bounded by the order of incorporation of May 16, 1893, will convince any one that the lines of the village were so run as to give to the village at least a somewhat peculiar shape in order to include the land belonging to the relator and his neighbor Pomeroy.



It appears from the evidence that one reason which moved the parties who were active in forwarding the incorporation to include the relator's property was that he was living thereon with his family, including the relator, nine persons, and they needed them within the limits to help make up the necessary 200 actual residents required by statute. It was shown that portions of farms not connected with the village proper and not platted or appropriated or adapted to municipal purposes were included within the corporate limits by the order of incorporation, and of such was the portion of the farm of relator, hence it was illegally included. (*State v. Dimond*, 44 Neb., 154, and cases cited.) The village organized had

no legal existence and *quo warranto* was the appropriate action. (*State v. Uridil, supra.*) A judgment of ouster will be rendered and for costs against the respondents.

WRIT ALLOWED.

JOHN C. DOLEN V. WILLIAM C. BLACK.

FILED JUNE 2, 1896. NO. 6694.

1. **Quieting Title.** In an action *quia timet* in this state the question of title between the parties may be fully litigated and determined and a decree rendered assigning the title to the real estate or any part of it to the party entitled thereto.
2. **Limitation of Actions:** ADVERSE POSSESSION. The statute of limitations will begin to run against the title of a party purchasing lands from the United States from the date of his compliance with all the requisites to entitle him to a patent therefor in favor of one who holds adverse possession of the real estate.

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

John Saxon and *Alfred Hazlett*, for plaintiff in error.

References: *Blazier v. Johnson*, 11 Neb., 409; *Gibson v. Chouteau*, 13 Wall. [U. S.], 92; *Wilcox v. McConnel*, 13 Pet. [U. S.], 498; *Irvine v. Marshall*, 20 How. [U. S.], 558; *Lindsey v. Miller*, 6 Pet. [U. S.], 667; *Oaksmith v. Johnston*, 92 U. S., 343; *Sparks v. Pierce*, 115 U. S., 408; *Burgess v. Gray*, 16 How. [U. S.], 48; *Duke v. Thompson*, 16 O., 34; *Wallace v. Miner*, 6 O., 367; *Hambrick v. Russell*, 5 So. Rep. [Ala.], 298; *Gould v. Kendall*, 15 Neb., 549; *Hobbie v. Zaepffel*, 17 Neb., 536.

J. A. Smith, contra.

HARRISON, J.

This action was commenced in the district court of Gage county by plaintiff, the relief prayed for being to

quiet the title to the west one-half of the northeast quarter and the east one-half of the northwest quarter of section 23, in township 1 north, of range 5 east, and in Gage county. The summons issued in the case, which was served on the defendants, was of date June 9, 1892. A number of the defendants answered, disclaiming any interest in the real estate. William C. Black, in a separate answer, which was in part in the nature of a cross-petition, pleaded title to the land by adverse possession during the full period prescribed by the statute of limitations, and asked a decree quieting the title in him. As the result of a trial of the issues to a judge of the district court the defendant, William C. Black, was awarded a decree granting him the relief prayed for in his answer, to reverse which the plaintiff has presented the case to this court by error proceedings.

It is claimed that the court had no jurisdiction in this action to try the question of the conflicting titles and grant the defendant Black affirmative relief. In an action *quia timet* in this state the question of title between the parties may be fully litigated and determined and a decree rendered assigning the title to the real estate, or any part of it, to the party entitled thereto. (Compiled Statutes, 1895, sec. 58, ch. 73; *Snowden v. Tyler*, 21 Neb., 199.)

It appears from the evidence that on March 14, 1881, one Otto Yaeger received from the United States, through its proper land officer, a certificate of purchase of the lands in controversy in the case at bar, and on December 15 of the same year, 1881, received a final certificate of purchase, entitling him to a patent for the land. It further appears that the money to make both the first and final payment of the purchase price of the land was furnished by one Thomas Yule, and that on March 14, 1881, the date of the first payment, Yaeger executed and delivered to Yule a quitclaim deed, in which the real estate in suit was described. The other conveyances which figure in the title, and which we need notice, were as follows:

December 15, 1881, warranty deed from Thomas Yule to Carl Langrich; June 10, 1882, deed by Otto Yaeger to John C. Dolen; September 25, 1882, patent by United States to Otto Yaeger; November 20, 1883, warranty deed by Carl Langrich to Elizabeth Avery; April 24, 1886, warranty deed by Elizabeth Avery to William C. Black. It is claimed that the possession of Yule and other parties to the asserted chain of title, commencing with Yaeger and running through various persons to William C. Black, if continuing and adverse, would not ripen into a title by virtue of the provisions of the statute of limitations until the expiration of ten years from the date of the patent issued to the purchaser of the land. It was established from the evidence that from the date of the quitclaim deed from Yaeger to Yule, March 14, 1881, each party whose name appears in the chain of title introduced in evidence, commencing with Yaeger and terminating in William C. Black, was in possession of the land, either personally or by tenant, from the time of its conveyance to him until he conveyed it to his grantee, and the land was being cultivated and improvements made thereon; that such possession was continuous and uninterrupted and adverse to all other claimants. On December 15, 1881, as we have stated, final payment was made for the land, and a final certificate issued. The party purchaser had done all things required of him by law to entitle him to a patent conveying to him the title to the land, and from that date the statute of limitations commenced to run. Hence, on June 9, 1892, more than ten years had elapsed and the action was barred, and the title by adverse possession had become unassailable by reason of the lapse of time. The statute of limitations will run against a party purchaser of lands from the United States who has complied with all the requisites to entitle him to a patent therefor from the United States, or his grantee, from the date of such compliance, in favor of a party who holds adverse possession of the lands. (*Carroll v. Patrick*, 23 Neb., 834; *Cauley v. Johnson*, 21 Fed.

Rep., 492; *Steele v. Boley*, 22 Pac. Rep. [Utah], 311, and cases cited.) It follows that the judgment of the trial court must be

AFFIRMED.

ALICE KROH ET AL., APPELLANTS, V. MARY J. HEINS ET AL., APPELLEES.

FILED JUNE 2, 1896. No. 6519.

1. **Witnesses:** INTEREST IN SUIT: TRANSACTIONS WITH DECEDENT: TESTIMONY. Section 329 of the Code of Civil Procedure excludes as incompetent, with certain specified exceptions, the testimony of one having a direct legal interest in the result of the suit, concerning transactions or conversations occurring between the witness and the deceased person, as against the representative of the latter.

2. ———: ———: ———: ———. The statute does not apply where the transaction or conversation was not between the witness and deceased person, but between the latter and a third party, in which the witness took no part.

3. ———: ———: ———: REPRESENTATIVES. The word "representative," as used in said section 329, includes any person or party who has succeeded to the rights of the decedent, whether by purchase, descent, or operation of law.

4. ———: ———: ———. The word "transaction," as employed in said section, embraces every variety of affairs which forms the subjects of negotiations or actions between parties.

5. ———: ———: ———: GIFTS. An interested party is prevented from testifying, over the objections of the representative of the decedent, to the receipt by him of a letter written by such decedent making a gift of his property, and to the contents thereof, since such letter constitutes a "transaction," within the meaning of the statute.

6. **Gifts:** EVIDENCE. *Held*, That the decree establishing a gift is not supported by sufficient competent evidence.

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

B. G. Burbank and *George F. Gillmore*, for appellants.

E. R. Duffie, B. N. Robertson, and *James F. Morton, contra.*

NORVAL, J.

The defendant, James F. Morton, on the 7th day of December, 1885, received from one Adolph Von Heilen $1,500, to be loaned for the latter for a period not exceeding five years, at not less than ten per cent interest per annum, the interest to be paid semi-annually. By the power of attorney executed by Von Heilen the notes and securities taken for the loans were to remain in Morton's hands, he guarantying the prompt payment of the principal and interest as the same became due. Subsequently, on June 28, 1886, $500 more was received by Morton to loan under the same terms, and the entire $2,000 was put at interest by him. Receipts for said sums were given by Morton to Von Heilen. On the 13th day of March, 1887, Von Heilen died intestate, leaving him surviving, a brother and four sisters, the plaintiffs herein, as his only heirs at law and next of kin, to-wit: C. Edward Von Heilen, Alice Kroh, Emma C. Thompson, Mary E. Brown, and Anna A. Heins. The defendants, William F. Heins, Mary J. Heins, and Alice Heins, are the minor children of said Anna A. Heins. The plaintiffs claim the notes and securities taken for the said moneys placed in Morton's hands as heirs of their deceased brother, and the said minors claim the same as a gift from the said Adolph in December, previous to his death. This is an equitable action to determine the rights of the plaintiffs to said moneys and securities. From a decree in favor of the defendants, the plaintiffs, excepting said Anna A. Heins, appeal.

The defendant Morton in his answer, among other things, sets up that he has no moneys in his hands belonging to the estate of said Adolph Von Heilen; that the latter in his lifetime appointed his sister, said Anna A.

Heins, trustee to receive the moneys at that time held by Morton and belonging to said deceased, for the use and benefit of the three youngest children of said trustee, the minor defendants, and at the same time said Adolph Von Heilen made over and assigned to said trustee all his right or title in or to said moneys, and authorized and directed Morton to pay the same to said trustee, and that he has paid over to her all of said moneys, with interest thereon, for the purpose stated, and no part of the same is now in his hands. The answer further sets up a counterclaim against the estate of the said deceased in the sum of $738 for services rendered as attorney and agent, and for cash advanced for said estate. This answer contained other averments which need not be here stated. All allegations of the answer are denied by the reply.

The evidence to establish the alleged gift of the money to the said minors rests alone upon the testimony of the defendant Morton and the said Anna A. Heins, which was admitted over the objections of the plaintiffs, they claiming that the said Morton and Mrs. Heins were disqualified from testifying against the personal representatives of said deceased. If they are right upon this proposition the decree cannot stand. Mrs. Heins testified, in effect, that she visited Adolph Von Heilen at his home in St. Louis in 1886, and that while there he informed her of his intention to make a gift of the moneys in Morton's hands to her three youngest children, and that afterwards, in December of the same year, she received a letter from Von Heilen through the mails inclosing the receipts given by Morton for the $2,000. This letter having been lost, she was permitted to testify as to its contents, as follows: "He wrote stating and sending the receipts with his letter, 'and take this letter and show it to Mr. Morton and turn these receipts over to him, and get his receipt in full for all the money,' stating that he was sick, and he says, 'in case of my death without making a will, it is my express wish that the money should go to your three youngest children.'" She further testified that she

showed this letter to Mr. Morton, turned over to him the said receipts received from her brother, and that Mr. Morton thereupon receipted to her for the money. Mr. Morton also testified to the contents of the said letter to Mrs. Heins, to the surrendering to him of the receipts given the deceased, and to receipting to her for the money which Von Heilen had left with him to invest. The witness further testified that he received through the post-office three or four letters from Von Heilen, and stated the substance of their contents after foundation had been laid for that class of testimony. The first letter was dated in December, 1886, and to the question, "State what it contained," Mr. Morton answered: "Well, sir, it was about the same as Mrs. Heins', and informing me to turn the money over to her children and give her a receipt for it, and also to send the interest, which was then due or about due, to him until further instructed. That is the very language of the letter. There was six months' interest due, which I sent him." Mr. Morton also testified that the deceased in the same letter stated "that he wished, in case of anything happening to him without making a will, that I should see that the Heins children would get his money." The contents of the other missing letters received from the deceased, as given by Mr. Morton, being of the same import, need not be here set out.

Counsel for plaintiffs argue that there is not sufficient competent evidence in the record to establish a gift from Von Heilen to the minor defendants, for the reason that both Mr. Morton and Anna A. Heins were incompetent to testify against the plaintiffs as to transactions which they had with Von Heilen in his lifetime. The question raised is whether either of these witnesses is disqualified from testifying to conversations had with the deceased, and to the contents of the letters already mentioned, under the provisions of section 329 of the Code of Civil Procedure, which reads as follows: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative

of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation." This section has been frequently before this court for consideration, and it has been uniformly held that a party who has a direct legal interest in the result of an action is precluded from testifying against the representative of a deceased person as to any transaction or conversation between the witness and such deceased person, except in the instances specifically enumerated in the statute. (*Wamsley v. Crook*, 3 Neb., 344; *Ransom v. Schmela*, 13 Neb., 73; *Magemau v. Bell*, 13 Neb., 247; *Housel v. Cremer*, 13 Neb., 298; *Rakes v. Brown*, 34 Neb., 304; *Parrish v. McNeal*, 36 Neb., 727; *Mead v. Weaver*, 42 Neb., 149; *Sharmer v. McIntosh*, 43 Neb., 509.) We are entirely satisfied with the interpretation placed upon the section quoted. The language of its provisions is too plain to admit of any other construction. Our statute does not, like those of some of the states, prohibit parties from becoming witnesses against the representatives of a deceased person, but it merely excludes persons who have a direct legal interest in the outcome of the suit from testifying to transactions or conversations with the deceased, and not then in case the evidence of the deceased in regard to the same has been already read in evidence, or such representative shall have called a witness who testified to the same conversation or transaction. Applying the foregoing to the case at bar, does the record disclose that either Morton or Mrs. Heins testified to any transaction or conversation had with Von

Heilen? As already stated, they each testified not only to the reception from the deceased of certain letters, but gave their contents, the loss of the letters having first been established. Mrs. Heins also repeated a conversation she had with Von Heilen. Clearly the testifying to said conversation was a violation of the letter and spirit of the law. The question arises whether the letters were "transactions" within the meaning and intent of the statute. The provisions of section 329 relate to all transactions between the witness and the deceased person, written as well as verbal. Obviously the legislature has not confined the operation of the statute to oral transactions merely, and we have no right to do so. The testimony of Mr. Morton and Mrs. Heins relate to "transactions" between each and the deceased.

The court in *Van Vetchten v. Van Vetchten*, 65 Hun, 215, in construing the statute of New York, almost identical with our own, say: "The language and intent of that section embraces every variety of affairs; all means of communication, oral, written, signs, or gestures, direct or indirect, positive or negative, or evidence of facts, the plain inference from which is a personal transaction between the witness and the party deceased. If the deceased could contradict, explain, or qualify the testimony, if living, it comes within the rule;" citing *Tooley v. Bacon*, 70 N. Y., 34; *Koehler v. Adler*, 91 N. Y., 657; *Holcomb v. Holcomb*, 95 N. Y., 316; *Mills v. Davis*, 113 N. Y., 243; *Nay v. Curley*, 113 N. Y., 575-580; *Heyne v. Doerfler*, 124 N. Y., 505.

Montague v. Thomason, 18 S. W. Rep. [Tenn.], 264, was a suit against the makers of a note found among the valuable papers of the deceased payee. It was held that one of the makers was incompetent to testify that he received a letter from the payee, which was lost, authorizing the renewal of the note in suit and promising to return such note as satisfied on the receipt of the renewal; that the renewal note was executed and delivered to the payee, and that he failed to return the original note. The

court in the opinion use this language: "A written transaction with, or statement by, a deceased person is no more a matter about which the adverse party may testify than a verbal transaction or statement. The statute makes no distinction. Its prohibition, on the contrary, is general; not limited to transactions and statements of one kind or the other, but comprehending both. No transaction with, or statement by, a deceased person is excepted, but all are included." To the same effect are the following decisions: *Holliday v. McKinne*, 22 Fla., 153; *Sabre v. Smith*, 62 N. H., 663; *Resseguie v. Mason*, 58 Barb. [N. Y.], 89. There are a few cases in conflict with the foregoing; see *Chadwick v. Cornish*, 26 Minn., 28; *Hall v. Northwestern Endowment & Legacy Association*, 47 Minn., 85.

Upon principle and authority we are constrained to hold that the testimony objected to related to transactions between the deceased and the witnesses, and, therefore, is within the prohibition of the statute, if Morton and Mrs. Heins had a direct legal interest in the event of the suit, and plaintiffs are the legal representatives of the deceased. In *Wamsley v. Crook*, 3 Neb., 344, it was held that "the word 'representative,' as used in the statute, was intended by the law-giver to designate the person or party who succeeds to the rights of the deceased, whether by purchase, descent, or operation of law." The same doctrine has been announced and applied in *Magemau v. Bell*, 13 Neb., 248; *Housel v. Cremer*, 13 Neb., 298; *Mead v. Weaver*, 42 Neb., 149. It follows from those adjudications that plaintiffs were the representatives of Von Heilen, a deceased person; and if Morton and Mrs. Heins possessed a direct legal interest in the litigation, their testimony as regards the contents of the letters in question was incompetent and should have been excluded.

Counsel for the defendants argue that they were not disqualified from testifying. It is to be remembered that Mrs. Heins is one of the heirs of her deceased brother, and is one of the parties plaintiff to this action. If plaintiffs succeed, and the gift to the children be not

established, it is obvious she will be entitled to a distributive portion of the money collected, and hence has a direct legal interest in the action. But it is insisted that since Mrs. Heins was a party plaintiff, her interests were adverse to that of the minors, and for that reason she was a competent witness for them. Mrs. Heins, doubtless, might waive the protection of the statute for herself alone, but she could not do so for her co-plaintiffs. She was an incompetent witness as against the other plaintiffs, who objected to her testimony. The fact that her interest was opposed to that of the defendants did not render her competent to testify to any transaction or conversation had between herself and the deceased over the objections of her co-plaintiffs. (*Le Clare v. Stewart*, 8 Hun [N. Y.], 127; *Howell v. Taylor*, 11 Hun [N. Y.], 214; *Cornell v. Cornell*, 12 Hun [N. Y.], 312; *Van Tuyl v. Van Tuyl*, 57 Barb. [N. Y.], 235; *Gifford v. Sackett*, 15 Hun [N. Y.], 79; *McCartin v. Administrator of Traphagen*, 11 Atl. Rep. [N. J.], 156.) Furthermore, Mrs. Heins being the mother, guardian, and trustee of the defendants, who are minors, she was interested adversely to the other heirs of the deceased. It is not material on which side of the case her greater interests lie, since her competency as a witness is not to be determined by the weighing of her conflicting interests. A direct legal interest in the event of an action disqualifies a witness from testifying to transactions or conversations with the deceased, whether such interest be great or small. (*Wylie v. Charlton*, 43 Neb., 840.) Morton was also disqualified from testifying to the receipt by him of certain letters alleged to have been written by the deceased, and to their contents, since Morton was a defendant to this action and directly interested in the result thereof. He claims to have accounted for and paid over to Mrs. Heins, the mother and guardian of his co-defendants, all of the moneys which had come into his hands. If plaintiffs are successful, he will be required to pay the money a second time. He is not a mere disinterested or nominal party. In his answer he

denies any liability to the plaintiffs for the money, and prays judgment against plaintiffs for services rendered and moneys paid out for the estate. Within the light of the authorities already mentioned, the conclusion is irresistible that Mr. Morton had such an interest in the outcome of the suit as to disqualify him from giving the contents of the letters written to himself by Von Heilen, since the reception of such letters, within the meaning of the statute, constituted transactions between the witness and the deceased. Doubtless, his testifying to the contents of the letter alleged to have been received by Mrs. Heins was not an infringement of the statute, as it merely excludes proof of transactions and conversations between the witness and the deceased. The provisions of section 329 do not apply where the transaction or conversation was not between the witness and the decedent, but between the latter and a third person. (*Lobdell v. Lobdell*, 36 N. Y., 327; *Colvin v. Phillips*, 25 S. Car., 228; *Mayes v. Turley*, 60 Ia., 407; *Gable v. Hainer*, 83 Ia., 457; *Sullivan v. Lattimer*, 17 S. E. Rep. [S. Car.], 701; *Hughey v. Eichelberger*, 11 S. Car., 49; *Raison's Administratrix v. Steele*, 29 S. W. Rep. [Ky.], 454; 29 Am. & Eng. Ency. Law, 722, and authorities there cited.)

The proving of the contents of the letter which it is claimed Von Heilen wrote Mrs. Heins, and the surrender by her to Morton of his receipts for the money, were insufficient to establish a valid gift of the funds to the minors without proof of the delivery of the subject of the gift, or such delivery as the nature of the property and the circumstances and situation of the parties would permit. The notes and securities held by Morton were never actually delivered by Von Heilen to Mrs. Heins or her children. It is claimed that the letter making the gift of them to the children was accompanied by the receipts of Morton evidencing Von Heilen's rights to the funds in dispute. If the delivery of the letter and receipts to Mrs. Heins was established by competent evidence, it might suffice; but outside of her testimony there

is nothing to show that the letter to her claimed to have been written by Von Heilen was sent by him to her, or that it inclosed the Morton receipts. Mrs. Heins, it is true, testified, over objections, to the reception of this letter and receipts through the post-office; but she was disqualified from testifying to their delivery, inasmuch as the reception by her of the letter and receipts constituted a "transaction" with a person since deceased, within the meaning of the statute. In addition to the authorities already given, see *Howard v. Zimpleman*, 14 S. W. Rep. [Tex.], 59; *Nunnally v. Becker*, 13 S. W. Rep. [Ark.], 79. The only case holding a contrary doctrine which has come under our observation is *Daniels v. Foster*, 26 Wis., 686, and the reasoning of the author of the opinion is illogical and unsound. A transaction is the doing or performing of any business or affair. It may be accomplished by writing as well as orally. The delivery of a written instrument is a part of the transaction, since it would be incomplete without delivery. If there was any proof that Von Heilen deposited this letter in the post-office, the presumption might be indulged that Mrs. Heins received the same by due course of mail; but there is no such evidence, and proof of its delivery was essential. As there is no competent evidence of the gift having been consummated by a delivery, it never became operative, and the trial court erred in holding that the plaintiffs, as the heirs and the representatives of the decedent, were not entitled to the funds. The decree is reversed and the cause remanded to the district court with directions to render a decree in favor of the plaintiffs.

REVERSED AND REMANDED.

SARAH NAMES ET AL., APPELLEES, V. L. W. NAMES, APPELLANT, ET AL.

FILED JUNE 2, 1896. No. 6608.

1. **Deeds as Mortgages.** A deed of real estate, absolute in its terms, executed and intended as a security for a debt or loan, will be construed as a mortgage merely, as between the parties, and all others, except good faith purchasers for value without notice.
2. ———: EVIDENCE. *Held*, That the deed from L. W. N. and wife to D. F. N. was not intended as an absolute transfer of the premises therein described.
3. **Action to Compel Reconveyance of Land.** *Held*, That this is not an action for relief on the ground of fraud, but one to compel a reconveyance of the property, the debt having been extinguished which the deed was given to secure.
4. ———: ———: LIMITATION OF ACTIONS. Such an action is not barred until the expiration of ten years after the right of action accrued.
5. **Tenants in Common:** RENTS AND PROFITS. A tenant in common who alone occupies the common property, and holds possession adversely as sole owner, or where he excludes his co-tenant from the enjoyment of the premises, is liable to his co-tenant for the rents and profits.
6. **Evidence:** TRANSCRIPT OF FOREIGN JUDGMENT. A transcript of a judgment of another state to be admissible in evidence must be duly authenticated in the mode prescribed by section 414 of the Code of Civil Procedure.

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

W. E. Gantt, for appellant.

References as to right of a tenant in common to recover from his co-tenant rents and profits: *Peck v. Carpenter*, 7 Gray [Mass.], 283; *Crane v. Waggoner*, 27 Ind., 52; *Shepard v. Richards*, 2 Gray [Mass.], 424; *Woolever v. Knapp*, 18 Barb. [N. Y.], 265; *Israel v. Israel*, 30 Md., 120; *Pico v. Columbet*, 12 Cal., 414; *Becnel v. Becnel*, 23 La. Ann., 150; *Kean v. Connelly*, 25 Minn., 222; *Fielder v. Childs*, 73

Ala., 567; *Terrell v. Cunningham*, 70 Ala., 100; *Everts v. Beach*, 31 Mich., 136; *Wilmarth v. Palmer*, 34 Mich., 347; *Davis v. Filer*, 40 Mich., 310; *Campau v. Campau*, 44 Mich., 31.

Wigton & Whitham and *B. W. Wood, contra.*

NORVAL, J.

The amended petition alleges, in effect, that plaintiff, Sarah Names, and the defendant, L. W. Names, on the 9th day of February, 1878, were husband and wife, and each owned an undivided one-half of the north half of section 7, township 28, range 4 east, in Dixon county; that Sarah has been ever since said date, and is now, the owner of an undivided one-half of the northwest quarter of said section; that on the 20th day of April, 1886, she sold and conveyed the undivided one-half of the northeast quarter of said section to her co-plaintiff, Sonneckson Sparks, who is now, and ever since has been, the owner thereof; that on June 7, 1882, the said Sarah Names and L. W. Names executed and delivered a deed covering the said northwest quarter to one De Witt F. Names, a brother of L. W. Names; that in order to obtain the signature of Sarah Names to said deed said L. W. Names represented to her that said deed was but a mortgage to secure a sum of money then owing by him to his said brother, De Witt F. Names; that L. W. Names would pay said indebtedness and redeem said land from said mortgage, and cause a reconveyance thereof to be made to the grantors; that said conveyance was executed and delivered for no other purpose whatever, and without any consideration to said Sarah, but that the same was executed by her for the sole accommodation of her husband, believing and relying upon his said representations; that said deed was but a mortgage, given for the sole purpose of securing said indebtedness; that on January 7, 1890, said De Witt F. Names conveyed said northwest quarter to the defendant, Charles E. Names, a

brother of L. W. Names; that on September 14, 1890, said Charles E. Names and wife deeded the same to Catharine Walrod, a sister of the defendants, and she and her husband, on February 24, 1891, conveyed the same to L. W. Names, who now holds the title to said northwest quarter, subject to the rights and equities of Sarah Names and subject to a certain mortgage executed by L. W. Names, and to two mortgages executed at his request by said De Witt F. Names; that L. W. Names, as tenant of Sarah Names, has used and occupied her interest in said premises ever since February 9, 1878, and has received the rents and profits thereof; that the rental value of such interest is the sum of $160 per annum, no part of which has been paid. The said L. W. Names, as tenant of plaintiff Sonneckson Sparks, has used and occupied his undivided one-half interest in the said northeast quarter from April 20, 1886, until January 7, 1891, and received the rents and profits thereof; that the rental value of said interest in said premises is $80 per year, no part of which has been paid. The prayer is that L. W. Names be required to execute and deliver a deed to Sarah Names of the undivided one-half of the said northwest quarter, and if he fails so to do within a reasonable time, that the decree rendered by the court be made to operate as such conveyance; that the incumbrances on said quarter section be decreed to be satisfied first out of L. W. Names' undivided one-half interest; that Sarah Names' title be quieted in her; and that a partition of said northwest quarter be made according to the respective rights of the parties interested therein, and that Sarah Names have judgment against L. W. Names for the sum of $2,400. The plaintiff Sparks prays for a partition of the said northeast quarter, and for judgment against L. W. Names for the sum of $320.

The defendant, Charles E. Names, in his answer, admits that Sarah and L. W. Names were husband and wife, and were owners each of an undivided one-half interest in the north half of said section 7, and that the

deed to De Witt F. Names and the mortgages described in the amended petition were executed and delivered as alleged. All other averments of the petition are denied. The defendant, further answering, alleges that the causes of action set out in the amended petition did not accrue within four years next preceding the commencement of the action; that the answering defendant is the owner of an undivided one-half interest in the said northeast quarter of section 7, and that the plaintiff Sparks is the owner of the other undivided one-half interest in said premises. Defendant prays judgment confirming the shares of the parties as above set forth, and for a partition of said real estate according to the said rights of the parties interested therein.

The answer of L. W. Names contains the same admissions and denials of the allegations of the amended petition as stated in the answer of his co-defendant, and avers that the deed to De Witt F. Names was intended to convey a fee-simple title to the grantee therein; that Sarah Names signed the same with the full knowledge that she was thereby conveying all her title and interest in and to the lands therein described, and that she received one-half of the consideration paid by said De Witt for said land, to-wit, the sum of $500. The defendant for further answer pleads the statutes of limitations, and by way of cross-petition for first and second causes of action sets up the recovery of two judgments by him against Sarah Names, which it is alleged are unpaid, one in the supreme court of the state of Iowa, on December 8, 1885, in the sum of $225, and the other in the district court of Webster county, Iowa, on or about September 4, 1886, for the sum of $357.95. The defendant also alleges that since the recovery of said judgments said Sarah Names has been a non-resident of the state of Iowa, and pleads the statute of limitations of that state. For another cause of action it is alleged that Sarah and L. W. Names, in 1877, purchased and became the owners in common of the northeast quarter of said section 7, and

that said defendant has paid all the taxes subsequently levied and assessed on said quarter section until the year 1885, aggregating the sum of $150.22; that one-half of said sum, with interest from the several dates of payment, is due and payable from the said Sarah Names, and that during all the time between the dates of the payments of said taxes she was a non-resident of this state and absent therefrom. There are other averments in the answer, which need not be referred to, as they are not necessary to a consideration of the questions now involved.

The replies of the plaintiffs deny each allegation contained in the answers, and set up the statute of limitations against the causes of action pleaded by L. W. Names.

Upon the trial of the issues presented by the pleadings the court found that the plaintiff Sparks and the defendant Charles E. Names were the owners each of an undivided one-half interest in the said northeast quarter of section 7, and that they were entitled to the partition of said real estate. The court further found, in substance, that the deed executed and delivered to De Witt F. Names to said real estate was intended as a mortgage; that whatever right, title, and interest he had in said tract has been redeemed and the premises reconveyed to L. W. Names, who now holds the legal title to the entire northwest quarter, the undivided one-half thereof being in trust for Sarah Names; that the mortgages on said real estate described in the amended petition were placed thereon by L. W. Names, or for his benefit, and that the same are to be satisfied first out of his undivided interest in said premises, before subjecting her interest to the payment of the same; that Sarah and L. W. Names were the owners in fee each of an undivided one-half of said land, and that partition thereof should be made. The court further found to be due Sarah Names from L. W. Names the sum of $750, for rents and profits; that there was nothing due the latter on the judgment pleaded

as his first cause of action in the cross-petition; that there is due from Sarah Names to L. W. Names on his second cause of action, the judgment recovered in the district court of Webster county, Iowa, the sum of $526.88; that there is due him for taxes paid $56.52, and that there is a balance due plaintiff, Sarah Names, from the defendant, L. W. Names, the sum of $166.60. From the decree rendered upon said findings the defendant, L. W. Names, appeals.

It is conceded by the respective parties that the decree, in so far as it partitions the northeast quarter of said section 7, is right. The only controversy in this court is between Sarah and L. W. Names. It is undisputed that while they were husband and wife and the owners, each, of an undivided one-half of the northwest quarter of said section 7, they executed a deed of said real estate to De Witt F. Names; that subsequently through *mesne* conveyances, as alleged in the petition, L. W. Names obtained title to the whole quarter section, and so held the same when this action was instituted. The main dispute arises over the deed to De Witt F. Names, the defendant claiming that it was executed and intended by the parties as an absolute conveyance of the land to the grantee therein mentioned, while Mrs. Names insists that the deed, although absolute in form, was given to secure her husband's debt, and, therefore, is in effect a mortgage merely. It is the settled law of this state that a deed absolute in its terms, when given to secure a debt, as between the parties thereto, and all others except good-faith purchasers for value without notice, will be construed by the courts to be a mortgage only. (*Wilson v. Richards*, 1 Neb., 342; *McHugh v. Smiley*, 17 Neb., 626; *Eiseman v. Gallagher*, 24 Neb., 79; *Tower v. Fetz*, 26 Neb., 706; *Kemp v. Small*, 32 Neb., 318.) L. W. Names having been one of the grantors in the deed to De Witt F. Names, is not a *bona fide* purchaser of the premises, and Mrs. Names is not precluded from showing the character and purpose of the conveyance. She is, however, required to

establish by clear and convincing evidence that such deed was intended as security for a debt or loan, and that the same has been satisfied, in order to obtain a reconveyance of the premises.

It is urged that the findings of the district court that the conveyance in question was a mortgage is unsupported by the evidence, or rather is contrary to the weight thereof. It is not, and cannot be successfully, contended that there is no testimony to sustain the finding that the deed was intended to operate as a mortgage. Mrs. Names testified positively that the deed was executed to secure a loan of money obtained by L. W. Names from his brother De Witt; that she received no consideration for the conveyance, and that there was no absolute sale of the land. Neither of the other parties to the instrument was called as a witness to contradict her testimony. Mrs. Names is fully corroborated by the witness Miss Acres, who testified to admissions made to her by L. W. Names, to the effect that the deed was executed in anticipation of divorce proceedings against Mrs. Names, which he afterwards brought; that the sale to De Witt was a sham, and that L. W. Names owned the land. It was further shown that after the deed to De Witt was executed, he gave a power of attorney to L. W. Names authorizing him to mortgage, sell, and handle the land in dispute as he saw proper, and that the latter continued to care for and rent the premises. The defendant called several witnesses, not parties to the conveyance, however, who testified substantially that they were present when the deed in question was delivered, and that De Witt F. Names paid $1,000 for the quarter section, $500 to each of the grantors. There was introduced other evidence tending to show that an absolute sale of the land was made to De Witt. It should be stated that Mrs. Names in her testimony denies receiving $500, or any other sum, on account of her signing the deed. It will be observed that the record discloses a marked conflict in the evidence, that given on the one side being sufficient to up-

hold the deed as an absolute conveyance according to its terms, and that on behalf of the plaintiff tends to prove or establish that the instrument was executed by Mrs. Names as a mortgage merely. The court below must have believed the plaintiff's witnesses, and we cannot say it should not have done so, although the greater number of persons testified for the defense on this branch of the case. It is not for us to weigh the testimony farther than to ascertain that the finding complained of is supported by the proofs, and we are convinced that it is. It is not so clearly and manifestly wrong as to make it the duty of this court to disturb it.

It is urged that this is an action for relief on the ground of fraud, and was therefore barred in four years after the discovery of the facts constituting the fraud. We think counsel mistakes the purport of the suit. It is not to obtain relief on the ground suggested, but rather one to have the true character of the deed to De Witt F. Names established, and to compel a reconveyance to Sarah Names of her interest in the premises, the mortgage debt having been extinguished. The statute of limitations does not run against such an action until the expiration of ten years after the cause of action accrues, and this suit was instituted within that period. (*Wilson v. Richards*, 1 Neb., 342; *McKesson v. Hawley*, 22 Neb., 692; *Baldwin v. Burt*, 43 Neb., 245.) It is true it was alleged and proved on the part of the plaintiff that L. W. Names represented to his wife that the deed was a mortgage, and that relying thereon she was induced to sign the same. The purpose of this was to estop L. W. Names from claiming that the instrument was in fact, as it was in form, an absolute conveyance. Relief is not predicated upon the misrepresentations of the defendant, but rather upon the fact that the deed was intended and treated as a mortgage, and that L. W. Names wrongfully took a conveyance of the title to himself alone, ignoring the interests of his wife in the premises.

Another point urged is that L. W. Names was entitled

to a lien upon the land for the sum of $500, which it is claimed was received by his wife when the deed to De Witt was given. There are two valid answers to this contention: First, no lien is claimed therefor in the answer. In the next place, there was sufficient evidence to show that Sarah Names did not receive the $500, or any other sum, as a consideration for making the deed. If she did not, then it is plain no recovery can be had against her for the same.

Complaint is made of that part of the finding which charges L. W. Names with the rents and profits of Sarah Names' interest in the premises. While there is a conflict in the authorities upon the proposition whether a co-tenant in the exclusive possession of the common property is liable to account for the value of such occupation, in the absence of an agreement to pay rents, where there has been no denial of the right of his co-owner to enter and enjoy with him, the weight of the adjudications in this country sustains the rule that where a tenant in common excludes his co-tenant from the enjoyment of the common property, or where he takes possession of the whole and holds the same adversely as owner, he is liable for the rents. (*Valentine v. Healey*, 86 Hun [N. Y.], 259; *Holmes v. Best*, 5 Atl. Rep. [Vt.], 385; *Almy v. Daniels*, 4 Atl. Rep. [R. I.], 753; *Scantlin v. Allison*, 4 Pac. Rep. [Kan.], 618; *Minter v. Durham*, 11 Pac. Rep. [Ore.], 231; *Edsall v. Merrill*, 37 N. J. Eq., 114; *Gage v. Gage*, 29 Atl. Rep. [N. H.], 543; *Wood v. Griffin*, 46 N. H., 230; *Zapp v. Miller*, 15 N. E. Rep. [N. Y.], 889; 11 Am. & Eng. Ency. of Law, 1099, and cases there cited.) It is undisputed that L. W. Names has held possession of the entire quarter section under a claim of exclusive right. He insisted that he was the sole owner of the premises and alone had the right to the rents and profits derived therefrom. Mrs. Names was, we think, entitled to recover her share of the value of the use or rental of the property for four years prior to the commencement of the action, without interest, as no demand was made. No rents prior to said

period are recoverable, since the statute of limitations had run against them. The amount allowed by the court, $750, was too large. The rental value of the entire quarter section did not exceed $320 per year, which for four years aggregates the sum of $1,280. One-half of this amount, or $640, would belong to each co-tenant. The decree, as to the amount of rents for which the defendant is accountable, is excessive to the extent of $110.

Another proposition advanced is that the court erred in rejecting a portion of the claim of L. W. Names for taxes. A perusal of the evidence convinces us that he was allowed fully one-half of the money paid out by him as taxes on the northeast quarter of said section, and he has no just cause to complain of the decree in this particular.

Objection is made to the disallowing of the defendant's first cause of action set up in his cross-petition, which is based upon a judgment for costs alleged to have been obtained by L. W. Names against Sarah Names in the supreme court of the state of Iowa. The recovery of the judgment is denied by the reply, and there is no competent proof in the record of the existence of the judgment. True, a transcript of that which purports to be such a judgment was introduced in evidence, but it contained no certificate of the presiding judge, and its admission in evidence was specifically objected to on that ground. The transcript not having been authenticated in the mode prescribed by section 414 of the Code of Civil Procedure, it was insufficient to prove the existence or recovery of the judgment pleaded; hence, the court was right in wholly rejecting the cause of action based thereon.

The only error we have discovered in the record is as to the amount of the personal judgment rendered in favor of Mrs. Names, which was for $166.60. This sum is $110 too large, that being the amount which we have already determined the finding of the court against the defendant for rents was excessive. The decree will be modified in this respect, and in all others it is affirmed.

JUDGMENT ACCORDINGLY.

FRED SCOFIELD V. CHARLES F. CLARK ET AL.

FILED JUNE 2, 1896. No. 6591.

1. **Pleading.** All facts well pleaded in an answer, not denied by a reply, are taken as true.
2. **Release and Discharge.** The release by a payee of one joint obligor operates as a release of the others also.
3. **Judgments.** Under section 440 of the Code of Civil Procedure a judgment *non obstante veredicto* should be rendered when the pleadings of the party obtaining the verdict confess facts entitling the other party to judgment. (*Manning v. City of Orleans*, 42 Neb., 712.)

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

Rickards & Prout, for plaintiff in error.

Alfred Hazlett, contra.

NORVAL, J.

This action was instituted in the county court of Gage county by Charles F. Clark to recover upon a promissory note for $800, executed by Fred Scofield and others, payable to A. T. Turney, and by him indorsed to C. G. Platter, who likewise indorsed the said instrument to plaintiff. The makers and indorsers were made defendants, although service of summons was had upon Scofield and Turney alone, against whom a verdict was rendered, and immediately Scofield filed a motion for judgment in his favor upon the pleadings *non obstante veredicto*, which was overruled, and judgment was thereupon rendered by the county court in favor of the plaintiff. Scofield prosecuted a petition in error to the district court, alleging, *inter alia*, that the county court erred in overruling his motion for judgment, notwithstanding the verdict. From a judgment affirming the decision of the county court, error is prosecuted to this court.

The record shows that one of the defenses interposed in Scofield's answer to the petition in the county court was that Turney, the original payee of the note, while he was owner thereof, for a valuable consideration released J. D. Patterson, P. G. Casper, and Julius Lane, joint makers with Scofield of the note sued upon. Plaintiff filed a general demurrer to this defense, which was overruled, and no reply to the answer was filed. The plaintiff by failing to reply admitted as true all facts well pleaded in said answer. (*Harden v. Atchison & N. R. Co.*, 4 Neb., 521; *Dillon v. Russell*, 5 Neb., 488; *Williams v. Evans*, 6 Neb., 218; *Payne v. Briggs*, 8 Neb., 78; *Hanson v. Lehman*, 18 Neb., 564; *Linch v. State*, 30 Neb., 740; *Hamilton Loan & Trust Co. v. Gordon*, 32 Neb., 663.) The answer alleges, in effect, that on the 1st day of March, 1890, Turney, who was the payee, owner, and holder of the note, in consideration of $300, to him paid by the three of the makers above stated, released them from further liability on said instrument, and that said release was indorsed in writing upon the back of said note by Turney, without Scofield's knowledge, consent, or procurement. The release being thus indorsed, the plaintiff was not an innocent holder of the paper, although he purchased the same before maturity thereof. The $300 payment was made before the note became due, which constituted a good consideration for the release and discharge of those who paid the money. That the release of one joint obligor will operate as a release of the others also is the settled law of this state. (*Neligh v. Bradford*, 1 Neb., 451; *Lamb v. Gregory*, 12 Neb., 507.) It follows that the answer stated a good defense to the note.

Section 440 of the Code of Civil Procedure provides: "Where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such parties." Under the foregoing provisions the defendant Scofield, upon the issues made by the pleadings, had a right to have judgment pro-

nounced in his favor. (*Rinker v. Lee*, 29 Neb., 784; *Manning v. City of Orleans*, 42 Neb., 712.) The county court erred in not sustaining the motion for judgment, *non obstante veredicto*, and the district court erred in rendering a judgment of affirmance. The judgment of the county court and that of the district court are reversed and the cause remanded to the last named court for further proceedings.

REVERSED AND REMANDED.

FARMERS & MERCHANTS INSURANCE COMPANY v. O. M. MOORE.

FILED JUNE 2, 1896. No. 6560.

1. **Parties.** Except as otherwise provided in the Code, every action must be prosecuted in the name of the real party interested.
2. **Insurance: PARTY IN INTEREST.** *Held*, That the petition fails to show that the plaintiff has such an interest in a policy of fire insurance as to entitle her to maintain an action thereon in her own name.

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

Campbell & Wallis, for plaintiff in error.

Allen, Reed & Ellis, contra.

NORVAL, J.

This was an action by O. M. Moore upon a policy of fire insurance issued by the defendant to one E. C. Warner, in the sum of $330, upon a dwelling house situate in the town of Warnerville, Madison county. The insured property having been subsequently wholly destroyed by fire, this action was commenced to recover the amount of said policy. The cause was tried before a jury and a verdict

rendered in favor of the plaintiff. The defendant prosecutes a petition in error.

At the commencement of the trial the defendant objected to the introduction of any testimony, on the ground that the petition failed to state a cause of action, which objection was overruled by the court. This ruling is assigned for error. It is insisted that the petition fails to show that the plaintiff has any interest in the contract or policy of insurance declared upon. The policy, a copy of which is set out in, and made a part of, the petition, was executed and delivered to E. C. Warner, the alleged owner of the insured premises. It contained, among other things, the following provisions: "Loss, if any, payable to M. O. Moore, mortgagee, as her interest may appear, subject, however, to all the conditions of this policy." The petition does not disclose that the policy was payable to this plaintiff, Olive M. Moore, or that it has been assigned to her, or that she was in any manner a party to the contract of insurance. The face of the policy shows that the insurance money was to be paid to M. O. Moore. There is no averment in the petition that the initials of plaintiff's maiden name were incorrectly stated in the policy, or that plaintiff and M. O. Moore are one and the same person. The petition is, therefore, faulty in not showing that this plaintiff has the right to recover upon the policy. The Code requires that actions must be prosecuted in the name of the real party in interest. In order to maintain the suit, plaintiff's interest should have been affirmatively disclosed by proper averments in the petition. (*Hicklin v. Nebraska City Nat. Bank*, 8 Neb., 463.) We are all of the opinion that, for the defect indicated above, the petition does not state a cause of action in favor of the plaintiff, and for that reason alone, without considering the other errors assigned, the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

FREDERICK H. MILLER, APPELLEE, V. GABRIEL GUNDERSON ET AL., APPELLANTS.

FILED JUNE 2, 1896. No. 6637.

1. **Negotiable Instruments:** ADMISSION OF EXECUTION. Evidence contradictory of the terms of a promissory note cannot furnish a defense to such note when it is admitted by defendants that such note was duly executed by them.

2. **Mortgages:** CANCELLATION: TENDER. A mortgage will not be canceled upon the application of the mortgagor, no creditor being interested, without a tender or requirement that the mortgagee be reimbursed for such expenditures as he has made, and indemnified as to such liabilities as in good faith he has incurred, on the faith of such mortgage.

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

B. G. Burbank, for appellants:

Partnership property, with the consent of all the partners, may be mortgaged to secure the individual debts of one or more of the partners. (*Richards v. Leveille*, 44 Neb., 38; *Roop v. Herron*, 15 Neb., 73; *Deitrich v. Hutchinson*, 20 Neb., 52; *Sylvester v. Henrich*, 61 N. W. Rep. [Ia.], 945; *Fisher v. Syfers*, 10 N. E. Rep. [Ind.], 306; *In re Kahley*, 2 Biss. [U. S. C. C.], 383; *Smith v. Smith*, 54 N. W. Rep. [Ia.], 73; *National Bank of Metropolis v. Sprague*, 20 N. J. Eq., 13; *Carver Gin & Machine Co. v. Bannon*, 85 Tenn., 718; *Case v. Beauregard*, 99 U. S., 119; *Huiskamp v. Moline Wagon Co.*, 121 U. S., 310; *Veal v. Keely Co.*, 86 Ga., 130; *Kennedy v. National Union Bank*, 23 Hun [N. Y.], 491; *Wiggins v. Blackshear*, 26 S. W. Rep. [Tex.], 939.)

John L. Carr, *David W. Merrow*, and *Isaac E. Congdon*, *contra*.

RYAN, C.

About the first day of January, 1888, Frederick H. Miller entered into partnership with Gabriel M. Gunder-

son for the purpose of carrying on the planing mill business in the city of Omaha. It was stipulated between the partners that the first named contributed $20,000 and the last named $15,000. It was also provided that eight per cent interest was to be allowed on any excess of capital which one partner might have, and that this interest was to be paid, with other expenses, from the business of the firm, before a division of profits. In the latter part of the year 1887 Gabriel Gunderson, the father of Gabriel M. Gunderson, had been asked by Frederick H. Miller to furnish money for the operation of a planing mill, which Miller had constructed, but had not means enough to operate. Mr. Miller's arrangement, as he claims, was to take Gabriel M. Gunderson into partnership with him, the father to furnish the amount of money necessary to enable Gabriel M. Gunderson, his son, to become such partner. The Gundersons insist that the advances made by the elder Gunderson were loans to the firm of Miller & Gunderson. This is the first matter of dispute between the litigants. Whatever this arrangement was, there is one thing certain, and that is that under it Gabriel Gunderson furnished $7,500 on January 17, 1888; $5,000 on April 24, 1888; $900 on May 17, 1888; and at some time prior to the last named date, $60.80,—making a total of $13,460.80. It seems that the first item of $7,500 was credited by Gabriel M. Gunderson upon the books of the firm of Miller & Gunderson as a payment on account for the capital advanced by himself as the junior member. There was no evidence that Gabriel Gunderson knew anything of this entry. When he sent the draft for $7,500 from Chicago, his place of residence, he inclosed three promissory notes, each of $2,500, to be signed by Gabriel M. Gunderson, Frederick H. Miller, and the wife of Miller. These notes were accordingly executed. Gabriel Gunderson explained in his testimony that he supposed this was the proper way for these notes to be given, though they were for the indebtedness of the firm of Miller & Gunderson. This firm, from its commencement, instead

of making money ran into debt, until on January 13, 1893, in a letter written by Frederick H. Miller to Gabriel Gunderson in Chicago, the situation was stated in this language: "I suppose you know that the mill is in the hands of the sheriff, and I do not see how the matter can be continued much longer, as about all the outstanding accounts are collected that can be at present, except a few hundred dollars. The judgments against us in the sheriff's office amount to about three thousand dollars, and more to hear from. There not being any prospect of fixing up the matter, think it would be best for all concerned for you to be here." Upon receipt of this letter Gabriel Gunderson went to Omaha. On January 19, 1893, the firm of Miller & Gunderson, by F. H. Miller, as partner, and F. H. Miller and Gabriel M. Gunderson, individually, joined in making a chattel mortgage upon the personal property of said firm to secure its five promissory notes to Gabriel Gunderson, payable on demand, of which notes each of three was for $3,270.10, another was for $6,780.51, and still another was for $5,000. At the same time F. H. Miller and Gabriel M. Gunderson, the joint owners of the planing mill real property, their wives joining, made a mortgage on said real property to secure payment of the notes above described, except the $5,000 note, to be hereafter explained. These notes represented advances and interest. These mortgages were duly filed for record on the day following their date. Soon afterward Gabriel Gunderson commenced proceedings for their foreclosure.

The petition in this case was filed by F. H. Miller as a quondam member of the firm of Miller & Gunderson. His former partner and the mortgagee were joined as defendants. The plaintiff in this petition described the various transactions in which he had taken part, in accordance with the theory that Gabriel Gunderson had made advances solely to enable his son to become a partner and to continue that relationship between the son and the plaintiff. It was averred that Gabriel Gunderson, in

the encouragement of the formation of a partnership between his son and plaintiff, was conniving and conspiring with said son to defraud plaintiff, and that the subsequent transactions were carried on in pursuance of the same fraudulent common purpose of the father and son to deprive plaintiff of his property and to defraud the creditors of said firm, and that the proposed foreclosure of the mortgages would consummate these designs of the defendants. It will greatly simplify this investigation to say, once for all, that plaintiff's counsel, in their brief, expressly state that in this litigation the rights of creditors are not involved. The prayer of the petition was that the mortgages be declared fraudulent, inoperative, and void; that they be canceled; that the advertised foreclosure of the chattel mortgage be enjoined; that any proceedings by defendants under said mortgages be restrained until the controversy herein has been determined by the court, and for such other and further relief as in equity and good conscience the plaintiff might be entitled to. The answer and reply raised the issues hereinbefore indicated. Upon a trial of these issues there was a decree in accordance with the prayer of the petition, on findings that Gabriel Gunderson, the defendant, obtained the mortgages from plaintiff by and through his own and his son's fraud and misrepresentation, as alleged in the petition, that is to say, that said Gabriel Gunderson would, if said mortgages were given him, pay all the debts of the firm of Miller & Gunderson, which he had not done and had never intended, but had always refused to do, and furthermore, that the money advanced by Gabriel M. Gunderson as his part of the capital of the firm was loaned to him by his father for that purpose; that the notes to Gabriel Gunderson never represented any indebtedness of the firm of Miller & Gunderson; that as between the plaintiff and the defendants there was never any consideration for said notes, and that the plaintiff was not liable on said notes.

It would be a tedious as well as fruitless task to re-

capitulate the evidence upon consideration of which the district court reached the above results. In respect to the proposition that Gabriel Gunderson obtained the mortgages by the representation that he would pay all the debts of the firm, it is deemed proper to say that it was shown that the First National Bank of Omaha, before the commencement of this action, had brought suit against Gabriel Gunderson upon this alleged promise to pay the debts of Miller & Gunderson to the amount of over $8,000. It is also shown by the evidence that after said mortgages had been made to him, Gabriel Gunderson had paid over $3,000 of the indebtedness of said firm on the faith of said mortgages. This defendant denied that he assumed the debt to the bank, but admitted that the above described note for $5,000 was one given to him to cover certain debts which he has in fact paid to said amount of over $3,000, and explained that the payment of these particular debts was necessary to obtain possession of the personal property mortgaged. Now, whether the theory of plaintiff is adopted, that is, that Gabriel Gunderson was to pay all the debts of the firm, including that to the bank, or whether, as the mortgagee claims, he was to pay only certain specified debts, is not very material in principle, for, in any event, it is clear that Gabriel Gunderson has advanced for the firm over $3,000 on the faith of these mortgages. To avoid the effect of this suggestion it is urged that while the mortgagee paid these debts, he took an assignment of the evidences thereof, which he still holds. There will be no difficulty in defeating any attempted enforcement of these claims against the firm, whenever, either by the foreclosure of the mortgages or otherwise, these debts shall have been paid by the firm aforesaid. We cannot understand why Mr. Gunderson should be deprived of his mortgage security without a tender or requirement of indemnifying him against any alleged personal liability incurred solely on the faith of said mortgages. As to the findings that these notes never represented an indebtedness of Miller

& Gunderson, but were given for advances made by the father to the son, it may be remarked, in the first place, that this conclusion was reached upon evidence of statements preceding the execution of these notes and in direct contradiction of their terms. In the second place, even if by competent evidence it could be shown that the undertakings of the signers were not what they were evidenced by the notes as being, nevertheless, the giving of a note and mortgage by a firm to secure payment of the debt of one of its individual members, when not violative of the rights of a creditor of the firm, has often been upheld as resting upon a sufficient consideration. Upon this point counsel for the appellants has cited many authorities which sustain this proposition. As these will appear properly accredited to such counsel, it is deemed inadvisable to reproduce them.

The judgment of the district court is reversed and this action is dismissed at the costs of the appellee.

REVERSED AND DISMISSED.

JACOB SIMS ET AL. V. JOHN C. DAVIS ET AL.

FILED JUNE 2, 1896. No. 6616.

1. **Practice:** DISMISSAL. In an action wherein the defendant has not appeared, a dismissal filed by plaintiff, as provided by statute, ends the case, and litigation therein cannot be continued.
2. **Final Orders:** REVIEW. A final judgment is necessary to entitle any party to review the ruling of the district court upon a mere interlocutory motion.

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

Switzler & McIntosh and *Sims & Bainbridge*, for plaintiffs in error.

C. H. Balliet, contra.

RYAN, C.

On the 30th of March, 1893, Alice Davis, by her attorneys, Switzler & McIntosh and Sims & Bainbridge, filed in the office of the district court of Douglas county her petition praying a divorce from her husband, John C. Davis, an allowance of alimony, and the custody of the two minor children of the parties litigant. On May 26, 1893, the default of the defendant was entered of record. On August 19, 1893, Jacob Sims and Switzler & McIntosh filed an application for the allowance of a balance due them as attorneys' fees and requiring the defendant to pay the same. On the 24th day of August, 1893, plaintiff filed a dismissal of this action, and such dismissal was entered of record by the clerk. The application for allowance of attorneys' fees and dismissal was filed during vacation. The attorneys caused to be served on Alice Davis and John C. Davis, September 8, 1893, a notice of their motion to set aside the order of dismissal entered in vacation. On September 28, 1893, the motion of the aforesaid attorneys for the vacation of the order of dismissal and the allowance of attorneys' fees was overruled. By a petition in error, in which the attorneys appear as plaintiffs and Alice and John C. Davis as defendants, it is sought to reverse the aforesaid ruling upon said motion.

If the dismissal operated to end the action, this case falls within the rule announced in *Lavender v. Atkins*, 20 Neb., 206, wherein, as to the rights of counsel to be heard after a dismissal, it is said: "What the rights of counsel may be in the case, it is not necessary to discuss. It is only necessary to say that Lavender and defendants having settled their dispute, the case is at an end, and the litigation in that suit cannot be continued." If, on the other hand, as seems to be contended by plaintiffs in error, their pending motion was merely interlocutory and for some purposes continued the action in existence, notwithstanding the filing of a dismissal, the result is

equally fatal to this proceeding, as will be shown by quotations from the transcript. Following the recitation of submission the record is in the following language: "On consideration whereof the court, being fully advised in the premises, overruled the said motion, to which ruling of the court the said Switzler & McIntosh and Jacob Sims duly except." This was all, and if the case was still pending when the above motion was presented, a final judgment was essential to give any party a standing in this court. In any event, the petition in error must be, and accordingly is,

DISMISSED.

W. E. AYERS V. WALTER H. TENNEY & COMPANY.

FILED JUNE 2, 1896. No. 6647.

Review: SUFFICIENCY OF EVIDENCE. In this case there is involved no question other than of fact, and the findings being sustained by sufficient evidence, the judgment is affirmed.

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

J. H. Grimm, L. W. Colby, and *G. R. Chaney,* for plaintiff in error.

Hastings & McGintie, contra.

RYAN, C.

This action was brought by the defendants in error against the plaintiff in error and F. O. Ayers in the district court of Saline county, for the collection of a promissory note for $405.80, made October 3, 1890. This note was due four months after its date. The controversy between the parties to this note was as to whether or not it had been paid. On January 24, 1891, which was before

it matured, this note was in the De Witt Bank for collection. This bank, on the day last named, telegraphed the payees of the note as follows: "Ayers Bros. in bad shape. Say will ship what goods they have of yours, prepaying freight, if you will take them as billed to them. Instruct." On the same day the following telegram was received in answer: "Have Ayers ship back the goods as suggested. See that it is done at once." This bank, on January 27, 1891, telegraphed as follows: "Enough goods have been shipped back for Ayers Bros.' note." On the day preceding the date of the last above telegram there was given to Ayers Bros. the following receipt:

"Received of Ayers Bros. goods to the value of four hundred and five and 80-100 dollars, in boots, shoes, and slippers, as per invoice attached, for Walter H. Tenney & Co., Boston, Mass. By C. B. ANDERSON,
"Agent."

The above C. B. Anderson, at the time of the signing of the above receipt, was cashier of the De Witt Bank. The invoice referred to was put in evidence by the defendants in error, and upon it was designated the goods which Ayers Bros. had received from W. H. Tenney & Co. There was no attempt to controvert the correctness of these designations, and they were therefore properly allowed as credits upon the note. There was judgment for the balance in the sum of $369.40, and the plaintiff in error, who alone had answered in the district court, now urges that the credit should have been of the entire amount of the invoice. The proposition by the first telegram was to "ship back what goods they have of yours," that is, what goods obtained from W. H. Tenney & Co. were held by Ayers Bros. The response authorized only shipment back of goods "as suggested." The bank receipted for goods invoiced as having been shipped to an amount in value sufficient to pay the note on the 26th, and not until the 27th notified the payee of the fact. It was then too late for the payee to prevent the shipment.

When the consignment was received the goods contemplated by the first and second telegrams were accepted as agreed; the remainder were stored subject to order of the consignor. Neither the bank nor Mr. Anderson was constituted the agent of Tenney & Co. for the settlement of the note by receiving goods. The direction to the bank was to have certain goods shipped as had been suggested. It was shown by the evidence that the plaintiff in error was aware of the contents of the first two telegrams, so that he was not deceived as to the limited nature of the bank's authority. The judgment of the district court is

AFFIRMED.

CHARLES J. PHELPS V. J. A. PIPER.

FILED JUNE 2, 1896. No. 8040.

1. **Secretary of State:** RIVAL POLITICAL CONVENTIONS. It is not the province of the secretary of state to determine which of two rival state conventions of the same party is entitled to recognition as the regular convention.
2. **Regularity of Nominating Conventions:** DUTY OF SECRETARY OF STATE: ELECTIONS. Where two factions of a political party nominate candidates and certify such nominations to the secretary of state in due form of law, the latter will not inquire into the regularity of the convention held by either faction, but will certify to the several county clerks the names of the candidates nominated by each, such practice being in harmony with the rule which requires courts, in case of doubt, to adopt that construction which affords the citizen the greater liberty in casting his ballot. *State v. Allen*, 43 Neb., 651, followed.
3. **Australian Ballot Law:** NOMINATING CONVENTIONS. The question as to which one of two factions of a political party is the true representative of such political party is rather a political than a judicial question.

ORIGINAL action involving the duty of the secretary of state in certifying nominations for state offices under the provisions of the Australian ballot law.

W. H. Thompson and *E. P. Smith*, for plaintiff.

A. S. Churchill, Attorney General, contra.

RAGAN, C.

This action concerns the duty of the secretary of state in certifying nominations for state offices under the provisions of chapter 24, Session Laws, 1891, commonly known as the "Australian Ballot Law." It was presented shortly before the last general election and its exigencies required an immediate decision, which was then rendered. Subsequently the parties withdrew the record for the purpose of making certain formal amendments to the pleadings, so that the preparation of an opinion has been necessarily delayed. Notwithstanding the manner in which the parties have entitled the case, it is essentially an application for a writ of *mandamus*. Only when so viewed can it present a case within the original jurisdiction of this court. It has been so treated by the court, and we shall refer, therefore, to Phelps as the relator and to the secretary of state as the respondent.

The relator alleges that he is an elector of the state of Nebraska and the nominee of the democratic party for the office of judge of the supreme court to be voted for at the general election to be held on the 5th day of November, 1895, and that he brings this action in his own behalf, in behalf of the democratic party, and in behalf of all the electors of the said party; that under the rules and according to the usages of the democratic party of the state of Nebraska a committee, called the democratic state central committee, duly authorized by the democratic party of said state, did call a convention of the democratic party of said state to meet in Omaha on the 26th day of September, 1894, composed of 556 delegates duly elected by the democratic party of the state; that said convention was duly organized by the election of

W. D. Oldham as chairman and Dan B. Honin as secretary; that amongst the duties which under the rules and customs of said party devolved upon said convention was that of electing a new state central committee; that said convention, under the rules and customs governing said party, did select a state central committee to serve for the term of two years and selected a chairman thereof to serve for a like period; that under the rules and customs governing said party said committee so elected was charged with the duty of representing and acting for the democratic party of the state at all times during said two years, except when a duly authorized convention was in session; that said committee is the only body under the rules and customs of the party having authority to call a convention, and the only body which has authority when the convention is not in session to act for the party in any way; that said committee, in accordance with the rules and usages of the party, called a convention to meet in Omaha on the 22d day of August, 1895, for the purpose of nominating candidates for the office of judge of the supreme court and for the purpose of nominating two candidates for the office of regents of the university; that said convention, consisting of duly authorized representatives of the party, did meet in Omaha on the 22d day of August, 1895, and did, according to the laws and usages of the democratic party, nominate the relator as the candidate of the party for the office of judge of the supreme court and nominated Alfred T. Blackburn and Robert Kittle as the candidates of the party for regents of the university; that said nominations were duly certified to and filed with the secretary of state on the 5th day of September, 1895, and that no objection to said certificate was filed within the three days provided by law; that said convention was the only body having authority to nominate for the democratic party such candidates; that on the 5th day of September, 1895, a body assembled in Lincoln, "which claimed to represent the democratic party, but which acted without any authority from

said party, or without any right whatever to speak for said party, under the rules and usages governing said party in said state of Nebraska," and nominated T. J. Mahoney as candidate for judge of the supreme court and John H. Ames and W. S. Ashby as candidates for regents of the university; that R. S. Bibb was chairman of said convention and H. B. Hubner was secretary thereof; that said Bibb as chairman and Hubner as secretary did, on the 17th day of September, 1895, file in the office of the secretary of state a certificate in which they falsely and fraudulently stated that said Bibb was the chairman of the convention representing the democratic party and that said Hubner was secretary thereof, and that a convention representing said party did nominate said Mahoney, Ames, and Ashby as aforesaid. The relator further states that each of the said allegations in said certificate is entirely false and made for the purpose of deceiving the voters of the state; that unless restrained the respondent will certify to the clerk of each county the names of Mahoney, Ames, and Ashby as candidates of the democratic party for said respective offices, to be placed upon the official ballot to be voted at the next general election; "that said convention which met in Lincoln on the 5th day of September, 1895, selected a state central committee of thirty-three members; that said committee afterwards met and duly organized by the election of Euclid Martin as chairman thereof and J. B. Sheean as secretary thereof, and that said committee claims to be the democratic state central committee of Nebraska. Plaintiff further says that the candidates and supporters of the ticket headed by Charles J. Phelps and the candidates and supporters of the ticket headed by Timothy J. Mahoney all agree that there is but one democratic party in Nebraska but disagree as to which of the said tickets represents said democratic party; the plaintiff and his supporters contending that the said ticket headed by said Charles J. Phelps represents the democratic party of the said state, and defendant and

his supporters contending that the said ticket headed by Timothy J. Mahoney represents the said democratic party." The prayer is, in brief, for an order commanding respondent to omit from his certificate to the clerk of each county the description of Mahoney as a candidate of the democratic party as judge of the supreme court and Ames and Ashby as candidates of said party for regents of the university, and for an order commanding the respondent to make his certificate without employing the word "democrat" or "democratic" in describing the political party or principles of said Mahoney, Ames, and Ashby.

The respondent by his answer challenges the jurisdiction of the court, and admits that plaintiff is the nominee of a convention claiming to represent the democratic party. He then alleges at considerable length, in substance, that the democratic party is a national organization of persons entertaining the same general political views, and that the different state organizations are merely branches of the national organization for purposes of convenience and for the purpose of maintaining the political doctrines of the national party; that membership in the party is dependent on allegiance to the political doctrines of the national party; that according to the rules and usages of the party the national convention, which meets once in four years, is the only body having authority to declare the party's doctrines, and that no state organization which does not accept the doctrine so declared by the national convention is or can be the democratic party of the state; that when any state or other political division is without an organization professing allegiance to and teaching the doctrines of the democratic party as declared at its last national convention, any body of voters who approve the political doctrines of the party have the right to organize committees and conventions for the maintenance thereof, and committees and conventions so organized are according to the rules and usages of the democratic party of such

state; that a convention claiming to be the democratic convention of the state assembled in Omaha September 26, 1894, but said convention was dominated by another organization known as the "Free Silver League," and under such domination said convention expressly refused to approve or sanction the political doctrines of the democratic party, but affirmed antagonistic doctrines and repudiated the doctrines of the party as declared by the last national convention; and that thereupon the democratic state central committee selected in 1892 called together a convention of voters approving the doctrines of the democratic party, and that said convention nominated candidates to be voted for at the general election held in 1894, and selected a state central committee; that on June 27, 1895, said committee called a convention of all voters who approved the doctrines of the democratic party to be held in the city of Lincoln on the 5th day of September, 1895; that pursuant to said call the several counties selected delegates, who assembled in convention in Lincoln on the day named and nominated Mahoney, Ames, and Ashby for judge of the supreme court and regents of the university; that said convention and committee has been recognized by the national democratic party as the only democratic convention and committee of Nebraska. The answer then pleads that the officers of said convention in due form certified such nomination to the secretary of state, and that no objections to such certificate were filed within the time provided by law.

It has been necessary to set forth at considerable length the pleadings, in order to disclose the real question presented for decision. It will be perceived that both the petition and answer disclose that in 1895 two conventions assembled, each by virtue of a call issuing from a body claiming to be the democratic state central committee, and each convention claiming to represent the democratic party of the state. Nominations were made by each convention for the state offices to be filled at the ensuing election, and these nominations were by

the officers of each convention duly certified to the secretary of state. No objections were filed to either certificate within the time provided by law, and the secretary of state was therefore about to certify to the several county clerks the candidates named on each certificate as those of the democratic party. The relator by this proceeding seeks to prevent the certification of the candidates of the Lincoln convention as democratic candidates. If the action of the secretary of state can be controlled by the court in this manner it must be because it is his duty in such case to determine as between two bodies or factions, each claiming to represent a political party entitled to have its candidates' names placed upon the ballots, which of such bodies or factions, according to the rules and customs of such party, rightfully represents it; and further, that when the secretary fails to so adjudicate such question, the court shall determine it and issue its mandate to the secretary of state accordingly. To our minds neither proposition is tenable. Indeed, we think that the case of *State v. Allen*, 43 Neb., 651, is conclusive on the first question at least. It was there held that it is not the province of the secretary of state to determine which of two rival state conventions of the same party is entitled to recognition as the regular convention; and further, that where two factions of a political party nominate candidates and certify such nominations to the secretary of state in due form of law, the latter will not inquire into the regularity of the convention held by either faction, but will certify to the several county clerks the names of the candidates nominated by each, such practice being in harmony with the rule which requires courts, in case of doubt, to adopt that construction which affords the citizen the greater liberty in casting his ballot. In the case cited, candidates representing the same faction as that represented by the candidates, which we will here for brevity designate the Mahoney ticket, applied for a *mandamus* to compel the secretary of state to certify their names as the candidates of the

democratic party, the secretary having refused to do so. The court denied the writ, holding as we have already stated; and further, that the record not disclosing that the relators had been nominated by any convention whatever, the secretary of state could not be required to certify the nominations, because it is his duty to determine, in the case of a certificate filed with him, whether such candidates were in fact nominated by a convention or assemblage of voters or delegates claiming to represent the party; that is, he should satisfy himself of the genuineness of the certificate. But he has no authority where a convention in good faith, claiming to represent the party, has in fact certified its nominations to him in due form, to refuse to recertify the same to the county clerks. We entertain no doubt of the correctness of the principles announced in that case; and it follows that the court by a writ of *mandamus* cannot compel the secretary of state to perform an act which he has no legal authority to perform. If it was the duty of the secretary to certify both sets of nominations, and if he had no power to determine between the rival factions which faction represented the democratic party, then it seems perfectly clear that the court can neither require him to make such decision nor can the court itself determine which faction rightfully represents the party, and upon such determination require the secretary to omit from his certificate one set of candidates which *State v. Allen* declares it is his duty to include in the certificate. The legislature has not provided any means for determining such controversies. Political parties are voluntary associations for political purposes. They establish their own rules; they are governed by their own usages. Voters may form them, reorganize them, and dissolve them at their will. The voters ultimately must determine every such question. The voters constituting a party are indeed the only body who can finally determine between contending factions or contending organizations. The question is one essentially political and not judicial in its character. It would be

alike dangerous to the freedom of elections, the liberty of voters, and to the dignity and respect which should be entertained for judicial tribunals for the courts to undertake in any case to investigate either the government, usages, or doctrines of political parties, and to exclude from the official ballots the names of candidates placed in nomination by an organization which a portion, or perhaps a large majority, of the voters professing allegiance to the particular party believe to be the representatives of its political doctrines and its party government. We doubt even whether the legislature has power to confer upon the courts any such authority. It is certain, however, that the legislature has not undertaken to confer it. We shall not enlarge upon the views we have expressed. If authority were needed in their support, we think the underlying principles suggested are those which governed the courts in *People v. District Court*, 18 Colo., 26, and *Shields v. Jacob*, 88 Mich., 164, as well as in *State v. Allen*, *supra*.

WRIT DENIED.

NORVAL, J., not sitting.

FRED DREXEL ET AL. V. JAMES RICHARDS, IMPLEADED WITH ROLLIN L. DOWNING ET AL., APPELLANTS, AND KENNARD GLASS & PAINT COMPANY ET AL., APPELLEES.

FILED JUNE 2, 1896. No. 6708.

1. **Mechanics' Liens: AFFIDAVIT: DESCRIPTION OF LAND.** Section 2, chapter 54, Compiled Statutes, construed, and *held* that the description of the real estate on which materials furnished by a subcontractor have been used in erecting an improvement is a necessary part of the affidavit required to be filed by such subcontractor in order to entitle him to a lien. *Holmes v. Hutchins*, 38 Neb., 601, followed.

2. ———: ———: ———. The purpose of said statute, in requiring a subcontractor, claiming a mechanic's lien, to file in the office of the register of deeds an affidavit stating the amount due him from the contractor, with a description of the real estate of the owner, is twofold: (*a*) To advise the owner what amount the subcontractor claims is due him for labor or material furnished a contractor towards the erection of an improvement upon the owner's real estate, and thus enable the latter to protect himself and property in making a settlement with the contractor; (*b*) that the public by an examination of the records may be able to learn on what precise property the mechanic's lien is claimed.

3. ———: ———: ———. Such statute requires that in the affidavit filed to procure the lien there should be such a description of the real estate as, aided by extrinsic evidence suggested by the description itself, would charge a party dealing with the real estate with notice of the lien claimed against it.

4. ———: ———: ———. In the affidavit filed by a subcontractor claiming a lien under said statute the real estate of the owner was described as the "Bartlett & Downing block in Kearney, Buffalo county, Nebraska." The correct description of the real estate was "Lot 388, in the town of Kearney, Nebraska." *Held*, That said description alone would not charge a party dealing with said lot 388 with notice that the lien was claimed against it.

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

Calkins & Pratt, for appellants.

B. G. Burbank, contra.

Kennedy & Learned, also for appellees:

The description of the lien is sufficient. (*Seaton v. Hixon*, 35 Kan., 663; *Caldwell v. Asbury*, 29 Ind., 451; *Tibbetts v. Moore*, 23 Cal., 208; *Odd Fellows' Hall v. Masser*, 24 Pa. St., 510; *Brown v. La Crosse Gas Light & Coke Co.*, 16 Wis., 578; *De Witt v. Smith*, 63 Mo., 263; *Knabb's Appeal*, 10 Pa. St., 186; *Shaw v. Barnes*, 5 Pa. St., 18; *Tredinnick v. Red Cloud Mining Co.*, 72 Cal., 78.)

The statute does not require the description of the premises to be a part of the affidavit. (*Lyon v. Logan*, 68 Tex., 521.)

RAGAN, C.

Rollin L. Downing and John G. Bartlett owned lot 388 and the west forty feet of lot 387 in the original town of Kearney Junction, Buffalo county, and contracted with Richards & Co. to furnish the material and labor and erect on said real estate a three-story brick and stone building. This suit was brought by Fred Drexel and others to the district court of Buffalo county to have established and foreclosed a lien against said real estate for material furnished by them to Richards & Co., and by the latter used in constructing said building on said real estate for Downing and Bartlett. Richards & Co. and a number of other persons were made defendants to this action. Of the parties made defendants the Bohn Sash & Door Company and the Kennard Glass & Paint Company filed cross-petitions, each claiming liens upon the real estate of Downing and Bartlett for material which they had furnished to Richards & Co. and which had been used by them in the construction of the building for Bartlett and Downing. The Sash & Door Company and the Kennard Glass & Paint Company had decrees as prayed, and this proceeding is an appeal by Downing and Bartlett from those decrees.

The Kennard Glass & Paint Company claimed and was awarded a lien on the premises of Downing and Bartlett for $779.30 and interest, for glass furnished by it to Richards & Co. and used by the latter in constructing the building on said real estate. The last item of glass was furnished by the Kennard Glass & Paint Company to Richards & Co. on the 16th of January, 1891, and on the 17th of March, 1891, in Douglas county, Nebraska, the agent of the Kennard Glass & Paint Company made out in writing a statement of the glass so furnished Richards & Co. and made oath to the same before a notary public. The statement and oath were as follows:

"OMAHA, NEBR., Mar. 17, 1891.

"RICHARDS & CO., ESQ.,

"To KENNARD GLASS & PAINT COMPANY.

Dr. Cr.

"Glass for the Bartlett & Downing block, Kearney, Buffalo county, Nebr..... $779 30

"OMAHA, NEBR., Mar. 17, 1891.

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

"F. B. Kennard, a member of the firm of the Kennard Glass & Paint Company, being first duly sworn, on his oath says: That the foregoing itemized account of * * materials * * * furnished * * * for the said Richards & Co. for the erection of a building on ———; and this affiant further says that he has and hereby claims a lien on the said premises," etc.

It will be observed that in the affidavit attached to this statement there was no description of the premises upon which the glass furnished Richards & Co. was used. The Kennard Glass & Paint Company forwarded this statement and affidavit by mail to the register of deeds of Buffalo county, and requested him, by letter, to ascertain the correct description of the real estate of Downing and Bartlett's on which Richards & Co. had erected the building for which they, the Kennard Glass & Paint Company, had furnished the glass, insert such description in such affidavit, and file the same in his office. This the register of deeds did on the 18th of March, 1891, or within sixty days of the date on which the Kennard Glass & Paint Company furnished to Richards & Co. the last item of glass for which they claimed a lien. By section 2, chapter 54, Compiled Statutes of 1895, it is provided, in substance, that if any person shall furnish any material to a contractor, who is engaged in the erection of an improvement on real estate, in pursuance of a contract with the owner thereof, and such material shall be used by said contractor in the erection of such improvement, then the party so furnishing such material to such contractor,

may have a lien upon such real estate for the amount due him for such material, if within sixty days from the date of furnishing such material he files, with the register of deeds of the county in which said real estate is situate, a sworn statement of the amount due him from such contractor for the material so furnished," together with a description of the land upon which the same [materials] were * * * used."

The first question presented here is whether the description of the real estate, on which materials furnished by a subcontractor to a contractor have been used in erecting an improvement, is a necessary part of the affidavit required to be filed by the subcontractor in order to entitle him to a lien under the statute. This question must be answered in the affirmative. In *Holmes v. Hutchins*, 38 Neb., 601, it was held: "One who claims the benefits of the mechanics' lien law must show a substantial compliance with each essential requirement thereof, one of which is that the sworn statement to be filed shall contain a description of the land upon which the labor was done or material was furnished for the purpose contemplated by such law." The rule announced in this case was followed and reaffirmed in *Bell v. Bosche*, 41 Neb., 853, and it was there declared that said rule held good as well in favor of one who was the owner of the land at the time the improvements were erected as in favor of a subsequent purchaser of the real estate. The insertion by the register of deeds of the description of Downing and Bartlett's real estate in the affidavit sent him by the Kennard Glass & Paint Company was not a compliance with said section 2, chapter 54, Compiled Statutes, 1895, on the part of the Kennard Glass & Paint Company. The affidavit made by the Kennard Glass & Paint Company did not contain a description of Downing and Bartlett's real estate, and was, therefore, ineffective, even though filed with the register of deeds, to invest them with a lien against such real estate. The act of the register of deeds in inserting the description of the real

estate, though done at the request of the Kennard Glass & Paint Company, could not supply the oath of the lien claimant required by the statute. The claim of the Kennard Glass & Paint Company for a lien then fails if it depends upon the description of the real estate of Downing and Bartlett inserted in the affidavit by the register of deeds.

It is to be observed that the affidavit made by the Kennard Glass & Paint Company in Douglas county was attached to a statement or itemized account made out by them against Richards & Co. for the materials furnished by the Glass & Paint Company to Richards & Co. and used by the latter in the erection of Downing and Bartlett's building. This itemized statement was attached to and was a part of the affidavit filed by the Glass Company to obtain the lien sought to be established in this proceeding. The statement was as follows:

"OMAHA, NEBR., Mar. 17, 1891.

"RICHARDS & CO., ESQ.,

"To KENNARD GLASS & PAINT COMPANY, Dr.

"Glass for the Downing & Bartlett block, Kearney, Buffalo county, Nebraska.....$779.30."

The appellees now insist that, conceding that a description of the owner's real estate is a material part of the affidavit that must be made and filed by one to secure a lien for labor or material furnished a contractor, still the description on the itemized account, namely, "For the Bartlett & Downing block, Kearney, Buffalo county, Nebraska," satisfies the statute. The reported cases where the question has been considered disclose a variety of opinions as to what constitutes a sufficient description of real estate in an affidavit filed to obtain a mechanic's lien thereon.

In *Caldwell v. Asbury*, 29 Ind., 451, the description in the affidavit was: "House and lot on the southwest corner of Fourth and Oak streets, in Terre Haute, Indiana." The court said that this description was capable of being reduced to a certainty, and applying the rule "that is

certain which may be made certain," the court held the description sufficient to sustain the lien.

In *Tibbetts v. Moore*, 23 Cal., 208, the description was: "A quartz mill, being at or near the town of Scottsville, in Amador county, known as 'Moore's New Quartz Mill.'" The court held that as there was no evidence that there was any other "quartz mill" at the place named, the description was sufficient.

In *Brown v. La Crosse City Gas Light & Coke Co.*, 16 Wis., 578, the description was: "The several buildings known as the Gas Works of the La Crosse City Gas Light & Coke Company, situated on lots numbers 8, 9, etc., in block 14." As a matter of fact the buildings were situate on other lots, but the court held that the description was sufficient to pass the title of the real estate upon which the works were situate, and, therefore, sufficient to sustain the mechanic's lien.

In *De Witt v. Smith*, 63 Mo., 263, the description in the affidavit was, "Three-story brick building on lots 19 and 20, block number 2," whereas the correct description was "lots 19 and 20, in block 20." The court held that as the evidence showed that the owner had no other three-story building or other building for which material was furnished by the lien claimant, and that he owned no other lots than those in block 20, the description was sufficient to uphold the mechanic's lien.

In *Hotaling v. Cronise*, 2 Cal., 60, the description of the property in the affidavit for lien was: "A wharf situated on Battery street, between Pacific and Jackson streets, in San Francisco." The court contented itself by saying that it thought the description of the property sufficiently certain.

In *Matlack v. Lare*, 32 Mo., 262, the property was described in the affidavit for the lien as: "Two three-story brick houses on the east side of Fifth street, between Franklin avenue and Morgan street." Speaking of this description the court said: "To enforce a judgment upon a mechanic's lien, the law requires that the execution

shall be a special *fieri facias*,—such an execution issued upon this judgment would fail to disclose to the officer the property to be sold. He certainly could not identify the property by the description in the *fieri facias*." The description was held too indefinite and defective to support a lien.

In *Rose v. Persse & Brooks Paper Works*, 29 Conn., 256, the description in the affidavit filed for the lien was: "Two tracts of land situated in the town of W, one bounded [&c] with two paper mills thereon; and the other bounded [&c] with one paper mill thereon." The court held that the affidavit filed for a lien was void as not containing a reasonably accurate description of the premises.

In *Lindley v. Cross*, 31 Ind., 106, the property was described in the affidavit for the lien as lots 6 and 7. The true description was lots 3 and 4. The mechanic's lien claimant alleged the misdescription of the property; that the ownership of the property remained unchanged; that no third person had acquired any rights in the property since the furnishing of the material for which a lien was claimed; that the materials furnished were the only ones of the kind ever furnished the lot-owner by the lien claimant, and prayed for a reformation of the lien and a decree foreclosing it. The court held that the description was wholly insufficient on which to base a lien and that the court had no power to reform it.

A statute of Missouri provided that one who had furnished labor or material for the erection of an improvement upon real estate might have a lien on the building and the land on which the same was situate,—if in the country, to the extent of an acre; if in a town, on the lot on which the building was located. In *Williams v. Porter*, 51 Mo., 441, the description of the real estate in the affidavit filed for a lien under this statute was: "On the northwest quarter of the southeast quarter of section 11, township 35, range 31, in the county of Vernon, in the state of Missouri." The court said: "The object in filing the lien is to give notice what land or

property is covered by it. And, therefore, the acre of ground must be identified by a true description, or so near a true description as to identify it. There is nothing in this description to show on what part of the land the house in question is located, nor any attempt to describe the acre of land intended to be covered by the lien. There being no proper description, no lien was created."

In *Munger v. Green*, 20 Ind., 38, the description of the land in the affidavit for a lien was: "One acre, more or less, lying north of, and adjoining the northwest corner of, Sixby's Addition to the village of Van Buren, in the county of La Grange, and state of Indiana, * * * conveyed to said Green by one Erastus Bartle." The court held that this description was void for uncertainty.

In *Knox v. Starks*, 4 Minn., 7, it was held: "When a party seeks to enforce a lien under the mechanics' lien law of 1855, he must describe the land with sufficient accuracy to enable the court to decree the sale, and the purchaser to find the land under such description. As much certainty is required as in a conveyance."

In *Montgomery Iron Works v. Dorman*, 78 Ala., 218, it was held: "The same certainty of description is requisite in the claim [for a mechanic's lien] as in the levy of an execution, so that the court may be informed what particular land to order sold, and the purchaser may be able to locate it."

Said section 2, chapter 54, of our mechanics' lien statute requires the claimant of the lien to set out in his affidavit filed therefor "a description of the land," etc. This same statute requires the claim for a lien to be filed in the office of the register of deeds of the county where the land is situate on which the improvements were made. The register of deeds is also required by the statute to keep a mechanics' lien record, in which he is required to record all claims filed for mechanics' liens. He is also required to index the mechanic's lien record. The register of deeds is further required by the statute to keep in his

office a numerical index, and he is required to keep this numerical index in such a manner that one, examining the title of real estate, may see at a glance the name of the grantee, the grantor, the kind of an instrument filed affecting real estate, the description of the real estate affected by the instrument filed, and the book and page where such instrument is recorded. Mechanics' liens are also required to be entered upon this numerical index immediately after they are filed.

We think it self-evident that the object of the legislature in requiring a subcontractor claiming a mechanic's lien to file in the office of the register of deeds an affidavit stating the amount remaining due him from the contractor, with a description of the premises of the owner, was two-fold: First, to advise the owner what the laborer or material-man claimed was due him from the contractor for labor or material furnished towards the improvement upon his, the owner's, real estate, and thus enable the owner to protect himself and his property in making a settlement with his contractor. Second, to advise persons dealing with this real estate of the mechanic's lien claim existing against it. And we think that section 2 of said chapter 54 contemplates such a description of the real estate in the affidavit filed to procure the lien as would charge a party dealing with it with notice that a lien was claimed against it, when aided by the extrinsic evidence suggested by the description itself. As already stated, the correct description of the property in controversy was lot 388, in the city of Kearney. Now, can it be said that an intending purchaser of said lot 388, examining the records of Buffalo county and seeing on the numerical index of the mechanics' lien record, or both of them, the statement that the Kennard Glass & Paint Company claimed a lien against the "Bartlett & Downing block, in Kearney, Buffalo county, Nebraska," would have been charged with notice of the fact, that said lot 388 was the same as the Bartlett & Downing block? We think not. The very object of the statute in

requiring the claimant of a mechanic's lien to set out in the affidavit therefor a description of the real estate on which he claims a lien was that the public by an examination of the record might be able to learn on what precise property the lien was claimed. (*Rose v. Persse Brooks Paper Works, supra.*)

Mechanics' liens are creatures of the statute, and while this court has uniformly given the mechanics' lien statutes a liberal construction, they should not be so construed as to exonerate lien claimants from a substantial compliance with the plain provisions of the law; nor should they be so construed as to put a premium upon negligence. In *Ely v. Wren*, 90 Pa. St., 148, it was said: "When a special security and remedy are given to a favored class of creditors, they must conform with reasonable accuracy to the provisions of the law designed for their benefit; * * * property against which the lien is given must be so accurately described that when judgment is obtained on the *scire facias* a separate schedule will not be required to be annexed to the *levari facias* for the guidance of the sheriff." In the record before us there is no evidence that said lot 388 was ever mentioned or designated on any plat or record as Bartlett & Downing's block; nor is there any evidence in the record whatever that the lot and the building thereon were commonly or generally known and designated as Bartlett & Downing's block. We think the finding and decree of the learned district court—that the recital, "Glass for the Downing & Bartlett block, Kearney, Buffalo county, Nebraska," on the itemized account attached to the affidavit filed by the Glass & Paint Company to procure the lien, was of itself a sufficient description of the premises on which the lien was claimed, within the meaning of the mechanics' lien statute—was wrong. We are of opinion that a person dealing with said lot 388 and seeing this recital on the public records would not be bound to know that the Bartlett & Downing block against which the mechanic's lien was claimed was identical with said lot

388, and, therefore, that the description of the property on which the lien was claimed was void for uncertainty. The decree in favor of the Kennard Glass & Paint Company is reversed and its cross-petition dismissed.

The argument relied upon here to secure a reversal of the decree in favor of the Bohn Sash & Door Company is directed to the one proposition that the evidence does not sustain the decree. It would subserve no useful purpose to quote this evidence or any part of it, and it must suffice to say that after a careful examination of all the evidence we think it sustains the finding and decree of the district court. The decree in favor of the Bohn Sash & Door Company is therefore affirmed.

JUDGMENT ACCORDINGLY.

HANOVER FIRE INSURANCE COMPANY ET AL. V. WILLIAM G. BOHN ET AL.

FILED JUNE 2, 1896. NO. 6687.

1. **Insurance:** CONSTRUCTION OF MORTGAGE CLAUSE. To a fire insurance policy was attached a "mortgage clause" making the loss payable to a named mortgagee of the insured property, and providing that the insurance should not be invalidated by any act or neglect of the mortgagor or owner of the insured property. *Held*, (1) That the "mortgage clause" was an independent contract between the insurance company and the mortgagee; (2) that no act or omission of the mortgagor, whether the same occurred at the time of the issuance of the policy or prior or subsequent thereto, invalidated said insurance policy.

2. ———: RIGHTS OF MORTGAGEE. A mortgagee of real estate has an insurable interest therein, which he may insure on his own account, and when he does so he insures not the real estate, but his interest therein arising from his lien.

3. ———: EFFECT OF INCUMBRANCE: FAILURE TO DISCLOSE TITLE. Where an application for fire insurance is oral, and no inquiries are made by the agent of the insurer as to the condition of the title to the property, and the insured says nothing about the ex-

istence of a mortgage thereon, but does not keep silent from any sinister motive or with the intention to deceive or mislead the insurer, then the fact that there exists a mortgage upon the insured property will not invalidate the policy of insurance, notwithstanding that it provides that it should be void if there existed any incumbrance by mortgage or otherwise against the insured property. (*Insurance Co. of North America v. Bachler*, 44 Neb., 549.)

4. **Insurable Interest.** One who has no title, legal or equitable, in property and no present possession or right of possession therein, yet has an insurable interest therein, if he will derive benefit from its continued existence or suffer loss by its destruction.

5. ———. One who mortgages his real estate to secure the payment of a debt for which he is personally responsible and subsequently conveys the title of such real estate to another subject to said mortgage, has an insurable interest remaining in said real estate.

6. **Insurance:** CONDITION OF TITLE: INSURED INTEREST IN PROPERTY. When an insurance company issues its policy and accepts and retains the premium without requiring an application by the insured and without making inquiry as to the condition of the property or state of its title, and the insured has in fact an insurable interest, the company will be conclusively presumed to have insured such interest and to have waived all provisions in the policy providing for its forfeiture by reason of any facts or circumstances affecting the condition or title of the property in regard to which no such statement was required or inquiry made. (*German Insurance & Savings Institution v. Kline*, 44 Neb., 395.)

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

Thomas D. Crane, for plaintiffs in error.

B. G. Burbank, *Charles Offutt*, and *James B. Meikle*, *contra*.

RAGAN, C.

September 1, 1888, William G. and Conrad Bohn were the owners in fee-simple of a lot in the city of Omaha on which was situated a three-story building. On that date they were indebted to the National Life Insurance Company of Montpelier, Vermont, hereinafter called the "Life Insurance Company," in the sum of $25,000, and to secure

said indebtedness they executed to said Life Insurance Company a mortgage upon said real estate. The mortgage required the said Bohns to keep said property insured during the existence of said mortgage against loss or damage by fire for the benefit of said Life Insurance Company or its assignee. On the said 1st day of September, 1888, the Hanover Fire Insurance Company and another, hereinafter called the "Fire Insurance Companies," issued and delivered their joint fire insurance policy to the Bohns, insuring said property in the sum of $5,000 against loss or damage by fire for one year, or until September 1, 1889. This policy had attached thereto a "mortgage clause" making the loss, if any, payable to the Life Insurance Company or its assignee. At the date of the issuance of this policy the legal title to said real estate was unincumbered except by the mortgage held by the Life Insurance Company. On the 1st day of September, 1889, the policy issued by the Fire Insurance Companies expired and was by them renewed for another year. The renewal expired on September 1, 1890, and was by the Fire Insurance Companies renewed for still another year, or until September 1, 1891. On the 12th day of March, 1891, the property was wholly destroyed by fire. In the district court of Douglas county the Life Insurance Company and the Bohns sued the Fire Insurance Companies to recover the amount of loss and damage to said insured property. At the date of the trial of the action there remained due to the Life Insurance Company from the Bohns on the latter's mortgage debt about $20,000. The Life Insurance Company and the Bohns had a verdict and judgment and the Fire Insurance Companies have brought the case here for review.

1. The alleged errors relied on for a reversal of this judgment may all be considered under the proposition whether under the proved and admitted facts the judgment is contrary to the law of the case. Prior to the date of the issuance of the policy in suit the Bohns sold and conveyed the real estate on which was situate the

insured building subject to the mortgage held by the Life Insurance Company. The policy provided: "If the interest of the assured in the property be untruly stated therein, or if the interest of the assured be other than the entire unconditional and sole ownership of the property, or if the property be incumbered by any other lien, mortgage or otherwise, or if the subject of insurance be a building on ground not owned by the assured in fee-simple, then and in every such case this policy shall be void." It is now insisted by the Fire Insurance Companies that since the Bohns were not the owners of the real estate on which the insured building was situate on the date of the issuance of the policy in suit, said policy has never had any force or validity whatever, and that, therefore, the judgment in favor of the Life Insurance Company cannot stand. At the time of the issuance of the policy in suit the Fire Insurance Companies attached to said insurance policy an agreement in writing called a "mortgage clause." It was provided in this "mortgage clause" that the loss, if any, should be payable to the Life Insurance Company; and it was further provided: "It is agreed that this insurance as to the interest of the above named mortgagee or beneficiary, or its assignee, only shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured." But what was the effect of this "mortgage clause" attached to this policy? We think that by this "mortgage clause" the Fire Insurance Companies entered into a contract with the Life Insurance Company in and by which they insured its interest as mortgagee in the insured property against loss or damage by fire to the extent of $5,000 for one year from September 1, 1890. The right of the Life Insurance Company to enforce the policy does not depend upon whether the Bohns have kept their engagements with the Fire Insurance Companies. By express provision of the "mortgage clause" attached to the policy no act or omission of the mortgagors or owners was to invalidate the insurance so far

as the Life Insurance Company or its assignee was concerned; and this was true whether said act or omission of the mortgagor or owner occurred at the date of the issuance of the policy prior or subsequent thereto. In other words, it comes to this: that by the provision of the "mortgage clause" the Fire Insurance Companies insured the interest of the Life Insurance Company in the mortgaged property. The contract of insurance was made with the Life Insurance Company or with the Bohns for their benefit, and it is immaterial whether the Life Insurance Company itself paid the premium or whether the Bohns paid it, and it was clearly the intention of all the parties that the validity of the insurance of the Life Insurance Company should not depend upon anything which the Bohns or their grantees had done or omitted to do or might do or omit to do.

A question almost identical with the one under consideration was before this court in *Phenix Ins. Co. of Brooklyn v. Omaha Loan & Trust Co.*, 41 Neb., 834. The policy in that case provided that if the property should be sold or transferred without the written permission of the fire insurance company indorsed on the policy, then that the policy should become void. There was attached to the policy a "mortgage clause" like the one in the case at bar. Before the loss occurred the mortgagor sold and transferred the property, the consent of the fire insurance company thereto not having been obtained. The insured property was destroyed by fire, and the mortgagee sued the fire insurance company for the amount of the loss. It was insisted by the fire insurance company that as the mortgagor had sold and conveyed the insured property prior to the loss, that at the date of the loss the policy was not in force; but the court held that the sale and conveyance of the mortgaged property by the mortgagor without the consent of the insurance company did not avoid the policy as against the mortgagee. We have reexamined that case and the authorities therein cited, and are satisfied that the decision is correct, both upon prin-

ciple and authority, and we accordingly reaffirm it. Sustaining the doctrine announced in that case, see *Ellis v. Council Bluffs Ins. Co.*, 64 Ia., 507; *Ellis v. Ins. Co. of North America*, 32 Fed. Rep., 646; *National Bank of D. O. Mills & Co. v. Union Ins. Co. of San Francisco*, 26 Pac. Rep. [Cal.], 509.

The provision in the policy, that it should be void if the subject of the insurance was a building on ground not owned by the assured in fee-simple, was not one that was binding or intended to be binding on the Life Insurance Company, mortgagee. The Fire Insurance Companies must have known when they issued the policy in suit with the mortgage clause attached thereto that the Life Insurance Company did not own the fee-simple title of the real estate on which the insured building was situate. The Life Insurance Company was not attempting to insure a fee-simple interest in the mortgaged property, nor did the Fire Insurance Companies understand that the former was attempting to insure anything further than the interest it had in the property by virtue of its mortgage. All the authorities agree that a mortgagee of real estate has an insurable interest therein which he may insure on his own account, and when he effects such insurance he is insuring not the real estate, but insuring his interest or lien therein. The terms "interest" and "title" are not synonymous terms in insurance policies, and the provisions in the policy under consideration, that it should be void if the interest of the assured should be other than the entire unconditional and sole ownership of the property, meant and means, not that the Life Insurance Company should be the owner of the legal title to the real estate on which the insured building was situate, but that the interest which it insured, namely, its mortgage lien upon the property, should be and was an unconditional interest belonging to it, not a contingent or speculative one.

2. After September 1, 1888, and before the issuance of the policy in suit, without the knowledge or consent

of the Fire Insurance Companies, the Bohns placed two other mortgages upon the property mortgaged to the Life Insurance Company. It is now insisted by the Fire Insurance Companies that this action of the Bohns invalidated the policy in suit, since it was provided by the policy that it should become void if the insured property should be incumbered by any lien or mortgage. The jury made a special finding, and the evidence supports it, that in September, 1888, and in September, 1889 and 1890, when the policy of September, 1888, was renewed, no questions were asked by the Fire Insurance Companies or their agents as to incumbrances existing against the property of the Bohns, nor did the Bohns make any statement on the subject. The record shows also, without contradiction, that the application for the insurance in the first instance, September 1, 1888, and for the subsequent renewals of the policy were oral; no written application was made to the Fire Insurance Companies for the insurance; and there is in the record no claim of any fraud practiced or attempted to be practiced by any one. The neglect of the Bohns to notify the Fire Insurance Companies of the incumbrances on the property at the dates of the renewals thereof seems to have resulted from the Fire Insurance Companies' not inquiring about incumbrances, and the Bohns not having them in mind. At all events it is not claimed that the Bohns, or either of them, were actuated by any sinister motives whatever in not disclosing to the Fire Insurance Companies the existence of these incumbrances in September, 1889 and 1890, when the policy was renewed. Where an application for fire insurance is oral and no inquiries are made by the agent of the insurer as to the condition of the title to the property, and the insured says nothing about the existence of a mortgage thereon, but does not keep silent from any sinister motive or with the intention on his part to deceive or mislead the insurer, then the fact that when the policy was issued there existed a mortgage upon the insured property will not invalidate the policy, notwith-

standing the fact that the policy provides that it should be void if there existed an incumbrance, by mortgage or otherwise, against the insured property. (*Ins. Co. of North America v. Bachler*, 44 Neb., 549.)

3. But it is insisted that the policy sued upon was never in force because the Bohns at the date of its issuance were not the unconditional and sole owners of the insured property and that the insured building was not situated on ground to which the Bohns had a fee-simple title. This contention involves the assumption that the Bohns at the date of the issuance of the policy in suit had no insurable interest in the insured property. Is this contention correct? What is an insurable interest? In *German Ins. Co. of Freeport, Ill., v. Hyman*, 34 Neb., 704, POST, J., speaking to this question, said: "An interest, to be insurable, does not depend necessarily upon the ownership of the property. It may be a special or limited interest disconnected from any title, lien, or possession. If the holder of an interest in 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 arising thereon, or other certain benefits growing out of or depending upon it, he has an insurable interest." To the same effect see *Merrett v. Farmers Ins. Co.*, 42 Ia., 11; *Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb., 537. In *Warren v. Davenport Fire Ins. Co.*, 31 Ia., 464, it was held: "The owner of stock in a corporation organized for pecuniary profit has, by reason of such ownership, an insurable interest in the corporate property." In *Williams v. Roger Williams Ins. Co.*, 107 Mass., 377, it was held that a mortgagee who had indorsed the note secured by his mortgage and become liable as an indorser on said note had an insurable interest in the mortgaged property. The court said: "It is now well established that even one who has no title, legal or equitable, in the property, and no present possession or right of possession thereof, yet has

an insurable interest therein, if he will derive benefit from its continuing to exist, or will suffer loss by its destruction." In *Waring v. Loder*, 53 N. Y., 581, it was held that where one had mortgaged his real estate to secure his debt and afterwards conveyed the real estate he still had an insurable interest in the property. To the same effect see *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill., 302; *Norwich Fire Ins. Co. v. Boomer*, 52 Ill., 442. In the case at bar, if we regard the contract of insurance made between the Bohns and the Fire Insurance Companies as having been made at the date of the issuance of the policy sued upon, we still think that they had an insurable interest in the insured property. They had sold the property subject to the mortgage thereon in favor of the Life Insurance Company, and they were personally and individually responsible for that mortgage debt. They would derive a benefit from the continued existence of the property and they would suffer loss by its destruction.

Was the policy in suit never in force because at the date of its issuance the Bohns were not the owners of the legal title to the real estate upon which were situated the insured building? It has already been stated that the Bohns owned the fee-simple title to this real estate when the policy was first issued, September, 1888; that the application for the insurance and the renewals of the insurance were oral; that no questions as to the title of the Bohns were ever propounded to them by the Fire Insurance Companies or their agents; that neither of the Bohns ever made any representations to the Fire Insurance Companies as to what title they had or held; that the Bohns were not actuated by any sinister motives whatever in not disclosing the nature of the interest they had in the insured property; that no fraud was attempted by any one, and that the failure of the Bohns in September, 1890, to disclose the exact nature of their interest in the insured property resulted either from their not thinking about it, or from the failure of the Fire In-

surance Companies to inquire about that interest. Under these facts we think the policy, notwithstanding its provisions, was in force even in favor of the Bohns at the time the loss sued for occurred. In *Hall v. Niagara Fire Ins. Co.*, 53 N. W. Rep. [Mich.], 727, a fire insurance policy contained a provision that it was void if the assured was not the sole and unconditional owner of the property, or if the insured building stood on ground not owned in fee-simple by the assured. The application for insurance in that case was oral, and no statement was made by the assured as to the condition or nature of his title. The supreme court of Michigan held, in construing the policy, that the provision quoted above applied only to such changes of title as arose after the execution of the policy, and not to the condition of the title of the property at the time the policy was issued. In *Norwich Fire Ins. Co. v. Boomer*, 52 Ill., 442, it was held that upon an application for insurance the party applying is bound to disclose the facts material to the risk, but in the absence of a requirement on the subject in the policy, or of any inquiry in respect thereto, it is not essential that he should disclose the nature of his interest in the property sought to be insured. It is sufficient if he have an insurable interest. And in *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill., 302, it was held: "The principal thing in an insurance is, that the assured has an insurable interest, and has acted in good faith. Under a statement that he is the owner, he is only bound to prove an insurable interest, which is such a title as, if there would be a loss without insurance, it would fall upon him. A mortgagor has such an interest." In *Philadelphia Tool Co. v. British-American Assurance Co.*, 19 Atl. Rep. [Pa.], 77, the policy provided: "If the assured is not the sole and unconditional owner of the property, or if the building stood on ground not owned in fee-simple by the assured, * * * then the policy shall be void." The assured had only a lease from year to year on the land upon which the insured building stood. The supreme court of Pennsylvania, in constru-

ing the policy, said: "A policy of insurance, like any other contract, is to be read in the light of the circumstances that surround it. This policy was issued without any application or written request describing the interest of the assured in the building. No actual representation of any sort upon the subject, oral or written, is alleged to have been made by or on behalf of the assured. We ought to assume that a policy written under such circumstances was written upon the knowledge of the representative of the insurer and intended to cover in good faith the interest which the insured had in the buildings. Fraud is never to be presumed, and in this case no fraudulent representation is shown or alleged. * * * We conclude that the policy * * * was intended to cover such interest in the buildings as the insurer had. This was a leasehold only, but it was an insurable interest. Presumably it is the interest which an application, if one had been made, would have shown, for it is the only interest which the tool company ever had or claimed to have. To such an interest the proviso whose protection is invoked is not applicable. The policy covering only the interest of the lessee, the ownership of the fee becomes immaterial." Finally, in *German Insurance & Savings Institution v. Kline*, 44 Neb., 395, it was held by this court: "When an insurance company issues its policy and accepts and retains the premium without requiring an application by the insured, and without making inquiry as to the condition of the property or the state of its title, and the insured has in fact an insurable interest, the company will be conclusively presumed to have insured such interest and to have waived all provisions in the policy providing for its forfeiture by reason of any facts or circumstances affecting the condition or title of the property in regard to which no such statement was required or inquiry made." This case is decisive against the plaintiff in error of the contention under consideration.

4. As already stated, the loss sued for in this action

occurred on the 12th of March, 1891. Within a day or two thereafter the Fire Insurance Companies discovered that the Bohns were not the owners in fee-simple of the real estate on which the insured building stood in September, 1890, nor had they been since that time. The Fire Insurance Companies, however, did not then cancel, or attempt to cancel, the policy in suit or declare it forfeited; on the contrary they demanded and were furnished proofs of loss; demanded that the insured should submit to arbitration and an appraisement of the damages sustained; and not until the case came on for trial in November, 1892, did the Fire Insurance Companies make any attempt to declare a forfeiture of the policy in suit. The jury made a special finding, and the evidence supports it, that the Fire Insurance Companies, with full knowledge of the fact as to the true condition of the title of the insured property, retained the premiums received by them from the Bohns and neglected for an unreasonable length of time to insist on the forfeiture of the policy, and by other acts had recognized and treated the policy as a valid, subsisting contract between them and the Bohns and had induced the Bohns to act in that belief. We think that the Fire Insurance Companies by their conduct in the premises waived their right to insist upon a forfeiture of the insurance policy in suit. A forfeiture in the policy of insurance may be waived where the insurer is fully cognizant of the facts out of which a forfeiture is claimed and treats and continues to treat the contract as binding and induces the insurer to act in that belief. (*Billings v. German Ins. Co.*, 34 Neb., 502, and cases there cited.)

Counsel for plaintiff in error indulges in certain criticisms upon some of the instructions of the trial court, but these call for no special notice. The judgment of the district court is right and is in all things

AFFIRMED.

HOME FIRE INSURANCE COMPANY, APPELLEE, V. WARREN DUTCHER ET AL., APPELLANTS.

FILED JUNE 2, 1896. No. 8478.

1. **Supersedeas:** EFFECT OF APPEAL. In this state an appeal does not operate as a supersedeas except as provided by statute and upon the terms imposed by statute.
2. **Appointment of Receiver:** SUPERSEDEAS: APPEAL. An order appointing a receiver *pendente lite* cannot be superseded as a matter of right during the pendency of an appeal from that order.
3. ———: FORECLOSURE. An order appointing a receiver of real property in aid of foreclosure proceedings is not an order directing the delivery of possession of real property within the meaning of subdivision 3, section 677, Code of Civil Procedure.
4. **Supersedeas:** POWER OF COURT. In cases where the statute makes no provision for a supersedeas as a matter of right, the court may in its discretion allow a supersedeas upon conditions which it may affix for the protection of the parties.
5. **Appeal:** SUPERSEDEAS. It is within the power of this court in its discretion, after obtaining jurisdiction of a case by appeal, to allow a supersedeas in cases not provided for by statute, and upon terms which the court may prescribe.

APPEAL from the district court of Douglas county. Heard below before KEYSOR, J. Submitted to supreme court on application of appellants for an order to prevent the district court and the receiver appointed below from proceeding further pending appeal. *Application sustained conditionally.*

Authorities cited by counsel are referred to in the opinion.

L. D. Holmes and *C. W. Young*, for appellants.

V. O. Strickler, contra.

IRVINE, C.

The Home Fire Insurance Company instituted an action in the district court of Douglas county to foreclose

a mortgage executed by Warren Dutcher on premises which he afterwards conveyed to defendant A. J. Dutcher. The petition contained allegations to the effect that the present value of the premises is less than the mortgage indebtedness; that taxes on the premises to a large amount have been suffered to become delinquent, and that waste was being committed. There was a prayer for a receiver *pendente lite*. The district court, upon hearing evidence on the application for a receiver, sustained said application and appointed a receiver for the premises. From this order the defendants have appealed. The district court, at the time of making the order, fixed the amount of the supersedeas bond at $500, and within the statutory period the defendants entered into a bond in that sum conditioned according to the third subdivision of section 677 of the Code of Civil Procedure. This subdivision is as follows: "When the judgment, decree, or order directs the sale or delivery of possession of real estate, the bond shall be in such sum as the court or judge thereof in vacation shall prescribe, conditioned that the appellant or appellants will prosecute such appeal without delay and will not, during the pendency of such appeal, commit or suffer to be committed any waste upon such real estate." A motion was made to strike this bond from the files on the grounds, first, that there is no authority in law for superseding an order appointing a receiver *pendente lite;* and second, that if such an order may be superseded, the bond should be conditioned to pay the reasonable rental value of the property pending appeal. This motion the court sustained, and an application having been made by the receiver for a writ of assistance, the appellants made application to this court for an order restraining the district court and the receiver from taking any further steps pending the appeal.

The primary question presented is that stated as the first ground of the motion to strike the bond from the files, to-wit: Is there any authority for superseding an

order appointing a receiver *pendente lite?* In considering the application we are, therefore, not reviewing the order striking the bond from the files, because, if an order appointing a receiver can be superseded as a matter of right, it must be under the third subdivision of section 677, as that is the only provision which could possibly apply to such a case. In such event the filing and approval of the bond operated as a supersedeas and the order striking the bond from the files was a nullity. If, on the other hand, there is no authority for a supersedeas in such a case, the bond itself was a nullity and the district court had authority to proceed in disregard of such bond. The question so presented is by no means free from difficulty. A supersedeas is now almost everywhere so much controlled by statute, and the statutes are so different in their provisions, that but little assistance can be had from the adjudications of other states. After a severe struggle it became established in England that an appeal of itself operated as a supersedeas. Following the analogy of this practice, it is held in some states that statutes providing special conditions, such as the giving of a bond, in order to effect a supersedeas are merely restrictive in their character, and that the appeal itself works a supersedeas where there is no statute requiring a bond or a compliance with other conditions. A different doctrine has, however, been announced in this state; and it must be accepted as the established rule here that a supersedeas can be had as a matter of right only where it is affirmatively provided for by statute. (*Gandy v. State*, 10 Neb., 243; *State v. Judges*, 19 Neb., 149; *State v. Meeker*, 19 Neb., 444; *Cooperrider v. State*, 46 Neb., 84.)

Owing to this difference between the rule on the subject in this state and the rule in many others, as well as the very broad differences between our statute and most others, the cases cited on behalf of the appellants have little or no application to that before us. Thus, *State v. Johnson*, 13 Fla., 33, was based on statutes making the

allowance of a supersedeas in all cases a matter of discretion. *Everett v. State*, 28 Md., 190, was based on a statute quoted in *Blondheim v. Moore*, 11 Md., 365, expressly providing the terms of a supersedeas in such cases. *Northwestern Mutual Life Ins. Co. v. Park Hotel Co.*, 37 Wis., 125, was based on a construction of a statute providing for supersedeas bonds in certain cases, followed by a provision fixing the terms of the bond in "all other cases." The court held this general provision applicable to orders appointing receivers, by virtue of the doctrine already mentioned as prevailing in some places that an appeal itself is a supersedeas unless a statute in a particular case requires some further condition to be complied with, or denies the right. That this is the Wisconsin doctrine appears more clearly perhaps from the case of *Hudson v. Smith*, 9 Wis., 122. *Elliot v. Whitmore*, 10 Utah, 238, seems to have been based on a statute like ours, and is, therefore, more nearly in point. In that case the defendant was in possession of a stream and had appropriated the water by means of a ditch to his own use. The plaintiff obtained a decree entitling him to the use of a part of the water, enjoining the defendant from using that portion awarded the plaintiff, and appointing a commissioner to put into the stream a certain device which would make a partition of the water in the proportions decreed. It was held that the case fell within a statute identical with subdivision 3 of section 677 of our Code, and that the decree was superseded by a bond thereunder, the decree in effect directing the delivery of possession of real estate. It seems to us that the court thereby gave an exceedingly liberal construction to this provision. But there is this difference between the case cited and that before us, that in the Utah case the decree was final, and considered as an order for the delivery of possession of real property, it was an order for a final and perpetual delivery to the adverse party; while in the case before us the possession of property is not ordered delivered finally to the plaintiff, but to an officer of the court, to hold the same on be-

half of all parties to the suit as their rights may ultimately be determined, and as a provisional remedy only. This distinction will be later adverted to.

In *Swing v. Townsend*, 24 O. St., 1, the action was for the construction of a will, an order to sell real estate, and for distribution. Receivers were appointed in the court below. An appeal having been taken from the decree, the supreme court held that the appeal did not supersede the receivership and that the powers and duties of the receivers continued notwithstanding. It would seem, however, from *Eaton & H. R. Co. v. Varnum*, 10 O. St., 622, that an order appointing a receiver was not at that time in Ohio an appealable order, as it is made here by section 275 of the Code of Civil Procedure. In the *Matter of the Real Estate Associates*, 58 Cal., 356, it was held that an appeal from an order adjudicating insolvency and appointing a receiver did not suspend the functions of the receiver, the court saying: "For obvious reasons it would be dangerous to hold that the functions of the receiver are suspended during the appeal. It may be imperatively necessary to the preservation of the estate that his functions should not be suspended." This case has a certain significance from the fact that section 945 of the California Code of Civil Procedure bears a close analogy to our section 677, subdivision 3; but other provisions of the California law are so different that we cannot give the case the weight which it would otherwise be entitled to.

A series of cases in Tennessee is instructive. That state has a statute which provides that "the supreme court in term or either of the judges in vacation may grant writs of supersedeas to an interlocutory order or decree or execution issued thereon as in case of a final decree." (Statutes of Tennessee, vol. 2, sec. 3933.) It would seem that the language of this statute was broad enough to authorize, by a liberal construction at least, the allowance of a supersedeas on appeal from an order appointing a receiver; but the Tennessee court holds

that it does not apply to such an order. (*Baird v. Turnpike Co.*, 1 Lea [Tenn.], 394; *Bramley v. Tyree*, 1 Lea [Tenn.], 531; *Roberson v. Roberson*, 3 Lea [Tenn.], 50.) The reason given for this construction is that the statute was intended only to apply to orders adjudicating rights, and that it does not extend to orders made pending litigation for the preservation of rights, but not adjudicating them.

The foregoing comprise all the cases to which the briefs direct our attention, as well as those most nearly approaching the question before us which an independent examination has brought to our attention. There are other cases treating an order appointing a receiver as one which should be superseded by appeal in the absence of express statute; but these cases emanate from jurisdictions following the old English practice, which we have shown does not prevail in this state. For several reasons we think that section 677 of the Code should not be so construed as to authorize a supersedeas of an order appointing a receiver *pendente lite* as a matter of right. In the first place, as already intimated, the third subdivision, which provides for orders directing the delivery of possession of real estate, is the only provision which could apply, and the condition of the bond in such case is merely that the appellants will not commit waste. If the sole object of a receivership is to prevent waste, that object can be more readily accomplished and with less hardship by an injunction. If the object is to otherwise preserve the property, or to sequester the rents and profits, the condition of the bond would be entirely inadequate to the protection of the party on whose application a receiver was appointed. In the next place it has been held that the district court may, in a proper case, appoint a receiver after decree and pending an appeal, and this in the case of a mortgage foreclosure after an order of confirmation. (*Eastman v. Cain*, 45 Neb., 48; *Philadelphia Mortgage & Trust Co. v. Goos*, 47 Neb., 804.) The propriety of such an appointment may largely depend upon the fact that a bond conditioned under the

third subdivision of section 677 is the only security that the appellant is required to give to supersede an order of confirmation; and that such security may frequently be inadequate. If we should now hold that an appeal could be taken in such case from an order appointing a receiver, and that order be superseded by another bond, conditioned in the same manner as the bond in the appeal from the order of confirmation, we would deny the very protection which the cases cited hold the mortgagee or purchaser is entitled to. The most conclusive reason, however, for the construction which we have indicated, is that the appointment of a receiver is a provisional remedy. It does not adjudicate any rights. Its purpose is merely the protection of the property in dispute pending the action. Provisional orders are usually summary, frequently not subject to review, always largely discretionary, and almost universally not subject to be superseded. The provisional remedies now existing by virtue of our Code of Civil Procedure are the writs of replevin and attachment, injunction, and receivers. (Code of Civil Procedure, title 8.) The Code contains no provision whereby the defendant in replevin can supersede the writ of replevin or even by a forthcoming bond obtain the return of the property pending the suit. In case of an attachment, there is no provision whereby the execution of the writ of attachment may be superseded; but there are two special provisions whereby the defendant can regain possession of the property upon giving bonds. (Code of Civil Procedure, secs. 206 and 219.) There is also an express provision whereby an order discharging the attachment may be superseded by certain procedure, and upon the giving of a bond specially provided in such case. (Code of Civil Procedure, sec. 236*e*.) There is no provision whereby an order allowing an injunction may be superseded, when it is solely prohibitive in its character; but there is a special provision whereby an order dissolving an injunction may be superseded so as to continue the injunction in force. (Code of Civil Procedure,

secs. 677, 679, 680, 681.) It will be observed, therefore, that generally the Code contemplates that the orders allowing any one of the provisional remedies shall stand in force until discharged by the court allowing them or by this court on appeal; and that wherever there is a special reason for suspending any of such remedies, the legislature has deemed it necessary to provide expressly therefor. It is evident that the legislature has not considered the general provisions for a supersedeas applicable to the provisional remedies in such a manner as to prevent their enforcement. The special provisions referred to have always been considered as exclusive in their character. The chapter relating to receivers contains no special provision for the superseding of an order of appointment; nor is there elsewhere in the Code any provision of that character. As pointed out already, to allow a supersedeas as a matter of right would in many cases defeat the whole purpose of the order, and we think the obvious intention of the legislature was that such purpose should not be in that manner defeated, and for that reason no provision was made for superseding such an order. Furthermore, the Code provides protection to the defendant from the results of continuing provisional remedies in the way of bonds which are always required for that purpose.

In holding that a party may not, as a matter of right, supersede an order appointing a receiver, we do not hold that a supersedeas may not be granted in the discretion of the court. This court has already held that a writ of ouster in a *quo warranto* case and a writ of *mandamus* are writs which may not be superseded as a matter of right; but it has also held that the court may in its discretion allow a supersedeas in such cases. (*Gandy v. State*, 10 Neb., 243; *State v. Judges*, 19 Neb., 149; *Cooperrider v. State*, 46 Neb., 84.) It is quite clear from the record that the district court has been proceeding on the theory that there was no authority whatever for a supersedeas in this case, and has not exercised, or been called upon to

exercise, its discretion in granting or refusing a supersedeas. This court now has jurisdiction of the case on appeal, and we have no doubt of its power to itself grant a stay on proper conditions. (*City of Janesville v. Janesville Water Co.*, 89 Wis., 159; *Haught v. Irwin*, 166 Pa. St., 548.) Inasmuch as the allowing of a stay is wholly a matter of discretion, it follows that the court may, in allowing the stay, affix such conditions as in its judgment are necessary for the protection of the parties. A bond conditioned merely not to commit waste is, as we have seen, not a sufficient protection. We think the bond should be further conditioned to pay the reasonable rental value of the property to the receiver in case the order appointing him should be affirmed. The record discloses that the premises are now occupied by one of the appellants as a homestead, and this state of facts demands that we should permit in this case the order appealed from to be superseded. In view of the evidence as to the value of the property and its probable rental value, we think the bond should be in the penal sum of $1,000. If a bond in that sum, and so conditioned, be filed within twenty days, with sureties approved by the clerk of the district court, the enforcement of the order will be suspended pending appeal. If not so given, the order heretofore entered staying proceedings will stand discharged.

ORDER ACCORDINGLY.

FIRST NATIONAL BANK OF MADISON V. H. H. CARSON.

FILED JUNE 2, 1896. No. 6561.

1. **Ruling on Motion: REVIEW: BILL OF EXCEPTIONS.** The action of the district court in overruling a motion cannot be reviewed here where evidence was necessary to support such motion and such evidence was not preserved by a bill of exceptions.

2. **Appeal: OBJECTION TO ISSUES NOT RAISED BELOW: WAIVER.** In a

case brought to the district court by appeal, the rule restricting the parties to the issues raised in the lower court must be invoked in framing the issues. It cannot be invoked by objection at the trial to the introduction of evidence in support of the new issue.

3. Evidence: HANDWRITING. Section 344 of the Code of Civil Procedure authorizes the genuineness of handwriting to be determined by comparisons made either by experts or by the jury of the disputed writing with other writings proved to be genuine.

4. ———: ———. Such genuine writings upon proof should be admitted in evidence for the purpose of permitting the jury as well as experts to make the necessary comparison.

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

S. O. Campbell, for plaintiff in error.

Allen, Robinson & Reed, contra.

IRVINE, C.

This case was before the court on a former occasion, when a judgment in favor of the defendant was reversed. (*First Nat. Bank of Madison v. Carson*, 30 Neb., 104.) The essential facts may be ascertained by reference to the former opinion. After the case was remanded to the district court the plaintiff obtained leave to withdraw its reply and thereupon filed a motion to strike out from the answer not only that portion thereof affirmatively pleading forgery, but also the general denial in so far as it put in issue the execution of the note sued on. The court sustained the motion in so far as it was directed to the plea of forgery, but overruled it otherwise. The case was then tried, the court excluding on the trial all evidence offered for the purpose of proving that the execution of the note had not been in issue in the county court. The trial resulted in another verdict for the defendant, and the plaintiff again brings the case here by petition in error.

Error is assigned upon the overruling of the motion to strike from the answer the general denial. The former

opinion holds that the defendant not having filed an affidavit as required by section 1100*a* of the Code of Civil Procedure, in the county court, the genuineness of the note was not there put in issue, and, therefore, upon proper objection, such an issue could not be raised in the district court; but such a motion must be supported by proof, and while the motion itself recites that the plaintiff offers in support thereof the papers filed in the county court, such a recital amounts merely to a declaration by the plaintiff that he will so support the motion. It does not prove that such papers were presented on the hearing of the motion, or that it was shown by any evidence that the requisite affidavit was not filed. The papers referred to appear in the bill of exceptions, but only as offered on the trial of the case, so that the record does not disclose that the motion was supported by the proof necessary to sustain it. We, therefore, cannot say that the district court erred in overruling the motion.

Nor was there any error in refusing to admit evidence on the trial for the purpose of proving that the issue then presented had not been raised in the county court. The former opinion is again authority for holding that such a question must be raised in framing the issues, and if an issue is raised by the pleadings, a party cannot, on the trial, object to proof in support of it, on the ground that it was not raised in the lower court. On the trial the plaintiff introduced the note in evidence with certain preliminary proof and then proved its purchase thereof. The defendant then took the stand and denied that he executed the note. The plaintiff, in rebuttal, undertook to meet this proof in two ways: First, by proving an admission by the plaintiff that he had signed the note; and, secondly, by witnesses who testified that in their opinion the signature was the genuine signature of the defendant. In connection with the latter class of evidence the defendant produced two documents, one of them an application for a loan and the other a tax schedule, both purporting to have been signed by the defendant. There

was quite satisfactory evidence introduced of the fact of the defendants signing these two documents. They were then offered in evidence and excluded. The plaintiff then called the defendant himself. He admitted having signed the tax schedule, and as to the application for a loan said that the signature looked like his and "he guessed it was his." The instruments were again offered in evidence and again excluded; but the court permitted expert witnesses called by the plaintiff to examine these signatures and compare them with that on the note and testify as to their belief in the identity of all three signatures. It seems to have been the theory of the trial court that instruments not in evidence for other purposes might be used by experts for the purpose of comparing the handwriting, but that they could not be admitted in evidence for that purpose. In this we think the court erred. At the common law there has been a great deal of controversy as to whether instruments not in evidence for other purposes might be used for the purpose of a comparison of the writing; but our Code, section 344, removes the question from our practice. It provides that "Evidence respecting handwriting may be given by comparisons made, by experts or by the jury, with writings of the same person which are proved to be genuine." In *Huff v. Nims*, 11 Neb., 363, the court referring to a similar question said: "The jury were competent to make the comparison between the writing in the note and that made in their presence, either with or without the aid of experts." In *Grand Island Banking Co. v. Shoemaker*, 31 Neb., 134, *Huff v. Nims* was approved in regard to the competency of the jury to make the comparison under section 344. It is a somewhat singular coincidence that the latter case referred to a similar note, made to the same person and apparently under the same circumstances as that involved in the case at bar. (See, also, *Capital Nat. Bank v. Williams*, 35 Neb., 410.) The court by its ruling gave the plaintiff the benefit of expert testimony based on a comparison of the signature to the

note with the proved signatures of the defendant; but by excluding the instruments from evidence it deprived the plaintiff of the right to have the jury make such a comparison, which section 344 declares, and the cases cited decide, that the jury was competent to do.

REVERSED AND REMANDED.

ERNEST STUHT V. WILLIAM F. SWEESY.

FILED JUNE 2, 1896. No. 6617.

1. **Pleading**: MOTION TO STRIKE. A motion to strike out portions of a pleading should designate with particularity the averments which it attacks.
2. ———: FAILURE TO SEPARATELY STATE CAUSES OF ACTION: REVIEW. A judgment will not be reversed because of the overruling by the court of a motion to require the plaintiff to separately state his causes of action, notwithstanding the fact that the petition might be construed as declaring on two contracts, when by a fair construction it may be construed as declaring on one only, with the other pleaded as matter of inducement, and where the court on the trial instructed the jury as to the issues on the latter theory.
3. **Contracts**: CONSIDERATION. A past consideration is sufficient to support a promise when the consideration was performed in pursuance of a previous request.
4. ———: ———: STATUTE OF FRAUDS. In such case the previous request, the performance of the consideration, and the subsequent promise constitute a single contract, and where it would otherwise be within the statute of frauds, the performance by one party, although preceding the promise, may be sufficient to take the case out of the statute.
5. **Statute of Frauds**: PARTY WALL: COST OF CONSTRUCTION. Accordingly, where one of two adjoining proprietors was about to build upon his land and at the request of the other constructed a party wall situated half on the land of each, and the other after the completion of the wall promised to pay one-half the cost thereof, the case is not within the statute of frauds and a recovery can be had upon the promise to pay.
6. **Evidence**: OFFER TO COMPROMISE. The rule excluding evidence of

offers to compromise existing disputes, does not exclude evidence of offers to compromise a dispute which form the basis or constitute a part of a contract actually compromising such dispute, when such last contract is sued upon.

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

The opinion contains a statement of the case.

E. J. Cornish, for plaintiff in error:

The alleged contract not being in writing is void. (*Pitkin v. Long Island R. Co.*, 2 Barb. Ch. [N. Y.], 221; *Selden v. Delaware & Hudson Canal Co.*, 29 N. Y., 634; *Mumford v. Whitney*, 15 Wend. [N. Y.], 381; *Bonnelli v. Blakemore*, 5 So. Rep. [Miss.], 228; *Rice v. Roberts*, 24 Wis., 461; *Knight v. Beenken*, 30 Pa. St., 372; *Wolfe v. Frost*, 4 Sandf. Ch. [N. Y.], 73; *May v. Prendergast*, 2 Pa. Dist. Ct. Rep., 613; *Price v. Lien*, 84 Ia., 590; *Morgan v. Bergen*, 3 Neb., 209; *Hunt v. Lipp*, 30 Neb., 469; *Lumpkin v. Johnson*, 27 Ga., 485; *Towlerton v. Davidson*, 7 Minn., 322; *Billingslea v. Ward*, 33 Md., 48; *Myers v. Byerly*, 45 Pa. St., 368; *Williams v. Morris*, 95 U. S., 444; *Congdon v. Darcy*, 46 Vt., 484; *Hoffstat v. Voight*, 146 Pa. St., 632.)

Evidence of an offer of compromise was improperly admitted. (*Olson v. Peterson*, 33 Neb., 358; *Kierstead v. Brown*, 23 Neb., 595; *Eldridge v. Hargreaves*, 30 Neb., 638; *Robb v. Hewitt*, 39 Neb., 217.)

W. T. Nelson, also for plaintiff in error.

Kennedy, Gilbert & Anderson, contra:

An action may be maintained on an oral agreement between adjoining owners that one shall erect a party wall and the other pay half the expense, if the wall is built before revocation of the agreement. (*Rice v. Roberts*, 24 Wis., 461.)

A parol contract to contribute toward the expense of erecting a party wall is not within the statute of frauds,

the wall being built before revocation of the agreement. (*Rindge v. Baker*, 57 N. Y., 209; *Masson's Appeal*, 70 Pa. St., 26; *Ensign v. Sharp*, 72 Ga., 708.)

IRVINE, C.

Sweesy brought an action against Stuht, alleging in his original petition that Stuht was, in 1888, the owner of the north one-third of lot 5, in block 169, in the city of Omaha, and that Pauline Chapman was the owner of the south two-thirds of that lot; that there was executed and delivered by said persons a written agreement whereby a party wall was to be maintained on the division line between their said lots. A copy of this contract was attached to the petition. It is unnecessary here to set out its terms beyond the facts that it provided that the party first having occasion to build should construct the wall, which should be of strength sufficient to support a building three stories or more in height; and that the other party should contribute one-half the cost of the same, payable, as the work progressed, on estimates made by the architect or superintendent of the building. The petition further alleged that in March, 1890, Sweesy became the owner of the Chapman lot, and that in the year 1890 he constructed a building thereon embracing a party wall in accordance with the contract. He prayed judgment for one-half the cost of said wall up to and including the third story, to-wit, $969.63. A general demurrer to this petition was sustained, obviously on the ground that the contract did not run with the land, and that Sweesy could, therefore, not avail himself of its benefits. Thereupon Sweesy filed an amended petition containing all the averments of the original, but alleging, in addition thereto, that when plaintiff was about to erect his building he and the defendant agreed that the party wall should be constructed on the division line between their respective lots, and that after the completion of the building the defendant, in consideration of the construction and completion of said wall, promised and un-

dertook to pay plaintiff one-half its cost up to and including the third story. A motion was made to require the plaintiff to separately state his causes of action, and also to strike out of the petition all averments with relation to the contract between the defendant and Pauline Chapman. This motion was overruled, whereupon the defendant answered, admitting the ownership of the premises as alleged, admitting the existence of the Chapman contract, and denying all other allegations of the petition. A trial was had, resulting in a verdict for the plaintiff for the amount claimed. The defendant brings the case here for review by proceedings in error. The petition in error contains fifty-one assignments of error. Many of them present the same questions of law, and the case can best be disposed of by a consideration of the general legal questions to which the assignments relate, without separate reference to each of the assignments.

The defendant contends that the court erred in overruling the motion to require the plaintiff to separately state his causes of action, and to strike out of the petition that portion relating to the contract between Stuht and Pauline Chapman. The theory of this motion was that the plaintiff in a single count declared upon the Chapman contract and also upon a subsequent parol contract; that the sustaining of the demurrer to the original petition took out of the case all consideration of the Chapman contract. We construe the amended petition, however, as declaring only upon the subsequent parol contract between the parties to this action, and as pleading the Chapman contract as matter of inducement. It is very probable that the district court should, on a proper motion, have stricken out some of the averments. But the motion did not specify any particular portions which should be stricken out, but left the court to surmise or determine what portions the pleader meant as referring to the Chapman contract. For this reason, if for no other, there was no error in overruling the motion. A motion to strike should designate with particularity

the averments which are deemed surplusage. Moreover, there was no prejudice to the defendant in the court's action, because the instructions informed the jury with admirable clearness that the action was based on the parol contract, and not on the written contract with Pauline Chapman.

The next question presented is whether the parol contract was valid. The evidence tends to show that Sweesy caused plans to be drawn for the building which he was about to construct, which plans contemplated a wall entirely upon his own land, he being then ignorant of the existence of the Chapman contract. Mr. Stuht, in company with the plaintiff, visited the architect's office and examined these plans, whereupon Stuht suggested that, as he contemplated building on his lot the following year, the plaintiff should construct his north wall half upon each lot, making thereof a party wall, and that he should construct it with arches at the ends of the hallways and with the elevator near the north end of the building, instead of at the south where it had been planned, so that when Stuht should build the two buildings might be connected and one elevator used for both. There is also evidence tending to show that the plaintiff, at Sweesy's request, increased the capacity of the heating apparatus in order that it might be available for Stuht's building when constructed. The plans were changed accordingly and the party wall constructed, Stuht from time to time seeing the work and knowing that it was being done according to his suggestion. After its completion Mr. Sweesy procured his attorney to draw a party wall contract. This was done, but Stuht refused to sign it, saying that there was already in existence a contract with Pauline Chapman and that he would pay for the wall in accordance with the terms of the Chapman contract, which facts rendered the pleading of that contract proper by way of inducement and rendered evidence thereof relevant. Sweesy threupon caused the architects to make an estimate of the cost of one-half of the wall up to and includ-

ing the third story, in accordance with the terms of the Chapman contract. The correctness of this estimate is in nowise impeached. Most of the foregoing evidence is contradicted; but as the verdict was for the plaintiff we must accept the foregoing facts as established in ascertaining the sufficiency of the evidence. Whether the court was right in holding that the Chapman contract did not run with the land is a question which does not concern us and which we do not decide. The plaintiff, by his amended petition, rests his case on the subsequent parol contract; and it must stand or fall on this contract. When we look to the evidence we find that what it tends to show is a request by Stuht, before the building was constructed, to construct the party wall, indeed, an agreement between the parties that it should be constructed, but so indefinite in its terms that whether it could be enforced is doubtful; the construction of the wall in accordance with that request or agreement, and a subsequent specific promise by Stuht to Sweesy to pay therefor. It is said that the consideration for this promise was past and that the promise was therefore *nudum pactum*. The law was, however, as early as the time of Queen Elizabeth, settled contrary to this view. *Hunt v. Bate*, 3 Dyer [Eng.], 272, is reported to the following effect: The servant of a man was arrested and imprisoned for trespass. He was let to mainprise by the manucaption of two citizens in consideration that the business of the master should not go undone. Afterwards the master promised to save the mainpernors harmless for all damages which should be adjudged. They were afterwards compelled to pay, and brought assumpsit. On motion in arrest of judgment it was held that the action did not lie, for want of consideration for the promise, because the master had not requested the plaintiffs to become sureties for the servant. But in another like action brought upon a promise of £20 made to the plaintiff by the defendant, in consideration that the plaintiff, at the special instance of the defendant, had taken to wife a cousin of the defendant, that

was good cause, although the marriage was executed before the undertaking and promise, because the marriage ensued the request of the defendant. The leading case of *Lampleigh v. Brathwait*, Hob. [Eng.], 105, is to the same effect, the court quaintly saying: "It was agreed that a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party that gives the assumpsit it will bind for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference." The same distinction is recognized in the more recent case of *Eastwood v. Kenyon*, 11 Ad. & E. [Eng.], 438; and in this country by Chief Justice Shaw in *Dearborn v. Bowman*, 3 Met. [Mass.], 155. (See, also, *Townsend v. Hunt*, 1 Cro. Car. [Eng.], 408.) These authorities, while mostly ancient, are still recognized as stating the law, and they certainly commend themselves to one's sense of justice.

It is next contended that the promise was within the statute of frauds and void because not in writing. Whether a promise in such a case is within the statute of frauds we need not inquire. See, however, *Stephens v. Harding*, 48 Neb., 659, on this point. If it were, it would be in this case taken out by part performance. The plaintiff had changed the plans of his building and had built his north wall partly on defendant's lot, it is true not relying on the specific promise made subsequent thereto, but undoubtedly in reliance upon the previous request or agreement. The philosophy of the cases referred to on the preceding question must be that where there has been a request on one side, a performance in pursuance thereof on the other, and a subsequent promise to pay therefor, the three acts link together and constitute a single transaction, the contract relating back to the original request. So that the performance by Sweesy, while it preceded the specific promise, followed and was induced by the request, and the whole matter

stands as if a distinct parol agreement had been made before the wall was built, in accordance with the terms of the promise made thereafter.

Some of the assignments of error relate to the admission of evidence as to the conduct of the parties prior to the promise. The views of the court as already expressed, we think, show the relevancy of that evidence so as to render a particular discussion here unnecessary.

Another assignment is that the court erred in permitting Mr. Kennedy, plaintiff's attorney, to give evidence of an offer made by Stuht in the way of compromise. This testimony related to a conversation between Kennedy and Stuht at the time Sweesy endeavored to procure the written agreement. It was a part of the negotiations which led to the promise sued upon. It was not an offer to compromise the now existing cause of action, but merely went in, in connection with other conversation, as a part of the transactions leading to the consummation of the contract sued on.

We think we have covered the questions raised by all the assignments of error, although they have not been noticed in detail. The rulings of the court upon the evidence, and the instructions, were in precise accordance with the views we have announced.

JUDGMENT AFFIRMED.

NORFOLK NATIONAL BANK V. N. W. JOB ET AL.

FILED JUNE 3, 1896. No. 6563.

1. **Review: AFFIDAVITS: BILL OF EXCEPTIONS.** Affidavits used in evidence, to be available for the purpose of review by proceedings in error or appeal, must be embodied in a bill of exceptions duly allowed and certified.

2. **Witnesses: CROSS-EXAMINATION: SIGNATURES.** Where, in an action on a bill or note, the defendant is examined with respect to the

genuineness of the signature alone, he should not, on cross-examination, be required to state his opinion touching collateral or incidental matters based upon a comparison of the disputed signature with others.

3. ———: ———. It is permissible by way of redirect examination to introduce evidence explanatory of facts elicited by the cross-examination, although corroborative of the witness' testimony in chief.

4. **Instructions.** Instructions complained of *held* not prejudicial to the plaintiff in error.

5. **Execution of Note:** SIGNATURE. Evidence examined, and *held* to sustain the judgment of the district court.

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

John R. Hays, for plaintiff in error.

Frick & Dolezal, contra.

POST, C. J.

This was an action by the plaintiff in error, the Norfolk National Bank, in the district court for Antelope county, upon a note for $3,000 claimed to have been executed by the defendants in error, N. W. Job and A. E. Barnum, under date of November 26, 1888, and payable to the plaintiff named ninety days after date. The defendants answered separately, denying the execution of the note sued on, and the issues thus joined were tried to a jury, resulting in a verdict and judgment for the defendants, which it is sought to reverse by means of this proceeding.

Of the several allegations of error, the first relates to the overruling of the motion for a new trial on the ground of newly-discovered evidence. The basis of the claim in that behalf is the affidavit of Mr. Rainbolt, president of the plaintiff bank; but, unfortunately for the plaintiff's contention, such evidence is not incorporated in, or identified by, the bill of exceptions. The rule is firmly established that affidavits used as evidence, in

order to be available for the purpose of review by proceedings in error or on appeal, must be embodied in a bill of exceptions duly allowed and certified. So firmly, indeed, is that rule settled by the decisions of this court that a citation of the cases in point would be wholly superfluous.

The second assignment relates to the action of the court in refusing to require the defendant Job, during his cross-examination, to state the points of difference between the disputed signature and others admitted to be genuine. There is no error in the ruling complained of. The direct examination was confined to the particular note in controversy, and it cannot be seriously contended that there was any foundation laid for the expression of an opinion by the defendant based upon a comparison of signatures. Possibly the court might, without prejudice, have permitted the examination demanded, but its refusal is certainly not an abuse of discretion calling for a reversal of the judgment. Exception was taken to certain questions allowed upon the redirect examination of the defendant above named. The answers were, however, merely explanatory of facts elicited by his cross-examination, and were for that reason rightly received in evidence.

It is next assigned that the court erred in giving instructions numbered 3, 4, 5, 6, 6½. Of the paragraphs mentioned, those numbered 3 and 4 merely define the issues in the cause, and advise the jury that the burden under the pleadings is upon the plaintiff to prove the execution of the note. We might, therefore, in view of the oft-asserted rule respecting assignments of this character, dismiss the subject without further comment; but having examined the paragraphs to which especial prominence is given in the brief of counsel for the plaintiff, we are unable to perceive any just ground of complaint on account thereof. By paragraph 6 the jury were advised that the defendant Job would be liable if he executed the note and placed it in the hands of one

Hoagland, to whom reference will hereafter be made, to be delivered to the plaintiff, although it may subsequently have been signed by his co-defendant, Barnum, without his knowledge or consent, which is in substantial accord with the rule announced in *Barnes v. Van Keuren*, 31 Neb., 165. By paragraph 6½ the jury were further, in effect, advised that the forgery upon said note of Barnum's name as a maker, after its execution by Job and after its delivery to the plaintiff, would, under the issues, defeat a recovery as to both defendants. That direction is defended upon the ground that the unauthorized addition to a promissory note of a name, under circumstances which amount to forgery, so destroys the identity of the contract as to render it inadmissible under the issues presented against the party by whom it was in fact executed. It is unnecessary to determine the question of the soundness of that reasoning, or whether, according to the doctrine of *Barnes v. Van Keuren*, the instruction is technically correct, since it was, in any view of the case, quite as favorable to the plaintiff as the latter was entitled to upon the case made by the pleadings and the proof. It should be remembered that the execution of the note is denied by Job as well as Barnum, and that his defense is that his name thereon is a forgery. There was no claim that the name of his co-defendant or other person was added after the execution of the note by him, as was the case in *Barnes v. Van Keuren*. The action was against both defendants as makers, and the instrument set out was declared to be their note. The sole issue, therefore, was the execution of the note; hence the instruction, if erroneous, could not have prejudiced the plaintiff.

But the proposition most relied upon is that the verdict and judgment are unsupported by the evidence and should be reversed upon that ground. The note in dispute was, according to the testimony of Mr. Rainbolt, president of the plaintiff bank, executed upon one of the blank forms in use by the bank, at the request of John P.

Hoagland, above mentioned, to be executed by some of his (Hoagland's) neighbors for his accommodation, and that it was about ten days later received by the bank through the mail, bearing the signatures which are identified by the witness as those of the defendants, and indorsed in blank by the said Hoagland. The defendant Job testified in his own behalf that he, on the date in question, to-wit, November 26, 1888, exchanged notes with Hoagland for the accommodation of the latter, who, according to his statement, desired to close his account with the plaintiff, preparatory to the opening of an account with a bank at Neligh. He testified positively that the note signed by him for $3,000 was prepared at the time of its execution by Hoagland, who in his, defendant's, presence erased the name of the plaintiff bank from a form like that used in the note introduced in evidence and inserted his, Hoagland's, name therein as payee, in which condition it was signed and delivered by him. He testified further that he had never seen or heard of the note in suit until some time during the following spring, previous to which, as shown by the evidence, Hoagland had fled from the state and has not since returned. The defendant Barnum is equally positive in his denial of his alleged signature to the note.

There was introduced by the plaintiff evidence to establish the cause of action alleged by comparing the signatures in dispute with others acknowledged to be genuine; also by admissions of the respective defendants. Regarding such evidence it may be said that it tends strongly to support the plaintiff's claim, and would, without doubt, have been sufficient to sustain a finding in its favor; but the question of the execution of the note was fairly submitted to the jury, and the verdict based upon the conflicting proofs must, for the purpose of this proceeding, be accepted as conclusive.

JUDGMENT AFFIRMED.

AMERICAN INVESTMENT COMPANY, APPELLEE, V. GREGOR MCGREGOR, APPELLANT, ET AL.

FILED JUNE 3, 1896. No. 6652.

1. **Mortgages:** JUDICIAL SALES: APPRAISEMENT. That appraisers added together the valuations of pieces of property of which a decree of foreclosure had been rendered and order of sale issued, and from the aggregate sum deducted the incumbrances, when it further appeared that each piece sold for more than two-thirds of its appraised value, *held* not prejudicial and not cause for setting aside the sale.

2. **Review.** In the absence from the record of anything to the contrary, the proceedings in a trial court are conclusively presumed to have been regular and will not be disturbed.

3. **Judicial Sales:** APPRAISEMENT: CONFIRMATION. The provisions of the statute requiring the sheriff to deduct from the real value of lands levied upon the amount of the liens and incumbrances prior to that of the mortgage which the property is ordered sold to satisfy, being for the sole benefit of the plaintiff, the defendant, owner of the equity, cannot be heard to object to the confirmation of the sale because such liens and incumbrances were not deducted in making the appraisement. *Smith v. Foxworthy*, 39 Neb., 214, followed.

4. ———: ———: DESCRIPTION. The finding and order of the judge, who confirmed a sale of real estate made under an order of sale in mortgage foreclosure proceedings, in regard to errors in the description of the real estate sold, which appeared in the appraisal or copy thereof on file in the case, examined and approved.

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

A. M. Gooding and *Miller & Ready*, for appellant.

Wilbur F. Bryant and *J. C. Robinson, contra.*

HARRISON, J.

Gregor McGregor, defendant in an action of foreclosure of a real estate mortgage, presents this, an appeal from an order of confirmation of a sale, made subsequent and pursuant to the decree of foreclosure, of the property

included in the mortgage. The objections to the confirmation urged in the district court were as follows:

"1. The property was not sold for a sum equal to two-thirds of its appraised value.

"2. The property, described as lots 5 and 6 of block 25, was appraised at the sum of $275, whereas in truth and in fact such property is worth a sum much greater than the sum of $275, to-wit, the sum of $1,500 and upwards, as shown by affidavits of record in this case.

"3. The incumbrances against said property were not taken into consideration by the appraisers therein, for that the applications for certificates from the county clerk and county treasurer were not required of such officers and gotten by the sheriff until after such appraisement was made.

"4. The interest of defendant McGregor and the other defendants herein were and are not specifically set out and appraised.

"5. The return and record nowhere show the separate interest of defendant McGregor and the other defendants.

"6. The court had no jurisdiction to render a decree against Lemon & McGregor, a partnership, for that such partnership was not sued and was not served with any order or summons from this or any other court in this case to appear and defend, and made no voluntary or any appearance whatsoever in the case. Wherefore defendant McGregor asks that such sale be not confirmed, and for such other relief as equity may require."

We will notice the objections in the order in which they were stated and numbered in the pleading filed in the district court. Of the portions to be considered we have just given a copy. It is contended that the property did not sell for two-thirds of its appraised value. The sale was of lots 5 and 6 in block 25, and the west fifty feet of lots 5 and 6 in block 43, in the village of Hartington, Nebraska. The first mentioned two lots were given by the appraisers the value of $1,800, and the portions of the lots in block 43 an appraised valuation

of $275, making a total of $2,075, from which sum they deducted taxes in the sum of $142.44 and mortgages $830, giving a total of liens and incumbrances of $972.44, deducting which from the $2,075 there remained the sum of $1,102.56, which was stated by the appraisers to be the real value in money of the interest of "Gregor McGregor *et al.*" in the premises. The two lots in block 25, the return of the officer shows, were sold for $700, and the parts of lots in block 43 for $200, a total of $900, more than two-thirds of the appraised value of $1,102.56, in the aggregate, of all the property sold. Of the record in the district court there has been removed to this court but few of the papers,—a copy of the appraisal, the notice of sale and proof of its publication, the return to the order of sale, the objections to confirmation, and the order confirming the sale; but from such parts of the record as we have here it is apparent that of the incumbrances deducted from the total of the valuations placed by the appraisers on the lots and parts of lots the sum of $830 was of a mortgage lien against the lots in block 25, and this sum subtracted from $1,800, at which sum their gross value was placed, leaves $970. We have before said that the return of the officer to the order of sale disclosed that these lots sold for $700, more than two-thirds of their appraised value after deducting incumbrances. As we have before stated, the parts of lots in block 43 sold for $200, which was more than two-thirds of their value, $275, as assessed by the appraisers, with no incumbrances deducted. From this it is clear that each portion of the property sold brought at the sale more than two-thirds of the appraised valuation thereof. It was not prejudicial to the rights of appellant that the appraisers added the valuation of the pieces of property together and from that sum deducted the incumbrances, since, as we have seen, each piece sold for a sum in excess of two-thirds of its real value as ascertained by the appraisers.

The second objection, for certain well-grounded reasons

stated by counsel for appellant in their brief, is not discussed and need not be considered.

The third objection was that the applications to the county clerk and county treasurer for certificates in regard to any incumbrances existing against the property were not made and the certificates procured prior to the appraisement, and consequently the incumbrances were not considered by the appraisers in perfecting the appraisal of the property. It is asserted in the argument of counsel for appellant that the applications above referred to were not made until the day of appraisement, as is shown by their dates, and that one of the certificates is of date April 7, a day later than the day of the appraisement, which, according to copy in the record, was of April 6; and further, that one certificate is without date. Whether these are facts or not we cannot say, as the applications and certificates, or copies thereof, are not of the record here. All that we have is a copy of the appraisement of the property, from which it appears that the incumbrances were deducted in making it, the officer's return to the order of sale, in which it is stated that the certificates were obtained and filed as required by law, and the finding of the judge that the sale in these, as well as all other particulars, was regular and made and conducted according to law. The conclusion, from our examination of the record, is irresistible that the branch of the objection which was predicated on an irregularity in obtaining the certificates in respect to incumbrances is devoid of force and must be overruled. As we have before stated, from all that appears in the record here the incumbrances were considered and deducted in making the appraisement, and the judge having made a finding that all things pertaining to the sale were regularly and properly performed, such finding must be held to be sustained by the evidence of record, and this point, raised by the third objection, must be determined as without force and overruled. Furthermore, on this point, it is a fair conclusion to be drawn from the record here that

the appellant was the owner, or one of the owners, of the equity of redemption in the property sold. If so, then if the appraisers had not considered the incumbrances in making the appraisement and had failed to deduct them in arriving at the true and final valuation of the interest to be sold, it could not be of any avail to defendant, for, as was held in the opinion in the case of *Smith v. Foxworthy*, 39 Neb., 214, "The provisions of the statute requiring the sheriff to deduct from the real value of the lands levied upon the amount of the liens and incumbrances prior to that of the mortgage which the property is ordered sold to satisfy, being for the sole benefit of the plaintiffs, the defendant, owner of the equity, cannot be heard to object to the confirmation of the sale because such liens and incumbrances were not deducted in making the appraisement." For the reasons supporting the rule announced we refer to the body of the opinion in the case just cited. We will say here, lest it be thought there is a conflict, that the rule which we have followed does not run counter to those announced in the decision in the case of *Burkett v. Clark*, 46 Neb., 466, in regard to the duties of an officer holding and enforcing an execution or order of sale of real estate. In the opinion just alluded to the general duties of the officer who makes the levy and sale are fully set forth, including the appraisement of the property. But nothing is said which in the least interferes with, or is to the contrary of what we have stated in the case at bar, that a defendant, owner of the equity of redemption, cannot successfully object to the confirmation of a sale of the property on the ground that prior incumbrances were not deducted in perfecting an appraisement.

The fourth and fifth reasons given to effectually bar the confirmation of the sale were that "the interest of defendant McGregor and the other defendants herein are not specifically set out and appraised," and that "the return and record nowhere show the separate interest of the defendant McGregor and the other defendants."

The only evidence in the record in this court in regard to what is claimed in these two statements (it is stated in brief of counsel for appellant that they must be considered together and as raising but one question) is that which is contained in the appraisement and return to the order of sale, and in the absence of any showing, or any further portions of the record from which it might be determined that the interest therein stated to have been appraised and sold was other and different, as to persons or in any other particular than as therein set forth, we must accept what we discover in such papers as correct. More especially is this true since the judge, who no doubt had the complete record before him, has approved the proceedings and pronounced them regular and in all respects according to law.

The sixth objection cannot be considered here, for the sufficient reason, if for none other, that there is nothing in the record in this court from which it can be determined whether the matters set forth in the objection as its basis are or were facts or not. If the whole record of the case was before us we might then be enabled to consider the question sought to be presented, but as it is we cannot do so.

Among the findings of the court was the following: "4. That in the appraisal of the property, returned and of record, there is a clerical error, that is to say, the words and figures block twenty-five (25) were inserted by mistake where the words and figures block No. forty-three (43) should appear; and the words and figures block No. forty-three (43) were inserted by mistake where the words and figures block twenty-five (25) should appear; and the foregoing as above set out is a mere clerical error." And immediately succeeding this portion of the decree was a direction to the sheriff and the appraisers to correct the record of the appraisal to conform to the facts. It is argued that the court should have set the sale aside because of the error in the appraisal, and should not have ordered its correction. The

finding of the court must have embraced the further constituent findings that the proper lots or parts of blocks had been viewed by the appraisers and valued by them, and that no one was misled by the error in the record of the appraisal, and, as we have seen, each piece of the property sold for more than two-thirds of its value as appraised, hence no prejudice resulted from the misplacement of the numbers of the blocks as set forth in the statement of the appraisement which was filed in the case. That the court directed or allowed the record to be amended to conform to the facts in respect to the erroneous positions of the numbers of the blocks as they appeared therein we cannot view as material. The order of confirmation must be

AFFIRMED.

NATE REYNOLDS V. CITY OF TECUMSEH.

FILED JUNE 3, 1896. No. 6624.

1. **Final Order: REVIEW.** To entitle a party to a review there must have been a final order or judgment rendered in the cause.
2. **Judgment for Costs: REVIEW.** A mere judgment for costs is not reviewable before final judgment.

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

L. C. Chapman and *B. F. Perkins*, for plaintiff in error.

S. D. Porter and *T. Appelget*, *contra*.

NORVAL, J.

This was an action to recover damages for personal injuries received by the plaintiff. Upon a trial of the issues to a jury a verdict was returned for the defendant. Plaintiff presented to the court a motion for a new trial,

which was overruled, and the following judgment was rendered, as shown by the journal entry: "It is therefore considered by the court that the said defendant recover of the said Nate Reynolds its costs herein expended, as heretofore by the verdict of the jury found." This is merely a judgment for costs, and not a final adjudication disposing of the case. (*Little v. Gamble*, 47 Neb., 827, and cases there cited.) The record failing to show a final judgment, the petition in error is

DISMISSED.

ANNA STOCHL ET AL., APPELLEES, V. WILLIAM C. CALEY, APPELLANT.

FILED JUNE 3, 1896. No. 6620.

1. **Vendor and Vendee:** MISREPRESENTATIONS: RESCISSION. Misrepresentations as to the location, quality, and value of real estate by a vendor are sufficient grounds for rescission when relied upon by the vendee and he is unacquainted with its value and condition, and has been prevented by the fraud of the vendor from making an examination of the property.
2. **Misrepresentations as to Real Estate.** Evidence *held* sufficient to support the findings of the trial court.

APPEAL from the district court of Knox county. Heard below before JACKSON, J.

W. L. Henderson and *O. W. Rice*, for appellant.

J. H. Berryman, contra.

NORVAL, J.

This was an action by Anna Stochl and C. H. Stochl against William C. Caley for the rescission of a contract and the cancellation of a deed executed in an exchange of real estate. From a decree in favor of the plaintiffs, the defendant appeals.

On and prior to February 25, 1892, the plaintiff, Anna Stochl, was the owner of lots 4, 5, and 6, in block 189, in County Addition to the city of Wahoo, which were occupied by her and her husband, Hynek Stochl. Prior to said date, negotiations were pending between said Anna Stochl and defendant for the exchange of the said Wahoo property for 160 acres of land in sections 9 and 10, town 30, range 5 west, in Knox county, which last described tract was owned by one Conrad Kyriss, and on which the defendant had an option contract of purchase, although plaintiffs at the time were not aware of such fact, the defendant having represented and claimed to them to be such owner. On said date an exchange was effected, plaintiff, Anna Stochl, and her husband deeding said property in Wahoo to defendant, and he causing Conrad Kyriss to convey the Knox county land to the plaintiff C. H. Stochl, the son of Anna and Hynek Stochl. Plaintiffs claim that by fraud and deceit practiced upon them by the defendant they were induced to make the trade, and upon this ground they ask to have the contract and deeds annulled. It appears from the record that Anna Stochl and her husband, prior to the exchange, had never seen the Knox county land and were unacquainted with its quality and value. In November, 1891, during the negotiations leading up to the transfer, Anna Stochl sent her son, her co-plaintiff, to Knox county to view the premises. The defendant procured Jacob Bloom, a son-in-law of Conrad Kyriss, to go with Caley and young Stochl to point out the land. Caley and Bloom testified that the identical land conveyed to C. H. Stochl was shown and pointed out to him on that trip; while C. H. Stochl testified positively that other lands, of better soil and more valuable, were shown him. There is also evidence tending to show that the defendant represented to Mrs. Stochl that nearly one-third of the 160 acres was in cultivation, and from fifty to seventy acres more were capable of being cultivated and were suitable for farming purposes; that the remainder was pasture

land, and that the entire quarter section was worth $15 per acre; that the land shown the son did not answer this description; that the tract actually conveyed was rough and hilly, of but little value, not over forty acres had been farmed and the remainder was not capable of being reduced to cultivation, and that plaintiffs relied upon the representations of the defendant as to the location, quality, and value of 160 acres of the land conveyed. Soon after the discovery of the fraud and deceit practiced, this action was instituted. A careful perusal of the bill of exceptions reveals a sharp conflict in the testimony, not only as to the representations made by the defendant, but as to the land actually shown the son. The rule as to findings based upon conflicting evidence is applicable to the case before us. This court cannot retry questions of fact, or weigh the testimony or pass upon the credibility of witnesses; that is the province alone of the district court. The finding being supported by sufficient evidence upon each material issue in the case, it cannot be disturbed by us.

It is argued that since the son of Mrs. Stochl went to view the land, she cannot be heard to say that she relied upon the representations of the defendant. Had not the wrong tract been pointed out to the son, there would be more merit to this contention. The son was prevented from making an examination of the property by the fraud and deceit practiced by the defendant, and the case falls within the rule laid down in *McKnight v. Thompson*, 39 Neb., 752, and *Hoock v. Bowman*, 42 Neb., 80. The decree is

AFFIRMED.

GEORGE W. MAXWELL v. HENRY M. SWIGART.

FILED JUNE 3, 1896. No. 6698.

Physicians and Surgeons: RECOVERY FOR SERVICES RENDERED IN VIOLATION OF LAW. The object of our statute providing for a state board of health, to regulate the practice of medicine, etc., is the protection of the sick and afflicted against the knavery of quacks, and it is accordingly *held* that the provision that "no person shall recover in any court in this state any sum of money whatever for any medical, surgical, or obstetrical services, unless he shall have complied with the provisions of this act," etc. (Compiled Statutes, ch. 55, art. 1, sec. 15), negatives the right of recovery for such services where there has been a failure to file the certificate of the state board of health with the county clerk of the proper county as required by the statute.

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

Smith & McCreary and *M. A. Hartigan*, for plaintiff in error.

Capps & Stevens, contra.

RYAN, C.

The defendant in error recovered, in the district court of Adams county, a judgment upon a verdict in the sum of $275. In the petition upon which this recovery was had it was alleged that the plaintiff therein named, on or about September 4, 1891, had made necessary proofs upon which a certificate had been issued to him by the Nebraska state board of health, and that when the services of plaintiff were performed for the defendant, plaintiff was one of the persons authorized by law to be registered and was authorized by law to collect for his said services. The services rendered for the defendant were shown by the proofs to have been so rendered between October 15 and November 29, 1892. On the 20th day of April, 1893, the certificate of the Nebraska state

board of health above referred to was filed in the office of the county clerk of Adams county. This was after the services had been rendered, but before the commencement of this action. The district court ruled that this registration before suit brought was a sufficient compliance with the statute to entitle the holder of the certificate to recover the value of his aforesaid services, and accordingly there was a verdict and a judgment. The correctness of this ruling is the sole matter presented for our consideration. It is required by the provisions of section 10, chapter 35, Laws, 1891, that the holder of a certificate of the state board of public health shall, before practicing, file such certificate or a copy thereof in the office of the county clerk of the proper county. Section 15 of the act just referred to is in the following language: "No person shall recover in any court in this state any sum of money whatever for any medical, surgical, or obstetrical services, unless he shall have complied with the provisions of this act and is one of the persons authorized by this act to be registered as a physician." In argument it was urged that the case of *Gardner v. Tatum*, 81 Cal., 370, sustains the view taken by the district court that the filing of the physician's certificate with the county clerk before suit brought for compensation for his services was such a compliance with the statutory requirement as to relieve against a disability of the nature of that imposed by our statute. It is provided in volume 3, section 7, page 560, Revised Statutes of California, 1880: "Any person practicing medicine or surgery in this state without first having procured a certificate to so practice shall be deemed guilty of a misdemeanor," etc. The penalty prescribed in the California act is for practicing without first having procured a certificate, and although this certificate is required to be registered with the county clerk, no penalty is prescribed for a failure to register. It was therefore held by the majority of the court, in the case last cited, that while no recovery could be permitted for services rendered be-

tween the date of application and that of the issue of the certificate, there could be a recovery for such services as were rendered after such issue. Nothing was said in the opinion about a failure to register, because, as is very obvious, that fact was not by statute made a necessary condition precedent to the right to practice medicine or surgery. This distinction renders unnecessary a prolonged discussion of the provisions of our statute, which as imperatively requires the registration as the issue of the certificate. The purpose of the statute was to protect the sick and afflicted against the knavery of quacks, and hence the construction that satisfies this statute by registration before suit brought is so foreign to the general scope of the entire act that it cannot be tolerated. In its holding adversely to the view just indicated the district court erred. Its judgment is therefore

REVERSED.

AUSTIN H. WEIR ET AL. V. ILLINOIS NATIONAL BANK OF SPRINGFIELD.

FILED JUNE 3, 1896. No. 6684.

Partnership: EVIDENCE. Where it is 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 such firm are not competent to establish the disputed partnership relation.

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

Deweese & Hall, for plaintiffs in error.

Field & Holmes, contra.

RYAN, C.

There was on March 27, 1893, a judgment on a verdict in favor of the defendant in error in the district court of

Lancaster county for the sum of $4,944.44 against the Badger Lumber Company, Austin H. Weir, and A. H. Weir & Co. To reverse this judgment this error proceeding is prosecuted.

The note upon which suit was brought was bought by and indorsed to the defendant in error and was in the following language:

"$4,730.00. CHICAGO, January 23, 1892.

"Three months after date we promise to pay to the order of S. A. Brown & Co. forty-seven hundred and thirty dollars at their office, at room 953, 'The Rookery,' Chicago, Ill. A. H. WEIR & CO."

It was alleged in the petition that A. H. Weir, the Badger Lumber Company, and Alfred Toll constituted the above named partnership firm of A. H. Weir & Co. at the time the note was executed. The Badger Lumber Company, a corporation, by its separate answer, denied each of the averments of the petition with reference to its being a member of the firm of A. H. Weir & Co. It was shown by the evidence, and not disputed, that Austin H. Weir, unquestionably a member of the firm of A. H. Weir & Co., attached the name of that firm to the note in suit. To establish the allegation that the Badger Lumber Company was a member of this firm Mr. Smith, the president of the bank, was permitted, over proper objections, to testify that Austin H. Weir had said to him after the maturity of the note, that "the Badger Lumber Company were his partners." The testimony of C. T. Boggs and F. M. Blish, over proper objections, was admitted to the same effect. It has been held by this court that where it has been 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. (*Weeks v. Palmer Deposit Bank*, 44 Neb., 684, and authorities therein cited.) Over proper objections there were given in evidence two re-

ports of a commercial agency, in which there were recited the statements of Mr. Weir that the Badger Lumber Company constituted the "Co." in the firm name of A. H. Weir & Co. Having held that Mr. Weir's mere statement was inadmissible as against the Badger Lumber Company, it is probably unnecessary to say that a statement of his statement, neither being under the sanction of an oath, is likewise incompetent. There seems to have gained some credence the proposition that a commercial agency performs such functions in the business world that its communications are entitled to receive peculiar consideration. It may be that these agencies are very important factors, and yet this should not justify the overturning of established and salutary rules of evidence.

It is possible that it is unnecessary to refer to the eighth instruction given by the court, but, for reasons hereinafter to be given, it probably is best that it should be noticed. It was in this language: "If you find from the evidence that Austin H. Weir, as a member of the firm of A. H. Weir & Co., stated at the time the note sued on was given that the Badger Lumber Company was a member of said firm, you are instructed, as a matter of law, that such evidence would be sufficient to warrant you in finding against said Badger Lumber Company, as a member of said firm." It has already been said that the statement of Mr. Weir was not admissible as evidence that the Badger Lumber Company was a member of the firm of A. H. Weir & Co. The above instruction was, however, that as a matter of law this result existed. The statement of Mr. Weir was not a matter of law. It was mere evidence, if anything, and, as we have already held, it was incompetent. In so far as A. H. Weir & Co. and A. H. Weir are concerned, the judgment must be affirmed, for they made no question as to its correctness as to them in their motion for a new trial, except that it was excessive in amount and this was not well founded. The judgment of the district court against the Badger Lumber Company is reversed, that against Austin H.

Weir and A. H. Weir & Co. is affirmed, and the cause is remanded for further proceedings.

JUDGMENT ACCORDINGLY.

DAVID R. HEIST V. EVALINE HEIST.

FILED JUNE 3, 1896. No. 6568.

1. **Divorce:** CONDONATION. Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and the repetition of the offense revives the wrong condoned.
2. ———: ———. Condonation of extreme cruelty may be avoided by abusive language and the use of opprobrious epithets.
3. ———: ———. Conduct of a husband towards his wife which would not alone support a decree of divorce on the ground of extreme cruelty may, nevertheless, be sufficient to avoid a condonation extended to the husband by the wife for such cruelty.
4. ———: ALIMONY. There is no fixed rule for determining what portion of the husband's estate should be decreed to his wife for alimony. The amount should be just and equitable, due regard being had for the rights of each party, the ability of the husband, the estate of the wife, and the character and situation of the parties.

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

John A. Whitmore and *Howard M. Kellogg*, for plaintiff in error.

Jerome H. Smith and *E. J. Hainer*, *contra*.

RAGAN, C.

Evaline Heist brought this suit in the district court of Hamilton county against David R. Heist, her husband, for divorce from the bonds of matrimony. She had a

decree as prayed, to reverse which David R. Heist has filed in this court a petition in error.

Mrs. Heist claimed to be entitled to a divorce from her husband because of extreme cruelty practiced by him towards her. Some of the specific acts of cruelty charged to the husband were that he had required of his wife, though a frail woman and in delicate health, the performance of heavy work in and out doors; that he had used towards his wife coarse and vile language; that on one occasion he had violently dragged her out of bed, thereby inflicting on her great pain and injury; that he had told his wife that he did not care for her; that he had an object in view in marrying her and when this object was accomplished she would leave; that on one occasion he had seized his wife while she was seated at the breakfast table and dragged her to the door of the house and told her to leave; that he had refused to permit their children, though they were able and willing, to assist her in the performance of certain household duties; that he had, in the presence of their children, called her vile and abusive names, among others, a "bitch;" that when the wife was weak and sick and in need of help to do her household work, the husband had refused to procure help for her, but harshly and cruelly told her if she could not do the work to leave. There were other acts of cruelty charged to the husband in the petition. His answer, in addition to a general denial of all the allegations of cruelty, set up the defense that in May, 1892, his wife had abandoned him without any just cause or provocation, and that in said month, at the intercession of their mutual friends, the husband and wife had met and talked over their family difficulties; that a reconciliation between them took place, and that all wrongs that the wife had suffered by reason of the husband's conduct she had then and there freely and voluntarily forgiven, and had then returned to his house and lived and cohabited with him until November, 1892, when, without any just provocation, she again abandoned him. To this defense of con-

donation the wife replied that at the interview between herself and husband, in May, the husband had admitted his cruel treatment of her, had prayed her forgiveness, and solemnly promised that if she would return to his home as his wife, to henceforth treat her as a kind, true, and faithful husband, and to forbear all harsh and cruel treatment of her; that she relied on these promises of her husband, and, so relying upon them, she returned to his home and lived and cohabited with him as his wife until November, 1892. She further alleged that her husband, disregarding the promises made to her at the time of their reconciliation, resumed his said cruel and inhuman treatment of her; that after her return to his house, on the occasions of being visited by her neighbors, the husband used towards her and in the presence of the neighbors harsh and angry language; that he charged her with lying, charged her with having lied in church immediately after taking the sacrament, and threatened her with a church trial, for the offense of lying, before the church authorities, and threatened to have her expelled from the church; that during the months of October and November, 1892, he used harsh and severe language towards her; called her harsh names, among others, a "devil," and a "Christian devil," and that in the autumn of 1892 he falsely charged her with attempting to poison him.

1. The first assignment of error argued here is that the decree of the district court is not sustained by sufficient evidence. We shall not quote this evidence, nor any part of it, but it supports the allegations of the petition. It is insisted, however, that the cruelty charged to the husband was condoned by the wife early in May, 1892, and that the conduct of the husband towards the wife subsequent to that time, as shown by the evidence, is not sufficient to sustain the decree. Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated; it is dependent upon future good conduct, and a repetition of the offense revives the wrong condoned.

(*Smith v. Smith*, 4 Paige Ch. [N. Y.], 432; *Wessels v. Wessels*, 28 Ill. App., 253.) Condonation is always accompanied with the implied condition that the injury shall not be repeated, and that the offending party will thereafter treat the other with conjugal kindness, or the offense will be revived. (*Davis v. Davis*, 19 Ill., 334.) In the case at bar the replication of the wife was, in substance, that early in May, 1892, she forgave her husband for the extreme cruelty previously practiced by him towards her, upon condition of, and relying upon, his promise that he would in future forbear all harsh and cruel treatment towards her and henceforth treat her as a kind and affectionate husband; that he had violated his promise so made and after her return to his house had resumed his harsh and cruel treatment of her. After the wife's return to the husband the evidence does not disclose that he ever violently laid hands upon her, but it does support the allegations of her petition that he called her vile names, accused her of lying, and accused her of having attempted to poison him. The question is whether this conduct of the husband towards the wife is sufficient to avoid the condonation. We think it is. In *Farnham v. Farnham*, 73 Ill., 497, it was held: "Condonation is forgiveness upon condition that the injury shall not be repeated, and is dependent upon future good usage and conjugal kindness." "Condonation of personal acts of violence and cruelty may be avoided by abusive language and the use of opprobrious epithets. Cruel treatment does not always consist in actual violence, and a wife, having forgiven her husband's acts of physical cruelty, may, from the subsequent use of abusive and brutal language and charges of infidelity, conclude that it will end, as on the prior occasion, in personal violence. In such case she is not bound to submit to actual violence as a condition to relief in a court of equity." In *Phillips v. Phillips*, 27 Wis., 252, it was held: "Condonation is conditional upon subsequent good conduct; and the effect of cruelty so condoned may be revived by subsequent acts of a simi-

lar nature, though slighter in degree and such as might not of themselves be sufficient ground of divorce." To the same effect see *Sewall v. Sewall*, 122 Mass., 156.

2. A second argument insisted on here is that the amount of alimony awarded the wife by the decree is excessive. The court found specially that the value of the property owned by the husband was $4,500 over and above all incumbrances thereon. The record does not show that the wife owned any property whatever. By the decree of the court the custody of the minor children was awarded to the wife, and the court also awarded her as alimony $2,250, payable in six annual installments. There is no fixed rule for determining what portion of the husband's estate should be decreed to his wife for alimony. The amount should be just and equitable, due regard being had for the rights of each party, the ability of the husband, the estate of the wife, and the character and situation of the parties. (*Cochran v. Cochran*, 42 Neb., 612, and cases there cited.) The decree of the district court is right and is in all things

AFFIRMED.

GEORGE MORGAN V. STATE OF NEBRASKA.

FILED JUNE 3, 1896. No. 8414.

Statutes: AMENDMENTS: CONSTITUTIONAL LAW: STENOGRAPHERS: COPY OF TESTIMONY: CRIMINAL LAW. Section 49 of an act entitled "An act to amend chapter 13, Revised Statutes of 1866, entitled 'Courts,'" passed and approved February 27, 1879, is unconstitutional and void, because said act amends section 5 of an act passed and approved February 19, 1877, without referring in its title to said section or act and without repealing said section 5.

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

W. R. Patrick and *W. S. Summers*, for plaintiff in error.

References: *State v. Moore*, 8 Neb., 22; *Supervisors v.*

United States, 4 Wall. [U. S.], 435; *City of Logansport v. Wright*, 25 Ind., 512; *Smith v. State*, 1 Kan., 365; *Thompson v. Carroll*, 22 How. [U. S.], 434; *Mason v. Fearson*, 9 How. [U. S.], 248; *People v. Buffalo County*, 4 Neb., 159; *Hurford v. City of Omaha*, 4 Neb., 351; *Stamper v. Miller*, 3 Atk. [Eng.], 212; *Rex v. Barlow*, 2 Salk. [Eng.], 609; *Curran v. Wilcox*, 10 Neb., 449; *State v. Gaslin*, 32 Neb., 296.

A. S. Churchill, Attorney General, and *George A. Day, Deputy Attorney General, contra.*

References: *Bohanan v. State*, 15 Neb., 212; *Paulson v. State*, 25 Neb., 347; *Argabright v. State*, 46 Neb., 822; *Burlington & M. R. R. Co. v. Saunders County*, 9 Neb., 507; *Ex parte Thomason*, 16 Neb., 238; *Herold v. State*, 21 Neb., 50; *State v. Lancaster County*, 17 Neb., 85; *State v. Hurds*, 19 Neb., 323; *Messenger v. State*, 25 Neb., 676; *Miller v. Hurford*, 11 Neb., 381; *Gatling v. Lane*, 17 Neb., 84; *Smailes v. White*, 4 Neb., 355; *Ryan v. State*, 5 Neb., 280; *State v. Pierce County*, 10 Neb., 477.

RAGAN, C.

In the district court of Douglas county George Morgan was convicted of the crime of murder in the first degree and by said court sentenced to suffer death by hanging. For the purpose of prosecuting to this court error proceedings to have said judgment reviewed, Morgan requested the district court to direct its short-hand reporter to make out and deliver to him, gratuitously, a long-hand copy of the short-hand notes of the evidence in such case in which Morgan had been convicted. Morgan supported this application by his affidavit that he was unable, by reason of his poverty, to pay for the long-hand copy of the evidence. The district court refused to comply with this request of Morgan's, and to reverse its ruling Morgan prosecutes here a petition in error.

Section 49, Chapter 19, Compiled Statutes of 1895, is as follows: "It shall be the duty of such reporter to furnish, on the application of the district attorney or any party

to a suit in which a stenographic record of proceedings has been made, a long-hand copy of the proceedings so recorded, or any part thereof, for which he shall be entitled to receive, in addition to his salary, a fee of five cents per hundred words, to be paid by the party requesting the same, except where such copy is required by the district attorney on the part of the state, in which case the reporter shall furnish such copy without the payment of any fee; *Provided also*, That in all criminal cases wherein, after conviction, the defendant shall make an affidavit that he is unable, by reason of his poverty, to pay for such copy, the court or judge thereof may, by order indorsed on such affidavit, direct the reporter to make such copy without the payment of any fee. It shall be the duty of the reporter to deliver such long-hand copy of the proceedings therein, within forty days from the final adjournment of the term at which the judgment is rendered, to the party demanding it." Morgan bases his claim to have the short-hand reporter of the district court furnish him gratuitously a long-hand copy of the evidence on the provisions of this statute. But the honorable the attorney general insists that the statute just quoted is unconstitutional and void, and that, therefore, the order of the district court cannot be disturbed. The constitutionality of the statute just quoted is the only point which we shall consider. On the 9th day of February, 1875 (see Session Laws of 1875, p. 63), the legislature passed an act entitled "An act to provide for short-hand reporters for the district courts." By section 1 of this act the judges of the district courts were each required to appoint a short-hand reporter. Section 2 of said act provided for the taking of the oath by the reporter appointed, and prescribed the reporter's duties. Section 3 of said act was as follows: "They [the short-hand reporters] shall receive compensation as follows: For each day actually employed in court taking testimony, the sum of five dollars, to be awarded and paid by the county upon the certificate of the judge; and for

making transcripts thereof, for each one hundred words the sum of ten cents; the same in criminal cases, to be audited and paid in the same manner; but where such transcripts are required in any civil case the fees thereof shall be paid by the party desiring the same, and the amount allowed such reporter shall in all instances, except where the defendant in the criminal case is acquitted, be taxed as part of the costs." On the 19th day of February, 1877 (see Session Laws, 1877, p. 158), the legislature passed an act to provide stenographic reporters for the district courts and to repeal the act of February 9, 1875, just quoted. Section 5 of said act of 1877 was as follows: "It shall be the duty of such reporter to furnish, on the application of the district attorney or any party to the suit in which a stenographic record of proceedings has been made, a long-hand copy of the proceedings so recorded, or any part thereof, for which he shall be entitled to receive, in addition to his salary, a fee of ten cents per hundred words, to be paid by the party requesting the same, except where such copy is required by the district attorney on the part of the state, in which case the reporter shall be paid by the county upon the certificate of the judge presiding." In 1879 (see Session Laws, 1879, p. 82), the legislature passed an act entitled "An act to amend chapter 13, Revised Statutes of 1866, entitled 'Courts,'" section 49 of said chapter being section 49, chapter 19, Compiled Statutes of 1895, the statute herein just quoted.

It will be observed that by section 5 of the act of 1877, quoted above, the official court reporter, in addition to his salary, was entitled to collect a fee of ten cents per hundred words for making out a long-hand copy of the evidence taken in a case; that this fee was to be paid by the party requesting the long-hand copy, unless the copy was ordered by the district attorney on behalf of the state, in which case the reporter was to be paid his fee by the county. By section 49 of the act of 1879 the reporter, in addition to his salary, is allowed a fee of five

cents per hundred words for making out a long-hand copy of the evidence. This fee is to be paid by the party requesting the long-hand copy, unless the same is required by the district attorney on the part of the state, in which case the reporter is required to furnish the long-hand copy gratuitously. The said section 49 further provides that a district court or a judge thereof may require the official reporter to furnish gratuitously to the defendant a long-hand copy of the evidence, taken in a criminal case in which the defendant had been convicted, upon the filing by such defendant of an affidavit that he is unable, by reason of his poverty, to pay the fees for such long-hand copy of the evidence. Said section 49 of the act of 1879 amends said section 5 of the act of 1877, but the title of the act of 1879 is "An act to amend chapter 13, Revised Statutes of 1866, entitled 'Courts.'" Nowhere in the title to this act is any reference made to official court reporters or stenographic reporters, and they are nowhere mentioned in chapter 13, Revised Statutes, 1866, amended by the act of 1879. Said section 5 of the act of 1877 was neither referred to in the title of the act of 1879, nor repealed by that act. Now section 11, article 3, of the constitution provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed." We think, therefore, that the contention of the attorney general must be sustained; that section 49 of the act of 1879, passed and approved February 27, 1879, is unconstitutional and void, because said act amends section 5 of the act passed and approved February 19, 1877, without referring in its title to said section or act and without repealing said section 5. (See *Sheasley v. Keens*, 48 Neb., 57, and cases there cited.) The order of the district court is

AFFIRMED.

W. H. DILLON ET AL. v. WILLIAM DARST.

FILED JUNE 3, 1896. No. 6609.

Negotiable Instruments: CONSIDERATION: PLEADING: EVIDENCE. In a suit upon a promissory note the answer of the defendants was a general denial. *Held*, That the defense that the consideration for the note was an illegal sale of intoxicating liquors made by the payee to the maker was an affirmative defense, and could not be proved under a general denial.

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

John C. Hartigan and *M. A. Hartigan*, for plaintiffs in error.

Smith & McCreary, contra.

RAGAN, C.

William Darst brought this suit to the district court of Adams county against W. H. Dillon and N. S. Dillon. Darst's suit was based on a promissory note made and delivered to him, signed Dillon & Co., per W. H. Dillon. Darst alleged in his petition that W. H. Dillon and N. S. Dillon were partners doing business under the firm name of Dillon & Co., and claimed a judgment against each one of the defendants. The answer of the Dillons was a general denial of all the allegations in the petition. Darst had a verdict and judgment against N. S. Dillon only, to reverse which she prosecutes to this court a petition in error.

The uncontradicted evidence in the record is that N. S. Dillon and W. H. Dillon were husband and wife; that N. S. Dillon was engaged in running a hotel and keeping a saloon in the city of Hastings, Nebraska, on her own account; that she did business under and by the name of Dillon & Co.; that W. H. Dillon was her agent for the

transaction of her business; that the consideration for the note sued on was intoxicating liquors sold and delivered by Darst in Omaha, Nebraska, to N. S. Dillon, and that W. H. Dillon had authority, as his wife's agent, to purchase said liquors and execute and deliver the promissory note sued on in payment of the same. It further appears that the note was past due and wholly unpaid, but it did not appear from the evidence whether or not Darst, at the time he sold the intoxicating liquors for which the note in suit was given, had a license from the city authorities of the city of Omaha to sell malt, spirituous, and vinous liquors. At the close of the evidence N. S. Dillon requested the district court to instruct the jury as follows: "The court instructs the jury that if they find from the evidence that the consideration for the note upon which this action is based was intoxicating liquors sold by the plaintiff to defendants, or either of them, then the court instructs the jury that before the plaintiff can maintain or prosecute this action he must show that he had a regular license duly and properly issued by the city authorities of the city of Omaha. If this does not appear, the plaintiff cannot recover." The refusal of the district court to give this instruction is the sole point relied upon here for the reversal of the judgment. The petition alleged the execution and delivery of the note by the Dillons and that they were partners. The answer of the Dillons was a general denial. Under this state of the pleadings the simple inquiry was whether Darst proved what he alleged in his petition; and under those issues no evidence was relevant which did not tend to prove or disprove the facts stated in the petition. The consideration for the note neither tended to prove nor disprove the averments of the petition. (*School District v. Shoemaker*, 5 Neb., 36.) The fact that the consideration for the note was intoxicating liquors sold and delivered by Darst to the Dillons in violation of law was new matter constituting an affirmative defense and could not be proved under a general denial. The

court did not err in refusing to give the instruction. (*Atchison & N. R. Co. v. Washburn*, 5 Neb., 117.) The judgment of the district court is

AFFIRMED.

HENRY BECKMAN V. BIRCHARD, BRIDGE & COMPANY.

FILED JUNE 3, 1896. No. 6606.

1. **Accord and Satisfaction:** ACCEPTANCE OF MONEY: ESTOPPEL. A creditor who accepts money tendered by the debtor unconditionally does not by that act estop himself from maintaining an action to recover any further sum that may be due. *Treat v. Price*, 47 Neb., 875, distinguished.

2. ———: EVIDENCE. Evidence examined, and *held* sufficient to sustain the verdict.

ERROR from the district court of Antelope county. Tried below before ALLEN, J.

O. A. Williams, for plaintiff in error.

Powers & Hays, contra.

IRVINE, C.

Birchard, Bridge & Co. sold to Henry Beckman certain wheat in the possession of the former at Norfolk, estimated at from eight to ten thousand bushels, at seventy-one and three-fourths cents per bushel, the wheat to be delivered on board cars at Norfolk, Beckman being engaged in the milling business at Neligh. This action was brought by Birchard, Bridge & Co. against Beckman to recover a portion of the purchase price. The controversy primarily relates to the amount of wheat delivered, Beckman claiming that he has paid in full for all delivered to him and Birchard, Bridge & Co. claiming that a greater amount was delivered than Beckman concedes. The trial resulted in a verdict for the plaintiffs

for $265.30. The defendant brings the case here, contending for a reversal upon one ground only, to-wit, that the verdict was not sustained by the evidence.

The contract between the parties contained no provision whatever for ascertaining the amount of the grain. After six cars had been delivered, a controversy having arisen as to the amount of their contents, Mr. Birchard visited Mr. Beckman's agent at Neligh and had some negotiations in regard to the matter. The plaintiffs contend that no adjustment was made of the existing dispute, while the defendant contends that it was then agreed that the wheat already delivered should be paid for by defendant according to the result of his own weighing. On this point the evidence is conflicting. In order to avoid future disputes it was, however, then agreed that the amount of the remaining wheat should be determined by the weight given by the railroad company. This attempt to provide a certain basis for the remainder of the transaction was unfortunately frustrated by the fact that for three of the remaining cars the railroad company gave different weights. As to these cars the bill of lading in each instance gave a greater weight than that given by the freight bill delivered to Beckman. The plaintiffs then insisted that the weight was to be determined by that reported on the bill of lading, while the defendant insisted that the freight bill was to govern. The evidence was again conflicting as to which of these weights the conference at Neligh determined should govern the transaction. The conflict of the evidence upon these two points, as well as the conflict as to the actual weight of the grain, is such that the verdict cannot be disturbed. There was sufficient evidence to sustain the plaintiffs' contention on both points. The suit was begun at a time when, according to defendant's own theory, he owed the plaintiffs $1,694.68. He employed Mr. O'Day, a lawyer of Neligh, to go to Norfolk to make a settlement. Mr. O'Day there tendered to the plaintiffs $1,694.68. This was accepted by the plaintiffs, and defendant now

claims that their acceptance of the money operated a payment or an accord and satisfaction. Here, again, the evidence is conflicting as to the circumstances. Viewed in one light, it presents a case very much like that of *Treat v. Price*, 47 Neb., 875; but according to some of the witnesses the money was neither tendered nor accepted in satisfaction of the entire debt. It was tendered absolutely and unconditionally, and so accepted merely as a payment on account. The jury was justified by the evidence in accepting the latter theory of the facts. It is argued that even in that light the transaction amounted in law to an accord and satisfaction. This is not true. The very purpose of requiring a tender, in order to be available as such, to be unconditional, is that it shall not raise any implication that the debtor intended to cut off a claim beyond the sum tendered. In order to make the tender available it must be on such terms that the creditor may receive it without compromising his rights to recover more. (*Tompkins v. Batie*, 11 Neb., 147.) If the plaintiffs had refused to accept the money they would have been entitled to judgment therefor, but without interest after the time of the tender. Having accepted it they were still at liberty to prosecute the action for the purpose of recovering any further sum that might be due.

JUDGMENT AFFIRMED.

LINCOLN STREET RAILWAY COMPANY V. CHARLES R. COX.

FILED JUNE 3, 1896. No. 6570.

1. **Master and Servant:** DEFECTIVE APPLIANCES: DUTY OF MASTER. A master does not insure his servants against defective appliances. The rule is that he is bound to use such care as the circumstances reasonably demand to see that the appliances furnished are reasonably safe for use and that they are afterwards maintained in such reasonably safe condition.

2. ———: ———: NOTICE. He is not liable for defects of which he has no notice unless the exercise of ordinary care under all the circumstances would have resulted in notice.

3. **Negligence**: PLEADING: EVIDENCE. In an action by a servant against his master for personal injuries the jury cannot be permitted to infer negligence from the mere fact that an accident happened. A want of ordinary care must be pleaded and proved.

4. **Master and Servant**: NEGLIGENCE: INSTRUCTIONS. Instructions in such case which make the case turn upon the fact of a defect in the appliances instead of upon negligence in furnishing and maintaining such appliances are erroneous.

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

William G. Clark, for plaintiff in error.

Lamb, Adams & Scott, contra.

References: *Kraatz v. Brush Electric Light Co.*, 82 Mich., 457; *United States Illuminating Co. v. Grant*, 55 Hun [N. Y.], 222; *United States Electric R. Co. v. Shelton*, 14 S. W. Rep. [Tenn.], 863; *Perry v. Marsh*, 25 Ala., 659; *Grizzle v. Frost*, 3 Fost. & Fin. [Eng.], 622; *Union Pacific R. Co. v. Fort*, 17 Wall. [U. S.], 553; 2 Thompson, Negligence, p. 975; *Lincoln Rapid Transit Co. v. Nichols*, 37 Neb., 333; *Filer v. New York C. R. Co.*, 49 N. Y., 47.

IRVINE, C.

Cox, a minor, by his next friend, brought this action against the Lincoln Street Railway Company to recover for personal injuries sustained by him while in the employ of the railway company. He recovered a judgment for $800. Cox was employed in driving a team which drew what is called a "tower wagon," being a wagon bearing a scaffold used for the purpose of repairing the trolley wires by means of which the defendant's electric railway was operated. At a point near the intersection of Seventeenth and South streets a fire-alarm wire passed above the trolley wire, crossing it at an angle of forty-five degrees and placed about fourteen inches above the trol-

ley wire at the point of the crossing. The evidence tends to show that the fire-alarm wire was so located before the trolley wire was erected. Three co-employes of Cox were engaged in repairing the wires. In some manner, while their work was progressing, the fire-alarm wire fell across the trolley wire and thence to the ground, where it came in contact with Cox, injuring him by burning and electric shock. The negligence alleged in the petition was in the construction of the trolley wire in dangerous proximity to the fire-alarm wire, and in permitting them to come in contact. On the latter branch of the case the court instructed the jury that if the contact was brought about by the negligence of any of Cox's companions in the work, there could be no recovery, as these men were his fellow-servants. This feature was therefore eliminated from the case, and the verdict must have been based upon the construction and maintenance of the trolley wire dangerously near the fire-alarm wire. On this branch of the case the court gave the following instructions:

"8. If you find from the evidence that at the point where the alleged injury occurred there had been erected across the street a fire-alarm wire, and that after said fire-alarm wire had been erected a trolley wire was erected along said street at said point, and thereafter the defendant took possession of said trolley wire, and when the defendant so took possession of said trolley wire it was in such close proximity to said alarm wire as that the said two wires were liable to come or be thrown together or in contact with each other, and while said defendant was in possession of said trolley wire it was charged with electricity, and the defendant so used and operated the same so charged, and negligently or carelessly permitted or caused the said two wires thus charged with electricity to come in contact with each other, and thereby one of them was burned in two and fell to the ground and without the fault of plaintiff struck him and injured him, then the defendant would be liable for such injury."

"10. It is the duty of a party or corporation maintain-

ing and operating an electric railway to see that its trolley wire is reasonably safe and sound, and of sufficient distance from other electric wires as that the use to which said party or corporation puts it will not endanger the lives of persons generally or the servants of the party or corporation so operating it.

"11. If you find from the evidence that at or near the point where the accident occurred the fire-alarm wire had been erected before the trolley wire and the trolley wire was, when erected, placed in such close proximity to the fire-alarm wire as to be dangerous, and you also find that at the time of the injury to plaintiff the employes of defendant were at work about the wire near said point, and were doing work in the line of their duty as such employes and were doing such work in the only way it could be done, and by doing said work said wires were brought or came in contact with each other and without fault or negligence of the plaintiff caused the injury complained of, then defendant would be liable."

In giving these instructions, especially as they were not accompanied by any instruction stating to the jury the rule of care devolving upon the defendant, we think the court erred. The effect of these instructions upon the minds of the jury must have been to make their verdict depend upon the fact of danger in the manner in which the wires were constructed and maintained, and not upon negligence on the part of the railway company in so maintaining and constructing them. The accident undoubtedly happened, and the jury found that it was not due to the negligence of the men at work about the wires. The fact of the accident therefore established the fact of danger, and the instructions were equivalent to telling the jury that a verdict might be based upon the fact of the injury, without proof of negligence. This was erroneous. (*Missouri P. R. Co. v. Lewis*, 24 Neb., 848; *Chicago, B. & Q. R. Co. v. Howard*, 45 Neb., 570.) We recognize the fact that there appears in the instructions we have quoted some language seeming to qualify this statement.

For instance, in the eighth instruction it seems to have been stated that there must be a finding that the defendant negligently and carelessly permitted or caused the wires to come in contact; but these adverbs refer to the conduct of the company or its servants in handling the wires, and are not used in connection with those parts of the instruction which relate to the erection and maintenance of the wires. Moreover, negligence and due care having been nowhere defined in the charge, the jury was left without means of properly applying the adverbs. Again, in the tenth instruction the duty of the company was stated, "to see that its trolley wire is reasonably safe and sound, and of sufficient distance from other wires as that * * * it will not endanger the lives of persons." To a legal mind the word "reasonably" might perhaps imply the element of care; but we must deal with the instructions in the sense in which they would be understood by the jury. Notwithstanding these qualifying words, we think it quite clear, as already stated, that the instructions made the case turn upon the fact of danger and not the fact of negligence. A master does not insure his servants against defective appliances. He is not chargeable in all events because the appliances furnished his employes are defective. He is liable only when he has been negligent in the matter. The rule is that as to his servants he is bound to use such care as the circumstances reasonably demand, to see that the appliances furnished are reasonably safe for use, and that they are afterwards maintained in such reasonably safe condition. He is not liable for defects of which he has no notice, unless the exercise of ordinary care would have resulted in notice. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578, *Missouri P. R. Co. v. Lewis, supra, Union P. R. Co. v. Broderick*, 30 Neb., 735, all recognize this rule. In *Hammond v. Johnson*, 38 Neb., 244, it is said that it is the duty of a master to furnish for the use of his servant in the course of his employment proper and safe appliances and instruments for the performance of the services required;

but this language is used in such a connection that no intimation could reasonably be drawn from it that the duty is absolute. On the contrary, it clearly appears that it is only for negligence in failing to perform the duty that a liability exists. A peculiar rule is stated in *Leigh v. Omaha Street R. Co.*, 36 Neb., 131. This is as follows: "It is a fundamental rule of law that the master is to furnish his servants with such appliances for his work as are suitable and may be used with safety, and if the servant is injured by reason of defective appliances placed in his hands by the master, or his agent, the master will be liable, unless he can clearly show that he has used due care in the selection of the same." It would seem from this that the plaintiff's case would be made out on proving that he was injured through a defect in the machinery, and that the burden would then devolve upon the master not only to show by a preponderance of the evidence, but to "clearly show" that he had used due care. We do not think that it was the intention of the writer of the opinion to convey such an impression; because every one of the ten cases he cites in support of the rule is to the effect that the master is not absolutely responsible for defects, but liable only where he has failed to exercise due care in the premises, and that the plaintiff must plead and prove such want of care.

REVERSED AND REMANDED.

F. R. KINGSLEY V. JOHN T. MCGREW ET AL.

FILED JUNE 3, 1896. NO. 6643.

1. **Conditional Sales: PAYMENT ON DELIVERY: WAIVER.** Where goods are sold to be paid for on delivery, an absolute and unconditional delivery of the goods by the vendor to the vendee without exacting payment passes the title and waives the condition. *Sutro v. Hoile*, 2 Neb., 186, followed.

2. ———: ———: ———. Therefore, where corn was sold to be paid for on delivery, and it was placed with the vendor's knowledge and consent into bins of the vendee and there mingled with a mass of corn belonging to the vendee, the vendor lost his right to reclaim the corn for non-payment.

3. ———: ———: REPLEVIN. Where a vendor seeks to reclaim goods sold by him on condition of immediate payment, his right is in any case limited to a reclamation of the specific goods by him sold. He cannot possess himself under such claim of an equivalent quantity of similar goods with which the goods by him sold have been commingled with his knowledge and consent.

4. **Sales: FRAUD: RIGHTS OF CREDITORS.** Unsecured general creditors of a vendor cannot be heard to assert a right which the vendor may possess to rescind his sale for fraud inducing thereto.

5. **Replevin: SALES.** A creditor may not possess himself of his debtor's property in the hands either of the debtor or the debtor's vendee and plead the indebtedness in defense of such possession.

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

A. H. Burnett and *G. Norberg*, for plaintiff in error.

Rhea Bros., contra.

IRVINE, C.

In 1891 and the early part of 1892 a partnership known as C. G. Sprague & Co. was engaged in buying corn. A portion of its business was conducted at Holdrege. It became indebted to F. R. Kingsley & Co., bankers doing business at Minden, in a large sum of money, and on the 17th of February, 1892, executed to F. R. Kingsley, a member of the firm of bankers, a bill of sale of all corn in store owned by Sprague & Co., in the city of Holdrege, describing the corn as consisting of about 1,300 bushels, and then situated in a certain building particularly described. The bill of sale was executed at Minden and an agent of Kingsley & Co. went immediately to Holdrege, where Sprague & Co.'s agent made, on the night of the 17th, a constructive, if not an actual, delivery of the corn. The agent of Sprague & Co., whose name is Scranton,

was then employed on behalf of Kingsley & Co. to take charge of the corn. The following day the bill of sale was filed for record in the county clerk's office and it seems that some acts of ownership were exercised on behalf of Kingsley that day. On the 19th of February, however, it was discovered that McGrew, who had been in the employ of Sprague & Co., was engaged in removing the corn from the bins in which it had been stored. Kingsley then instituted this action in replevin to recover the corn. The action was brought for the whole mass of corn, McGrew seeming to have established himself in possession of the whole. Subsequently George Rowland, J. W. Kramer, and John Miller intervened in the action, claiming the corn. There was a verdict for the defendants assessing the value of their possession at $191.48, on which verdict judgment was entered in favor of McGrew, Kramer, and Miller.

We think the verdict was not sustained by the evidence, a question raised by proper assignments of error. The evidence is uncontradicted that there was an actual transfer from Sprague & Co. to Kingsley. The petition alleges an absolute sale, and the evidence tends to support this averment. It may have been intended as a mortgage, but no question is raised on the ground of a variance, and whether the transaction was a sale or mortgage it was, in either event, binding as between the parties. Considered as a sale, whether or not there had been an actual delivery to Kingsley, there was a sufficient memorandum to satisfy the statute of frauds. The plaintiff therefore made out a *prima facie* case and was entitled to a verdict unless the defendants showed a better title, or established a right to impeach the conveyance. The claim of the intervenors was founded upon the fact that each of them had sold corn to Sprague & Co., a portion of which had not been paid for. Their contention is that their contracts with Sprague & Co. were for payment on delivery of the corn, and that Sprague & Co. not having paid on delivery, the title did not pass. It is

a general rule of law that where goods are sold on condition of being paid for on delivery, an absolute and unconditional delivery of the goods by the vendor to the vendee without exacting payment passes title and constitutes a waiver of the condition. This rule has been recognized by this court. (*Sutro v. Hoile*, 2 Neb., 186.) In avoidance of the operation of this rule the defendants contend that their contracts were made with McGrew, representing Sprague & Co.; that their delivery of the corn was to McGrew, and that it was not to pass into the possession of Sprague & Co. until payment was made, and that McGrew's action in repossessing himself of the corn was in pursuance of that understanding. Unfortunately for this contention the corn was hauled to Holdrege in some instances by the vendors themselves, and in all instances with their knowledge, and placed in the bins of Sprague & Co., together with other corn which had been bought and paid for by Sprague & Co., and which was undoubtedly in their possession. There is also other evidence tending to show that the vendors intended at the time that the delivery should be complete and unconditional. The evidence is entirely insufficient to warrant a finding that the delivery was to McGrew as the vendor's agent, that it was conditional upon immediate payment, or that any lien had been reserved. But aside from this feature, if the vendors retained the title or retained a lien, it was upon the specific corn which each had sold and which had not been paid for. They had no right to reclaim an equivalent number of bushels out of a large quantity of corn in bulk, as they are here attempting to do.

It is contended that as a part of the contract whereby the transfer was made by Sprague & Co. to Kingsley, Kingsley promised Sprague & Co. to pay for the corn which had been delivered and which Sprague & Co. had not paid for, and there is evidence tending to support that contention; but it is wholly irrelevant to the issues in this case. If Kingsley & Co., or Kingsley, had made

any such contract, it would not operate to reinvest the vendors with the title with which they had parted, nor would it create a lien upon the corn which they had sold; much less would it pass to them the title or create a lien in an equivalent amount of corn in bulk with which the corn they sold had been commingled by their own acts and with their knowledge and consent. The facts referred to if established might render Kingsley liable for the purchase price of the corn; but they would not defeat Kingsley's title or right of possession, which are the questions in issue in this action.

Another contention is that the transfer from Sprague to Kingsley was fraudulent. There is no evidence that it was made with any intention on the part of Sprague & Co. to hinder, delay, or defraud their creditors, and indeed the defendants do not contend that any such intention existed. Even if the transaction were fraudulent in that manner, they have not established any lien as creditors which would enable them to take advantage of the fact. The argument is, however, that there was an agreement whereby Kingsley & Co. were not only to pay Sprague & Co.'s debts as a portion of the consideration, but they were not to take possession of the corn and they were to permit Sprague & Co. to continue the business. It is contended that their subsequent acts showed that they did not at the time intend to perform these agreements. The legal inference from these facts, if they existed, is that Sprague & Co. have a right of action against Kingsley & Co. for their breach of the contract, or perhaps, if they should so elect, a right to rescind; but the defendants are on this state of facts again confronted with the difficulty that they have no lien which permits them to set up the rights of Sprague & Co. as against the plaintiff. The election to rescind would belong to Sprague & Co., and not to unsecured simple contract creditors, in the absence of proper legal proceedings to assert their rights as creditors. In other words, whether there was fraud such as to avoid the transaction

on behalf of creditors, or whether there was fraud on the part of the vendee inducing the sale, in either event a general creditor would have no right to take the law into his own hands, seize a certain portion of his debtor's goods and defend an action of replevin on that ground, either as against the vendor or the vendee. A creditor may not possess himself of his debtor's property and plead the indebtedness in defense of such act. (*Murphey v. Virgin*, 47 Neb., 692.)

There are other assignments of error based on the facts that the intervenors asserted a common claim and proved several claims, if any; that the verdict was in favor of all the defendants for the total of the sums due each; that the judgment was not in the alternative, as the law requires, and was entered on behalf of only three of the defendants instead of according to the verdict on behalf of all. We deem it unnecessary, however, in view of the conclusion reached as to the sufficiency of the evidence, to consider these assignments.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL. WILLIAM H. FULLER, V. FRED B. BEALL, DISTRICT JUDGE.

FILED JUNE 16, 1896. No. 8310.

1. **Trial:** VERDICT. A verdict which responds to all of the issues made by the pleadings should not be rejected on account of immaterial findings or recommendations superadded by the jury.

2. **Mandamus:** DISTRICT JUDGE: RECEIVING VERDICT. Where a verdict is returned which is sufficient in form and responsive to the issues made by the pleadings it is the duty of the district court to receive and enter it of record. The duty in that regard is ministerial, involving no judicial or discretionary power, and may accordingly be enforced by means of the writ of *mandamus* issued out of this court.

ORIGINAL application for *mandamus* to require respondent to receive and enter of record a verdict. *Writ allowed.*

James McNeny, for relator.

POST, C. J.

This is an original application for a writ of *mandamus* to require the respondent, as judge of the district court for Webster county, to receive and enter of record the following verdict:

"J. C. HARTMAN, Plaintiff,
v.
WILLIAM H. FULLER, Defendant.

"We, the jury in this case, duly impaneled and sworn, do find and say that there is nothing due either plaintiff or defendant, and the said plaintiff and defendant are entitled to bear proportionately the costs of this action.

"P. J. SPRACHER,
"*Foreman.*"

The foregoing verdict, as we learn from the record, was returned on the 13th day of December, 1894, in an action then pending and on trial before said court, in which John C. Hartman, as plaintiff, claimed from the defendant, William H. Fuller, the sum of $184.66 on account, and the latter sought to recover the sum of $431.33 on a similar cause of action against the plaintiff. Thereupon, according to the admission of the pleadings, "the court refused to accept or receive said verdict and refused to send said jury back to correct the said verdict, but neglected and refused to receive the same and summarily discharged the said jury; that the plaintiff then and there objected and excepted to the action of the court in refusing to receive the said verdict, and insisted that the verdict as returned by the jury should be received and the clerk ordered to enter the same upon the records of said court, which the court refused to do." It is further shown that the relator, as defendant in the above entitled

action, afterward submitted a formal request for judgment upon said verdict, which request was at a subsequent term denied and the cause continued for trial by the court, on its own motion. Although the subject is not wholly free from doubt, the inference we draw from the record is that the verdict was by the respondent held to be insufficient in form and substance to sustain a judgment for either party; but in that conclusion of the learned district judge we are unable to concur. The rule appears to be that a verdict which responds to all of the issues submitted should not be rejected on account of immaterial findings or recommendations superadded by the jury. In the verdict here set out there is a distinct and explicit finding with respect to the cause of action alleged by each party, and the attempted apportionment of the costs may be rejected as surplusage. (*Parkinson v. McQuaid*, 54 Wis., 473; *Hancock v. Buckley*, 18 Mo. App., 459; *State v. Knight*, 46 Mo., 83; *Foote v. Woodworth*, 66 Vt., 216; *Tucker v. Cochran*, 47 N. H., 54; Graham & Waterman, New Trials, 136.)

It remains to be determined to what extent, if at all, this court will assert its coercive power for the purpose of controlling the action of the district court in the disposition of the verdict. In *Lloyd v. Brinck*, 35 Tex., 1, cited by the relator, it was held that the trial court cannot upon its own motion set aside a verdict sufficient in form and responsive to the issues made by the pleadings, and that it may, by means of the writ of *mandamus*, be required to enter judgment in such case, notwithstanding a previous order setting aside the verdict. That case cannot, it is believed, be reconciled with *Weber v. Kirkendall*, 44 Neb., 766, holding that the power is inherent in the district court, as a court of general jurisdiction, to correct errors in its proceedings upon its own motion, in the absence of a request by either party to the controversy. We agree, however, with the Texas court that the true test in cases where it is sought to control the actions of judicial officers is whether the duty sought to

be enforced involves the exercise of their judgment and discretion. Judge Thompson, in his work on Trials, section 2636, says: "If the verdict has been unanimously agreed upon by the jury, reduced to writing in due form, returned by the jury, and regularly presented to the court, and if for insufficient reasons the court refuses to receive and record the same, it may be compelled to do so by a *mandamus* sued out in a tribunal possessing superintending jurisdiction over it." And the view thus stated finds support in the decisions of the courts, both state and national. (See *State v. Knight, supra; Munkers v. Watson*, 9 Kan., 668; *Cortleyou v. Ten Eyck*, 22 N. J. Law, 45; *Haight v. Turner*, 2 Johns. [N. Y.], 371; *Horne v. Barney*, 19 Johns. [N. Y.], 247; *Ex parte Bostwick*, 1 Cow. [N. Y.], 143; *Hudson v. Parker*, 156 U. S., 277.) The act of receiving and recording a verdict when returned by the jury is, it appears from the authorities cited, essentially ministerial, not involving the exercise of any discretion on the part of the judge, and the duty in that regard may accordingly, in a proper case, be enforced by means of the writ of *mandamus*. It follows that the writ should be allowed as prayed.

WRIT OF MANDAMUS ALLOWED.

GEORGE FOX ET AL., APPELLEES, V. SAMUEL MCCLAY ET AL., APPELLANTS.

FILED JUNE 16, 1896. No. 6510.

1. **Exemptions:** CLAIMS FOR WAGES. An employe who so far retains the control of the work in hand that he is not subject to the direction of his employer while engaged thereat is an independent contractor and not within the exception of section 531, Civil Code, relating to clerks', laborers', and mechanics' wages.

2. **Judgments:** INJUNCTION. Equity will not interfere to prevent the enforcement of a judgment on account of mere error of law.

3. **Homesteads:** STATUTES. The act of 1879, entitled "An act to provide for the selection and disposition of homesteads, and to exempt the same from judgment liens, and from attachment, levy, or sale, upon execution or other process," is complete in itself and embraces the entire subject indicated by its title.

4. ———: ———: CLAIMS FOR WAGES. The provision of section 531, Civil Code, that nothing therein contained shall be construed "as to exempt any property in this state from execution or attachment for clerks', laborers', or mechanics' wages," has no application to property exempt as a homestead under the laws of this state.

5. ———: ———: ———. Section 1 of the act of 1879 declares that the homestead "shall be exempt from judgment liens and from execution and forced sale except as in this chapter provided." The only exceptions therein named are: (1) Debts secured by mechanics', laborers', and vendors' liens; (2) debts secured by mortgage executed by both husband and wife or an unmarried claimant. *Held*, That the provision of the Code relating to clerks', laborers', and mechanics' wages, if applicable to homesteads, was, so far as it conflicts with the act above mentioned, thereby repealed.

6. **Review:** SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* to sustain the finding and decree of the district court.

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

John S. Bishop, for appellants.

Reese & Gilkeson and *W. B. Comstock*, *contra*.

POST, C. J.

This was a proceeding in equity by the plaintiffs, George Fox and Ella Fox., husband and wife, in the district court for Lancaster county, against Samuel McClay, Wilbur M. Judd, and O. Larsen, and from a decree in their favor the defendants named have prosecuted an appeal to this court.

The facts alleged as grounds for the relief sought are substantially as follows: In the month of January, 1890, the defendant Larsen procured the entry by S. T. Cochran, a justice of the peace for Lancaster county, of a judgment against the said George Fox in the sum of $7.90,

and costs of suit, taxed at $3.85; that the indebtedness upon which such judgment was rendered was for a pair of boots before that time purchased by the said George Fox from the plaintiff therein, and that no part thereof was for work and labor; but for the purpose of fraudulently deceiving the said justice, and in order to deprive the said George Fox and his family of the exemptions provided by statutes of this state, said Larsen falsely represented said indebtedness to be for work and labor, and thereby procured a finding to that effect to be made and entered in connection with the judgment aforesaid; that a transcript of said judgment was thereafter filed in the office of the clerk of the district court for Lancaster county and an execution issued for the satisfaction thereof, by virtue of which the said McClay, as sheriff, on the 6th day of January, 1891, sold to the defendant Judd, for the sum of $1, lot 16, block 5, in East Park Addition, in the city of Lincoln, which was at the date of said judgment, and still is, the homestead of the plaintiffs and their family, and as such has been continuously occupied by them, and that on the 16th day of March, 1891, a deed was executed by the said sheriff whereby he pretended to convey to said Judd the premises above described; that on the 18th day of May, following, the defendant last named, claiming title to said premises by virtue of the aforesaid sheriff's deed, lodged with a justice of the peace for said county a complaint alleging that he was entitled to the possession thereof, but that the plaintiffs herein unlawfully and forcibly detained the same; that plaintiffs failed to appear and defend in that proceeding by reason of a mistake respecting the hour set for the hearing thereof, whereby judgment was rendered against them in their absence for the restitution of the premises and for costs of suit, and which the said justice refuses upon their motion to set aside and vacate; that a writ of restitution was subsequently issued and placed in the hands of said sheriff, and which he now threatens to execute, by removing the plaintiffs and their children

from said premises and putting said Judd in possession thereof pursuant to the judgment last mentioned. It is further alleged that the real estate described, the title of which is in the said Ella Fox, is of the value of $1,500 only, and is accordingly exempt to the plaintiffs as a homestead under the laws of this state. The prayer is that the judgment first above mentioned be declared null and void; that the sale and deed to the defendant Judd, as well as the judgment of restitution, be canceled and set aside and the defendants forever enjoined from asserting title or right of possession under and by virtue of said judgment or proceedings thereunder. The defendants Judd and McClay answered, alleging that the judgment first mentioned was rendered for work and labor before that time performed by Larsen, upon due notice, and is in all respects regular and valid; that subsequent to the sale by the sheriff of the property in dispute the plaintiffs herein joined in resisting the confirmation thereof, on the ground that said property was their homestead, which objection, although supported by plaintiffs' own affidavits, was overruled and the sale in due form confirmed, which order remains in full force and effect and is an adjudication of the issue thus presented. The other allegations of the petition are put in issue by the answer. The reply is a general denial.

The question first claiming attention is that of the validity of the original judgment, upon which the subsequent proceedings depend. We quite agree with counsel for plaintiffs that Larsen was not within the exception contained in section 531 of the Code, providing that nothing therein contained shall be construed as exempting "any property in the state from execution or attachment for clerks', laborers', or mechanics' wages," etc. The claim upon which that judgment rests was, as we have seen, the price of a pair of boots, and which, as the record discloses, were manufactured by Larsen upon the written order of the plaintiff George Fox; but the relation of the former to the latter was that of an independent contractor,

and not that of master and servant as contemplated by the statute. In *Lang v. Simmons*, 64 Wis., 529, the test was held to be whether one claiming rights under the statute retains the entire control of the work to be done, or whether he is subject to the control and direction of the other party; that if a servant or employe occupies such relation toward his employer that the latter can control and direct him while engaged in the work in hand, he is within the protection of the statute exempting wages; otherwise not. The rule thus stated appears altogether reasonable and just, and is fully supported by the numerous authorities to which reference is made in the case above cited. There is, however, a fatal objection to the reasoning of plaintiffs with respect to this branch of the case, viz., the failure of George Fox to exhaust his remedy before the justice of the peace. He was notified that he had been sued by Larsen on account for work and labor, but permitted judgment to be entered against him by default, and which, although obviously erroneous, is not void in the sense that it can be impeached in a purely collateral proceeding.

It is shown by the record that the property in controversy was, at and prior to the date of the levy thereon, held by George Fox under and by virtue of a contract of purchase from one Huff, and that pending the subsequent proceedings he assigned said contract to his wife, Ella Fox, who procured its cancellation and the execution of a new agreement, in her own name, by said Huff. It is from the foregoing facts argued that Ella Fox took subject to the levy to satisfy the judgment against her husband, and was not, therefore, a necessary party to the confirmation proceeding. There would have been some force in that argument provided the judgment against George Fox had been a lien upon the property in controversy; but, as clearly established by the proofs, said premises were during all of the time in question actually occupied by the plaintiffs and their family as a homestead, and were exempt to them under the provi-

sions of chapter 36, Compiled Statutes. (*Schribar v. Platt*, 19 Neb., 625; *Giles v. Miller*, 36 Neb., 346; *Baumann v. Franse*, 37 Neb., 807.) The provision of the Code excepting clerks', laborers', and mechanics' wages from the operation of the exemption laws of the state appears in the Revised Statutes of 1866. The provision exempting homesteads is found in the act approved February 26, 1879, entitled "An act to provide for the selection and disposition of homesteads, and to exempt the same from judgment liens, and from attachment, levy, or sale, upon execution or other process" (Session Laws, 1879, p. 57), section 1 of which, after defining the homestead, declares that it "shall be exempt from judgment liens and from execution or forced sale, except as in this chapter provided." The only exceptions therein appearing are those enumerated in section 3, viz.: (1) Debts secured by mechanics', laborers', or vendors' liens; (2) debts secured by mortgage executed and acknowledged by both husband and wife, or an unmarried claimant. The act last mentioned is, as indicated by its title, complete in itself and embraces the entire subject-matter of the selection, exemption, and disposition of the homestead. Granting, therefore, that the foregoing provision of the Code relating to clerks', laborers', and mechanics' wages was intended to apply to property otherwise exempt as a homestead, it is in radical conflict with section 1 of the act of 1879 and was thereby repealed by implication. (*Brome v. Cuming County*, 31 Neb., 362; *State v. Benton*, 33 Neb., 823; *State v. Bemis*, 45 Neb., 724.) Nor can the fact that the same provision is found in the act of 1887, amendatory of section 531 of the Code, be regarded as material, since the evident purpose of that measure is to limit the amount of property exempt in certain cases, and by no reasonable construction can it be said to affect the statute relating to homesteads.

But the proposition most relied upon by defendants is that the question whether or not the Larsen judgment was a lien upon the premises was, by the order of confir-

mation, determined adversely to the plaintiffs. It should be observed that the alleged appearance in that proceeding by Ella Fox is put in issue by the answer, and among other findings of the district court is the following: "The said Ella Fox was not a party to the action and not a party to the confirmation proceedings under said sale, and was not concluded by such confirmation." The record shows that Mrs. Fox, by attorney, on January 28, 1891, objected to the confirmation on the following grounds: "(1) She is the owner of the premises and the execution was not issued for the satisfaction of any judgment against her; (2) the execution defendant, George Fox, has no interest in said premises; (3) the confirmation of the sale and the recording of a sheriff's deed will cast a cloud upon her title," and which objections were supported by affidavits of the plaintiffs herein. On the other hand, it is shown by the testimony of the plaintiffs that the appearance in the name of Mrs. Fox was wholly unauthorized, and that the affidavits mentioned were by them intended to be used in support of like objections interposed by the said George Fox. The finding in favor of the plaintiffs, based upon the foregoing evidence, which is undisputed except by the record above referred to, must for the purpose of this proceeding be accepted as conclusive. The single question presented upon the final analysis of the cause by the district court was that of the veracity of the plaintiffs, and which, as is obvious from the result, was resolved in their favor.

The decree is in accordance with the proofs and will be affirmed. We may add that counsel for defendants, by failing to discuss the effect of the judgment against the plaintiffs, in the proceeding for the forcible detention of the property, have rendered unnecessary an examination of that subject.

AFFIRMED.

HOME FIRE INSURANCE COMPANY V. STANISLAUS GARBACZ.

FILED JUNE 16, 1896. No. 6611.

1. **Insurance: FAILURE TO PAY PREMIUM NOTE: EFFECT.** An insurance company may by its policy provide that upon the failure of the insured to pay in full at maturity a premium note therein described said policy shall lapse and remain inoperative while such note remains unpaid, and such condition, unless waived, is a complete defense to an action by the insured for a loss during the period of default.
2. **Principal and Agent: DELEGATION OF AUTHORITY.** Authority conferred upon an agent requiring the exercise by him of special skill, judgment, or discretion cannot, in the absence of a known usage, unless justified by the necessities of the case, without the consent of the principal, be delegated to another.

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

Jacob Fawcett and *Greene & Breckenridge*, for plaintiff in error.

A. M. Robbins, contra.

POST, C. J.

This was an action in the district court for Valley county, where the defendant in error as plaintiff was permitted to recover for the value of three mares, one mule, and one two-year-old colt, being property covered by the policy of insurance, which is the basis of the action.

Of the several allegations of error one only needs be noticed at this time. In the policy introduced in evidence we observe the following condition: "It is hereby understood that if the premium is not paid in cash at the time of making the application for this insurance, and a note, notes, or obligation is given for the whole or a part of the premium on this policy of insurance, that it is a condition of the acceptance of such application, and the

issue of this policy, that such note, notes, or obligation shall be promptly paid when due—time, as to such payment, being the essence of the acceptance of such note, notes, or obligation, and the issuing of this policy, and if not paid when due, this policy shall lapse at the maturity of said note, notes, or obligation, and cease to be in force, and be and remain inoperative while past due and unpaid, and until such past due note, notes, or obligation is fully paid, and this company shall not be liable during such default, and no demand or legal action on the part of this company to secure it or enforce payment, shall be construed as reviving the policy. The payment after maturity of such note, notes, or obligation, in whole or in part, and its acceptance and retention by this company, shall not render this company liable for any loss occurring after the maturity of such note, notes, or obligation, and while the same or any part thereof remain past due and unpaid, nor shall such subsequent payment and its retention by this company be construed to be retroactive, or to extend the policy beyond its original term, or be deemed a waiver of any condition in the policy, application, or note. The actual payment of such past due note, notes, or obligation to the company or its authorized collector having such note in his possession for collection, revives the policy as to such note, notes, or obligation, from and after the date of such payment, and its receipt by said company." On the part of the defendant below it was shown that a note of $11.50, the consideration for said policy, matured January 1, 1890, and on October 27, following, said note remaining wholly unpaid, suit was commenced thereon. On the 1st day of November said action was dismissed before judgment, upon the execution of a new note for $17.85, due forty days after date, being the amount of the note first described, with interest and costs expended and incurred in the prosecution of said action by the defendant in error. The last mentioned note was taken by Mr. Coffin, whose relation to the plaintiff in error was that of an attorney and collec-

tion agent, as "collateral" to the note for $11.50, and is so designated by an indorsement thereon. It also contained the following interlineation, apparently in the same hand as the other writing thereon, viz.: "This note does not revive policy." An attempt was made to prove that the words quoted were added without the consent of the maker, subsequent to the execution and delivery of the note, but with what success it is needless to determine, for reasons hereafter appear. The loss, as shown by the proofs, occurred by fire on the 19th day of December, 1890, subsequent to the maturity of the second or collateral note and at which time the said premium was wholly unpaid, wherefore it is argued that the policy had by virtue of the foregoing stipulation lapsed and remained inoperative up to and including the date mentioned.

A provision similar to that relied upon was held by this court in *Phenix Ins. Co. v. Bachelder*, 32 Neb., 490, and same case 39 Neb., 95, to be reasonable, and a complete defense to an action for a loss which occurred during the period of default. We have no doubt of the soundness of the conclusion there stated, which is in accord with the decided weight of authority, if indeed there can be said to exist a diversity of opinion upon the subject. But an attempt was made to prove a waiver of the foregoing condition of the policy by an extension of time for payment of the collateral note. In support of that contention the defendant in error testified to a conversation relating to said note, the day preceding its maturity, with Mr. Coffin's clerk and stenographer, Miss McMahon, in which the latter agreed to extend the time for payment thereof until January 1. He is, however, contradicted by Miss McMahon, who testified that the defendant in error, about the time in question, called at the office in which she was employed and spoke about an extension of his note, but was referred by her to Mr. Coffin as the only person having authority to grant his request. The district court should, we think, have directed a verdict for the plaintiff in error without regard to the testimony of

the last named witness, since there is an evident failure of proof upon the issue of a waiver. Mr. Coffin was, it may be assumed, authorized, in behalf of the plaintiff in error, to allow the extension sought, but such authority implies the exercise of a judgment or discretion which in the absence of a known usage, unless justified by the necessities of the case, cannot without the consent of the principal be by an agent delegated to another. (*Furnas, Irish & Co. v. Frankman*, 6 Neb., 429; *Commercial Bank of Lake Erie v. Norton*, 1 Hill [N. Y.], 501; *Titus v. Cairo & F. R. Co.*, 46 N. J. Law, 393; *Ruthven v. American Fire Ins Co.*, 60 N. W. Rep. [Ia.], 663; Mechem, Agency, sec. 186, and cases cited. Had Miss McMahon been in this instance expressly authorized by Mr. Coffin to allow the alleged extension, her act in that behalf would not, in view of foregoing authorities, conclude the plaintiff in error in the absence of a subsequent ratification concerning which the record is silent.

REVERSED AND REMANDED.

HARRISON, J., not sitting.

H. L. SPAULDING v. J. SHERBURNE JOHNSON.

FILED JUNE 16, 1896. No. 6682.

1. **Chattel Mortgages:** FAILURE TO REGISTER: RIGHTS OF CREDITORS. A mortgage of chattels, where the mortgagor is permitted to retain the exclusive possession and control of the property conveyed, is void as against creditors of such mortgagor unless filed for record as required by section 14, chapter 32, Compiled Statutes. (*Farmers & Merchants Bank of York v. Anthony*, 39 Neb., 343.)

2. **Review:** TRANSCRIPT: JUDGMENT BY CONSENT. Where a transcript shows the filing before a justice of the peace of a bill of particulars in due form, accompanied by a demand for judgment against the defendant, and an acknowledgment by the latter, in writing, of the indebtedness alleged, with a request for the entry of judgment therefor, the assent of the plaintiff, although not affirmatively appearing, will be presumed, particularly where he is

shown to have subsequently procured an execution to be issued for the satisfaction of the judgment so rendered.

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

John R. Hays, for plaintiff in error.

Phelps & Sabin, contra.

POST, C. J.

This case involves the right of possession of a stock of drugs and store fixtures, the defendant in error, plaintiff below, claiming under a chattel mortgage executed by one Moore, and the plaintiff in error claiming by virtue of five executions to satisfy as many different judgments against the mortgagor named. There was a trial before the district court for Madison county, resulting in a verdict and judgment for the plaintiff below, which has been removed into this court for review by means of the petition in error of the unsuccessful party.

The facts out of which the controversy arose are, briefly stated, as follows: The defendant in error, in the month of January, 1889, sold to said Moore the stock of drugs in dispute, receiving therefor the sum of $550 in cash and trade and twelve notes amounting in the aggregate to $1,750, the first of which was payable six months after date and one maturing every six months thereafter. Moore, for the purpose of securing said notes, executed to the defendant in error a mortgage covering the property in controversy, expressly reserving the possession thereof, and containing a power of sale in the following words: "Permission being hereby granted to sell in an ordinary business way from above stock, provided stock be not reduced below $2,000." That mortgage is, it is conceded, by reason of the power of sale therein contained, void as to creditors of the mortgagor. On November 12, 1890, there were outstanding eleven of the notes above described, which were satisfied by the execution by Moore

of a note for the amount thereof, to-wit, $1,800, payable to the order of the defendant in error one day after date. To secure the note last described, Moore, on the same day, to-wit, November 12, 1890, executed in favor of the defendant in error a second mortgage upon the stock of drugs aforesaid, and which was filed for record November 14 at 2 o'clock P. M. The mortgage last mentioned contains no such provision as that above quoted and appears to have been given in consequence of the recognized invalidity of the one first executed, there being no agreement for a change of possession, the mortgagor remaining in charge of the stock and selling therefrom in due course of business until dispossessed by the plaintiff in error as hereafter shown. On November 13, 1890, judgments were recovered against Moore, the mortgagor, as follows: In favor of Rome Miller for $175.25, and in favor of Horneck, Hess & Moore for $151.36 and $179.59; and on November 14, judgments were recovered against the same party by A. Gunther for $141.64, and the Citizens National Bank for $105. Executions were immediately issued for the satisfaction of the said judgments, and on the afternoon of the 13th the property in controversy was thereunder seized by the plaintiff in error as constable; and on the morning of the 14th a further levy was made to satisfy the judgment rendered on that day. On November 20 this action of replevin was instituted by the defendant in error and prosecuted to judgment with the result stated.

The only assignment of the petition in error which we shall notice is that relating to the sufficiency of the evidence to sustain the judgment complained of. As has been observed, the several levies were fully completed, and the plaintiff in error was in possession by virtue thereof when the second mortgage was filed for record. The case is therefore directly within the rule announced in *Farmers & Merchants Bank of York v. Anthony*, 39 Neb., 343, and must be governed thereby. It is said in that case, quoting from the syllabus: "When the possession

of property described in a chattel mortgage remains with the mortgagor, and the mortgage, or a copy thereof, is not filed as required by section 14, chapter 32, Compiled Statutes, the mortgage is absolutely void as to creditors of the mortgagor, no matter whether they have actual notice of the mortgage or not." It is unnecessary to elaborate upon what is there said. It is sufficient that the conclusion stated is fully supported by the authorities cited, and in harmony with the plain provision of the statute.

It is, however, contended that the judgments above described are void, and that the plaintiff in error was accordingly a trespasser, without any right to the possession of the property levied upon; but to that proposition we cannot agree. The records in question are substantially alike and of which one is here set out:

"Before George N. Beels, Justice of the Peace for Madison County.

"ROME MILLER, Plaintiff,
v.
O. S. MOORE, Defendant.

"November 13, 1890, plaintiff filed bill of particulars claiming the sum of $175.25 on account for rent. At the same time the defendant filed his written statement as follows [omitting caption]:

" 'Comes now the defendant O. S. Moore and, waiving the issuance and serving of summons herein, admits that he is indebted to the plaintiff Rome Miller on the account set out in the bill of particulars, in the sum of $175.25, and consents that judgment may be entered against him for that amount.

" 'Dated Norfolk, Nebraska, this November 13, 1890.

" 'O. S. MOORE.'

"It is therefore considered that the plaintiff have and recover from the defendant the sum of $175.25, together with the costs of this action, taxed at $2.

"GEORGE N. BEELS,
"Justice of the Peace."

In *Mercer v. James*, 6 Neb., 406, one Woods, the maker of a promissory note, voluntarily appeared before a justice of the peace, acknowledged his indebtedness to the plaintiff on said note, and consented to the entry of judgment for the amount due thereon, which was accordingly there done. It was held that the plaintiff's assent, although not affirmatively shown by the transcript, should be presumed from the fact that he procured a satisfaction of the judgment by an execution, levy, and sale of the defendant's property. That case was followed and approved in *Flanagan v. Continental Ins. Co.*, 22 Neb., 235, and must be accepted as the law of this state. It follows that for the reason stated the judgment of the district court must be reversed and the cause remanded.

REVERSED.

KINGMAN & COMPANY V. WEISER BROTHERS.

FILED JUNE 16, 1896. No. 6661.

Attachment Against Defendants Charged with Fraudulently Disposing of Their Property: ORDER DISCHARGING ATTACHMENT: REVIEW. The evidence examined, and *held* insufficient to sustain the finding and judgment of the trial court.

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

James H. McIntosh, for plaintiffs in error.

References: *Smith v. Sands*, 17 Neb., 498; *Beals v. Flynn*, 25 Neb., 578; *Kellogg v. Richardson*, 19 Fed. Rep., 70; *Smith v. Howard*, 20 How. Pr. [N. Y.], 121; *O'Neil v. Salmon*, 25 How. Pr. [N. Y.], 246.

T. M. Franse and *A. C. Abbott*, *contra*.

References: *Kierstead v. Brown*, 23 Neb., 595; *Eldridge v. Hargreaves*, 30 Neb., 638; *Sherer v. Piper*, 26 O. St., 478;

Jones v. Foxall, 13 Eng. L. & Eq., 140; *Mayer v. Zingre*, 18 Neb., 458; *Holland v. Commercial Nat. Bank*, 22 Neb., 583; *Johnson v. Steele*, 23 Neb., 82; *Grimes v. Farrington*, 19 Neb., 44; *Armstrong v. Cook*, 54 N. W. Rep. [Mich.], 873; *Caulfield v. Bittinger*, 37 Neb., 542.

HARRISON, J.

Plaintiffs instituted an action against defendants, or the firm of which they were members, in the district court of Thurston county, to recover the amount alleged to be due on a promissory note executed by the firm and delivered to plaintiffs, and caused a writ of attachment to issue in such action, the grounds therefor, as stated in the attachment affidavit, being as follows: "That the said defendants are about to convert their property, or a part thereof, into money for the purpose of putting it beyond the reach of their creditors; and that they have assigned, removed, and disposed of their property, or a part thereof, with the intent to defraud their creditors, and that they have property and rights of action which they conceal." The writ was issued and levied on certain property as the property of the defendant firm. In the action, subsequently to the issue and levy of the writ, a motion to discharge the attachment was filed for the partnership, the reason assigned being that the statements contained in the affidavit were untrue. On a hearing of the motion it was sustained and the attachment ordered discharged. Plaintiffs filed a bond and removed the attachment branch of the case to this court for review of the proceedings of the trial court therein. The sole question presented for determination is, Was there sufficient evidence to sustain the findings of the trial judge on which was based the order discharging the attachment, viz., that the allegations of the affidavit in attachment were not true?

It appears that on and prior to the 24th of October, 1893, James and John Weiser were partners in and conducting a retail hardware business and store in Pender,

Nebraska, and also dealing in agricultural implements; that on or about the date mentioned the firm negotiated a sale or made a transfer of the business, stock of hardware, and agricultural implements to one Bender, the consideration to be received by the firm being a tract of land containing 294 acres, situate in Cuming county, this state. Of this land about thirty acres were under cultivation, and there were buildings on the land, viz., a frame house 16x28 feet and some small sheds. This land was purchased by Bender, July 25, 1893, for the sum of $5,076, it being entirely a time sale, the whole consideration being divided into payments to be made at stated dates subsequent to the time of sale, ending with January 1, 1897. In October, 1893, the land was accepted in the trade for the stock of hardware, etc., at a valuation of $12,076. The stock, which inventoried about $7,000, and the assumption by the firm of the $5,076 deferred payments to be made of the original purchase price of the land, constituting the consideration passing to Bender in the trade. Some witnesses placed the value of the land at the full amount at which it was figured in the deal between the firm and Bender. One witness placed it higher, and one, whose affidavit was presented on the part of the firm, stated the value of the land to be $10,000. There was a bill of sale of the stock of goods to Bender, and a quitclaim deed of the land from Bender to the Weisers; also an assignment to the Weisers of a contract of sale and purchase executed between the prior owner and Bender. We will here give what James Weiser said in his affidavit was a statement of the assets and liabilities of the firm:

The Weiser Block (Opera House)	$20,000 00
Block in Main Street Addition	1,600 00
294 acres of land in Cuming county, Neb	12,076 00
Bills receivable	9,930 00
Total assets	$43,606 00

LIABILITIES.

Kingman & Co	$2,207 25
Other liabilities	19,882 00
Total liabilities	$22,089 25

What is denominated the Weiser Block (Opera House), and valued in the foregoing statement at $20,000, was valued by other witnesses, quite a number of whose affidavits were of record on the part of the Weisers, at $15,000, two on the part of the plaintiff who stated its value to be $10,000, and one who said it was worth not to exceed $13,000. Prior to the deal between the firm and Bender the opera house, or the building in a room of which the stock of hardware was situated, was incumbered as follows: A first mortgage in the sum of $4,000, of date September 19, 1891, with interest at eight per cent per annum, none of which, it appears, either principal or interest, had been paid. A second mortgage, of date March 1, 1892, in the sum of $1,000, and a third for $907.35, of date July 17, 1893. On the second and third, as on the first, the interest remained unpaid. There was an unpaid balance of purchase consideration for the block in Main Street Addition of $850.

We will now notice some of the conditions existing as to the property of the Weisers as a firm or as individuals, or which arose from transfers made at or about the time of the trade hereinbefore alluded to. All, or practically all, of the bills receivable had been delivered to banks, creditors of the firm, or to other creditors, as collateral security for the payment of the indebtedness of the firm. On October 25, 1893, during the pendency of the trade between Bender and the firm, an assignment of all book accounts, as shown in the ledger, was made, which was evidenced by posting in or attaching to the ledger the following:

"For value received, we hereby sell, assign, and set over to the First National Bank of Pender all our right,

title, and interest in the within book accounts; same to be held by said bank as collateral security.

"Dated this 25th day of October, 1893.

"WEISER BROTHERS,
"By JAMES WEISER."

And afterwards the book was delivered to the bank. A mortgage had been executed by the firm which covered the opera house block, by its terms securing the payment of three promissory notes of one thousand dollars each, payable in one, two, and three years after date, with interest at the rate of six per cent per annum. The notes were of date October 2, 1893, and payable to Margaret Weiser, the mother of the two partners. James Weiser, one of the partners, testified that he received $1,000 in money from his mother in the year 1891 and gave his individual note evidencing the indebtedness thus created, and that the mortgage just referred to was given by the firm "as collateral security for the note that I owed her individually. I applied it in the business." The mortgage was filed and recorded October 24, 1893. The partners were unmarried and had a furnished room or some rooms in which they lived. On October 24, 1893, a bill of sale was executed, which conveyed, or purported to convey, all their furniture, etc., together with some property of the firm (as stated by James Weiser, all their movable property, aside from what was sold to Bender, excepting probably a few small articles), to one Jacob Weiser, a brother of the members of the firm, who lived in Pennsylvania, and who was not in Pender at the time of the execution of the bill of sale, had no agent there, and it is of the evidence of James Weiser, the apparent spokesman for the firm, that the instrument was executed and recorded without any request or suggestion of the grantee that it be done, and the property covered thereby remained in the possession of the partners and was used by them as it had been prior to the transfer. The consideration expressed in this bill of sale was the sum of $400, of which the one-half was the amount of a note

given for the sum therein expressed, $200, received by James Weiser of his brother, Jacob, at some time prior to the transactions of October, 1893. The other one-half, or $200, it was testified, was the aggregate of smaller sums received by James Weiser of Jacob at different times, and as to which no more definite statement was made or account given. The contract of purchase of the vacant block, or lots, in Pender was said to be in possession of a bank as collateral security to an indebtedness of the firm. There was owing by the firm to the plaintiff herein, October, 1893, the amount of the claim on which this action was based, and on the morning of October 26, 1893, a Mr. Buchanan, an agent of the plaintiff, called at the store, and during the course of a conversation then had with James Weiser was told that "they [the firm] had sold out and got a contract deed for an equity in a farm; that they were not getting any money out of it, and that they had made the deed with the purpose and intention of preventing any of their creditors from running an attachment on their goods and taking them all, so that themselves and other creditors would not get anything; that they were making the deal to prevent that; said he had given a mortgage on the real estate to his mother and a bill of sale to his brother." During the evening of the day that the above statement was made Mr. J. H. McIntosh, of Omaha, attorney for plaintiffs, was in Pender for the purpose of collecting or securing their claim against the firm of Weiser Bros. In company with Mr. Buchanan, he called on the firm and had an interview with the partners, or with James Weiser, representing the firm, and he made then substantially the same statement to them which he had made to Mr. Buchanan in the morning, and which we have quoted herein. On the following morning, October 27, 1893, the attorney and the agent for plaintiffs again saw James Weiser, and he again repeated a portion of the statement made the previous day or evening, coupled with a proposition to sell to the plaintiffs, Kingman & Co., the land which the

firm was getting in the trade with Bender. Mr. McIntosh then said to Weiser: "Very well, I wish you would let me take that in writing with me to Omaha;" to which the answer was, "All right," and pen, ink, and paper were procured and the following was written by plaintiffs' attorney:

"PENDER, NEB., 10th month, 27th day, 1893.

"*To Kingman & Co., Omaha, Neb.*—GENTLEMEN: We have traded our hardware and implement business to one Mr. Bender for an equity in a farm of 294 acres four miles and a half from West Point, in Cuming county. We did this to put our property in such shape that one of our creditors could not jump in with an attachment and get everything and leave nothing for our other creditors or ourselves. We expect to clean up everything within sixty or ninety days. As you are our largest creditor, we make you the offer to assign to you our equity in the land we are getting in consideration of forty dollars an acre, you to have credit for your claim against us and to pay us cash for the balance, you returning, of course, the collateral you hold. We are not in position to have you accept this offer for two or three days yet, and until we have completed the transaction here. Also, we beg to say that this offer is confidential, for if our other creditors should hear of it they would be jumping in and giving us trouble.

"Yours truly, WEISER BROS."

This was handed to Mr. Weiser, who, after reading the same aloud, said, "That is all right; that is just what I said," sat down at a desk and signed the firm name to it, as shown on the copy given above. Evidence was introduced on behalf of defendants in the attachment to show the good faith of all the different transfers made by the firm, and the absence of any fraudulent intent in any of the transactions questioned herein. There was no denial, however, of the statements of James Weiser testified to as having been made to the attorney and agent of plaintiffs.

We have given a somewhat extended summary of some of the important points of the evidence and have made a careful examination of the whole, and from our consideration thereof feel forced to conclude that the findings of the district judge on which he based his order dissolving the attachment were manifestly wrong and not sustained by the evidence. There seems to have been an intention, which is plainly indicated by the evidence of the facts and circumstances, to convey or dispose of the property in such manner as to defraud creditors, to hinder and delay them in the collection of claims or debts against the firm, to place the property beyond the reach of the ordinary processes of the law, and the attachment was fully warranted. (*Kellog v. Richardson*, 19 Fed. Rep., 70; *Robinson Notion Co. v. Ormsby*, 33 Neb., 665.)

It is urged that the written statement was an offer to compromise and not admissible in evidence. It was offered and received on the part of the defendant firm, and they cannot now be heard to complain of its reception in evidence. It is further claimed that it contains admissions made at a time and in such manner that they should not be given any, or if any, very little weight. It is true they were written by the attorney for plaintiffs, but were read by the member of the firm then representing it and signed after he expressed himself as fully satisfied of the correctness of the matters set forth, and in part it but repeated what had been voluntarily declared two or three times by the same party who signed the statement for the firm, and seems entitled to be given credit when viewed in connection with all the facts and circumstances surrounding and attendant upon its making and others which tend to corroborate its statements. The order of the district court dissolving the attachment is reversed and the branch of the cause now before us remanded to the district court for further proceedings.

REVERSED AND REMANDED.

KINGMAN & COMPANY V. WEISER BROTHERS.

FILED JUNE 16, 1896. NO. 6662.

Attachment: FRAUD IN DISPOSING OF PROPERTY: EVIDENCE.

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

James H. McIntosh, for plaintiffs in error.

T. M. Franse and *A. C. Abbott, contra.*

HARRISON, J.

This is a companion case to that of the same title, in which a decision is filed at this time. (*Kingman v. Weiser*, 48 Neb., 834.) This case was submitted at the same time, upon the same evidence, and the decision of that case is applicable to and disposes of this. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

WILLIAM H. DOLAN ET AL. V. ROSA MCLAUGHLIN ET AL.

FILED JUNE 16, 1896. NO. 5901.

1. **Intoxicating Liquors:** ACTION ON SALOON-KEEPERS' BONDS. The conclusions announced in the former opinion in this case, reported in 46 Neb., 449, approved and adhered to, and, having been there stated in the syllabus to the opinion, need not and will not be here restated.
2. ———: ———. The decision in the case of *Curran v. Percival*, 21 Neb., 434, examined and distinguished.

REHEARING of case reported in 46 Neb., 449.

G. M. Lambertson, *F. M. Hall*, and *E. N. Kauffman*, for plaintiffs in error.

Alfred Hazlett, *W. C. Le Hane*, and *Griggs, Rinaker & Bibb*, *contra*.

HARRISON, J.

Rosa McLaughlin, in her own behalf as widow of John McLaughlin, and also for the minor children of John McLaughlin, instituted this action in the district court of Gage county against certain retail liquor dealers and their sureties on the bonds executed as required by the provisions of chapter 50 of the Compiled Statutes, entitled "Liquors." William H. Dolan of plaintiffs in error and the sureties on his bond were not of the original parties to the suit, but subsequently to its commencement were made parties defendants therein. A judgment was rendered in the trial court against all defendants, and William H. Dolan and his bondsmen prosecuted proceedings in error to this court. The case was presented and heard and the determination of it was set forth in an opinion which has been reported in 46 Neb., 449, to which we refer for a statement of the issues and also some of the facts. We need not restate them here. After the opinion referred to was filed a motion for rehearing was made, which was sustained and a rehearing allowed. The case has been the second time argued and submitted. The conclusions reached on the points decided in the former opinion were stated in the syllabus thereto as follows: "Where, in a petition, it was alleged, and the proofs therewith corresponded, against two licensed saloon-keepers and the sureties on their bonds that the surviving members of a family have been deprived of their means of support by the death of the head of the family, which death took place while such head of the family was in a deranged and stupid state, superinduced by periods of intoxication at intervals extending over a period of five months' time,

the last of which period of intoxication had been two weeks after any liquor had been sold, and that to some of the fits of intoxication the principals contributed by sales of liquor, held a misleading error to instruct the jury that 'Where several liquor dealers furnish intoxicating liquor the use of which results in intoxication and damage, each dealer is equally liable, and that, in case one dealer furnishes the first draught while the user thereof is perfectly sober, and the liquor which intensified and completed the intoxication was furnished by other parties, the dealer furnishing the first draught is equally liable with the others for the damage resulting from such intoxication.' In an action for damages against licensed liquor dealers and the sureties on their bonds for loss of support caused by the death of the head of the family alleged to have been brought about by intoxicating liquors sold by such dealers, where there had been introduced evidence tending to show that at least one sale was of a liquid not intoxicating, it was erroneous to instruct the jury that, 'Where it is shown that the person was sold or furnished liquor at a licensed saloon, the presumption is that such liquor was intoxicating.'" The holding of this court as embodied in the first paragraph of the syllabus to the former opinion, and which we have just quoted, is at this time attacked as being contrary to what is and should be the law in the particulars involved. Preliminary to the consideration of the instruction referred to, Commissioner RYAN correctly stated in the former opinion that, "As we understand the petition, the death of John McLaughlin and the subsequent loss of support of his family are the facts from which the damage is claimed to have resulted. It is true that between October 20, 1890, and March 23, 1891, various sales of intoxicating liquors to John McLaughlin were alleged to have been made, but these sales were referred to simply as contributing to his being habitually intoxicated, and perhaps therefrom resulting his diseased condition. There was no claim that between March 23, 1891, and April 6 thereafter, which latter was

the day on which McLaughlin died, there had been sold to him any intoxicating liquors, nor that, in this interim, he had used such liquor. The testimony of attending physicians was that death resulted from a general breaking down of the system caused by the use of too much alcoholic stimulants, and this, as we understand it, was what was alleged in the petition," and after quoting the language of the instruction said in respect to it that "In a proper case the correctness of this instruction would probably be unquestioned. It, however, applied to a case wherein there may have been produced by the contributory sales of different liquor dealers a state of intoxication from, or by reason of which, directly, the damage complained of resulted. The evidence in the case at bar shows that, as early as 1881, John McLaughlin had suffered from delirium tremens; that with the exception of a period of about three years soon thereafter he had habitually, up to the time of his death, indulged in frequent debauches, and that, in consequence, his general health became impaired. We cannot avoid the conclusion that, as applied to the facts of this case, both as pleaded and proved, the above instruction was probably prejudicial to the plaintiffs in error." After again carefully and thoroughly considering the rule stated for the guidance of the jury in the instruction in question, we are forced to the conclusion that the remarks of the writer of the former decision in this case in regard thereto were entirely pertinent and the conclusion reached a true one. The questions submitted to the jury by the instruction as given were in reference to a single intoxication of a person and damages arising therefrom, while the ones to be submitted were of an habitual drunkenness of a person, long continued, and the death of a person after an interval during which no intoxicants were used, whether the death was the result of the use of intoxicating liquors, and if so, whether such, as were proved to have been furnished by any of the defendants, contributed to the production of the result, the death. It is settled that the damages or

loss of means of support of a wife and minor children caused by the death of the husband and father occasioned by the use of intoxicating liquors may be recovered in an action against the liquor sellers who sold or furnished intoxicating liquors to the party whose death resulted from the use thereof and the intoxication produced thereby; but in each case, and as to each party against whom a recovery is had, the necessary elements of a complete cause of action must be present, must appear, and as to what are the necessary facts to be proved in order to recover the jury should be informed. If William H. Dolan sold or furnished intoxicating liquors to John McLaughlin, the use of which contributed in producing his death and the consequent damage to the suing parties, then he and his bondsmen were liable, and it was proper to so state in apt and clear language to the jury; but the instruction given did not so state, was inapplicable to the facts in the case at bar, and well calculated to mislead the jury, and should not have been given. In a case in which the facts and circumstances are as in the case at bar the connection between the sale and furnishing the intoxicating liquor, its use, and the damages, must appear, to warrant a recovery.

The second section of the syllabus of the former opinion is assailed for being in conflict with the rule of law announced on the same subject in the decision of the case of *Curran v. Percival*, 21 Neb., 434. What was decided in that opinion, as stated in the head-notes thereof, was as follows: "The sale of intoxicating liquor in a saloon may be proved by circumstantial evidence, and where the circumstances establish such sale, the jury will be justified in disregarding the positive assertion of the bartender that the liquor sold by him was not intoxicating. An instruction that 'If you shall find from the evidence that the deceased went into the saloon of the defendant, and that the business of the defendant was to sell intoxicating drinks, and that deceased was sober when he went into the saloon and that he came out of the

saloon intoxicated, these facts raise the presumption that such person obtained intoxicating liquor in such saloon, but such presumption may be overcome by proofs and circumstances; and if you shall find from the evidence that deceased did not procure liquor from the defendant that caused him to be intoxicated, or that contributed thereto, you should find for the defendant,' held not erroneous." It needs no comment, nor more than a mere reading, to convince that the doctrine stated in what we have just quoted and the instruction therein set forth and approved are not identical with what was told the jury by the instruction given in the case at bar, and which we have now under consideration, nor that Commissioner RYAN, in his disapproval of the one given as stated in the second paragraph of the syllabus of the former opinion in this case, did not conflict with or overrule what was really decided in *Curran v. Percival.* In the body of the opinion in that case the writer thereof quoted from the opinion in the case of *McDougall v. Giacomini,* 13 Neb., 435, as follows: "Suppose it is shown that a place is a licensed saloon, and that persons go in there sober and come out under the influence of liquor. These facts raise a presumption that such persons obtained intoxicating liquor in the saloon. (*Commonwealth v. Van Stone,* 97 Mass., 548; *Commonwealth v. Kennedy,* 97 Mass., 224.) The business of a saloon-keeper is to sell intoxicating drinks by the glass. If, therefore, the proof shows that he has sold or furnished liquor at his place of business, the presumption would seem to be that such liquor was such as his business required him to keep and furnish to his customers—intoxicating liquors. The fact of intoxicating liquor being furnished by a saloon-keeper may be proved like any other fact." The portion of the foregoing, "If, therefore, the proof shows that he has sold or furnished liquor at his place of business, the presumption would seem to be that such liquor was such as his business required him to keep and furnish to his customers—intoxicating liquors," was *obiter* in each of the cases in which it was

used and to which we have referred. It is without question that the sale of liquors and their intoxicating character may be proved like any other fact and by circumstantial evidence, or inferred from other proved facts and circumstances, and it is doubtless true that if it be proved that a retail dealer in intoxicating liquors has sold or furnished liquors at his place of business to a person to drink, then facts are established which prove, or tend to prove, or from which it might be inferred in the absence of further proof or of anything to the contrary, that the liquor sold or furnished was intoxicating. This, we take it, was what was meant by what was said in the opinions in the 13th and 21st Nebraska Reports, to which we have hereinbefore alluded; but that the foregoing is true does not warrant the giving of an instruction such as was given in the case at bar, where the evidence on the point as to which the instruction purports to be a charge to the jury is of the character it is in this case. In regard to the condition of the evidence on the particular branch of the case under consideration we will quote from the former opinion: "On the trial the proofs were that the greater part of the intoxicating liquors consumed by McLaughlin were sold to him by J. J. Patterson & Co. There were, however, a few instances as to which the testimony was that intoxicating liquors were sold to him in the saloon of William H. Dolan. This was denied by Dolan and his employes when examined as witnesses. Following this was uncontradicted testimony that, in many instances, McLaughlin had been refused whiskey, notwithstanding the fact that he urgently sought to buy and pay for it. Elias N. Whitmarsh, a witness for the plaintiff in the district court, testified that after October 20, 1890, and before 1891 [the date was not more definitely fixed], he saw John McLaughlin at the bar of William H. Dolan drink something, but whether it was water or beer he could not say. This witness said that the glass out of which this drink was taken looked like a seltzer glass, and that the sale

was by Dolan himself. James H. Clapp, one of Dolan's witnesses, testified that, in December, 1890, or January thereafter, he with others was in Dolan's saloon, and that McLaughlin came up with the rest and took something of a light color in a glass, and that when witness asked him what was the matter McLaughlin answered: 'Billy [Dolan], here, is a good boy, but he won't let me have anything but seltzer.'" And to this might have been added more of the same nature or to the same effect. Such being the state of the issues in respect to the kind of liquor obtained at Dolan's saloon, the instruction given was improper and well calculated to mislead the jury; nor does the conclusion in this or the former opinion in any degree conflict with the doctrine announced in the opinion in *Curran v. Percival*, or the rule which resulted from the approval of the instruction stated in the syllabus to that opinion. The judgment of the district court is reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

MCCORMICK HARVESTING MACHINE COMPANY V. JAMES L. CALLEN ET AL.

FILED JUNE 16, 1896. No. 6725.

Conditional Sales: CHATTEL MORTGAGES. A mortgagee of a conditional vendee in possession of chattels is not a purchaser within the meaning of section 26, chapter 32, Compiled Statutes, and the rights of the conditional vendor thereof are prior and paramount to the lien of such mortgagee under his mortgage.

ERROR from the district court of Sherman county. Tried below before HOLCOMB, J.

Nightingale Bros., for plaintiff in error.

J. R. Scott, contra.

HARRISON, J.

On September 8, 1888, the plaintiff made a conditional sale of a mowing machine to J. W. Rose and E. P. Bridges. By the terms of the written contract of sale the title and ownership of the machine were expressly reserved, and remained vested in the seller until such time as a note given as a part of the purchase consideration should be paid in full by the buyers. The plaintiff did not file a copy of the written contract of sale in the office of the clerk of the county wherein the purchasers of the mower resided. October 24, 1889, a chattel mortgage was executed by J. W. Rose in favor of J. L. Callen, in which was included, together with other property, the mowing machine hereinbefore mentioned. During the month of October, 1890, the mortgagee took possession of the mortgaged property, and, it was alleged in plaintiff's petition, converted it to his own use, contrary to the rights of plaintiff and to plaintiff's damage. In an action of conversion in the district court of Sherman county the defendants were successful.

In the petition in error filed in this court it is assigned that the verdict is not sustained by the evidence; that the verdict was contrary to law; and that the trial judge erred in giving instruction numbered 2 of the instructions given on his own motion. The paragraph of the charge referred to was as follows: "The contract or conditional sale of the mowing machine to the witness Rose by the plaintiff, with the possession of the machine being in the hands of said Rose, is by our statute invalid as to the creditors, subsequent purchasers, or mortgagees of said Rose in good faith and without notice of such conditional sale, unless such instrument, or a copy thereof, is filed in the office of the county clerk, which the evidence shows conclusively was not done in this case." The evidence established that the sale of the mower by plaintiff to Rose and Bridges was a conditional one, as pleaded; that subsequent to the sale a mortgage was executed and

delivered to Callen which included the machine in its list of property, and that Callen took the mower. Prior to the enactment of a statutory rule on the subject it was held by this court: "A sale and delivery of goods on condition that the property is not to vest until the purchase money is paid or secured does not pass the title to the vendee until the condition is performed." (See *Aultman v. Mallory*, 5 Neb., 178.) The decision just referred to was of the July, 1876, term of this court, and during the legislative session of 1877 there was passed what is now designated section 26, chapter 32, of the Compiled Statutes, which reads as follows: "That no sale, contract, or lease wherein the transfer of title or ownership of personal property is made to depend upon any condition shall be valid against any purchaser or judgment creditor of the vendee or lessee in actual possession, obtained in pursuance of such sale, contract, or lease, without notice, unless the same be in writing, signed by the vendee or lessee, and a copy thereof filed in the office of the clerk of the county within which such vendee or lessee resides," etc. In the case of *Campbell Printing Press & Mfg. Co. v. Dyer*, 46 Neb., 830, in which the respective rights of the vendor in a conditional sale of chattels and a subsequent lien-holder by virtue of a chattel mortgage made by the vendee were in litigation, the section of the statute just quoted was under consideration, and it was held to have no reference to a mortgagee of chattels in possession of a conditional purchaser, and that the rights of the vendor in the conditional sale were paramount and superior to those of such mortgagee. The doctrine then announced is clearly applicable to the facts in the case at bar and must control the determination of the questions involved, and the consequent disposition of the cause at the present hearing, favorably to the contention of the plaintiff. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

ELIZABETH FITZGERALD V. PETER J. DONOHER ET AL.

FILED JUNE 16, 1896. No. 6712.

1. **Intoxicating Liquors:** SALES: DAMAGES: ACTION AGAINST SALOON-KEEPER: PARTIES. The action which arises in favor of a parent against a retail dealer in intoxicating liquors and his bondsmen, because of the death of a son during minority and the consequent loss, by the parent, of the services of the minor, when such death is occasioned by the use of intoxicating liquors sold or furnished to the minor by the saloon-keeper or someone acting for him, is by virtue of the provisions of chapter 50 of the Compiled Statutes, entitled "Liquors," and not under the provisions of what is termed the "Civil Damage Act." (Compiled Statutes, ch. 21.) The action may be prosecuted in the name of the party entitled to the damages, without the intervention of an administrator of the estate of the deceased.
2. ———: ———: ———: ———. "A poor person dependent for support upon a relative, according to the provisions of chapter 67, Compiled Statutes, may, in his own name and for his own benefit, maintain an action against a vendor of intoxicating drinks, for the loss of such support, caused by the death of such relative, when such death occurs in consequence of the traffic of such vendor in intoxicating drinks, without any action of the county commissioners in that behalf." The decision in the case of *McClay v. Worrall*, 18 Neb., 44, approved and followed.
3. **Parent and Child:** DUTY OF CHILDREN. Under the provisions of chapter 67, Compiled Statutes, the support of a dependent poor parent devolves upon a child or children of any age, if they be possessed of the requisite ability to render such support.

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

Tucker & Walcott, for plaintiff in error.

M. F. Harrington and *E. W. Harney, contra.*

HARRISON, J.

The plaintiff commenced this action in the district court of Cherry county against the defendants, retail liquor dealers, and their bondsmen to recover the damages which she alleged accrued to her by the death of

her son, caused by intoxication produced by liquors sold to him by the saloon-keepers of defendants. It was further pleaded in plaintiff's behalf that the son was a minor, or about eighteen years of age, healthy, energetic, and industrious, and, quoting from the petition, "That this plaintiff was wholly dependent upon the said John Fitzgerald, her minor son, for support and maintenance, and that he was her means of support; that the proceeds of his labor as the manager of her affairs, and producing the means of her support, amounted to about $1,200 per year, which he applied to the support of this plaintiff; * * * that plaintiff and said minor son, now deceased, constituted one family, and that she is without means of support." General demurrers to the petition were filed by the defendants and on hearing were sustained and the action dismissed; hence the error proceedings on the part of plaintiff.

There are two questions presented in the argument of the case here for our determination: First, was the plaintiff, the mother, entitled to recover for the reason that she legally could claim the services of her son during his minority? and second, she being entirely dependent upon him for support, did the duty of furnishing the support devolve upon the son?

It is conceded by counsel for defendants, in the brief filed, that the plaintiff was entitled to the services of her son, he being a minor; but it is contended that if collected by or for her, it could only be by an administrator of the estate of her deceased son, under the provisions of what is termed the "Civil Damage Act." (Compiled Statutes, ch. 21.) This position is untenable. The right of recovery under the enactment to which we have just alluded would arise alone from the party standing in such relationship to the deceased as to be entitled to his estate, or a share of it, by virtue of heirship. Under this statutory law in relation to damages the right of any party thereto is dependent upon the degree of kinship to the deceased, which must be such as to confer the right to in-

herit the estate. (*Warren v. Englehart*, 13 Neb., 283.) But in the case at bar it is entirely different. In chapter 50 of the Compiled Statutes, entitled "Liquors," it is provided that a person licensed to sell liquors shall pay all damages that the community or individuals may sustain in consequence of the traffic, and in this action the plaintiff seeks to recover that to which she was entitled, the services of her son, a minor, not as his heir or as a part of his estate, but because of her parental right to his services, and it is an action arising under the provisions of right to damages arising under chapter 21, Compiled Statutes of 1895.

It is further claimed that the plaintiff's claim to support from her son must have been referable to the provisions of the act entitled "Paupers," chapter 67, Compiled Statutes, section 1 of which is as follows: "Every poor person who shall be unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy, or other unavoidable cause shall be supported by the father, grandfather, mother, grandmother, children, grandchildren, brothers, or sisters of such poor person, if they or either of them be of sufficient ability; and every person who shall refuse to support his or her father, grandfather, mother, grandmother, child, or grand-child, sister, or brother, when directed by the county commissioners of the county where such poor person shall be found, whether such relative shall reside in the same county or not, shall forfeit and pay to the county commissioners, for the use of the poor of their county, such sum as may be by the county commissioners adjudged adequate and proper to be paid, not exceeding ten dollars per week for each and every week for which they or either of them shall fail or refuse, to be recovered in the name of the county commissioners, for the use of the poor aforesaid, before a justice of the peace or any other court having jurisdiction; *Provided*, That whenever any persons become paupers from intemperance or any other bad conduct, they shall not be entitled to support from any rela-

tive except parent or child; *And provided further*, That such poor person entitled to support from any such relative may bring an action against such relative for support, in his or her own name and behalf," and that under this no duty to furnish support for a parent or relative would or could arise as against a child during its minority. In the case of *McClay v. Worrall*, 18 Neb., 44, it was announced by this court: "A poor person dependent for support upon a relative, according to the provisions of chapter 67, Compiled Statutes, may, in his own name and for his own benefit, maintain an action against the vendor of intoxicating drinks for the loss of such support, caused by the death of such relative, when such death occurs in consequence of the traffic of such vendor in intoxicating drinks, without any action of the county commissioners in that behalf," and in the body of the opinion it was observed: "The case at bar was brought under the provisions of chapter 50, and the plaintiff need only invoke the provisions of chapter 67 for the purpose of establishing one link in the chain of law constituting her right to recover, to-wit, the legal obligation resting upon a son, of whatever age, being of sufficient ability, to support his aged, infirm, and destitute mother. * * * The foundation of the plaintiff's right to damages against the plaintiffs in error is that by means and in consequence of their traffic she has sustained the loss of that support which the law of the state, as well as the law of nature, gave her a right to, at the hand of her son. *Non constat* that but for his untimely death in consequence of such traffic she would ever have occasion to invoke the laws of the state against him for such support. It may be and is granted that in an action under the proviso above quoted by one relative against another for support the ability of such relative would have to be alleged and proved, and it is equally true that in the case at bar the plaintiff must have alleged and proven facts sufficient to establish a legal and reasonable expectancy that but for his death her son would have continued in the future, as

in the past, to possess the ability to support her. This she has done, and none the less so because his ability as proved consisted less in accumulated property than in strong arms and a willing heart." It is contended that the party deceased, through the death of whom the action in the case cited arose, was not a minor, but was twenty-three years of age at the time of his decease, and hence the doctrine stated in the decision is not applicable in the case at bar. There is no exception in this regard in chapter 67. It will be noticed by an examination of its language that all persons of the requisite kinship may be charged with the support of their relatives designated therein where "they or either of them be of sufficient ability." The dependent person, the relative, as set forth in the law, and possessed of sufficient ability, are the requirements of the statute. Whether the provisions are in all respects wise and equitable, or may not be abused, or in some supposable instances work seeming injustice, are questions which it is not within our province to inquire into or determine. The plaintiff was entitled, as a parent, to the services of her son, and, if he was of sufficient ability, was, if dependent, entitled to be supported by him, and under chapter 50 of our statutes, insomuch as it refers to damages accruing to individuals by reason of sales made by parties engaging in the business licensed under other and further provisions of the chapter, a right of action arose in her favor, if deprived of her means of support by reason of her son's death, occasioned by sales of intoxicating liquors to him by the principals in the bonds sued upon, the saloon-keepers, or at their respective places of business by any one authorized to make the sales. It follows that the trial judge erred in sustaining the demurrers, and the judgment consequent thereon must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

FRANCIS C. FULLER V. DENNIS CUNNINGHAM.

FILED JUNE 16, 1896. No. 6753.

1. **Review**: CONFLICTING EVIDENCE. A verdict not clearly against the weight of the evidence will not be disturbed, though there may have been sufficient evidence to support a contrary verdict.
2. ———: QUESTIONS NOT RAISED BELOW. Questions not raised before and considered by the trial court on the hearing of a case will not be available when raised in this court.
3. ———: LAW OF THE CASE. Decisions upon points involved in a case, made by this court on a former hearing, become the law of the case, and if the cause be brought again to this court they will not, as a rule, be re-examined, or the rulings then made reversed, unless manifestly incorrect.
4. **Instructions.** Objections to instructions examined, and *held* not well taken, and instruction requested *held* properly refused.

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

C. A. Baldwin and *Weaver & Giller*, for plaintiff in error.

Cowin & McHugh, contra.

HARRISON, J.

Dennis Cunningham commenced this, an action of replevin, in the district court of Douglas county against Francis C. Fuller to recover the possession of a frame building in South Omaha, in which there had been and was being conducted a retail liquor business or saloon; also, to recover the bar and fixtures, all furniture, and other articles in use in the building and business. There was a trial of the issues and judgment for defendant, which in error proceedings in this court was reversed and the cause remanded to the trial court for further proceedings. For a report of the former decision see 35 Neb., 58. A second trial in the district court resulted in a verdict and judgment for the plaintiff, hence the pre-

sentation of the case here on error on behalf of the defendant Francis C. Fuller. Cunningham's claim to ownership and right of possession of this property in controversy was predicated upon an alleged purchase of it by him during the month of October, 1887, of Groner & Yates, a firm then in the retail liquor business in the building. Fuller's rights in the premises were grounded in an alleged purchase of the property from George W. Duncan, who asserted a sale to him by Groner & Yates of the same date as the alleged purchase by Cunningham, or that the transactions which were stated to constitute a purchase by Cunningham in reality made a sale to Duncan.

It is insisted in the argument in the brief filed for Fuller that the verdict was not supported by the evidence, and was contrary to the evidence. We have carefully examined and considered the evidence, and while doubtless it would sustain a verdict directly to the contrary of the one returned by the jury, it was sufficient to support the determination of the issues made by the jury as embodied in its verdict, and, agreeable to the established rule, the verdict will not be disturbed. (*Kelly v. Watts*, 33 Neb., 729; *Conner v. Draper*, 34 Neb., 871; *Reed v. Davis Milling Co.*, 37 Neb., 391; *Wagner v. Steffin*, 38 Neb., 392; *Mills v. Leavitt*, 38 Neb., 580.)

It is argued that the court erred in admitting certain evidence. Of the admission of this evidence there was no complaint, either generally or specifically, in the motion for a new trial, and the question presented, not having been raised by such motion, will not be considered at this time. (*Becker v. Simonds*, 33 Neb., 680.)

At the former hearing of the case in this court it was of the errors assigned that the trial court erred in refusing to give a certain instruction quoted in the opinion then announced, and it was held that the trial court erred in refusing to give the instruction. Conformably to that holding of this court, the trial court, on the second trial of the cause, gave the instruction alluded to,

and its giving is now urged as erroneous. What was said in the former decision in regard to the instruction under consideration became the law of the case, and the question should not, and will not, ordinarily, in a second hearing in this court, be re-examined, or the ruling then made reversed, unless manifestly incorrect. (*City of Hastings v. Foxworthy*, 45 Neb., 676.) Furthermore, the instruction in question was proper and its giving not erroneous; hence we will adhere to the former ruling of the court in respect to it.

It is assigned and urged that the trial court erred in refusing to give an instruction prepared and tendered by the counsel for defendant. The instruction, the refusal to give which is the burden of this complaint, did not embody in its statements any theory of the case advanced or urged by either party to the cause, it was inapplicable to the facts developed in evidence, and had it been given and a verdict returned by the jury responsive to its directions, it must, on motion, have been set aside as unsupported by the evidence. The judgment of the trial court is

AFFIRMED.

CHARLES BEST V. MALCOM STEWART.

FILED JUNE 16, 1896. No. 6658.

1. **Justice of the Peace: ENTRY OF JUDGMENT.** "Upon a verdict, the justice must immediately render judgment accordingly. When the trial is by the justice, judgment must be entered immediately after the close of the trial, if the defendant has been arrested or his property attached; in other cases it must be entered either at the close of the trial, or if the justice then desire further time to consider, on or by the fourth day thereafter, both days inclusive." (Code of Civil Procedure, sec 1002.)

2. ———: ———: **COUNTY JUDGE.** The provisions of the section just quoted are applicable to a county judge when exercising the ordinary powers and jurisdiction of a justice of the peace. (See Compiled Statutes, ch. 20, sec. 2.)

3. **Appeal to District Court:** ORDER REMANDING CAUSE. In an appeal from the judgment of the county judge, in an action wherein he exercised the ordinary powers and jurisdiction of a justice of the peace, a motion was made in the district court to dismiss the appeal for the reason that the judgment was one for costs alone and hence not appealable. The motion was sustained and the district court made an order remanding the cause to the county court for final judgment. *Held*, An unauthorized order on the part of the district court and hence ineffective.

4. ———: JURISDICTION: ORDER IN APPELLATE COURT. The county judge, acting under the order of the district court, attempted to render a judgment or to amend its former one, and from this action an appeal was taken, of which a motion to dismiss on the part of defendant, was overruled. The defendant did not appear further and his default was entered and judgment taken against him. *Held*, That the judgment was void; that the county judge had no jurisdiction when he rendered the judgment, and the district court acquired none by the attempted appeal.

5. **Replevin:** PLEADING AND PROOF. Under a general denial, in an action of replevin, the defendant may introduce any matter which is a defense to the cause of action of plaintiff.

6. ———: ———: VALUE OF PROPERTY. When the value of the property is alleged in the petition in an action of replevin, and such allegation is specifically admitted in the answer, no proof of the value of the property is necessary.

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

L. C. Chapman, for plaintiff in error.

T. Appelget and *J. Hall Hitchcock, contra.*

HARRISON, J.

The plaintiff commenced this, an action of replevin, in the district court of Johnson county against the defendant, the coroner of said county, to recover the possession of certain personal property described in the pleadings. The petition alleged ownership and right of immediate possession, and was further framed seemingly with the idea of basing the claim to recover the possession of the property on its being exempt from process, but if this idea ever obtained, it was abandoned during or before

the trial. The property was alleged in the petition to be of the value of $500. Defendant filed an answer, a denial of all statements of the petition except that of value of the property, which was admitted. There was in the trial court a verdict and judgment for defendant, he being awarded a return of the property, or, in lieu thereof, to recover the value of his interest therein, assessed at the sum of $346.02. The property in controversy was taken possession of by the coroner under levy of two executions issued in favor of a party who was the sheriff of the county, and the coroner's defense was a justification under the writs.

It is urged on behalf of plaintiff that one of the executions was issued to enforce collection of a void judgment, and hence furnished no authority to, or justification for, the officer taking the property. It appears that the judgment creditor commenced an action against the plaintiff herein in the county court of Johnson county to recover the sum of $100, alleged to be due the creditor as rent for the use and occupancy by the other party of a tract of land belonging to the creditor, and the issues in that case were submitted to the county judge on a stipulated statement of the facts; that the county judge made a finding in favor of Best, the plaintiff in the case at bar, but failed to render any other judgment than one for costs. From this judgment the creditor took an appeal. In the district court a motion was made in behalf of Best to dismiss the appeal, which, on hearing, was sustained and an order was made that the case be remanded to the county court for final judgment, and this order was subsequently transmitted to the county judge. The entry of the judgment for costs by the county judge was of date December 6, 1889. The hearing of the motion to dismiss the appeal in the district court and entry of the order made therein was of date April 2, 1890, and the county judge received a copy of the order from the clerk of the district court on May 10, 1890, and on that day attempted to render a judgment, or did enter one on his docket.

Whether it was another judgment for costs or a judgment for dismissal of the action and for costs does not very clearly appear from the record that was taken by the creditor to the district court in an attempted second appeal, where he was again met by a motion to dismiss the appeal, which, on hearing, was overruled. His motion to dismiss the appeal being overruled, the debtor, Best, did not further appear and was defaulted, a jury impaneled, proof made, and a verdict and judgment given favorable to the creditor in the sum of $100, and to enforce this judgment one of the executions was issued, by virtue of which the coroner attempted, in the case at bar, to justify his seizure of the property involved. The judge of the district court had no power, when he determined and sustained the motion to dismiss the first appeal, to remand the cause to the county court with an order to such court to amend its judgment or to render judgment. The case being one in which the county judge was exercising the ordinary powers and jurisdiction of a justice of the peace, the proceedings therein would be governed by the provisions of the Code of Civil Procedure relative to justices of the peace. The time had expired within which the county judge could render any judgment in the cause. (Code of Civil Procedure, sec. 1002. See sec. 2, ch. 20, Compiled Statutes.) Consequently he had no jurisdiction to render the second judgment and the district court acquired none by the appeal, and its judgment rendered in the case was without jurisdiction and void; and the execution issued to enforce the judgment for $100 and interest and costs afforded no justification for the coroner in taking the property, or defense to this action. There was an execution on a judgment of $185, against which nothing is alleged or argued. This last mentioned judgment was, so far as we are informed in this case, valid, and the execution issued for its enforcement furnished good matter of defense for the officer who levied it on the property. The evidence to establish the defense of justification by virtue of the writs of execution was competent

in an action of replevin under the general denial. (*Richardson v. Steele*, 9 Neb., 483; *Merrill v. Wedgewood*, 25 Neb., 283.)

It is contended that as there was no proof of the value of the property in controversy, there could be no finding of the value. The petition alleged its value and the answer specifically admitted such allegation. This was sufficient to establish, there being no proof on the subject, that the property was of the value claimed in the petition. Section 134 of the Code of Civil Procedure, to which we are cited, is to the effect that allegations in a petition of value or of amount of damage shall not be considered as true without proof because not controverted or denied in the answer. To the same effect is the decision in the case of *Campbell v. Brosius*, 36 Neb., 792, to which we are cited by counsel for plaintiff in support of his position in this contention. It follows from the foregoing conclusions that the finding of the jury as to the value of defendant's interest in the property, also the judgment of the court based on the verdict, were, each of them, erroneous to the extent it included the amount of the judgment in the sum of $100 and its accompanying interest and costs, to-wit, $132.50. The defendant may file a remittitur of this last named sum within forty days, and if he does so the judgment will be affirmed, and if not it will be reversed and the cause remanded.

JUDGMENT ACCORDINGLY.

GERMAN NATIONAL BANK OF BEATRICE V. STEPHEN D. TERRY ET AL.

FILED JUNE 16, 1896. No. 6677.

Bill of Exceptions: FAILURE OF CLERK TO AUTHENTICATE. A bill of exceptions cannot be considered on error or appeal where it is not authenticated by certificate of the clerk of the trial court.

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

Murphy & Le Hane, for plaintiff in error.

L. M. Pemberton, contra.

NORVAL, J.

This was an action in the nature of a creditors' bill. Upon the trial the court found the issues in favor of the defendants. A motion for a new trial was filed, and from an order overruling the same, error is prosecuted to this court.

The sole question in the case is one of fact and that cannot be considered by us, since the document attached to the transcript purporting to be a bill of exceptions is not in any manner authenticated by certificate of the clerk of the district court. A citation of the decisions of this court which sustain the proposition would be superfluous. The decree is

AFFIRMED.

CHARLES F. SCHRODER, APPELLEE, V. LOUISA SCHRADER ET AL., APPELLANTS.

FILED JUNE 16, 1896. No. 6749.

Partition of Half-Section of Land Into Four Equal Parts: DIVISION AMONG WIDOW AND THREE CHILDREN: APPEAL BY WIDOW AND BY ONE OF THE HEIRS. Evidence in the case examined, and *held* to sustain the findings and decree.

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

H. W. Short, for appellants.

R. D. Sutherland, contra.

NORVAL, J.

On the 27th day of October, 1879, one August Schroder died intestate, leaving surviving him, a wife and three children. At the time of his death he was seized in fee-simple of 320 acres of land in Nuckolls county. The widow, Louisa Schroder, has since married one W. F. Schrader. This was an action by Charles F. Schroder, one of the heirs of the deceased, for a partition of said real estate. The court at the hearing found that said Louisa, as the widow of said deceased, was entitled to a dower interest in said premises, and, subject thereto, each of the three children, as heirs of said August Schroder, is the owner of the undivided one-third part of said real estate. A decree was entered confirming the shares of the respective parties, and that partition of the land be accordingly made. Referees were appointed to make such partition, who assigned to the widow, as her dower interest, the homestead eighty-acre tract, and allowed eighty acres of land to each of the three children. From an order confirming the report of the referees the widow and one Mary L. Schroder, one of the heirs, appeal.

The sole question is whether a fair and equitable division of the property has been made. The record discloses that the referees called upon the widow before the division was made and informed her of the manner of the partition and the tract they proposed to allot to each, and that she expressed herself as being entirely satisfied. While the eighty acres assigned to her constitutes only one-fourth of the acreage of the entire premises, there is evidence to show that it equals in value the one-third of the whole 320 acres. The part set off to her as dower being equal in value to one-third of the lands, she has no just cause to complain of the division.

It is claimed that the eighty acres allotted to Mary L. Schroder is rough and inferior land, not exceeding in value $1,000, while each of the tracts set off to the other two heirs is choice, smooth land and more valuable. Nu-

merous witnesses were examined upon this branch of the case, and the evidence adduced is very conflicting, but the preponderance of the testimony tends to establish that the tract set off to Mary L. Schroder has at least thirty acres of good farming land and the remainder is covered with a heavy growth of hardwood timber, capable of making 2,000 cords of wood; that the entire eighty acres is fully as valuable as either of the tracts assigned to the other children, and that no fairer or more equitable partition of the premises could have been made. The decree is accordingly

AFFIRMED.

GENEVA NATIONAL BANK V. SILAS BAILOR ET AL.

FILED JUNE 16, 1896. No. 6638.

1. **Attachment**: MOTION TO DISSOLVE: BURDEN OF PROOF. Where the facts stated in an affidavit for an attachment are denied on a motion to dissolve, the burden is cast upon the plaintiff to sustain his charges by proof.
2. ———: ———: REVIEW. An order discharging an attachment, made upon conflicting evidence, will not be disturbed by a reviewing court, unless the decision is clearly and manifestly wrong.
3. ———: EVIDENCE OF FRAUD. Evidence examined, and *held* that it fails to show that the defendant fraudulently contracted the indebtedness for which this action was instituted.
4. ———: ———. *Young v. Cooper*, 12 Neb., 610, distinguished.

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

F. B. Donisthorpe, for plaintiff in error.

Ong & Jensen and *Charles H. Sloan*, *contra*.

NORVAL, J.

The Geneva National Bank brought this action in the court below against Silas Bailor and A. Bailor upon

three promissory notes aggregating the sum of $2,840, besides interest. On the same day an affidavit for an attachment was filed, and an order of attachment was issued, which was returned without any property being seized. An affidavit in garnishment was filed by the bank, and notice or summons in garnishment was served upon Arthur Atherton, James Kimbrough, and the Citizens Bank. The latter made no disclosure, and the answer of Atherton revealed that he was indebted to the defendant, Silas Bailor, in the sum of $2,600, or thereabouts. A motion was filed to dissolve the attachment and garnishment proceedings for the reason the allegations of the attachment affidavit were untrue, which motion was sustained, and this ruling is the only question before us for review.

The affidavit for attachment was made by A. O. Taylor, cashier of plaintiff's bank, and sets up four grounds:

1. The defendant, Silas Bailor, is about to remove his property, or a part thereof, out of the jurisdiction of the court, with the intent of defrauding his creditors.

2. That he is about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors.

3. That he has assigned, removed, or disposed, or is about to dispose of, his property, with the like fraudulent intent.

4. That the debt for which suit was brought was fraudulently contracted or incurred.

The record reveals that the motion to discharge was heard upon proofs in the form of affidavits, consisting of the affidavit of Silas Bailor filed in support of his motion, and the affidavit of A. O. Taylor, offered by plaintiff in resistance thereof. The defendant, in his motion and affidavit, expressly and specifically denied each averment of fraud contained in the original affidavit on which the attachment was obtained. The burden, therefore, was upon the plaintiff to sustain some one of the grounds of attachment by a preponderance of the evidence.

(*Dolan v. Armstrong*, 35 Neb., 339; *Olds Wagon Co. v. Benedict*, 25 Neb., 375; *Steele v. Dodd*, 14 Neb., 496.) The affidavit of Taylor read on the hearing of the motion in some respects tends to prove the facts justifying the issuance of the attachment stated in his original affidavit made for the purpose, but all charges of fraud having been denied by the defendant under oath, it cannot be said that the finding and judgment are unsupported by the evidence, or are clearly and manifestly against the weight thereof. The decision being based upon conflicting evidence, the order sustaining the attachment on that ground alone should be upheld. (*Mayer v. Zingre*, 18 Neb., 458; *Johnson v. Steele*, 23 Neb., 82; *Smith v. Boyer*, 35 Neb., 46.) With these observations we might dismiss a further consideration of the case, but as counsel has so strenuously insisted that the debt was fraudulently contracted by the defendant, we will briefly notice that argument.

It appears that Silas Bailor, in 1893, sold his farm to Arthur Atherton, the garnishee herein, a written contract to that effect at the time being entered into. By the terms of the agreement, between $2,000 and $3,000 of the consideration was payable on August 1, 1893. At the time the contract of sale was made Bailor was indebted to plaintiff for money borrowed. He applied to the bank in April, 1893, for a further loan, and for an extension of time of payment on the amount then owing by him to the bank. The loan was accordingly made, and an extension of time of payment of his existing indebtedness was granted. Other loans and extensions were afterwards made Bailor by the bank, which are covered by the notes in suit. The affidavit of Taylor, in addition to the foregoing, states, in effect, that each loan and extension was obtained on the stipulation of Bailor that he would apply the proceeds of the sale of the farm in liquidation of his entire indebtedness to the bank; that subsequently the defendant, in violation of his said agreement, contracted with the Citizens Bank of Geneva to pay the pro-

ceeds of the sale of the farm to liquidate his indebtedness to said bank, although such debt was amply and fully secured. The affidavit of Taylor also contains statements of matters transpiring since the attachment herein was issued, but they are wholly immaterial and foreign to the present inquiry. The important question is whether any grounds for attachment existed at the time the writ was issued, and not since. The affidavit of Taylor, viewed in its most favorable light, fails to show that the debt was fraudulently contracted. Bailor is not charged with misstating a single material fact. Atherton was owing him as he represented. It is true, Bailor agreed to turn over the proceeds of the place to the plaintiff, but that did not constitute a representation of an existing matter or fact, but was merely a promise of the performance of an act in the future, and insufficient whereon to base a charge of fraud. The failure of Bailor to apply the unpaid purchase price of the land on the plaintiff's claim was, at most, a breach of contract, and constituted no ground for the suing of an attachment. The case of *Young v. Cooper*, 12 Neb., 610, cited by plaintiff, is not applicable to the facts before us. There a commission firm in Chicago advanced to the defendant $2,000 on representations of the latter that they had purchased from the former 125 hogs and would have 200 by Saturday night, when, as a matter of fact, those bought had not been purchased for plaintiffs. There was a false representation of a material fact as to the 125 hogs. No significance was placed in that case upon the statement of the number of hogs to be subsequently purchased. In the case at bar the evidence fails to show a single misstatement as to an existing material fact; hence the charge that the debt was fraudulently contracted falls to the ground. The judgment is

AFFIRMED.

STATE OF NEBRASKA, EX REL. FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, V. EUGENE MOORE, AUDITOR OF PUBLIC ACCOUNTS.

FILED JUNE 16, 1896. No. 8372.

1. **Statutes:** AMENDMENTS: CONSTITUTIONAL LAW. It is only where an act of the legislature is incomplete in itself, but manifestly amendatory of some existing statute to which it does not refer, that it is within the inhibition of the constitutional provision that "no law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed." (Constitution, art. 3, sec. 11.) If the act is complete in itself it does not violate said provision.

2. ———: ———: ———: INSURANCE. The act of the legislature approved March 30, 1891, entitled "An act to authorize the organization of mutual insurance companies" (Session Laws, 1891, p. 272, ch. 33), is not inimical to said clause of section 11 of article 3 of the constitution, it being an independent and complete law of itself, and not amendatory of a prior statute.

3. ———: TITLES OF ACTS. *Held*, That said act contains but a single subject of legislation, which is fairly expressed in the title.

4. ———: REPEAL BY IMPLICATION. It is only where two statutes on the same subject are so repugnant to each other that both cannot be enforced the last one enacted will supersede the former, and repeal it by implication.

5. ———: UNCONSTITUTIONAL PROVISIONS: VALIDITY OF PORTIONS OF ACT. Where a statute contains provisions which are unconstitutional, if the valid and invalid are not so connected as to be incapable of separation, and the valid portion is a complete act and not dependent upon the part that is void, the latter alone will be disregarded and the rest sustained, if it is manifest that the void part was not an inducement to the legislature to pass the part which is valid.

6. **Insurance:** PREMIUMS: PAYMENT IN CASH: CONSTRUCTION OF STATUTE. The clause of section 8 of the said act of March 30, 1891, which declares that each policy holder shall, "at the time of effecting the insurance, pay such percentage in cash and such other charges as may be required by the rules and by-laws of the company" (Session Laws, 1891, p. 274, ch. 33, sec. 8), construed, and *held* that the word "cash," in the connection employed, means current money, and that the amount, as well as whether any advance payments shall be made by the insured, depends alone upon the rules and by-laws of the company.

7. ———: ———: ———. In case the rules and by-laws provide for the payment in money of a membership fee or other charge at the time the insurance is written, the same must be paid in advance in cash, and not by accepting in lieu thereof the promissory note of the policy holder.

ORIGINAL application for *mandamus* to require the auditor of public accounts to issue a certificate authorizing the relator to transact a mutual insurance business in the state of Nebraska. *Writ denied.*

The opinion contains a statement of the case.

F. Martin, Thomas Darnall, and *Lamb & Adams,* for relator:

If an act of the legislature is complete within itself it must stand, though it may be in conflict with former statutes and may so operate on prior laws as to materially change or modify them. (*State v. Page,* 12 Neb., 386; *Smails v. White,* 4 Neb., 353; *Brome v. Cuming County,* 31 Neb., 362; *State v. Benton,* 33 Neb., 823; *State v. Bemis,* 45 Neb., 724.)

All that the law requires is that the amendatory statute shall be definite and certain as to the statute amended, and germane to the title of the original act. (*State v. Babcock,* 23 Neb., 128; *State v. Bemis,* 45 Neb., 724.)

The act does not express more than is embodied in the title. (*Paxton v. Farmers & Merchants Irrigation & Land Co.,* 45 Neb., 884; *State v. Ream,* 16 Neb., 683.)

The auditor had no authority to investigate, in a public manner, the acts and conduct of relator with a view of revoking its authority to do business. That prerogative is exclusively within a court of competent jurisdiction. (*Stout v. Zulick,* 7 Atl. Rep. [N. J.], 362; *Greenbrier Lumber Co. v. Ward,* 3 S. E. Rep. [W. Va.], 227; *In re New York Elevated R. Co.,* 70 N. Y., 327; *Leslie v. Lorillard,* 18 N. E. Rep. [N. Y.], 363; *City of South Omaha v. Taxpayers' League,* 42 Neb., 671.)

Reference is also made to the following cases: *State v.*

Lancaster County, 17 Neb., 85; *State v. Hurds*, 19 Neb., 323; *Muldoon v. Levi*, 25 Neb., 457.

A. S. Churchill, Attorney General, George A. Day, Deputy Attorney General, and *H. C. Brome*, for respondent.

Charles O. Whedon, contending that the act of March 30, 1891, authorizing the organization of mutual insurance companies, is unconstitutional, cited the following cases: *Ryan v. State*, 5 Neb., 276; *Lancaster County v. Hoagland*, 8 Neb., 36; *City of South Omaha v. Taxpayers' League*, 42 Neb., 678; *Jones v. Davis*, 6 Neb., 33; *State v. Page*, 12 Neb., 386; *Herold v. State*, 21 Neb., 50; *Lowe v. Rees Printing Co.*, 41 Neb., 127; *Trumble v. Trumble*, 37 Neb., 340; Cooley, Constitutional Limitations [5th ed.], 486.

NORVAL, J.

Relator is a mutual insurance company incorporated under and by virtue of the provisions of the act of the legislature entitled "An act to authorize the organization of mutual insurance companies," approved March 30, 1891. (Session Laws, 1891, p. 272, ch. 33.) It has been doing a general mutual insurance business in this state for more than four years, has a membership of about 4,500, and is carrying insurance of more than $13,000,000. On the 15th day of January, 1896, relator filed with the respondent, auditor of public accounts, an annual statement of its business for the year ending December 31, 1895, and on February 1, 1896, and at various times since said date, it has requested and demanded that respondent issue to relator a certificate authorizing it to do a mutual insurance business in this state. Respondent having refused to comply with said request, this action was instituted to require him to issue to relator a certificate of authority to transact business. Two matters are presented by the record for consideration: First—The constitutionality of the act under which relator was incorporated. Second—Has relator complied with that part of section 8 of said

act which provides that members of the company shall, "at the time of effecting the insurance, pay such percentage in cash and such other charges as may be required by the rules and by-laws of the company"?

It is contended that the act of 1891, chapter 33 of the laws of that year, is in contravention of that clause of section 11, article 3, of the constitution which declares that "no law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed." This constitutional provision has been frequently before this court for consideration, and it is a rule well settled that where an act of the legislature is not complete in itself, but is amendatory of a former law to which it does not refer, it is within the constitutional inhibition quoted above. In other words, the fundamental law of the state requires all the parts of an amended law to be incorporated in the act, and the old law so amended to be repealed. If said constitutional provision is disregarded or not complied with in the amendment of a prior act, the new law is void. (*Smails v. White*, 4 Neb., 353; *Ryan v. State*, 5 Neb., 276; *Lancaster County v. Hoagland*, 8 Neb., 38; *Sovereign v. State*, 7 Neb., 409; *In re House Roll 284*, 31 Neb., 505; *Stricklett v. State*, 31 Neb., 674; *City of South Omaha v. Taxpayers' League*, 42 Neb., 671.) It is also firmly established in this state by a long line of decisions that an act complete in itself is not inimical to said constitutional provision, although such act may be repugnant to, or in conflict with, a prior law, which is not referred to nor in express terms repealed by the later act. In such case the earlier statute will be construed to be repealed by implication. (*Smails v. White*, 4 Neb., 353; *Jones v. Davis*, 6 Neb., 33; *State v. Maccuaig*, 8 Neb., 215; *State v. Whittemore*, 12 Neb., 252; *State v. Page*, 12 Neb., 386; *State v. Ream*, 16 Neb., 681; *Ballou v. Black*, 17 Neb., 389; *Herold v. State*, 21 Neb., 50; *State v. Arnold*, 31 Neb., 75; *Brome v. Cuming County*, 31 Neb., 362; *State v. Benton*, 33 Neb., 823; *State v. Benis*, 45 Neb., 724.)

The rule last above stated is not assailed as being unsound, but it is argued that it is not applicable here, since the law under consideration contains no specific or general repealing clause. That it does not purport to repeal any previous enacted statute in conflict therewith is not an important consideration. Its failure to do so did not make the act incomplete, as suggested by counsel. All prior laws conflicting with the act of 1891 were as effectually repealed by implication as though said act had contained a specific or general repealing provision. In some of the cases above cited statutes were upheld, although some of their provisions were repugnant to existing laws upon the same subject and no repealing clauses were inserted. The act of 1891, under which relator was organized and incorporated, consists of nineteen sections, some of which embody the same subject of legislation at that time contained in chapter 43, Compiled Statutes, entitled "Insurance Companies," and there is an apparent, if not a real, conflict between the provisions of the two laws. Thus, by section 1 of the act of 1891 any number of persons, not less than twenty, residing in the state, who collectively shall own property of the value of $20,000 or over, which they desire to have insured, are authorized to organize a mutual insurance company, while section 3 of said chapter 43 requires at least two hundred persons to form an insurance company on the mutual plan. The mode of organization, as well as the manner of conducting the business, is prescribed in each act, and in many essential particulars the two enactments are contradictory; but in so far as they do conflict, if both laws cannot stand, the provisions of the older act must yield to the latest expressions of the legislative will. The act of 1891 purports to be and it is an independent and complete law within itself, not amendatory of, nor in any manner depending upon, any other statute, and, therefore, under the authorities cited, is not inimical to the constitutional provision quoted above. Said chapter 43, prior to 1891, related to different kinds of insurance companies, among

others, fire and life, stock companies as well as those organized upon the mutual plan, while the act under review deals with mutual companies alone, and authorizes their organization upon terms and conditions different from those specified in said chapter 43, yet it does not follow that the provisions of the old law on the subject of mutual insurance were repealed or superseded by the subsequent statute. Obviously it was the intention of the lawmakers to authorize the formation of two distinct classes of mutual insurance companies, with dissimilar powers conferred and restrictions imposed. The prior law, as already suggested, permits not less than two hundred persons to organize such a company, and the act of 1891 authorizes the formation of companies for mutual insurance by any number of persons not less than twenty. The mode and manner of transacting the business of insurance are differently prescribed by each law, yet it is not discernible why both statutes may not be sustained, and companies be formed for mutual insurance under either. The legislature, by separate and distinct enactments, has provided for the incorporation of cities of various classes. Thus, cities having a population of eighty thousand or more may incorporate as metropolitan cities; municipalities possessing between 25,000 and 100,000 inhabitants are known as cities of the first class; cities of the second class, with a less number of inhabitants, are likewise, also, provided for. The laws relating to the incorporation of the several classes of cities were passed at different times, and distinct powers were given by each enactment. The number of inhabitants generally determines the form of government. If the said act of 1891 is unconstitutional upon the grounds urged, then for the same reason more than one of the several city charters must fall to the ground. A construction which must lead to such consequence should not be adopted unless unavoidable. The conclusion is irresistible that the older enactment relating to mutual insurance companies is not repealed by the subsequent act upon the same subject of legislation.

It is insisted that the act under consideration conflicts with the constitutional provision that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title." (Constitution, art. 3, sec. 11.) An inspection of the entire act discloses that it has but one general object, contains but one subject of legislation, and that is fairly expressed by its title. It is not obnoxious to the constitutional provision quoted. (*White v. City of Lincoln*, 5 Neb., 505; *Hamlin v. Meadville*, 6 Neb., 227; *State v. Ream;* 16 Neb., 681.)

Another contention is that section 11 of the law under consideration is invalid because it provides for the adjustment of losses by three arbitrators, one to be chosen by the claimant, one by the company, and the third by the two persons thus selected, and further, that the award made by them shall be final. It is contended that this provision was inserted to oust the courts of their constitutional jurisdiction, and hence is void and not enforceable. It is not certain that the clause relating to arbitration could have the effect imputed to it by counsel, since by section 14 of the same act it is expressly provided that "Suits at law may also be brought and maintained against any such company by members thereof for losses sustained, if payment is withheld after such losses become due." (Session Laws, 1891, p. 276, ch. 33, sec. 14.) Thus, it would seem that arbitration is not the only means provided for the adjustment of losses, but that their payments may be enforced in the courts by appropriate legal proceedings. Conceding that this is not the proper construction to be placed upon the statute, and the clause relating to arbitration is invalid because it deprives the insured of the right to enforce the payment of his loss in the courts, it does not necessarily follow that the entire law falls to the ground. The rule is where a statute contains provisions which are invalid or unconstitutional, if the valid and invalid portions are not so connected as to be incapable of separation, and the valid part is a complete act and not dependent upon the part that is void, the latter

alone will be disregarded and the remainder upheld. (*State v. Lancaster County*, 6 Neb., 474; *State v. Hardy*, 7 Neb., 377; *State v. Lancaster County*, 17 Neb., 85; *State v. Hurds*, 19 Neb., 323; *Muldoon v. Levi*, 25 Neb., 457; *Messenger v. State*, 25 Neb., 674; *Magneau v. City of Fremont*, 30 Neb., 843.) The main provision of the law under consideration not being dependent on the clause relating to arbitration, the whole act is not void.

Objections have been made to the validity of other sections of the act, but they need not be noticed, since they are disposed of by the foregoing observations.

Section 8 of the act under consideration provides *inter alia:* "All persons so insured shall give their obligation to the company, in a written or printed application, binding themselves, their heirs, and assigns to pay their *pro rata* share to the company of the necessary expenses and of all losses by fire, lightning, or tornado which may be sustained by any member thereof during the time for which their respective policies are written and they continue as members of the company, and they shall also, at the time of effecting the insurance, pay such percentage in cash and such other charges as may be required by the rules and by-laws of the company." (Session Laws, 1891, p. 274, ch. 33, sec. 8.) The rules and by-laws adopted by the relator provide, in effect, that each person becoming a member of the company shall pay in advance a membership fee of $2, and a sum in addition thereto equal to one per cent of the amount of insurance covered by his policy. It is admitted that relator has issued policies of insurance without requiring the payment in advance of the membership fee required by its by-laws, but accepted in lieu thereof the written promises of the parties becoming members. The respondent contends that nothing but cash in advance can be accepted for the percentage and membership fee, while relator insists that it has the right to take notes for the same. It will be observed that the statute requires only such percentage and other charges to be paid when the insurance is written as shall be pro-

vided for in the rules and by-laws of the company. The amount, as well as whether any advance payment must be made, depends alone upon such rules and by-laws. If they exact no cash payment, then none need be paid at the time the insurance is effected. That this is the import and meaning of the statute is plain. Here the by-laws of the company have provided for the payment of certain charges, a membership fee of $2, besides a percentage of one per cent. It requires no argument to show that the legislature contemplated that both of these amounts should be paid not only in advance of issuing of the policy, but in actual cash, and not by receiving the note or other obligation of the policy-holder. If that is not the purport of the statute, it is meaningless. A note or other promise to pay is not cash. The word "cash," as employed in the above statute, means current money. Relator, under its existing by-laws, exceeded its authority in accepting notes or other obligations in payment of membership fees required to be paid in advance, although it appears that in doing so it acted in good faith, relying on the opinion of Attorney General Hastings given upon the subject.

It is urged that the auditor has no right to refuse a certificate because the relator "has not been tracking the law in every respect." In this counsel are in error. By section 17 of the act of 1891 it is made the duty of every insurance company organized and doing business thereunder, on the first day of January of each year, or within a month thereafter, to file with the auditor a statement showing the condition of the company on the last day of the preceding month, and "if, upon examination, he is of the opinion that such company is doing business correctly, in accordance with the provisions of this act, he shall thereupon furnish the company a certificate, which shall be deemed authority to continue business the ensuing year." (Session Laws, 1891, p. 277, ch. 33, sec. 17.) It is only in case the auditor finds that the company in the transaction of its business has complied with the law

that he is authorized to issue his certificate. In making his examination he is not confined alone to the report or statement furnished by the company. The writ must be denied.

WRIT DENIED.

CITY OF OMAHA V. HENRY COOMBE.

FILED JUNE 16, 1896. No. 6668.

1. **Review:** CONFLICTING EVIDENCE. A verdict upon fairly conflicting evidence will not be disturbed in error proceedings on the assumption that it is not sufficiently sustained by the proofs.
2. **Instructions:** EVIDENCE. An instruction requested, which in its theory has no support in the proofs adduced, *held*, properly refused.

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

E. J. Cornish, for plaintiff in error.

Lee S. Estelle, contra.

RYAN, C.

This action for damages alleged to have been sustained by the defendant in error was begun in the district court of Douglas county. There was a verdict and judgment against the city for the sum of $500. Just previous to the accident complained of the city was grading and paving a portion of Locust street. In doing this work a man-hole, with its iron cover, was left projecting above the level of the street about twelve inches. On the night of the 18th of October, 1890, the defendant in error was driving a team along Locust street, and, as he alleged, by reason of the darkness, unrelieved by any light, his wagon struck the aforesaid man-hole and thereby he was thrown to the ground and injured. It was alleged in the

petition that there was neither a light to warn of danger, nor a barricade to prevent accident. The sole issue was as to the correctness of each of these contentions, and the jury, upon conflicting evidence, found against the city. With this verdict and the judgment thereon we cannot interfere. It is, however, insisted that the jury should have been instructed as requested, that, if the employes of the city, before quitting work for the night, placed a proper barricade near the man-hole, the burden of proof would be upon the plaintiff to show that some employe of the city removed such barricade. If there had been any evidence to show that there had been removed a properly placed and erected barricade, there might possibly have been some justification for giving this instruction; but this element had no place in the proofs. The evidence on one side was in direct opposition to that on the other, and there was no middle ground which alone could have justified the giving of the instruction requested. There is presented neither by the record nor in the argument any other question and the judgment of the district court is

AFFIRMED.

FREDERICK MENGEDOHT V. THEODORE L. VAN DORN.

FILED JUNE 16, 1896. No. 6746.

1. **Review: OBJECTION TO JUROR.** Objections to the competency of jurors cannot be reviewed in the supreme court when no such question was raised in the motion for a new trial.
2. **Assault: DAMAGES: VERDICT FOR PLAINTIFF.** The facts disclosed by the evidence stated, and *held* to justify the verdict returned and the judgment thereon rendered.

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

Joel W. West and *Frank Heller*, for plaintiff in error.

Kennedy, Gilbert & Anderson, George W. Covell, and *Connell & Ives, contra.*

RYAN, C.

In this case there was a judgment in favor of the plaintiff in the district court of Douglas county for $957.51 on account of injuries inflicted by the defendant. The judgment defendant, as plaintiff in error, seeks a reversal of this judgment.

There are argued irregularities in the selection of the jury, but these cannot be considered, for they were not urged in the motion for a new trial. (*Hastings & G. I. R. Co. v. Ingalls,* 15 Neb., 123.)

It is insisted that the verdict was not sustained by sufficient evidence, and, in effect, was contrary to law. The defendant in error was the owner of a certain tenement building in the city of Omaha, for the erection of which plaintiff in error had contributed the materials and labor, and in consideration thereof had claimed a mehanic's lien on the said building. Upon a decree rendered foreclosing said lien plaintiff in error purchased the aforesaid building and thereunder received a deed. This he at once filed for record, and having received from the register of deeds a receipt showing that it had been so filed, plaintiff in error went directly to the building in question and the doors not being fastened, he entered. This was about 4 o'clock in the afternoon. The defendant in error, who had a room which he used as an office in said building, soon afterwards came into the hall and there met the plaintiff in error. Between these parties there were assertions of ownership and right of possession of each in his own favor. The wife of the defendant in error having come in took part in this discussion and threatened to shoot plaintiff in error if he attempted to eject her husband and herself from the building. Plaintiff in error thereupon went to another building near, and by means of a telephone obtained instructions from his

attorney, though the nature of these instructions does not appear in the evidence. Returning to the building where defendant in error was, plaintiff in error, assisted by Mr. Burdick, who meantime had been sent to his aid, seized the defendant in error and forcibly took him to the street, and as there was amply sufficient evidence to show, dropped him upon the pavement in such a brutal manner as to cause protracted and probably permanent mental derangement. In view of these facts which the jury were warranted in finding, the verdict, sustained by the evidence, was neither excessive nor, as urged, contrary to law.

These observations meet some objections made to instructions asked by plaintiff in error and refused and others asked by defendant in error which were given. There were instructions given by the court which in argument were criticised in detail, but they cannot be reviewed, for the reason that in the motion for a new trial the assignment with reference to them was in the following language, to-wit: "The court erred in giving the second, third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth instructions given by the court on its motion." Some of these were properly given, and most certainly if others were not they cannot be considered. We cannot see that there was error in excluding from the consideration of the jury the pleadings in the case which resulted in the decree under which the plaintiff in error purchased and received the master commissioner's deed. This deed itself was admitted in evidence, whereby he was permitted to show the title under which he claimed the right to take possession of the property in said deed described. In a proper manner he was entitled to obtain that possession. This action was not for wrongfully taking the possession, but for willfully and maliciously inflicting injuries upon the person of the defendant in error. The judgment of the district court is

AFFIRMED.

T. P. HALEY v. JAMES MCCARTY.

FILED JUNE 16, 1896. NO. 6649.

Ruling on Motion: CONFUSING EVIDENCE: REVIEW. Where the evidence submitted upon a motion is imperfect and so confusing in its nature that it cannot be determined affirmatively that there was error in overruling such motion, the ruling of the district court must be sustained.

ERROR from the district court of Custer county. Tried below before NEVILLE, J.

M. McSherry and *J. S. Kirkpatrick*, for plaintiff in error.

Sullivan & Gutterson and *Hutchinson & Dickinson, contra.*

RYAN, C.

T. P. Haley recovered a judgment before a justice of the peace of Custer county on December 12, 1889, in the sum of $75 and costs. There were entries upon the docket of the justice of the peace as follows:

"Execution this day issued and delivered to Charles Penn, sheriff.

"Dec. 14, 1889.—Execution returned this day as follows:

" 'I hereby return this execution satisfied in full, this 14th day of December, 1889. CHARLES PENN,
" '*Sheriff*,
" 'By D. E. HERRMAN,
" '*Deputy*.'

"And afterwards, by request of defendant's attorney, the following amended return was made in my presence, to-wit:

" 'I hereby certify that within execution was paid under protest and demand to file this bond at the same time.
" 'CHARLES PENN,
" '*Sheriff*,
" 'By D. E. HERRMAN,
" '*Deputy*.' "

There was afterwards on the same day filed and approved an appeal bond. In the district court there was a judgment in favor of McCarty.

There is presented for review but one question by these proceedings in error, and that question arises upon the overruling of the following motion: "Comes now the plaintiff, Rev. T. P. Haley, and moves the court to dismiss defendant's appeal in the above entitled cause, for the reason that the judgment from which said defendant seeks to appeal has been fully paid, as more fully appears by the transcript in said case, which is made a part of this motion and in support thereof, and the said judgment was paid by the defendant in this case." The entire bill of exceptions is made up of what is designated as a statement of facts, which seems to be statements by counsel respectively for their clients. It is in no sense an agreement and seems to be devoted entirely to the question whether or not the money paid to the sheriff was paid voluntarily or under compulsion. At the close there was the following colloquy:

"By the Court: That is all the entry?

"By Attorney: This is the agreed state of facts to be considered with the other affidavits.

"By the Court: Strike out that part stating that a levy was made."

It is very evident that this court cannot say upon such a condition of affairs as is above disclosed that the trial court erred in its ruling upon the motion to dismiss the appeal. The bill of exceptions is not complete, and even what appears does not in the least degree settle the questions of fact concerning which the altercation of counsel took place. The judgment of the district court is therefore

AFFIRMED.

D. C. KERR v. JAMES CORNELL.

FILED JUNE 16, 1896. No. 6657.

Review: CONFLICTING EVIDENCE. No question but one of fact determined upon conflicting evidence being presented by the record, the judgment of the district court is affirmed.

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

S. D. Porter and *Compton & Porter*, for plaintiff in error.

L. C. Chapman, contra.

RYAN, C.

This action was brought by D. C. Kerr for damages alleged to have resulted from the tearing down of a fence across a section line whereby plaintiff's inclosed lands were thrown open so that cattle destroyed a portion of his crop. There was presented only one question and that was whether the broken fence had been across a public highway. On the part of the defendant there was testimony that the road had been opened by proper authority and had been in use for more than fifteen years as a highway by the public before it was obstructed by the plaintiff. The evidence as to the opening of the road was, it is true, quite unsatisfactory and yet there was such evidence. On the part of the plaintiff there was adduced evidence tending to show that the alleged highway had never in fact been in use as such. The jury could properly have found either way upon this question. Its determination adversely to the plaintiff left no ground for recovery as prayed. There is no other question presented by the record and the judgment of the district court is

AFFIRMED.

MERLE & HEANEY MANUFACTURING COMPANY V. W. A. WALLACE ET AL.

FILED JUNE 16, 1896. No. 6716.

Opening Judgment: FINAL ORDER: REVIEW. There cannot be a review of an order of the district court opening a judgment and permitting an answer to be filed in the case until there has been a further order or judgment in its nature final.

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

L. D. Holmes and *Wharton & Baird*, for plaintiff in error.

McCabe, Wood & Elmer, contra.

RYAN, C.

There was originally a judgment rendered by the district court of Douglas county in favor of plaintiff against the defendants upon a promissory note made by defendants to plaintiff. In this note there was a power of attorney authorizing any attorney at law to appear and to confess judgment. There was an appearance and answer by an attorney for the defendants, whereby was confessed plaintiff's cause of action as alleged and its right to a recovery as prayed. This attorney had no other authority than was conferred by the provisions of the note, and therefore this judgment was at the same term it was rendered set aside on motion of the defendants, who were given thirty days within which to answer. These proceedings in error are brought to reverse this order.

It is provided by section 582 of the Code of Civil Procedure that "A judgment rendered or final order made by the district court may be reversed, vacated, or modified by the supreme court for errors appearing on the record." In the section immediately preceding that above quoted is the following language: "An order affecting a sub-

stantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order, which may be vacated, modified, or reversed, as provided in this title." In *Smith v. Sahler*, 1 Neb., 310, it was held that an order is final only when no further action is required to dispose of the cause pending, but when the cause is retained for further action the order is interlocutory. The same rule, under various circumstances, has been enforced in *Scofield v. State Nat. Bank of Lincoln*, 8 Neb., 16, *Shedenhelm v. Shedenhelm*, 21 Neb., 387, and numerous authorities cited, as well as in *School District v. Cooper*, 29 Neb., 433, *Clark v. Fitch*, 32 Neb., 511, *Brown v. Edwards & McCullough Lumber Co.*, 44 Neb., 361, *Bartram v. Sherman*, 46 Neb., 713, and *Johnson v. Parrotte*, 46 Neb., 51. There being no final judgment or final order in this case, the petition in error is

DISMISSED.

MERLE & HEANEY MANUFACTURING COMPANY V. W. A. WALLACE ET AL.

FILED JUNE 16, 1896. No. 6717.

Opening Judgment: FINAL ORDER: REVIEW.

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

L. D. Holmes and *Wharton & Baird*, for plaintiff in error.

McCabe, Wood & Elmer, contra.

RYAN, C.

The facts in this case are the same as those stated in another case having the same title. (*Merle & Heaney*

Mfg. Co. v. Wallace, 48 Neb., 886.) Following the order in that case, the petition in error in this case is

DISMISSED.

CUMING COUNTY V. JULIUS THIELE.

FILED JUNE 16, 1896. No. 6730.

County Boards: RULINGS ON CLAIMS. The question presented in this case is the same as that decided in *Sioux County v. Jameson*, 43 Neb., 265; accordingly, the judgment of the district court is affirmed.

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

P. M. Moodie, for plaintiff in error.

T. M. Franse and *J. C. Crawford, contra.*

RYAN, C.

The defendant in error was county clerk of Cuming county two terms, that is, from January 6, 1888, till January 6, 1892. On the 10th day of March, 1891, he filed a claim in the office of the county clerk in respect to which, on June 18, 1892, the following resolution was passed by the board of supervisors: "Be it resolved, that the claim of ex-county clerk Thiele for $634.24, and interest $96, or a total of $730.24 filed March 10, '91, for making the tax list of the year 1888, coming up for consideration, and it appearing to the board that said Thiele did during his term of office ending January 7, 1890, receive and retain and does still retain fees and emoluments of office to the amount of $783.71 in excess of the amount to which he was lawfully entitled, it is considered, ordered, and adjudged that this claim be offset against said sum of $783.71 due from Thiele to the county and that his said

claim be therefore rejected." From this action of the county board Thiele appealed to the district court of said county, where, upon a trial to a jury, he obtained a verdict for the amount of his claim, upon which judgment was duly rendered. There is argued but one question, and that is, whether or not the board of supervisors of Cuming county, upon a presentation of a claim in all respects meritorious, had the authority in law to offset against it the amount of a claim which had been allowed by a former board and paid. The argument of the plaintiff in error is that, as the claim which had been paid was for services for which the clerk was not entitled to receive compensation, the allowance thereof was a complete nullity and might, therefore, be ignored. These services were of the same nature as were those under consideration in *Sioux County v. Jameson*, 43 Neb., 265, and following the rule laid down in that case the judgment of the district court in this is

AFFIRMED.

FRED KROEHLER V. SIMEON I. LONG.

FILED JUNE 16, 1896. No. 6756.

Review: CONFLICTING EVIDENCE. There is involved in this case solely a question of fact, which, upon conflicting evidence, must be treated as settled by the verdict of the jury.

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

Beeson & Root, for plaintiff in error.

A. N. Sullivan, contra.

RYAN, C.

For the year 1892 the defendant in error leased certain farm lands to John Voris and his minor son, Frank Voris.

For the rent of the land leased to John Voris individually, John Voris gave his promissory note for $207 secured by mortgage on the crops growing on the land of which said $207 was the rental, and for $237 the father and son jointly executed their promissory note secured by a chattel mortgage on the land of which the $237 was the agreed rental to be paid by John Voris and Frank Voris. A part of the oats raised on the land leased by John Voris was sold to the defendant in error and the remainder was sold to different parties without objection made by the mortgagee. The defendant in error for the payment of such balance as was due him from the father and son relied upon the mortgage made by them to him. This mortgage was dated June 21, 1892, and was filed for record on the 2d day of July immediately following. A part of his mortgaged property was levied upon in the fore part of 1893 to satisfy certain judgments against John Voris. From Fred Kroehler, the constable who made these levies, the defendant in error replevied by virtue of his mortgage. The question was simply whether this mortgage was valid as against creditors of John Voris. Under instructions very favorable to the plaintiff in error the jury returned a verdict for the defendant in error, and as this was supported by sufficient evidence the judgment of the district court is

AFFIRMED.

CHARLES T. KENYON V. ANTHONY YOUNG.

FILED JUNE 16, 1896. No. 6760.

Landlord and Tenant: ACTION FOR RENT: EVIDENCE. In an action to recover rent upon an oral lease from plaintiff to defendant it was properly ruled to be an immaterial inquiry whether or not defendant had subleased the premises to a third party for the term for which he was sought to be held liable.

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

Thomas Darnall and *C. V. Manett*, for plaintiff in error.

E. M. Coffin and *T. T. Bell, contra.*

RYAN, C.

The defendant brought this action before a justice of the peace of Howard county for the recovery of $50 rent for the pasturage of certain prairie land which he alleged was due him upon an oral lease with Charles T. Kenyon. There was a judgment against Kenyon, from which he appealed to the district court of said county. On a trial had to a jury there was again a judgment against Kenyon, who, by his petition in error, seeks its reversal in this court.

In the brief of plaintiff it is conceded that there were no errors in respect to giving or refusing to give instructions. In the introduction of evidence, however, it was sought by plaintiff in error to show that William Stone had used the prairie for pasturage purposes during the period for which it was sought to hold Kenyon liable in this action and that this was under a lease from Young to Stone. As tending to prove this, Mr. Kenyon was asked if he had leased this land to Stone for the year in question. An objection was properly sustained to this inquiry, for the real question in issue was whether Young had leased to Kenyon, and it was immaterial whether or not Kenyon in turn had leased to Stone. It was argued that the verdict was contrary to the evidence, but the bill of exceptions, while it shows a sharp conflict in the evidence, discloses sufficient to sustain the verdict returned. The judgment of the district court is

AFFIRMED.

HARRISON, J., not sitting.

H. R. NEITZEL ET AL. V. ROBERT LYONS.

FILED JUNE 16, 1896. No. 8457.

1. **Parties: WAIVER OF OBJECTIONS: REVIEW.** Where a stranger filed a motion in a pending case in the district court showing that he was directly interested in the subject-matter of the litigation, and a hearing of this motion was had without any objection that such motion was not presented by a party to the action, *held*, on error proceedings to review the ruling made on such motion, that the parties who resisted the motion solely on its merits thereby waived all rights of objection to such motion not being originally presented by a proper party.
2. **Receivers: APPOINTMENT: EVIDENCE.** The evidence examined, and *held* not to justify the overruling of the motion to vacate the appointment of receiver.

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

John A. Davies and *Samuel M. Chapman*, for plaintiffs in error.

Mockett & Polk, contra.

RYAN, C.

In the district court of Cass county a motion to discharge the receiver of the State Bank of Murdock was overruled, and from this order this error proceeding is prosecuted. The receiver was appointed upon the petition of Robert Lyons. In substance, the averments of the petition were that the defendant, the State Bank of Murdock, a corporation, is engaged in a general banking business in the town of Murdock, in Cass county; that its capital stock is $25,000, of which thirty per cent is paid up; that plaintiff owns thirty shares of this stock, of the par value of $100 per share; that G. H. Weidman is the president and H. R. Neitzel is cashier of defendant; that said bank has been and still is grossly mismanaged; that the officers of said bank have through mismanagement

wasted and lost to the stockholders $2,500 of the capital stock; that the officers of said bank have borrowed money for said bank without authority from the directors, and said H. R. Neitzel has hypothecated notes belonging to said bank for his own personal use, and has made false reports of said bank and its loans and discounts to the state banking board; that said Neitzel has failed in every particular to properly conduct the business of said bank, and has made collections and remitted only a portion of the proceeds, retaining the balance for his own use and the use of the bank, greatly to the injury of the good name of the bank, and by his treatment of customers he has driven the depositors out of the bank, so that said bank is running at a loss and jeopardizing the interests of the depositors; that by reason of the mismanagement herein set out the capital stock of plaintiff will be entirely lost to him and he has no remedy at law, and unless this honorable court appoint a receiver to take possession of and wind up the business of said bank, plaintiff will suffer a great and irreparable loss, and that the state banking board had ordered that the capital stock of said bank be reduced or that a receiver be appointed. The prayer of this petition was as follows: "Wherefore plaintiff prays that a receiver may be appointed by this honorable court to take charge of the affairs of said defendant bank and wind up its business, and to collect and receive its assets and pay all its depositors and creditors equally and justly, and perform all orders of the court herein, and for such other and further relief as in justice and in equity the plaintiff may be entitled to." This petition was filed March 5, 1896, and on the same day there was likewise filed a motion for the appointment of a receiver, upon the grounds at length stated in the petition. Without a summons being asked or issued there was, on March 5, 1896, filed with the clerk of said district court the following document:

"WAIVER OF NOTICE AND VOLUNTARY APPEARANCE.

"Comes now the defendant, the State Bank of Murdock, and waives the issuance and service of notice herein and time of notice in the above entitled cause, and consents to the appointment of Dexter M. Quackenbush as receiver of the property of the defendant as prayed in the petition, and consents that such appointment may be peremptorily made without notice.

"Dated this 5th day of March, 1896.

"STATE BANK OF MURDOCK,
"By G. H. WEIDMAN,
"President."

On the date of the filing of the above petition, motion, and appearance an order was made at chambers appointing Dexter M. Quackenbush receiver of the defendant bank. On March 12, 1896, H. R. Neitzel, cashier of the aforesaid bank, filed his motion to vacate the order whereby the receiver had been appointed. Of the filing of this motion notice was given Robert Lyons and the receiver. On March 30, 1896, the court overruled the motion to discharge the receiver and ordered stricken from the files the affidavits of certain parties in support of it, among which was that of C. F. McGrew, one of the bank examiners of this state. By the affidavit of Mr. McGrew it was made to appear that the bank was solvent; that the note of the cashier therein had been permitted by the banking board to be given to reduce the amount of the real estate, furniture, and fixtures carried by said bank in excess of the amount permitted by law, and that the requirement of the state banking board was to cover this excess. By none of the affidavits submitted was there attempted to be shown any misconduct of Mr. Neitzel, the cashier.

The first point made by the defendant in error, Robert Lyons, is that plaintiff in error, the bank, filed its motion without previous leave of the court, and the same objection is urged against the affidavits submitted in support

of this motion. This motion and these affidavits were considered by the district court without any objection being made by Mr. Lyons, so far as this court can find in the record. After the motion had been submitted, and contemporaneously with the ruling on said motion, the district court, reciting that its action was on the motion of plaintiff Lyons, ordered the affidavits stricken from the files; but the motion to set aside the order by which the receiver had been appointed, and in support of which the stricken affidavits had been filed, was held to present nothing for consideration, because it had been filed without leave of court. This recitation did not change the status of this motion and the waiver by the adverse party of any right to object to a review of this order under the rule laid down in *Chadron Banking Co. v. Mahoney*, 43 Neb., 214. As the affidavits ordered stricken from the files have been duly preserved by a bill of exceptions, they are properly before us with reference to their competency, materiality, and relevancy with respect to the ruling called in question. As has already been stated, one of these affidavits showed that the bank was solvent, and there was no attempt to show that its cashier had been guilty of any misconduct. Others of these affidavits were made by stockholders of the bank, and one was made by its said cashier. Each of these affiants stated that the affiant was opposed to the appointment of a receiver and objected to Mr. Quackenbush especially, for the reason that he was an officer of a rival bank in the same county. It would seem that there was sufficient evidence to establish the fact that previous to the time that Mr. Weidman assumed to enter the bank's appearance in this action he had tendered his resignation, but as there was no showing that this resignation had been accepted, it may be that he was still its president. The court found that at the time of consenting to the appointment of the receiver he was president, and we shall accept the fact as settled.

It was shown on the hearing, by the affidavit of Robert

Lyons and of G. H. Weidman, that the affairs of the defendant bank were managed by a board of three directors. At the time the receiver was appointed the members of this board were Robert Lyons, H. R. Neitzel, and G. H. Weidman. The plaintiff was one of these directors who alleged in his petition that "Said defendant bank has been and still is grossly mismanaged, and that the officers of said bank have through mismanagement wasted and lost to the stockholders $2,500 of the capital stock," and that "the officers of said bank have borrowed money for said bank without authority from the directors." In connection with these averments, and immediately following them, there were charges against the cashier, in support of which there was no attempt to make proof. To this petition an appearance was entered by another of the three directors, who was the president of the bank, and there was by him a consent that the receiver might be appointed, the issuance and service of summons and time being expressly waived. Here was one director charging gross mismanagement by the officers of the bank, another director entering an appearance and consenting to the relief prayed, and an order at chambers made on the same day without the knowledge of the third director. The affidavits showed no act of the cashier which was not for the bank's interest, and we cannot countenance an arrangement between his associate managing officers whereby it would seem that their own mismanagement must be treated as grounds justifying the placing of the bank in the hands of the receiver, against the protest of interested stockholders. The appointment of this receiver was not at the instance of a creditor of the bank; neither was it upon the suggestion of the state banking board. It appears from the affidavit of Mr. McGrew that this bank is solvent. The petition was filed by a stockholder as such, and the appointment of a receiver could be had solely upon equitable grounds. The official relation which Mr. Lyons sustained to the bank and the manner in which the order

complained of was obtained did not entitle him to have the bank wound up by a receiver, regardless of the wishes or interests of other stockholders of the bank. The order of the district court overruling the motion to vacate the order appointing D. M. Quackenbush receiver of the State Bank of Murdock is reversed, and the cause is remanded for further proceedings not inconsistent with the views above expressed.

REVERSED AND REMANDED.

JOSEPH G. ARMSTRONG v. WILLIAM W. WOOD.

FILED JUNE 16, 1896. No. 6764.

Review: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* to sustain the finding of the district court, and the judgment affirmed.

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

Thomas L. Redlon, for plaintiff in error.

W. H. Westover, *contra*.

RAGAN, C.

William W. Wood, an attorney at law, sued Joseph G. Armstrong in the district court of Sheridan county to recover the value of certain professional legal services rendered by the former for the latter at his request. The case was tried to the court without a jury and resulted in a judgment in favor of Wood, and against Armstrong, for $55, to reverse which Armstrong has filed here a petition in error.

The only argument relied on here for a reversal of this judgment is that the finding of the court on which it is based is not sustained by sufficient evidence. There is

no merit whatever in this contention. The evidence abundantly sustains the finding of the court and its judgment is

AFFIRMED.

W. K. JACOBS ET AL. V. ST. JOSEPH MILLING COMPANY.

FILED JUNE 16, 1896. No. 6618.

Review. The record examined, and *held* to present for review not a single legitimately debatable question of law or fact, and the judgment affirmed.

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

McCabe, Wood & Elmer, for plaintiffs in error.

Joseph Crow and *Charles C. Crow, contra.*

RAGAN, C.

This is an action in replevin brought to the district court of Douglas county by the St. Joseph Milling Company against W. K. Jacobs and others. The milling company had a verdict and judgment, and Jacobs and others prosecute here a petition in error.

The record presents not a single legitimately debatable question of law or fact. It is argued here that the verdict is not supported by sufficient evidence, but there is not the slightest ground for this contention. It is also said that the district court erred in giving a couple of instructions, but the arguments urged against these instructions are mere criticisms of the most technical character. There is no error whatever in the record and the judgment of the district court is

AFFIRMED.

H. C. MCARTHUR ET AL. V. H. T. CLARKE DRUG COMPANY.

FILED JUNE 16, 1896. No. 6735.

1. **Pleading:** CONSTRUCTION. The allegations of a pleading must be liberally construed. (Code of Civil Procedure, sec. 121.)
2. **Action on Account:** PLEADING. In an action founded upon an account it is sufficient for the plaintiff to give a copy of the account with all credits and indorsements thereon and to state that there is due to him on said account from the defendant a specified sum which he claims with interest. (Code of Civil Procedure, sec. 129.)
3. **Assumpsit:** PETITION: COPY OF ACCOUNT. In a suit on an account for goods sold and delivered, where the petition is framed under said section 129 and there is attached to such petition a copy of the account sued on, such account must be considered as a part of the petition when construing the allegations thereof.
4. ———: ———. In such case, if the facts stated in the account taken in connection with those stated in the petition show a liability of the defendant in favor of the plaintiff, a demurrer, on the grounds that the petition does not state a cause of action, cannot be sustained.
5. **Pleading:** DEMURRER. A party who stands upon a general demurrer to a pleading thereby admits all the material facts averred and must take the consequences which result from such admission.

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

W. B. McArthur, for plaintiffs in error.

Pound & Burr, contra.

RAGAN, C.

In the county court of Lancaster county the H. T. Clarke Drug Company sued Henry McArthur and William B. McArthur, partners doing business under the firm name of McArthur & Son. The suit was brought to recover a sum which the drug company claimed was owing to it from McArthur & Son for certain merchandise sold and delivered by the former to the latter. To the peti-

tion filed by the drug company McArthur & Son filed a general demurrer, which was overruled by the county court, and, McArthur & Son refusing to plead further, judgment was rendered in favor of the drug company. To reverse this judgment McArthur & Son prosecuted a petition in error to the district court, which tribunal affirmed the judgment of the county court, and McArthur & Son have filed a petition in error here to review the judgment of the district court.

1. The petition of the drug company, so far as material here, was as follows: "The plaintiff complains of the defendants and for cause of action alleges: That it is a corporation existing under and by virtue of the laws of the state of Nebraska, and the defendants are a partnership doing business in Lincoln, Nebraska, and at various times between the 1st day of December, 1892, and the 1st day of July, 1893, was delivered to the defendants at their request goods, wares, and merchandise and drugs of the value of $401.96. Plaintiff further says that $401.96 is a just and reasonable charge for the goods delivered, and that although they have often demanded payment therefor, no part thereof has been paid by said defendants. Wherefore plaintiff prays judgment in the sum of $401.96 and interest from July 1, 1893, and costs of this action. An itemized statement of said account is hereto attached and made a part hereof." The itemized statement attached to the petition, so far as the same is material here, is as follows:

"STATEMENT.

"H. T. CLARKE DRUG COMPANY,
"Wholesale Druggists,
"Cor. 8th and P Streets,
"Importers and Jobbers of Dry Paints, Oils, Glass, Stationery and Druggists' Sundries.

"LINCOLN, NEBR., 8-22-93.

"Mr. McArthur & Son, City, Dr.

"1892.
"Dec. 1st. To merchandise..... $9 14."

Then follow dates up to and including April 13, 1893, opposite which are various charges aggregating $757.33. Then come the credits on the statement, as follows:

"Cr.

"March 9th. Merchandise returned..... $3 23
"March 9th. Merchandise returned..... 93"

Then followed dates up to and including June 23, opposite each of which are certain credits in money, the total aggregating $355.37. The difference between the total debits and credits is taken and shown on the statement as $401.96. The question is whether this petition states a cause of action in favor of the drug company and against McArthur & Son. It is insisted that it does not, because there is no allegation in the petition that the goods sued for were sold and delivered by the plaintiff to the defendants at the latter's request, and *Stubendorf v. Sonnenschein*, 11 Neb., 235, is cited as sustaining this contention. In that case the names of the parties thereto appeared only in the title to the case, and it was insisted that the title of the case was no part of the petition, and that, therefore, the latter did not state a cause of action, because the names of the parties to the suit were not repeated in the body of the petition, and this was the only point decided in the case. Another case cited to sustain the contention here is *Tessier v. Reed*, 17 Neb., 105. The petition considered in that case was in the following language: "The plaintiff complains of the defendant, and for cause of action says that there is now due and owing from the defendant to the plaintiff, for goods, wares, and merchandise heretofore sold and delivered by the plaintiff to the defendant, the sum of $348." It was probably objected to this petition, though the opinion does not so state, that it did not allege when the goods sued for were sold and delivered to the defendants, nor were so sold and delivered at their request. The court held that the petition was subject to a motion to make definite and certain, but that as it showed a liability of the defendant in favor of the plaintiff, it was good

as against a general demurrer. Section 121 of the Code of Civil Procedure provides: "In the construction of any pleading, for the purpose of determining its effects its allegations shall be liberally construed, with a view to substantial justice between the parties." The petition under consideration was probably framed under section 129 of the Code of Civil Procedure, which provides: "In an action * * * founded upon an account * * * it shall be sufficient for the party to give a copy of the account * * with all credits and indorsements thereon, and to state that there is due to him on such account or instrument from the adverse party a specified sum, which he claims, with interest." This is section 5086—formerly 122—of the Code of Civil Procedure of the state of Ohio, and section 123 of the Code of Civil Procedure of the state of Kansas.

1 Kinkead on Code Pleading, at section 58, in discussing this section and quoting from Judge Swan, says: " 'It is sufficient here to say that the better practice is to insert the copy in the pleading of such money instruments as are described in section 122 [Ohio Code] whenever a party states his cause of action in the manner allowed by that section; and that if it is not so inserted and attached, but referred to in the pleading as annexed, it will also be sufficient; and the court will in such case treat the annexed copy as a part of the pleading itself, under that section, inasmuch as the allegations of the pleading authorized by that section are upon the copy whether embodied in the pleading or annexed, and the copy therefore necessarily forms a part of the pleading by force of the section.' " (See, also, *Ohio Life Ins. & Trust Co. v. Goodin*, 1 Handy [O.], 31; *Memphis Medical College v. Newton*, 2 Handy [O.], 165.)

In *State v. School District*, 8 Pac. Rep., 208, the supreme court of Kansas, construing the section of the Code under consideration, said: "Where an instrument in writing for the payment of money is sued on, and a copy of such instrument is attached to the petition and made a part

thereof, such copy should be considered as a part of the petition when construing the allegations thereof."

In *Rathburn v. Burlington & M. R. R. Co.*, 16 Neb., 441, it was held that if the language of a petition, when given its ordinary meaning, shows a liability of the defendant in favor of the plaintiff it states a cause of action. (See, also, *Tessier v. Reed*, 17 Neb., 105.)

In *Pefley v. Johnson*, 30 Neb., 529, it was held that an exhibit made a part of a petition is to be considered, and if the facts therein stated, in connection with those in the petition proper, show a liability of the defendant in favor of the plaintiff, a demurrer on the grounds that the petition does not state a cause of action cannot be sustained. (See, also, *George v. Edney*, 36 Neb., 604.)

"A party who stands upon his general demurrer to a pleading, thereby admits the material facts averred and must take all the consequences which result from such admission." (*People v. Weston*, 3 Neb., 312.)

Reading the petition of the drug company in connection with the itemized statement attached thereto it is alleged that there was delivered to McArthur & Son goods of the value of $757.33; that this sum is a just and reasonable charge for the goods delivered; that they had paid on these goods $355.37, and that they were debtor to the Clarke Drug Company for the goods delivered in the sum of $401.96. A debtor is one who owes, therefore McArthur & Son by the demurrer admit that they owe the Clarke Drug Company $401.96 for the goods. In the language of *Pefley v. Johnson, supra*, then, the allegations in the petition and the itemized statement of account attached thereto show a liability of McArthur & Son to the drug company and therefore the petition states a cause of action notwithstanding the fact that there is no allegation therein that the goods were sold or delivered by the Clarke Drug Company.

2. It is also argued here that the district court erred in rendering judgment in favor of the drug company for interest from July 1, 1893, as the last item in the account

bears date April 13, 1893, and that interest does not begin to run until six months from the date of the last item in the account. There are two answers to this contention: (1.) This point was not made in the petition in error filed in the district court to review the judgment of the county court, nor is it made in the petition in error filed here. Alleged errors not assigned in the petition in error will be disregarded. (*Erck v. Omaha Nat. Bank*, 43 Neb., 613.) (2.) Neither the county court nor the district court rendered a judgment against McArthur & Son in favor of the drug company for any interest on this account whatever. The judgment of the county court was pronounced on the 9th of September, 1893, and was simply for $401.96, with interest from that date. The district court simply affirmed this judgment. The judgment of the district court is

AFFIRMED.

WESTERN ASSURANCE COMPANY OF TORONTO V. JOSEPH KLEIN.

FILED JUNE 16, 1896. NO. 6724.

1. **Judgments: ORDER TO OPEN: EVIDENCE.** The word "adjudged," found in section 606 of the Code of Civil Procedure, means judicially determined. Therefore, although a district court may find that the grounds, or some of them, specified in section 602 of the Code exist for the vacation of a judgment, it should not set such judgment aside, unless, after a hearing of the applicant's evidence, the court shall find and decide that such applicant has made out a *prima facie* valid defense or cause of action.

2. ———: ———: ———: **FRAUD.** The evidence examined, and *held* to sustain the finding of the district court that the judgment sought to be vacated by the action had not been procured by the fraud of the party obtaining said judgment, within the meaning of section 602 of the Code.

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

C. S. Polk and *Fyke, Yates & Fyke*, for plaintiff in error.

Byron Clark, contra.

RAGAN, C.

The Western Assurance Company of Toronto, Canada, brought this action to the district court of Cass county against Joseph Klein to set aside a judgment rendered by default in said court in favor of Klein and against the assurance company on the 8th day of November, 1893. The district court, after hearing the evidence, entered a decree dismissing the action of the assurance company and it prosecutes to this court a petition in error.

1. The fourth subdivision of section 602 of the Code of Civil Procedure provides that a district court shall have power to vacate or modify its own judgment or orders after the term at which they were rendered "for fraud practiced by the successful party in obtaining the judgment," and it is upon this subdivision of said section that the action of the assurance company is based. The assurance company alleged in its petition, in substance, that before the answer day in the case of Klein v. The Assurance Company it filed a motion to quash the service in that action; that sometime after that its attorney notified the attorney of Klein of the filing of said motion and inquired of him when it could be taken up, and that Klein's attorney answered that he thought he might submit to the motion and asked leave to have the sheriff's return amended; that its attorney then said to Klein's attorney that this would be all right, but that when the motion to quash was disposed of he desired to file an answer for the assurance company, as he had one prepared; that there was no hurry about disposing of the motion as the case could not be tried at that—the September—term, and Klein's attorney responded that the case could not be tried at that term; that he was in no hurry to try it; that he did not wish to try it at that term, as he would

like to see the case settled; that a proposition made by Klein's counsel to settle the case was at that time under consideration by the assurance company; that subsequent to this conversation the attorneys for the respective parties had a consultation in regard to the settlement of the case and at that time no reference was made to the motion pending to quash the service; that on the 20th of October, 1893, the jury for the September term was discharged for that term and the court adjourned to October 30; on this date court again convened and adjourned to the 31st of October; that on said last date court again convened and adjourned to meet on the 4th of November; that on the 31st of October the judge stated that the court would be adjourned to the 4th of November to dispose of some matters he then had under advisement and that he would then adjourn the court until sometime in December, when he would hold an equity term; that on the 4th of November, the judge being absent, the clerk of the court adjourned it from day to day to the 8th of November; that on the 7th of November the attorney for the assurance company in a conversation with the judge of the court asked him if it would be in session on the following day, and was informed by the judge that it would for a short time to dispose of matters under advisement; that on the 8th of November, 1893, the court convened at 10 o'clock in the forenoon and after disposing of matters under advisement the case of Klein v. The Assurance Company was called, default taken, and judgment entered in the absence of the counsel for the assurance company; that the motion to quash the service of summons had been on the 20th of October, 1893, without notice to the attorney of the assurance company, called up and disposed of by Klein's attorney confessing the motion and the sheriff amending his return; that the court adjourned without day on the 8th of November, 1893, and before counsel for the assurance company learned that judgment had been rendered by default against his client. The petition further alleged that the

counsel for the assurance company relied on the statements made to him by the attorney for Klein and was thereby prevented from making a defense to the action, though the assurance company had a meritorious defense to Klein's action. The answer of Klein traversed all the allegations of the petition relating to the conversations between the attorneys for the respective parties and between the attorney for the assurance company and the judge of the court, and denied that the assurance company had any defense to the action of Klein.

The undisputed evidence shows that the September term of court did not finally adjourn until the 8th day of November; that the motion to quash the service was submitted to and the sheriff's return amended on the 20th of October; that the court was in session on the 30th of October and again on the 31st of October; that the counsel for the assurance company resided in the city of Plattsmouth, where the court was held; that he knew the court was in session on the morning of the 8th of November; that he was in the court house, but not in the court room, on that morning while the court was in session, and that the assurance company was in default of an answer and had been from the 20th of October. The evidence on behalf of the assurance company tended to support the allegations of its petition, while the evidence on behalf of Klein tended to contradict the allegations of the petition. In other words, the evidence on which the district court based the finding and judgment complained of here was conflicting. It has been so many times said by this court that in cases tried to a court without a jury the finding on questions of fact is entitled to the same weight and the same presumption of correctness as the verdict of a jury that it is unnecessary to cite the cases. Possibly, had we been trying the case, we would have reached a different conclusion from that reached by the district court, but we have no right for that reason to disturb the finding. We have carefully examined all the evidence, and it is sufficient to support the finding made by the district court.

2. But there is another reason why the judgment under consideration cannot be disturbed. As already stated, the assurance company alleged in its petition filed to vacate the judgment that it had a meritorious defense to Klein's action, and tendered with said petition an answer which stated a defense to that action; but on the trial of the case, to vacate the judgment, the assurance company offered no evidence to support the allegations alleged in its petition and answer attached thereto as a defense to Klein's action. Section 606 of the Code of Civil Procedure provides: "A judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment is rendered, or, if the plaintiff seeks its vacation, that there is a valid cause of action." Now the word "adjudged" means adjudicated, and adjudicated means judicially determined. (Anderson's Law Dictionary.) Section 605 of the Code provides: "The court may first try and decide upon the grounds to vacate or modify a judgment or order before trying or deciding upon the validity of the defense or cause of action." Although a district court may find that the grounds, or some of them, specified in said section 602 of the Code of Civil Procedure exist for the vacation or modification of a judgment, it should not therefore set aside such judgment, unless after a hearing of the applicant's evidence it shall adjudge—determine—that the applicant has made out a *prima facie* defense or cause of action. If these provisions of the Code did not exist, still the district courts of the state, in the exercise of their general equity powers, might, in a proper case and on sufficient grounds, set aside a judgment after the term at which it was rendered; but certainly no court of equity would set aside a judgment unless the party applying therefor should aver and prove that he had a meritorious defense or cause of action; in other words, a court of equity would not do an idle thing by setting aside a judgment unless it appeared that if the relief sought should be granted a different re-

sult would probably follow. The facts stated in the petition of the assurance company for the vacation of the judgment rendered against it in favor of Klein did not invoke the general equity powers of the district court, but the petition of the assurance company, as already stated, was framed under said section 602 of the Code, and therefore we think that to authorize the district court to have set aside the judgment it must have made a finding—it must have adjudged—based on evidence introduced by the assurance company that in its, the court's, opinion the assurance company had a defense to Klein's action. In *Thompson v. Sharp*, 17 Neb., 69, it was held that in proceedings instituted under the provisions of the Code to vacate a judgment after the term at which it was rendered the court must first pass upon the grounds to vacate the judgment, and if the grounds alleged for its vacation were established, the court should next inquire into the cause of action or defense, and if both these matters were found in favor of the applicant, the judgment should be set aside; otherwise not. In *Osborn v. Gehr*, 29 Neb., 661, it was held that a court of equity would not set aside a judgment regular on its face unless it was shown that no cause of action existed at the time in favor of the party obtaining the judgment. See, also, *Janes v. Howell*, 37 Neb., 320, and *Bond v. Wycoff*, 42 Neb., 214, where the court, in construing said section 606 of the Code, said: "Before plaintiffs in error were entitled to have the judgment against them set aside, it was necessary for them to allege and prove that they had a valid defense, in whole or in part, to the cause of action stated in the petition." The judgment of the district court is

AFFIRMED.

WESTERN UNION TELEGRAPH COMPANY V. O. O. WILHELM.

FILED JUNE 16, 1896. No. 6757.

1. **Pleading:** DEFINITENESS AND CERTAINTY: REVIEW. It is not error for a court to overrule a motion to compel a pleader to make his pleading more definite and certain, when to sustain such motion would require the pleader to state matters of evidence rather than conclusions of fact.
2. **Contracts:** DAMAGES FOR BREACH. The general rule is that the party injured by breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach. (*Griffin v. Colver*, 16 N. Y., 489.)
3. **Telegraph Companies:** FAILURE TO DELIVER MESSAGE: LOSS OF PROFITS OF SALE: DAMAGES. The plaintiff residing at Wayne, Nebraska, authorized his agents in Omaha, Nebraska, to exchange a tract of land owned by him for a stock of merchandise, investing them with discretion as to the merchandise and terms of the exchange. The agents negotiated such an exchange and delivered to the telegraph company at Omaha a message addressed to the plaintiff advising him of the fact and requesting him to come to Omaha and bring an abstract of title, a deed, and $300 in money. The telegraph company never delivered the message and by reason thereof the exchange was never consummated. It appeared that if the message had been delivered the exchange would have been effected and the plaintiff would have made a profit thereon. *Held*, The telegraph company was liable to the plaintiff for the profits he would have made had the exchange been consummated.

ERROR from the district court of Wayne county. Tried below before JACKSON, J.

The facts are stated by the commissioner.

Estabrook & Davis, for plaintiff in error:

The district court erred in overruling the motion to make the petition more definite and certain. (*Goodwin v. Walls*, 52 Ind., 268; Elliot, Appellate Procedure, sec. 665.)

The court erred in giving instructions 3 and 4 on its own motion. (*Omaha Coal, Coke & Lime Co. v. Fay*, 37 Neb.,

75; *Wasson v. Palmer*, 13 Neb., 376; *School District v. Foster*, 31 Neb., 501.)

Under the evidence it is perfectly plain that the consummation of the trade depended upon its approval by Wilhelm. In fact he was asked by the telegram to come to Omaha. It is perfectly apparent that he never did give any authority to Malmgren to make a binding contract. The trade depended upon his approval. There is no presumption that he would have been satisfied. Damages depending upon a contingency of this kind are too remote and lack the element of certainty. (*Clay v. Western Union Telegraph Co.*, 81 Ga., 285; *Baldwin v. United States Telegraph Co.*, 45 N. Y., 744; *Beaupré v. Pacific & Atlantic Telegraph Co.*, 21 Minn., 155; *Western Union Telegraph Co. v. Hall*, 124 U. S., 444; *Hibbard v. Western Union Telegraph Co.*, 33 Wis., 558.)

A. A. Welch and *W. L. Rose, contra.*

RAGAN, C.

O. O. Wilhelm sued the Western Union Telegraph Company in the district court of Wayne county, alleging in his petition, in substance, that on the 29th of January, 1892, Malmgren & Lovegren, residing in Omaha, Nebraska, were his agents; that on that date they delivered to the telegraph company at Omaha a dispatch in words and figures as follows:

"OMAHA, NEB., Jan. 29, 1892.

"*To O. O. Wilhelm, Wayne, Neb.:* Come at once. Have stock. Bring deed, abstract, and $300. Answer.

"MALMGREN & LOVEGREN."

That the telegraph company received this message and agreed to correctly transmit and deliver it to Wilhelm at Wayne, Nebraska; that prior to the said date Wilhelm's agents were negotiating an exchange of a quarter section of land in Sherman county, belonging to Wilhelm, for a stock of merchandise in Omaha, Nebraska; that on said date Wilhelm's agents had effected the exchange of Wil-

helm's land for a stock of merchandise; that Wilhelm had made an engagement to meet his agents at their office in Omaha upon receipt of a message from them that they had perfected the exchange of said land for said merchandise; that the telegraph company never delivered said message; that by reason thereof Wilhelm arrived in Omaha too late to consummate the exchange of said land for said stock of goods; that said exchange was for that reason never perfected, and he thereby lost the profit he would have made in such exchange, to his damages in the sum of $1,500. Wilhelm had a verdict and judgment for $100, to reverse which the telegraph company has filed here a petition in error.

1. The telegraph company filed in the district court a motion as follows: "Comes now the defendant and asks the court that the plaintiff be required to make his petition herein more definite and certain, in this, to-wit: How and in what manner he could, or expected he could, make a profit of $1,500 in the trade or exchange mentioned in said petition." The overruling by the district court of this motion is the first assignment of error argued here. The petition was sufficiently definite and certain. It stated the facts. To have required Wilhelm to state in his petition in what manner he would have realized a profit on the exchange, had it been made, would have required him to state the evidence. If counsel for the telegraph company desired Wilhelm to state in his petition the value of the land and the value of the goods, they should have so framed their motion. Unless a motion can be allowed in the exact form presented to the court it should be denied. (*McDuffie v. Bentley*, 27 Neb., 380; *Stuht v. Sweesy*, 48 Neb., 767.) The refusal of the court to grant this motion was not error.

2. It is next assigned for error that the district court erred in giving instructions 3 and 4. The exception taken to the instructions at the trial was in the following language: "To the giving of the third and fourth of which instructions the defendant then and there duly excepted."

The court did not err in giving both these instructions. The fourth, at least, is a correct statement of the law of the case, and since the assignment is that the court erred in giving both the instructions, and one of them is good, the assignment must be overruled.

3. The third assignment of error is that the court erred in refusing instructions 1, 4, and 5 asked by the defendant below. Exceptions taken at the trial to the instructions refused were as follows: "The defendant thereupon asked the court to instruct the jury as follows, which the court refused to do, and upon such refusal the defendant then and there excepted." Then follow instructions Nos. 1, 4, 5, and 6 asked by the telegraph company, and then the following: "To the refusal of the court to give to the jury the last above instructions the defendant then and there excepted." Since the court did not err in refusing to give all these instructions, the assignment is overruled.

4. The fourth assignment of error is that the verdict is not supported by sufficient evidence. In support of this contention it is said: "The evidence fails to show that the property which defendant was to receive was of greater value than the property he was to give." It was admitted on the trial that the land of Wilhelm, over and above incumbrances thereon, was of the value of $700, and the $300 cash which he was also to pay made the value of the land and money which he was to give for the goods $1,000. A witness testified in behalf of Wilhelm, as to the value of the stock of merchandise, as follows: "I think it was $2,400; am not right sure, but know it was over $2,000." A witness on behalf of the telegraph company testified that the merchandise was worth not to exceed $200; but this witness admitted that he had come from Omaha to Wayne to testify in behalf of the telegraph company, and that it was to pay him for his time and attendance $10 a day and expenses. All that we can say about the value of this stock of merchandise is that the evidence on the subject was conflicting. The witnesses and their credibility were for the jury;

and the amount of damages awarded by the jury are within the excess of the value of the stock of merchandise over the land and money which Wilhelm was to exchange therefor.

A second argument in support of this contention is that "the evidence shows that the trade was not consummated, but depended upon the examination of the goods and approval by the defendant." It must be confessed that the evidence is not of a very clear and satisfactory character. The evidence on the part of Wilhelm tended to show that prior to the time the message was delivered to the telegraph company he owned a piece of land in Sherman county; that he himself resided at Wayne, Nebraska; that he had authorized Malmgren & Lovegren, who appear to have been real estate agents at Omaha, to trade this land for a stock of merchandise; that he invested them with discretion as to the merchandise and the terms of the exchange; that he authorized them to "pledge him"—in the language of the evidence—for $300 in addition to his land for a stock of merchandise; that Malmgren & Lovegren found a stock of merchandise and agreed with the owner thereof, or his agent, to exchange him the Wilhelm land and $300 for the stock of merchandise; that Malmgren & Lovegren, after making this agreement for the exchange, sent the telegram to Wilhelm which is the subject of this suit, notifying him that they had made the exchange and asking him to come to Omaha at once and bring the deed to his land and an abstract of title thereto, and $300 in money; that if this dispatch had been promptly delivered, Wilhelm would have reached Omaha in time to have delivered his deed and money and accepted the goods, and would have done so. It is true, so far as the record shows, that the owner of the goods had never seen the land, nor had Wilhelm or his agents seen the goods; they were in boxes. The whole transaction appears to have been a kind of "pig in the poke" trade or exchange; but we are constrained to say that the evidence, and the inferences fairly and rea-

sonably and logically deducible therefrom, support the conclusion that Wilhelm's agents were authorized to make the exchange.

5. Finally, it is insisted, in substance, that the evidence does not show that the neglect of the telegraph company to deliver the message was the proximate cause of the damages sustained by Wilhelm. Wilhelm's petition is framed upon the theory that by reason of the failure of the telegraph company to deliver the dispatch he was prevented from consummating the exchange of the land for the stock of goods, and thereby lost the profits he would have made had such exchange been consummated. These damages are not too remote. The general rule is that the party injured by breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach. (*Griffin v. Colver*, 16 N. Y., 489. See, also, *Squire v. Western Union Telegraph Co.*, 98 Mass., 232.)

In *Western Union Telegraph Co. v. Haman*, 20 S. W. Rep. [Tex.], 1133, on the 21st day of June, 1889, one of the firm of Haman & Co., after receiving instructions by wire from his firm, purchased a quantity of wool for the firm at eighteen and one-half cents per pound and delivered a message to the telegraph company advising his firm of such purchase. The telegraph company neglected to deliver the message. When the wool was purchased it was worth in the market twenty-one cents per pound, but when the firm first learned of the purchase the price had declined. Haman & Co. then sued the telegraph company to recover the difference between the price they had paid for the wool and its market price on the 21st of June. It appeared from the evidence that had the dispatch been promptly delivered Haman & Co. could and would have sold the wool at twenty-one cents per pound. The court held that the damages were not too remote, were not uncertain, and were not contingent. (*Parks v. Alta California Telegraph Co.*, 13 Cal., 423; *Turner v. Hawkeye Tele-*

graph Co., 41 Ia., 458; *Candee v. Western Union Telegraph Co.*, 34 Wis., 471.) Since it appears from the evidence that the message delivered to the telegraph company for Wilhelm was never delivered; that by reason of the failure of the telegraph company to deliver the message the exchange of properties was not consummated, and he thereby lost the profits he would have made upon that exchange; and since the evidence warrants the conclusion that had the message been delivered the exchange would have been consummated, we think the evidence sustains the finding that the neglect of the telegraph company to deliver the message was the proximate cause of the loss and damages sustained by Wilhelm. The judgment of the district court is

AFFIRMED.

DANE COUNTY BANK OF STOUGHTON, WISCONSIN, V. THOMAS J. GARRETT ET AL.

FILED JUNE 16, 1896. No. 6673.

1. **Judgments: FINAL ORDER: REVIEW.** An order of a district court, made in an error proceeding setting aside the judgment of a county court, is a final order which may be reviewed on error by the supreme court before the final disposition of the original case by the district court.
2. **Appeal from County Court to District Court: JURISDICTION: TRANSCRIPT.** The filing in a district court of a petition in error and the issuance of a summons in error, to review the judgment of a county court, within one year from the date of its rendition, are not alone sufficient to invest the district court with jurisdiction. It is also indispensable to the jurisdiction of the district court that there should be filed therein a transcript of the proceedings of the county court had in the case in which the judgment sought to be reviewed was rendered, and such transcript must be filed in the district court within one year after the date of the rendition of such judgment.

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

Rhea & Rhea, for plaintiff in error.

A. J. Shafer, contra.

RAGAN, C.

On the 4th day of January, 1892, in the county court of Phelps county, the Dane County Bank recovered a judgment against Thomas J. Garrett et al. on a promissory note. No appeal was ever taken by Garrett et al. from this judgment. On the 14th day of January, 1892, Garrett et al. filed in the district court of Phelps county a petition in error to reverse the judgment of the county court. A summons in error was issued and served on the 18th of January, 1892. On the 23d of June, 1893, Garrett et al., for the first time, filed in the district court a transcript of the proceedings of the county court. The district court sustained the petition in error and set aside the judgment of the county court, and to reverse this order of the district court the Dane County Bank has filed in this court a petition in error.

1. The action of the district court in sustaining the error proceeding and setting aside the judgment of the district court was a final order which the Dane County Bank may review in this court by error proceedings without waiting for the final disposition of the original case by the district court. (*Banks v. Uhl*, 5 Neb., 240; *Tootle, v. Jones*, 19 Neb., 588.)

2. The filing by Garrett & Co. in the district court of their petition in error and having a summons in error issued and served did not invest the district court with any jurisdiction to review the judgment of the county court. In order to have invested the district court with jurisdiction to review that judgment it was not only necessary for Garrett et al. to file their petition in error in the district court, but also to file in the district court a transcript of the proceedings had by the county court (Code of Civil Procedure, secs. 584, 586); and such peti-

tion in error and transcript of the proceedings of the county court must have been filed in the district court within one year from the date of the rendition of the judgment by the county court. (See Code of Civil Procedure, sec. 592, and *Sturtevant v. Wineland*, 22 Neb., 702.) The district court, then, was without jurisdiction to review the judgment of the county court, and its judgment in the premises was void and the judgment of the county court remains in full force and effect, so far as the action of the district court is concerned. The judgment of the district court is reversed and the proceeding in error from county court is dismissed.

REVERSED.

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4. An attachment bond may be sufficient when signed by a surety, though not signed by the attaching creditor. *Id*..... 33

Redelivery Bonds.

5. A stranger to an attachment suit who executes a redelivery bond under sec. 206 of the Code is bound to deliver the property attached in his hands, or its appraised value in money, to answer the judgment in the case. *Cooper v. Davis Mill Co.* 420
6. Where the obligor in a redelivery bond executed under sec. 206 of the Code is a stranger to the attachment suit, he cannot, after judgment and order of sale therein, be heard to assert, in an action upon the bond, that he was the owner of the property attached in his hands and left in his possession by the sheriff. *Id.*

Fraud. Evidence.

7. Evidence *held* insufficient to sustain an order discharging an attachment against defendants who were charged with fraudulently disposing of property to defraud creditors and to hinder and delay them in the collection of debts. *Kingman v. Weiser* 834, 842
8. The burden is on plaintiff to sustain his charges, where the allegations of his affidavit for attachment are denied on motion to dissolve. *Geneva Nat. Bank v. Bailor*..... 866

Attachment—*concluded.*

9. Evidence *held* insufficient to show that defendant fraudulently contracted the debt for which suit was brought. *Id.*

Attestation. See DEEDS, 5.

Attorney and Client. See ACKNOWLEDGMENT, 5. INFANTS, 3, 4.

Right of attorney to continue litigation after client dismissed the case. *Sims v. Davis*..... 721

Australian Ballot Law. See ELECTIONS.

Banks and Banking. See RECEIVERS.

Bathing Resorts.

1. In a suit against a bath-house company the court erred in directing a verdict for the company, where it failed to search for a missing bather when notified of his disappearance in time to rescue him. *Brotherton v. Manhattan Beach Improvement Co*..... 563
2. A company maintaining a bathing resort and letting out its privileges to the public for hire is bound to take such precautions for the safety of bathers as a person of ordinary prudence would take under the circumstances. *Id.*

Bill of Exceptions. See NEW TRIAL. REVIEW, 12-16.

1. The clerk of the district court may sign and allow a bill of exceptions when it is shown by affidavit that the trial judge is absent from the district. *Chicago, B. & Q. R. Co. v. Hyatt,* 161
2. An application for additional extension of time to prepare a bill of exceptions should be addressed to the judge to whose ruling exception was taken, such extension by another judge being ineffective. *Hanscom v. Lantry*..... 665
3. The duty of a judge in allowing exceptions is, within statutory limitations, a continuing one and does not terminate with the qualification of his successor. *Id*..... 666
4. A motion to correct a bill of exceptions by supplying evidence omitted through inadvertence will not be entertained in the supreme court. *Warner v. Hutchins*..... 672
5. An unauthenticated bill of exceptions will not be considered in the appellate court. *German Nat. Bank of Beatrice v. Terry,* 863

Bills and Notes. See NEGOTIABLE INSTRUMENTS.

Bonds. See ATTACHMENT, 3-6. COUNTY TREASURERS, 2-8. INJUNCTION, 7, 10, 11. JUDGMENTS, 4. OFFICE AND OFFICERS, 2, 3.

Boundaries. See MUNICIPAL CORPORATIONS, 4.

Building and Loan Associations.

1. In a suit for money paid for stock, and to cancel the subscription contract on account of false and fraudulent representations of defendant's agent, the surrender of the stock is a condition precedent to the right to rescind, in absence of evidence that the stock is worthless. *Building & Loan Ass'n of Dakota v. Cameron*..... 124

Building and Loan Associations—*concluded.*

2. The primary object of the act of 1891, relating to building and loan associations (Comp. Stats., secs. 148*a*-148*r*, ch. 16), is to bring a designated class of foreign corporations within the jurisdiction of the state courts in order to protect persons dealing with them from fraud and imposition. *American Building & Loan Ass'n v. Rainbolt*..... 434
3. Mismanagement of the affairs of the corporation by its officers or agents does not warrant the withdrawal of stockholders or the repudiation of the obligations assumed by them. *Id.* 435
4. A stockholder who acted as a director of the corporation for three years and had notice of its business methods and financial condition, cannot, in a suit against it, recover the money he paid for his stock on the ground that his subscription was procured by fraud of defendant's agents. *Id*..... 434
American Building & Loan Ass'n v. Rees & Elbe..... 573

Buildings. See PARTITION, 2.

Burden of Proof. See ATTACHMENT, 1.

Carriers. See RAILROAD COMPANIES.

1. *Held*, That plaintiff was not guilty of such negligence in alighting from a moving train as to defeat a recovery for personal injuries. *Chicago, B. & Q. R. Co. v. Hyatt*..... 162
2. Where a passenger knowingly jumps from a moving train under such circumstances as to render the act obviously and necessarily perilous and to show a willful disregard of danger, it will prevent a recovery for personal injuries. *Id.*
3. A common carrier is an insurer of the safety of a passenger, except as against his criminal negligence or his violation of a rule of the carrier. *Fremont, E. & M. V. R. Co. v. French* .. 639
4. The relation existing between a carrier and passenger is a contractual one, the undertaking of the carrier being to safely transport and deliver the passenger. *Id.*

Chattel Mortgages. See FIXTURES. FRAUDULENT CONVEYANCES, 6. PRINCIPAL AND AGENT, 4. SALES, 13. TROVER AND CONVERSION, 3.

1. A tax lien on personalty is paramount to the lien of a chattel mortgage executed after the delivery of the tax list to the county treasurer. *Farmers Loan & Trust Co. v. Memminger*... 17
2. Extension of time for payment of a debt is a sufficient consideration for a chattel mortgage securing such debt. *Fuller v. Brownell* 145
3. An unrecorded chattel mortgage is good between the parties, and others, except mortgagor's creditors or subsequent purchasers and mortgagees in good faith. *Id.*
4. A chattel mortgage, where mortgagor retains exclusive possession and control of the chattels, is void as against mort-

Chattel Mortgages—*concluded.*
gagor's creditors unless filed for record as required by sec. 14, ch. 32, Comp. Stats. *Spaulding v. Johnson* 830
5. An indorsee of chattel mortgage notes, who held them as collateral security for a debt of mortgagee, was entitled, on breach of condition, to possession of the chattels, as against both parties to the mortgage. *Houck v. Linn* 228
6. A chattel mortgage is not avoided by the fact that subsequent to its execution the mortgagee consented to a sale of the property by the mortgagor for the benefit of both, no other liens existing and the sale not having been consummated. *Id.*
7. A chattel mortgage is not avoided by the failure of the mortgagee to foreclose immediately upon default. *Id.*

Collateral Attack. See EXECUTIONS, 2.

Collateral Security. See CHATTEL MORTGAGES, 5. PLEDGES.

Compromise and Settlement. See COUNTY TREASURERS, 6. EVIDENCE, 27.

Condemnation Proceedings. See EMINENT DOMAIN.

Conflict of Laws.
Contract *held* to be governed by the laws of Nebraska in a suit on a note where the defendant alleged that the consideration was a usurious loan and that the contract was made in the state of New York and void under the laws thereof. *Bascom v. Zediker* 380

Confusion. See ACCESSION AND CONFUSION.

Consideration. See CHATTEL MORTGAGES, 2. CONTRACTS, 15.

Constitutional Law. See STATUTES.
1. So much of the act of March 31, 1887, amending sec. 85 of the Code, as makes a *lis pendens* constructive notice of the action to the holders of prior incumbrances or conveyances, is unconstitutional. *Sheasley v. Keens* 57
2. The right of review, either by error or appeal, is granted by the constitution, and the legislature has no authority to impose a penalty of five per cent upon the affirmance of a judgment. *Coburn v. Watson* 258
3. Assuming that the purpose of the act of 1891, relating to foreign building and loan associations (Comp. Stats., secs. 148*a*-148*r*, ch. 16), was to invalidate contracts of non-complying corporations, the act, as to agreements existing at the time of its enactment, is unconstitutional. *American Building & Loan Ass'n v. Rainbolt* 435

Construction. See CONTRACTS, 13, 14.

Contempt.
1. In a summary proceeding, one making, in good faith, an application to a judge for an order transferring a case on ac-

Contempt—*concluded.*

count of the latter's prejudice cannot be punished for contempt, because former, libelous publications were tendered in support of the application, such an offense only being punishable in a proceeding based on an information. *Le Hane v. State* 105

2. It is not a contempt *per se* to present to a judge, in respectful language and in a proper manner, an application for a trial before another judge on account of the former's prejudice. *Id.* 106
3. It is not a contempt to present to a judge, in respectful language and in a proper manner, an application for a trial before another judge on account of the former's prejudice, merely because documents offered in evidence reflect upon the character of the judge, of whom prejudice is alleged. *Id.*
4. A tender of evidence before a judge, when made in good faith, to show prejudice, on application for a trial before another judge, is not a contempt of court. *Id.*

Continuance.

1. A motion and affidavit based upon the absence of a witness are insufficient, where they fail to show that either the attendance of the witness or his testimony would be obtained after the granting of a continuance. *McClelland v. Scroggin*.. 141
2. Statements in the affidavits of a prisoner and his counsel that there exists in the county where the case is to be tried a great deal of excitement, are not sufficient to justify the reversal of an order denying a continuance. *Hoover v. State*, 184
3. In absence of an abuse of discretion in a ruling upon motion for a continuance, the decision will not be disturbed. *Storz v. Finklestein* 27
Burris v. Court 179
Hoover v. State 184
4. Prejudicial error did not result from denying a continuance, where the application was based on the absence of a witness who appeared at the trial and testified. *Imhoff v. Richards*... 593

Contracts. See ARBITRATION AND AWARD. ATTACHMENT, 5. CARRIERS, 4. CONFLICT OF LAWS. COUNTIES, 10. EASEMENTS, 2. EVIDENCE, 14. INJUNCTION, 5. PARTY WALLS. SALES. STATUTE OF FRAUDS. VENDOR AND VENDEE, 4.

1. Discussion of testimony as to the terms of a conditional promise to pay plaintiff a certain sum as a bonus. *Smith v. Smith* 21

Subscriptions. Pleading and Proof.

2. In an action on a subscription contract, it was *held*, under the pleadings and evidence discussed in the opinion, that an issue as to whether defendant authorized the contract which plaintiff's solicitor undertook to make for the former, should have been submitted to the jury. *Rawlings v. Young Men's Christian Ass'n* 216

Contracts—*continued.*

3. In a suit on a contract a general denial puts in issue the making of the contract, and places upon plaintiff the burden of establishing it as alleged. *Id.*
4. In an action on a subscription contract, a defendant who authorized plaintiff's solicitor to enter the former's name for a certain amount subject to conditions, *held*, not bound by the acts of plaintiff's solicitor beyond the authority conferred. *Id.*
5. Contract of the subscribers for the erection and equipment of a butter and cheese factory *held* to be several, and that each subscriber was liable to the amount of his subscription only. *Davis v. Ravenna Creamery Co*..... 471

Time.

6. Parties may by a distinct provision make time of the essence of a contract for the sale of land. *Brown v. Ulrich*..... 409

Rescission.

7. One seeking to rescind a contract on the ground of fraud must offer to return the consideration, where it is of any value or where its loss would result in disadvantage or inconvenience to the adverse party. *Building & Loan Ass'n of Dakota v. Cameron* 124
8. The continued use or employment of property received under a fraudulent contract will be construed as an election to affirm the contract. *American Building & Loan Ass'n v. Rainbolt* 434
9. Not every breach of contract by one party will authorize the other party to treat the contract as rescinded. *Id.*
10. Failure of a party to perform an independent stipulation collateral to the main consideration, not amounting to a condition precedent, *held* not to authorize the other party to treat the contract as abandoned. *Id.*
11. Evidence *held* not to prove a breach by a foreign building and loan association of an alleged agreement to maintain a local board of directors. *Id.*
12. The right to rescind a contract on the ground of fraud must be promptly exercised upon the discovery of the fraud. *Id.* *American Building & Loan Ass'n v. Rees and Elbe*..... 573

Construction.

13. Where a contract is ambiguous, a practical construction placed upon it by the parties should prevail over any mere technical interpretation. *Davis v. Ravenna Creamery Co*..... 471
14. Where a contract is partly written and partly printed, the writing controls in case of inconsistency of provisions. *Id.*

Consideration.

15. A past consideration is sufficient to support a promise when the consideration was performed in pursuance of a previous request. *Stuht v. Sweesy* 767

Contracts—*concluded.*

Damages for Breach.

16. A party injured by a breach of contract may recover all his damages, including gains prevented as well as losses sustained. *Western Union Telegraph Co. v. Wilhelm* 910

Conveyances. See DEEDS.

Corporations. See BUILDING AND LOAN ASSOCIATIONS. EVIDENCE, 6.

1. Under a subscription contract with builders for the construction of a factory for operation by a company to be incorporated by the subscribers whose liability was several, it was *held* that the corporation was not liable on the contract, and that the builders could not enforce a mechanic's lien for the amount of the unpaid subscriptions. *Davis v. Ravenna Creamery Co.* 471
2. The fact that one is shown to be secretary and treasurer of a corporation will not authorize the presumption that he is a stockholder. *Horbach v. Tyrrell* 514

Costs. See CRIMINAL LAW, 4. JUDGMENTS, 7.

Cotenancy. See TENANCY IN COMMON.

Counties. See COUNTY TREASURERS. HIGHWAYS. VILLAGES.

Surface Water. Highways.

1. A county or city in exercising the right of eminent domain may divert water in a manner which would be unlawful if done by an individual; but, in such case, just compensation must be made for all damage inflicted. *Churchill v. Beethe*... 87
2. An action will not lie to enjoin a county from constructing a culvert across a highway, when such culvert is reasonably necessary to a proper maintenance of the road, damages consequent from such construction being presumed to have been satisfied when the highway was opened. *Id.* 88

County Boards.

3. The approval of the official bonds of county, precinct, and township officers, is the act of the county board as a body, and not the act of an individual member or members. *Stoner v. Keith County* 280
4. The county board has exclusive original jurisdiction to examine and pass upon claims or demands against the county. *Stenberg v. State* 290
Douglas County v. Keller..... 317
5. County boards are not courts in a constitutional sense. *Id.*
6. In the absence of statutory power a county board cannot review or reverse the acts of a prior board performed within the scope of its authority. *Id.*
7. It was *held* that a county board had jurisdiction to examine and allow a claim for the return of purchase money paid to the county by the purchasers of land under a void sale to them by a prior county board. *Id.*

Counties—*concluded.*

8. A county board in passing on claims acts judicially, and its judgment is final unless reversed on appeal. *Cuming County v. Thiele* 888

County Seat Election.

9. The dismissal of an attempted contest of a county seat election, because the district court had no jurisdiction, *held* proper. *Sebering v. Bastedo* 358

Depository.

10. An agreement of a county treasurer that if money is advanced by a bank for certain county purposes, the bank shall be relieved to a certain extent from liability to the county as a depository, is not enforceable. *Commercial State Bank of Neligh v. Antelope County* 496

County Attorney. See CRIMINAL LAW, 3.

County Boards. See COUNTIES.

County Judge. See INJUNCTION, 6. JUSTICES OF THE PEACE.

County Seat. See COUNTIES, 9.

County Treasurers.

1. Settlements between the county board and treasurer do not constitute a judicial determination of the subjects involved. *Bush v. Johnson County* 1
2. It is the duty of the bondsmen of a county treasurer to see that his duties are properly discharged. *Id.*
3. The duty of a county treasurer to safely keep, account for, and turn over the public funds which come into his hands by virtue of his office is an absolute one. *Id.*
4. An incoming county treasurer who accepts from his predecessor, as county funds, a certificate of deposit, and exchanges it at the bank which issued it for a similar certificate for a like amount payable to himself as treasurer, is liable on his bond for a loss of the funds through the failure of the bank. *Id.*
5. That county funds have been lost or stolen without the fault or negligence of the treasurer is not a defense to the principal or sureties in a suit on the bond of the treasurer for his failure to account for or pay over the county funds. *Id.* 2
6. Where a treasurer in his report to and settlement with the county board included a certificate of deposit as so much cash, without knowledge of the board, the settlement did not bind the county as an acceptance of the certificate as cash accounted for, or release the treasurer or his bondsmen, the bank having failed before payment of the certificate. *Id.*
7. A county treasurer's bond should be approved by the county board. *Stoner v. Keith County* 279
8. A county treasurer is not entitled to a commission on the proceeds of sales of bonds paid to him as such officer. *Id.*

County Treasurers—*concluded.*

9. The words, "on all moneys collected," in sec. 20, ch. 28, Comp. Stats., refer solely to such taxes as the county treasurer collected from taxpayers. *Id.*

10. In a suit on the bond of a county treasurer to recover funds which he failed to turn over to his successor, it was *held* that any sum due him from the county should have been pleaded as a set-off. *Id.*

11. Where the date of a county treasurer's default has not been proved, it may be presumed to have occurred at the close of his term of office when all county funds in his hands should have been turned over to his successor. *Id.* 281

Courts. See COUNTIES, 5, 9. EVIDENCE, 4. JUDGMENTS, 6. JUSTICE OF THE PEACE. MANDAMUS, 3.

1. Where prejudice would prevent an impartial trial, a party or his counsel may apply to the judge before whom the case would naturally come on for hearing, for a trial before another judge. *Le Hane v. State* 105

2. The supreme court has no original probate jurisdiction. *Fitzgerald v. Fitzgerald & Mallory Construction Co* 386

3. Where a county court having jurisdiction makes an order in reference to the disposition of the assets of an estate, the supreme court will not pass upon the validity of the order unless presented for review by a direct proceeding. *Id.*

4. After a federal court has acquired jurisdiction of the parties to a suit and the subject-matter, a state court may not interfere with the exercise of such jurisdiction. *Prugh v. Portsmouth Savings Bank* 414

5. As a general rule a state court will not enjoin parties to an action already in progress in a federal court from further proceeding therein, the exceptions to the rule being based upon the doctrine that in courts of concurrent jurisdiction the one first acquiring jurisdiction retains it for all purposes. *Id.*

6. A state court having no prior jurisdiction of the subject-matter will not, by injunction, restrain a plaintiff in whose favor judgment has been rendered in a federal court from proceeding to the execution of the judgment, nor restrain a United States marshal from selling property levied upon to satisfy the judgment. *Id.*

7. After acquiring jurisdiction of a case by appeal, the supreme court has power to allow a supersedeas, in absence of statutory authority. *Home Fire Ins. Co. v. Dutcher* 755

Creditors' Bill. See FRAUDULENT CONVEYANCES, 1-3.

Criminal Law. See CONTINUANCE. INDICTMENT AND INFORMATION.

1. An information upon which the accused is to be tried for a felony is void if filed in vacation. *In re Vogland* 37

2. In reviewing the record in a criminal case, there is no presumption that an order of the judge requiring relatives of

Criminal Law—*concluded.*

accused to go away from the latter during the trial, was without justification; nor that prejudice resulted from the unusual manner of making the order. *Hoover v. State*..... 184

3. Where the only objection by accused to the misconduct of the county attorney was that he made statements unwarranted by the evidence, an instruction directing the jury to disregard such statements left no ground for complaint. *Id.*. 185

4. The right of appeal from the county court to the district court in a criminal case is restricted to defendant, and appeal will not lie in favor of the complaining witness against whom a judgment for costs has been rendered. *O'Chander v. Hansen* 485

Damages. See ATTACHMENT, 1. BATHING RESORTS. CARRIERS, 1, 2. EMINENT DOMAIN. FRAUD, 2. INTOXICATING LIQUORS. MUNICIPAL CORPORATIONS, 1-3. NEGLIGENCE, 6. PRINCIPAL AND AGENT, 2. RAILROAD COMPANIES, 8-10. SALES, 2. SURFACE WATER. TROVER AND CONVERSION.

1. Judgment for plaintiff *held* to be sustained by the evidence in an action against one who tore down a fence near a section line and drove over plaintiff's grounds and crops. *Oyler v. Ross* 211

2. The law awards damages to a person injured through negligence of another, not as punishment, but as compensation for pecuniary loss and for pain and suffering. *Fremont, E. & M. V. R. Co. v. French*..... 639

3. An injured passenger is not entitled to damages that will put him in a better position than he would have been in had the carrier complied with its contract for safe transportation. *Id.*

4. A judgment for $6,300 in favor of an injured railroad passenger was *held* excessive and the filing of a remittitur for $1,300 was made a condition of affirmance in the supreme court. *Id.*

5. Verdict for plaintiff for $957.51 *held* to be sustained by the evidence in a suit for damages for assault and battery, where plaintiff was ejected from a building and thrown upon the pavement in such a manner as to cause protracted and probably permanent mental derangement. *Mengedoht v. Van Dorn,* 880

6. A telegraph company *held* liable for the profits plaintiff was prevented from realizing through its failure to deliver a message to him. *Western Union Telegraph Co. v. Wilhelm*..... 910

Dedication. See HIGHWAYS, 4.

Deeds. See LIMITATION OF ACTIONS, 4. MORTGAGES, 9-12.

1. A deed executed in good faith before the grantor was sued, but unrecorded when judgment was rendered against him, was *held* to take precedence of a sheriff's deed under attachment or execution where the former deed was recorded before the sheriff's deed. *Sheasley v. Keens*..... 57

2. Evidence *held* sufficient to sustain a decree canceling a deed

Deeds—*concluded.*

on the ground that grantor, by reason of his mental condition, was incapable of making a disposition of his property, or of realizing the purport and effect of his acts. *Hay v. Miller* 156

3. A court of equity may reform a deed so as to make it comply with the intention of the parties. *Beall v. Martin*..... 479
4. An acknowledgment is not essential to the validity of a conveyance which does not convey or incumber the homestead of grantors. *Horbach v. Tyrrell*..... 514
5. Any expression from which it appears that the subscriber witnessed the execution by grantor answers the requirement of sec. 1, ch. 73, Comp. Stats., as to witnessing deeds, the use of the word "witness" or "witnessed" being unnecessary. *Link v. Connell* 574

Depositions.

Where a deposition shows that the witness is a non-resident of the county, it is unnecessary for the party offering it to prove that the witness is not present in court. *Lowe v. Vaughan* 651

Description. See EXECUTIONS, 4. MECHANICS' LIENS, 7, 8.

Dismissal. See REPLEVIN, 3. RES JUDICATA, 3. REVIEW, 50.

Where defendant has not appeared, a dismissal filed by plaintiff, as provided by statute, ends the case. *Sims v. Davis*..... 720

Divorce. See REVIEW, 41, 42.

1. Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. *Heist v. Heist*..... 794
2. Condonation is dependent upon future good conduct, and the repetition of the offenses revives the wrong condoned. *Id.*
3. Condonation of extreme cruelty may be avoided by abusive language and the use of opprobrious epithets. *Id.*
4. Conduct of a husband which would not alone support a decree of divorce on the ground of extreme cruelty may be sufficient to avoid a condonation. *Id.*
5. The amount fixed for alimony should be just and equitable, due regard being had for the rights of each party, the ability of the husband, and the estate of the wife. *Id.*
6. Where the wife was awarded the custody of the minor children, and the husband's unincumbered property was valued at $4,500, an allowance to the wife of $2,250 as alimony was *held* not excessive. *Id.*..... 798

Dower. See PARTITION, 3.

Drainage. See INJUNCTION, 5.

Easements. See PARTY WALLS.

1. A court of equity will give effect to a parol grant of an easement certain in its terms and based on a valid consideration, where there has been such a performance on grantee's part

Easements—*concluded.*

as would, in case of a contract for the sale of the fee, take the case out of the statute of fraud. *Gilmore v. Armstrong*..... 92

2. Adjoining lot owners may, by grant, impose mutual conditions upon the land owned by each, the mutuality of the covenants being a sufficient consideration for the respective grants; and such mutual covenants should be construed as the grant of reciprocal easements which may be enforced in equity when the remedy at law is insufficient. *Barr v. Lamaster* 114

Ejectment. See ADVERSE POSSESSION.

Plaintiff must allege in his petition that he is entitled to the possession of the premises sought to be recovered. *George v. McCullough* 680

Election of Remedies. See REVIEW, 2.

Elections. See COUNTIES, 9.

1. The question as to which one of two factions of a political party is the true representative is rather a political than a judicial question. *Phelps v. Piper*..... 724
2. It is not the province of the secretary of state to determine which of the two rival state conventions of the same party is entitled to recognition as the regular convention. *Id.*
3. Where two factions of a political party nominate candidates and certify the nominations to the secretary of state, he will not inquire into the regularity of the convention held by either faction, but will certify to the several county clerks the names of candidates nominated by each. *Id.*

Eminent Domain. See MUNICIPAL CORPORATIONS, 2, 3.

1. The rule that in the absence of negligence one deflecting surface water by the proper use or improvement of his land is not liable for resulting damage to a neighbor, applies to counties exercising the right of eminent domain. *Churchill v. Beethe* 87
2. All damages, immediate or prospective, which may flow from the proper construction and maintenance of an improvement carried on under the power of eminent domain, must be compensated in the original condemnation proceedings. *Id*..... 83

Equity. See EASEMENTS, 2. DEEDS, 2. SPECIFIC PERFORMANCE. VENDOR AND VENDEE, 5.

A court of equity may reform a deed so as to make it comply with the intention of the parties. *Beall v. Martin*..... 479

Error. See REVIEW.

Estoppel. See ACCORD AND SATISFACTION. ATTACHMENT, 5, 6. BUILDING AND LOAN ASSOCIATIONS, 4. MUNICIPAL CORPORATIONS, 2. RES JUDICATA, 3. REVIEW, 47. STATUTE OF FRAUDS, 3. TAXATION, 5. VENDOR AND VENDEE, 1.

1. Where owners in severalty of adjoining lots erected, pursu-

Estoppel—*concluded.*

ant to mutual agreement, buildings having stairs, hallway, skylight, and heating apparatus in common, an owner who filed, and subsequently dismissed, a petition for leave to erect a partition wall was not estopped to call in question the power of the court to decree partition under a pleading of the other party. *Barr v. Lamaster* 114

2. The facts claimed to constitute an estoppel must be pleaded. *Cobbey v. Buchanan* 391
3. Generally, the doctrine of estoppel *in pais* is not applicable to infants. *Id.*
4. Declarations of a partner that he is acting with authority in paying an individual debt with firm assets do not create an estoppel against other partners in favor of one relying upon such declarations. *Columbia Nat. Bank v. Rice* 428
5. One who by his words or conduct willfully causes another to believe in and act under certain facts, is estopped from averring against the latter a different state of things as existing at the same time. *Brown v. Eno* 538
6. Evidence *held* to sustain a finding that defendants by their conduct were estopped from claiming or asserting a mortgage lien upon certain chattel property. *Id.*

Evidence. See ACCOUNTS, 3. CORPORATIONS, 2. FRAUDULENT CONVEYANCES, 1, 4. LANDLORD AND TENANT, 5. NEGLIGENCE, 11. PARTNERSHIP, 5, 6. RAILROAD COMPANIES. REVIEW, 17-24. WILLS, 2, 4. WITNESSES.

Negligence.

1. It is for the court to say what act or omission is evidence of negligence, but it is generally for the jury to say whether the evidence establishes negligence. *Omaha Street R. Co. v. Martin* 66

Sanity.

2. As the result of personal observation after stating the facts observed, a non-professional witness may give his opinion as to sanity. *Hay v. Miller* 156
3. A non-expert witness should be permitted to express an opinion as to sanity, only when he has shown sufficient qualifications and has stated the facts and circumstances upon which his opinion is based. *Hoover v. State* 184

Judicial Notice.

4. The supreme court will take judicial notice of the boundaries of a judicial district and of the counties therein. *Chicago, B. & Q. R. Co. v. Hyatt* 162

Admissions.

5. An admission that absent witnesses would testify as alleged in an affidavit for a continuance, *held* not an admission that the testimony was true. *Burris v. Court* 179
6. Testimony at another trial, by an officer of a corporation, with relation to previous corporate acts cannot be proved as

Evidence—*continued.*
an admission binding upon the corporation. *Columbia Nat. Bank v. Rice* 428

Foundation.

7. Where an instrument is admitted without sufficient proof of its execution, subsequent proof may cure the error. *Houck v. Linn* 227
8. Error in allowing a witness to state, without laying a foundation, his recollection of the evidence of a witness since deceased, may be cured in a case tried to the court, by completing the foundation with statements in giving evidence. *Twohig v. Leamer* 247

Parol Evidence.

9. In an action on a subscription contract, parol evidence may be admitted to prove the contents of the subscription book after proof of its loss, though similar books not offered in evidence are in existence. *Rawlings v. Young Men's Christian Ass'n* 216
10. It is not competent to change or vary the terms of a written contract by parol evidence. *Stoner v. Keith County*..... 281
11. Parol evidence of prior or contemporaneous conditions modifying a written proposition afterwards submitted and acted upon cannot be received in evidence to vary the terms of the writing. *Commercial State Bank of Neligh v. Antelope County,* 496

Collateral Facts.

12. Evidence of collateral facts corroborative of statements of parties with respect to the principal contention is confined to such transactions as shed some light upon the question at issue. *Blomgren v. Anderson*..... 240
13. As a rule the circumstances surrounding the parties, their relations toward each other and the subject of the controversy at the time of the transaction involved, are proper subjects of proof. *Id.*
14. In a suit for three months' wages at $20 per month, the answer being that the services were, under an agreement, performed for plaintiff's board and lodging, it was *held* proper for plaintiff to prove that a third person, in defendant's hearing at the time of the alleged agreement, offered to employ plaintiff at $1.25 per day. *Id.*

Witnesses Deceased.

15. Evidence given during a trial by a witness since deceased is admissible on a subsequent trial of the same case, and may be stated by one who heard it, where it is not in the form of a deposition or otherwise lawfully preserved. *Twohig v. Leamer* 247
16. Before permitting a witness to give his recollection of the evidence of a person since deceased it must be shown that it was given in a former action between the same parties with an opportunity for cross-examination, that it involved

Evidence—*concluded.*

the same subject-matter, and that the witness recollects and can repeat it. *Id.*

Handwriting.

17. Under sec. 344 of the Code, the genuineness of handwriting may be determined by comparing the disputed writing with that proved to be genuine. *First Nat. Bank of Madison v. Carson* 764

18. Where the genuineness of handwriting is in issue, writings proved to be genuine should be admitted in evidence for the purpose of permitting the jury and experts to make comparisons. *Id.*

Books, Documents, and Judgments.

19. In a suit for injuries to one who was ejected from a building and thrown upon the pavement, pleadings in a case through which defendant acquired title to the building were properly excluded. *Mengedoht v. Van Dorn*..... 882

20. An objection to a question calling for the contents of books, *held* properly sustained. *Columbia Nat. Bank v. Rice*..... 432

21. The printed copies of statute laws issued by the secretary of state are only presumptive evidence of such laws, the original enrolled acts deposited in his office being the controlling evidence. *Bruce v. State*..... 570

22. A memorandum made contemporaneously with the facts of which it purports to be a record, when properly identified, is admissible as independent evidence. *Imhoff v. Richards*..... 591

23. The transcript of a foreign judgment is not admissible unless authenticated according to sec. 414 of the Code. *Names v. Names* 701

Words.

24. Where a witness uses a word having a signification so generally known as to be understood by the jurors, courts will not treat the word as unintelligible merely because from motives of decency and propriety lexicographers have ignored it. *Bruce v. State* 570

Contracts.

25. Evidence *held* sufficient to sustain a decree in favor of plaintiff who sued for the purchase price of land. *Stephens v. Harding* 659

Communications.

26. Reference to communications of commercial agencies. *Weir v. Illinois Nat. Bank*..... 793

Offers to Compromise.

27. The rule excluding evidence of offers to compromise does not apply to offers to compromise a dispute which form the basis or constitute a part of a contract actually compromising such dispute. *Stuht v. Sweesy*..... 768

Exceptions. See BILL OF EXCEPTIONS. INSTRUCTIONS, 11, 12.

Executions.

1. Land levied upon by virtue of a writ of execution is subjected to the process of the court. *Prugh v. Portsmouth Savings Bank* 415
2. Execution sale of land under a dormant judgment cannot be attacked collaterally. *Link v. Connell*..... 574
3. The irregularity in a sheriff's making a sale instead of a master, *held*, cured by confirmation of sale. *Id.*
4. Finding in regard to errors in the description of realty sold under mortgage foreclosure, approved. *American Investment Co. v. McGregor*..... 779
5. The statutory provision for the deduction of prior liens is for plaintiff's benefit, and the failure to observe it cannot be urged by defendant as an objection to confirmation. *Id.*
6. That appraisers added the valuation of pieces of realty and from the aggregate deducted incumbrances, *held* not ground for setting aside a sale, where each piece sold for more than two-thirds of its appraised value. *Id.*

Exemptions. See HOMESTEAD.

The provision of sec. 531 of the Code, that no property shall be exempt when seized for clerks', laborers', or mechanics' wages, does not apply to an employe who so far retains control of the work that he is not subject to the direction of his employer. *Fox v. McClay*..... 820

Exhibits. See PLEADING, 3, 4.

Factors and Brokers. See SALES, 3, 4.

False Representations. See BUILDING AND LOAN ASSOCIATIONS, 1. FRAUD, 2. VENDOR AND VENDEE, 5.

Fees. See COUNTY TREASURERS, 8.

Final Orders. See JUDGMENTS. REVIEW, 25-28.

Findings. See TRIAL, 8, 9.

Fires. See NEGLIGENCE, 11. RAILROAD COMPANIES, 8-10.

Sec. 62, Criminal Code, making it a misdemeanor to set fire to woods and prairies, applies alone to fires set out on the lands of another. *Kansas City & O. R. Co. v. Rogers*..... 654

Fixtures.

In the absence of an agreement or consent of the landlord, neither the tenant nor his mortgagee can remove trade-fixtures after the expiration of the tenancy or after the surrender of possession. *Fuller v. Brownell*..... 145

Foreclosure. See EXECUTIONS.

Forgery. See EVIDENCE, 17, 18. WITNESSES, 10.

Fraud. See JUDGMENTS, 10. STATUTE OF FRAUDS.

1. Evidence *held* sufficient to sustain findings for plaintiff in a

Fraud—*concluded.*

suit to rescind a contract and cancel a deed for vendor's fraud and misrepresentations. *Stochl v. Caley*..... 786

2. False representations as the basis of an action are such only as in some manner actually mislead the complaining party to his damage. *American Building & Loan Ass'n v. Bear*..... 455
3. Mere collateral inducement, though fraudulently made, affords no ground for the rescission of a contract or for the recovery of damages. *Id.*

Fraudulent Conveyances. See VOLUNTARY ASSIGNMENTS, 2.

1. There is no presumption of law that a transaction is fraudulent merely because the property transferred is all the seller owned. *Goldsmith v. Erickson*..... 48
2. Whether or not a transfer of property is fraudulent as against the creditors of the seller is a question of fact determinable upon the evidence adduced in each case. *Id.*
3. Where one buys the entire stock of a merchant at a fair price without knowledge that the latter is indebted to other persons, the sale should not be declared void, though the purpose of the purchaser was, in part, to secure payment of a debt due a bank of which he was cashier. *Id.*
4. The fact that a partnership sold most of its property to one of small means for notes and a small amount of cash was not alone sufficient evidence that the transaction was fraudulent. *Nebraska Moline Plow Co. v. Klingman*..... 204
5. Evidence *held* sufficient to sustain a finding that a conveyance by a man and wife to the former's father was neither made nor accepted with the intent to defraud, hinder, or delay the creditors of the grantors. *May v. Hoover*..... 199
6. A chattel mortgage on all property of an insolvent debtor, executed under an agreement that the lien should not be filed, that mortgagee should take possession and hold the property for the benefit of the mortgagor, and after sale and payment of the debt, account to him for the balance of the proceeds, *held* fraudulent as to other creditors. *Bacon v. Brockman* 365

Garnishment. See VOLUNTARY ASSIGNMENTS, 1.

Unsecured creditors may, by garnishment, compel a secured creditor to account to them for the surplus security after satisfying his debt. *Ætna Ins. Co. v. Bank of Wilcox*..... 544

Gifts.

A decree establishing a gift *held* not supported by sufficient competent evidence. *Kroh v. Heins*..... 691

Guardian and Ward.

Evidence, though conflicting, *held* sufficient to sustain an order disposing of the final report of the guardian. *Saling v. Saling* 245

Habeas Corpus.

Prisoners were discharged where the information under which they were convicted was filed in vacation. *In re Vogland*.... 37

Handwriting. See EVIDENCE, 17, 18.

Highways.

1. The proceedings by which a highway is opened call for settlement and payment of all damages which may arise from the proper construction and maintenance of the highway. *Churchill v. Beethe* 88
2. A petition is not essential to confer jurisdiction upon a county board to open a section line road under sec. 46, ch. 78, Comp. Stats. *Oyler v. Ross*..... 211
3. An order of a board of supervisors instructing the county clerk to cause a section line road to be resurveyed and to enter such survey when made upon the records, is not an order for the opening of such road, within the meaning of sec. 46, ch. 78, Comp. Stats. *Id.*
4. Evidence *held* to sustain a finding that plaintiff did not dedicate land to the public for a highway. *Id.*

Homestead.

1. Proceeds of the sale of a homestead are, for six months, entitled to the same protection against legal process as the homestead itself. *Prugh v. Portsmouth Savings Bank*..... 414
   Corey v. Plummer 481
2. Where the proceeds of a sale of the homestead are invested in a city lot within six months, the lot may be selected as a homestead, though not yet occupied as such. *Prugh v. Portsmouth Savings Bank*..... 414
3. The amount of an incumbrance is not to be deducted from the $2,000 homestead exemption, but the claimant is entitled to the exemption in excess of the incumbrance. *Id.*
   Corey v. Plummer 481
4. The extent of a homestead is determined by the claimant's interest in the land, and not by the fee-simple value of the premises. *Corey v. Plummer*..... 481
5. Where the homestead is not worth $2,000, a purchaser takes it free from any judgment obtained against vendor after he acquired the homestead, unless the judgment is based on a mortgage, mechanic's, or vendor's lien. *Id.*
6. Judgment rendered against a vendor after registration of his contract of sale of homestead worth less than $2,000, and before payment of balance of purchase money and execution of deed, *held* not a lien upon the land or upon the unpaid purchase money. *Id.*
7. A conveyance of a homestead is void unless acknowledged. *Horbach v. Tyrrell* 514
   Havemeyer v. Dahn 536
8. The act of 1879, relating to homesteads (Session Laws, p.

Homestead—*concluded.*

57), is complete in itself and embraces the entire subject indicated by its title. *Fox v. McClay* 821

9. The provision of sec. 531 of the Code, that nothing therein contained shall be so construed "as to exempt any property from seizure for clerks', laborers', or mechanics' wages," has no application to property exempt as a homestead. *Id.*

10. The provision of sec. 531 of the Code, that no property shall be exempt when seized for wages, so far as it conflicts with sec. 1 of the Homestead Act of 1879 (Session Laws, p. 57), was thereby repealed. *Id.*

Homicide. See EVIDENCE, 3.

1. The fact that defendant was convicted of murder within three weeks after he committed the crime did not show prejudicial error in the proceedings. *Hoover v. State*..... 184

2. Evidence *held* sufficient to sustain a conviction for murder in the first degree. *Id*..... 185

Husband and Wife.

Under sec. 1, ch. 53, Comp. Stats., the wife's separate estate is not chargeable for necessaries for the family until after judgment has been entered against her husband and execution returned unsatisfied. *Small v. Sandall*..... 318

Improvements.

For the purpose of redemption, only a purchaser in good faith at a judicial sale, believing he has a good title, will be allowed credit for improvements made upon the property. *Cram v. Cotrell* 646

Incompetent Persons. See INSANITY.

Indictment and Information.

1. An information upon which the accused is to be tried for a felony is void if filed in vacation. *In re Vogland*..... 37

2. A plea in abatement sustained only by the presumption that the interlineation of the word "purposely" in the information filed with the examining magistrate was made during or after the preliminary examination, *held* properly overruled in the district court. *Hoover v. State*..... 184

Infants.

1. Necessaries for which an infant is liable are such things as are necessary to his support, use, and comfort. *Cobbey v. Buchanan* 391

2. The question as to what are necessaries must be determined from the facts and circumstances of each case. *Id.*

3. The question whether services of an attorney in attempting to procure an infant's discharge from the custody of an officer are necessaries, was properly submitted to a jury. *Id.*

4. An examination of public records by an attorney and advice to an infant as to the latter's right to property by inheritance, *held* not necessaries. *Id.*

Infants—*concluded.*

5. To estop one who represented himself to be of age, from asserting infancy as a defense, it must be shown that his statement was fraudulently made and that it was believed and acted upon by plaintiff. *Id.*

Injunction. See COUNTIES, 2. COURTS, 6. MUNICIPAL CORPORATIONS, 4.

Malice.

1. That plaintiff was inspired by malice in bringing suit is no defense where he has a valid cause of action. *Jacobson v. Van Boening* 80

Threatened Injury to Land. Waters.

2. That the injury is in part threatened by the acts of one other than defendant is no defense. *Id.*

3. In an action to prevent a continuing injury to land through an unlawful discharge of surface water by an adjoining proprietor, plaintiff need not prove that actual injury occurred before the suit was brought, proof that the acts complained of, unless restrained, will result in damage being sufficient. *Id.*

4. A continuing injury to land caused by an unlawful discharge of surface water by an adjoining proprietor may be restrained by injunction. *Churchill v. Beethe*..... 87

5. An injunction should not be granted to restrain defendant from further maintaining a dam and ditch jointly located and constructed by him and plaintiff for the benefit of both under a parol agreement, and maintained seven years, though, by mistake, the ditch lay mostly on plaintiff's land instead of being located on the dividing line. *Gilmore v. Armstrong* 92

Temporary Injunctions.

6. A county judge has power to allow a restraining order pending a hearing on application for a temporary injunction. *State v. Greene* 327

7. An order granting a temporary injunction does not become effective until the applicant for the writ executes an undertaking. *Id.*

8. A restraining order ceases to be operative on the expiration of the date fixed by its terms. *Id.*

Supersedeas.

9. The provisions of sec. 677 *et seq.* of the Code, providing for a supersedeas bond upon the dissolution of a temporary injunction, do not apply to a mere restraining order. *Id.*

10. A bond for a restraining order will not give effect to a temporary injunction subsequently allowed in the same case. *Id.*

11. Where a temporary injunction did not become operative for want of an undertaking, the giving of a supersedeas bond

Injunction—*concluded.*

upon dismissal of the suit did not give validity to the injunction. *Id.*

Party Wall.

12. A property owner may, by injunction, have his rights and estate protected from the injury of an adjoining owner who threatens to extend a common wall one story beyond the height fixed by the contract between them. *Calmelet v. Sichl,* 505

Insanity. See EVIDENCE, 2, 3. WILLS, 4.

While mere imbecility or weakness of mind in a grantor will not, in the absence of fraud, avoid a deed, insanity will do so if of such a character as to induce the conveyance. *Hay v. Miller* 156

Instructions. See MASTER AND SERVANT, 6.

1. The action of the court in admitting evidence to establish a fact in issue and in refusing to instruct, upon request, that, from evidence stated, a certain presumption arose and that other evidence stated established other facts, *held* proper. *Paddock v. Gosney Live Stock Commission Co.* 176
2. An instruction that plaintiff by admitting absent witnesses would testify as stated in an affidavit for a continuance did not admit such testimony would be the truth, *held* not erroneous. *Burris v. Court* 182
3. It is not reversible error to refuse an instruction based on an assumption of fact in issue in the case. *Blue Valley Lumber Co. v. Smith* 293
4. The court may refuse an instruction on a question not in issue. *Imhoff v. Richards* 596
5. Instruction *held* properly refused as not justified by the evidence. *Id.*
6. An instruction giving undue prominence to subordinate elements of the issues, and which may mislead the jury, is ground for reversal of the judgment on the verdict. *Rising v. Nash* 597
7. It is reversible error to state to the jury prejudicial propositions of law not applicable to the issues or evidence. *Kansas City & O. R. Co. v. Rogers* 654
8. A request for an instruction inapplicable to the evidence and failing to state any theory of the case should be refused. *Fuller v. Cunningham* 859
9. Instructions *held* not prejudicial to payee in an action on a note where the genuineness of the signature was in issue. *Norfolk Nat. Bank v. Job* 775
10. Instructions will not be reviewed unless the record shows affirmatively that exceptions were taken below. *Unland v. Garton* 203
Lowe v. Vaughan 651
11. Exceptions should be taken separately to instructions. *Blue Valley Lumber Co. v. Smith* 293

Instructions—*concluded.*

12. A general exception to the whole charge is not available on review, if any one of the instructions was correct. *Id.*

13. An assignment of error as to a group of instructions given may be overruled in the appellate court when one of them is found to be correct. *Fairfield v. Kern* 254
Newman v. Ryne 362
Link v. Connell 585
Woodworth v. Parrott 675
Mengedoht v. Van Dorn 882
Western Union Telegraph Co. v. Wilhelm 913

14. An assignment of error as to the refusal to give a group of instructions may be overruled in the appellate court, when it is found that one of them was properly refused. *Unland v. Garton* 203
Newman v. Ryne 362
Link v. Connell 585
Woodworth v. Parrott 675

Insurance. See ARBITRATION AND AWARD.

1. Where the loss is payable to "M. O. Moore," "O. M. Moore" cannot maintain an action on the unassigned policy without alleging that the initials were incorrectly inserted therein or that plaintiff is the person referred to in the policy. *Farmers & Merchants Ins. Co. v. Moore* 713

2. A mortgagee of realty has an insurable interest therein. *Hanover Fire Ins. Co. v. Bohn* 743

3. One who mortgages his realty to secure a debt for which he is personally responsible, and subsequently conveys the title to another subject to the mortgage, has still an insurable interest in the property. *Id.*

4. A mortgage clause *held* to be an independent contract between the insurance company and mortgagee, which could not be invalidated by an act of mortgagor. *Id.*

5. 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.*

6. 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 title, where the insured has an insurable interest in the property. *Id.* 744

7. The insurer may provide that upon default in payment of a premium note the policy shall lapse and remain inoperative during non-payment, and such a condition, unless waived, is a defense to a suit for a loss during the period of default. *Home Fire Ins. Co. v. Garbacz* 827

8. The word "cash," as used in sec. 8 of the act of 1891 (Session Laws, p. 274), declaring that each policy holder in a mutual insurance company shall, "at the time of effecting the insur-

Insurance—*concluded.*

ance," pay a percentage in cash, means current money. *State v. Moore* 870

9. Where the rules and by-laws of a mutual insurance company provide for payment in money of a membership fee or other charge at the time the insurance is written, the same must be paid in advance in cash, and not by acceptance of the policy-holder's note. *Id.*..... 871

Interest. See MUNICIPAL CORPORATIONS, 2. USURY.

Interlineations. See INDICTMENT AND INFORMATION, 2.

Intervention. See REVIEW, 36.

Intoxicating Liquors.

1. Recovery cannot be had for the price of liquors knowingly sold for the purpose of enabling the buyer to resell them in violation of law, the seller participating in the illegal traffic. *Storz v. Finklestein* 28
2. A license issued without full payment of the fee prescribed by law is invalid. *Fry v. Kaessner*..... 133
3. Discussion of instructions relating to the liability of several saloon-keepers in an action on their bonds by a widow and her children for loss of support, where it was alleged that the death of the head of the family resulted from intoxication produced by the use of liquors purchased at different saloons. *Dolan v. McLaughlin*..... 842
4. A suit under ch. 50, Comp. Stats., on a saloon-keeper's bond, may be prosecuted in the name of the person entitled to the damages, without the intervention of an administrator of the person deceased. *Fitzgerald v. Donoher*..... 852
5. An action against a saloon-keeper for loss of services of a minor whose death resulted from the use of liquors sold by the former, may be maintained by the mother of the deceased person, where she was dependent upon him for support. *Id.*

Issues. See REVIEW, 29, 30.

Judges. See BILL OF EXCEPTIONS, 2, 3. COURTS.

Judgments. See COUNTIES, 8. DEEDS, 1. EVIDENCE, 23. EXECUTIONS, 2. HOMESTEAD, 5, 6. JUSTICE OF THE PEACE. RES JUDICATA. REVIEW, 25-28, 31-33.

1. Statutory settlements between the county board and treasurer do not constitute a judicial determination of the subjects involved. *Bush v. Johnson County*..... 2
2. The following finding of a justice of the peace was *held* sufficient to sustain a judgment against defendant: "This cause coming on for hearing upon the bill of particulars and the evidence was submitted to me, upon consideration whereof I find in favor of the plaintiff." *Coad v. Read*..... 40
3. A judgment of a justice of the peace against a defendant for $125 and interest thereon from a fixed anterior date was

Judgments—*concluded.*
properly affirmed in the district court where it was assailed for uncertainty in an error proceeding. *Id.*

4. In a suit upon a supersedeas bond, a judgment for plaintiff should, under sec. 511 of the Code, state which defendant is the principal debtor and which is surety. *Van Etten v. Kosters* 152
5. The jurisdiction of a court does not cease by the rendition of judgment, but continues for the purpose of enforcing the judgment. *Prugh v. Portsmouth Savings Bank* 414
6. It will not be presumed that an unsigned order was made by the sole judge of a district, who was disqualified to act by reason of having been an attorney for one of the parties, where the law permits the district judges to hold court for each other. *Link v. Connell* 574
7. A mere order for recovery of costs is not a final judgment. *Reynolds v. City of Tecumseh* 785
8. Under sec. 440 of the Code, a judgment *non obstante veredicto* should be rendered where the pleadings of the party obtaining the verdict confess facts entitling the other party to judgment. *Scofield v. Clark* 711
9. Equity will not prevent the enforcement of a judgment on account of mere error of law. *Fox v. McClay* 820
10. Evidence *held* to sustain a finding that a judgment by default against defendant had not been procured by plaintiff's fraud. *Western Assurance Co. v. Klein* 904
11. A judgment by default should not be set aside under sec. 602 of the Code, unless, after a hearing of applicant's evidence, the court finds and decides that applicant has made out a *prima facie* defense or cause of action. *Id.*

Judicial Notice. See EVIDENCE, 4.

Judicial Sales. See EXECUTIONS.

Jurisdiction. See COUNTIES, 9. COURTS, 6. REVIEW, 31-33.

Justice of the Peace. See JUDGMENTS, 2. REVIEW, 31-33.
The provisions of sec. 1002 of the Code, for rendering and entering judgments apply to a county judge exercising the powers and jurisdiction of a justice of the peace. *Best v. Stewart,* 859

Laches. See REVIEW, 50, 52.

Landlord and Tenant. See TENANCY IN COMMON.

1. A tenant cannot remove trade-fixtures after the expiration of the tenancy, or after the surrender of possession, in absence of an agreement or consent of the landlord. *Fuller v. Brownell* 145
2. The relation of landlord and tenant does not necessarily depend upon express agreement, but may be implied from the conduct of the parties. *Farley v. McKeegan* 237
3. A general occupancy by one other than the owner of the land

Landlord and Tenant—*concluded.*

will be treated as a tenancy from year to year, where the reservation of rent or other circumstances plainly indicate an agreement for an annual holding. *Id.*

4. Tenancy from year to year can only be terminated by agreement, express or implied, or by notice for the time and in the manner prescribed by law. *Id.*
5. In a suit for rent due upon an oral lease from plaintiff to defendant, whether the latter had subleased the premises to a third person was immaterial. *Kenyon v. Young*..... 890

Law of the Case. See REVIEW, 39, 40.

Letters. See WITNESSES, 7.

Libel and Slander. See CONTEMPT, 1.

License.

1. A parol license upon sufficient consideration, carried into execution by the incurring of expense by the licensee, is usually not revocable. *Gilmore v. Armstrong*..... 95
2. In a court of equity part performance of a parol license may be sufficient to take the case out of the statute of frauds. *Id.*, 96

Limitation of Actions. See ADVERSE POSSESSION.

1. Lapse of time, short of the period of limitation fixed by statute, will not impair the right to maintain suit against an agent to recover the difference between the real value of land formerly owned by him and the fictitious price at which he sold it to his principal. *Oliver v. Lansing*..... 338
2. A payment on a note by the sale of the debtor's property under execution or other legal process, is not such part payment as will, under sec. 22 of the Code, arrest the running of the statute of limitations. *Moffitt v. Carr*..... 403
3. The statute begins to run against the title of a purchaser from the government from the time he is entitled to a patent for the land, in favor of one holding adverse possession. *Dolen v. Black* 688
4. A suit to compel a reconveyance of land transferred by absolute deed as a security for a debt is not barred until the expiration of ten years after the right of action accrued. *Names v. Names* 701

Lis Pendens.

So much of the act of March 31, 1887, amending sec. 85 of the Code, as makes a *lis pendens* constructive notice to all persons not parties to the action, who thereafter deal with the subject-matter thereof, is valid. *Sheasley v. Keens*..... 57

Malicious Prosecution.

Where the apparent facts are sufficient to induce a discreet and prudent person to believe accused committed the crime charged, the informer is not liable for malicious prosecution, though accused was discharged. *Fry v. Kaessner*..... 133

Mandamus.

1. Writ may issue to compel a county treasurer to receive from the holder of a school-land contract the amount of rentals, interest, and costs due upon the land, where a forfeiture of the contract was ineffective for want of notice. *State v. Henton* 488
2. A district judge will not be mandamused to fix the penalty of a bond to supersede a decree awarding alimony. *State v. Cornish* 614
3. The duty of the district court to receive a verdict which is sufficient in form and responsive to the issues may be enforced by a *mandamus* from the supreme court. *State v. Beall*, 817

Master and Servant.

1. A section-foreman and an engineer in charge of an engine not used in section work are not fellow-servants within the rule which prevents a recovery for injuries caused by the negligence of a fellow-servant. *Omaha & R. V. R. Co. v. Krayenbuhl* 553
2. A section-hand cannot be charged with contributory negligence for remaining upon a railroad track to remove an obstruction endangering an approaching train, when he might have saved himself by abandoning the track and leaving the train to its fate. *Id.*
3. A master does not insure his servants against defective appliances. *Lincoln Street R. Co. v. Cox*..... 807
4. A master is bound to use such care as the circumstances reasonably demand to see that the appliances furnished are reasonably safe and that they are afterwards maintained in a reasonably safe condition. *Id.*
5. A master is not liable for defects of which he has no notice, unless the exercise of ordinary care would have resulted in notice. *Id*..... 808
6. Instructions making the case turn upon the fact of a defect in the appliances, instead of upon negligence in furnishing and maintaining the appliances, *held* erroneous. *Id.*

Maxims.

"*Falsus in uno, falsus in omnibus.*" *Omaha & R. V. R. Co. v. Krayenbuhl* 553

Mechanics' Liens. See CORPORATIONS, 1.

1. One may acquire a lien for building material furnished to the purchaser of the land, where the latter is in possession under a contract of sale; but, in absence of an agreement between the vendor and vendee of the land that the improvements are to be made, the lien only attaches to vendee's interest and is inferior to the vendor's lien. *Fuller v. Pauley*..... 138
2. The right to a lien under sec. 2, art. 1, ch. 54, Comp. Stats., does not depend upon the terms of the contract between the building owner and contractor, but upon the ground that the subcontractor furnished materials or labor for the build-

Mechanics' Liens—*concluded.*

ing and complied with the provisions of the statute. *Drexel v. Richards* 322

3. To entitle a subcontractor to a lien, he must file in the office of the county clerk, within sixty days from the date of the last item of material furnished or labor performed, the sworn statement required by sec. 2, art. 1, ch. 54, Comp. Stats. *Id.*
4. Evidence *held* to sustain a decree refusing plaintiff a lien. *Id.*
5. The purpose of sec. 2, art. 1, ch. 54, Comp. Stats., in requiring an affidavit for a lien, is to advise the land owner of the amount of the subcontractor's claim and to provide for the public a record indicating the property to which the lien attaches. *Id.* 732
6. A description of the realty improved with materials furnished by a subcontractor is a necessary part of his affidavit for a lien. *Id.*
7. Under sec. 2, art. 1, ch. 54, Comp. Stats., the affidavit for a lien must contain such a description of the realty as, aided by extrinsic evidence suggested by the description itself, would charge a party dealing with the property with notice of the lien. *Id.* 733
8. A lien did not attach to property described as "Bartlett & Downing block in Kearney," where the correct description was "Lot 388, in the town of Kearney." *Id.*

Mortgages. See ACKNOWLEDGMENT, 4, 5. CHATTEL MORTGAGES. EXECUTIONS. INSURANCE, 2-5. REVIEW, 45.

Limitation of Actions.

1. A sale of mortgaged premises by a trustee who pays the proceeds to the holder of the note secured, and the latter's indorsement of such payment on the note will not take the note out of the operation of the statute of limitations as to the mortgagor. *Moffitt v. Carr* 403

Judgments.

2. Mortgagee *held* not bound by notice of a judgment lien and levy of execution against one not shown by the records to have had interest in or title to the land. *Reed v. Rice* 586

Assignments.

3. The assignment of a debt secured by a mortgage carries the mortgage with it. *Cram v. Cotrell* 646
4. Where several notes are secured by the same mortgage, an assignment of one operates as an assignment of a proportionate interest in the mortgage. *Id.*

Foreclosure.

5. A junior mortgagee who was not made a party to a proceeding foreclosing a senior mortgage is entitled to redeem such senior mortgage from the purchaser at judicial sale. *Id.*

Release.

6. Where the mortgage debt has been assigned, a purchaser in good faith without notice of the assignment will be protected

Mortgages—*concluded.*

by a release of the mortgage executed by the original mortgagee. *Id.*

Judicial Sales.

7. The pendency of a foreclosure proceeding continues, as a rule, until confirmation of sale and distribution of proceeds. *Link v. Connell* 575
8. A purchaser of land bound by a decree of foreclosure is not entitled to personal notice of sale and confirmation subsequently made in enforcing the decree. *Id.*

Deeds as Security.

9. Where the relation of the parties to a conveyance absolute in form continues as debtor and creditor, the transaction will be treated as a mortgage and the conveyance as a security. *Riley v. Starr* 243
10. Evidence *held* to sustain a finding that a deed was intended as a security. *Id.*
11. Under the evidence an absolute deed *held* a mortgage, there being no intention to make an absolute transfer of the premises described. *Names v. Names*..... 701
12. An absolute deed to land executed and intended for a security will be construed a mortgage as to the parties and all others, except good-faith purchasers for value without notice. *Id.*

Cancellation.

13. A mortgage should not be canceled upon application of mortgagor alone, without tender or payment of expenditures made in good faith by mortgagee, or without requiring indemnity for liabilities incurred by him on the faith of the mortgage. *Miller v. Gunderson*..... 715

Motions. See REVIEW, 15.

Municipal Corporations. See COUNTIES, 1, 2. QUO WARRANTO. VILLAGES.

1. A city has a right to grade its streets and guard against surface water by dike or embankment, but it may be liable for damages where it negligently constructs an embankment in a street and causes surface water to flow into the cellar of an abutting property-owner. *City of Kearney v. Themanson*... 74
2. A lot owner by signing the petition set out in the opinion waived his right to payment of an award at the time his property was taken for a street, and also waived his right to collect interest on the award. *West v. City of Omaha*..... 466
3. A city owned a house situate on a lot taken for a street, a former owner wrongfully removed the house, and the evidence was *held* insufficient to sustain a finding that it was worth $750. *Id.*
4. Where the proper officers have undertaken to extend city boundaries, an owner of land so incorporated cannot, after the lapse of years, maintain a suit to restrain the collection of city taxes, on the ground that there was no authority to incorporate his land. *Sage v. City of Plattsmouth*..... 558

Murder. See HOMICIDE.

Names. See INSURANCE, 1. PARTIES, 1.

Necessaries. See HUSBAND AND WIFE. INFANTS.

Negligence. See BATHING RESORTS. CARRIERS. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 1. RAILROAD COMPANIES.

1. The law requiring a person to exercise caution commensurate with the obvious peril with which he is confronted means no more than that he is, under all circumstances, required to exercise ordinary care. *Omaha Street R. Co. v. Martin*..... 66
2. Where the facts are such that all reasonable men must draw the same conclusion therefrom, the question of negligence is one of law for the court. *Id.*
3. Where reasonable men may draw different conclusions respecting the subject of negligence, the question is one of fact for the jury. *Id.*
Miller v. Strivens 458
4. It is for the judge to determine what acts are evidence of negligence, but it is the province of the jury to say what conclusion such evidence warrants. *Id.*
5. Where plaintiff proves his case without disclosing negligence on his part, the burden of proving contributory negligence is on defendant. *Omaha Street R. Co. v. Martin*..... 66
6. A defendant who was guilty of negligence in failing to discover the dangerous position of plaintiff, or in negligently injuring the latter after discovering his exposed position, may be liable for damages though plaintiff negligently exposed himself to injury. *Id.*
7. One owing a duty to another and failing, after discovering that the latter is in danger, to take reasonable precautions which would avert an injury to him, may be liable in case of an injury, though the former was free from negligence in the first instance and the person injured negligently exposed himself to danger. *Brotherton v. Manhattan Beach Improvement Co.* 563
8. Evidence *held* to so clearly disclose criminal negligence on part of a railway passenger as to permit no reasonable inference to the contrary. *Chicago, B. & Q. R. Co. v. Hague*.... 79
9. "Criminal negligence," as used in sec. 3, art. 1, ch. 72, Comp. Stats., means a flagrant and reckless disregard of personal safety, and willful indifference to the injury liable to follow. *Id.*
Chicago, B. & Q. R. Co. v. Hyatt..... 162
10. Ordinary care is such a degree of care as a prudent and reasonable man would exercise. *McClelland v. Scroggin*..... 141
11. Evidence relating to the management and operation of a steam-thresher and engine where straw and grain were consumed by fire, *held* to present questions of negligence which should have been submitted to the jury. *Id.*

Negligence—*concluded.*

12. In a suit against the owner of a runaway team which collided with plaintiff's carriage, a finding that defendant was not guilty of negligence was sustained by the evidence. *Miller v. Strivens* 458
13. Negligence is the failure to exercise such care, prudence, and forethought as, under the circumstances, duty requires should be exercised. *Brotherton v. Manhattan Beach Improvement Co.,* 563
14. Negligence may consist in the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do. *Id.*
15. To establish a cause of action based on negligence plaintiff must show that the negligence pleaded and proved was the proximate cause of the injury. *Id.*
16. It is the duty of a traveler upon a highway to exercise ordinary care when approaching a railroad crossing. *Omaha & R. V. R. Co. v. Talbot*..... 628
17. A want of ordinary care must be pleaded and proved in an action by a servant against the master for personal injuries. *Lincoln Street R. Co. v. Cox*..... 808
18. In a suit by a servant against his master for personal injuries the jury should not be permitted to infer negligence from the mere fact of an accident. *Id.*

Negotiable Instruments. See CHATTEL MORTGAGES, 5. CONFLICT OF LAWS. LIMITATION OF ACTIONS, 2. RELEASE AND DISCHARGE. USURY.

1. A lack of consideration is no defense to negotiable paper in the hands of an innocent purchaser for value in the usual course of business before maturity. *Blue Valley Lumber Co. v. Smith* 293
2. A promissory note without consideration is invalid as between the original parties, and cannot be enforced against the maker in the hands of the payee. *Stenberg v. State*..... 300
   Douglas County v. Keller..... 317
3. Where defendants admit that the note was duly executed by them, evidence contradicting its terms cannot furnish a defense. *Miller v. Gunderson* 715
4. Evidence *held* to sustain a judgment for defendants in a suit on a note where the execution of the note was in issue. *Norfolk Nat. Bank v. Job*..... 775
5. In a suit on a note the defense that the consideration was an illegal sale of intoxicating liquors cannot be proved under a general denial. *Dillon v. Darst*..... 803

New Trial. See REVIEW, 34.

The unsuccessful party to a petition for a new trial, under sec. 318 of the Code, is not entitled to a review in the supreme court, unless the evidence on the former trial, when material, has been preserved by a bill of exceptions. *Western Gravel Co. v. Gauer* 246

Nominations. See ELECTIONS, 2, 3.

Notary Public. See ACKNOWLEDGMENT.

Notice. See LIS PENDENS. MASTER AND SERVANT, 5. MORTGAGES, 2, 8. PARTNERSHIP, 4. SCHOOL-LANDS.

Objections. See PLEADING, 9. REVIEW, 23, 35, 36.

Office and Officers. See COUNTY TREASURERS. STENOGRAPHERS.

1. An officer must discharge his official duties for the compensation fixed by law, and will not be allowed compensation for extra work unless it is authorized by statute. *Stoner v. Keith County* 279
2. An official bond which has been presented to a county board and approved, binds the sureties though they signed the bond conditionally, the board having no notice of the condition and there being nothing to raise the duty of inquiry as to the manner of executing the bond. *Id.* 280
3. Consideration *held* sufficient for an additional official bond which was executed, delivered, and approved during the principal's term of office. *Id.* 281

Parent and Child.

Under ch. 67, Comp. Stats., the support of a dependent poor parent devolves upon a child of any age. *Fitzgerald v. Donoher* 852

Parties. See INSURANCE, 1. INTOXICATING LIQUORS, 4, 5. PRINCIPAL AND SURETY, 5. REVIEW, 36. WILLS, 1.

1. In suing upon an account plaintiff should give his Christian name rather than his initial letters. *Small v. Sandall* 318
2. Objections on the ground of a defect of parties must be raised by answer or demurrer. *Stephens v. Harding* 659
3. Except as otherwise provided by the Code, every action must be prosecuted in the name of the real party in interest. *Farmers & Merchants Ins. Co. v. Moore* 713

Partition.

1. The right of partition is confined to joint tenants and tenants in common of an estate in land. *Barr v. Lamaster* 114
2. Where owners in severalty of adjoining lots erected, pursuant to mutual agreement, buildings corresponding in size, having stairs, hallway, skylight, and heating apparatus in common, the mere existence of the cross-easements does not authorize the partition of the lots at the suit of either party. *Id.*
3. A decree partitioning a half-section of land into four equal parts and assigning to a widow, as her dower interest, the homestead eighty-acre tract, and to each of three children eighty acres of the land, *held* sustained by the evidence. *Schroder v. Schrader* 864

Partnership. See FRAUDULENT CONVEYANCES, 4.

1. Note and mortgage given by a firm to secure the debt of an individual member may be valid. *Miller v. Gunderson* 720

Partnership—*concluded.*

2. To constitute a ratification by a partnership of an unauthorized act of a member of the firm, the act of ratification must be performed with knowledge of material facts. *Columbia Nat. Bank v. Rice* 428
3. A member of a partnership has no implied authority to dispose of firm property for his individual benefit or for payment of his individual debts *Id.*
4. A partner's creditor who knowingly receives the proceeds of firm property in payment of the individual debt of the partner is charged with notice of the latter's want of authority. *Id.*
5. Declarations of a partner that he is acting with authority in paying an individual debt with the proceeds of firm property are insufficient to establish such authority. *Id.*
6. Mere statements of one claiming to act for, and as a member of, a firm are not competent to establish a disputed partnership relation. *Weir v. Illinois Nat. Bank* 791
7. One who shared in the profits of a venture as compensation for services *held* not a partner, where he had no interest in or control over the property involved, except as a salesman. *Ætna Ins. Co. v. Bank of Wilcox* 544
8. A partnership does not hold its property in trust for its creditors, nor have creditors a lien upon partnership property simply because they are creditors. *Id.*
9. In the absence of fraud a partnership may prefer one creditor to the exclusion of another. *Id.*

Party Walls.

An agreement for the construction of a three-story wall in common by joint property owners on the land of one does not justify the assumption that the other party may, for his sole benefit, extend the wall another story. *Calmelet v. Sichl,* 505

Payment. See COUNTY TREASURERS, 4. INSURANCE, 9.

Part payment, within the meaning of sec. 22 of the Code, is a voluntary payment by the debtor or one authorized by the debtor to make a payment. *Moffitt v. Carr* 403

Penalties. See CONSTITUTIONAL LAW, 2.

Physicians and Surgeons.

1. The object of the statute creating a state board of health to regulate the practice of medicine and surgery is to protect the sick and the afflicted from the knavery of quacks. *Maxwell v. Swigart* 789
2. Fees for services rendered by a physician before he filed with the county clerk his certificate from the state board of health are not recoverable, though he filed the certificate before bringing suit. *Id.*

Plea in Abatement. See INDICTMENT AND INFORMATION, 2.

Pleading. See CONTRACTS, 3. ESTOPPEL, 2. INSURANCE, 1. NEGOTIABLE INSTRUMENTS, 5. REPLEVIN, 6, 7. STATUTE OF FRAUDS, 2. TRIAL, 3.

Reply.

1. Permission to file a reply out of time, or during the trial, rests largely in the legal discretion of the trial court. *Storz v. Finklestein* 27

Petition.

2. Several causes of action in a petition should be separately stated and numbered. *Building & Loan Ass'n of Dakota v. Cameron* 124

Exhibits. Contracts. Accounts.

3. The failure to attach an exhibit referred to in a pleading is not a ground for demurrer, where the matters alleged in the pleading amount to a cause of action or defense. *Home Fire Ins. Co. v. Arthur*..... 461
4. A pleading, in which the only cause of action is for money due as per account attached, fails to state a cause of action, where the account has been omitted. *Id.*
5. Where a petition referring to an oral agreement and to a written contract may be construed as declaring on the former and as pleading the latter as matter of inducement, the failure to require plaintiff to separately state his causes of action may not be reversible error. *Stuht v. Sweesy*..... 767
6. Where the facts stated in an account and in the petition in a suit thereon, under sec. 129 of the Code, show a liability of defendant to plaintiff, a demurrer on the ground that the petition does not state a cause of action cannot be sustained. *McArthur v. Clarke Drug Co*..... 899

Judgment on Pleadings.

7. Where a cause is decided on the petition and answer alone, matters of defense well pleaded should be considered established. *Van Etten v. Kosters* 152
8. Judgment on the pleadings alone should not be rendered for a larger sum than the answer admits to be due. *Id.*

Names.

9. Objection that plaintiff has not sued in his full Christian name may be made any time before judgment. *Small v. Sandall* 318

New Matter.

10. Facts which merely disprove the allegations of the adverse party do not necessarily constitute new matter, and are, as a rule, admissible in evidence under a general denial. *American Building & Loan Ass'n v. Rainbolt*..... 434

Objections.

11. The sufficiency of a petition to state a cause of action may be challenged in the appellate court. *Sage v. City of Plattsmouth* 558

Pleading—*concluded.*

Amendments.

12. An order allowing an amendment cannot be considered in the reviewing court, where the only record preserved is that "leave is hereby granted the plaintiff to amend the petition herein by interlineation, to which the defendant duly excepts." *Imhoff v. Richards* 590

13. The proceedings on motion to amend a pleading, and the amendment, should be preserved by a bill of exceptions where the order allowing the amendment is to be attacked in the appellate court. *Id.*

14. Unless there appears to have been an abuse of discretion on part of the trial judge, his refusal to grant leave to amend a pleading to conform to the evidence presents no ground for reversal in the appellate court. *Id.* 591

Nature of Action.

15. The nature of an action is not alone determined by the prayer for relief, but also from the character of the facts alleged. *Stephens v. Harding* 659

Answer.

16. All facts well pleaded in an answer, not denied by a reply, are taken as true. *Scofield v. Clark* 711

Motion to Strike.

17. A motion to strike out portions of a pleading should designate with particularity the averments attacked. *Stuht v. Sweesy* 767

Construction.

18. The allegations of a petition must be liberally construed. *McArthur v. Clarke Drug Co* 899

Demurrer.

19. A party who stands upon a general demurrer to a pleading thereby admits all the material facts averred. *Id.*

Statements of Evidence.

20. The court may overrule a motion to compel a party to make his pleading more definite and certain, where an order sustaining the motion would require statements of evidence rather than conclusions of fact. *Western Union Telegraph Co. v. Wilhelm* 910

Pledges. See CHATTEL MORTGAGES, 5.

Equity will not award to a creditor other than the pledgee a part of the property pledged, solely on the ground that the remainder would probably be sufficient to pay the debt secured. *Ætna Ins. Co. v. Bank of Wilcox* 544

Police. See ARREST.

Practice. See COURTS, 1. JUDGMENTS, 6. REVIEW, 50.

1. An agreement to proceed to trial subject to future amendment of the pleadings was enforced, though the practice was criticised. *Tecumseh Nat. Bank v. Harmon* 222

Practice—*concluded.*

2. Where defendant has not appeared, a dismissal by plaintiff, as provided by statute, ends the case. *Sims v. Davis*..... 720

Prejudice. See COURTS, 1.

Presumptions. See REVIEW, 37, 38.

Principal and Agent. See CONTRACTS, 2, 4. PARTNERSHIP, 2. RAILROAD COMPANIES, 11. SALES, 3.

1. An agent who abused his trust for a profit at his principal's expense can only be relieved of liability to the extent to which a clear preponderance of the evidence shows that he ought to be relieved in view of his dishonest conduct. *Oliver v. Lansing* 333
2. An agent who sells his own land to his principal under general instructions which repose a special trust in the agent and require him to do the best he can for his principal may be held to account for the difference between the real value of the property and the price at which it was sold, though the principal mortgaged the property before bringing suit. *Id.*
3. Stockholders represented by an agent who was for three years an acting director and a stockholder in the corporation, *held* chargeable with the knowledge possessed by him in respect to the affairs of the corporation. *American Building & Loan Ass'n v. Rainbolt* 434
4. Evidence *held* to sustain a finding that one defendant was the agent of another defendant, and that the former acted within the scope of his authority in making representations as to the amount due on notes and mortgages payable to both. *Brown v. Eno* 538
5. The apparent authority of an agent which will bind his principal is such authority as the former appears to have by reason of his actual authority. *Id.*
6. Authority to sign an agreement to arbitrate cannot be inferred from acts as special agent having no reference to such arbitration or the subject-matter therein contemplated. *Manufacturers & Builders Fire Ins. Co. v. Mullen*..... 620
7. Power of an agent to delegate to another authority requiring the exercise of special skill, judgment, or discretion. *Home Fire Ins. Co. v. Garbacz*..... 827

Principal and Surety. See JUDGMENTS, 4.

1. Negligence or carelessness of the county board in the examination and settlement of the accounts or report of the county treasurer is not a defense available to the sureties of the treasurer in a suit to recover funds which he failed to turn over. *Bush v. Johnson County*..... 2
2. Where the bond of a county treasurer is conditioned for the faithful performance of the duties of his office, the responsibility of the sureties is the same as that of their principal. *Id.*

Principal and Surety—*concluded.*

3. Additional sureties, by signing a county treasurer's bond after its approval without the knowledge and consent of the original sureties, release the latter from future liability on the bond and become liable thereon for any subsequent default of the principal. *Stoner v. Keith County* 280
4. Sureties of a county treasurer are released by a material alteration of the bond without their knowledge and consent. *Id.*
5. Where the bond of a county treasurer has been signed by additional sureties during his term of office and an additional bond given and approved, all the sureties may be joined as defendants in a suit on the bonds for a default at the close of the term. *Id.* ..... 281.

Probate Courts. See COURTS, 3.

Publication. See SCHOOL-LANDS.

Quieting Title. See LIS PENDENS.

In an action *quia timet* the rights of the litigants may be determined and a decree rendered assigning the title to the realty, or any part of it, to the party entitled thereto. *Dolen v. Black* 688

Quo Warranto.

An owner of lands illegally included within the boundaries of a village may maintain *quo warranto* to determine the validity of the incorporation. *State v. Mote* 683

Railroad Companies.

1. Evidence *held* insufficient to sustain the judgment for a plaintiff who sued for the value of a horse killed on defendant's track. *Grand Island & W. C. R. Co. v. Phipps* 493

Injury to Passenger.

2. The right of plaintiff to recover by showing he was injured through the operation of the railroad while a passenger on the company's train can only be defeated by proof that the injury resulted from his criminal negligence or from his violation of a rule of the company. *Chicago, B. & Q. R. Co. v. Hague* 97
Fremont, E. & M. V. R. Co. v. French 638

Negligence. Evidence.

3. Evidence of a high rate of speed of a train outside of cities and villages will not alone establish negligence. *Missouri P. R. Co. v. Hansen* 232
Omaha & R. V. R. Co. v. Krayenbuhl 553
Omaha & R. V. R. Co. v. Talbot 628
4. The mere running of a train behind schedule time is not evidence of negligence. *Omaha & R. V. R. Co. v. Talbot* 628
5. Failure to give the highway-signals required by statute is evidence of negligence. *Id.*

Railroad Companies—*concluded.*

6. A jury should not be instructed to consider whether highway-signals were given, in determining whether the train was in other respects negligently operated. *Omaha & R. V. R. Co. v. Krayenbuhl* 553

7. One injured at a railroad crossing cannot recover for failure of the company to give a statutory highway-signal unless he shows that the company's negligence was the proximate cause of the injury. *Omaha & R. V. R. Co. v. Talbot* 628

Fires. Value of Trees.

8. In a suit against a railroad company for negligently setting out fire which destroyed trees on plaintiff's land the measure of damages is the damage to the trees. *Kansas City & O. R. Co. v. Rogers* 654

9. In ascertaining damages to trees injured by fire the inquiry should not be confined to the value of the trees before the injury, but should extend to the difference in value before and after the fire. *Id.*

10. In a suit against a railroad company for setting out fire which spread to lands of plaintiff and destroyed trees, testimony that in estimating their value he considered what they were worth to him as ornamental trees and as adding value to his land, was properly admitted. *Id.* 653

Accident at Crossing.

11. A driver in a wagon containing another occupant was the agent of the latter so as to charge him with the negligence of the driver in failing to look and listen before driving upon a railroad track. *Omaha & R. V. R. Co. v. Talbot* 627

12. A railroad crossing is a place of danger, and persons to whom negligence may be imputed are bound to take notice of that fact. *Id.* 628

13. Where the failure of a traveler on a highway to exercise ordinary care when approaching a railroad crossing contributes to his injury in a collision with an engine, he cannot recover for the injury. *Id.*

Rape. See STATUTES, 3.

Ratification. See PARTNERSHIP, 2. PRINCIPAL AND AGENT, 2.

Receivers. See REVIEW, 45, 46.

Evidence *held* not to justify the overruling of a motion to vacate the appointment of a receiver to wind up the affairs of a bank. *Neitzel v. Lyons* 892

Records. See MORTGAGES, 8.

Recusation. See COURTS, 1.

Reference.

Evidence *held* sufficient to sustain the findings of a referee. *Fitzgerald v. Fitzgerald & Mallory Construction Co* 386

Registration. See DEEDS, 1.

Release and Discharge.
The release by a payee of one joint obligor releases the other. *Scofield v. Clark* 711

Remittitur. See DAMAGES, 4.

Rents. See TENANCY IN COMMON.

Replevin. See REVIEW, 19.
1. It is a good defense to prove title and right of possession in a third person. *Fuller v. Brownell* 145
2. In an action of replevin against a constable who held the property under a writ of attachment, he cannot justify on the ground that the attachment plaintiff had an independent lien upon the property prior to the attachment. *Houck v. Linn* 228
3. Where plaintiff took the property under the writ, he cannot, by dismissing the action, prevent defendant from having the right to possession determined in the suit. *Vose v. Müller* 602
4. A creditor may not possess himself of his debtor's property in the hands either of the debtor or the latter's purchaser and plead the indebtedness in defense of such possession. *Kingsley v. McGrew* 813
5. One who sold goods on condition of immediate payment cannot, upon default, possess himself of the same quantity of similar goods with which the goods sold have been commingled with his consent. *Id.*
6. Under a general denial defendant may introduce any matter which is a defense to plaintiff's cause of action. *Best v. Stewart* 860
7. Where the value of the property is alleged in the petition and specifically admitted in the answer, proof of value is unnecessary. *Id.*

Reporters. See STENOGRAPHERS.

Rescission. See CONTRACTS, 7-12. VENDOR AND VENDEE, 5.

Res Judicata. See REVIEW, 39, 40.
1. A judgment is binding upon the parties and their privies, as to the issues adjudicated. *Fuller v. Brownell* 145
2. A judgment is conclusive upon the parties and their privies, and cannot be attacked collaterally. *Stenberg v. State* 300
Douglas County v. Keller 317
3. The mere dismissal of an action and a publication by plaintiff that he did wrong in bringing the suit cannot be shown in bar of a subsequent suit upon the same cause of action. *Oliver v. Lansing* 339

Restraining Order. See INJUNCTION, 7-10.

Retraxit. See RES JUDICATA, 3.

Review. See COURTS, 2. CRIMINAL LAW, 2. INJUNCTION, 9-11. PLEADING, 5. TRIAL.
1. The legislature has no authority to impose a penalty of five per cent upon affirmance of a judgment. *Coburn v. Watson* .. 258

Review—*continued.*

2. By filing a petition in error a party waives his right to have the case reviewed upon appeal. *Thomas v. Churchill*..... 266
3. An adverse ruling upon a request to give an immaterial instruction is not a ground of reversal. *Newman v. Ryne*..... 362
4. The sufficiency of a petition to state a cause of action may be challenged in the appellate court. *Sage v. City of Plattsmouth*, 558
5. Questions not raised below will be disregarded. *Fuller v. Cunningham* 857
6. Where the record fails to present a question of law or fact, the judgment may be affirmed. *Jacobs v. St. Joseph Milling Co.* 898

Assignments of Error.

7. An assignment of error as to a group of instructions given may be overruled in the appellate court when one of them is found to be correct. *Fairfield v. Kern*..... 254
Newman v. Ryne 362
Link v. Connell 585
Woodworth v. Parrott 675
Mengedoht v. Van Dorn..... 882
Western Union Telegraph Co. v. Wilhelm..... 913
8. An assignment of error as to the refusal to give a group of instructions may be overruled in the appellate court when it is found that one of them was properly refused. *Unland v. Garton* 203
Newman v. Ryne 362
Link v. Connell 585
Woodworth v. Parrott 675
9. Error in the form of submitting an issue of fact to a jury in an equity case is not available in absence of an exception and an assignment of error attacking the judgment on that ground. *Hay v. Miller*..... 153
10. To present for review the rulings on evidence, the particular rulings complained of must be referred to in the petition in error. *Coburn v. Watson*..... 258
11. An assignment, "errors at law occurring at the trial and duly excepted to," does not present for review the correctness of rulings on evidence. *Imhoff v. Richards*..... 591

Bill of Exceptions.

12. Where the bill of exceptions shows that material evidence has been omitted therefrom, the judgment below will not be reversed on account of the insufficiency of proof. *Storz v. Finklestein* 28
Warner v. Hutchins 672
13. Where the only questions for review relate to the evidence, the judgment will be affirmed in absence of a bill of exceptions. *Winters v. Means*..... 333
McKenna v. Dietrich 433
14. A question involving an examination of the bill of excep-

Review—*continued.*

tions cannot be considered after the bill has been quashed. *Reed v. Rice* 586

15. An order overruling a motion necessarily supported by evidence will be disregarded where the evidence has not been preserved by a bill of exceptions. *First Nat. Bank of Madison v. Carson* 763

16. Affidavits used in evidence below, to be available upon review, must be embodied in a bill of exceptions. *Norfolk Nat. Bank v. Job* 774

Evidence.

17. The judgment should not be disturbed where the only question presented is one of fact as to which the evidence is conflicting. *Smith v. Smith*..... 21
Fuller v. Pauley 139
Louis v. Union P. R. Co..... 151
Fairfield v. Kern 254
Baylis v. Parmele 619
Woodworth v. Parrott 675
City of Omaha v. Coombe..... 879
Kerr v. Cornell 885
Krochler v. Long 889

18. A judgment supported by sufficient evidence should be affirmed where questions of fact only are presented. *Hay v. Miller* 156
Ayers v. Tenney 722
Fuller v. Cunningham 857
Armstrong v. Wood 897

19. Judgment for defendant reversed because not supported by sufficient evidence in a suit against a sheriff for property wrongfully held under an attachment. *Howland v. Sharp*.... 131

20. Where a motion to discharge an attachment, because plaintiff's affidavits are untrue, is heard on conflicting evidence, the ruling on the motion will not be disturbed unless it is clearly against the weight of evidence. *Nebraska Moline Plow Co. v. Klingman* 204
Geneva Nat. Bank v. Bailor..... 866

21. The admission of immaterial evidence is not ground for reversal where the verdict could not have been different had the objectional evidence been excluded. *Farmers Loan & Trust Co. v. Memminger*..... 17

22. A ground of complaint is not presented by the refusal of the court to make a finding, where no sufficient evidence was offered to support it. *Frank v. Scoville*..... 169

23. Where evidence excluded under a general objection was for any reason properly excluded, the ruling will not be reversed because the objection was too general. *Imhoff v. Richards*... 591

24. Where the evidence on a motion is so confusing that it cannot be determined whether there was error in overruling it, the ruling will be sustained. *Haley v. McCarty*..... 883

Review—*continued.*

Final Orders.

25. A final judgment is necessary to entitle a party to review the ruling below on an interlocutory motion. *Sims v. Davis*..... 720
26. There cannot be a review before the entry of a final order below. *Reynolds v. City of Tecumseh*..... 785
27. An order opening a judgment and permitting an answer to be filed cannot be reviewed until after the entry of a final judgment. *Merle & Heaney Mfg. Co. v. Wallace*.....886, 887
28. An order of a district court setting aside the judgment of a county court as erroneous may be reviewed in the supreme court, before the final disposition of the original case in the district court. *Dane County Bank v. Garrett*..... 916

Issues.

29. A cause should be tried in an appellate court with the issues unchanged, except as to matter arising after the trial below. *Cobbey v. Buchanan* 391
30. Upon appeal to the district court, the rule restricting the parties to the issues raised below must be invoked in framing the issues. *First Nat. Bank of Madison v. Carson*..... 763

Jurisdiction.

31. An appellate court acquires no jurisdiction of the subject-matter where the tribunal or body from which the appeal was taken had none. *Stenberg v. State*..... 300
Douglas County v. Keller 317
Best v. Stewart 860
32. Upon motion to dismiss appeal from a mere judgment for costs, an order of the district court remanding the case to the county court for final judgment *held* ineffective, where the county judge acted within the jurisdiction of a justice of the peace. *Best v. Stewart* 860
33. A judgment of a county court rendered pursuant to an invalid order of the district court remanding a case for final judgment *held* void. *Id.*

New Trial.

34. Objections to competency of jurors not raised by motion for new trial will be disregarded in the appellate court. *Mengedoht v. Van Dorn* 880

Objections. Parties.

35. Objection that plaintiff has not sued in his full Christian name may be made in the district court on appeal. *Small v. Sandall* 318
36. Parties who resisted a motion below on its merits and failed to object on the ground that it was not filed by a party to the suit, waived the right of objection on that ground in a proceeding to review the ruling on the motion. *Neitzel v. Lyons*, 892

Presumptions.

37. It will be presumed that the proceedings below are regular, in absence of a record showing the contrary. *American Investment Co. v. McGregor* 779

Review—*continued.*

38. Upon a record which shows the filing of a bill of particulars before a justice of the peace, a demand for judgment, and defendant's admission of the indebtedness alleged with a request for judgment therefor, it will be presumed that plaintiff assented to the judgment, where he procured an execution. *Spaulding v. Johnson* 830

Stare Decisis.

39. The determination of a question presented in reviewing proceedings below becomes the law of the case. *Coburn v. Watson* 258

40. Decisions upon points involved in a former hearing become the law of the case, and will not, as a rule, be re-examined. *Fuller v. Cunningham* 857

Supersedeas. Divorce. Receivers.

41. The penalty of a supersedeas bond for appeal from a decree awarding alimony must be double the amount of the decree, and the bond must be conditioned according to subd. 1, sec. 677, of the Code. *State v. Cornish* 614

42. Neither the district court nor the judge thereof has power to fix the penalty of a bond given to supersede a decree for alimony, the amount being fixed by statute. *Id.*

43. An appeal does not operate as a supersedeas except as provided by statute. *Home Fire Ins. Co. v. Dutcher* 755

44. In a case not provided for by statute the court may, in its discretion, allow a supersedeas upon conditions which it may affix for the protection of the parties. *Id.*

45. The appointment of a receiver in aid of foreclosure proceedings is not an order directing the delivery of possession of realty within the meaning of subd. 3, sec. 677, of the Code, relating to appeal bonds. *Id.*

46. An order appointing a receiver *pendente lite* cannot be superseded as a matter of right during the pendency of an appeal from that order. *Id.*

Transcripts.

47. Where the record shows that a reply was filed, defendant will not be heard to insist that his answer should be taken as true because of his failure to have the reply copied into the transcript. *Lewis Investment Co. v. Boyd* 604

48. One cannot urge on appeal that he was entitled to judgment on pleadings omitted from the transcript. *Id.*

49. The transcript for review imports verity and cannot be impeached by counsel, in a brief. *Id.*

50. Where appellant neglects to file in the district court a transcript of his appeal from the inferior court within thirty days, appellee may file one, or utilize one filed out of time by appellant, and move to dismiss the appeal under sec. 1011 of the Code. *Schoonover v. Saunders* 463

51. The ruling below on a motion cannot be reviewed upon a

Review—*concluded.*

record containing neither the motion nor the proof in support of it. *Hudson v. Pennock*..... 359

52. The district court does not acquire jurisdiction of a proceeding in error from the county court unless the transcript for review is filed within a year from the rendition of the judgment assailed. *Dane County Bank v. Garrett*..... 916

Witnesses.

53. That the greater number of witnesses testified in favor of the party against whom the verdict was rendered is not a ground for reversal. *Fremont, E. & M. V. R. Co. v. French*.... 639

Sales. See TROVER AND CONVERSION, 4, 5.

1. A sale of intoxicating liquors is void when knowingly made for the purpose of enabling the buyer to resell them in violation of law, the seller participating in the unlawful traffic. *Storz v. Finklestein*..... 27

2. A purchaser of personalty may surrender possession to a third person claiming it; but to recover damages from the seller the purchaser must prove that such third person had a paramount title. *Hanna v. Buckley*..... 127

3. An agreement whereby a manufacturer authorized a merchant to sell tobacco at a fixed price for a certain commission on all sales made, the latter being required to guaranty payment for the tobacco and to execute notes therefor, *held* a contract of sale and not a contract of agency. *Mack v. Drummond Tobacco Co*..... 397

4. A conveyance of chattels at a certain price, with a provision that the buyer may, upon failure to resell, return them, is a contract of sale with an option to rescind, and not a contract of brokerage. *Houck v. Linn*..... 227

5. A warranty is sufficient if the language used by the seller amounts to an undertaking or assertion that the article sold is as represented, though he did not use the word "warrant." *Unland v. Garton* 202

6. Whether the seller's statement was intended as a warranty or as an expression of opinion concerning the property sold is a question of fact for the jury. *Id.*

7. Verdict for plaintiff in a suit for the price of a harvesting machine *held* to be supported by sufficient evidence, where defendant pleaded a breach of warranty. *Woodworth v. Parrott* 675

8. In an action to recover the purchase price of cattle the evidence was *held* sufficient to sustain a verdict for plaintiff. *Lowe v. Vaughan* 651

9. Verdict for plaintiff *held* sustained by sufficient evidence in a suit for a balance of the purchase price of wheat, where the weight or quantity was in issue. *Beckman v. Birchard*..... 805

10. An unconditional delivery of goods by seller to buyer with-

Sales—*concluded.*
out exacting payment passes title and waives condition for payment on delivery. *Kingsley v. McGrew*..... 812
11. Unsecured general creditors of seller cannot be heard to assert a right which he may possess to rescind his sale for fraud. *Id.*..... 813
12. One seeking to reclaim goods sold on condition of immediate payment is limited to a reclamation of the goods by him sold. *Id.*
13. A mortgagee of a conditional purchaser in possession of chattels is not a purchaser within the meaning of sec. 26, ch. 32, Comp. Stats., and the rights of the conditional seller are paramount to mortgagee's. *McCormick Harvesting Machine Co. v. Callen*..... 849

School-Lands.
Section 16, ch. 80, art. 1, Comp. Stats., providing that forfeiture of school-land leases held by non-residents may be entered after ninety days from date of published notice, means ninety days from the completion of the publications, and forfeitures entered within a shorter time are ineffective. *State v. Henton*..... 488

Secretary of State. See ELECTIONS.

Set-Off and Counter-Claim. See COUNTY TREASURERS, 10.
1. In a suit upon a supersedeas bond against the principal and sureties, a legal claim due from plaintiff to the principal may be pleaded as a set-off. *Van Etten v. Kosters*..... 152
2. A court of equity may allow a proper set-off in a case not provided for by statute. *Stenberg v. State*..... 300
Douglas County v. Keller..... 317
3. The provision of the Code relating to set-offs authorizes such defenses to be interposed before, but not after, judgment. *Id.*

Sheriffs and Constables. See ARREST. REPLEVIN, 2. TROVER AND CONVERSION, 3.

Sheriffs' Deeds. See DEEDS, 1.

Specific Performance. See VENDOR AND VENDEE, 4.
Where parties have made time of the essence of a contract for the sale of land, equity will refuse to enforce specific performance in favor of a party in default unless strict performance has been waived. *Brown v. Ulrich*..... 409

Stare Decisis. See REVIEW, 39, 40.

State and State Officers. See ELECTIONS, 1, 3.

Statute of Frauds. See LICENSE.
1. A parol agreement by a grantee to reconvey land to his grantor is within the statute of frauds and does not create an express trust in favor of the latter. *Thomas v. Churchill*.. 266
2. It is not necessary that the existence of a parol contract be

Statute of **Frauds**—*concluded.*

denied in pleading in order to render the defense of the statute of frauds available; but the pleader may admit the contract and yet plead and insist upon the statute and its application. *Id.*

3. The failure to object to the introduction of evidence of a parol agreement to reconvey land will not amount to a waiver of the right to invoke the statute of frauds, where the statute has been properly pleaded as a defense. *Id.*

4. Where one requested an adjoining proprietor to build a party wall half on the land of each, and promised, after the wall had been constructed, to pay one-half the cost, the case is not within the statute of frauds and recovery may be had upon the promise. *Stuht v. Sweesy*..... 767

Statute of Limitations. See LIMITATION OF ACTIONS.

Statutes. See CONSTITUTIONAL LAW. SCHOOL-LANDS. TABLE, *ante*, p. lvii.

1. So much of the act of March 31, 1887, amending sec. 85 of the Code, as makes a *lis pendens* constructive notice of the action to the holders of prior incumbrances or conveyances, is void as being in violation of sec. 11, art. 3, of the constitution. *Sheasley v. Keens* 64

2. Where there is a conflict between a law as published and the original enrolled act, the latter controls. *Bruce v. State*..... 570

3. Chapter 105, Session Laws of 1887, is a valid amendment of sec. 12, Criminal Code, relating to rape, though the repealing clause in the published act purports to repeal sec. 11 instead of sec. 12 as theretofore existing, the enrolled act disclosing that original sec. 12 was in fact repealed. *Id.*

4. Section 49, act of February 27, 1879 (Comp. Stats., sec. 49, ch. 19), relating to stenographers, is unconstitutional and void as amending sec. 5, act of February 19, 1877, without referring thereto in the title, or repealing that section. *Morgan v. State*, 798

5. Section 11, art. 3 of the constitution, relating to amendments, does not apply to an act complete in itself. *State v. Moore*... 870

6. It is only where two statutes are so repugnant to each other both cannot be enforced that the prior one is repealed by implication. *Id.*

7. The act of 1891 (Session Laws, p. 272), authorizing the organization of mutual insurance companies, contains but a single subject, which is fairly expressed in its title. *Id.*

8. The act of 1891 (Session Laws, p. 272), authorizing the organization of mutual insurance companies, is complete in itself and not inimical to the constitutional provision (sec. 11, art. 3) forbidding the amendment of prior statutes without repealing them. *Id.*

9. The unconstitutionality of a portion of a statute does not invalidate the remainder, where the different parts are separable. *Id.*

Steam-Threshers. See NEGLIGENCE, 11

Stenographers.

Section 49, ch. 19, Comp. Stats., containing a provision requiring stenographers to furnish free of charge in certain cases a copy of the evidence, is unconstitutional. *Morgan v. State*... 798

Street Railways.

Whether the act of a person in attempting to board a moving street car is negligence is generally a fact to be determined by the jury. *Omaha Street R. Co. v. Martin*..... 66

Subrogation. See TAXATION, 4.

Subscriptions. See BUILDING AND LOAN ASSOCIATIONS, 1, 4. CONTRACTS, 2, 4, 5.

Supersedeas. See INJUNCTION, 9-11. REVIEW, 41-46.

Supreme Court. See COURTS, 7.

Surface Water.

1. One may defend his premises against surface water by dike or embankment, but is liable for damages where he negligently or unnecessarily constructs an embankment and overflows the land of an adjoining proprietor. *City of Kearney v. Themanson* 74
   Jacobson v. Van Boening..... 80
2. One may, by barriers or otherwise, protect his land from surface water, and for injuries occasioned to others from a proper exercise of that right he is not responsible. *Jacobson v. Van Boening* 80
3. One should not accumulate surface water on his land and by means of a ditch discharge it in a volume upon the land of another. *Id.*
   Gilmore v. Armstrong 95
4. In the absence of negligence, one deflecting surface water by the proper use or improvement of his land is not liable for resulting damage to a neighbor. *Churchill v. Beethe*..... 87

Taxation. See ADVERSE POSSESSION, 1. MUNICIPAL CORPORATIONS, 4.

1. Taxes assessed on personalty are a lien from and after the delivery of the tax list to the county treasurer. *Farmers Loan & Trust Co. v. Memminger*..... 17
2. The lien of taxes on personalty is paramount to the lien of a chattel mortgage executed after the delivery of the tax list to the county treasurer. *Id.*
3. A county treasurer's deed is invalid, either with or without a seal. *Frank v. Scoville* 169
4. The holder of a tax deed which is invalid for want of a seal, or for want of statutory authority for a seal, is entitled to reimbursement for the taxes paid upon his purchase and for subsequent taxes properly paid; and he may be subrogated to the rights of the public in the tax liens. *Id.*

Taxation—*concluded.*

5. The holder of a tax-sale certificate may foreclose his lien when the treasurer's deed is invalid by reason of irregular proceedings, but this rule cannot be invoked, where the purchaser alleges in his petition that the treasurer made the sale without authority of law and without jurisdiction. *Ledwich v. Connell* 172

Telegraph Companies. See DAMAGES, 6.

Tenancy in Common.

A tenant in common who alone occupies the property and holds possession adversely as sole owner, or excludes his co-tenant from the enjoyment of the premises, is liable to the latter for rents and profits. *Names v. Names*..... 701

Tenants. See EASEMENTS, 2.

Tender.

In order to make a tender available it must be on such terms that the creditor may receive it without compromising his right to recover more. *Beckman v. Birchard*..... 807

Transcripts. See EVIDENCE, 23. REVIEW, 47-52.

Treasurers. See COUNTY TREASURERS.

Trial. See CRIMINAL LAW. INSTRUCTIONS. JUDGMENTS, 8. PLEADING, 7, 8. REVIEW, 22-24. WITNESSES.

1. The admission of immaterial evidence in a cause tried to a jury is not ground for reversal, where it had no effect on the result. *Farmers Loan & Trust Co. v. Memminger*..... 17
2. Where prejudice would prevent an impartial trial, a party or his counsel may apply to the judge before whom the case would naturally come on for hearing, for a trial before another judge. *Le Hane v. State*..... 105
3. In a suit on a bank deposit the court erred in failing to submit the issue of payment raised by an amended answer filed after the trial, where evidence on that issue was admitted under an agreement by plaintiff in open court to allow defendant twenty days to amend its answer "in any manner" with the same effect as if presently filed. *Tecumseh Nat. Bank v. Harmon* 222

Verdicts.

4. It is error to direct a verdict for defendant, where the evidence is sufficient to warrant a finding and judgment for plaintiff. *Van Etten v. Edwards*..... 25
5. Verdict set out in opinion *held* sufficient in form and substance to sustain the judgment. *Link v. Connell*..... 575
6. A verdict responding to all the issues should not be rejected on account of immaterial findings or recommendations. *State v. Beall* 817
7. The act of receiving and recording a verdict is ministerial and does not require the exercise of judicial discretion. *Id.*. 820

Trial—*concluded.*

Findings.

8. Upon the trial of questions of fact it is not necessary for the court to state its findings, except generally for plaintiff or defendant, unless there is a request for a special finding under the conditions stated in sec. 297 of the Code. *Coad v. Read*... 40
9. A general finding for plaintiff by a justice of the peace is sufficient to sustain a judgment as against an attempt to set it aside in the district court upon a proceeding in error. *Id.*

Issues.

10. Upon the trial of an appeal in the district court, the rule restricting the parties to the issues raised below cannot be invoked by objection to the introduction of evidence in support of the new issue. *First Nat. Bank of Madison v. Carson*..... 764
11. A party aggrieved by the form of submitting an issue of fact to a jury in an equity case should take an exception. *Hay v. Miller* 156

Witnesses. Harmless Error.

12. Error in sustaining objections to questions as leading is cured, where the evidence sought to be elicited is given by the same witness in response to other questions. *Houck v. Linn* 227
13. Error in sustaining an objection to a question may be cured by a subsequent answer to the same question. *Columbia Nat. Bank v. Rice* 432
14. To make error available in a ruling sustaining an objection to a question, one examining his own witness must offer to prove the facts sought to be elicited. *Murry v. Hennessey*.... 603

Trover and Conversion.

1. The owner, by receiving a portion of the converted goods, when returned, or by accepting a portion of the proceeds of their sale, is not thereby barred of a right of action for the wrongful taking, but proof of such facts may be shown in mitigation of damages. *Coburn v. Watson*..... 257
2. The fact that property has been taken by legal process, or otherwise, from the person who converted it is no defense in a suit for conversion brought against him by the owner, unless it is shown that the latter received the property or the proceeds of its sale. *Id.*
3. In an action of conversion by a mortgagee against an officer who seized the chattels under a writ in favor of mortgagor's creditors, the measure of damages is the market value of the property when converted, with interest, deducting the market value of any property returned to, and received by, the mortgagee and the proceeds of any property of which he has received the benefit. *Id*..... 258
4. As a general rule, the prices which goods brought at a public auction are admissible as evidence of their market value. *Imhoff v. Richards* 591

Trover and Conversion—*concluded.*

5. Evidence of the careful conduct of a sale which was illegal as to plaintiff's rights, and incompetent evidence of published notice, *held* properly excluded. *Id.*

6. Evidence *held* sufficient to sustain a verdict for plaintiff. *Id.*

Trusts. See FRAUDULENT CONVEYANCES, 6. PRINCIPAL AND AGENT, 2.

Usury. See CONFLICT OF LAWS.

1. Discussion of an instruction giving undue prominence to a subordinate element of an issue relating to usury. *Rising v. Nash* 597

2. A stipulation in a note providing for compound interest does not render the note usurious. *Lewis Investment Co. v. Boyd*.. 604

3. Interest will not be compounded when to do so would make the aggregate rate exceed ten per cent per annum. *Id.*

4. By stipulation, interest may be allowed on a coupon interest note after maturity, when the amount of interest on both coupon and principal does not exceed the maximum legal rate on the principal sum. *Id.*

Vendor and Vendee. See COUNTIES, 7. HOMESTEAD, 5, 6. MORTGAGES, 8. PRINCIPAL AND AGENT, 2.

1. Where an agreement to convey land is superseded by another contract, of which time is the essence, providing for a conveyance upon payment before a certain date of the purchase money and certain independent indebtedness due vendor, it was *held* that, after failure of vendee to tender the purchase money by the time fixed, equity would not require a conveyance, though vendee had begun suit for the independent indebtedness. *Brown v. Ulrich*..... 409

2. Petition *held* to state a cause of action for the purchase price of land under a parol agreement to convey, upon performance by plaintiff. *Stephens v. Harding*..... 659

3. The rights and liabilities of parties to a parol agreement for the conveyance of realty are not necessarily reciprocal. *Id.*

4. One entering into possession of land under a parol promise of the owner to convey, the latter subsequently tendering a deed, may be liable in an action for the purchase price, though the possession is not such part performance as would entitle the purchaser to maintain a suit for specific performance. *Id.*

5. Vendor's misrepresentations as to location, quality, and value of realty are grounds for rescission when relied upon by a vendee who was unacquainted with the value or condition of the land and who was prevented by vendor's fraud from making an examination. *Stochl v. Caley*..... 786

Vendors' Liens. See MECHANICS' LIENS, 1.

Verdicts. See TRIAL, 4-7.

Villages.

1. The law authorizing the incorporation of villages does not contemplate including remote territory not adapted to municipal purposes. *State v. Mote*..... 683
2. Territory incorporated into a village by a county board must contain two hundred residents. *Id.*
3. An actual resident within the meaning of the statute relating to incorporation of villages is one who is in a place intending to establish his domicile or permanent residence there. *Id.*
4. Evidence *held* to show that there were less than two hundred actual residents within territory sought to be incorporated by a county board. *Id.*

Voluntary Assignments.

1. In an action where the goods assigned by an insolvent firm have been garnished in the hands of the assignee, it is immaterial whether the deed of assignment was witnessed; and any ambiguity in the deed will not be so construed as to render it void. *Deere v. Losey*..... 622
2. The fraudulent disposition of a portion of property by one about to make a voluntary assignment will not impair assignee's title to the remainder, where the assignment is made to, and acted upon by, the assignee in good faith. *Id.*

Voters and Elections. See ELECTIONS.

Wages. See ASSUMPSIT, 1.

Waiver. See INSURANCE, 6. REVIEW, 36. SALES, 10. VENDOR AND VENDEE, 1.

Warranty.. See SALES, 5, 6.

Wills.

1. Interest of contestants *held* to be such as to entitle them to resist the probate of an instrument offered as a will. *Murry v. Hennessey*..... 608
2. The burden of proof is on proponent to establish the execution of the will and the testamentary capacity of testatrix. *Id.*
3. Mere knowledge of testator that his name is being signed, or the fact that he acquiesced in the signing, does not meet the requirements of sec. 127, ch. 23, Comp. Stats., providing that a will shall be signed by testator, or by some one in presence of testator by the latter's express direction. *Id.*
4. Evidence *held* to justify the jury in finding that testatrix did not possess sufficient mental capacity to make a valid will. *Id.*

Witnesses. See CRIMINAL LAW, 2. DEEDS, 5. EVIDENCE, 2, 3, 8. TRIAL, 12.

1. A memorandum prepared at the time of the fact in question or soon afterward, and known by a witness to be correct at

Witnesses—*concluded.*

the time it was made, may be used by him to refresh his memory. *City of Kearney v. Themanson* 75

2. Probable effect of testimony of witnesses who were willing to testify to their criminal conversation with plaintiff in a bastardy proceeding. *Burris v. Court* 183
3. The maxim "*falsus in uno, falsus in omnibus*," applies only where a witness has knowingly and willfully testified falsely. *Omaha & R. V. R. Co. v. Krayenbuhl* 553
4. The credibility of witnesses is for the jury. *Fremont, E. & M. V. R. Co. v. French* 639
5. The word "representative," as used in sec. 329 of the Code relating to incompetency of witnesses, includes any person or party who has succeeded to the rights of the person deceased, whether by purchase, descent, or operation of law. *Kroh v. Heins* 691
6. Section 329 of the Code relating to the incompetency of witnesses does not apply where the transaction or conversation in issue was not between the witness and deceased person, but between the latter and a third person. *Id.*
7. An interested party cannot testify, over the objection of a representative of a person deceased, to the receipt or contents of a letter written by the latter whereby he disposed of his property by gift, the letter being a "transaction" within the meaning of sec. 329 of the Code. *Id.*
8. Under sec. 329 of the Code, testimony concerning transactions or conversations between a witness interested in the result of the suit and a person deceased is incompetent as against the latter's representative. *Id.*
9. It is permissible by way of redirect examination to introduce evidence explanatory of facts elicited by the cross-examination, though corroborative of the testimony in chief of the witness. *Norfolk Nat. Bank v. Job* 774
10. Where defendant is examined as to the genuineness alone of the signature to the bill or note sued on, he should not, on cross-examination, be required to state his opinion touching collateral or incidental matters based upon a comparison of the disputed signature with others. *Id.*

Words and Phrases. See EVIDENCE, 24.

1. "Cash." *State v. Moore* 870
2. "Criminal negligence." *Chicago, B. & Q. R. Co. v. Hague* 97
3. "Moneys collected." *Stoner v. Keith County* 279
4. "Necessaries." *Cobbey v. Buchanan* 391
5. "Ordinary care." *McClelland v. Scroggin* 141
6. "Resident." *State v. Mote* 683
7. "Transaction." *Kroh v. Heins* 691