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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

SEPTEMBER TERM, 1894

VOLUME XLII.

D. A. CAMPBELL,
OFFICIAL REPORTER.

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In behalf of the people of Nebraska.

64035

THE SUPREME COURT

OF

NEBRASKA.

1894.

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SUPREME COURT COMMISSIONERS.

(Laws 1893, chapter 16, page 150.)

SECTION 1. The supreme court of the state, immediately upon the taking effect of this act, shall appoint three persons, no two of whom shall be adherents to the same political party, and who shall have attained the age of thirty years and are citizens of the United States and of this state, and regularly admitted as attorneys at law in this state, and in good standing of the bar thereof, as commissioners of the supreme court.

SEC. 2. It shall be the duty of said commissioners, under such rules and regulations as the supreme court may adopt, to aid and assist the court in the performance of its duties in the disposition of the numerous cases now pending in said court, or that shall be brought into said court during the term of office of such commissioners.

SEC. 3. The said commissioners shall hold office for the period of three years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of the supreme court, payable at the same time and in the same manner as salaries of the judges of the supreme court are paid. Before entering upon the discharge of their duties they shall each take the oath provided for in section one (1) of article fourteen (14) of the constitution of this state. All vacancies in this commission shall be filled in like manner as the original appointment.

SEC. 4. Whereas an emergency exists, this act shall take effect and be in force from and after its passage and approval.

Approved March 9, A. D. 1893.

RULE OF COURT.

ADOPTED NOVEMBER 21, 1894.

15. Whenever an issue of fact is presented for trial in an original action or proceeding, a commission will be named composed of two resident electors of the state of different political affiliations, who shall, under the direction of the court, select such number of persons having the qualifications of jurors in the district court as may be designated in the order for their appointment. A *venire* for the jurors so selected will be issued by the clerk directed to the bailiffs of this court or any sheriff or sheriffs of the state, and shall be served in the manner prescribed for the service of summons. Said commissioners, before entering upon the duties of their office, shall take and subscribe the oath prescribed by section 1 of chapter 10, Compiled Statutes.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1894.

PRESENT:

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

A. D. ROSE v. WASHINGTON COUNTY.

FILED OCTOBER 2, 1894. No. 5793.

1. **Highways:** POWERS OF COUNTY BOARD TO OPEN. A petition is not essential to confer jurisdiction upon the county board to open section line roads under section 46, chapter 78, Compiled Statutes.
2. ———: ———: DAMAGES TO PROPERTY OWNERS. The only limitation upon the discretion of the board in that respect is the fundamental one of compensation for private property taken or damaged.

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

Osborn & Jackson, for plaintiff in error, cited: *Robinson v. Mathwick*, 5 Neb., 252; *Doody v. Vaughn*, 7 Neb., 31; *State v. Otoe County*, 6 Neb., 133; *Damp v. Town of Dane*, 29 Wis., 428; *Williams v. Holmes*, 2 Wis., 96; *Warren v. Brown*, 31 Neb., 8; *Beatty v. Beethe*, 23 Neb., 210; *Howard v. Dakota County*, 25 Neb., 233; *Throckmorton v. State*, 20 Neb., 647; *In re Minneapolis R. Co.*, 38 Minn., 157; *Kemerer v. State*, 7 Neb., 132.

W. E. David and *Walton & Mummert*, *contra*, cited: *Davis v. Commissioners of Boone County*, 28 Neb., 837.

POST, J.

This is a petition in error from the district court for Washington county. The facts essential to an understanding of the questions at issue are as follows: On the 23d day of July, 1890, A. O. Pound and sixteen others, who are described as resident electors of said county, presented to the county board the following petition: "We, the undersigned, respectfully petition for the appointment of a commissioner to examine and report on the location of a county road commencing at the southwest corner of section No. 34, township No. 13 north, of range 11 east of the 6th P. M., running thence east on section and township line about one and one-third miles, to a county road running north and south through section 35, town 18, range 11 east, and terminating at said point where it intercepts the county road running north and south." Subsequently a remonstrance against any action by the board upon the petition was filed by P. Quinlan and twenty-four others. Afterwards the board took action upon the petition, by ordering a road to be opened in accordance with the prayer of the petition. The plaintiff in error, a property owner, presented his claim on account of damage to the north half of section 3, town 17, range 11, and was allowed, by appraisers appointed for that purpose, the sum of $107.50.

From that award he took an appeal to the district court, where a trial was had, resulting in a finding in his favor in the sum of $90. Having moved unsuccessfully for a new trial, he removed the cause into this court for review. His objections to the judgment are all embraced in one proposition, viz., that the petition upon which the county board acted is insufficient to confer jurisdiction, hence any action taken thereunder is void. The petition certainly lacks form and completeness, but, in our view, section 46, chapter 78, Compiled Statutes, confers upon the county board authority to open section-line roads without petition. There is no limitation upon the power of the board, or conditions prescribed by law for the exercise of the discretion with which the board is invested in that respect, except the fundamental one of compensation for damage to private property. This is in accordance with previous decisions of this court. (See *Throckmorton v. State*, 20 Neb., 652; *Howard v. Brown*, 37 Neb., 902.) In view of the conclusion announced, it is unnecessary to examine the other questions argued.

AFFIRMED.

C. F. EISLEY V. ELIZABETH S. HORR.

FILED OCTOBER 2, 1894. NO. 4705.

1. **Negotiable Instruments:** SURETIES. Where two makers of a promissory note are shown to be sureties for a third party, they will be presumed to be co-sureties until the contrary is shown.
2. ——: ——. Evidence *held* to sustain the finding of the trial court.

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

Mapes & Licey, for plaintiff in error, cited: *Williams v. Bosson*, 11 O., 62; *Keith v. Goodwin*, 31 Vt., 268; *Chapeze v. Young*, 9 S. W. Rep. [Ky.], 399; Brandt, Suretyship, 230; *Oldham v. Broom*, 28 O. St., 41; *Adams v. Flanagan*, 36 Vt., 400.

Wigton & Whitham, *contra*, cited: *Norton v. Coons*, 3 Denio [N. Y.], 132; *Warner v. Price*, 3 Wend. [N. Y.], 397; *Norton v. Coons*, 6 N. Y., 33; Story, Contracts, sec. 584; *Price v. Edwards*, 11 Mo., 526; *Knox v. Vallandingham*, 13 S. & M. [Miss.], 526.

POST, J.

This was an action by the plaintiff in error to recover from the defendant in error and one Livingston the sum of $160 and interest on account of money paid as an accommodation indorsed for said defendants. The allegations of the petition are in substance as follows: On the 1st day of March, 1889, the defendants executed their note to the Farmers Loan & Trust Company in the sum of $260, due June 1 after date; that the plaintiff, at the request of the defendants and for their accommodation, signed said note as surety. On the maturity of said note there remained due thereon $160, which the plaintiff was compelled to pay and which he seeks to recover by this proceeding. Livingston made default, but the defendant in error answered admitting the execution of the note and the payment by the plaintiff as alleged, but denied that the note was signed by plaintiff for her accommodation, and alleged that she was merely a co-surety with the plaintiff for Livingston. She also alleged the payment of $100 on said note. The allegations of the answer were all put in issue by the reply.

From the above statement it appears that there were two questions to be determined from the evidence, viz., whether the relation between the parties was that of principal and surety, or whether they were co-sureties for Livingston.

Second—The alleged payment of $100 by defendant. The issues were tried to the court without the assistance of a jury and resulted in a general finding for the defendant, upon which judgment was entered and which it is sought to reverse by means of this proceeding. The only evidence before the court was the testimony of the parties who sustained the allegations of their respective pleadings. Upon such a record, following the recognized rule of this court, we must regard the finding of the trial court as conclusive. The parties are presumed to be co-sureties and equally bound for the default of their principal (*Orvis v. Newell*, 17 Conn., 97; *Baldwin v. Fleming*, 90 Ind., 177; 2 Randolph, Commercial Papers, 976); and this presumption we assume was one of the considerations which led to the finding of the district court. There is no error in the record and the judgment is

AFFIRMED.

GEORGE D. SMILEY, APPELLEE, V. ALEXANDER MACDONALD, APPELLANT.

FILED OCTOBER 2, 1894. No. 6957.

1. **Constitutional Law:** SPECIAL LAWS: MUNICIPAL CORPORATIONS: EXCLUSIVE FRANCHISES. Section 15, article 3, of the constitution, which provides that "the legislature shall not pass local or special laws * * * granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever," *held*, not a restriction upon the power of the legislature over the subject involved, but rather as a limitation with respect to the manner of the exercise of such power.

2. ———: METROPOLITAN CITIES: CONTRACT TO REMOVE GARBAGE. The constitutional provision above cited does not pro-

hibit cities of the metropolitan class from contracting for the removal therefrom of dead animals, garbage, and other noxious and unwholesome matter.

3. ———: ———: REMOVAL OF GARBAGE: EXCLUSIVE CONTRACT. Nor will such a contract be held void by reason of a stipulation therein that the privilege thereby conferred upon the contractor is exclusive.

4. ———: POLICE POWERS. The legislature cannot, under the guise of police regulation, arbitrarily invade private property or personal rights. The test when such regulations are called in question is whether they have some relation to the public health or public welfare, and whether such is, in fact, the end sought to be attained.

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

A statement of the case appears in the opinion.

Saunders, Macfarland & Dickey, for appellant:

It is not the province of the courts to decide that any particular act passed by the legislature in the exercise of its police power, and, as a health law, is unconstitutional, unless it plainly appears to be so on the face of the act. (*In re New York E. R. Co.*, 70 N. Y., 351; *People v. Albertson*, 55 N. Y., 50; *People v. Draper*, 15 N. Y., 532; *In re Townsend*, 39 N. Y., 171; *People v. Smith*, 21 N. Y., 595; *Lindenmuller v. People*, 33 Barb. [N. Y.], 548; *Neuendorff v. Duryea*, 69 N. Y., 557; *Stuyvesant v. Mayor of New York*, 7 Cow. [N. Y.], 585; *Martin v. Mott*, 12 Wheat. [U. S.], 19.)

A municipal corporation has the right and power to grant, if it deems best, the exclusive duty of removing the garbage to one person or to one corporation. (*Walker v. Jameson*, 37 N. E. Rep. [Ind.], 402; *Slaughter House Cases*, 16 Wall. [U. S.], 36; *Commonwealth v. Alger*, 7 Cush. [Mass.], 84; *Thorpe v. Rutland & B. R. Co.*, 27 Vt., 149; *Gibbons v. Ogden*, 9 Wheat. [U. S.], 203; *City of*

New York v. Miln, 11 Pet. [U. S.], 102; *Le Claire v. City of Davenport*, 13 Ia., 210; Tiedeman, Limitations of Police Power, p. 316; *River Rendering Co. v. Behr*, 7 Mo. App., 345; Beach, Public Corporations, sec. 995; 15 Am. & Eng. Ency. Law, sec. 8, p. 1173; *Town of Summerville v. Pressley*, 11 S. E. Rep. [S. Car.], 545; *City Council of Charleston v. Baptist Church*, 4 Strob. [S. Car.], 306; *Copes v. City of Charleston*, 10 Rich. [S. Car.], 502; *Zylstra v. City of Charleston*, 1 Bay [S. Car.], 382; *Harrison v. City of Baltimore*, 1 Gill [Md.], 264; *Boehm v. City of Baltimore*, 61 Md., 259; *State v. Mott*, 61 Md., 297; *Huesing v. City of Rock Island*, 128 Ill., 465; *State v. Lowery*, 49 N. J. Law, 391; *Weil v. Ricord*, 24 N. J. Eq., 169; *Gregory v. Mayor of New York*, 40 N. Y., 273; *Cronin v. People*, 82 N. Y., 318; *People v. Mulholland*, 82 N. Y., 324; *Metropolitan Board of Health v. Heister*, 37 N. Y., 661; *Johnson v. Simonton*, 43 Cal., 242; *In re Linehan*, 72 Cal., 114; *Ex parte Shrader*, 33 Cal., 279; *Bliss v. Kraus*, 16 O. St., 54; *State v. Cowan*, 29 Mo., 330; *Mayor of the City of Monroe v. Gerspach*, 33 La. Ann., 1011; *Kennedy v. Phelps*, 10 La. Ann., 227; *Wreford v. People*, 14 Mich., 41; *Dubois v. City of Augusta*, 1 Dudley [Ga.], 30; *City of St. Louis v. McCoy*, 18 Mo., 238; *Metcalf v. City of St. Louis*, 11 Mo., 103; *Train v. Boston Disinfecting Co.*, 144 Mass., 523; *Ex parte O'Donovan*, 24 Fla., 281; *Polinsky v. People*, 73 N. Y., 65; *Health Department of New York v. Knoll*, 70 N. Y., 530; *Vandine, Petitioner*, 6 Pick. [Mass.], 187; *People v. Gordon*, 45 N. W. Rep. [Mich.], 658; *City of Newport v. Newport Light Co.*, 8 Ky. Law Rep. [Ky.], 22; *Des Moines Street R. Co. v. City of Des Moines*, 73 Ia., 513; *Kilvington v. City of Superior*, 83 Wis., 222; *City of Anderson v. O'Conner*, 98 Ind., 168; *Boon v. City of Utica*, 2 Barb. [N. Y.], 104.)

Breckenridge & Breckenridge, contra, contending that the contract is an exclusive franchise and invalid, cited: Dil-

lon, Municipal Corporations [4th ed.], secs. 89, 362; *Saginaw Gas Light Co. v. Saginaw*, 28 Fed. Rep., 529.

POST, J.

This is an appeal from a decree of the district court for Douglas county restraining the defendant from proceeding under a contract with the city of Omaha providing for the removal of the garbage, offal, dead animals, etc., from said city. In view of the importance of the question at issue it is deemed proper to copy at length from the petition, to-wit:

"The plaintiff states to the court that he is a citizen and resident of the city of Omaha, Nebraska, and a taxpayer therein, and has been such resident of the city of Omaha and taxpayer therein for, to-wit, the period of eight years, and he brings this action in said capacity, as a taxpayer and citizen of said city, against this defendant, Alexander MacDonald, and states to the court the following facts:

"That on the 21st day of July, 1893, said Alexander MacDonald, the defendant herein, made and entered into a pretended contract or agreement with the city of Omaha, under and by the terms of which for a period of ten years from and after January 1, 1894, said Alexander MacDonald, in consideration of being allowed the right to remove dead animals, garbage, offal, night soil, etc., within the city of Omaha, for the period of ten years from and after January 1, 1894, under the terms and stipulations contained in said pretended contract, a copy of which is hereto attached, marked 'Exhibit A,' and made a part hereof as though incorporated at length in the body of this petition, agreed to pay the said city of Omaha, annually, for such privilege, at the end of each year, during the existence of said contract, the sum of $250.

"Plaintiff alleges that under and by virtue of the terms of said pretended contract the defendant is given an exclusive privilege and right, which is illegal and contrary to

law, and is permitted thereunder to make large profits in the transaction of the business therein specified, and that the compensation fixed by said contract or agreement is burdensome upon the taxpayers of said city and is in excess of the reasonable value of the services to be so rendered.

"The plaintiff further says that the contract as aforesaid is unlawful in this, to-wit, that the privilege of removing garbage, dead animals, offal, night soil, etc., necessary to be removed, under the requirements of the board of health, as set out in said pretended contract or agreement with said city and the defendant, is a franchise, and that no authority to grant said franchise to said defendant Alexander MacDonald was ever voted by the citizens and legal voters within and for said city of Omaha, Nebraska, and that the city council and the municipal authorities of said city of Omaha had no right or authority whatever to make and enter into any such contract.

"Plaintiff says that he is informed and believes that the said defendant is about to enter upon the execution of his said pretended contract with the said city, and if permitted to do so will, under color of authority as shown by said pretended contract, levy and assess upon said taxpayers of the city of Omaha and this plaintiff unlawful dues for the removal of garbage, dead animals, offal, night soil, etc.

"Plaintiff alleges that he is without remedy at law.

"Wherefore plaintiff prays that said pretended contract between the said city of Omaha and said Alexander MacDonald be declared null and void and set at naught, and that the defendant, his agents, employes, and servants, be perpetually enjoined from proceeding under said pretended contract to remove dead animals, garbage, offal, night soil, etc., or any other filth required to be removed by board of health or the ordinances of said city of Omaha, and for such other relief as to the court may seem meet."

The contract to which reference is therein made is as follows:

"This agreement, made and entered into this 21st day of July, 1893, by and between the city of Omaha, party of the first part, and Alexander MacDonald, party of the second part,

"Witnesseth: That the party of the second part, in consideration of being allowed to remove and make use of all the dead animals, garbage, offal, night soil, etc., necessary to be removed, as may be required by the board of health or ordinances of said city of Omaha, during the period of ten years commencing January 1, 1894, or from such time prior to said date as may be required by the mayor and council, hereby agrees, in accordance with the ordinances of said city now existing or hereafter passed, and in accordance with the rules and regulations of the board of health of said city, and as may be required by the commissioner of health upon payment of the charges herein authorized, to remove to some place or places at least two and one-half miles outside of the corporate limits of said city, and if within three miles of the corporate limits of said city to such place or places as may be designated by said board of health, and dispose of the same in such manner as not to cause or create a nuisance, all dead animals, garbage, manure, ashes, filth, offal, night soil, etc., as may now or hereafter during the existence of this contract be required to be removed by said ordinances, rules or regulations at not exceeding the prices following, to-wit:

"Each dead animal weighing over 500 pounds, $2.00.

* * * * * * *

"Whenever the owner of any dead animals found in the public streets or at any public place is unknown, the said party of the first part agrees to pay to said party of the second part the sum above specified for removing such animals upon satisfactory proof being furnished of the removal of any such animals and that the owner thereof is unknown.

"It is further understood and expressly agreed that for

the privileges herein granted the party of the second part shall anually pay to the said party of the first part at the end of each year the sum of two hundred and fifty ($250) dollars.

"It is further understood and expressly agreed by said party of the second part that at all times during the existence of this contract he shall be subject to the orders of said board of health and to the ordinances, of said city and that he will promptly and faithfully comply with the same.

"It is further understood and agreed that said party of the second part, for the purpose of removing said dead animals, garbage, manure, ashes, filth, offal, night soil, etc., shall be permitted to load the same upon cars at five places as near equally distant from each other as is practical, such places for loading cars to be approved by the board of health of said city, and to be subject to change from time to time as said board of health may require."

* * * * * * *

To the foregoing petition a general demurrer was interposed, which was overruled, and the defendant refusing to plead further, a decree was allowed as prayed, and which is the decree involved in this appeal.

The issue involved is thus tersely stated by counsel for plaintiff: "There is one question only presented by the demurrer, and that is whether the contract is an exclusive franchise." The plaintiff has assumed the affirmative of that position, and asserts that said contract is in contemplation of law a franchise, and, therefore, within the prohibition contained in section 15 of article 3 of the constitution. The provision of said section which is invoked in this action is as follows: "The legislature shall not pass local or special laws in any of the following cases, that is to say: * * * Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted."

From a careful analysis of that provision it would seem that it was intended, not as a restriction upon the power of the legislature over the subject involved, but rather as a limitation in respect to the manner of the exercise of that power. The precise limitation of the legislative power to confer by general law privileges in their nature exclusive is foreign to our present inquiry. It is sufficient for the purpose of this controversy that, according to recognized rules of construction, the people of the state must be understood to have conferred upon the legislature all of the sovereign power resting in them, subject only to the limitations of the state and national constitutions, for, as said by Judge Redfield in *Thorpe v. Rutland & B. R. Co.*, 27 Vt., 140, the American legislatures have the same unlimited power, except when restrained by written constitutions, as the British parliament. We might safely rest our conclusion upon the reasons stated, but there are other considerations suggested by the record which it is deemed proper to notice.

It will be observed that no claim is made to the effect that the contract complained of is unauthorized by the ordinances of the city of Omaha. The inference, therefore, is that it was executed in pursuance of an ordinance having at least the form of law. The question is thus presented whether the contracting for the removal of the garbage, offal, and other unwholesome substances by contract for a term of years is an assumption of power by the city in excess of that conferred by chapter 12*a*, Compiled Statutes, entitled "Metropolitan Cities," and which, for convenience, will be referred to as its "charter." By section 23 thereof it is provided that "the mayor and council shall have power to make and enforce all police regulations for the good government, general welfare, health, safety, and security of the city and the citizens thereof, in addition to the police powers expressly granted herein, and in the exercise of the police power may pass all needful

and proper ordinances," etc. By section 27 it is provided that "the mayor and council shall have power to prevent any person or persons from bringing, depositing, having, or leaving upon or near his premises or elsewhere within the city, any putrid or diseased carcass, or any putrid, diseased, or unsound beef, pork, poultry, fish, hides, or skins of any kind, or any other unwholesome substance, and to compel the removal of the same at the expense of such person or persons." It requires no argument to prove that the subject of the contract before us is within the strict letter of these provisions of the charter. The boundary line which divides the police power of the state from the other functions of government is often difficult to discern. As said by Shaw, C. J., in *Commonwealth v. Alger*, 7 Cush. [Mass.], 85: "It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise." It may, however, with safety be asserted that the legislature cannot under the guise of police regulations arbitrarily invade personal rights and private property. On the other hand it should appear to the court, when such regulations are called in question, that they have, in fact, some relation to the public health or public welfare, and that such is the end sought to be attained thereby (*In re Jacob*, 98 N. Y., 98; *Millett v. People*, 117 Ill., 303); but the removal of the noxious and unwholesome matter mentioned in the contract tends directly to promote the public health, comfort, and welfare, and is, therefore, a proper exercise of the police power. Nor is the fact that in this instance the city has by contract conferred an exclusive privilege material. From the power thus conferred upon the city is implied the duty to determine the means and agencies best adapted to the end in view. The means adopted appear to be not only a reasonable and necessary regulation, but a judicious exercise of the discretion conferred upon the city. That the object of all such regulations can be best attained by entrusting the

work in hand to a responsible contractor who possesses the facilities for carrying it on with dispatch and with the least possible inconvenience to the public is apparent to all. In the case of *Vandine, Petitioner*, 6 Pick. [Mass.], 187, Putnam, J., referring to a similar regulation of the city of Boston, said: "It seems to us, however, that the city authority has judged well in the matter. They prefer to employ men over whom they have an entire control by night and by day, whose services may be always had, and who will be able from habit to do this work in the best possible way and time. Practically we think the main object of city government will be better accomplished by the arrangement adopted, than by relying upon the labor of others against whom the government would have no other remedy than by a suit for breach of contract. * * We are satisfied that the law is reasonable, and not only within the power of the government to prescribe, but well adapted to preserve the health of the city." (See, also, *River Rendering Co. v. Behr*, 7 Mo. App., 345; *Walker v. Jameson*, 37 N. E. Rep. [Ind.], 402; Tiedeman, Limitations of Police Power, p. 316; and also, as applicable in principle, *Boehm v. City of Baltimore*, 61 Md., 259; *State v. Lowrie*, 49 N. J. Law, 391; *People v. Gordon*, 45 N. W. Rep. [Mich.], 658; *Kilvington v. City of Superior*, 83 Wis., 222.) The alleged excess of power is a mere sanitary measure, as obviously so as the familiar and necessary quarantine for the detention of persons exposed to contagious diseases. In either case, the privilege, although exclusive, is but an incident to the proper exercise of the general police power of the state. The judgment of the district court is therefore reversed and the cause remanded for further proceedings therein

REVERSED.

GEORGE F. PEAKS v. AMBROSE M. LORD.

FILED OCTOBER 2, 1894. No. 5413.

1. **Pleading:** REPLY. Pleading affirmative matters in an answer, which amount to no more than a denial of plaintiff's cause of action, will not necessitate a reply.
2. **Instructions:** OBJECTIONS: REVIEW. To entitle a party to a review of the action of a trial court in giving instructions the objections to the instructions must be pointed out in a motion for new trial.
3. **Partnership:** AGREEMENT OF DISSOLUTION: PAROL EVIDENCE TO EXPLAIN. Where an agreement of dissolution of partnership, reduced to writing and signed by the parties, stated that one of the partners assumed and agreed to pay the accounts and liabilities of a branch of the business conducted at Battle Creek, and gave no list of the items of charges or other reference to them, *held*, that evidence which disclosed what items were included in the accounts as charges against the designated portion of the business, as agreed upon between the partners prior to signing the articles of dissolution, was competent, and its admission was not erroneous on the ground that it tended to vary or modify the terms of the written agreement.
4. **Ruling on Motion to Strike Out Answer of Witness:** HARMLESS ERROR. The overruling of a motion to strike from the record certain portions of the answers of a witness as not responsive to the question, where it appears that the matter thus sought to be eliminated is not calculated to mislead the jury or harmful to the rights of the moving party, *held* not prejudicial error.
5. **Assignments of error** not referred to or argued in the briefs filed will be deemed waived.
6. **Conflicting Evidence:** REVIEW. Where the evidence is conflicting, but there is sufficient evidence to support the verdict, it will not be disturbed.

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

The opinion contains a statement of the case.

S. O. Campbell and *W. M. Robertson*, for plaintiff in error:

Every allegation of new matter in answer not denied by the reply, for the purpose of the action, must be taken as true. (*Hamilton Loan & Trust Co. v. Gordon*, 32 Neb., 663; *Dillon v. Russell*, 5 Neb., 484; *Steele v. Russell*, 5 Neb., 215; *Williams v. Evans*, 6 Neb., 216; *Payne v. Briggs*, 8 Neb., 75.)

The court erred in admitting testimony as to conversation, statement, or agreement by the parties prior to the signing of the written agreement of dissolution of the partnership. (*Watson v. Roode*, 30 Neb., 264; *Aultman v. Brown*, 40 N. W. Rep. [Minn.], 159; *Nichols v. Crandall*, 43 N. W. Rep. [Mich.], 875; *Dodge v. Kiene*, 28 Neb., 116; *Mills v. Miller*, 4 Neb., 441; *Hamilton v. Thrall*, 7 Neb., 210.)

John R. Hays and *Robinson, Reed & Foster*, *contra*:

Where the legal effect of the allegations in an answer is a mere denial of the averments in the petition, such allegations cannot be regarded as new matter which will be taken as true unless controverted by reply. (*Dayton Ins. Co. v. Kelly*, 24 O. St., 345; *Burroughs v. McLain*, 37 Ia., 189; *Mehurin v. Stone*, 37 O. St., 49; *Simmons v. Green*, 35 O. St., 104.)

Facts stated in an answer which could have been given in evidence under a general denial do not constitute new matter requiring a reply. (Maxwell, Code Pleading, 558; *Corry v. Campbell*, 25 O. St., 134; *Simmons v. Green*, 35 O. St., 104.)

HARRISON, J.

Ambrose M. Lord instituted suit in the district court of Madison county against George F. Peaks, alleging in his petition that on or about February 15, 1885, the parties to the action formed a copartnership for the purpose of

doing a retail lumber business under the firm name of Peaks & Lord, which business relation was continued until October 25, 1889, at which time it was dissolved by mutual consent; that at the time of the dissolution of the partnership the firm was indebted to various persons and firms, and among them to one Jacob Spies, in the sum of $212.48, for lumber purchased of him, which sum of indebtedness George F. Peaks, by the terms of the agreement of dissolution, assumed and agreed to pay, but failed and refused so to do; that suit was commenced by Jacob Spies May 13, 1890, in the county court of Madison county against the firm and the individual members thereof to recover said sum, and in which he obtained judgment therefor; that on July 15, 1890, Peaks failing and refusing to pay the judgment, Lord paid the same with interest and costs, amounting in total to the sum of $251.33, for which amount and interest from June 15, 1890, Lord prayed judgment. To this petition Peaks filed an answer, in the first paragraph of which he denied each and every allegation thereof not afterward expressed in the answer and specifically admitted. Then followed the admission of the formation, continuance, and dissolution of the firm and its indebtedness to Spies, as alleged in the petition. An allegation of lack of knowledge or information sufficient to form a belief in regard to the suit of Spies on the account, the judgment, or its payment by Lord, and a denial of all these matters, and the further portion of the answer we will give in the words therein used, as a full and correct knowledge of it will be necessary in deciding one point presented in the case here: "This defendant further answering says that at the time of the dissolution of the said firm of Peaks & Lord, the plaintiff, as a part of the indebtedness of said firm assumed by him, assumed and agreed to pay the indebtedness to said Jacob Spies of $212.48; that in consideration of the plaintiff assuming and agreeing to pay the indebtedness of said firm to the said Spies, with other indebt-

edness of said firm, this defendant assumed and has paid certain indebtedness of said firm." No reply was filed, and after the jury was impaneled and the first witness was sworn and placed on the stand, counsel for Peaks made an objection and motion as follows: "The defendant now objects to the introduction of any evidence in this case, for the reason that a material allegation of the answer, being the fourth paragraph thereof, is not denied by the plaintiff in this suit; and the defendant now moves the court to instruct the jury to find a verdict for the defendant, for the reason above stated." The action of the court in overruling the above objection and motion is one of the errors assigned in the petition in this court. The evidence was introduced and the jury returned a verdict for Lord, the plaintiff in the district court; Peaks filed a motion for a new trial, which was overruled, and judgment rendered on the verdict for Lord, and a review in this court of the proceedings during the trial below is asked by Peaks.

We will first notice the objection to any evidence being introduced under the pleadings, and motion for judgment for Peaks, because no reply had been filed denying the matter set up in the fourth paragraph of the answer. To state it in the strongest terms, this was merely affirmative matter, which amounted to no more than a denial of the cause of action stated in Lord's petition. Lord's action was predicated in part on the promise by Peaks to pay the debt to Spies. The allegation of the answer simply denied this, and stated that Lord had assumed and agreed to pay the Spies account. If on the trial there had been a finding in favor of Peaks he would have been entitled to no affirmative relief; nothing more than a general finding in his favor, a failure of Lord's cause of action, hence the answer did not require a reply and the court did not err in overruling the objection and motion. (See *Kavalier v. Machula*, 41 N. W. Rep. [Ia.], 590; *Jordan v. Buschmeyer*, 10 S. W. Rep. [Mo.], 616; Maxwell, Code Pleading, 558, and cases cited.)

Counsel for plaintiff in error argues in his brief that the court erred in giving instructions 6 and 7 of the instructions given by the court on its own motion. The giving of these instructions was not assigned as error in the motion for a new trial or in the petition in error, and hence are not entitled to consideration here.

Paragraph No. 10 of the petition in error is as follows: "The court erred in permitting the plaintiff to show, upon cross-examination of the plaintiff in error, that the matters in controversy were submitted to arbitration, or to a referee, prior to the signing the articles of dissolution. (See page 27, bill of exceptions.)" By examination of page 27 of the bill of exceptions we find the following in regard to the subject referred to in the paragraph quoted:

Q. Isn't it a fact this matter was submitted at one time to arbitration, or to a referee, prior to this time?

Objected to by the defendant, as incompetent, irrelevant, and immaterial, and not proper cross-examination. Overruled by the court, to which defendant excepts.

Q. Now I will ask you if this matter wasn't referred to a referee at one time?

A. What matter?

Q. This matter of the question as to how much interest you had in the business and how much interest Mr. Lord had in the business.

A. Certain questions were submitted to a referee for decision.

Q. Now, you may state if you didn't make a statement to that referee of the assets and things of that kind; have a showing of the assets of the business that was made by you. You may examine this, marked "Exhibit E," and state if that was a statement which was submitted to the referee.

A. It bears my signature. It must be so.

Q. You may state from that, Mr. Peaks, as to how much the agreed assets of the firm were at that time.

Objected to by the defendant, as immaterial. Sustained by the court, to which plaintiff excepts.

It will be noticed that the first question asked, and to which objection was interposed and overruled, was not answered; that the next objection which was made to any of the testimony was sustained. Clearly there is nothing in this of which the plaintiff in error can complain.

Assignments numbered 5 and 9 are as follows:

"5. The court erred in admitting any oral testimony in reference to the dissolution and settlement of the firm affairs, the same having been reduced to writing and signed by the members of the firm."

"9. The court erred in admitting any evidence of the witnesses Lord and Burr tending to prove that the parties to this action, prior to the making of the written articles of dissolution and settlement, made a different settlement."

There was introduced in evidence an agreement signed by the parties to this action, which we copy:

"The copartnership heretofore existing between Geo. F. Peaks and Ambrose M. Lord under the firm name of Geo. F. Peaks & Co., with offices and yards at Battle Creek, Nebraska, and Burnett, Nebraska, was dissolved on the 30th day of September, 1889. George F. Peaks assumes payment of all accounts, notes, and taxes of the Battle Creek yard, and will retain as his individual property the real estate and buildings of the firm at Battle Creek, and will own and is empowered to collect all accounts and notes due the said Battle Creek yard, together with the following notes due the Burnett yard, and which are indorsed by A. M. Lord, to-wit: [Then followed an itemized list of notes aggregating $970.74.] Ambrose M. Lord assumes payment of all accounts, notes, and taxes of the Burnett yard and will retain as his individual property the real estate, buildings, stock in trade and personal property of the firm at Burnett, Nebraska, and will own and is empowered to collect all accounts and notes due the said Burnett yard,

except the notes before mentioned as transferred to Geo. F. Peaks.

"Given under our hands and seals at Burnett, Nebraska, this second day of November, A. D. 1889.

"GEO. F. PEAKS. [SEAL.]
"A. M. LORD. [SEAL.]"

It is strenuously insisted by counsel for Peaks that this writing contained all the contract between the parties and that no evidence could be received to change, vary, or modify its terms. There was testimony admitted to show that the Spies account was included in the Battle Creek account and assumed and to be paid by Peaks, and that it was so included at his request and demand before he would sign the above agreement. There were also admitted some short statements of assets and liabilities of the two lumber yards as compiled from the books of account, and which were shown to be agreed to as correct by the parties before attaching their signatures to the contract of dissolution. Counsel for Peaks objected to all this testimony, but the court admitted it over the objection. This is the action of which complaint is made in the last mentioned allegations of error, and it is argued by counsel that this testimony should not have been admitted, because it contradicted or modified the terms of the agreement in writing, under and by which the firm was dissolved. The articles referred to, it will be remembered, stated that "George F. Peaks assumed payment of all accounts, notes, and taxes of the Battle Creek yard," and contained no list or statement of these accounts which were charges against the particular yard designated. It appears to us very clear that the above language suggests a reference to the books of account or an agreed statement of what should compose or be considered the items of account chargeable and to be charged to the business at Battle Creek, as the only source of knowledge or information from which any light could be obtained regarding such items of charge, in any controversy

where the question arose for determination, and that the evidence was competent and material,—indeed it was the only evidence from which the account could be determined. The article of dissolution was, in respect to this subject, incomplete and clearly indicated and plainly directed where the further evidence was to be sought, and the admission of such evidence did not violate or infringe upon the rule invoked by counsel in their brief.

The next statements of the petition in error which we will consider are two in which complaint is made that answers to two questions were made by one of the witnesses in which he volunteered, or gave, some testimony which was not called for by, and not responsive to, the interrogatories propounded, and that the court erred in overruling the motion of counsel to strike it out. The matter contained in these answers was not responsive to the questions then asked, and the rules of strictly correct practice may have demanded that it be stricken from the record; but it was of the same class of testimony as we have hereinbefore held to be competent, and we cannot believe that the jury was misled by it or the rights of the complaining party prejudiced by leaving it stand as a part of the testimony; hence, if error, it was not prejudicial.

There are some assignments of error which are not referred to in the brief of plaintiff in error, and in accordance with the established rule of this court these will be deemed waived and not further noticed.

The only other error alleged in the petition is that the verdict is not sustained by sufficient evidence. The evidence was conflicting on the main issue involved, but we think fully sufficient to support the verdict rendered. It follows that the judgment of the district court is

AFFIRMED.

JOHN HARTNETT, APPELLEE, V. THOMAS HARTNETT, APPELLANT.

FILED OCTOBER 2, 1894. No. 5858.

Equity: DEEDS: UNDUE INFLUENCE. Where coercion is not sufficient to amount to duress, but a social or domestic force is exerted on a party which controls the free action of his will, and prevents voluntary action in the making of a contract or execution of a deed for real estate, equity may relieve against the same on the ground of undue influence. Doctrine announced in *Munson v. Carter*, 19 Neb., 293 approved and followed.

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

Davis, Gantt & Briggs, for appellant, cited: *Marshall County High School Co. v. Iowa Evangelical Synod*, 28 Ia., 360; *Finlayson v. Finlayson*, 3 L. R. A. [Ore.], 801; *Knapp v. Bailey*, 79 Me., 195; *Miller v. Edgerton*, 38 Kan., 36; *Fairchild v. Rasdall*, 9 Wis., 380*; *Clifton v. Jackson Iron Co.*, 74 Mich., 183; 2 Parsons, Contracts, 782; *Bolt v. Rogers*, 3 Paige Ch. [N. Y.], 154; *Goudy v. Gebhart*, 1 O. St., 262; *Hendrickson v. Evans*, 25 Pa. St., 441; *Payne v. Bruton*, 10 Ark., 53; *Blystone v. Blystone*, 51 Pa. St., 374; *Nellis v. Clark*, 20 Wend. [N. Y.], 24.

Jay & Beck, contra, cited: *Munson v. Carter*, 19 Neb., 293; *Borden v. White*, 44 N. J Eq., 291; *Pinger v. Pinger*, 42 N. W. Rep. [Minn.], 289; *Catalani v. Catalani*, 24 N. E. Rep. [Ind.], 375; *Nolan v. Nolan*, 43 N. W. Rep. [Mich.], 1078; *Dunn v. Dunn*, 7 Atl. Rep. [N. J.], 842; *Whipple v. Barton*, 3 Atl. Rep. [N. H.], 922; *Tancre v. Pullman*, 29 N. W. Rep. [Minn.], 171; *Davis v. Dean*, 26 N. W. Rep. [Wis.], 737; *Samson v. Samson*, 25 N. W. Rep. [Ia.], 233; *Crawford v. Hoeft*, 24 N. W. Rep. [Mich.], 645; *Smith v. Smith*, 19 N. W. Rep. [Wis.], 47; *Ashton*

v. Thompson, 18 N. W. Rep. [Minn.], 918; *Sprague v. Hall*, 17 N. W. Rep. [Ia.], 743; *Thorn v. Thorn*, 16 N. W. Rep. [Mich.], 324; *Hanna v. Wilcox*, 5 N. W. Rep. [Ia.], 717; *Watkins v. Brant*, 1 N. W. Rep. [Wis.], 82; *Ikered v. Beavers*, 7 N. E. Rep. [Ind.], 326; *Oakley v. Ritchey*, 28 N. W. Rep. [Ia.], 448; *Bledsoe v. Bledsoe*, 1 S. W. Rep. [Ky.], 10; *Saunders' Appeal*, 6 Atl. Rep. [Conn.], 193; *Woodbury v. Woodbury*, 5 N. E. Rep. [Mass.], 275; *Porter v. Throop*, 11 N. W. Rep. [Mich.], 174; *June v. Willis*, 30 Fed. Rep., 11; *Webber v. Sullivan*, 12 N. W. Rep. [Ia.], 319; *O'Neil v. O'Neil*, 14 N. W. Rep. [Minn.], 59; *Maix v. McGlynn*, 88 N. Y., 357; *Smith's Will*, 52 Wis., 543; *Smith v. Smith*, 19 N. W. Rep. [Wis.], 47; *Weller v. Weller*, 19 N. E. Rep. [N. Y.], 433; *Goodrich v. Shaw*, 40 N. W. Rep. [Mich.], 187; *Fitch v. Reiser*, 44 N. W. Rep. [Ia.], 214.

HARRISON, J.

November 12, 1892, the plaintiff John Hartnett commenced an action against the defendant in the district court of Cedar county, alleging in the petition then filed that on December 18, 1890, he was the owner of real estate in Dakota county, Nebraska, more particularly described as follows: "East half of the southwest quarter, and the northwest quarter of section 12, township 28, range 7," and that on the last named date he conveyed to defendant, by warranty deed, a portion of the land, to-wit, "the east half of the southwest quarter of said section 12," and further pleading as follows: "The plaintiff further states that said warranty deed was procured from him by fraud and undue means, and that he was induced to sign and deliver the said deed to defendant by false and fraudulent statements and misrepresentations, and by threats of personal violence and by threatening to bring suit against plaintiff, made by defendant to this plaintiff, and that said deed was made wholly without consideration and was and is not the vol-

untary act and deed of the plaintiff but was induced and procured by fraud and misrepresentations and threats as aforesaid." The prayer of the petition is that the deed to defendant be canceled and plaintiff be decreed to be the owner of the land. On the 28th day of March, 1892, the plaintiff filed what is styled in the record "an amendment to the petition," which was as follows:

"1. Comes now the plaintiff and for amendment to his petition filed herein states and shows the court that the said deed described in the said petition of the plaintiff was procured from the plaintiff and he was induced to sign the same by false and fraudulent statements made to him by the defendant, and that the said defendant wanted to use said land for the purpose of inducing an uncle of the defendant to convey to defendant certain lands, and wanted the lands conveyed to himself and allowed to stand in his name for the sole purpose of procuring such conveyance, and the defendant, at and before the time the plaintiff conveyed said land to the defendant as described in the petition, promised to the plaintiff that immediately upon his securing the conveyance of the other lands from his uncle as aforesaid, he, the defendant, would at once reconvey the lands, described in the plaintiff's petition, to the plaintiff.

"2. That the lands as above set forth have been conveyed by the uncle of the said defendant to the defendant and are owned and held by him, but that the defendant, though often requested to do so, has refused to reconvey the said lands to the plaintiff."

To the petition and its amendment the defendant filed an answer, in which he admitted the conveyance of the land to him and denied, generally, each and every allegation not expressly admitted or otherwise answered, and for a further defense alleged that from the time he became capable of doing work on a farm, he worked for plaintiff on his farm in Dakota county continuously until defendant was about twenty-eight years old; that after he arrived at the age of

twenty-one years it was understood between him and plaintiff that defendant should receive of plaintiff for such labor the reasonable value of the same, which he fixes at the sum of $2,000; that at or before the time of the conveyance of this land by plaintiff to defendant there was an accounting between them, at which time defendant demanded payment for his labor according to agreement, and that the conveyance of this land in controversy was made by plaintiff to defendant in payment for defendant's claim for labor, and accepted as such by him. The answer also contains what is denominated a "second and further defense," in which it is stated that plaintiff, at or before the time of the conveyance of this land to defendant, owned at different times in Dakota county tracts of land aggregating 1,600 acres and a large amount of personal property; that plaintiff had six children, and at or before the time of the conveyance of this land to the defendant the plaintiff made a division of his lands and personal property among his children, and the land in controversy in this case was conveyed to defendant as a portion of his share of the plaintiff's property, he being one of the plaintiff's sons. The answer closes with a prayer for a dismissal of the petition. There was a reply filed on behalf of plaintiff, in which it was admitted that defendant worked for plaintiff upon the farm during a portion of the time stated in the answer, and then alleged that defendant had been fully paid for all services rendered to plaintiff prior to the time of the execution of the conveyance of this land. The reply also contained a general or special denial of all the other allegations and statements of the answer. There was a trial of the issues to the court, a decree rendered in favor of plaintiff, from which defendant has appealed to this court.

The testimony in this case shows that at and prior to the time of the execution of the deed, which it is sought to annul, two of the sons of the plaintiff, one of them the defendant, were living on a farm with plaintiff, which be-

longed to him; that the two sons were working the farm together, and probably shared the proceeds of their joint efforts,—at least the bank account was in the name of Hartnett Brothers, and each carried a check book and drew upon it for money necessary for various purposes. The plaintiff was seventy-two or seventy-three years of age, not in very good health and somewhat weak and feeble. He had, prior to the time of making this deed, given or conveyed to some of his children, of whom there were six in all, portions of his property, but the defendant had not received what he considered or claimed to be his share, and demanded and insisted he be given what he termed "his share," and with it that the tract of land included in the deed in controversy be conveyed to him; and on December, 1890, he received a conveyance of another piece of land, and twenty-six head of cattle and other personal property were turned over to him, and this deed in suit was executed and delivered. The only question which concerns us in this case is, what was the moving influence or reason which induced the plaintiff to make this particular deed? The testimony does not show that this tract of land was conveyed to defendant in payment of labor or as a part of any share of the estate to which he was in any manner or for any cause entitled, or because plaintiff considered that defendant had any right or claim to it, and we must turn to the evidence adduced on this point to discover why the deed was made and delivered to defendant. In the testimony of the plaintiff we find the following:

A. Well, he wanted a deed of me all the time and I would not give it to him; and then he went to his two brothers and talked to them about it and I would not give it to him. He threatened me several times—threatened my life; and then he went to his two brothers and talked to them about it. He said James got so much from me that he was going to get his uncle's place. He was going to marry John Ryan's daughter and get so much from her;

then he went to his two brothers and told them if I gave him that and he got his uncle's place, he would deed it back. * * *

Q. You say he threatened your life?

A. Yes, sir.

Q. Was that because you refused to make the deed?

A. Yes, sir.

Q. State what he said about that matter.

A. He told me first he would have "blood" if I didn't give it to him. One night he followed me into the bedroom and said he would kill me if I didn't give it to him.

Cross-examination:

Q. Then the deed was not made on account of the threats?

A. I could not go from here to the door he was not after me threatening me.

Q. You didn't care anything about the threats, did you?

A. He would call me all sorts of names, and I thought he was pretty nearly insane.

Q. The threats didn't have any affect on you?

A. The threats and everything else had a hand in it.

Q. The real fact is you deeded it on account of those promises to deed it back?

A. Yes, sir.

Q. Was you afraid of him?

A. Yes, sir; I was afraid of him because I could not get from here to the door that I was not in dread that he would kill me.

Q. It was simply on one occasion?

A. He threatened me besides that.

Q. You was not afraid of him, was you?

A. I was not afraid of him that he would kill me; I knew he would not kill me.

Redirect:

Q. As a matter of fact the deed was made by you and made through the representations made by him that he

would deed it back, and also by reason of the threats he made?

A. Yes, sir.

Q. Both of them compelled you to make the deed?

A. Yes, sir.

Q. And he kept the threats up continuously?

A. You are right he did. I could not go any place unless he threatened me.

One of the brothers testified on this subject as follows:

Q. I will ask you to state if you ever heard any threats made against the plaintiff, your father.

A. He threatened to kill him. I have heard him tell him: "You G—d d—n t—g s—n of a b—h, if you don't give me my rights I will kill you."

Q. Did you hear him threaten your father if he did not give him this land?

A. That was what he was after.

Q. He deeded him some land at the same time?

A. I couldn't say. I didn't read the deed. He said he did.

Q. Would he make those threats continuously?

A. I have heard him make them five or six times a day.

Q. Isn't it true that he would continuously keep them up pretty nearly?

A. Yes, sir.

The defendant in his examination in chief states:

Q. Did you ever make any of those threats that were testified to here in your presence this morning?

A. No, sir.

Q. You never made any of them?

A. Only one. I never said I would kill him. I threatened to sue him. He gave me a piece of land and I asked him where it lay, and he gave me the numbers, and I said, "I don't understand the numbers." I told him—I was pretty angry—I said I would have blood. I meant so. I didn't intend to kill him, or do any bodily harm. I meant to sue him.

Q. Any language that you used in relation to that land meant that you would bring suit against him unless he would settle?

A. Yes, sir.

And during cross-examination testified:

Q. You told the old man you would have blood or this deed, didn't you?

A. Yes, sir.

Q. And the old man was sick at that time, wasn't he?

A. No, not that I know of.

Q. But the old man was in bed?

A. He was in bed that night, or going to bed. He was not in bed because he was sick. He had gone to bed for the night.

Q. The old man was in bed and you told him you would have that deed or you would have blood?

A. No, sir; I did not.

Q. What did you tell him?

A. I said I did not see what was to keep me from killing him, from bleeding him.

Q. You said that you would kill him, didn't you?

A. No, sir.

Q. Did you say if he said a word you would shoot him?

A. No, sir.

Q. What did you do that for then?

A. Because he kept me out of my rights.

Q. You meant to kill him, didn't you?

A. No, sir.

Q. What did you mean?

A. I meant to sue him.

We quote the foregoing portion of the testimony to show the general drift and import of the evidence given, as directed to the point now under consideration. One of the contentions of counsel for defendant is that the evidence of the promise by defendant to reconvey this land should not have been received, as, if received and considered, it would be violative of the rule that parol testimony

cannot be received for the purpose of changing or varying the terms of a written contract, and he cites a number of authorities to sustain his position. We do not think the citations apply in this case, as we do not consider the evidence of the promise to deed the land back can be viewed as establishing, or as introduced for the purpose of proving, that the deed was given on condition or to ingraft a condition upon it, or to invalidate it by showing there was no consideration for its execution, but rather as one of the elements of the influence which was exerted upon the father by the son, by which the will of the father was controlled and overcome and he was induced to execute the deed. This was but one of the facts and circumstances entering into the transaction, and as such was competent to be received and considered in the final determination of the issues between the parties, not as a controlling factor, in itself sufficient to entitle the plaintiff to relief, but as a constituent part of the plan or scheme, and of the means adopted by the defendant to effect his purpose of obtaining the deed for the land.

It is further insisted by counsel that plaintiff cannot recover for the reason that if the deed was made pursuant to an agreement between the plaintiff and defendant that it should be done to induce the uncle of defendant to convey to him a tract of land, it constituted an alliance between them for a fraudulent purpose, and the court will not hear the complaint of plaintiff or grant him any relief founded upon matters involved in such combination. There is a total absence of evidence in the record to show there was any agreement, or even expectation, that the conveyance of this land was to operate in any manner upon the uncle, or that it did so operate to induce or influence him to convey land or lands to the defendant, hence this can have no weight in determining the rights of the parties, as they must be governed by the facts shown in evidence.

We now reach the main question in the case, viz., whether

under all the evidence given in the case, the plaintiff shall be allowed the relief demanded, and this we conclude must be answered in the affirmative. The rule by which we are guided in our consideration of the facts and circumstances in this case was announced in the case of *Munson v. Carter*, 19 Neb., 293, a case very similar in its leading and governing facts and incidents to the one at bar, where it was held: "Where coercion is not sufficient to amount to duress, but a social or domestic force is exerted on a party which controls the free action of his will, and prevents voluntary action in the making of a contract or execution of deed for real estate, equity may relieve against the same on the ground of undue influence;" and the author of the opinion, in the text, makes a statement which is so appropriate in its application to the facts in the case at bar that we will quote it here, viz.: "The testimony shows, beyond question, that the mother was induced to execute the deed in controversy by the coarse language, threats, bluster, intimidation, and persistence of the son, and that it was not her voluntary act and deed." The oft-repeated threats, abuse, and importunities of the son to the father operated on the will of the father and influenced and induced him to execute the conveyance in controversy, and we are satisfied that of his own will and volition, uninfluenced in the manner indicated, he would not have executed it. This brings it within the rule, and we conclude that the decree of the district court was just and right. In support of the doctrine of *Munson v. Carter, supra*, in addition to the cases therein cited and commented upon, we add the following: *Edwards v. Bowden*, 12 S. E. Rep. [N. Car.], 58; Pollock, Contracts, 524; 2 Pomeroy, Equity Jurisprudence, sec. 951; 1 Parsons, Contracts, 393, 395; 1 Chitty, Contracts, 269, 273; 2 Greenleaf, Evidence, sec. 301. The decree of the lower court, in so much as it sets aside and annuls the conveyance described in plaintiff's petition, is . . . . . .

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. JAMES F. HILDEBRAND.

FILED OCTOBER 2, 1894. No. 5293.

1. **Trial**: DIRECTING VERDICT. Where there is testimony which should be submitted to the jury, an instruction which withdraws the case from them is not proper, and it is not error to refuse to give it.
2. **Evidence.** In a civil action, when a fact may be fairly and reasonably inferred from other and all the facts and circumstances proved, it may be taken as established.
3. **Railroad Companies**: FAILURE TO FENCE TRACK: INJURY TO LIVE STOCK: DAMAGES. The evidence *held* sufficient to sustain the verdict.

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

Greene & Baxter, for plaintiff in error.

George A. Magney, contra.

HARRISON, J.

July 9, 1891, James F. Hildebrand instituted an action in the district court of Sarpy county to recover of the railroad company damages in the sum of $1,000, stating his cause of action in his petition as follows:

"1. The plaintiff complains of the defendant for that said defendant is a corporation doing business under the laws of the state of Nebraska.

"2. That on or about the 6th day of October, 1890, said defendant was operating a railroad through Sarpy county, said road having been open for use for more than six months in said county; and while so operating the same at the time above stated, at a place near Portal on said road, where the defendant is required by law to fence its track

but had failed to do so, said defendant, by its agents and employes, ran an engine over and against one black Percheron-Norman stallion known as 'Denmark,' by reason of which said stallion was injured so that he died next day.

"3. The said stallion was the property of this plaintiff, and was of the value of $1,000.

"4. Plaintiff further says that defendant had not fenced its said track at this point, nor provided the same with cattle guards as required by law.

"5. That immediately after said stallion was injured as aforesaid plaintiff notified defendant of the same; and plaintiff has frequently since requested the defendant to pay the damages which he has sustained by reason of the killing of said stallion as aforesaid, but defendant has refused so to do; and plaintiff further says that his damages sustained as aforesaid are $1,000, no part of which has been paid."

The company filed the following answer, to-wit:

"Now comes the defendant above named, and for answer to the petition filed by the plaintiff admits that it is a corporation, and that as such it was operating a line of railroad through the county of Sarpy at the time complained of; that whether the plaintiff is the owner of the stallion mentioned in the plaintiff's petition this defendant has not knowledge or information and therefore denies the same.

"Further answering, the defendant denies each and every allegation contained in said petition, except as hereinbefore stated and admitted."

There was a trial of the issues before the court and a jury, and a verdict for Hildebrand for the amount claimed, $1,000. Motion for a new trial was filed by the company, argued, and overruled, after which judgment was rendered in favor of Hildebrand in the sum of $1,000 and for the costs, to reverse which the company has prosecuted its petition in error herein to this court.

There is no dispute in the testimony with reference to

the facts of the ownership of the horse by Hildebrand and its value in the sum of $1,000, or the place being one where the company was by law required to erect and maintain fences along its tracks and put in cattle guards, or that the horse, having broken its halter strap or rope, ran out of the stable and upon the track near Hildebrand's residence, at or very near in point of time of the passage of one of the company's trains which was due there about 7 o'clock P. M. and which came along "on time" and within a few minutes after the horse reached the track, and which train was then running at the rate of twenty-five or thirty miles an hour. At a distance of about one-half of a mile from the place where the horse went upon the track was a trestle, at a point where the track of this company crossed that of the Union Pacific Railway Company. The trestle was from fifteen to twenty feet in height, and the cross-ties upon which the rails were laid were, as the testimony discloses, about three or four inches apart, or distant one from the other, on the one hundred feet commencing at the easterly end of the trestle and going over it toward the west, and beyond this were, in the language of one witness, "twelve or fourteen or sixteen inches apart, or something like that." The point where the horse entered upon the track was in an easterly direction from the trestle, and the train was a west-bound train, hence both train and horse were headed toward the west. The horse,—judging from the hoof marks and other indications,—after getting on the trestle, had no trouble in traveling over the first hundred feet where the ties were close together, but when it came to where the intervals between the ties were wider, it evidently stepped off and thrust its leg or legs down in several of the spaces, as there were hairs left on the edges of the ties in such a position and of a kind and color to clearly indicate that they had been scraped by the ties from the leg or legs of this horse, and after passing over some fifteen or twenty feet of this wider spaced portion of the trestle, the

horse either jumped or, in its attempts and struggles to proceed farther, threw itself from the trestle on the left or southerly side to the ground below, or was struck by the locomotive or train and thrown to the ground, where he was discovered under the trestle, one hundred and fifteen or one hundred and twenty feet from the easterly end, standing upon three legs, the right hind leg being broken and crushed between the hock and pastern joints. It was dark, and no one of the parties who testified at the trial saw or related how the horse fell or was thrown from the trestle. The horse died the day after the accident of the injuries received.

The main question raised by the petition in error and argued in the brief filed is that the verdict was not sustained by sufficient evidence and was contrary to the weight of the evidence. This is directed in the argument to the one point in the testimony of whether there was sufficient —or, indeed, any—evidence to show that the horse was pushed or thrown from the track by the engine or train. The evidence relating to this particular fact was conflicting, but a careful examination and analysis and comparison of all the testimony convinces us that the conclusion of the jury as embodied in their verdict was sustained by the evidence, reached, as it must have been, from a consideration of all the facts and circumstances of the accident, and more particularly the condition of the horse when found under the trestle, the marks and bruises all being upon his right side and of such a character or nature and in such places on his body as to indicate that they were produced by contact with the engine or train, rather than the movement and struggles of the animal when on the trestle; the leg being bruised and the bone crushed rather than broken sharp off; the indications and marks upon the trestle showing that the horse had been pushed or slid along and off at the side, and other physical facts evidential in themselves, and from which we are satisfied that the inferences

drawn by the jury in arriving at the verdict they did were fair and reasonable and warranted by such facts. In civil cases it is sufficient if the evidence, on the whole, agrees with and supports the hypothesis it is adduced to prove; and it is the duty of the jury to decide according to the reasonable probability of the truth. (1 Greenleaf, Evidence [15th ed.], 13*a*.)

The company prepared and presented the following instruction with a request that it be given: "The jury are instructed that the evidence in this case will not warrant the finding of a verdict for the plaintiff. You will therefore find for the defendant." This was refused, to which counsel for the company excepted, and it was assigned and argued as one of the errors committed by the trial court. Having determined that there was evidence sufficient to sustain the verdict for the plaintiff below, this instruction was clearly wrong, and there was no error in the court's refusing to give it. This case in its facts comes far within the rule of this court that where there is testimony which should be submitted to the jury, an instruction which withdraws the case from them cannot be sustained. The questions of fact in the case were well and fairly submitted to the jury for their determination, and there being sufficient evidence to support their conclusion, it will not be disturbed.

AFFIRMED.

URANIA YOUNG V. HERSHELL N. SAGE.

FILED OCTOBER 2, 1894. NO. 4938.

1. **Instructions.** It is not error to refuse to give instructions requested to be given which have been substantially expressed in the instructions prepared and read to the jury by the court on its own motion.

2. **Damages**: NEGLIGENCE: FENCE ON HIGHWAY: COLLISION: INSTRUCTIONS. The action of the district court in refusing to give to the jury certain instructions requested by the defendant examined, and *held* no error in such refusal.

3. **Evidence on Former Trial**: WITNESSES. To render the testimony of a witness given during the former trial of a cause admissible in evidence during a subsequent trial it must be shown that the witness, whose testimony it is thus sought to introduce, is absent from the state or without the jurisdiction or beyond reach of the process of the court.

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

Lamb, Ricketts & Wilson, for plaintiff in error.

Abbott, Selleck & Lane, contra.

HARRISON, J.

This action was instituted before a justice of the peace in Lancaster county by H. N. Sage, and from a judgment there rendered was appealed to the district court, where Sage filed a petition as follows:

"Comes now the plaintiff, and for his cause of action against the defendant complains and alleges:

"1. That on the 12th day of March, 1889, and for a long time continuously prior thereto, there was a public highway running along the west line of northwest quarter of section 15, township 10, in range 7 east, in Lancaster county, Nebraska; said highway was opened for public travel in due manner and in all respects as provided by law on or about the —— day of ——, 1872, and ever since said date, and up to and including the 12th day of March, 1889, has been in constant and common use as a public highway.

"2. That on or about the —— day of ——, 188—, and prior to the said 12th day of March, 1889, and prior to the injury hereinafter complained of, the said defendant, by

herself, her agents and employes, wrongfully, willfully, carelessly, and negligently constructed and built a certain barbed wire fence within said public highway and then and thereafter permitted the same there to remain without taking any precaution whatever to prevent injury thereby; said fence was constructed of wire, armed with large sharp and dangerous barbs and points, and was built a long distance into said highway, to-wit, sixteen and one-half feet, and extended along and beside and dangerously near the traveled track, to-wit, within five feet of said track.

"3. That on said 12th day of March, 1889, plaintiff was the owner of a certain horse, buggy, and harness.

"4. That on said 12th day of March, 1889, as plaintiff was lawfully traveling upon said highway and was properly and carefully conducting said horse, buggy, and harness over and along the same, and in the beaten and traveled track hereinbefore described, and was in the exercise of due and ordinary care in all respects, and especially in the management and control of said horse, said horse became startled, and without any fault or negligence whatever on the part of the plaintiff, shied sidewise into and upon said fence, and said buggy was thereby overturned and broken and said harness cut and torn, and said horse was by said wires and barbs cut, bruised, mangled, and torn so as to be totally disabled for any kind of service or labor whatever for a long period of time, to-wit, two months, and said horse was further permanently disfigured and scarred and permanently injured in and about his feet and legs, to the damage of plaintiff in the sum of $125; that plaintiff was obliged to expend, and did expend, for medical treatment, medicines, bandages, liniments, ointments, and appliances in attempting to cure said horse of his injury the sum of $65.10; that he was compelled to pay for repairing said buggy the sum of $7.75, and to repair said harness the sum of $3.50; in all to plaintiff's damage in the sum of $200. Plaintiff therefore prays

judgment in the sum of $200, with interest and costs of suit."

To which Urania Young, defendant, filed the following answer:

"Comes now the defendant, and for her answer to the plaintiff's petition herein filed says that she denies each and every allegation contained in said petition; and for a further answer the defendant says that whatever damage, if any, the plaintiff sustained to his horse and buggy and harness was the direct result of the plaintiff's neglect and the vicious character of his horse, and that the neglect, if any, on the part of this defendant is not the proximate cause of said injury or damage."

The reply to this answer, by Sage, was a denial of all new matter contained in the answer. The result of a trial of the issues to a jury was a verdict in favor of Sage, upon and in accordance with which, after hearing and overruling a motion for new trial, the court rendered judgment. The plaintiff in error has prosecuted a petition in error and removed the case to this court, seeking a review of the proceedings during the trial of the case in the lower court. Of the errors alleged in the petition there are but three insisted upon or argued in the brief filed by counsel for plaintiff in error, viz.:

"The court erred in refusing to give the first paragraph of the instructions requested by the defendant in the court below.

"The court erred in refusing to give the second paragraph of the instructions requested by the defendant in the court below.

"The court erred in refusing to admit the testimony of the witness A. C. Ricketts as to what the witness Yandt testified to in the justice court."

The first two of these may, we think, be properly considered together. Instructions numbered 1 and 2, requested to be given by plaintiff in error, read as follows:

"1. The jury are instructed that although they find from the evidence that defendant's fence encroached upon the limits of the highway at the place of the alleged injury, and that the plaintiff was driving his horse with due care, yet if the plaintiff's horse, by reason of fright or viciousness, had become uncontrollable and was in the act of running away at the time of coming in contact with the defendant's fence, your verdict should be for the defendant.

"2. In order that the defendant should be liable in damages for the alleged injury it is necessary that the fact that the defendant's fence encroached upon the limits of the highway was the proximate cause of the injury and not the remote cause; and if you find from the evidence that the plaintiff's horse, prior to the time he struck the fence, had become unmanageable and was in the act of running away, this would be the proximate cause of the injury, and not the fact that the defendant's fence encroached upon the highway, and your verdict should be for the defendant."

It is contended by counsel for plaintiff in error that by these instructions they sought to direct the attention of the jury to the propositions that if the plaintiff in the district court (Mr. Sage) was not using due care at the time of the occurrence upon which the action for damages in this case is predicated, he was not entitled to recover; and further, that it was the viciousness of the horse and its fright at some calves or objects by the roadside which caused it to become unmanageable or uncontrollable, which comprised the proximate cause of the injuries or damages resulting from what occurred, and not the fence against which the horse ran or threw itself and the buggy. Whether the incidents and circumstances of the fright of the horse, its viciousness, if the fact that it possessed any such traits, or acquired habits, was proved, can be assigned as the proximate cause of the injuries or damages, rather than the unlawful and prohibited act of Urania Young in placing an obstruction in the highway, by erecting and maintaining

therein the barbed wire fence against which the horse jumped and pulled the buggy, is a question upon which, if we turn to the authorities upon the definition and application of the doctrine of the proximate cause for an answer or solution, we will discover much diversity and contrariety of opinion; but a decision of this case does not, it seems to us, necessarily involve a discussion or determination of this point, hence it will not be examined or decided; but conceding for the purpose of the argument here that it was proper and right that the jury should be instructed on the proposition embodied in the foregoing requests 1 and 2 of plaintiff in error, we think they were fully covered by the instructions given by the court on its own motion. The court fully instructed the jury in regard to the highway, its location and establishment, and the burden of proof, etc., and further instructed them as follows:

"6. If you find from the evidence that the plaintiff's horse, while being driven along the highway in a careful and prudent manner, became frightened at objects near the road and shied from his course, and if you further find from the evidence that the horse in so shying acted as a horse of reasonable docility and training might act under the same circumstances, then the fact of the horse so shying would not defeat the plaintiff's right of recovery. The occurrence must be attributed to one of the casualities of the road. It would be otherwise, however, if you would conclude from the evidence that the circumstances were not such as to frighten a horse of reasonable docility and training and that the shying of plaintiff's horse was caused by a previously acquired vicious habit.

"7. If a horse driven with due care upon a highway becomes by reason of fright actually uncontrollable, so that his driver cannot stop him or direct his course, or exercise or regain control over his movements, and in this condition comes upon a fence in the highway, by which an injury is occasioned, the owner of the fence is not liable un-

less it appears that the accident would have occurred if the horse had not been so uncontrollable; but a horse is not to be considered uncontrollable in this sense if he merely shies or starts, or is momentarily not controlled by his driver."

"4. In order to entitle the plaintiff to recover, the plaintiff must establish that the defendant was negligent in the acts complained of, and that the accident complained of and the damages sustained by reason thereof were not contributed to in any way or manner by any negligent or careless act of the plaintiff. It would be negligent for the defendant to place in the highway, in close proximity to the traveled and beaten track, a barbed wire fence which might occasion damage to travelers by reason of the ordinary casualities that travelers are liable to encounter while traveling said highway, and it would devolve upon the plaintiff while traveling upon said highway to use ordinary care in driving and managing his horse and avoid accidents that might happen; and if the horse driven by the plaintiff would be found from the evidence to be spirited and liable to fright, then it would devolve upon the plaintiff and he would be held to use a greater degree of care than otherwise."

In the fourth the question of the contributory negligence or care in driving and managing the horse is fully covered, and in the sixth and seventh the occurrence being attributable to the ugly habits or viciousness of the horse or its having become wholly unmanageable through fright; and these, constituting the proximate cause, are fairly set forth and presented; consequently the rights of plaintiff in error were not prejudiced by the refusal to give the instructions 1 and 2 referred to in the petition in error.

During the progress of the trial in the district court one A. C. Ricketts was called as a witness in behalf of plaintiff in error, and the following is the record of his examination and the further proceedings in reference to evidence which it was desired to elicit from him:

Q. Were you present at the trial of this case in the court below?

A. Yes, sir.

Q. Was a witness there examined by the name of Yandt, who was with Mr. Sage at the time of the accident?

A. Yes, sir.

Q. You may state to the jury what the witness, Mr. Yandt, when on the stand in that trial, said concerning the manner of the happening of this accident.

Objected to, as incompetent, irrelevant, and immaterial, and as calling for hearsay testimony. Sustained. Exception.

Defendant here offers to prove by this witness that one Mr. Yandt was a witness in this case in the justice court in the trial thereof, and, after being duly sworn to testify to the truth, the whole truth, and nothing but the truth, testified that he was with the plaintiff at the time of the occurrences in controversy; that the horse in controversy became frightened; that the first move of the horse was violent and sufficient to break the lines, and that the horse then turned immediately to the left, overturning the buggy and throwing the witness and plaintiff to the ground, and that from there he turned toward the fence of defendant; and further, that the first move of said horse overturned the vehicle and threw them both on the ground. Objected to, as incompetent, irrelevant, and immaterial, and as calling for hearsay testimony. Sustained. Exception.

It appears that the witness Yandt, who is referred to in the above offer to prove, was examined during the trial of this case before the justice of the peace, and that his evidence then and there given might under some circumstances be repeated during a subsequent trial of the case, and thus introduced, was announced as the decision of this court in the case of *Omaha Street R. Co. v. Elkins*, 39 Neb., 480, where it was held: "Where a witness is shown to be absent from the state, his testimony given at a former trial of the

cause is admissible in evidence if otherwise unobjectionable." (See, also, *City of Omaha v. Jensen*, 35 Neb., 68.)

During the cross-examination of H. N. Sage in the district court he was interrogated with reference to this witness Yandt, and answered as follows:

Q. This man Yandt that was with you, he was working for you at the time?

A. Yes, sir.

Q. He was a witness in this case in the lower court?

A. Yes, on the opposite side.

Q. On what?

A. Mr. Young subpœnaed him.

Q. You put him on the stand, didn't you?

A. I don't remember whether my attorney called on him or not.

Mr. Lane: I will say we did.

Q. When did he leave the county?

A. I can't say just the time. It was somewheres, I guess, a little better than a year ago.

Q. Has he been back to your knowledge?

A. I don't know. I don't think he ever has.

Q. Do you know what business he went into out west?

A. Yes, he went out there to try farming.

Q. That is in Red Willow county?

A. That is out here, what they call Red Cloud.

Q. Have you had any correspondence with him since he went?

A. No, sir; I never have.

It is one of the indispensable conditions which entitles a party to the introduction of evidence of the nature offered in this case, and which it is alleged the court erred in excluding, that the witness, whose testimony it is thus sought to bring to the attention of the court or jury, is absent from the state, or without the jurisdiction or beyond the process of the court wherein the case is on trial, and it devolves upon the party desiring to use the evidence to satisfy

the court that such is the fact, unless it is admitted; in other words, the foundation must be laid for its introduction. The portion of the examination of Sage which we have quoted is all the showing or proof of any kind there is in the record which refers to the whereabouts of the witness Yandt, and the most that can be claimed for it is that it discloses that Yandt left the county to go to another county almost a year prior to the trial, and that Sage did not think he had ever been back, but he did not know. Clearly this did not establish the fact that the witness Yandt was not within reach of the process of the court, or could not be obtained as a witness, and was not sufficient to entitle the plaintiff in error to introduce through the medium of another witness the testimony as detailed by the witness Yandt during the former trial of the case. We conclude that the judgment of the district court was right and must be

AFFIRMED.

FARMERS LOAN & TRUST COMPANY v. M. B. DAVIS ET AL.

FILED OCTOBER 2, 1894. No. 5802.

Review: FAILURE TO FILE MOTION FOR NEW TRIAL. Where it is sought by a petition in error to have the proceedings of a district court, during the trial of an equity case, reviewed by the supreme court, there must have been a motion for new trial filed and presented to the trial court, as in an action at law.

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

M. J. Sweeley, for plaintiff in error.

Davis, Gantt & Briggs, contra.

HARRISON, J.

The Farmers Loan & Trust Company, incorporated under the laws of the state of Iowa, commenced an action in the district court of Cedar county to foreclose tax liens against certain real estate situate in Cedar county and the property of one of the defendants, M. B. Davis. The cause was tried to the court and judgment rendered for the defendant, to reverse which the company prosecuted a petition in error to this court.

An examination of the record discloses the fact that there was no motion for a new trial filed in the trial court. It is a well established rule of this court that where it is sought by a petition in error to have the proceedings of a trial court, during the trial of an equity case, reviewed in the supreme court, there must have been a motion for new trial filed and presented to the trial court, as in an action at law. (See *Gray v. Disbrow*, 36 Neb., 857; *Carlow v. Aultman*, 28 Neb., 672.) This case falls within the above rule, and therefore we cannot review the proceedings of the lower court. The judgment of the district court is

AFFIRMED.

STEPHEN HEATON V. DORA M. THAYER.

FILED OCTOBER 2, 1894. No. 5747.

Summons: FINDING AS TO DEFENDANT'S RESIDENCE: REVIEW. The finding of the district court, as to the actual place of residence of a defendant served with summons by leaving a copy thereof at his alleged usual place of residence, will not be disturbed when such finding has been made on consideration of conflicting evidence.

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

W. T. Thompson, for plaintiff in error.

John Patterson, contra.

RYAN, C.

On the 16th of May, 1892, the defendant in error, as plaintiff, filed her petition in the district court of Merrick county, praying the foreclosure of a mortgage made by the plaintiff in error. Proper summons, duly issued, was afterwards filed in this cause, with the following indorsement:

"STATE OF NEBRASKA, } ss.
MERRICK COUNTY. }

"I hereby certify that on the 16th day of March, 1892, I served the within writ of summons on the within named Stephen Heaton, by leaving at his usual place of residence a certified copy of this summons and of the indorsement thereon; and Minnie Heaton, by delivering to her a certified copy of this summons and all the indorsements thereon.

"J. W. PORTER, *Sheriff.*"

By a motion filed for that purpose alone the district court's jurisdiction of the person of Stephen Heaton was challenged, because "at the time of the pretended service of summons upon him defendant had no residence in the state of Nebraska." In support of this motion, by the affidavit of Stephen Heaton therewith filed, it was stated that ever since the 16th day of March, 1892, and for some time prior to that date, affiant had been a resident of Lima, Peru, South America, having during that time no other place of residence, and that affiant had not resided in Nebraska since 1874, since which year he had been absent from Nebraska, excepting that he had occasionally made his parents visits in this state; and that from 1874 to 1881 he had been a resident of Lima aforesaid, and that from 1881 to 1891 he had been a resident of the City of Mexico. The above statements were corroborated as to the non-resi-

dence of Stephen Heaton by the affidavit of Henry Heaton. To sustain the sheriff's return there were introduced in evidence the affidavits of Minnie Heaton, wife of Stephen; also, the affidavit of Stephen Heaton's father, and a joint affidavit made by two of his brothers and two sisters, filed in an attachment proceeding to avoid a levy of the writ. Each of these affidavits was dated February 16, 1892. That of Minnie Heaton was that she lived with her children on a certain quarter section of land which she described; that on December 11, 1891, and for a long time prior to that date, and ever since, she and her husband and children had been *bona fide* residents of Merrick county, Nebraska. The affidavit of Henry Heaton was to the effect that Stephen Heaton was on February 16, 1892, a *bona fide* resident of Merrick county, Nebraska, and had been a resident of said Merrick county for a period of more than three years previous to the date of the affidavit. The joint affidavit of the brothers and sisters of Stephen Heaton was to the same facts as to the residence as that of the father. There was also submitted in resistance of this motion the affidavit of the sheriff of Merrick county, in which he said that at the time he served the summons Minnie Heaton and her children were living upon the same premises and at the same place as when she made the affidavit hereinbefore referred to. The affidavits of the members of the Heaton family were dated February 16, 1892, just one month previous to the date of the return of summons made in this case. At the date of these several affidavits it was made to appear quite conclusively that Stephen Heaton was, and for a number of years had been, a resident of the state of Nebraska. When the service of summons was made, his wife and children resided in the same place as when these affidavits were made. If in the meantime Stephen Heaton had changed his residence, it must have been by a mere mental act, for, so far as any evidence submitted discloses, there was no change in the status or place of resi-

dence of either himself, his wife, or his children. The evidence on which the question of the place of residence of Stephen Heaton was submitted presents a question of fact such that a finding of the court for either party would not be disturbed as being without support of evidence. The finding of the court adversely to the contention of Stephen Heaton as to his residence at the time of the service of the summons, therefore, settles that question. The judgment of the district court is

AFFIRMED.

OSWALD HYDE, APPELLEE, V. SARAH J. MCCONNELL ET AL., APPELLANTS.

FILED OCTOBER 2, 1894. NO. 5628.

Specific Performance: HOMESTEAD: EVIDENCE. On full examination of all the evidence, the findings made and relief granted by the trial court are found to be fully justified, and its judgment is, therefore, affirmed.

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

Saunders & Macfarland and *C. S. Dickey*, for appellants.

Gregory, Day & Day, contra.

RYAN, C.

This action was begun in the district court of Douglas county for a specific performance by Sarah J. McConnell and her husband, John McConnell, of a written contract for the conveyance of the south twenty-five feet of lot 3, in block 10, in Brown Park Addition to South Omaha. By the terms of this contract Sarah J. McConnell was bound to convey to John F. Kenny the property above

described, upon payment of the total amount of $350 in quarterly payments of $25 each. This contract was assigned to appellee, from whom Mrs. McConnell received several payments, though her written assent to the transfer was not indorsed as required by the terms of the contract itself. This contract was dated March 19, 1888. The assignment thereon was made in August, 1889. In the month last named the assignee, with his family, took possession of the property described in the aforesaid contract, and have ever since maintained that possession. While thus in possession the assignee made valuable and lasting improvements of the property. This unimproved half lot was shown at the time of the trial to have been worth about $400. Improved as it was, it was worth between $1,500 and $1,600. Mr. and Mrs. McConnell, before the commencement of the suit, made a warranty deed describing the premises involved, but, as appellee was then in possession, this pretended conveyance cuts no figure in the controversy. The defendants Mr. and Mrs. McConnell alone testified adversely to several witnesses on behalf of the plaintiff, but their evidence showed a disposition to quibble, not to say prevaricate. Interrupting the cross-examination of Mr. McConnell there occurred this colloquy between the witness and the attorney for Mrs. McConnell:

Mr. Macfarland: That is the only home you folks have?

A. Yes, sir.

Q. You and your wife occupy it as a home?

A. Yes, sir.

On this scrap of evidence the argument in this court has largely been directed to the homestead rights of Mr. and Mrs. McConnell, and the indispensable requirement in respect to a homestead that both should have joined in the executory contract above referred to. Elsewhere it was shown in evidence that Mr. and Mrs. McConnell resided on that part of the lot not herein involved, and that between the

different parts of the lot there was maintained a division fence. This testimony might in terms as aptly have referred to the fraction occupied by the McConnells as to the other part, and in view of all the evidence it is quite clear that consistently with the truth no other reference could have been in the mind of Mr. McConnell when he made the answers to the two interrogatories above set out. In this conclusion we are confirmed by the fact that no homestead rights or disabilities anywhere in the pleadings were mentioned by any litigant. On all disputed matters the findings of the district court were as they should have been, favorable to the appellee, and proper relief was decreed. Its judgment is therefore

AFFIRMED.

IRVINE, C., took no part in the determination of this case.

REUBEN E. MCCLAIN, APPELLEE, V. A. E. MORSE ET AL., APPELLANTS.

FILED OCTOBER 2, 1894. No. 5627.

Review: BILL OF EXCEPTIONS: DEFECTIVE CERTIFICATE: AFFIRMANCE. The sole question being as to the sufficiency of the evidence to sustain the findings of fact made by a referee, whose allowance of the bill of exceptions fails to show that it contains all the evidence adduced, the judgment of the district court is affirmed. Following *Turner v. Turner*, 12 Neb., 161, and *Omaha & N. W. R. Co. v. Menk*, 4 Neb., 24.

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

Saunders & Macfarland, for appellants.

Edgar H. Scott, contra.

RYAN, C.

This action was brought in the district court of Douglas county by the appellee, against the appellants, for an accounting in the settlement of a partnership which had existed between the several parties litigant. By this appeal there is presented only the correctness of the findings of fact made by a referee, whose allowance of the alleged bill of exceptions was as follows:

"This bill of exceptions contains evidence given by both parties at the trial had before me, and is by me duly allowed on presentation by the defendant Clark.

"FRANK L. WEAVER,
"*Referee.*"

This fails to show that the evidence given was all that was given; hence, it is impossible for us to review the findings of fact of which complaint is made. (*Turner v. Turner*, 12 Neb., 161; *Omaha & N. W. R. Co. v. Menk*, 4 Neb., 24.) The judgment of the district court is

AFFIRMED.

IRVINE, C., did not sit.

ERNEST STEGEMAN, APPELLANT, V. ROBERT FAULKNER ET AL., APPELLEES.

FILED OCTOBER 2, 1894. NO. 5594.

1. **Taxation:** PURCHASER AT INVALID SALE: SUBROGATION. Where a tax sale is invalid, the purchaser thereat is, by the payment of his bid, simply subrogated to the rights of the county for the enforcement of payment by foreclosure of the amount actually due which he has paid, with interest thereon at the rate of ten per cent per annum.

2. ———: ———: ATTORNEY'S FEE. A purchaser at an invalid tax sale is not entitled to have taxed in his favor an attorney's fee as part of the cost of the foreclosure of the lien to which he has by payment become subrogated.

APPEAL from the district court of Colfax county. Heard below before MARSHALL, J.

Phelps & Sabin, for appellant.

Grimison & Thomas, contra.

RYAN, C.

This action was commenced by the appellant in the district court of Colfax county for the foreclosure of a tax lien on lots 1, 2, 3, 4, 5, and 6, in block 65, of the original town of Schuyler. The notice of the tax sale held in January, 1890, was in the following language:

"DELINQUENT TAX LIST.

"SCHUYLER, NEBRASKA, October 10, A. D. 1889.

"Notice is hereby given that I will offer at public sale at the court house in Schuyler on the first Monday in November, between the hours of 9 o'clock A. M. and 4 o'clock P. M., the following described real estate for delinquent taxes for the year 1888. JOHN NOVOTNY, JR.,

"*Treasurer of Colfax County, Neb.*"

The property in respect of which the lien is claimed, and the amount for which it would be sold, as shown by the description attached to the aforesaid notice, was as follows: Lots 1, 2, 3, 4, 5, and 6, block 65, $35.70. No bid was had for this property at the advertised public sale, and the lots were therefore sold at private sale for the sum of $697.49, for the taxes of the years 1883, 1884, 1885, 1886, 1887, and 1888.

Section 86, chapter 77, of the Compiled Statutes makes the following provision in relation to delinquent taxes: "In all cases where taxes are delinquent on any real prop-

erty for any preceding year or years, it shall be the duty of the county clerk in making up the list for the current year, to enter the amount of the delinquent tax opposite the tract or parcel of real property against which it was charged, in a suitable column or columns, with the year or years in which the same was due, and the amount thereof shall be collected in like manner as tax on other real property for that year may be collected." In section 109 of chapter 77, just referred to, it is provided, in relation to the notice to be given of tax sales, that "the notice shall contain a notification that all lands, on which the taxes of the preceding year, naming it, remain unpaid, will be sold, and the time and place of the sale, and said notice must contain a list of the land to be sold and the amount of taxes due thereon." In the absence of a showing to the contrary, it may well be presumed that the county clerk, in making up the list of taxes for the current year, complied with the requirements of section 86 above quoted. At any rate, by the provisions of section 109 it was required that the notice published should contain a list of the lands to be sold and the amount of taxes due thereon, implying thereby that not only should the notice contain the amount of taxes due for the immediately preceding year, but, in addition, it should also embrace the delinquent taxes of former years. If the notice in this case had contained the amounts delinquent for the years from 1883 to 1887 in addition to the taxes for 1888, the amount shown to be due would have been $697.49,—if the amount bid correctly represents the amount of such delinquencies,—instead of showing, as it did, that there was due but the sum of $35.70. The considerations stated render the tax sale, under which plaintiff claims his right, invalid and, therefore, the purchaser was simply subrogated to the rights of the county. (*Pettit v. Black*, 8 Neb., 52; *Wilhelm v. Russell*, 8 Neb., 123; *O'Donohue v. Hendrix*, 13 Neb., 258; *Merriam v. Hemple*, 17 Neb., 347; *Otoe County v. Brown*, 16 Neb.,

395; *Otoe County v. Mathews*, 18 Neb., 466; *Merriam v. Dovey*, 25 Neb., 623.)

By section 179 of chapter 77 of the Compiled Statutes it is provided that the owner of any certificate or certificates of tax sales upon any tract of land, or town lot, shall be deemed the assignee and owner of all the liens for taxes of the state, etc., and may, instead of demanding a deed therefor as provided in this act, proceed, by action at any time before the expiration of five years from the date of such certificate, to foreclose the same, etc. In case of the foreclosure of such tax certificates as provided above, it is provided, in section 181, that the plaintiff shall be entitled to interest on each amount paid by him and evidenced by his certificate of tax sale and receipt for taxes paid, at the rate of twenty per cent per annum from the date of each payment for the term of two years, and at the rate of ten per cent per annum on each of said sums from and after the said two years and until decree of foreclosure, etc. It is also provided in the same section, and in the same connection, that at the time of the rendition of the decree the court shall award to the plaintiff attorney's fees equal to ten per cent thereof, which shall be taxed as a part of the costs of the action. Evidently these provisions refer to the foreclosure of a valid tax certificate. In the case at bar the sale was invalid for the reasons indicated, and the certificate, therefore, was not such an evidence of the amount due the plaintiff as entitled such plaintiff to relief under the provisions of the sections just quoted. In *Otoe County v. Brown*, 16 Neb., 398, it was held that the provision as to attorney's fees was not intended to apply to actions where the county foreclosed tax liens. As the rights of the appellant to foreclose are measured by the rights of the county in the same respect, it logically follows that the provision as to attorney's fees cannot be held to apply to such a foreclosure as the plaintiff was entitled to in this action. By the provisions of section 105 of chapter 77 of the Com-

piled Statutes, delinquent taxes draw ten per cent interest only, and the district court, therefore, correctly allowed but that amount and, for the reason above stated, properly disallowed attorney's fees. The judgment of the district court is

AFFIRMED.

ROBERT L. GARLICHS, APPELLANT, V. MICHAEL DONNELLY ET AL., APPELLEES.

FILED OCTOBER 2, 1894. No. 5571.

1. **Mechanics' Liens:** STATEMENTS. It is not necessary to the sworn statement and claim of lien required to be filed by subcontractors that there should be attached thereto a copy of the written contract under the terms of which the rights of such subcontractor have accrued; neither is it necessary that the ownership of the property benefited should be set forth therein.
2. ———: ITEMIZED ACCOUNTS. Where the itemized account filed with the sworn statement and claim of lien disclosed when the furnishing of labor or material began and ended, it is not essential that as conclusions the same facts should be restated.

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

Hall, McCulloch & English, for appellant.

Howard B. Smith, Isaac Adams, Cowin & McHugh, Wharton & Baird, Blair & Goss, and *Mahoney, Minahan & Smyth*, for appellees.

RYAN, C.

For some time prior to the 29th day of August, 1889, Robert L. Garlichs, the plaintiff, was the owner of a certain lot and fraction of a lot thereto adjoining, situate in Boggs

& Hill's Second Addition to the city of Omaha. On the date last named Mr. Garlichs and Michael Donnelly, one of the defendants, entered into an agreement with reference to the transfer of said property from the former to the latter, but the title was not to be perfected in Donnelly until he had made certain improvements on the property. In accordance with their agreement, and as part of the purchase price, Mr. Donnelly on that date executed and delivered to Mr. Garlichs nine notes; three of these notes were for $1,833.33 each, and may be called the "first series;" three others were for $1,833.33 each, and may be called the "second series;" and three others were for $1,000 each, and may be called the "third series." On the first of January, 1890, Mr. Donnelly, being the equitable owner of said property, and having made arrangements to procure a loan of $17,000 from the Lewis Investment Company, one of the defendants, executed to that company his note for $17,000, and on January 1, 1890, Mr. Donnelly also executed to the Lewis Investment Company certain commission notes. On January 4, 1890, Mr. Garlichs conveyed the legal title to all the property to Mr. Donnelly. On the same date Mr. Donnelly executed and delivered to the Lewis Investment Company a mortgage upon the same property to secure his said note for $17,000, which mortgage was recorded on the same day. On the same date Mr. Donnelly also executed and delivered to the Lewis Investment Company a second mortgage upon the property above described to secure his said commission notes, which mortgage was recorded on said date. On January 4, 1890, Mr. Donnelly executed a mortgage to Mr. Garlichs upon the east forty-six feet of said real estate to secure the notes called the "first series;" and executed a mortgage on the middle forty-six feet to secure the notes called the "second series;" and executed a mortgage on the west twenty-three feet to secure the notes designated as the "third series." Each of these mortgages contained a reci-

tation that it was made subject to the mortgage to the Lewis Investment Company. On the 6th day of January of the same year the three mortgages from Donnelly to Garlichs last above mentioned were recorded. January 11, 1890, Mr. Donnelly executed to Albert L. Meals and Joseph McVea, defendants, a conveyance of all the property above described, and said grantees assumed and agreed to pay the mortgage to the Lewis Investment Company as a part of the purchase price of said property. On the 19th day of February, 1890, Thiessen, Arnold & Co. filed a mechanic's lien, and on the same date Goodman & Cooper also filed a mechanic's lien. On the 20th of February, 1890, Thiessen, Arnold & Co. assigned their mechanic's lien to Goodman & Cooper. This action was brought for the purpose of foreclosing the three mortgages which had been executed and delivered by Mr. Donnelly to the plaintiff. After the commencement of this action Mr. Garlichs assigned certain notes, hereinbefore designated as the "third series," and the mortgages securing the same, to Milton T. Barlow, and also assigned one of the notes of the "second series" to the Union National Bank of Omaha. These assignees afterward intervened and are now parties to this action. Before the Lewis Investment Company would make the loan of $17,000 which Mr. Donnelly sought to secure, the company required as a condition precedent that receipts and waivers of a large amount should be furnished as proof that the improvements then on the real estate had either been paid for or had been otherwise provided for. Thiessen, Arnold & Co. and F. D. Cooper executed the release as to which there has been much controversy in this case, in terms following:

"This release of mechanic's lien, made this 10th day of December, 1889, witnesseth, that for a full and valuable consideration we, the undersigned, Thiessen, Arnold & Co. and F. D. Cooper, do severally waive and release all claims which we now have, or may hereafter acquire by virtue of

the laws of the state of Nebraska, against lots 9 and 10, block 5, in Boggs & Hill's Second Addition to the city of Omaha, Douglas county, Nebraska, or the brick row of stores or flats situate thereon, and our right to file a lien or liens on said property by reason of the brick work done or materials furnished by us in, on, or about the construction of the buildings on the aforesaid premises.

"THIESSEN, ARNOLD & CO.
"F. D. COOPER."

On the 12th day of February, 1892, a decree was rendered in which the two mechanics' liens owned by Goodman & Cooper were adjudged to be liens prior to the liens or claims of all other parties to this action. Thiessen, Arnold & Co. and Goodman & Cooper were subcontractors in respect to the improvements on account of which they claimed and had decreed a mechanic's lien. In argument it is insisted that the claim for a lien filed on behalf of Thiessen, Arnold & Co. and the one filed on behalf of Goodman & Cooper were defective, for the reason that their contracts with the principal contractor was in writing, and no copy of it was attached to the claim for lien filed with the register of deeds of Douglas county. The provision of the mechanics' lien law applicable to subcontractors is found in section 2, chapter 54, of the Compiled Statutes, and seems to be an independent rule governing the manner in which the claim of a subcontractor shall be filed. As was said in *Colpetzer v. Trinity Church*, 24 Neb., 120, this lien is given, not upon the grounds that the contract was made with the owner by such contractor, but because the material was furnished and was used in the erection of the building. The time within which a subcontractor is required to file his claim is limited to sixty days from the performance of labor or furnishing material, and the statute provides that if the contractor does not pay him he shall have a lien for the amount due from the same time, and in the same manner

as the original contractor, and the risk of all payments made to the original contractor shall be upon the owner until the expiration of the sixty days specified. From this language it would seem that the right of the subcontractor to a lien is contingent upon the fact of the contractor making payment within the sixty days provided by law. By the provisions of section 3 there is allowed a period of four months within which a lien may be filed in the office of the county clerk or register of deeds, and in connection with this period it is provided that when labor has been done or material furnished as provided in the written contract, the same or a copy thereof shall be filed with the account required. While the language with which section 3 begins is broad enough to cover subcontractors as well as contractors, it is evident from these considerations that the section just named applies to one class entitled to liens, while section 2, complete in itself, applies to subcontractors alone. It was, therefore, unnecessary that there should be attached to the subcontractor's claim for a lien a copy of any written contract relating to the matter in respect of which the lien is claimed.

It is also argued that the account set forth in the lien filed by Thiessen, Arnold & Co., and by them assigned to Goodman & Cooper, is not such an account as the law contemplates, and is not based on the contract between McVea and said subcontractors. There is no reason stated for the conclusion claimed. It may be true that the contract under which Thiessen, Arnold & Co. was to do the work provided that it should be for $3,935.67, and that the account shows a debit of $3,979.47, but no clear reason is assigned in argument why this is misleading. It may be also observed, in relation to another point made, that the statute does not require that the affidavit for a subcontractor's lien shall contain the allegation that the contract was made with the owner of the property. The first section of the chapter on that subject, in general terms, provides

who shall be entitled to a lien, but it does not undertake to specify what shall be contained in the claim filed for that lien. The provisions upon that subject are found in section 2 of the act, in which, as we have already observed, there is no such requirement as is claimed. The account attached to the affidavit was itemized, and from the itemized statement the first and last date are easily obtainable. It was, therefore, unnecessary that there should be a general statement in addition giving the date of the commencement and of the completion of the work. The claimant could found no right as to items not embraced within his account, and an inspection of the statement of account would render very obvious the time of commencement and the time of completion of the work.

An extended argument is made directed to the claim that the liens of Thiessen, Arnold & Co. and Goodman & Cooper were not filed within sixty days of the performance of the labor and the furnishing of material by those claimants. In one view of the evidence this contention is sustained. In another view it is not. The question presented was one of fact submitted to the court upon conflicting evidence, and found favorably to the contentions made on behalf of these claimants. It is, therefore, unnecessary to review the testimony upon which this conclusion was founded. It must stand as an established fact.

In respect to the release, of which a copy has already been set out, the following were the eighth and ninth findings of fact by the district court, to-wit:

"8. That an instrument dated December 10, 1889, signed by said Thiessen, Arnold & Co. and F. D. Cooper, purporting to be a release of the rights of said Thiessen, Arnold & Co. and F. D. Cooper to a mechanic's lien on said premises, was without consideration and void, and was delivered to defendant Lewis Investment Company without the consent, expressed or implied, of either said Thiessen, Arnold & Co. or F. D. Cooper, and contrary to the instructions of said last mentioned party.

"9. That the claim of defendant the Lewis Investment Company arose out of a building loan, and that under the agreement by which said loan was negotiated, the money thereby represented was to be first applied to the payment of the claim of contractors for labor and material furnished in the construction of said building, and that said Lewis Investment Company paid to the account of plaintiff Garlichs the sum of $8,500, after being informed that said instrument referred to in finding No. 8 was without consideration and void, and that there was due to defendant Goodman & Cooper, for labor and material furnished, the amount represented by said claims of Thiessen, Arnold & Co. and Goodman & Cooper."

These two findings of fact would settle the controversy between the Lewis Investment Company and the claimants of liens with respect to whether or not the release, as claimed by the investment company, had induced that company to make the loan and advance the money which otherwise it would not have done. On behalf of the investment company, which was a non-resident of this state, the business was done by its agents, Muir & Gaylord. The testimony of these gentlemen tends to establish as a fact the claim of the investment company. On the other hand, the evidence of both Goodman and Cooper was directly in support of the two findings quoted. It would subserve no useful purpose to attempt a review of the testimony given respectively as to this contention. The findings of the district court settled as facts the controversy, and the result is as just stated. The decree of the district court in accordance with the above findings established the liens of Goodman & Cooper and Thiessen, Arnold & Co., held by Goodman & Cooper, as prior in right to the mortgage in favor of the investment company.

The brief opposing the two liens just mentioned was submitted on behalf of the Lewis Investment Company, therein styled as "appellee." On behalf of Garlichs, Bar-

low, and the Union National Bank there was filed a stipulation as follows: "The undersigned, having examined the briefs filed in the above entitled action by the Lewis Investment Company, one of the appellees, hereby, for the purpose of saving expense, request that said brief be considered and taken as the brief on behalf of the undersigned." To this stipulation was attached the signatures, respectively, of the attorneys of the parties just named as consenting thereto. In view of this stipulation we have considered only the questions presented by the brief filed on behalf of the Lewis Investment Company. Upon a careful reading of the record we have found no question on behalf of one of the appellees which is not common to all. The discussion, therefore, which has been addressed to the claims of the Lewis Investment Company will not be extended specially to any other party to the litigation. The judgment of the district court is

AFFIRMED.

POKROK ZAPADU PUBLISHING COMPANY V. ANTON ZIZKOVSKY.

FILED OCTOBER 2, 1894. No. 5738.

1. **Libel:** SPECIAL DAMAGES: PLEADING AND PROOF. Any written or printed statement which falsely and maliciously charges another with the commission of an indictable, criminal offense is libelous *per se*, and in a suit predicated upon the publication of such statement the plaintiff need neither aver nor prove special damages.
2. **Construction of Words in Publication:** LIBEL. In determining whether the words of a publication are libelous the courts will not resort to any technical construction of the language used, but construe it in its ordinary and popular sense.
3. **Libel:** TRUTH OF PUBLICATION AS DEFENSE: MOTIVES. It

seems that the truth alone is not a complete defense to an action for libel. To make it such it must appear that the publication alleged to be libelous was made with good motives and for justifiable ends.

4. **Corporations:** CEMETERY ASSOCIATIONS. A cemetery association organized under section 45, chapter 16, Compiled Statutes, 1893, is a private corporation.

5. **Privileged Communications.** A communication is privileged when made in good faith, in answer to one having an interest in the information sought; and it will be privileged when volunteered, if the party to whom the communication is made has an interest in it, and the party by whom it was made stands in such relation to him as to make it a reasonable duty, or, at least, proper that he should give the information. (*Sunderlin v. Bradstreet*, 46 N. Y., 191.)

6. **Secretary of Cemetery Association:** LIBEL: CHARGE OF EMBEZZLEMENT: PROOF OF MALICE. The secretary of a cemetery association organized under the incorporation law of this state is not a public officer in such sense as to enable the publisher of a newspaper to claim that an article published concerning him, and charging him with embezzling the funds of such cemetery association, is a privileged communication, and thus compel such secretary, in an action for libel, to prove express malice. Following *Wilson v. Fitch*, 41 Cal., 363.

7. **Libel:** PRESUMPTION OF PLAINTIFF'S INNOCENCE: DEFENSE. In an action for libel, where the publication made the basis of the suit charges the plaintiff with the commission of a crime, the law presumes that the plaintiff is innocent thereof; and such presumption becomes conclusive where the defendant to the action does not plead as a defense thereto the truth of the charge.

8. ———: MALICE: QUESTION FOR JURY. In an action of libel for publishing a statement charging the plaintiff with having committed a crime, whether such publication was maliciously made; and whether its publication was an injury to the plaintiff, are questions of fact for the jury.

9. ———: PRESUMPTION OF MALICE: DAMAGES. In such a case, in the absence of all evidence, the law presumes that in the publication of such charge the publisher was actuated with a malicious intent, and that the plaintiff suffered some damages thereby.

10. ———: DEFENSE: BELIEF IN TRUTHFULNESS OF CHARGES. It is not a defense to a suit for libel that the defendant had rea-

sonable grounds to believe, and did believe, that the charge made by him was true. Such facts, if shown, would not relieve the publisher from liability.

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

The facts are stated by the commissioner.

Moriarty & Langdon and *Frank T. Ransom*, for plaintiff in error:

As no special damages are alleged, no cause of action is stated in the petition unless the article complained of is libelous *per se*. (*Geisler v. Brown*, 6 Neb., 254.)

The language of the publication is not libelous *per se*. (Odgers, Libel & Slander, p. 1; *Geisler v. Brown*, 6 Neb., 254; Criminal Code, sec. 47.)

The cemetery association was a public corporation. The alleged libel was a privileged communication, and there should be no finding against the publishing company without proof of actual malice. (*Shurtliff v. Stevens*, 51 Vt., 501; *Press Co. v. Stewart*, 119 Pa. St., 585.)

There was error in that part of the court's instruction wherein the jury was told that the "plaintiff had filed a reply to the answer in which he denies each and all the allegations of affirmative matter therein set forth." (*Dossler v. Wisley*, 32 Mo., 498; *Missouri Coal & Oil Co. v. Hannibal & St. J. R. Co.*, 35 Mo., 84; *Bradshaw v. Mayfield*, 24 Tex., 482; *Bryan v. Chicago, R. I. & P. R. Co.*, 63 Ia., 464; *Galloway v. Hicks*, 26 Neb., 536; Code, secs. 132, 134, 144.)

Instructions should be confined to the issues. Where this rule has not been observed, reversal must follow. (Sackett, Instructions, sec. 19; *Herron v. Cole*, 25 Neb., 704.)

Instructions should be clear, explicit, and concise. (Sackett, Instructions, sec. 5; *Milton v. State*, 6 Neb., 137; *Ballard v. State*, 19 Neb., 610.)

Instructions relating to the question of malice and to the question of the injury resulting from the published statement, requested by the publishing company, were erroneously refused by the court. (Odgers, Libel & Slander, sec. 469, 582; *Broadwell v. Nixon*, 4 N. J. Law, 362*; *Mills v. Sleght*, 5 N. J. Law, 565; *Todd v. Collins*, 6 N. J. Law, 154; *Marshall v. Hann*, 17 N. J. Law, 425; *Matthewson v. Burr*, 6 Neb., 312; *Gilbert v. Saddlery Co.* 26 Neb., 207; *Hancock v. Stout*, 28 Neb., 301; *First Nat. Bank of Madison v. Carson*, 30 Neb., 104; Sackett, Instructions, sec. 25; *Fitzgerald v. Meyer*, 25 Neb., 77; *School District of Chadron v. Foster*, 31 Neb., 501.)

Capek & Piatti and *Herdman & Herdman, contra:*

The language complained of is libelous *per se.* (*Turrill v. Dilloway*, 17 Wend. [N. Y.], 428; Townsend, Slander & Libel [3d ed.], secs. 135, 140, 143; 3 Lawson, Rights, Remedies & Practice, sec. 1241; Cooley, Torts [2d ed.], p. 240; *Chaplin v. Lee*, 18 Neb., 440; *Sanderson v. Caldwell*, 45 N. Y., 398; *Shattuc v. McArthur*, 25 Fed. Rep., 133; *Solverson v. Peterson*, 64 Wis., 198; *Hoke v. Brames*, 95 Ind., 161.)

In an action for libel evidence that plaintiff had a wife and family is admissible on the question of damage. (*Barnes v. Campbell*, 60 N. H., 27; *Rhodes v. Nagles*, 66 Cal., 677.)

It is no defense that others had previously published or spoken the same words. (Townsend, Libel & Slander [3d ed.], sec. 417; *Hinkle v. Davenport*, 38 Ia., 365; *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. [Mich.], 347, and note.)

The cemetery association is a private corporation. (*In re Danville Cemetery Association*, 66 N. Y., 569.)

Officers and servants of a private corporation are privileged to the same extent from libelous criticism as are private individuals. (*Wilson v. Fitch*, 41 Cal., 363; *Hunt v. Bennett*, 19 N. Y., 173.)

A reply is waived where the trial proceeds as though one had been filed. (*Schuster v. Carson*, 28 Neb., 612; *Western Horse & Cattle Co. v. Timm*, 23 Neb., 526.)

A reply may be filed after verdict where both parties tried the case on the theory that the allegations of the answer were denied. (*Whitney v. Preston*, 29 Neb., 243.)

Instructions must be construed together, and if as a whole they properly state the law it is sufficient. (*City of Lincoln v. Smith*, 28 Neb., 762; *Campbell v. Holland*, 22 Neb., 589; *Bartling v. Behrends*, 20 Neb., 211; *Gray v. Farmer*, 19 Neb., 69; *St. Louis v. State*, 8 Neb., 406; *Murphy v. State*, 15 Neb., 383; *Rice v. City of Des Moines*, 40 Ia., 638; *State v. Maloy*, 44 Ia., 104.)

A charge given by the court must be construed with the evidence in the case. (*Maurer v. Miday*, 25 Neb., 580; *State v. Downer*, 21 Wis., 275; *Huffman v. Ackley*, 34 Mo., 277.)

Neither a newspaper nor an individual has a right to speak or publish defamatory words simply because they relate to matters of public concern. (*McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. [Mich.], 341, and note.)

RAGAN, C.

Anton Zizkovsky sued the Poprok Zapadu Publishing Company (hereinafter called the "Publishing Company") in the district court of Douglas county, for damages for an alleged libel published by the latter of and concerning the former. Zizkovsky had a verdict and judgment, and the Publishing Company prosecutes error to this court.

On and prior to October, 1890, the Publishing Company was a corporation engaged in the printing and publishing, in the city of Omaha, of a newspaper in the Bohemian language, which paper circulated almost exclusively among Bohemians of the state—a very large number of whom resided in the city of Omaha—its circulation being about 4,000. On the date above mentioned, Zizkovsky was the

secretary of a cemetery association, a corporation organized by a number of Bohemians under the general incorporation laws of the state. The members of the cemetery association were all Bohemians, and only people of that nationality or speaking that language were entitled to become members of such corporation and make interments in said cemetery. The article published by the Publishing Company and made the basis of this action, translated into English, was as follows: "The 'cemetery association' held, again on Monday after a long while, one of its meetings. The meeting was not a very harmonious one, and the consequence was that Mr. Anton Zizkovsky, the sec. *pro tem.*, gave up his office. And how could he do otherwise, since the other members of the committee did not approve of his economy and his method of running the society's affairs. He paid out money whenever he felt like it. He paid it to whomsoever and how he pleased, without consulting anybody. But that is not the only thing. Some of his expenditures are suspicious. For instance, he counts that for nineteen days' work he paid $1.75 a day, whereas such work is paid $1.50 a day, and there are reasons to suppose that he paid no more than that, putting those 25 cents for each day into his own pocket. Another one of his entries also caused bad blood. He charged $10 for five visits to the cemetery. Not a single officer ever charged anything for something of that kind, as the inspection was always done on a day when nothing could be lost, as in the case of Zizkovsky's. And he, finding out that the committee cannot approve of such 'economy,' did not wait for them to take away the office from him, but resigned himself. With such economists as Zizkovsky is, the society would very soon end. The blame of this rests mainly with the members, who are indifferent and who do not go often enough to the meetings, all which enables such people as Zizkovsky to sneak into offices and smear their pockets."

1. The first argument made is that the publication com-

plained of is not libelous *per se*, and, since no special damages are alleged in the petition, it does not state a cause of action. It will be observed that the publication complained of, in effect, made the charge that while Zizkovsky had expended only $28.50 of the cemetery association's funds for labor upon the cemetery grounds, he charged to the association and took from its funds the sum of $33.25 for said labor, and converted the difference of said sums, or $4.75, to his own use. This was, in effect, charging Zizkovsky with having committed the crime of embezzlement.

In *Hendrickson v. Sullivan*, 28 Neb., 329, it was held that "words falsely and maliciously spoken of a person, which impute the commission of some criminal offense, involving moral turpitude, for which the party, if the charge be true, may be indicted and punished by law, are actionable *per se*, and no special damages need be alleged or proved in order to maintain the action." It is equally true that any written or printed statement which falsely and maliciously charges another with the commission of an indictable, criminal offense is libelous *per se*, and in a suit predicated upon the publication of such false and malicious statement the plaintiff need neither aver nor prove special damages. In determining whether the words of a printed publication are libelous the courts will not resort to any technical construction of the language used, but the court and the jury will read the words in court as they would read them elsewhere. Language alleged to be libelous is to be construed in its ordinary and popular sense, and the question is whether the language, when so construed, did convey, or was calculated to convey, to persons reading it the charge of a crime. (*Turrill v. Dolloway*, 17 Wend. [N. Y.], 426; *Thomas v. Blasdale*, 147 Mass., 438; *Hayes v. Ball*, 72 N. Y., 418.)

2 and 3. The second and third errors assigned in the petition in error relate to the admission and rejection of testimony on the trial; but what particular evidence the court

erred in admitting or rejecting is not specifically pointed out, and for that reason these alleged errors cannot be considered.

4. The fourth alleged error argued in the brief is that the court, in stating the case to the jury, told them that the "plaintiff had filed a reply to the answer, in which he denies each and every allegation of affirmative matter therein set forth." Counsel for the plaintiff in error say this was a mistake; that no reply was then on file, and none was put on file until after the motion for a new trial had been overruled. The record bears out the statement of counsel for the plaintiff in error; but this action of the court is not assigned as an error in the petition in error filed herein, nor did the plaintiff in error take any exception to the statement of the issues as made by the court.

5. The fifth error argued by counsel for plaintiff in error in their brief relates to the giving of certain instructions given by the court on its own motion as follows:

"(2.) Every publication, by writing or printing, which falsely charges upon or imputes to any one a crime which renders him liable to punishment, or which alleges against him that which is calculated to make him infamous or odious in the estimation of the public, is libelous *per se*, and in such a case malice is implied from the publication against the publishers thereof."

"(4.) You are instructed that any publication in a newspaper charging one with an offense punishable under the law, or tending to bring him into contempt among his fellow-men, is a libel *per se*, or of itself, and in such case it is not required that the plaintiff should prove express malice or ill-will towards him on the part of the defendant, the law in such a case presumes malice."

The criticism made upon these instructions is that they omit falsity and malice as elements of a libel. While this may be technically correct, the court was not obliged to use the words "false" and "malicious" in every instruction

given to the jury. Instructions given to a jury must be construed together, and if, when construed as a whole, they properly state the law it is sufficient. (*City of Lincoln v. Smith*, 28 Neb., 762.) An examination of all the instructions given to the jury by the court in this case leads us to the conclusion that the jury were correctly instructed as to what constituted a libel.

It is further argued that by the instructions above the jury were in effect told that if the publication complained of was libelous, the publisher was liable therefor even though the charge made therein was absolutely true. In the first place, we do not think that a jury of reasonable men could have put any such interpretation upon these instructions. In the second place, the law presumed that the charge was false, and the Publishing Company did not plead that the charge was true. The truth or falsity, then, of the charge made against Zizkovsky was not put in issue either by the pleadings or evidence in the case. Again, we are by no means prepared to concede the other proposition of counsel, that the truth of a charge is always a complete defense in libel. The constitution (article 1, section 5) declares that "in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." From this it would seem that even the truth is not a complete defense in an action for libel, unless the libel was published with good motives and for justifiable ends. However this may be, we do not think it can be fairly said that the effect of these instructions was to tell the jury that they might convict the Publishing Company of libel even if they believed that the charge alleged to be libelous was in fact true.

6. The sixth assignment of error relates to the giving of certain instructions by the court at the request of Zizkovsky as follows:

"(4.) You are instructed that the law implies damages from the publication of libelous words, without proof of

special damages, and it also implies that the person who publishes the libel intends the injury which the libel is calculated to produce." It is objected to this instruction that as the element of falsity is omitted therefrom, the jury were, in effect, told that the law implies damages from libelous words whether they be true or not. What has already been said above with reference to instructions 2 and 4, given by the court on its own motion, must dispose of this criticism.

"(8.) You are instructed that a cemetery association organized under the general laws of this state is a private corporation, and that the corporation, its officers and servants, have the same and equal immunity and protection from criticism that a private individual possesses, and that the publisher of any newspaper who publishes a criticism of and concerning the officers and servants of a private corporation is responsible to the same extent for such criticism as though it had been published of and concerning a private individual." It is argued that this instruction was erroneous for three reasons:

(1.) Because the court instructed the jury that the cemetery association, of which Zizkovsky was secretary, was a private corporation. We think it was. "Private corporations are associations formed by the voluntary agreement of their members. * * * Public corporations are not voluntary associations at all, and there is no contractual relation between the corporators who compose them. They are merely government institutions, created by law, for the administration of the public affairs of the community." (Morawetz, Private Corporations, sec. 3.) This Bohemian Cemetery Association was organized under chapter 16, Compiled Statutes, 1893, entitled "Corporations," section 45 of which provides that "it shall be lawful for any number of persons, not less than five, who are residents of the county in which they desire to form themselves into an association, to form themselves into a cemetery

association, and to elect any number of their members, not less than three, to serve as trustees, and one member as clerk, who shall continue in office during the pleasure of the society; all such elections shall take place at a meeting of a majority of the members of such association, and after notice for at least twenty days in a newspaper, or by posting at least three written notices at public places in the township." A corporation organized under this section is a private corporation. (*In re Petition Deansville Cemetery Association*, 66 N. Y., 569.)

(2.) The second objection to the instruction is that because it told the jury that the officers of the cemetery association had the same immunity and protection from criticism that a private individual had, therefore the instruction assumed, as a universal proposition, that a private individual was exempt from criticism. We do not think that the effect of this instruction was to tell the jury that the law absolutely protected a private individual from criticism.

(3.) The third objection to the instruction is that by it the jury were told that the publisher of a newspaper was liable for any criticism of a private individual. We do not think the language of the instruction will bear such a construction.

"(9.) You are instructed that in arriving at a verdict in this case you are not to take into consideration anything that may have been said by counsel as to the criminal liability of any of the members of the defendant corporation." The arguments made by counsel to the jury are not in the record; and we are at a loss to understand how the question of the criminal liability of any of the members of the Publishing Company could have been in issue in this case, and therefore we cannot say that the court erred in giving the instruction complained of.

7. The seventh error assigned relates to the refusal of the court to give to the jury, at the request of the Publishing Company, a number of instructions. Without

quoting these instructions, or any of them, it must suffice to say that the substance of all the instructions refused were given by the court in other instructions.

8. The Publishing Company, in the third paragraph of its answer, set out that prior to the publication of the article alleged to be libelous there existed in the city of Omaha a corporation by the name of the "Bohemian Cemetery Association;" that it owned a piece of land that had been laid out and platted into lots for burial purposes; that the purchasers of said lots were Bohemian people residing in said city; that the stockholders and members of said association consisted largely of Bohemian people, who spoke and read the Bohemian language; that Zizkovsky was the secretary of the cemetery association, and that it was his connection with the cemetery association as its secretary, and the mode in which he discharged his duty as such officer, to which allusion was made in the article alleged to be libelous; that it was through publications made by the Publishing Company that the Bohemian people living in Omaha became acquainted with the location of the cemetery and of its existence as a corporation, and that all the members of said corporation were directly or indirectly concerned in the manner in which Zizkovsky discharged his duty as secretary thereof, and that the alleged libel or publication was nothing more than a fair comment of Zizkovsky's conduct as secretary; that it was made in good faith, without malice or ill-will towards Zizkovsky, and was made in the honest belief of its truth as a matter of news, in which the Bohemian people in general and the members of the cemetery association especially were directly or indirectly interested. No reply was filed to this answer until after the verdict of the jury was rendered. It is now argued by the counsel for the Publishing Company that as the allegations of this answer were not denied by a reply, all the material allegations therein stand confessed and admitted, and that the district court should have granted the Publishing Company

a new trial. It appears from the record that after the Publishing Company had called witnesses and introduced evidence tending to support the allegations of its answer, and after it had rested its case, Zizkovsky was called and testified in rebuttal. No objection was made to the rebuttal testimony on the ground that a reply had not been filed. In other words, it appears that the case was tried on the theory that a reply was on file. The objection of the Publishing Company that no reply was filed comes, then, too late. (*Schuster v. Carson*, 28 Neb., 612; *Western Horse & Cattle Ins. Co. v. Timm*, 23 Neb., 526.) But it is said by counsel for the Publishing Company that the testimony given in rebuttal by Zizkovsky was not directed to and did not traverse the truth of the allegations of the answer, and that, therefore, the case stands as it would had no reply been filed, and had the case not been tried on the theory that a reply was on file. The answer to this is that the Publishing Company called witnesses and put in evidence which tended to prove all the allegations of its answer. These witnesses were cross-examined by Zizkovsky, so that the truth of the averments of the Publishing Company in its answer went to the jury, and their general finding against the Publishing Company must be taken to mean that in the opinion of the jury, it had not made out the defense set out in its answer.

Another argument under this head is that this publication under the circumstances was a privileged communication. "A communication is privileged within the rule when made in good faith, in answer to one having an interest in the information sought; and it will be privileged if volunteered when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such relation to him as to make it a reasonable duty, or, at least, proper that he should give the information." (*Sunderlin v. Bradstreet*, 46 N. Y., 191.) We do not think that the publication in this case comes within the

rule of a privileged communication. It was volunteered by the Publishing Company to all the readers of the Publishing Company's paper. The evidence shows that this paper had a circulation of some 4,000 readers, the greater part of whom had no interest in the affairs of the cemetery association; and, furthermore, the Publishing Company stood in no such relation to the members of the cemetery association as to make it a reasonable or proper duty that the Publishing Company should publish this communication. "The trustee of a private corporation is not a public officer in such a sense as to enable the publishers of a newspaper to claim an article published concerning him, and criticising his conduct as trustee, as a privileged communication, and, therefore, compel such trustee, in an action for libel, to prove express malice." (*Wilson v. Fitch*, 41 Cal., 363.)

9. The final argument of the counsel is that Zizkovsky's evidence failed to establish the three following conclusions: (1) That the alleged libel was false; (2) that it was published maliciously; (3) that it injured Zizkovsky's reputation; and that, therefore, the verdict is contrary to the law and evidence. The answer of the Publishing Company admits the publication of the alleged libel, and does not plead as a defense that the matters charged in the publication against Zizkovsky were true. As has already been seen, the publication charged Zizkovsky with the commission of a crime. Of the commission of this the law presumed him to be innocent until the Publishing Company pleaded his guilt as a defense and satisfied the jury of the truth of the plea by a preponderance of the evidence. The Publishing Company not having pleaded as a defense that the charges they made against Zizkovsky were true, the law, by presumption, supplied the conclusive proof that the charge was false. The question, then, as to whether the charge made by the Publishing Company against Zizkovsky was true was not an issue in the case. The Publishing Company

did plead that at the time it made the publication it had reason to believe, and did believe, that the charges made therein were true. This was not a defense. It is no defense to a suit for libel that the party sued had reasonable grounds to believe that the charge made was true. Such facts, if shown, would not relieve the publisher from liability. (*Shattuc v. McArthur*, 25 Fed. Rep., 133.) Whether the article complained of was published maliciously, and whether its publication was an injury to Zizkovsky, were questions of fact for the jury. In the absence of all evidence the law presumes that in the publication of an article which is libelous upon its face, the publisher was actuated with a malicious intent. (*Zuckerman v. Sonnenschein*, 62 Ill., 115; *Byrket v. Monohon*, 7 Blackf. [Ind.], 83; *Pennington v. Meeks*, 46 Mo., 217; *Mitchell v. Milholland*, 106 Ill., 175.) Where the publication complained of is libelous of itself, as in this case, no proof of actual injury to the plaintiff by reason of its publication was necessary to entitle him to recover something, as the law presumed that he had suffered some injury by reason of the publication, and the amount of that injury or damage was a question for the jury. (*Bergmann v. Jones*, 94 N. Y., 51; 1 Sutherland, Damages, p. 12; *Miles v. Harrington*, 8 Kan., 430; *Yeates v. Reed*, 4 Blackf. [Ind.], 463; *Swift v. Dickermann*, 31 Conn., 285; *Mitchell v. Milholland*, 106 Ill., 175; *Stewart v. Minnesota Tribune Co.*, 40 Minn., 101.) Whether this publication, then, was maliciously made, whether it injured or damaged Zizkovsky, were questions for the jury to determine from all the evidence, taking into consideration the publication itself and the circumstances under which it was made; and we cannot say, after reading all the evidence in the case, that the jury came to an incorrect conclusion.

Counsel for the Publishing Company eloquently appeal to us to set aside this judgment, because, they say, "that to sustain such judgment would be to establish a dangerous

precedent; to strike a deadly blow at the liberty of the press; to ignore an important, popular right which has been strongly hedged about with constitutional safeguards; to disregard the spirit of our institutions and the tendency of our age; to lose sight of the uniform policy of our country's legislation, both state and national; and to put in chains, so to speak, a great organ of public opinion which for more than a century past has been looked upon as one of the mainstays of a republican form of government." Counsel are to be commended for the zeal and the ability which they have displayed in their defense of this case. But it must not be forgotten that the same constitution which guaranties the freedom of the press guaranties also to the individual life, liberty, the pursuit of happiness, the protection of property, and, impliedly at least, reputation. To all well disposed persons a good reputation is as dear and as valuable as property. Indeed, a reputation for honesty is the only property possessed by many people. It is not striking down the "liberty of the press," to hold it civilly responsible for spreading broadcast over the land the false charge that an individual has been guilty of a crime. Who is Zizkovsky? A Bohemian who came to our shores for the purpose of gaining in the great west a home for himself and his family, which, perhaps by reason of the crowded condition of his native land and by reason of his poverty, he could not acquire there. He appears to be a laboring man, but he is none the less a citizen and entitled to the protection of the law on that account. It appears from the record that he can but poorly speak or understand the English language. It is, then, but a reasonable inference that his association with his fellow-men is limited to people of his own nationality. To charge him in the Bohemian language in a public newspaper with having committed the crime of embezzling the funds of a cemetery association, organized by and for the benefit of people of his own nationality, was not only to charge him

with a crime but a crime of a very detestable character. The tendency of the charge was to hold him up to the ridicule and the contempt of his own people and to put him without the pale of their confidence, friendship, and society. This was to inflict a greater injury upon Zizkovsky than it would have been to deprive him of his property.

> "Who steals my purse, steals trash; 'tis something, nothing.
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name,
> Robs me of that which not enriches him,
> And makes me poor indeed."

The judgment of the district court is

AFFIRMED.

AGNES B. HOOCK, APPELLEE, V. ANNA K. BOWMAN, APPELLANT.*

FILED OCTOBER 2, 1894. No. 5721.

1. **Vendor and Vendee: CONTRACT OF SALE: MISREPRESENTATIONS: RESCISSION.** B. desired to purchase for the purpose of building thereon, lots 1 and 2 in a certain addition to the city of Omaha, platted and owned by H. The agent of H. showed the lots to B., pointed out the corners and stakes, represented that lot 1 was a corner lot, that lot 2 was contiguous thereto, and that both fronted on Sawyer street. The streets had not been opened through the addition. B., believing and relying on the truth of the representations made by the agent, entered into a written contract with H., agreeing to purchase and pay for said lots. The representation as to lot 1 being a corner lot was false. *Held*, That these representations, under the circumstances, were material, and entitled B. to a rescission of the contract.

2. ———: ———: ———. A purchaser of real estate has a right to believe and rely upon representations made to him by his vendor as to the character, quality, and location of the property, when the facts concerning which the representations are made are unknown to the vendee.

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*See also *Hoock v. Bowman*, 42 Neb., 87.

3. ———: ———: ———: LACHES. If a vendor makes material representations as to the character, quality, or location of his real estate, and the vendee believes, relies, and acts on these representations, and they prove to be false, the vendor cannot shield himself from the consequences of his fraudulent conduct by interposing the plea of laches on the part of his vendee.

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

G. A. Rutherford, for appellant.

George M. O'Brien and *Moses P. O'Brien, contra.*

RAGAN, C.

On the 24th day of June, 1887, Agnes B. Hoock, by her contract in writing of that date, agreed to sell and convey to Anna K. Bowman lots 1 and 2, in Hoock's subdivision of lots 15 and 16, in Brookline, Douglas county, Nebraska. At the time of the making and delivery of the contract Mrs. Bowman paid $100 of the purchase money, the contract providing that the remainder should be paid in three equal annual installments; and when such payments were made Mrs. Hoock was to execute to Mrs. Bowman a deed of conveyance for the property mentioned in the contract. Default in the payments having occurred, Mrs. Hoock brought this suit to the district court of Douglas county against Mrs. Bowman for an accounting of the amount due her from Mrs. Bowman on the contract, and for a decree ordering the property sold to pay the amount found due. Mrs. Bowman, as a defense to this action, pleaded that prior to the execution of the contract sued upon the plaintiff represented to her that said lot 1 was a corner lot, bounded on the north by Park street and on the east by Sawyer street, and that lot 2 was contiguous to lot 1, and both fronted on Sawyer street; that she, Mrs. Bowman, relied upon these representations and believed the same to be true; and in consequence of the statements and

her belief in their truth she entered into the contract sued upon, agreeing to purchase the lots. She then averred that the representations made by plaintiff were false, and known by her to be false at the time they were made, and that they were made by the plaintiff with intent to deceive the defendant; and that since her discovery that the representations made by the plaintiff as to the situation of the lots were false, she, the defendant, had refused to make any further payments under the contract. She prayed for a rescission of the contract and for a judgment against Mrs. Hoock for the money she had paid on the lot. The district court specially found that this defense of Mrs. Bowman was sustained by the evidence, and also found that the lots were not worth as much by $25 as they would have been had they been located as the plaintiff represented them to be; but refused the appellant a decree rescinding the contract, and deducted from the amount due Mrs. Hoock on the contract the $25, and rendered a decree ordering the lots to be sold for the payment of the remainder. From this decree Mrs. Bowman prosecutes an appeal to this court.

1. This appeal presents only the question of the correctness of the conclusion of law made by the court on the finding. The question is, were the false representations made by appellee as to the situation of these lots of such materiality as to entitle the appellant to a recission of the contract? The appellant desired these lots for the purpose of building thereon. This fact was known to the appellee. The appellee's agent showed these lots to the appellant, pointed out the corners and stakes, represented that lot No. 1 was a corner lot, that No. 2 was contiguous thereto, and that both fronted on Sawyer street. The addition of which the lots were a part had been platted by the appellee, but the streets had not been opened. We think these representations, under the circumstances, were material; and since they were believed, relied, and acted upon by the appellant, she was entitled to a rescission of the contract; but if

she chose to ratify the contract, she might have done so and sued the appellee for damages and recovered the difference between what the lots were worth as located, and what they would have been worth had they been located as represented.

In *Delorac v. Conna*, 29 Neb., 791, S. resided in California and owned a piece of land in this state worth $25 per acre, which land she had never seen and of whose location and value she had no knowledge. C. falsely represented to S. that the land was wild and unproductive, and that $10 per acre was far above its real value. Believing these representations, S. sold and conveyed the land to C. It was held that S. was entitled to a rescission of the contract.

In *Cruess v. Fessler*, 39 Cal., 336, it was held that a misrepresentation of the value of a business and good-will knowingly made by the vendor was fraudulent and entitled the purchaser to a rescission of the contract.

In *Livingston v. Peru Iron Co.*, 2 Paige Ch. [N. Y.], 390, the vendee applied to the vendor to purchase a lot of wild land, and represented to him that it was worth nothing except for the purpose of a sheep pasture, the vendee knowing at the time that there was a valuable mine on the land, of the existence of which the vendor was ignorant. It was held that the representations made by the vendee as to the value of the land and his concealment from the vendor of the existence of the mine were fraudulent and entitled the vendor to a rescission of the conveyance he had made to the vendee.

In *Stevens v. Giddings*, 45 Conn., 507, the plaintiff offered a city lot for sale at auction. The auctioneer at the sale represented that the lot had a depth of 100 feet. The purchaser relied upon this representation in buying the lot. It turned out afterwards that the lot was but 95½ feet deep. It was held that the representation was material, and that the purchaser was entitled to a rescission of the contract.

In *Roberts v. French*, 26 N. E. Rep. [Mass.], 416, a lot-

owner sold his lot at auction. The auctioneer stated that the lot contained a certain number of square feet; that its lines were of a certain length, as ascertained by an actual measurement made by himself. A bidder, relying upon these representations of the auctioneer, purchased the property. It was afterwards discovered that the lot contained several hundred square feet less than it was represented to contain, and that the boundary lines of the lot were shorter than stated to be by the auctioneer. It was held that the representations were material and entitled the puchaser to a rescission of the contract.

For other illustrations of misrepresentations as to the character, quality, and location made of real estate, entitling the purchaser to rescind the contract, see *McFerran v. Taylor*, 3 Cranch [U. S.], 269; *Neil v. Cummings*, 75 Ill., 170; *Witherwax v. Riddle*, 121 Ill., 140; *Harvey v. Smith*, 17 Ind., 272; *Gifford v. Carvill*, 29 Cal., 589; *McGibbons v. Wilder*, 43 N. W. Rep. [Ia.], 520; *McKinnon v. Vollmar*, 43 N. W. Rep. [Wis.], 800; *Wilson v. Yocum*, 42 N. W. Rep. [Ia.], 446; *Lynch v. Mercantile Trust Co.*, 18 Fed. Rep., 486. In this last case the agent of the owner went with the purchaser, showed the property, pointed out the boundary lines of it, and stated that the block included all the land lying between certain fences, and that its frontage on Fifth street was 600 feet. The lot in fact had a frontage of only 470 feet. It was held that the purchaser of the land was entitled to damages for the deceit, he having elected to ratify the contract.

2. To support this decree it is argued by the counsel for the appellee that notwithstanding the false representations made by appellee as to the location of this property, yet, nevertheless, the appellant has precluded herself by her laches from rescinding the contract. The laches imputed to appellant are that the plat of the addition, of which the lots are a part, was of record in the office of the register of deeds of Douglas county; that appellant,

by consulting this plat in the recorder's office, could have ascertained that lot 1 was not a corner lot bounded on the north by Park street; and that, as she did not make this inquiry, she is estopped. The answer to this argument is twofold: (1.) There is no evidence in this record to show that the plat of the addition was on record when the sale was made. (2.) It would make no difference if it was. The purchaser of real estate has a right to believe and rely upon representations made to him by his vendor as to the character, quality, and location of the property when the facts concerning which the representations are made are unknown to the vendee; and if a vendor makes material representations as to the character, quality, and location of his real estate, and the vendee believes, relies, and acts upon these representations, and they turn out to be false, the vendor cannot then shield himself from the consequences of his fraudulent conduct by interposing the plea of laches on the part of his vendee. This rule is supported by all the authorities.

Where one assumes to have knowledge of a subject of which another may be ignorant, and knowingly makes false statements regarding it, upon which the other relies to his injury, the party who makes such statements will not be heard to say that the person who took his word and relied upon it was guilty of such negligence as to be precluded from recovering compensation for injuries, which were inflicted on him under cover of falsehood. (*Eaton v. Winnie*, 20 Mich., 156.)

The omission by one of the parties to an agreement, to make inquiries as to the truth of facts stated by the other, cannot be imputed to him as negligence. Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual agreement. (*Mead v. Bunn*, 32 N. Y., 275.)

In *Olson v. Orton*, 28 Minn., 36, a party falsely repre-

sented that the lands which he was offering to sell included certain timber lands. The purchaser relied upon this statement, which proved to be false, and he then sued the vendor for damages for the deceit, and the court held that the vendor could not avoid the consequences of his false representations, merely because the purchaser might have consulted the records of the official surveys, had the land surveyed, and thus ascertained if the boundaries included the timber land.

In *Union Nat. Bank v. Hunt*, 76 Mo., 439, it was held that a purchaser of stock of a bank, from the bank is entitled to rely upon assurances of an officer of the bank as to its financial condition, and if already a stockholder, is not bound to avail himself of his right of examining the books of the bank to ascertain whether the representations made to him were true.

In *Lynch v. Mercantile Trust Co.*, 18 Fed. Rep., 486, it was held: "The purchaser of land is entitled to rely upon the vendor's assertions about the boundaries, and is not obliged to consult the recorded plat." To the same effect see *Simar v. Canaday*, 53 N. Y., 298; *Carmichael v. Vandebur*, 50 Ia., 651; *McKee v. Eaton*, 26 Kan., 226; *Risch v. Von Lillienthal*, 34 Wis., 250; *Witherwax v. Riddle*, 121 Ill., 140; *Davis v. Jenkins*, 26 Pac. Rep. [Kan.], 459.

In *Backer v. Pyne*, 30 N. E. Rep. [Ind.], 21, it is said: "A false and fraudulent representation may be relied on by a person having no actual knowledge, although the fact in question is a matter of public record."

The decree appealed from is reversed and the cause remanded to the district court with instructions to enter a decree in favor of the appellant, canceling the contract in suit, and to take an account of the amount paid by the appellant to the appellee on said contract, and render a judgment in favor of appellant therefor.

REVERSED AND REMANDED.

IRVINE, C., not sitting.

AGNES B. HOOCK, APPELLEE, V. ANNA K. BOWMAN, APPELLANT.*

FILED OCTOBER 2, 1894. No. 5721.

1. **Vendor and Vendee:** CONTRACT OF SALE: REGISTRATION. Where the owner of real estate contracts in writing to sell and convey the same to another, and such contract is duly signed, witnessed, and acknowledged by such owner and recorded in the office of the register of deeds in the county where such real estate is situate, then one who purchases and receives a conveyance of said real estate from said owner takes such real estate subject to the rights therein of the vendee in said contract.

2. ———: ———: RESCISSION. In such case the vendee in said contract of sale is not entitled to a rescission thereof because of the sale and conveyance of the real estate by the owner to a third party.

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

G. A. Rutherford, for appellant.

George M. O'Brien and *Moses P. O'Brien, contra.*

RAGAN, C.

On the 25th day of June, 1888, Agnes B. Hoock, by her contract in writing of that date, agreed to sell to Anna K. Bowman lots 1 and 14, in block 1, in Hoock's subdivision of lots 15 and 16, in Brookline, in Douglas county, Nebraska. By the terms of the contract Mrs. Bowman was to pay a certain part of the purchase money down and the remainder to be paid in monthly installments; and when all such payments were made, Mrs. Hoock was to convey the property to Mrs. Bowman by warranty deed. Mrs. Bowman having failed to make the payments as provided by the contract, Mrs. Hoock brought this suit in the district court of Douglas county against Mrs. Bowman, setting

*See also *Hoock v. Bowman*, 42 Neb., 80.

out the contract and its terms, alleging a failure of Mrs. Bowman to make her payments as agreed, and prayed for an accounting of the amount due her from Mrs. Bowman on the contract; and that in case the amount found due should not be paid within a time fixed by the court, the property might be advertised and sold to pay such amount. To this action Mrs. Bowman interposed two defenses: (1.) That at the time of making said contract Mrs. Hoock represented that said lots were corner lots; that lot 1 cornered on Park street and Western avenue, and that lot 14 cornered on Park street and Sawyer avenue; that such representations were false and fraudulent, and known by Mrs. Hoock at the time they were made to be false and fraudulent, and made for the purpose of deceiving Mrs. Bowman; that she, Mrs. Bowman, did not know how said lots were located; that she entered into the contract to purchase the lots, believing and relying upon the statements as to their location made by Mrs. Hoock. (2.) The second defense was that, after the contract sued upon had been entered into, Mrs. Hoock sold and conveyed the real estate described in the contract to a third party. The district court found the issues of fact in favor of Mrs. Hoock, and rendered a decree ordering the property sold to make and raise the amount due Mrs. Hoock on the contract, and from this decree Mrs. Bowman has appealed.

It appears from the evidence in the record that Mrs. Hoock first sold these lots to one Seymour, giving him a contract of purchase similar to the one in suit, and that Seymour assigned his contract to Mrs. Bowman, and she surrendered it to Mrs. Hoock and took in its place the contract made the basis of this action. The contention of the appellant is, and the evidence tends to support it, that she was present at the time Mrs. Hoock contracted to sell the land to Seymour, and that she then and there heard Mrs. Hoock represent to Seymour that lot 1 was a corner lot, fronting on Park street and Western avenue, and that lot

14 cornered on Park street and Sawyer avenue, and that it was this representation, made by Mrs. Hoock to Seymour, on which she relied and which induced her to take an assignment of the latter's contract. There is al o some evidence in the record which tends to show that Mrs. Hoock reiterated to Mrs. Bowman these representations, at the time or just before the contract in suit was substituted for the Seymour contract. The evidence, however, as to whether the appellee made these representations to Seymour, as to whether the appellant was present at the time the contract between the appellee and Seymour was executed, and whether the appellee reiterated the representations at the time the contract in suit was delivered, was conflicting, and as the trial court found the issues against the appellant, and as that finding is not unsupported by the evidence, we decline to disturb it.

As to the other defense, that after the execution of the contract in suit the appellee sold and conveyed the property to a third party, there is no dispute; but the evidence shows that the contract in controversy here was duly signed, witnessed, and acknowledged by Mrs. Hoock, and filed in the office of the register of deeds of Douglas county prior to the time appellee sold and conveyed the premises to said third party. Appellee's grantee, then, took only the interest which she had in the property, and the effect of her sale and conveyance was to assign to such third party all her interest in the contract in suit. The grantee of this property, under the deed from the appellee, took it charged with whatever interest the appellant had therein by virtue of her contract with the appellee. Appellant, then, was not prejudiced by the sale and conveyance made of the property by the appellee; nor did such sale and conveyance, under the circumstances, entitle the appellant to a rescission of the contract in suit. The decree of the district court is

AFFIRMED.

IRVINE, C., not sitting.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. CORNELIUS O'CONNOR.

FILED OCTOBER 2, 1894. NO. 5227.

1. **Eminent Domain:** CONSTRUCTION OF RAILROADS IN STREETS: ACTION FOR DAMAGES TO ABUTTING PROPERTY OWNER: LIMITATION: MEASURE OF DAMAGES: ADDITIONAL BURDENS. A railway company constructed in a public street in front of the lot and dwelling house of plaintiff, fronting on said street, its railway track, and operated its trains and cars thereon. Subsequently the railway company erected in said street, in front of plaintiff's property, a coal house, hoisting apparatus, and side tracks for use in connection therewith. The coal house had a capacity of forty thousand tons, and was filled from cars pushed on said side tracks. The tenders of the engines of the railway company were run on these side tracks and supplied with coal from the coal house. The walls, foundations, and plastering of plaintiff's house were injured by the concussion produced by heavy trains and engines running to and from said coal house. The occupants of plaintiff's premises were annoyed by the ringing of bells and the sounding of whistles of the engines hauling cars to and from said coal house and being loaded with coal thereat. Smoke and steam from engines on said side tracks, and dust and soot arising from the loading and unloading of coal at said coal house, drifted on the property and into the dwelling house of plaintiff, rendering its occupation uncomfortable, and depreciating its rental value. *Held*, (1) That at the time the railway company first constructed its railway track in the street in front of plaintiff's property there at once accrued to the owner of such property, if he was thereby injured, a right of action against the railway company, and that this right of action was barred after four years from the date of the railway company's first occupation of the street; (2) that had the owner of said property brought such action, the measure of damages would have been the depreciation in the market value of the lot by reason of the construction and proper operation of the railway in the street in front of the property for all time; (3) that this depreciation in value would have been the difference in the market value of the lot immediately before and immediately after the construction of the railway; (4) that in ascertaining such depreciation the cuts or fills made in the street in front of the property, the proximity of the track to the front of the lot,

the danger of fire from passing trains, the probability of damage to the house on the lot from jars caused by passing cars and engines, the inconvenience to the occupants of the property arising from the presence and proper and ordinary use of the railway track for all time, the annoyance to such occupants from smoke, cinders, and dust from passing trains and engines, the annoyance caused by the roar of trains, the sounding of whistles and the ringing of bells, and every other fact and circumstance that would have influenced the market value of the property in the mind of a good-faith intending purchaser thereof, would have all been proper elements for consideration in determining the damages to plaintiff's property; (5) that all such elements of damage would have been included in the appraisement, judgment, or settlement made on account of the original construction of the railway in the street; and such elements, nor any of them, could not be made the subject of an action for damages brought by the owner of the property against the railway company more than four years after the date of the original construction of the railway in the street; (6) that the side tracks constructed by the railway company subsequently to the original building of its railway in the street were presumably within the purview of the original location of the railway and did not constitute an additional burden to plaintiff's property, and that its building could not be made the basis of a separate and independent action for damages by the property owner against the railway company; (7) that the coal house and hoisting apparatus erected by the railway company in the street in front of plaintiff's property were presumably not within the purview of the original location of the railroad, and constituted additional burdens to plaintiff's property, and invested him with a right of action against the railway company for damages to his property caused thereby; (8) that plaintiff's right of action against the railway company for damages caused to his property by the erection of such coal house and hoisting apparatus was barred in four years from the date of their construction in the street; (9) that the measure of the plaintiff's damages was the depreciation in the market value of his real estate caused by the location of the coal house and hoisting apparatus, and their ordinary and proper use for all time; (10) that, in arriving at the amount of such depreciation of plaintiff's property, the proximity of the coal house and hoisting apparatus to the property, the capacity of the coal house, the danger from fire, the annoyance from soot, smoke, and coal dust, the probability of damage to the house on the lot from the jars of passing trains and engines, were all competent and proper elements for consideration, as all these things were

within the realm of results that would naturally flow from the proper and ordinary use of the coal house and hoisting apparatus, and were involved in and a part of the damages which plaintiff could have recovered on account of the original construction of the coal house and hoisting apparatus; and these elements, nor any of them, could not be made the subject of an independent suit by plaintiff against the railway company brought more than four years after the date of the original construction of the coal house and hoisting apparatus.

2. ———: ———: ADDITIONAL BURDENS. Where a railway company condemns real estate for the erection thereon of a railway, and builds one track thereon, and there is subsequently built by said railway company one or more extra tracks on the same right of way, and on the original profile or grade, such extra tracks are not additional burdens to adjoining property and cannot be made the subject of an action for damages alleged to be caused to such property by their construction; such extra tracks are presumably within the purview and purposes of the original condemnation.

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

The opinion contains a statement of the case.

Marquett & Deweese and *John H. Ames*, for plaintiff in error, cited: General Statutes, 1873, sec. 83; Consolidated Statutes, sec. 508; *Merchants Union Barb Wire Co. v. Chicago, R. I. & P. R. Co.*, 70 Ia., 105; *Butler v. City of Passaic*, 44 N. J. Law, 171; *City of Quincy v. Chicago, B. & Q. R. Co.*, 92 Ill., 21; *Burlington & M. R. R. Co. v. Reinhackle*, 15 Neb., 279; *Blakeley v. Chicago, K. & N. R. Co.*, 25 Neb., 207; *City of Omaha v. Kramer*, 25 Neb., 489; *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb., 365; *Omaha & N. P. R. Co. v. Janecek*, 30 Neb., 276; *Dana v. Valentine*, 5 Met. [Mass.], 8; Wood, Nuisances, sec. 709; *Meyer v. City of Lincoln*, 33 Neb., 566; *Pomeroy v. Chicago & M. R. Co.*, 25 Wis., 641; *Kutz v. McCune*, 22 Wis., 628; *Rand v. Townshend*, 26 Vt., 670; *Lewis v. Wilmington & M. R. Co.*, 11 Richardson [S. Car.], 91;

Central R. Co. v. Merkel, 32 Tex., 723; *Drury v. Midland R. Co.*, 127 Mass., 571; Rorer, Railroads, pp. 418–421.

Byron Clark, also for plaintiff in error.

Matthew Gering, contra:

Whatever is injurious to health, offensive to the sense, or obstructs the free use of property so as to interfere with the enjoyment thereof by the owner is a nuisance. (*State v. Taylor*, 29 Ind., 517; *Norcross v. Thoms*, 51 Me., 503.)

Even though the railroad company conducted its business in a careful manner, it is liable in damages resulting from the use of its property where the defendant in error has been disturbed in his property rights and his rental values have been reduced. (*People v. Detroit White Lead Works*, 9 L. R. A. [Mich.], 722; *Wiley v. Elwood*, 9 L. R. A. [Ill.], 726; Field, Damages, sec. 748; *McKeon v. See*, 51 N. Y., 300; *Drake v. Chicago, R. I. & P. R. Co.*, 19 N. W. Rep. [Ia.], 215; *Cain v. Chicago, R. I. & P. R. Co.*, 3 N. W. Rep. [Ia.], 736.)

Where houses are jarred and other injuries result from the running of trains over the tracks and from loading and unloading cars and engines, the company is liable. (6 Lawson, Rights, Remedies & Practice, sec. 3003; *Robinson v. Baugh*, 31 Mich., 290; *Wesson v. Washburn Iron Co.*, 13 Allen [Mass.], 95; *Whitney v. Bartholomew*, 21 Conn., 213; *Demarest v. Hardham*, 34 N. J. Eq., 469; *Cooper v. Randall*, 53 Ill., 24; *Dittman v. Repp*, 50 Md., 516; *Yocum v. Hotel St. George*, 18 Abb. N. Cas. [N. Y.], 340; *Tuebner v. California S. R. Co.*, 66 Cal., 171.)

Permitting the nuisance to exist without protest for a longer period than the statute of limitations will not bar an action for damages. (*Goodall v. Crofton*, 33 O. St., 271; *Adams v. Chicago, B. & N. R. Co.*, 39 Minn., 286; *Lamm v. Chicago, St. P., M. & O. R. Co.*, 10 L. R. A. [Minn.], 268.)

The following authorities are cited on the question of nuisance by use of the street, and on the measure of damages: *Carhart v. Auburn Gas Light Co.*, 22 Barb. [N. Y.], 297; *Grigsby v. Clear Lake Water-Works Co.*, 40 Cal., 396; *Vanard v. Cross*, 8 Kan., 248; *Omaha & R. V. R. Co. v. Standen*, 22 Neb., 343; *Drake v. Chicago, R. I. & P. R. Co.*, 19 N. W. Rep. [Ia.], 215; *Staple v. Spring*, 10 Mass., 73; *Blesch v. Chicago & N. W. R. Co.*, 43 Wis., 183; *Carl v. Sheboygan & F. D. L. R. Co.*, 1 N. W. Rep. [Wis.], 235; *Thayer v. Brooks*, 17 O., 489.

Beeson & Root, also for defendant in error.

RAGAN, C.

On the 5th day of May, 1890, Cornelius O'Connor sued the Chicago, Burlington & Quincy Railway Company (hereinafter called the "Railway Company") in the district court of Cass county for damages, alleging that he was the owner of lot 13, in block 48, in the city of Plattsmouth; that said lot and the house thereon were used by him for residence purposes, and that said lot fronted west on Second street, a public thoroughfare of said city. The three material allegations in the petition were as follows:

"(6.) And plaintiff avers and complains that said defendant did, on or about the 3d day of July, 1886, by its agents and employes, well knowing the premises herein, and without any authority whatever from, or compensation to, plaintiff, and without any authority from any person or corporate body legally authorized to grant such authority, erect and maintain a switch track in such public thoroughfare, a fence of the height of about six feet immediately in front of said lot, and did so erect and maintain, and still maintains and uses constantly and daily, a coal shed and hoisting machine, and also did build, construct, and maintain, and so continues to do so, a side or switch track immediately in front of said lot, by reason of which said lot

is totally obstructed from view, and this plaintiff has for five years last past and is now daily prevented from using or enjoying said street upon which said track, switches, coal houses, fence, and other obstructions have been wrongfully placed by the defendant.

"(7.) That since the 3d day of July, 1886, and long prior thereto, the defendants herein, by their agents and employes, have wrongfully, and to the great damage of plaintiff's property and enjoyment thereof, permitted their car rolling stock to be loaded and unloaded with coal on said switch tracks, which is immediately in front of and abuts on said residence property, and that said defendant now and since said time constantly permits its cars and rolling stock, trains, and locomotive engines to so obstruct the passage of said public thoroughfare and street as to completely isolate the plaintiff from the enjoyment thereof, and further compelling said plaintiff, in order to have free ingress and egress to Granite street, to use for a sidewalk his own property.

"(8.) That during all of said time hereinbefore mentioned the said defendant, by its agents, servants, and employes, has permitted, and does now permit, its locomotive engines to whistle and ring bells at all hours of the night and day, to the great annoyance and damage of plaintiff's property and the enjoyment thereof; and further, that by reason and as an immediate consequence of so permitting its heavy and ponderous engines and cars to run over said switch to jar and shake the said dwelling house, unfitting it for the purpose for which it was built, and thereby damaging the walls and plaster, necessitating constant repairing.

"(9.) And plaintiff further avers that said defendant, without any authority from, or compensation to, plaintiff, has caused to be laid across said property a water pipe, and in making excavations therefor tore down and ruined part of plaintiff's fence and otherwise damaging said premises, and that it is now and has been in the habit of throw-

ing the dirt and rubbish adjacent to and upon said premises, to the damage thereof, making the same by reason thereof nearly useless for a dwelling house."

The answer of the Railway Company, among other defenses, pleaded the statute of limitations; that is, that O'Connor's cause of action did not accrue within four years immediately preceding the date of the bringing of the suit. O'Connor had a verdict and judgment and the Railway Company prosecutes error.

The evidence in the record tends to establish the following facts: That O'Connor became the owner of the property in the year 1885; that on this lot was a house sometimes used by O'Connor for a residence and sometimes rented by him to tenants, and that this lot fronted west on Second street, the same being one of the public streets of the city of Plattsmouth; that prior to the year 1877 the Railway Company laid its railway track in said street in front of the O'Connor property and had since been operating its trains on said track; that in the year 1877, 1878, or 1879 the Railway Company erected a coal house in Second street in front of the O'Connor property, and has since maintained said coal house at said place; that in the year 1886 said coal house was partially destroyed by fire, but was at once rebuilt; that said coal house had a capacity of 40,000 tons; that the Railway Company built two side tracks in Second street so as to reach said coal house from its main track,—one of these side tracks was built more than four years before this suit was brought, and one was built within four years of the bringing of this suit; that the cars loaded with coal were run upon these side tracks and the coal unloaded into the coal house by means of a derrick or hoisting machine; that engines were run up on these side tracks to the coal house and stood there while the tenders were being loaded with coal; that the loading of coal into the coal house and loading it from the coal house into the engines caused dust to ensue and settle on the O'Connor

property and house standing thereon, to the annoyance of the occupants; that the movement of the engines and cars on the side tracks shook and jarred the house on the O'Connor lot and injured the foundation, plastering, and walls thereof; that the smoke and soot from the locomotive engines standing on the side track for the purpose of being loaded with coal, drifted on the O'Connor property and into the house thereon and rendered its occupation uncomfortable. All of which things depreciated the rental value of the O'Connor property. The evidence further tends to show that within the four years prior to the bringing of this suit the Railway Company laid a water pipe across a part of the O'Connor lot and built a fence between the front of the lot and its coal house, which obstructed O'Connor's ingress and egress to and from his lot to the street.

The court charged the jury, among other things, as follows: "If you shall further find from the evidence that the defendants have caused to be erected on said street, in front of plaintiff's said property, a coal house where coal is unloaded from cars to said coal house and from said coal house into tenders of defendant's engines, and by reason thereof great, unusual, and annoying noises are created, and smoke, dust, and cinders and ashes from the engines of the defendant standing by said coal house, are cast upon and across plaintiff's said premises to such an extent as to interfere with the comfortable enjoyment and use of said premises, or depreciate the rental value thereof, then you should find for the plaintiff and assess his damages, if you find from the evidence that plaintiff has been so damaged, at such a sum as you believe from the evidence will fully compensate him for such injury to said property for a period not to exceed four years prior to May 5, 1890. In other words, gentlemen of the jury, if defendant constructed the railway tracks complained of more than four years prior to May 5, 1890, plaintiff cannot recover in this

action for the construction of such tracks, nor for any damages caused to his property by reason of the trains and engines passing and repassing his said property, but in that event he can recover in this action for damages to said property resulting from other and different uses of such tracks, such as for the purpose of storing cars and engines, annoying noises caused by the loading and unloading of coal in and out of the defendant's coal house, smoke, dust, and cinders cast upon and across his said premises by the engines stationary on said tracks, if you find these facts from the evidence, and the measure of his damages in such case would be such a sum as you may find from the evidence will fully compensate plaintiff for any diminution of the rents and profits of said property during and not to exceed four years prior to May 5, 1890, if you find from the evidence that by reason of said acts any diminution in the rental value of said property has accrued in said time." It is now urged by the Railway Company that this instruction was erroneous, because it prescribed an improper measure of damages and misstated the law as to the statute of limitations.

The *Omaha S. R. Co. v. Todd*, 39 Neb., 818, was an action by a land owner against a railway company to recover damages for the amount of land appropriated by the railway company for a right of way and for the amount of damages sustained by the land owner to the remainder of his farm by reason of the appropriation of a part thereof, and it was held that the damages to which a land owner is entitled by reason of the construction of a railway across his farm are: (1) The actual value of the land taken at the time of the taking, without diminution on account of any benefit, or any set-off whatever. (2) The depreciation in value of the remainder of the farm, caused by the appropriation of a part thereof for railway purposes, and the construction and permanent operation and occupation of the railroad thereon, excluding general benefits; and that

in an inquiry whether, and how much, the part of a farm not taken for a railroad right of way is depreciated in value by the appropriation of a part, evidence as to the size of the farm, the purpose for which it was used, the improvements thereon, and how located, the construction of the road across the farm, the cuts and fills made or to be made in the construction of the road, the width of the right of way, the height of embankments, the depth of ditches, the inconvenience of crossing the tracks from one part of the farm to another, the liability of stock being killed, the danger from fire from passing trains, were all facts competent for the jury's consideration in determining the depreciation in value of the remainder of the farm. To the same effect see *Fremont, E. & M. V. R. Co. v. Bates*, 40 Neb., 381.

In *Omaha & R. V. R. Co. v. Moschel*, 38 Neb., 281, it was held: "An action against a railroad company for damages to plaintiff's real estate caused by the railroad company's building its tracks and operating its road across the street and on a lot lying next to plaintiff's property must be brought within four years of the date of the construction of such railroad." "Where a railroad company, in 1880, built its railroad track and side tracks across a street and on a lot (owned by it) lying next to plaintiff's property, and more than four years thereafter plaintiff brought suit against the railroad company for the depreciation in value of his lot caused by the building of such railroad, and its subsequent operation, and for subsequently building and operating additional tracks across said street and lot, held, (1) that plaintiff in no event could recover for any depreciation in the value of his property by reason of any acts of the railroad company, either in matters of construction or operation, the habitual doing, or the commencement of the doing, of which acts was at a date more than four years prior to the date of suit brought; (2) that the plaintiff could, and if he did or did not, within four years after

the date of building of said original railroad on said lot and across said street adjacent to his property, bring suit for damages for the depreciation in value of his premises, caused by such railroad construction and operation, then every element of damages, past and future, that was or would have been properly admissible in that suit, either in matters of construction or operation, must be excluded from the consideration in this case."

Now applying the principles enunciated in the foregoing cases to the case at bar, it is quite clear that at the time the Railway Company first laid its tracks in Second street in front of the O'Connor property there at once accrued to the owner thereof, if he was thereby damaged, a right of action against the Railway Company. This right of action would have been barred within four years from the date of the Railway Company's occupation of the street. If the owner of the O'Connor property had brought such action, the measure of his damages would have been the depreciation in the market value of the lot by reason of the occupation of the street in front thereof by the Railway Company, and this depreciation in value would have been the difference between the market value of the lot immediately before and immediately after the construction of the railway; and in ascertaining this depreciation, the cuts or fills made in the street in front of the property; the proximity of the track to the front of the lot; the danger of fire from passing trains; the probability of damage to the house on the lot from the jars of passing cars and engines; the inconvenience to the occupants of the property by the presence and proper and ordinary use of the railway track; the annoyance from smoke, cinders, and dust from passing trains and engines; the noises from the proper operation of the road, such as the roar of trains, the sounding of whistles, and the ringing of bells, would have all been elements for consideration in determining how much the occupation of the street by the railway had diminished

the value of the O'Connor property. In other words, every fact and circumstance connected with the usual and proper operation of the road in front thereof for all time that would have influenced the market value of the property in the mind of a good-faith intending purchaser thereof would have been proper for consideration; but all elements of damages which would or might ensue to the O'Connor property by reason of the building in front thereof of the railway and its continuous and proper operation would have been included in the appraisement, judgment, or settlement of the damages, and the reason for this is, that it is a matter of common knowledge that a railway cannot be operated without noise and smoke and soot, nor can heavy cars and engines be propelled over iron tracks without jarring buildings in close proximity thereto. All these things were within the realm of what would probably result from the proper and ordinary operation of the railway as first constructed, and entered into and formed a part of the damages which the O'Connor property sustained by reason of the location and use of the railway in the street. But if, after the Railway Company had laid its tracks in Second street, and after the damages caused thereby to the O'Connor property had accrued and been adjudicated or settled, it had built an embankment in the street in front of the O'Connor property, or had made a cut in said street in front thereof for the use of its railway tracks, then the building of such embankment, or the making of such cut, would have been an additional burden to the O'Connor property presumably not within the purview of the original location of the railroad; and had it produced an injury to the O'Connor property, it would have invested the owner thereof with an additional right of action therefor. This right of action would likewise have been barred within four years from the time of building such embankment or making such cut, and the measure of damages to the owner of the O'Connor property would have been ascer-

tained in the same manner as his damages for the original location of the road.

The erection and use of the coal house in the street in front of the O'Connor property in 1878 or 1879 was an additional burden thereto, and invested the then owner of said property with a right of action for damages against the Railway Company by reason thereof. That right of action was barred within four years from that date. And the measure of damages to the owner of the O'Connor property by reason of the erection of said coal house and its use was the depreciation caused by reason of the erection of the coal house and its original and proper use for all time; and in arriving at the amount of this depreciation or damage, the proximity of the coal house to the property, the capacity of the coal house, the danger from fire, the annoyance from soot and smoke and coal dust, the probable damage to the house on the property from the jars caused by passing trains and engines, were all competent and proper elements for consideration. All these things were within the realm of results that would naturally flow from the proper and ordinary use of the coal house, and were involved in and a part of the damages sustained by the O'Connor property by reason of the location and use of the coal house. Coal could not be loaded into nor out of said coal house without making a dust. The coal could not be brought to the coal house except on cars pulled by engines. These engines could not be present at the coal house, either for the purpose of hauling coal there or for taking on a supply of coal, without the usual accompaniments of smoke, steam, cinders, the ringing of bells, and the sounding of whistles. We conclude, therefore, that where the owner of a lot fronting on a street sues a railway company for damages to his lot by reason of the erection and use in said street in front thereof of a coal house, the owner's measure of damages is the depreciation in the market value of his real estate caused by the erec-

tion and proper and ordinary use of the coal house for all time. No doubt that in an inquiry as to the amount of such damages the depreciation in the rental value of the premises might be shown, as that would tend to show the amount of depreciation that the property had suffered. And we further conclude that such owner's right of action accrues upon the location of the coal house or other improvement, of which he complains, in the street, and is barred within four years therefrom; and that in such right of action are embraced all things effecting his property which result from the ordinary and proper use of the improvement complained of. We conclude, therefore, that the learned judge of the district court erred in giving the instruction complained of.

There remain in the case a few points for disposition. As already stated, the evidence shows that within four years prior to the bringing of this suit the Railway Company constructed in the street opposite the O'Connor property an additional side track for use in connection with its coal house. This did not confer upon O'Connor any cause of action against the Railway Company. If a railway company condemns real estate for the erection thereon of a road, and builds one track thereon, then we are of opinion that the building of one or more additional tracks on the same right of way and on the same profile or grade, should be construed to be within the purview and purposes of the original condemnation; but, as already stated, the evidence tends to show that the Railway Company, within four years of the suit brought, laid a water pipe across the O'Connor lot and built a fence between the front of it and its coal house and the street. The building of this fence and the laying of this water pipe were not elements that might have been considered in determining O'Connor's damage to his property by reason of the original location of the coal house in the street in front thereof. They were not things that would naturally or probably result from the proper and

ordinary use of the coal house, and if O'Connor's property has been depreciated in value by reason of the erection and maintaining of said fence and the location of said water pipe, he is entitled to recover such damages.

The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

O. D. OBERT ET AL., APPELLEES, V. W. C. WENTZ, APPELLANT.

FILED OCTOBER 2, 1894. No. 5578.

Review: FAILURE TO FILE BRIEF: AFFIRMANCE. The appellant filed no brief in this case, and as the pleadings support the decree rendered, the judgment of the district court is affirmed without further examination of the record.

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

Hainer & Smith, for appellant.

Howard M. Kellogg, contra.

RAGAN, C.

This is an appeal from the district court of Hamilton county. The appellant has filed no brief in the case, and the pleadings support the decree rendered by the district court. Its judgment is therefore

AFFIRMED.

OMAHA FAIR & EXPOSITION ASSOCIATION ET AL. V. MISSOURI PACIFIC RAILWAY COMPANY ET AL.

FILED OCTOBER 2, 1894. No. 4588.

1. **Review:** MISCONDUCT OF JUROR: EVIDENCE. Where a new trial is asked for on the ground of misconduct of a juror or of the prevailing party, the finding of the trial court in support of the verdict will not be set aside unless the evidence of misconduct is of a clear and convincing character.

2. **New Trial:** CONVERSATIONS WITH JURORS: EVIDENCE. While all communications during a trial between jurors and persons connected with the case are to be avoided, still a verdict should not be set aside because a witness has been seen in conversation with a juror, where it is made to appear that there was no communication with reference to the case.

3. **Instructions.** Where the facts of a case call for the application of a specialization of or a limitation of a general rule of law, an instruction simply stating the general rule is not erroneous where other instructions correctly state the specialization or limitation.

4. **Trial:** INSTRUCTIONS. It is not error to refuse an instruction which states to the jury an inference of fact to be drawn from the evidence and no rule of law.

5. ———: ———: REVIEW. Error cannot be predicated upon the submission of an issue to the jury when the party alleging such error, by a request for an instruction, himself asked the submission of the issue.

6. **Railroad Companies:** FIRES: DAMAGES: CONTRIBUTORY NEGLIGENCE. The owner of land cannot be deprived of the free enjoyment of his property by the construction of a railroad adjacent thereto, and, therefore, his failure to take unusual precautions against its destruction by fires negligently set out by the railroad cannot be urged as a defense to an action to recover for such loss; nor can contributory negligence in such cases be predicated upon his proper use of his property in the usual manner, but the obvious hazard of fires is a fact which he cannot disregard, and he is bound to take such precautions as a person of ordinary prudence would take for the protection of his property, not against anticipated negligence of the railroad, but against such obvious hazards.

7. **Review**: CONSOLIDATION OF CASES: JOINT MOTION FOR NEW TRIAL: AFFIRMANCE. Where several cases with different plaintiffs, presenting different states of fact, were, by agreement, tried together, and by stipulation all the plaintiffs joined in one motion for a new trial and in one petition in error, *held*, that the proceedings were indivisible, and that the judgment must be affirmed as to all if free from error as to one.

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

See opinion for citation of authorities.

Montgomery, Charlton & Hall, Breckenridge, Breckenridge & Crofoot, and *R. W. Barger*, for plaintiffs in error.

R. S. Hall and *B. P. Waggener, contra.*

IRVINE, C.

The grounds of the Omaha Fair & Exposition Association lay near a railroad belonging to the Omaha Belt Railway Company, and operated by the Missouri Pacific Railway Company. A fire started between the tracks of the railroad and the fair grounds, destroying a portion of the fence surrounding the latter and certain buildings. The Fair & Exposition Association held insurance on this property in a number of companies. After adjustment and payment of the loss, the Fair & Exposition Association and the insurance companies joined in an action against the Missouri Pacific Railway Company to recover from that company on account of said loss, alleging that the fire had been negligently set out by the railroad company. The negligence specifically alleged was the defective construction of an engine and the permitting of dry grass and weeds and old ties to accumulate on the right of way. Certain other persons, who owned property situated upon the fair grounds which was destroyed by the same fire, brought separate actions to recover for the same loss. Some of these

were brought against both the Missouri Pacific and the Omaha Belt Railway Company. In some of these actions insurance companies joined as plaintiffs on the same grounds as in the principal case. In some of the cases answers and replies were filed and issues duly made. In one at least there was a stipulation to consider the case at issue on the same issues as made by the pleadings in other cases. The cases were tried together, and there was a separate verdict in favor of the defendants in each case. A stipulation was filed that only one motion for a new trial need be filed; that such motion entitled in each case should be considered a motion for a new trial in each case; that the cases should be heard together upon the motion for a new trial, and in case it should be overruled, said cases should, for the purpose of prosecuting a petition in error, be consolidated and taken to and heard in the supreme court upon one petition in error and one record, and that only one bill of exceptions should be settled, the same to apply to each of the cases. Separate judgments were, however, entered by the district court. The plaintiffs in all the cases have now joined in one petition in error seeking a reversal of these judgments.

1. The first question we are called upon to consider relates to assignments of error in regard to the overruling of the motion for a new trial in so far as it was based upon charges of misconduct of a juryman and of the defendants. The evidence upon these charges is substantially as follows: There are affidavits of two attorneys for the plaintiffs that a witness in said action was one Smith, an expert engineer and master mechanic, at the time of the trial an employe of a railroad company in Texas and at the time of the fire in controversy roundhouse foreman and inspector of engines for the defendant; that one Gibb was a juryman engaged in the trial of the case; that after the adjournment of court one evening, after the arguments to the jury had been commenced and before they were con-

cluded, the attorneys making the affidavits entered the bar-room of a hotel in Omaha and while there Smith and Gibb entered the room. They approached the bar and stood at some distance from the attorneys. The attorneys heard Smith ask Gibb what he would take, heard Gibb answer, and saw Smith order drinks; then Smith turned to the attorneys and invited them to drink, but they declined. They then saw Smith hand money to the bartender, apparently in payment. Gibb testifies that when Smith lived in Omaha he and Gibb were intimate friends; that during the trial he held no communication with Smith until informed by another juryman that the trial judge had informed him that a juryman might speak to a witness during the trial, provided there was no communication in reference to the case; that accordingly Gibb entered into a conversation with Smith on such topics as their former intimacy suggested, and, as Smith was about to depart, asked him to take a drink; that Gibb took soda water; that there was no conversation between them in anywise relating to the case. The question as to whether or not a verdict would be set aside merely upon proof that a juryman partook of intoxicating liquors during the trial is not presented by this record. The attorneys both testify that they heard Gibb's answer to Smith's inquiry as to what Gibb would take, but they do not state what that answer was. They say that they heard the drinks ordered, but they do not say what was ordered. Gibb's testimony that he drank soda water stands, therefore, undisputed. This feature may, therefore, be dismissed from consideration and our attention directed to the proof by which it is attempted to established an undue influence upon the juryman. In the first place the trial court found in favor of the defendants on this point, and the finding of that court should not be disturbed, if supported by sufficient evidence. The evidence would have to be very clear and convincing to support a reversal against the finding of the trial judge on

such a point. (*Foxworthy v. City of Hastings*, 31 Neb., 835; *Everton v. Esgate*, 24 Neb., 235; *Cortelyou v. McCarthy*, 37 Neb., 742.) In the next place the evidence was conflicting as to whether the witness purchased the drinks for the juror or the juror for the witness. The cases cited, of *Ensign v. Harney*, 15 Neb., 330, and *Vose v. Muller*, 23 Neb., 171, were cases where favors had been bestowed on jurors by the prevailing party or his attorney, and the case of *Johnson v. Greim*, 17 Neb., 447, was one where the jury, during a view of the premises, had taken a meal at the house of the prevailing party, and the verdict was sustained upon the ground that they were in charge of a bailiff instructed to provide them with food; that there was no other available place, and that the jury was, therefore, placed under no obligations to the prevailing party. Mere communications between a party and a juror, not referring to the case and unaccompanied by circumstances creating obligations, or such as would probably create a sense of obligation, have never been held in this state sufficient alone to vitiate a verdict. There was affirmative testimony that no communication took place in regard to the case; that the communication flowed simply from the meeting of old friends, and there was evidence from which the trial court might have found that if obligations were created they were upon the witness and not upon the juror. But the evidence was not such as to require the trial court to treat the act of Smith as that of the defendant. It might be in some cases that the relations of a witness to one of the parties would be such that a communication between such witness and a juror should be looked upon with as much suspicion as a communication with a party; but it was shown that Smith had left the employ of the defendant, was then living in a distant state, and the trial court was justified, under the evidence, in regarding him as it would any other witness. Certainly, a verdict should not be set aside upon such evidence of transactions between a

juror and a casual witness where an absence of all communications with reference to the case is affirmatively shown. It can hardly be too often repeated that parties, counsel, witnesses, and all other persons should be extremely careful to avoid evil and the appearance of evil in their relations to jurors. It is sometimes necessary, to avoid the possibility of error, that verdicts be set aside simply because there may have been an undue influence exerted, and for that reason even innocent communications are fraught with some danger. In this case, however, the showing made by the plaintiffs was so explained that the trial judge did right in not setting aside the verdict upon this ground.

2. All the other assignments relate to the instructions given and refused. In the petition in error error is assigned on these subjects in the same manner as in *Hiatt v. Kinkaid*, 40 Neb., 178. This form of assignment, therefore, precludes us from examining any group further than to ascertain that the action of the district court was correct as to one instruction of that group. Among the instructions given by the court of its own motion and so grouped was the following: "If you shall find from all the testimony that what was done or omitted to be done by the defendants was such as would not have been done or omitted to be done by a person of ordinary prudence, under like circumstances, then negligence would be imputed to the defendants for such act or omission." The criticism of this instruction is that it makes ordinary care the test and fails to state to the jury the degree of care required to prevent fires along railroads owing to the extra hazard in such cases; but, at the request of plaintiffs the jury was instructed that it was the duty of a railroad company to take such precaution against danger of any kind, including the danger of setting out fire, as the magnitude of the peril demands, and that the ordinary care to be used in the management of a railroad requires precautions, which, if used in any business involving less risk, would be deemed equivalent to the utmost care. The

substance of this rule was given in three other instructions requested by the plaintiffs, so that, taking the whole charge together, the jury was instructed precisely according to plaintiffs' theory on this subject. The use of the term "under like circumstances" in the instruction complained of called attention to the particular nature of this case and coupled the plaintiffs' instructions with the general instruction given in such a manner as to make the former complementary to the latter and remove any possibility of a conflict in the instructions or confusing the jury. It is not error to state correctly in one instruction a general rule of law when in other parts of the charge proper specializations and limitations are made with regard to the particular case under consideration, even where the general rule, standing alone, might be too broad for the case and might operate to mislead the jury.

3. Among the instructions refused particular complaint is made of the refusal of the ninth, twelfth, and fourteenth. It was not error to refuse these instructions, for the reason that they all presented inferences of fact and not of law. We quote the fourteenth. "You are instructed that a fire seen to break out in grass near and to the leeward of a railroad track soon after the passing of an engine affords a presumption that the engine set out the fire, which, if you find that the defendant was operating the road, should be rebutted by evidence that the fire was set out in another way." This instruction suggested no rule of law. The burden of proof was upon the plaintiffs to show that the defendant set out the fire, and it was for the jury to say, under all the evidence, whether or not there was a preponderance of the evidence to that effect, and not for the court to say that an inference of fact must be drawn. The instruction was argumentative upon the facts, and under our Code of Procedure vicious for that reason. Instructions 9 and 12, while couched in somewhat different language, were of the same nature.

4. Among the instructions given at defendants' request and complained of in a group as erroneous was the following: "The jury are instructed that every action must be brought and prosecuted in the name of the real party in interest, and unless they find from the evidence that the plaintiffs in this action are the real parties in interest, they will return a general verdict for the defendant." It seems that a question was raised as to the proper persons to maintain the action, the insurance companies having paid the loss and then joined in the action with the owners of the property destroyed. This instruction was evidently directed to this point, and it is urged that the question had been decided on demurrer and was not a proper issue for the jury. Whether or not such an issue was properly presented we need not decide, for at plaintiffs' request the jury was given an instruction beginning as follows: "You are instructed that it is the law in this state that every action must be prosecuted in the name of the real party in interest and those united in interest must be joined as plaintiffs or defendants, and this rule is applicable, not only to actions formerly denominated 'equitable,' but to those formerly denominated 'legal,' including those for a recovery of money only, and the defendant cannot object that the court must be required to apportion the amount recovered to the several plaintiffs." The instruction then proceeded to state to the jury the state of facts which, if found, would entitle all the plaintiffs to recover. This instruction was similar to the one complained of, except that to the general language was added a specific statement presenting the case from the plaintiffs' point of view. Having themselves asked the court to submit this issue to the jury, they cannot complain because by a substantially similar instruction requested by the other side the issue was so submitted.

5. Error is assigned as to the modifying by the court of a group of instructions requested by the plaintiff. Each of these instructions as requested related to what would be

proof of negligence on the part of the defendants and to the right of plaintiffs to recover if such negligence were shown. The modification in each instance consisted in requiring as an element to the plaintiffs' right to recover that there should be "an absence of proof of contributory negligence." It is argued that there was no evidence sufficient to submit to the jury on the issue of contributory negligence. If this position be well taken, then it was error to modify any of the instructions in this group. There was evidence tending to show that servants of the fair association had cut down weeds outside of the fair grounds and between those grounds and the defendants' tracks, and had left these weeds to dry out and lie where they had fallen. There was also evidence tending to show that the fire started among these weeds. On this evidence the plaintiffs contend that there is no duty imposed upon an adjoining owner to protect his own property from fires negligently set out by a railroad. A number of cases are cited where the owner of property had failed to take some precaution against fire or where he had allowed combustible material to accumulate on his own land, and the court had held that such fact did not prevent a recovery. On the other hand, the defendants contend that while negligence cannot be predicated upon the ordinary use of one's own property, still one may not recover in case his loss was caused by his failure to exercise such precautions as a person of ordinary prudence would exercise for the protection of his own property, and that the evidence in this case was sufficient to submit to the jury upon that issue. Both of these views find substantial support in the authorities. Indeed, in the multiplicity of cases it would be difficult to assert any theory at all within range of reason for which support cannot be found. Some cases, of which *Richmond & D. R. Co. v. Medley*, 75 Va., 499, is an illustration, go to the full length of the doctrine contended for by plaintiffs, and hold that the construction of a railroad imposes no

additional duty on the owner of adjacent land and requires him to take no precautions whatever to avoid injury by fire. A somewhat modified but similar doctrine is inferable from the case of *Pittsburgh, C. & St. L. R. Co. v. Jones*, 86 Ind., 496. Nearly all the modern cases asserting this doctrine cite the case of *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis., 223; but in *Murphy v. Chicago & N. W. R. Co.*, 45 Wis., 222, this case was explained as holding only that under the facts thereof the court was right in refusing to charge that the plaintiff was guilty of contributory negligence as a matter of law, and in the latter case and in *Clune v. Milwaukee & N. R. Co.*, 75 Wis., 532, it was held that similar facts should go to the jury. The expressions in the opinion in *Kellogg v. Chicago & N. W. R. Co.*, so far as they extended beyond the rule that negligence *per se* had not been shown, were distinctly disapproved.

In a large class of cases the rule is asserted that a land owner cannot be charged with contributory negligence where he uses his property in the usual course for the purpose for which it is adapted. *Patton v. St. Louis & S. F. R. Co.*, 87 Mo., 117, *Kalbfleisch v. Long Island R. Co.*, 102 N. Y., 520, and *Philadelphia & R. R. Co. v. Hendrickson*, 80 Pa. St., 182, are illustrations of this rule. In a larger number of cases, however, it has been held that facts somewhat similar to those charged against the plaintiffs would constitute evidence of contributory negligence which should be submitted to the jury. (*Kansas P. R. Co. v. Brady*, 17 Kan., 380; *Kansas City, F. S. & G. R. Co. v. Owen*, 25 Kan., 419; *Missouri P. R. Co. v. Cornell*, 30 Kan., 35; *Garrett v. Chicago & N. W. R. Co.*, 36 Ia., 121; *Slossen v. Burlington, C. R. & N. R. Co.*, 60 Ia., 215; *Bryant v. Central V. R. Co.*, 56 Vt., 710; *Karsen v. Milwaukee & St. P. R. Co.*, 29 Minn., 12; *Illinois C. R. Co. v. Nunn*, 51 Ill., 78; *Chicago & N. W. R. Co. v. Simonson*, 54 Ill., 504.)

In *Burlington & M. R. Co. v. Westover*, 4 Neb., 268, it was held that the failure of the plaintiff to plow fire-breaks

about his premises did not constitute contributory negligence, the court saying, "All take the risk of injuries unavoidably produced by the use of fire for the purpose of generating steam; but upon what authority is any one to be deprived of the free and ordinary use of his property, in order to prevent its destruction by the negligent use his neighbor may make of his? We know of no such authority." In the same case it was held that the fact that the railroad company permitted dry grass and rubbish to remain on its land was one from which the jury might infer negligence. As applied to the facts of that case, the correctness of the decision cannot be doubted. The construction of a railroad near one's premises does not require one to forbear the ordinary use of his land, nor does it require him to take unusual precautions to guard against the consequences of probable negligence on the part of the railroad; but a railroad company is liable for losses caused by fires set out only when the fires are set out by its negligence. In spite of the utmost precautions fires may arise, and while the owner of adjacent land need not fortify himself against negligence merely to be anticipated and not yet committed, still, especially as fires are not necessarily the result of negligence, he should be required to take such precautions as a person of reasonable prudence would under similar circumstances to prevent the destruction of his property. This rule does not deprive him of the beneficial enjoyment of his property any more than in any other case of negligence. It would probably be under very exceptional circumstances that he would be required to do any affirmative act for his protection; but to hold that with knowledge of the danger he may place combustible materials in such a manner as to invite the spread of any fire which may be set out and, notwithstanding such act, recover, would be to establish a rule wholly foreign to the spirit of our law and as unjust as it would be unique. Here the evidence tended to show that the fair association actually

went off of its own property and performed acts which resulted in the accumulation of combustible matter near the tracks of the defendant and between those tracks and the fair grounds. This was certainly sufficient evidence to submit to the jury under the well settled rule in this state, and the court did not err in so doing.

The foregoing discussion should properly be restricted to the principal case in which the Fair & Exposition Association was a plaintiff. The insurance companies joining as plaintiffs in that case had only the rights acquired by what in insurance parlance is termed "subrogation." They only succeeded *pro tanto* to the rights of the fair association, and all that has been said properly applies to their case. It will be recalled from the statement that there were five other cases on behalf of owners of property on the grounds, and companies insuring such other property. The other plaintiffs had nothing to do with the acts complained of as constituting contributory negligence, and there was no evidence at all tending to show contributory negligence on the part of the plaintiffs in these other cases; but by agreement of the parties the cases were all tried together and upon the same evidence. As already stated, the parties stipulated that only one motion for a new trial should be filed, which was done. They also stipulated that for the purpose of prosecuting a petition in error the cases should be consolidated and heard in the supreme court on one petition in error and one record. The doctrine is well settled that where two or more plaintiffs or defendants join in a motion for a new trial, if the verdict is good against one, the motion must be overruled as to all. (*Scott v. Chope*, 33 Neb., 41; *McDonald v. Bowman*, 40 Neb., 266.) It has also been held that where several join in a petition in error, if the judgment attacked was good against one, it must be affirmed as to all. (*Gordon v. Little*, 41 Neb., 250.) The writer, while considering these rules firmly based on authority, has heretofore regarded them as purely technical,

but this record discloses a reason for their application. These cases,—some with two plaintiffs, some with a dozen; some with one defendant, some with two,—presenting different rights, different defenses, different questions, both of law and of fact, were tried together and thrust upon the court and the jury in a confused mass. In the motion for a new trial the identity of the several cases was still further lost, and in this court it is stipulated that they shall actually be consolidated for the purpose of hearing. By taking this course counsel elected to waive any rights existing by reason of the differences between the cases and to stake the result upon whichever case might present the least favorable aspect. The attention of the trial court not having been called to the differences in the cases, and there being no effort to sever them in this court, we must enforce the rule as above stated.

JUDGMENT AFFIRMED.

ANDREW G. WEANDER V. FRANK JOHNSON.

FILED OCTOBER 2, 1894. NO. 5864.

1. **Judgments by Consent: REVIEW.** A party cannot be heard to urge error in the proceedings leading to a judgment which was entered by his own consent.
2. **Transcripts for Review.** The transcript of the record filed in the supreme court imports in this court absolute verity. If in fact incorrect, the district court, and not this court, must make the correction.

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

H. H. Bowes, for plaintiff in error.

Sears & Thomas, contra.

IRVINE, C.

The record in this case discloses that the action was begun by Johnson against Weander in the county court of Burt county, where there was a judgment against Weander, from which he appealed to the district court. In the district court there was a motion by Weander to dismiss the case, for the reason that Johnson had failed to file his petition within time. This was overruled and a motion filed by Johnson to dismiss the appeal for want of an answer. An answer was filed notwithstanding this motion, which answer was stricken from the files, leave to refile the same denied, and apparently a default entered, for there then was a motion to set aside the default, which was also overruled and judgment entered, the judgment reciting that it was the same as had been entered in the county court. The orders of the court on these various motions are assigned as error, but we cannot examine them, for the reason that the record recites that the judgment entered was by consent of the plaintiff in error. Having consented to the judgment, he cannot be heard to urge error in the proceedings leading to it. It is insisted in the brief that the record is incorrect in this particular and that there was no consent. The transcript of the record imports absolute verity and cannot be impeached in any manner. We must take that transcript as we find it. If the transcript is not correct, or if the record is not correct, the correction must be made in the district court.

JUDGMENT AFFIRMED.

WILLIAM H. RIGHTMIRE V. HENRY H. HUNTEMAN ET AL.

FILED OCTOBER 2, 1894. No. 5241.

1. Review: ADMISSION OF INCOMPETENT EVIDENCE: HARMLESS ERROR. A judgment will not be reversed because of the admission of incompetent evidence, where no possible prejudice resulted.

2. ———. The evidence *held* sufficient to sustain the verdict.

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

I. L. Albert and *Whitmoyer & Gondring*, for plaintiff in error.

J. G. Reeder, contra.

IRVINE, C.

The defendants in error sued the plaintiff in error for building materials sold and delivered. The plaintiff in error interposed a counter-claim for damages caused by defective material and delay in delivering the same. There was a verdict and judgment for the defendants in error for $980.47.

Error is assigned on the admission in evidence of two papers, designated Exhibits "A" and "B." Exhibit A is not made a part of the bill of exceptions and for that reason the assignment of error in relation thereto would have to be disregarded. Exhibit B is simply a list of the material sued for in the second count of the petition. The answer expressly admits the contract for this particular material, the only issue raised being as to the fact of its delivery and as to its character. This list could have no influence on the determination of this issue; and whether or

not it was competent, its admission could not have been prejudicial. It would seem from the general testimony that Exhibit A was a similar list of other material, and the same remarks would be applicable to it.

The principal assignment of error is that the verdict is not sustained by the evidence and that it is excessive. It is admitted that the defendants in error were entitled to some judgment against the plaintiff in error, but it is urged that the judgment rendered was too large. No question of law is involved in this assignment, and it would be useless to state the evidence in the opinion. It has been examined and found to be conflicting, with sufficient evidence on behalf of the defendants in error to forbid our disturbing the verdict.

JUDGMENT AFFIRMED.

POST, J., not sitting.

ORRIN R. CAIN V. CITY OF OMAHA.

FILED OCTOBER 2, 1894. No. 5590.

1. **Eminent Domain:** LOCAL ASSESSMENTS: SPECIAL BENEFITS. The only foundation for a local assessment lies in the special benefits conferred upon the property assessed, by the improvement to pay which the assessment is made, and an assessment beyond the benefit so conferred is a taking of property for public use without compensation, and therefore illegal.
2. **Metropolitan Cities:** LOCAL ASSESSMENTS: UNSUBDIVIDED TRACT. Under the law relating to cities of the metropolitan class, where an improvement extends through an unsubdivided tract of land, such tract is not subject to local assessment to pay for such improvement to a greater distance from the improvement than the average distance to which assessments on subdivided lots are levied.

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

B. G. Burbank, for plaintiff in error.

W. J. Connell, contra.

IRVINE, C.

The plaintiff was the owner of a strip of land about 900 feet long and 189¾ feet deep fronting on Locust street, in the city of Omaha, and designated as "tax lot 57." For the purpose of opening Twenty-second street from some point south to Locust street the city appropriated a strip of land 66 feet wide across the land of the plaintiff. The result of opening this street was to leave tax lot 57 in two tracts, one extending east from Twenty-second street, so extended, 314 feet, the other extending west from Twenty-second street 507 feet. The plaintiff was awarded $3,010 for the strip of land so taken. In order to pay this award a local assessment was levied on lot 57 and other property. The plaintiff paid that portion of the assessment levied on lot 57 under protest, having objected to the levy before the board of equalization, and then brought his action under Compiled Statutes, 1889, chapter 12*a*, section 69, to recover back the taxes so paid as being invalid, unjust, and inequitable. It was alleged that the amount assessed upon tax lot 57 was exorbitant, unjust, and illegal, and in excess of the special benefits conferred, and that property south of said tax lot was not assessed at all, although equally benefited. These allegations were put in issue. There was a trial to the court and a finding and judgment for the defendant, from which the plaintiff prosecutes error, assigning practically only that the finding and judgment are not sustained by the evidence. The city rested its case upon the plaintiff's evidence, and there is no conflict whatever in the proof. The city has not furnished

us with a brief, and we are not informed upon what grounds the learned district judge determined the case—perhaps from a doubt of the authority of the court to review the assessment in such a proceeding. The uncontradicted evidence shows that the whole amount awarded for the appropriation of property was to the plaintiff, for the strip of land referred to. Of the $3,010 so awarded, $1,000 was levied upon that portion of lot 57 lying east of Twenty-second street, $1,000 on that portion lying west of Twenty-second street, and the remainder in small amounts on land lying on either side of Twenty-second street north of Locust, extending back from Twenty-second street 184 feet and north from Locust street six blocks. The fact that two-thirds of this tax was levied upon the remainder of the tract, a part of which was appropriated, and the other one-third distributed in very small sums over a vast area, is in itself sufficient to excite grave suspicions as to the *bona fides* of the proceedings. Cain subdivided lot 57 into eighteen lots, upon which he constructed houses. The evidence is uncontradicted that no portion of lot 57 received any benefit from the opening of Twenty-second street except the two lots which were thereby given a frontage upon that street,—in other words, made corner lots by the improvement,—and that the benefit to those lots did not exceed $150 each. It is elementary constitutional law that the only foundation for a local assessment lies in the special benefits conferred by the improvement, and that a local assessment beyond the special benefits conferred is a taking of private property for public use without compensation. (*Hanscom v. City of Omaha*, 11 Neb., 37.) This tax exceeds the special benefits conferred by at least $1,700, and to that extent was clearly illegal.

Further, the tax was levied on the whole of lot 57, extending west from Twenty-second street 507 feet and east therefrom 314 feet. Among the subdivided lots to the north the assessment did not extend beyond a depth of 184

feet. Section 73 of the law relating to cities of the metropolitan class provides that when "any public improvement shall extend into or through any unsubdivided tract, parcel, or parcels of land, said taxes shall be levied so as not to be charged against the real estate adjoining such improvement for a greater depth than the average distance through the subdivided real estate to be taxed for said purpose." Under this statute no portion of lot 57 lying more than 184 feet from Twenty-second street could be taxed. The evidence clearly shows that the assessment was made in an illegal manner and that it was grossly unjust. In fact the whole scheme of assessment is such as to indicate that an attempt was made under the guise of a local assessment to take back from the plaintiff two-thirds of the condemnation money awarded him. It is but just that where a portion of one's property is taken under circumstances allowing no deduction for benefits conferred upon the remainder, the remainder, if specially benefited, should bear its fair proportion of the cost of the improvement; but the courts will not permit municipalities to evade the provision of the constitution, that the property of no person shall be taken or damaged for public use without just compensation, by paying the compensation and then under the guise of taxation taking it back from the person entitled.

REVERSED AND REMANDED.

HENRY W. VALLERY V. STATE OF NEBRASKA.

FILED OCTOBER 2, 1894. NO. 5371.

1. **Libel:** DEFENSE. In a prosecution for libel it is no defense that the writing was a repetition of previous oral publications and that the defendant was induced to make the written publication by acts of the person concerning whom the libel was published.

2. ———: PRIVILEGED PUBLICATION: MALICE. The libel alleged was published of and concerning a school teacher at a meeting of the school district called for the purpose of receiving any charges which might be made and transmitting them to the county superintendent. *Held*, That the occasion was not one of absolute privilege, and that the defendant was liable at least on proof of express malice in the publication.

ERROR to the district court for Saunders county. Tried below before MILLER, J.

Simpson & Sornborger, for plaintiff in error.

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

IRVINE, C.

Vallery was convicted in the district court of Saunders county of writing and publishing of and concerning one Eliza King the following:

"April 18, 1891. School District No. 49, Saunders County, Neb. Charges made by one Henry W. Vallery against Eliza King. * * * Also, Eliza King did tell one Henry W. Vallery that she did commit adultery with one George R. Hassenplug, and one Will Morrow, and one Will Larue, one Col. Odell, and one E. Emphrey, one George Essex, one Gene Key, one Joe Samic, one Will Emphres. I, Henry W. Vallery, will swear that this is true to the best of my belief and knowledge.

"HENRY W. VALLERY."

The evidence tended to show that prior to the publication of the writing, which formed the basis of the information, Vallery had made similar oral statements to neighbors of Miss King. Miss King was a school teacher employed in district 49 of Saunders county. A meeting of the school district was called for the purpose of taking some action on the charges which had been circulated. The precise object of the meeting is generally stated by the witnesses to have been to procure the formulation in writing of any charges

which might be preferred, in order that they might be transmitted to the county superintendent for his action. It does not seem to have been in the contemplation of those calling or holding the meeting to take any action themselves, and it is probable from the evidence that the circulation of these rumors had caused such a state of affairs in the district that it was deemed advisable to force an issue and in some manner dispose of the matter. The defendant argues, with great urgency, that the meeting was held in pursuance of a preconceived plan by Miss King and her father for the purpose of entrapping Vallery into a written publication of the charges in order that a criminal prosecution might be instituted. Such an inference, at least so far as Miss King's father is concerned, would be a reasonable, but by no means a necessary, inference from the testimony, and there is even slight evidence tending to show that Miss King was a participant in the acts resulting in the meeting, although her own testimony is positive to the contrary. When the meeting was called to order, its object was stated by the chairman and a general invitation was extended to any one who wished to make charges against Miss King to make them in writing. There was no response, and Vallery was directly requested to do so if he desired to make the charges. He hesitated and desired time to consider, but finally agreed to place his charges in writing if the meeting, by vote, so ordered. The meeting did so order, and the paper counted upon was then written at Vallery's dictation, read over to him, some emendations made, then signed by him, read aloud, and presented to the chairman, who forwarded it to the superintendent. On this state of facts the defendant contends that the evidence shows that the publication was at the instance and by the procurement of the person defamed, and that this constitutes a defense. The argument is general, but we presume that it is directed to the assignment of error that the verdict is not sustained by sufficient evidence, and to assignments relating to alleged

errors in the instructions. We shall first consider the question presented with relation to the instructions given and refused.

The defendant requested several instructions, presenting his theory of the case as above stated. These were refused. The court of its own motion instructed the jury that if the complaining witness, or any one acting for her, requested Vallery to appear at the meeting for the purpose of reducing the charges to writing, then this would create a case of privilege; but if the jury should further find that the defendant's acts at the meeting were not in good faith for the purpose of discharging a duty, but that he was actuated by express malice, then he would nevertheless be guilty. The defendant, in support of his view of the law, cites *King v. Waring*, 5 Esp. [Eng.], 15; *Weatherston v. Hawkins*, 1 T. R. [Eng.], 110; *Smith v. Wood*, 3 Camp. [Eng.], 323. These were all civil cases. In *King v. Waring* the alleged libel was contained in a letter written in response to an inquiry as to the character of a servant. The court said that the issue was that in consequence of the letter the plaintiff was prevented from getting a place, and if the letter of inquiry was written, not with a fair view of inquiring as to character, but to procure an answer upon which to ground an action for libel, no action could be sustained. *Weatherston v. Hawkins* was a similar case, and in that we find the opinions of Lord Mansfield and of Mr. Justice Buller, both to the effect that the communication was privileged and that no malice was shown. *Smith v. Wood* involved only the question as to whether the exhibition to a third person of a caricature at the request of such third person was sufficient evidence of publication to support a civil action. Lord Ellenborough held, without an opinion, that it was not. None of these cases supports the contention of the defendant, and we are not aware that there exists, in the law of criminal libel at any rate, any doctrine akin to that of contributory negligence, whereby a prose-

cution is barred if the person defamed has, in some manner, induced the publication. Indeed, in civil cases we are not aware that the authorities have ever gone further than to hold that circumstances of provocation may be shown in mitigation of damages. Nor do we think that the occasion was one of absolute privilege. It has, indeed, been held that a school district board has authority to discharge as well as to hire a teacher (*Bays v. State*, 6 Neb., 167); but in so doing it acts as any other contracting party acts in determining to terminate a contract or refuse further performance. It does not act judicially. The power to revoke certificates upon notice and hearing is conferred upon the officers having power to grant the certificate,—in this case the county superintendent. (Compiled Statutes, ch. 79, sub. 7, sec. 7.) Conceding, for the purpose of argument, what the writer, speaking for himself, is by no means prepared to declare, to-wit, that a person making a charge to the superintendent, or presenting evidence before him, is entitled to the same protection as a party in filing his pleadings or a witness in testifying in court, still there would be no case of absolute privilege made out here. The charges should be brought to the superintendent and not to the school meeting. Taking the view of the law most favorable to the defendant, all that can be claimed is that the school meeting, being interested in the character of the teacher, if it called upon Vallery for information he would be protected, provided he acted on reasonable grounds of belief with good motives and for justifiable ends. Express malice would render him liable. This is what the court charged the jury, and the charge was in this respect as favorable to the defendant as the law would permit.

As to the sufficiency of the evidence little need be said. The proof adduced of the circumstances surrounding the case, and especially the vile and abusive language used by Vallery in testifying, convinces us, as it convinced the jury, beyond a reasonable doubt, that he was actuated by malice.

In the brief, complaint is made of certain rulings on the evidence, but there are no assignments of error relating thereto and they cannot be considered.

We are asked in case of affirmance to determine that the sentence was excessive and to reduce it accordingly. The trial judge imposed the extreme penalty allowed by the statute,—a fine of $500 and imprisonment for six months. We certainly cannot say that this punishment is excessive. We cannot readily conceive a libel of greater enormity than that of which the jury has found Vallery guilty. It may well be doubted whether our statutes in this regard provide penalties of sufficient severity to meet the ends of justice and prevent the defamation of character. We think this defendant may well congratulate himself that the law did not permit a more severe penalty to be inflicted.

JUDGMENT AFFIRMED.

JAMES GADSDEN, APPELLANT, V. WILLIAM LATEY ET AL., IMPLEADED WITH ALVIN SAUNDERS, APPELLEE.

FILED OCTOBER 2, 1894. No. 5477.

Mortgage on Lands in Different Counties: SUFFICIENCY OF RELEASE. A mortgage was made on lands in Dodge, Douglas, and other counties. Subsequently an instrument was executed and delivered by the mortgagee, reciting the execution of the mortgage and describing it, but reciting that it conveyed the Dodge county lands, describing the same, but making no reference by description to the other land. The instrument then proceeded as follows: "I do hereby acknowledge that the said mortgage and the note accompanying the same is redeemed, paid, and satisfied, and I do hereby release all my claim to the premises covered by said mortgage, and do release and quitclaim unto [the mortgagors], their heirs and assigns forever, the premises covered by said mortgage, and do release all obligations due me by virtue of said note and mortgage." This instrument was

acknowledged and was recorded in Dodge county, but not in Douglas. Subsequently an action was brought to foreclose the mortgage on the Douglas county land against one who had purchased after the execution of the release, but without notice thereof. *Held*, (1) That the release extended to all land described in the mortgage, and was not restricted to the particular tract described in the recital; (2) that, in the absence of allegations and proof of fraud or mistake, it operated to discharge the whole mortgage.

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

E. T. Hodsdon and *Joseph Crow*, for appellant.

Saunders, Macfarland & Dickey and *John L. Webster*, *contra.*

IRVINE, C.

Gadsden brought this action in the district court of Douglas county to foreclose a mortgage executed by the defendants Latey and Benson to one Alfred Stedman to secure a note for $5,000. The mortgage covered a large amount of property situated in the counties of Douglas, Dodge, Colfax, and Stanton; but the petition described only property in Douglas and Stanton counties. Stedman and Gadsden were partners as bankers when the note and mortgage were executed. Soon after their execution the note was transferred to the partnership and thereafter to a banking corporation, which succeeded the partnership. On the day of the maturity of the note it was again transferred to Gadsden. On the 10th of April, 1888, Latey and Benson conveyed a portion of the mortgaged property to Alvin Saunders. Saunders answered setting up several defenses, to only one of which attention need be directed. He pleaded that the note had been paid and the mortgage satisfied, and, further, that the mortgagee had executed and delivered a release thereof. There was a general finding for Saunders and a decree canceling the mortgage on the

land conveyed to him. From this decree Gadsden appeals. The release referred to was as follows:

"Know all men by these presents, that whereas William Latey and wife and William V. Benson and wife on the 23d day of September, 1887, by a certain indenture of mortgage did convey to me certain premises, to-wit, the east half northwest quarter and the west half northeast quarter section five (5), township seventeen (17) north, of range six (6) east of the 6th P. M., in the county of Dodge and state of Nebraska, which said mortgage was filed for record in the office of the county clerk of Dodge county in the state of Nebraska, on the 28th day of September, 1887, at ——— of said day, and duly recorded in Book 'W' of Real Estate Mortgages, on page 521, and which said mortgage was executed and given to secure the payment of a certain sum of money therein mentioned:

"Now, therefore, for and in consideration of the sum of one dollar, to me in hand paid by William Latey and William V. Benson aforesaid, the receipt whereof is hereby confessed and acknowledged, I do hereby acknowledge that the said mortgage and the note accompanying the same is redeemed, paid, and satisfied, and I do hereby release all my claim to the premises covered by said mortgage, and do release and quitclaim unto the said William Latey and William V. Benson, their heirs and assigns forever, the premises covered by said mortgage, and do release all obligations due me by virtue of said note and mortgage.

"In witness whereof, I have hereunto set my hand and seal this 5th day of January, 1888.

"ALFRED STEDMAN. [SEAL.]

"In presence of

"T. B. CREWITT."

This release was acknowledged and recorded in Dodge county but not in Douglas. The reply admits that the Dodge county land was released, but pleads that it was intended to, and did, release only that land and not the

Douglas county land. The evidence shows that when Saunders purchased he had no notice of the mortgage except such as the law imports from its record in Douglas county, and that he did not at that time know of the release. There is some evidence tending to create an estoppel *in pais* from other facts; but as it is not shown that Saunders relied upon or even knew of the release, no equitable estoppel can be claimed by reason thereof, and the question presented is whether or not, in the absence of facts constituting an equitable estoppel, the document referred to operated to discharge the mortgage on the Douglas county land and estop the plaintiff from asserting its invalidity for that purpose.

The first question presented is as to the proper construction of the language of this instrument. The only premises expressly described are lands in Dodge county and this description is in a recital which identifies the mortgage by parties, date, and place of record. In the operative part of the instrument is the following language: "I do hereby release all my claim to the premises covered by said mortgage and do release and quitclaim unto [the mortgagors] the premises covered by said mortgage." A distinct reference to the mortgage thus incorporates the mortgage in the release (2 Devlin, Deeds, sec. 1020, and cases cited); and the language, extending generally to the land covered by the mortgage referred to, must be taken to refer to all such land, and not only to the particular tract described in the recital. On this question *Miller v. Hicken*, 92 Cal., 229, is directly in point, although there the particular description was contained in the releasing clause instead of a recital. But if there were doubt as to the construction it would be set at rest by the following language: "I do hereby acknowledge that the said mortgage and the note accompanying the same is redeemed, paid, and satisfied, and do release all obligations due me by virtue of said note and mortgage." No language could be selected more

clearly expressing an intention to acknowledge satisfaction of the whole mortgage deed and to discharge the whole lien of the mortgage. What, then, is the legal effect of the instrument so construed? Clearly the delivery of this instrument operated, in the absence of fraud or mistake, to divest the lien of the mortgage, and must be held effective for that purpose until rescinded or reformed for such fraud or mistake. Neither fraud nor mistake is in this case pleaded, nor is any reformation asked. The reply in effect admits the instrument and puts in question merely its legal effect and construction. If reformation were sought, then the question would arise as to Saunders' notice and his *bona fides;* but as the case was presented we do not think that these questions are material. If A be the owner of land and convey to B, the deed not being recorded, and B thereafter convey to C, C takes title, although he did not investigate and did not know in fact of the conveyance from A to B. In such case A could not be heard to set up title against C on the ground that C took without notice of the fact making his title good. So here a formal deed of release was made, including even words sufficient to operate as a conveyance of the property, and, upon most familiar principles, the grantors are bound by the instrument and estopped not only by its operative part, but even by its recitals, in so far as they are particular and pertinent to the subject-matter of the instrument. (7 Am. & Eng. Ency. of Law, 7, and cases cited.) This estoppel operated in favor of the grantees in the release, and of Saunders, their privy in estate. Without regard to the other defenses and the questions arising therefrom, the foregoing considerations demanded the decree which was rendered.

JUDGMENT AFFIRMED.

P. A. NELSON v. W. JENKINS.

FILED OCTOBER 3, 1894. No. 5766.

1. **Trespass.** In order to maintain trespass to land the plaintiff must be the owner, or in possession thereof, when the acts complained of were committed.
2. **Bill of Exceptions:** OMISSION OF EVIDENCE: CERTIFICATE OF JUDGE. The certificate of the trial judge attached to a bill of exceptions, reciting that "the bill contains all the evidence offered or adduced by either party," is unavailing, and will not control, where the bill on its face reveals the fact that important and material evidence has been omitted therefrom; and in such case the verdict will not be set aside as contrary to the evidence.
3. **Trial:** ERRONEOUS ADMISSION OF EVIDENCE: WITHDRAWAL: REVIEW. Error cannot be successfully assigned upon the admission of evidence, when the trial court subsequently strikes the evidence from the record and withdraws it from the jury's consideration.
4. **Instructions:** REVIEW. Instructions to the jury must be considered together, and if then they state the law applicable to the facts and the issues made by the pleadings, it is sufficient.
5. **Highways:** ADVERSE USER. It is not indispensable to the establishing of a highway by adverse user that there be no deviation in the line of travel. If the travel has remained substantially unchanged, it is sufficient, even though at times, to avoid encroachments or obstructions upon the road, there may have been a slight deviation from the common way.

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

Jay & Beck, for plaintiff in error.

Barnes & Eames, contra.

NORVAL, C. J.

This suit was brought in the district court by P. A. Nelson to recover damages for trespass upon the south half

of the northeast quarter of section 9, in township 28, range 8 east, in Dixon county, by reason of the defendant cutting down a fence erected and standing upon said real estate. The petition contains the usual averments in an action in trespass. The defendant filed an answer, which, after admitting the cutting down of the fence in controversy, alleges that the same was erected over and across a public highway, and denies the other averments of the petition. The plaintiff for reply denies each allegation in the answer contained. From a verdict and judgment in favor of the defendant the plaintiff prosecutes a petition in error to this court.

The first assignment of error relates to the sufficiency of the evidence to sustain the verdict and judgment. The defendant admits that he cut down and removed the fence in dispute, but contends that the place where the same was standing was a part of the public road or highway, and therefore he committed no trespass. The principal question argued in the briefs is, whether a highway was established by adverse user by the public for the period of ten years; but, with the view which we entertain of another feature of the case, it will not be necessary to consider the evidence relating to the establishment of the road in controversy, or to decide whether a highway was in fact established by the proofs. Though it be conceded that there was no legal road at the point where the alleged trespass was committed, still the verdict was not contrary to the evidence. In order to maintain trespass to land the plaintiff must be the owner, or in possession thereof, when the acts complained of were committed. This question has more than once been so decided by this court. (*Yorgensen v. Yorgensen*, 6 Neb., 383; *Chicago, R. I. & P. R. Co. v. Shepherd*, 39 Neb., 523; *Hanlon v. Union P. R. Co.*, 40 Neb., 52.) The petition in this case fails to allege that plaintiff was in possession when the alleged trespass was committed, but avers that he was at that time the owner

of the land. This allegation of ownership was put in issue by the defendant's answer, and it therefore devolved upon the plaintiff to establish by competent evidence that he had title to the real estate upon which the fence was situated. It appears from an inspection of the bill of exceptions that plaintiff upon the trial introduced in evidence a deed to the premises, and it is also recited that the original of which deed is attached to the bill of exceptions and marked "Exhibit A." There is no such exhibit attached to, nor is the original deed, or a copy thereof, made a part of, the bill of exceptions in the case. The evidence fails to disclose the name either of the grantor or grantee described in the deed referred to, or that the conveyance was executed prior to the time the alleged trespass was committed. While the judge's certificate attached to the bill of exceptions contains the statement that "the bill contains all the evidence offered or adduced by either party," such recital is unavailing and will not control, inasmuch as the bill on its face reveals the fact that important evidence, the deed, is omitted. (*Missouri P. R. Co. v. Hays*, 15 Neb., 224; *Oberfelder v. Kavanaugh*, 29 Neb., 427; *Schneider v. Tombling*, 34 Neb., 661; *Dawson v. Williams*, 37 Neb., 1.) It follows that, as the entire evidence adduced in the trial court has not been embodied in a bill of exceptions, the verdict cannot be molested on the ground that it is unsupported by, or is contrary to, the evidence.

There are two assignments of error which relate to the admission of testimony. The defendant at the trial, for the purpose of establishing a highway by proceedings under the statute, was permitted to place in evidence the records of the county board of Dixon county relating to the laying out of the road over the land in question, and to introduce, over the objections of the plaintiff, oral testimony as to the contents of the petition upon which it was claimed the county board had acted. It is strenuously insisted that the admission of this was erroneous. The

record shows that the objectionable testimony was subsequently, during the progress of the trial, stricken out by the court, and the error, if any, in its admission was thereby cured, especially since the consideration of the evidence was withdrawn from the jury. While the court in its instructions did not in express language direct the jury to disregard the testimony which had been stricken out, the charge of the court was so framed as not to submit to the jury for their determination the question whether a highway had been located and established in accordance with statutory requirements. Therefore the testimony in question was as fully and completely withdrawn from the jury as if they had been told in unequivocal language to disregard it.

Complaint is made of the giving of the third paragraph of the court's charge, which is in the following language: "You are instructed that a public highway may be established by adverse use for a period of ten years or more. A peaceable, continuous, and uninterrupted use of a piece of ground, as a road by the public, for ten years or more, creates what is called a 'prescriptive' right to use the road as such, and this right continues until it is clearly and unmistakably abandoned by the public." It is urged, in argument, that this instruction is not applicable to the evidence, but that the jury should have been told that a public road could only be established by adverse user where the lands are cultivated and improved. The instruction should be read and construed in connection with the second and third instructions given at the request of the plaintiff in error, which read as follows:

"2. The jury are instructed that before a highway can be established by adverse user it must be shown by a fair preponderance of the evidence that the same has been traveled and used by the public as a highway, and has been claimed as such for ten years continuously, and that the travel thereon has been confined to definite, fixed limits,

which must be the same as the boundaries of the highway sought to be established.

"3. You are instructed that no highway can be established by adverse user of wild, uninclosed, or uncultivated lands."

It is a familiar doctrine that instructions to the jury must be construed together, and if then they state the law applicable to the issues and evidence, it is sufficient. (*Gray v. Farmer*, 19 Neb., 69; *Bartling v. Behrends*, 20 Neb., 211; *Campbell v. Holland*, 22 Neb., 589; *City of Lincoln v. Smith*, 28 Neb., 762.) Considering these three instructions together, it is manifest that the law was stated quite as favorably to the plaintiff in error as he was entitled to have given to the jury. There is no conflict in the above third paragraph of the court's charge and the third request of the plaintiff in error. The former stated the general rule relating to the establishing of public roads by adverse user, while the latter stated the exception to such rule, that a highway could not be established by mere user over wild, uninclosed lands. Each instruction is entirely consistent with the other and the jury could not have been misled by the giving of the same.

It is finally urged that the third instruction given at the instance of the defendant in error is erroneous, which instruction reads thus: "The jury are instructed that where evidence is introduced which tends to establish a highway by user or dedication, it is not necessary that the travel shall be upon the identical thread of travel, during all the time, but the travel may be slightly deviated to avoid obstructions." It is not indispensable to the establishment of a highway over lands, by prescription, or adverse user, that there be no deviation in the line of travel. If the point of travel has remained substantially unchanged for the full period it is sufficient, even though at times, to avoid encroachments or obstructions upon the road, there may have been slight changes in the line of travel. (*City of Be-*

atrice v. Black, 23 Neb., 263.) The instruction of which complaint is made correctly states the rule, and is based upon the evidence in the case.

We conclude that the record discloses no ground for disturbing the verdict, and the judgment is therefore

AFFIRMED.

GEORGE A. HOAGLAND V. HENRY WILCOX.

FILED OCTOBER 3, 1894. No. 5845.

1. **Attachment.** The plaintiff in an action is entitled to have a writ of attachment issued when he has filed an affidavit stating the necessary facts, in a court where he has instituted an action and had summons issued, which can or may be legally served, if he had the same issued with the true intent that it shall be served.

2. **Venue:** ACTIONS. A suit for the recovery of money, when the defendant is a resident of the state, must be brought in the county where the defendant resides, or in the county where he temporarily is. Such action cannot be instituted in a county in which the defendant does not reside, before he enters the county. (*Coffman v. Brandhoeffer*, 33 Neb., 279.)

3. ———: ———: ATTACHMENT: RESIDENCE OF DEFENDANT. A petition was filed in the district court of Douglas county declaring upon an account and promissory note, and an affidavit filed to procure an attachment, which stated, as grounds for the issuance of the writ, that "the said defendant is about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors; that the said defendant has property and rights in action which he conceals; that the said defendant has assigned, removed, and disposed of his property, or a part thereof, with the intent to defraud his creditors; that the said defendant fraudulently contracted the debt and incurred the obligation for which the said plaintiff's suit is brought." A summons was procured by the plaintiff to be issued, directed to the sheriff of Kearney county, and was by him there served. Defendant made a special appearance and

objected to the jurisdiction of the court, on the grounds that he was a resident of Kearney county at the time the petition was filed and summons issued, and was not then in Douglas county, which was supported by a showing of the truth of the facts stated as the grounds of the objections. The action of the court sustaining the objections to its jurisdiction and quashing the service was not erroneous.

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

The facts are stated in the opinion.

Switzler & McIntosh, for plaintiff in error:

Attachment proceedings may be commenced in the county where property can be found, and summons sent for service to the county where the defendant resides. (*Cooper v. Reynolds*, 10 Wall. [U. S.], 308; *Slaughter v. Bevans*, 1 Pinney [Wis.], 348; *Herndon v. Givens*, 16 Ala., 261; *Atkinson v. Wiggins*, 69 Ala., 190; *Becknell v. Becknell*, 110 Ind., 42; *Conahan v. Cullin*, 2 Disney [O.], 1; *Bauer v. Deane*, 33 Neb., 487.)

G. Norberg and *Stewart & Munger*, *contra*, cited: *Coffman v. Brandhoeffer*, 33 Neb., 281; *Gandy v. Jolly*, 34 Neb., 536, 35 Neb., 711; *Gates v. Wagner*, 46 Ia., 355.

HARRISON, J.

On the 9th day of February, 1892, the plaintiff herein filed a petition in the district court of Douglas county, in which was stated an action against defendant Henry Wilcox, on an account for lumber and material sold by plaintiff to defendant, also declaring upon a promissory note executed by defendant in favor of plaintiff, and also filed an affidavit for attachment, in which it was stated: "Affiant further says that the said defendant is about to convert his property, or a part thereof, into money for the purpose of

placing it beyond the reach of his creditors; that the said defendant has property and rights in action which he conceals; that the said defendant has assigned, removed, and disposed of his property, or a part thereof, with the intent to defraud his creditors; that the said defendant fraudulently contracted the debt and incurred the obligation for which the said plaintiff's suit is brought." The affidavit also contained the following statement as a foundation for issuance of notices in garnishment: "And this affiant further says that he has good reason to believe, and does believe, that the Ætna Insurance Company and the Connecticut Fire Insurance Company of Hartford, Connecticut, and within the county of Douglas, have property of the defendant in their possession; that said property consists of loss payable to the defendant by each of said insurance companies on account of the destruction by fire of property of said defendant covered by insurance policies written by each of the said insurance companies herein named; that on account of said loss by fire of said property the said two insurance companies, and each of them, are indebted to the defendant in an amount unknown to affiant." The undertaking was filed as required by law and approved by the clerk. A summons for Henry Wilcox was issued, directed to the sheriff of Kearney county, and an order of attachment and garnishee summons issued and delivered to the sheriff of Douglas county. These writs were all returned duly served, the summons to Wilcox having been personally served upon him in Kearney county. The return of the writ of attachment shows that it was not levied directly upon any property of the defendant, and the record does not disclose whether the garnishees ever answered, hence we are not informed as to whether or not any property or credits of defendant were reached by the process issued in the attachment proceedings. Afterwards the defendant Wilcox entered a special appearance and filed the following objections to the jurisdiction of the court:

"Comes now the defendant Henry Wilcox, doing business as the Wilcox Lumber Company, and appearing specially for the purpose of objecting to the jurisdiction of this court, and for no other reason or purpose, shows to the court that it has no jurisdiction to proceed in the above entitled cause for the following reasons:

"1. This defendant is a resident of Wilcox, Kearney county, Nebraska.

"2. The pretended service of the pretended summons from Douglas county, Nebraska, on this defendant was made in Kearney county, Nebraska.

"3. The Ætna Fire Insurance Company and the Connecticut Fire Insurance Company are not parties to this suit, but said insurance companies have been summoned to appear and answer as garnishees only."

The objections were accompanied by affidavits setting forth the facts of his residence in Kearney county, and that he was not in Douglas county at the time the petition in the suit was filed. On hearing in the district court the challenge to the jurisdiction was sustained and the following order made: "Now on this 14th day of April, A. D. 1892, this cause being heard on objections of defendant to jurisdiction of the court herein, upon consideration whereof the court sustains the said objections, and hereby orders that the service of process heretofore made upon defendant in this action be, and the same is hereby, quashed, to which order and ruling of court plaintiff excepts, and upon application is allowed forty days from rising of court in which to prepare and serve bill of exceptions herein." To secure a review of the above order the case was removed to this court by petition in error in behalf of George A. Hoagland, plaintiff.

The only question presented for consideration and determination is, did the commencement of the attachment proceedings in Douglas county, where property or credits belonging to the defendant could be found and subjected to

attachment process by the aid of garnishment, authorize the issuance of the summons to Kearney county and render its service there sufficient service upon which to predicate a personal judgment against the defendant so served, or one which would appropriate the property or credits, if any discovered, to the payment of the plaintiff's claims?

In the case of *Coffman v. Brandhoeffer*, 33 Neb., 279, it was held: "An action is considered commenced, so far as the right to issue a writ of attachment is concerned, as soon as the petition is filed in the proper court, and a summons is issued thereon with a *bona fide* intent that it shall be served." "A suit for the recovery of money, when the defendant is a resident of the state, must be brought in the county where the defendant resides, or in the county where he temporarily is. Such action cannot be instituted in a county in which the defendant does not reside before he enters the county." But it is contended by the counsel for plaintiff that the doctrine announced in *Coffman v. Brandhoeffer* does not apply in the case at bar, because, as they state in their brief, "it was not a proceeding *in rem*." The opinion in the case was written by NORVAL, J., who makes the following statement: "This suit was commenced on the 3d day of April, 1890, in the county court of Douglas county by the plaintiff in error upon a promissory note signed by the defendant. At the same time an affidavit for attachment and garnishment was filed, and a summons, writ of attachment, and garnishee summons were issued, returnable May 5, 1890. The grounds for attachment were: (1) That the defendant was about to remove his property, or a part thereof, out of the jurisdiction of the court with intent to defraud his creditors; (2) that the defendant 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 the defendant has property and rights in action which he conceals; (4) That the defendant has assigned, removed, or disposed

of, and is about to dispose of, his property or a part thereof, with the intent to defraud his creditors; (5) that the defendant fraudulently contracted the debt on which the action is about to be brought. On April 25 the summons was returned not served, the defendant not being found in the county." The defendant filed a motion which was as follows: "Comes now the defendant, by his attorney, and makes his appearance specially and for the sole purpose of objecting to the jurisdiction of this court, and respectfully represents that this court has no jurisdiction of this defendant and no means of obtaining jurisdiction, and therefore no basis or authority for issuing an attachment against this defendant. Wherefore defendant asks that said attachment be withdrawn and declared void." With this motion several affidavits were filed establishing that the defendant was a resident of Keith county, and not in Douglas county when the action was instituted. There were also affidavits presented on the part of plaintiff, which, quoting the language of the opinion, were "to the effect that at the time the summons was issued they had information that the defendant was en route to the county of Douglas from Keith county; that the summons was issued with a *bona fide* intention to have it served on the day it was issued, or before the return day thereof, and that the defendant was every few weeks in Douglas county, and plaintiff believes he will soon have an opportunity of having the summons served on the defendant in said county." The motion was sustained and the case dismissed, and in the district court of Douglas county, on error thereto, the ruling was sustained, and in this court it was affirmed, the syllabus on the question of jurisdiction being as heretofore quoted, and in the text of the opinion it is stated: "For some purposes an action is not regarded as commenced until the defendant is summoned; while for others an action is deemed begun when the petition is filed and a summons is issued thereon which is served on the defendant. Manifestly it was the

intention of the legislature that an order of attachment could properly issue before the summons is served. The purpose of an attachment is to secure the property of the debtor for the payment of the judgment that shall be rendered against him. If the plaintiff must wait until the service of a summons is made on the defendant before he can sue out an attachment, the remedy would be of little or no value. We conclude that an action is to be considered commenced, so far as the right to issue a writ of attachment is concerned, as soon as the petition is filed in the proper court, and summons is issued thereon with a *bona fide* intention that it shall be served. (*Hagan v. Burch*, 8 Ia., 309; *Reed v. Chubb*, 9 Ia., 178; *Bell v. Olmsted*, 18 Wis., 75.) Of course attachment proceedings will be of no avail unless suit is brought in a court having jurisdiction and personal service of a summons is made upon the defendant or service is obtained by publication when such service is proper. The next question presented is, was this action properly brought in Douglas county? The suit is for the recovery of money, and it is undisputed that the defendant was then a resident of the state and could have been personally served with a summons therein. This not being a local action, section 60 of the Code governs as to the county in which it must be brought. This section reads: 'Every other action must be brought in the county in which the defendant or some of the defendants reside, or may be summoned.' The defendant was a resident of Keith county, and was not in the county of Douglas when the suit was instituted. The sheriff returned the summons indorsed 'Not served, the defendant not found in Douglas county.' Clearly the meaning of section 60 is that actions like this, if not instituted in the county where the defendant resides, must be begun in the county where the defendant actually is, and the summons must be served upon him while in the county. The suit cannot be commenced before he enters the county. * * * The suit being improp-

erly brought in Douglas county, there was no authority for issuing the attachment."

It was undoubtedly determined in the opinion in the above case that an action, such as is the one at bar, must be commenced in the county where the defendant, if only one, as in this case, resided or was present and could be served with process at the time of the institution of the action, and the facts of the attachment and garnishment proceedings, being a part of the suit, could not and did not alter or extend the right of the plaintiff to make service of process upon the defendant beyond the manner prescribed and authorized by statutory provisions, as was attempted in the case at bar by the issuance of summons to the sheriff of Kearney county. Notwithstanding that jurisdiction might have been obtained of property of defendant, if any found in Douglas county, by the officer with the attachment writ, or through the process of garnishment, yet the court would have been powerless to render any judgment or make any order which would subject it to the satisfaction of the debt of defendant until in some manner pointed out by the law, service of notice was effected upon the defendant, and as he was a resident of the state, it could not be by publication; and as he was not a resident of, and was not at the time in, Douglas county, he could not be personally served. There could be no judgment entered without notice given. (See Cooley, Constitutional Limitations [5th ed.], 498; *Windsor v. McVeigh*, 93 U. S., 277; Brown, Jurisdiction, sec. 40; *Anheuser-Busch Brewing Association v. Peterson*, 41 Neb., 897.) The service of the summons in Kearney county was unauthorized by any provision of our law, and hence was ineffectual, and the court below did not err in sustaining the objection to it.

The counsel for plaintiff have cited and quoted from the case of *Cooper v. Reynolds*, 10 Wall. [U. S.], 308, but this was a decision rendered in a collateral attack upon the effect of a judgment rendered in an attachment case, where

the writ had been levied upon property, and was not a direct attack upon the jurisdiction of the court in the original suit, as is the one at bar, and we do not consider it as decisive of the question in the case now under consideration.

The case of *Slaughter v. Bevans*, 1 Pinney [Wis.], 348, is cited by counsel as being directly in point. From the report of the case we gather that Bevans commenced an action in Iowa county district court and sued out a writ of attachment and also writs of attachment directed to Brown, Dane, Grant, Milwaukee, and Racine counties. The sheriff of Iowa county returned the writ directed to him *nulla bona*, but personally served; how or when the personal service was made not being stated or appearing in the return. The defendant in the case, Slaughter, made a motion to dismiss the proceeding, alleging, as a reason for dismissal, that he was a resident of Dane county at the time of the commencement of the action, and still continued to reside there. This motion was overruled, and the supreme court, in passing upon this point, says in the syllabus of the case: "The law does not confine the plaintiff in attachment, in suing out his writ, to the county where the defendant resides or where he is found; the affidavit that the defendant has property in the county where the writ issues, is a sufficient authority for commencing in such county;" and in the body of the opinion: "The fourth error assigned is: that the court erred in overruling the motion to dismiss the attachment. The motion was made at the September term, 1840, on the ground that the defendant was at the time of the commencement of the suit, and continued to be, a resident of Dane county, and not of the county of Iowa. The process of attachment is, in the case of a non-resident, a means of compelling a party to appear through his property. It is not regulated by the general law respecting proceedings in courts, but it is regulated exclusively by the act upon the subject of attachments. That act does not

confine the plaintiff in his suit to the county where the defendant resides or is found. The original affidavit filed by the plaintiff sets forth that the defendant had property in the county of Iowa, which was enough to authorize the writ in that county, if the point were doubtful." The foregoing opinion, while it holds that a writ of attachment may be obtained or issue in a county other than the one in which the defendant resides or may be found if the proper affidavit is filed, does not hold that the action may proceed without service upon the defendant, and the return of the writ of attachment showed personal service, which is a material fact, as the law of Wisconsin has always seemed to contemplate that some service of the attachment writ should be made, and when made be a sufficient foundation for further proceedings to subject the property, if any levied upon, to the payment of the debt the recovery of which was sought in the action in which the writ issued. The learned judge who wrote the opinion in the case of *Slaughter v. Bevans* doubtless had this condition of the law of Wisconsin in regard to attachment, coupled with the fact that the return of the writ showed service on defendant, in mind when he stated, "The law does not confine the plaintiff in attachment, in suing out his writ, to the county where the defendant resides or where he is found." There are no such provisions in our law, and we do not think the rule announced in *Slaughter v. Bevans* entirely applicable, or a governing one here.

Another case which is cited by counsel is that of *Herndon v. Givens*, 16 Ala., 261, in which the opinion of the court, in so far as it is embodied in the syllabus, is as follows: "The statute of 1807, which enacts that 'no freeholder of this state shall be sued out of the county of his permanent residence,' does not apply to suits commenced by attachment;" and in the text: "The act of 1807 enacts that 'no freeholder of this state shall be sued out of the county of his permanent residence, provided the same be within this

state, unless it be in the actions enumerated in the last section; nor shall any person who may reside in this state be held to bail, if sued out of the district or county of his residence and freehold.' (Clay's Dig., 342, sec. 163.) This enactment does not apply to suits commenced by attachment, but only to those instituted in the ordinary mode of process against the person of the defendant. The attachment is an extraordinary remedy, justified by the exigency of the case, and supposes that the seizure of the defendant's property by the initiatory process is most probably essential to the recovery of the plaintiff's demand. If the creditor was always compelled to sue it out in the county in which the debtor may be a 'freeholder' and have a 'permanent residence,' it would sometimes be ineffectual, and the debt might be lost. Thus, where the freehold was of much less value than the amount of the debt, or was encumbered, and the creditor might meet the debtor in another county removing all his personal estate beyond the limits of the state, if the creditor in such case were required to sue his attachment in the county of the debtor's residence, before it could be levied, the latter might transfer his property to another jurisdiction." The reasoning upon which the rule announced was founded, that if the creditor discovered his debtor in a county other than that of his permanent residence removing his personal property beyond the limits of the state, and must go to the county of the debtor's residence to commence an action before he can institute a suit and sue out an attachment, before it could be levied the debtor might get without the state and thus defeat the plaintiff's claim and evade the process of the court, is robbed of its potency and force in this state by our statutory provisions which allow an action to be brought against the party in any county where he can be served with summons, thus providing for the exact contingency or situation supposed by the Alabama court and used to illustrate and explain the rule in *Herndon v. Givens.*

The rule announced in that case is derived from a decision construing a provision of statute differing very materially from ours on the subject embraced and giving, as a ground for the position taken, a reason the significance and force of which is destroyed by our laws, which provide a remedy for the exact difficulties and conditions which moved the Alabama court to announce the decision it did, and we cannot adopt it or allow it to have a controlling influence in the decision of the present case.

The other Alabama case cited, *Atkinson v. Wiggins*, 69 Ala., 190, and another which we find, *McPhillips v. Hubbard*, 12 So. Rep. [Ala.], 711, both follow and are based upon the reasoning in *Herndon v. Givens*, *supra*, and are entitled to no greater weight or consideration as precedents than should be given to it.

We are satisfied that the lower court was right in holding that the commencement of the action by attachment, or the fact that a writ of attachment had been obtained in the action in Douglas county, was not sufficient to authorize the issuance of the summons to Kearney county and its service on defendant, that such service was invalid and ineffective, and there was no error committed in quashing the service.

AFFIRMED.

WILLIAM D. MEAD, JR., v. FRANK L. WEAVER.

FILED OCTOBER 3, 1894. No. 5784.

1. **Witnesses**: CONVERSATION WITH DECEASED CO-PLAINTIFF: PROOF. On suggestion of the death of one of two plaintiffs, where it had been ordered that the action proceed in the name of the survivor as plaintiff, *held*, that thenceforward said survivor was such representative of the deceased that a conversation between one of the parties interested and deceased was not provable by such interested party's testimony.

2. **Attorneys' Fees: TAXATION IN FEDERAL COURTS.** The taxation of attorneys' fees by the federal courts is a matter of which such courts have sole cognizance, and such taxation cannot in the state courts be impeached as being contrary to public policy.

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

The opinion contains a statement of the case.

William A. Redick, for plaintiff in error:

The court erred in refusing to admit testimony as to conversations with E. W. Whipple, deceased. (*Shain v. Forbes*, 23 Pac. Rep. [Cal.], 198; *Hess v. Lowery*, 122 Ind., 225; *Kansas Mfg. Co. v. Wagoner*, 25 Neb., 442; *Bates v. Forcht*, 1 S. W. Rep. [Mo.], 120; *Magenau v. Bell*, 13 Neb., 249; *Wolf v. Madden*, 47 N. W. Rep. [Ia.], 981; *Apperson v. Exchange Bank*, 10 S. W. Rep. [Ky.], 801.)

The attorney should not be allowed to recover. (*Hopping v. Quin*, 12 Wend. [N. Y.], 517; *Scobey v. Ross*, 5 Ind., 445; *Semmes v. Western Union Telegraph Co.*, 20 Atl. Rep. [Md.], 127; *In re Breckenridge*, 31 Neb., 490.)

Weaver & Giller and *C. A. Baldwin*, *contra*, contending that the testimony relating to conversations with E. W. Whipple, deceased, was properly excluded, cited: *Wamsley v. Crook*, 3 Neb., 344.

RYAN, C.

This action was begun in the county court of Douglas county by Ernest W. Whipple and Frank L. Weaver, as partners doing business in the name and style of Whipple & Weaver. After an appeal had been taken to the district court, the death of Ernest W. Whipple was suggested, and on motion it was ordered that the case proceed in the name of Frank L. Weaver, the remaining party plaintiff. In

the petition it was averred that plaintiffs were practicing attorneys, and that during the month of December, 1888, the defendant William D. Mead placed certain notes, secured by two mortgages, in the hands of plaintiffs with instructions to foreclose the same in the United States circuit court for the district of Nebraska, and promised to pay plaintiffs for such services, and plaintiffs promised to take therefor whatever sum the said court should allow as attorneys' fees; that pursuant to such instructions and in consideration of the aforesaid promise, plaintiffs began two foreclosure suits in favor of the aforesaid William D. Mead, —one on December 14, 1888, against George J. Paul and Gustave B. Hengen, and the other on December 26, 1888, against George J. Paul and George B. Tzschuck, and prosecuted said suits to judgment; that in each of said foreclosure actions a request for stay was duly filed. It was further alleged by the plaintiffs that as attorneys in said foreclosure proceedings they obtained an allowance of the sum of $175 as attorneys' fees in each case, and that about the expiration of the stays taken they were discharged as attorneys from both foreclosure cases, and that after discharging plaintiffs as such attorneys, William D. Mead settled and satisfied of record the judgment rendered in the case first above described. The recovery of judgment for the above aggregate sum of $350, with interest thereon from July 8, 1889,—the date whereon the two decrees of foreclosure were entered,—constituted plaintiffs' first cause of action. For their second cause of action the aforesaid plaintiffs alleged in their petition that on the 14th day of June, 1889, they, at the request of William D. Mead, on his behalf commenced injunction proceedings in the said United States circuit court to restrain George J. Paul and others from removing from the premises, on which Mead held a mortgage, certain buildings, constituting a part of the realty mortgaged, and obtained a restraining order as prayed, for which services they claim judgment for the sum

of $100, with interest from June 14, 1889. In the answer it was alleged by way of defense that Mead was a resident and citizen of the state of New York when the aforesaid foreclosure proceedings were begun, while Jamieson was a resident and citizen of the state of Nebraska; that Mead was advised by plaintiffs to bring said foreclosure suits in the circuit court of the United States for the district of Nebraska, and further advised that said suits could not be brought in said court unless said Jamieson assigned and indorsed said notes and mortgages to said Mead, but that if his assignment and indorsement was made, then said Mead, being a citizen of New York, could bring suit in said court against the defendants in the foreclosure proceedings who were all residents and citizens of the state of Nebraska; that in pursuance of the instructions of said plaintiffs, and relying on the advice so given, defendant Mead procured said assignments and said suits were commenced in said court as alleged; that the petition in either of said foreclosure suits did not disclose the residence or citizenship of Jamieson, but alleged the citizenship of Mead and the several respondents in each suit, but nowhere in said suits did the citizenship of said Jamieson appear until after decrees and the expiration of the stays. The defendant furthermore answered that upon expiration of the stays when orders of sale had been issued, the defendant for the first time discovered that the said circuit court had no jurisdiction to foreclose said mortgages on account of the lack of requisite citizenship of Jamieson, the complainant's assignor, and the decrees in said causes were nullities, or the question of their validity so grave that it would be unsafe and unwise to proceed with said sales when the title to the property sold thereat would be defective if not worthless. Thereupon the defendant denied himself the further services of plaintiffs and under the advice of other counsel in good standing as to legal ability, settled one of said suits for the sum of $225 less than the face of the decree; that in the other suit

no settlement could be effected, wherefore Mead was compelled, as he alleged, to go on with the sale and take his chance on the title procured thereat, which he did, and bought the property in at said sale, which was confirmed by the court over the objections of the foreclosure defendants, interposed on account of the want of jurisdiction of said court, which availed nothing except to prevent the recovery of a deficiency judgment, which, but for such want of jurisdiction, should have been rendered for about $2,400. In relation to the injunction proceedings described in the petition, defendant Mead answered that they were simply auxiliary to the foreclosure proceedings, and that the compensation in the foreclosure proceedings provided for should be held to be a discharge of all liability on account of attorneys' fees in said injunction proceedings. The prayer of the answer of defendant Mead was that his damages set forth in his answer as having arisen on account of the malpractice of the plaintiffs should be set off against any amount which might be found due plaintiffs, and that Mead might be dismissed with his costs. By a reply the averments of the answer were denied. A trial of the issues resulted in a verdict in favor of plaintiffs for the sum of $539.87, upon which judgment was duly rendered. To reverse this judgment the defendant, as plaintiff, has filed his petition in error in this court.

It is unnecessary to discuss the evidence adduced in support of each party's contention, for there was sufficient to support a verdict in favor of either party. The contest was largely directed to proof on the one hand that the commencement of the foreclosure proceedings in the federal court was suggested by the defendant in error simply to enable them to secure the taxation of attorneys' fees, notwithstanding the fact known to said defendant in error that to enable Mead, a resident and citizen of New York, to institute such proceedings in the United States court it was necessary that he should secure an assignment from

Mr. Jamieson of his rights as joint owner of the notes secured by the mortgages of which foreclosure was desired. The defendant in error showed by the testimony of Frank L. Weaver that he had no knowledge that Mr. Jamieson was a resident or citizen of Nebraska. The plaintiff in error then offered to prove a conversation between Mr. Whipple (since deceased) and Mr. Jamieson, whereby, as plaintiff in error claimed, it would be shown that Whipple knew that Jamieson was a resident and citizen of Nebraska, and that notwithstanding such knowledge he advised that the assignment should be made and foreclosure begun in the name of William D. Mead as complainant in the federal court. An objection to this proposed testimony was sustained on the ground that as Whipple is now dead, any conversation had between him and a witness adversely interested could not be given in evidence as against Whipple's representative. In section 45 of our Code of Civil Procedure it is provided that in case of the death of a party to an action the court may allow the action to continue by or against his representative or successor in interest. As has already been said, the district court, upon suggestion of the death of Whipple, ordered that the case proceed in the name of Weaver, the surviving plaintiff. By the statute, which conferred power upon the district court to make this order, the party in whose name the action is continued is designated as the "representative" of the deceased. We are not at liberty to ignore this use of the word "representative" when so directly referred to, as we find it in section 329 of the same Code. There had been no evidence given which, under the section just referred to, rendered competent the testimony offered as to the alleged conversation between Jamieson and Whipple. The transfer of the mortgage securities admittedly left Jamieson as much actual interest in the result as before the assignment. The exclusion of the proposed testimony of Jamieson was therefore proper. (*Wamsley v. Cook*, 3 Neb., 344; *Ransom v. Schmela*,

13 Neb., 74; *Magenau v. Bell*, 13 Neb., 249; *Housel v. Cremer*, 13 Neb., 298.) The exclusion of the proposed testimony of Mr. Mead as to his conversation with Mr. Whipple was proper on the ground just stated and, therefore, will receive no independent consideration.

The defendant, by way of answer, and throughout the trial, insisted that the contract looking to the taxation of attorneys' fees in favor of the defendant in error was one contrary to public policy. No claim was made that the attorneys' fee provision in the mortgages foreclosed was a device for covering up the exaction of unlawful interest, as seems to have been assumed was the case in *Dow v. Updike*, 11 Neb., 97, in which was first questioned the right to tax attorneys' fees. In the opinion just referred to the only other question made of the right to tax attorneys' fees was because in an act passed by the legislature in 1873 that right was recognized, and it was inferred from the repeal of said act that the legislature intended to withdraw and deny this right by which the act repealed had been conferred. Since the filing of the above opinion there have been other decisions of this court based upon the inference just noted. There has also been reprobated a resort to questionable means by attorneys for the purpose of having taxed these fees, but this court has never directly nor indirectly assumed to criticise the power or motives of the federal court in taxing such costs as we have now under consideration.

In respect to the questions argued with reference to instructions given and those refused it is sufficient to say, generally, that there was such a grouping of those complained of in argument with those of which no complaint is, or properly could be, made that we cannot consider them as invited by the plaintiff in error in argument. The judgment of the district court is

AFFIRMED.

IRVINE, C., not sitting.

J. T. ROBINSON NOTION COMPANY, APPELLEE, V. JOHN B. FOOT ET AL., APPELLANTS.

FILED OCTOBER 3, 1894. No. 5671.

1. **Fraudulent Conveyances:** PREFERRING CREDITORS. An intention to defraud ought not to be inferred from the mere fact that by pledging his personal property and mortgaging his real estate a debtor has given a preference to one or more of his creditors.
2. **Judicial Sales:** TITLE OF PURCHASER: FRAUD. A purchaser of real property at judicial sale, duly confirmed, takes a title which cannot be assailed because of fraud in a prior transfer of the decree under which such sale was had, provided the aforesaid judicial sale itself was in all respects free from fraud and collusion.

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

H. Gilkeson and *Frick, Dolezal & Stinson*, for appellants.

Mahoney, Minahan & Smyth and *Simpson & Sornborger, contra.*

RYAN, C.

This action, to subject certain real property situated in Saunders county to the payment of a judgment in its favor, was commenced by the J. T. Robinson Notion Company on March 16, 1891, against John B. Foot, its judgment debtor, and other parties joined as defendants. Of these parties, it was alleged that the Bank of North Bend fraudulently claimed to be the owner of said real property, while as to the other parties, M. E. Smith and W. V. Morse, it was charged, simply, that they had or claimed some interest in the premises as mortgagees. No averment was made by which, either directly or indirectly, it was sought to

impeach the *bona fides* of the mortgages held by Morse or Smith. As against the Bank of North Bend, it was alleged that judgment was obtained by the J. T. Robinson Notion Company in January, A. D. 1891, against John B. Foot, in the district court of Dodge county, for the sum of $1,278; that execution thereon was duly issued, and returned "No property found whereon to levy," after which a transcript of the last named judgment was filed in the office of the clerk of the district court of Saunders county, which was followed by an execution from that office, returned as had been that preceding it; that about February 25, 1888, defendant Foot purchased from M. Dowling a certain note for $1,478.53, secured by mortgage on the premises now sought to be subjected to Foot's debt; that afterward, on September 24, 1888, defendant Foot, in a proceeding instituted for the foreclosure of said mortgage, obtained a decree for the sum of $1,546.29, drawing interest at the rate of ten per cent per annum; that on or about December 19, 1888, defendant Foot transferred all his interest in said decree to the Bank of North Bend. The sole charges of fraud made in the petition were in this language: "The plaintiff further alleges that said transfer of said decree from said Foot to said bank was so conveyed as aforesaid fraudulently, without consideration, and for the express purpose of protecting the assets of said Foot against the just claims of the creditor of said Foot, and for the further purpose of hindering and delaying the plaintiff and other creditors of said Foot in collecting their just claims against said Foot. Plaintiff further alleges that in pursuance of said fraudulent intent upon the part of said Foot and said bank, said bank did, on or about the 15th day of January, 1889, cause said premises hereinbefore described to be sold at sheriff's sale, and thereupon purchased said premises at said sale, and are now holding said premises under the sheriff's deed executed to said bank upon the confirmation of said sale;

and plaintiff further alleges that by taking said sheriff's deed said bank became the trustee of said Foot, and, as such, yet holds said premises." In the petition there was no averment as to when the indebtedness from Foot to the J. T. Robinson Notion Company originated. The existence of any indebtedness is first shown by pleading the judgment obtained in January, 1891. The transfer of the decree was in the petition asserted to have taken place on December 19, 1888,—a little more than two years before there was alleged to have been in existence any claim in favor of the notion company against Foot. It requires a very liberal resort to construction to supply the lacking averment from the general statements that the transfer of the decree was made "fraudulently, without consideration, and for the express purpose of protecting the assets of said Foot against the just claims of the creditor of said Foot, and for the further purpose of hindering and delaying the plaintiff and other creditors of said Foot in collecting their just claims against Foot." In a close case this might become very important. It is now mentioned because if this indebtedness from Foot to the notion company had its origin before the events transpired, of which complaint is made, the company has apparently slept on its rights for an unusual length of time before beginning this suit, in excuse of which no explanation has been offered. On the other hand, if this indebtedness arose after the transfer complained of, there is shown no reason justifying complaint by the notion company, for with fraudulent transfers anterior to the creation of an indebtedness to him the creditor ordinarily has no concern. These, however, are not the only difficulties to be overcome in sustaining the decree of the district court which granted the relief prayed. It was shown by the evidence that for a long time prior to December 18, 1888, the defendant Foot was carrying on the business of a general merchant at North Bend, the place of business of the bank; that

there were quite a number of claims owing by Foot,—that to the bank just named then being of the amount of $11,-045.50. At the date last named Mr. Foot failed in business, having on hand a stock of merchandise which invoiced about $16,000. He had also several pieces of incumbered real property, among which was that now sought to be subjected to the payment of the notion company's claim. To secure certain of the creditors, he gave chattel mortgages on his merchandise, as follows: To the appellant bank, one for $7,545.50; to May Brothers, one for $7,500, and one to Mr. Moone and Mr. Smith for about $2,300. As the goods mortgaged invoiced about $16,000, and the amounts secured by these mortgages amounted to $17,-345.50, fraud could not be implied as to this transaction because of these creditors taking an inordinate amount of security. There was, however, still unsecured to the bank of North Bend a balance of $3,545.50. As security for $1,900 of this balance, Foot gave the bank an assignment of his decree against the premises sought to be subjected in this action, and for the security of the remainder he mortgaged to the bank certain lands in Dodge, Platte, and Butler counties, subject to certain mortgages which were afterward foreclosed. The validity of the decree assigned by Foot to the bank was in no way assailed in the district court, and, hence, must conclusively be presumed to have been correct and just. The first lien established by it was for costs; second, the claims of D. C. Hall; third, the claim of John Beermaker; fourth, the amount due John B. Foot. The return of sale under this decree shows that the sale was for the sum of $1,250, on the bid of the Bank of North Bend. After satisfying costs, there were distributed the following amounts under the decree: To D. C. Hall, $1,064.50; to John Beermaker, $29.55; to John Foot, the balance, $63.55. Exclusive of costs, the amount actually paid by the bank to the sheriff was $1,094.05 on the 15th day of January, 1889, and during the month last named

this sale was duly confirmed, and presumably the amounts respectively due Hall and Beermaker were paid to them. There is no claim made that the sale was irregular, nor that the distribution to Hall and Beermaker was unauthorized; neither is their right to receive all that was paid them in any way questioned. After the bank's purchase, its title rested on the decree and sale. The transfer of the decree then became important only so far as it authorized payment of such part of the proceeds of the sale as Foot or his assignee might be entitled to receive from the proceeds of the sale pursuant thereto. It might be that upon proper averments, sustained by proofs, the notion company could show itself entitled to redeem by paying to the bank the amount by it paid over and distributed between Hall and Beermaker, with interest thereon; but this would involve a tender of the amounts last named. No such tender has been made; neither was this action one for redemption. An action to redeem was suggested as the proper proceeding under similar circumstances in *McKeighan v. Hopkins*, 14 Neb., 361, and it was therein said that a judicial sale could not be collaterally attacked except for fraud or collusion. Neither of these grounds were urged as against the validity of the decree or sale thereunder, and the notion company, therefore, was in no such situation that it should be permitted to maintain its action in the form in which it was instituted, especially in view of the fact that between the bank and Foot there was no evidence to justify a finding of the existence of the trust relation charged in its petition.

The evidence in this case has been carefully considered, and while there were circumstances which called for explanation, there was in each instance such an explanation as left no reason for suspecting the motives of any of the parties concerned. The district court seems, by the questions propounded to the cashier of the bank, to have been greatly influenced by the fact that at the time the transfer

of the decree was made the assignor thereof was insolvent, to the knowledge of the assignee. This circumstance alone would not be sufficient to justify the inference of fraud, for an insolvent debtor has the right, in good faith, to prefer one creditor to another. (*Jones v. Loree*, 37 Neb., 816.) The judgment of the district court is

REVERSED.

LARS A. PETERSON ET AL., TRUSTEES OF THE FIRST SWEDISH BAPTIST CHURCH OF STROMSBURG, NEBRASKA, APPELLEES, V. SAMUEL SAMUELSON ET AL., APPELLANTS.

FILED OCTOBER 3, 1894. No. 5288.

Religious Societies: SECEDERS: FORFEITURE OF MEMBERSHIP. Where certain members of a church society withdrew therefrom and organized another society of the same church, and afterward returned to the society from which they had withdrawn, there exists no presumption that by said withdrawal the seceders had forfeited their membership of the church as parts of which both societies had existed.

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

The facts are stated by the commissioner.

E. L. King, *E. E. Stanton*, and *R. S. Norval*, for appellants:

A majority of the members of a religious society cannot change the purpose for which its property was acquired by changing the corporate name of the society. (*Baker v. Ducker*, 79 Cal., 365.)

Even if the majority of the members of a church society should secede, such secession would forfeit the right of the seceders to the common property, and the minority remaining become entitled to its exclusive use. (*Rottmann v. Bartling*, 22 Neb., 375; *Methodist Episcopal Church v. Wood*, 5 O., 283; *Lewis v. Watson*, 4 Bush [Ky.], 228; *Associated Reform Church v. Trustees of the Theological Seminary of Princeton*, 4 N. J. Eq., 77; *Hoskinson v. Pusey*, 32 Gratt. [Va.], 428; *McRoberts v. Moudy*, 19 Mo. App., 26.)

An organized church cannot be divested of its property against its will, even though a majority of its members enter into a new organization which adopts the name of the old, provided the old still exists. (*Venable v. Coffman*, 2 W. Va., 310; *Harper v. Straws*, 14 B. Mon. [Ky.], 48.)

There being no provision of the statute permitting two church societies to organize in one, any pretended organization would be void, as the statute cannot be extended by implication beyond its language. (*Evenson v. Ellingson*, 39 N. W. Rep. [Wis.], 342.)

H. M. Marquis and *M. A. Mills*, *contra*, cited: *Watson v. Jones*, 13 Wall. [U. S.], 727; *Shannon v. Frost*, 3 B. Mon. [Ky.], 258; *German Reformed Church v. Commonwealth*, 3 Barr [Pa.], 282; *State v. Farris*, 45 Mo., 183; *Hadley v. Mendenhall*, 89 Ind., 136; *Chase v. Cheney*, 58 Ill., 509; *Gibson v. Armstrong*, 7 B. Mon. [Ky.], 495; *Lamb v. Cain*, 29 N. E. Rep. [Ind.], 13; *Venable v. Baptist Church of Atchison*, 25 Kan., 177.

RYAN, C.

This action was brought in the district court of Polk county by the plaintiffs named as trustees of the First Swedish Baptist Church of Stromsburg, against the defendants, to enjoin such defendants from threatened forcible detention of possession of certain church property.

No objection was made as to the form of action by which relief was sought, and none will be raised by us further than to suggest that we shall not enter upon a consideration of the title to the church property above referred to, questioned because of alleged irregularities in making conveyances thereof. The defendants justify absolute control of the church property which they have undertaken to enforce by a claim (1) that the persons named above as plaintiffs are not in reality trustees; (2) because the church society for which said persons assume to act as trustees has no standing to assert a right of possession. It appears from the evidence adduced that in the year 1873 a church society was organized near Stromsburg, under the name of the "Baptist Church Society of the County of Polk and State of Nebraska," which society, in 1875, received a conveyance of block 3, in Buckley's Addition to the town of Stromsburg, upon which lot there is now a church edifice and parsonage which have cost about $7,000. In the evidence we find it repeated over and over that in 1887 about fifty members of the church "seceded" and organized a separate organization under the name of the "Regular Swedish Baptist Church Society." Subsequently the original society met with these so-called "seceders," and a reunion of these elements was effected. After this amalgamation was accomplished the society resulting resolved to and did change its name to that of "The First Swedish Baptist Church of Stromsburg, Nebraska." It is argued that this last named society did not succeed to the rights of that first above named, because there is no provision of the statute authorizing the consolidation of two distinct church organizations resulting in a third one entirely distinct. The appellees urge that either this must have been done or the members of the society must have been admitted as new members, which could only be done when less than five members dissented,—in this instance there were twenty-six adverse votes. The trouble with both of these alterna-

tive propositions is that they assume that the seceders were outside the church which they originally left. The evidence discloses simply that these fifty or more members organized a new society, built a new church, and worshiped therein, separate and apart from the society which they had left. They were still members of the Swedish Baptist Church at large, and there is no intimation that by seceding from one society their relations to the church at large were impaired. When, therefore, there was a reunion of the fragments, the same society existed as had originally been organized, and it might or might not change its name as its members chose. This reunion was by merger of the seceders into the first organized society, and that the trustees of that society still remained such there can be no room for doubt. After the return of the seceders, the reunited society elected William O. Backlin, one of the seceders, a new trustee. It is urged in argument that the three other trustees had previously resigned and are therefore now disqualified. The evidence shows that while there was discord in the affairs of the parent church society, these three trustees, at a business meeting of the church, declared they would resign if quiet was not restored, according to the testimony of some witnesses. Tested by the evidence of other witnesses, these three trustees actually tendered their resignations because of want of harmony in the church society. In either event this is immaterial, for, if tendered, the resignations were not accepted and these trustees continued afterward the discharge of their duties as trustees.

It is not deemed necessary to enter into a detailed review of the causes of the ill-feeling which even now seems to find lodgment in this little community. The district court found for the plaintiff on the facts, as to which an extended statement would subserve no useful purpose, for each finding was based on sufficient evidence. The judgment of the district court is

AFFIRMED.

FANNIE M. SLOMAN, APPELLANT, V. WILLIAM H. SPELLMAN, APPELLEE.

FILED OCTOBER 3, 1894. No. 5368.

Review of Conflicting Evidence. There being no question of law involved in this case, and the finding of the district court being supported by sufficient competent evidence, its decree is affirmed.

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

Brome, Andrews & Sheean, for appellant.

Switzler & McIntosh, contra.

RAGAN, C.

On the 4th day of February, 1890, William H. Spellman filed in the office of the register of deeds of Douglas county, Nebraska, a duly verified account of certain items of material and labor which he alleged that he had furnished Fannie M. Sloman in pursuance of a verbal contract made with her for the plumbing and gas-fitting of her residence on lot 2, in block 10, in West Omaha Addition to the city of Omaha, and claimed a lien on said real estate for said labor and material so alleged to have been furnished. On the 27th day of March, 1890, Fannie M. Sloman filed her petition in the district court of Douglas county against said William H. Spellman, alleging, in substance, that on or about the 1st day of July, 1889, she, Mrs. Sloman, entered into a verbal contract with Spellman, in and by which he agreed to furnish the material and do the plumbing and gas-fitting upon a residence she was then erecting on said lot; that Spellman agreed to furnish such labor and material at the actual cost thereof, with fifteen per cent added; that Spellman represented that the

actual cost of said labor and material with fifteen per cent added would not exceed the sum of $800; that in full payment of the labor and material Spellman might furnish her under the contract, she agreed to convey him, by a deed of general warranty, lot 13, in block 9, Jerome Park Addition to the city of Omaha, subject to certain incumbrances, and that Spellman agreed to accept Mrs. Sloman's conveyance of said lot in full payment of whatever labor and material he should furnish her under the contract; that she had duly tendered to Spellman a warranty deed of said lot in Jerome Park Addition in payment for the work and material which Spellman had furnished under his contract with her; that she had accompanied such deed and tender with an abstract of title showing that she had a good estate in fee-simple in the lot; that Spellman had refused to accept the conveyance of said lot in Jerome Park Addition in payment of the labor and material he had furnished her; that he had filed in the office of the register of deeds a verified account of items of labor and material which he had furnished for her residence under his contract, and was wrongfully claiming a lien upon her real estate for the amount of such labor and material. She prayed for an accounting with Spellman with respect to the labor and material which he had furnished towards plumbing and gas-fitting her residence, that the amount justly due Spellman on account thereof might be determined, and that he be required by decree of court to accept in payment of the amount due him the deed for the lot in Jerome Park Addition, and for a cancellation of the verified account of items of labor and material filed by Spellman in the office of the register of deeds. Spellman, by his answer, admitted that he entered into a verbal contract with Mrs. Sloman, in and by which he was to furnish the labor and material for the plumbing work and gas-fitting of her residence. He denied that by the contract he was to have for the same only the actual cost of the labor and material with fifteen per cent

added; averred that she was to pay him for such labor and material in cash, as the work progressed, the cost of the material, with fifteen per cent added, and the current wages for journeyman plumber and helper. He expressly denied that he agreed to accept from Mrs. Sloman a conveyance of the Jerome Park Addition lot in payment of the work and labor he should furnish her under his contract. He denied that he represented that the plumbing and gas-fitting would not cost to exceed $800, and alleged that he did said plumbing and gas-fitting in all respects according to the contract with Mrs. Sloman, and that the cost thereof greatly exceeded the sum of $800. By way of a cross-petition he set up the verbal contract with Mrs. Sloman, in and by which he agreed to furnish the labor and material and do the plumbing and gas-fitting work on her residence; alleged that he had complied in all respects with the contract; that within four months of the date of the last item of labor and material furnished under the contract he had made an account in writing of the items of the labor and material furnished thereunder, duly made oath thereto, and filed the same in the office of the register of deeds of Douglas county, claiming a mechanic's lien upon Mrs. Sloman's lot and the improvements thereon for such labor and material. He prayed for an accounting of the amount due him from Mrs. Sloman, and that the same might be decreed a lien upon her lot and residence. To this answer Mrs. Sloman filed a reply, consisting of a general denial of all the allegations of new matter in the answer. The district court found all the issues in favor of Spellman, and by decree gave him a lien against the property of Mrs. Sloman for the amount due him from her for the labor and material he had furnished in doing the plumbing work in her residence, and from this decree Mrs. Sloman appeals to this court.

It will be seen from what has been said that the two material issues in the case were: (1.) Whether Spellman

agreed to accept the Jerome Park Addition lot in payment for the labor and material he should furnish Mrs. Sloman. (2.) If he did not, how much was due Spellman from Mrs. Sloman for the labor and material he had furnished her in pursuance of the contract between them? There is no question of law in the case. It would subserve no useful purpose to quote the evidence or any of it. On every material issue of fact in the case there is an irreconcilable conflict of evidence. We do not know who has told the truth, nor who has been guilty of falsehood. The truth of the matters litigated in this action will probably never be known. The district judge saw the witnesses, heard them testify, observed their demeanor upon the witness stand, and weighed the conflicting evidence. We cannot say that he reached an incorrect conclusion; and, indeed, if he had found these issues in favor of Mrs. Sloman, the evidence in this record would sustain such finding. The evidence covers nearly seven hundred pages of closely type-written matter. We have patiently and carefully read, studied, and compared all this evidence because it was our duty to do so; but its study has not been entirely devoid of what might be called a melancholy interest, as it affords a striking object lesson of the uncertainty and unreliability of human testimony. Since we cannot say that the findings made by the district court are not supported by sufficient competent evidence, the decree must be and is

AFFIRMED.

JAMES R. BARNACLE & COMPANY, APPELLEE, V. MERON A. HENDERSON, APPELLANT, ET AL.

FILED OCTOBER 3, 1894. No. 5547.

1. **Mechanics' Liens:** ACCEPTANCE OF NOTE: WAIVER OF LIEN. When a material-man or laborer takes the promissory note, draft, or bill of exchange of the owner for the amount due the former from the latter for labor or material furnished for an improvement on real estate, there is no conclusive presumption of law that such note, draft, or bill of exchange was given or accepted in payment and discharge of the debt of which it was an evidence, nor does the law presume that such material-man or laborer thereby intended to waive his right to a mechanic's lien under the statute.

2. ———: ———: INTENTION TO WAIVE LIEN: QUESTION FOR JURY. In such case, whether a note was so taken and accepted in discharge and payment of the debt, and whether the material-man or laborer by taking the note intended thereby to waive his lien under the statute, are questions of fact to be determined from all the facts and circumstances in evidence in the case.

3. ———: WRITTEN CONTRACT: ACCOUNT OF ITEMS. Where the contract between an owner and a material-man for the erection of an improvement upon real estate is in writing, then the filing of such contract or a copy thereof with the verified "account of items" is essential to invest such material-man with a lien under the statute.

4. ———: FORECLOSURE: ORAL CONTRACT: VARIANCE BETWEEN AFFIDAVIT AND PETITION: ESTOPPEL. Where the contract between the owner and the material man is verbal, the fact that by inadvertence or mistake the material-man alleges in his affidavit, filed with the "account of items" for the purpose of obtaining a lien, that the contract was in writing, does not estop him, in a suit to foreclose a lien, from alleging and proving that the contract was in fact a verbal one, nor does it render the verified "account of items" filed to obtain a lien, incompetent evidence.

5. ———: ———: CROSS-PETITION OF CLAIMANT: FAILURE OF OWNER TO ANSWER: REVIEW. A contractor brought suit to foreclose a mechanic's lien. The owner and a number of material-men were made defendants. One of the material-men filed

an answer in the nature of a cross-petition, claiming a lien upon the premises of the owner for material furnished in the erection of the improvement thereon. To this cross-petition the owner filed no answer. *Held*, That the owner could not be heard to object on appeal to the correctness, except as to the amount of the finding and decree of the district court in favor of such material-man.

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

Hall, McCulloch & English, for appellant.

L. D. Holmes, J. Q. Burgner, Connell & Ives, I. E. Congdon, Montgomery, Charlton & Hall, McClanahan & Gilmore, Parke Godwin, and *Switzler & McIntosh*, for appellees.

RAGAN, C.

On the 29th day of April, 1890, one J. H. Van Closter was the owner of lot 27, Rees Place Addition to the city of Omaha. While he was the owner of this property he entered into contracts with various persons by which they were to furnish labor or material for the erection of some buildings on said lot. After the improvements had been commenced Van Closter sold and conveyed the property to one Hallett H. Henderson. The material-men and laborers not having been paid in full, one of them, James R. Barnacle & Co., brought this suit against Henderson, Van Closter, and a large number of other persons—most of them being parties who had furnished labor or material towards the erection of the buildings aforesaid—in the district court of Douglas county, for an accounting of the amount due them, Barnacle & Co., under their contract with Van Closter, and to have established by decree of the court a lien under the statute against said lot. While this suit was pending, Hallett H. Henderson sold and conveyed the real estate to one Meron A. Henderson, who, on her own application, was made a party defendant to the action. Find-

ings and decrees were by the district court rendered in favor of a large number of parties to the action, and Meron A. Henderson appeals to this court from the findings and decrees of the district court in favor of the following parties to the suit, namely: James R. Barnacle & Co., Miller & Gunderson, Kennard Glass & Paint Company, B. Melquist, and Milton Rogers & Sons. We will dispose of these in their order.

James R. Barnacle & Co.: The district court found that there was due Barnacle & Co. from Van Closter $898.56, and gave them a lien against the real estate in controversy for that amount. The appellant insists that the amount found due Barnacle & Co. by the district court was $177.98 too large. The facts on which this contention is based are that shortly after Barnacle & Co. began work for Van Closter, the latter gave them his note for $510; this note was paid by Van Closter, except the sum of $177.98, for which amount he gave Barnacle & Co. a renewal note, and the principal and interest of this renewal note is included in the amount found due Barnacle & Co. by the district court. The argument of appellant's counsel is that Van Closter gave the $510 note and Barnacle & Co. received it in absolute payment of that much of the debt owing by Van Closter to Barnacle & Co. for the labor and material furnished by the latter towards the improvement, and that Barnacle & Co., by accepting said note, thereby released their right to a mechanic's lien against the premises to the extent of $510. In *Hoagland v. Lusk*, 33 Neb., 376, it was held: "The acceptance by a material-man of a note and chattel mortgage as collateral security for materials, previously furnished for the erection of a building under a contract with the owner, is not a waiver of the lien of the material-man, unless such was the intention of the parties." When a material-man or laborer takes a promissory note, draft, or bill of exchange of the owner for the amount due the former from the latter for labor or material furnished

for an improvement on real estate there is no conclusive presumption of law that such material-man or laborer accepted such note, draft, or bill of exchange in payment and discharge of the debt of which it was an evidence, nor does the law presume that he thereby intended to waive his right to a material-man or laborer's lien. Whether a note so taken was accepted in discharge and payment of the debt, and whether the material-man or laborer by taking the note intended thereby to waive his lien under the statute, are questions of fact to be determined from all the facts and circumstances in evidence in the case. (Phillips, Mechanics' Liens, secs. 275, 276, and cases there cited; *Young v. Hibbs*, 5 Neb., 433.) In the case at bar the district court, in effect, found that the $510 note was neither given by Van Closter nor accepted by Barnacle & Co. in payment and discharge *pro tanto* of the amount due from the former to the latter; and that Barnacle & Co. in accepting the note did not intend thereby to waive their right to a lien under the statute. The evidence in the record supports this finding of the district court. Its decree in favor of Barnacle & Co. is therefore affirmed.

Miller & Gunderson: The district court found there was due from Van Closter to Miller & Gunderson $1,372.10. The appellant insists that this amount is too large by the amount of $1,000 and interest thereon. This argument is based on two contentions: (1.) That Van Closter gave his note to Miller & Gunderson for $1,000 as part payment of the amount owing to the latter by the former, and that Miller & Gunderson accepted said note in payment and discharge of that much of the debt owing to them from Van Closter, and thereby waived their right to a lien for the amount of the note; and as the amount of the note and interest is included in the amount found due Miller & Gunderson by the district court, that such finding is erroneous to the extent of the $1,000 note and interest. What has been said above under the Barnacle claim disposes of

this first contention. (2.) A second contention of the appellant Mrs. Henderson is, in substance, that her grantor, Hallett H. Henderson, prior to the time that he became the owner of the real estate, held a mortgage thereon, and that Van Closter applied to him for an extension of the time of paying such mortgage and for an additional loan of $4,200 to be secured by another mortgage on the real estate; that for the purpose of inducing Henderson to make such extension and additional loan, Van Closter represented to him that Miller & Gunderson had already been paid $1,000 on their contract, and that $2,500 of the $4,200 which Van Closter wished to borrow of Henderson was also to be paid to Miller & Gunderson; that, relying upon these representations of Van Closter, Hallett H. Henderson agreed to extend the time of payment of his first mortgage and advance Van Closter $4,200 more if he would obtain from Miller & Gunderson a receipt or voucher for the $1,000 which Van Closter represented that he had already paid them on their contract, and also a receipt for the $2,500 which Miller & Gunderson were to receive out of the $4,200 loan; and that in pursuance of this agreement Miller & Gunderson executed and delivered to Hallett H. Henderson a written receipt for $2,500 and for the $1,000, or $3,500; and that thereupon Hallett H. Henderson extended the time of payment of his first mortgage against Van Closter and advanced him the further sum of $4,200, $2,500 of which was paid to Miller & Gunderson; and that Miller & Gunderson knew that at the time they signed and delivered the receipt admitting that Van Closter had paid them $3,500, that Hallett H. Henderson relied and acted upon that statement in making the additional loan of $4,200 to Van Closter; that the $1,000 which Van Closter represented he had paid to Miller & Gunderson, and which they acknowledged by their receipt had been paid, was the $1,000 note above referred to, executed by Van Closter to Miller & Gunderson, the amount

of which, with interest, is included in the amount found due Miller & Gunderson by the district court. In brief, the contention of appellant is that Miller & Gunderson having represented to Henderson that the $1,000 note made the subject of their mechanic's lien in this case had been paid to them by Van Closter, and Henderson having relied upon this and advanced Van Closter $4,200 on the property, relying on Miller & Gunderson's statement that the $1,000 had been paid, or that the property was not subject to a mechanic's lien for that amount, that Miller & Gunderson are now estopped from claiming a lien against the property for the amount of the $1,000 and interest which they admitted had been paid, and but for which admission Henderson would not have advanced the $4,200. If the evidence in the record sustained this contention, it would be fatal to the lien of Miller & Gunderson to the extent of the $1,000 and interest thereon. For it is clear that if Miller & Gunderson represented to Hallett H. Henderson that $1,000 of their claim against Van Closter for labor and material for the improvement had been paid and discharged by him, and if Henderson believed and relied upon that statement and was thereby induced to and did thereby make a further loan to Van Closter, secured by a mortgage on the premises, that then Miller & Gunderson would be estopped from afterwards asserting a lien against the premises for the $1,000 which they had represented to Henderson as having been paid, and which representation caused him to change his status. But there is no evidence in the record which shows or tends to show that Henderson either believed the statements made in the receipt or acted upon them. Henderson does not testify in the case. Indeed, the record contains no evidence, unless it be an inference that Henderson did extend the time of payment of the first mortgage he held against Van Closter or make the latter an additional loan of $4.200. Van Closter himself was upon the witness stand, but was not questioned

on the subject. The finding and decree, then, of the district court in favor of Miller & Gunderson and against appellant cannot be disturbed.

Kennard Glass & Paint Company: The correctness of the decree rendered by the district court in favor of the Kennard Glass & Paint Company is assailed here by the appellant on the theory that such finding and decree are not supported by any competent evidence. The Kennard company in its cross-petition alleged that it made a verbal contract with Van Closter to furnish him certain material to be used in the construction of the building that he was erecting on the real estate described herein; that it furnished Van Closter the material as per the verbal contract, and within four months of the date of furnishing the last item of such material it made an itemized account thereof in writing, made oath thereto, and filed the same in the office of the register of deeds of Douglas county. All these allegations of the cross-petition were proved on the trial. But the affidavit attached to the "account of items" filed in the office of the register of deeds recited that the contract between the Kennard company and Van Closter was a written contract, and neither a written contract nor a copy of one was attached to nor filed with the verified "account of items" filed by the Kennard company for the purpose of obtaining the lien. The introduction in evidence of this verified "account of items" or mechanic's lien, so filed with the register of deeds, was objected to by appellant as incompetent. The argument of appellant is that since the Kennard company pleaded in its cross-petition that its contract with Van Closter was a verbal one, that the so-called mechanic's lien filed in the clerk's office was incompetent evidence under the pleading, and that, therefore, the Kennard company not only failed to obtain a lien but failed to prove one. As already stated, the evidence on the trial showed beyond dispute that the contract between the Kennard company and Van Closter was a

verbal one; that the Kennard company furnished the material in pursuance of such contract; that within the time required by the statute they made an account of the items furnished under the contract, duly made oath thereto, and duly filed the same in the proper public office. The evidence further showed affirmatively that the contract between the Kennard company and Van Closter was not a written contract, and that the expression in the affidavit filed with the mechanic's lien, that the contract was a written one, was an oversight or mistake. Now, if the contract made between the Kennard company and Van Closter had been a written one, and neither such contract nor a copy thereof had been filed with the account of items and affidavit filed for the purpose of obtaining the lien, then it is unquestionably true that the failure to file such contract or a copy thereof with the verified "account of items" in the clerk's office would not have invested the material-man with a lien upon the premises. But in a case where the contract between the owner and the material-man is verbal, where the material was furnished in pursuance of such verbal contract, and the material-man, in the time required by the statute, makes an account of the items of the material furnished as required by the statute, and makes oath thereto and files the same in compliance with the law, then the fact that, by inadvertence or mistake, the material-man alleged in his affidavit that the contract was in writing does not estop him in a suit to foreclose the lien from alleging and proving that the contract was in fact a verbal one, nor does it make the verified "account of items" filed to obtain a lien incompetent evidence. The finding and decree of the district court in favor of the Kennard Glass & Paint Company must, therefore, be affirmed.

Melquist: Neither the appellant nor her grantor, Hallett H. Henderson, nor his grantor, Van Closter, filed any answer or other pleading to the cross-petition filed by Mel-

quist for the purpose of foreclosing his alleged mechanic's lien against the Van Closter premises. The appellant, therefore, cannot be heard to object on appeal to the correctness of the finding and decree of the district court made in favor of Melquist, except as to the amount. (*Zarrs v. Keck*, 40 Neb., 456.)

Milton Rogers & Sons: These parties filed an answer in the nature of a cross-petition in the suit, in which they allege that there was due them $633.67 and interest thereon from Van Closter for material furnished him by them in pursuance of a written contract between the parties, and which material was used in and about the construction of the building on the premises of Van Closter. The district court in its decree found that there was due them from Van Closter the sum of $648.41 for materials furnished him in pursuance of the contract pleaded in the cross-petition, and rendered a decree giving Milton Rogers & Sons a lien upon the Van Closter lot. There is not in this entire record one single word of evidence tending to support this finding and decree of the district court. It must, therefore, be reversed. The finding and decree of the district court in favor of Milton Rogers & Sons is reversed and dismissed.

The decree of the district court in all other things is affirmed.

JUDGMENT ACCORDINGLY.

BROWNELL & COMPANY ET AL., APPELLANTS, V. ELIJAH STODDARD ET UX., APPELLEES.

FILED OCTOBER 3, 1894. No. 5394.

1. **Fraudulent Conveyances:** CREDITOR'S BILL: HUSBAND AND WIFE: RESULTING TRUST. In an action by judgment creditors to subject to the payment of their judgments land conveyed by

the debtor through a third person to the debtor's wife, the wife testified that when the land was bought by her husband, twenty years prior to the trial, she furnished a portion of the purchase money. There was no evidence tending to show that there was any agreement or intention that the money should be repaid or that the wife should have either a lien upon or interest in the land. *Held*, That such evidence was insufficient to establish in her favor either a lien for the money so furnished or a resulting trust in the land.

2. ———: ———: EQUITY: EVIDENCE. In order to establish any equity in the wife because of such transaction, it must not only appear that she furnished the money as claimed, but there must also be evidence to overcome the presumption of an advancement, and in a contest with her husband's creditors, the presumption of bad faith in the transfer.

3. **Subrogation:** LIENS OF CREDITORS: PAYMENT BY WIFE. The judgment debtor conveyed the land to a third person for the purpose of enabling such third person to obtain a loan thereon and discharge certain incumbrances. The wife of the debtor discharged the incumbrances and the transferee conveyed to her. The district court rightly held that in an action by the creditors to subject the land to the payment of their judgments she was entitled to be subrogated to the rights of those whose liens she had paid, and rightly included in the lien so established the amount of certain taxes paid by her before the judgments were recovered.

4. **Homestead:** FAILURE TO ASSERT RIGHT: WAIVER. The right of homestead is a personal privilege, and will be deemed waived unless asserted before a sale of the premises, where those entitled to claim the right have been parties to the proceeding resulting in the sale, where those proceedings have been adversary in their character, and where there has been an opportunity to assert the right of homestead.

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

A statement of facts appears in the opinion.

Isaac Adams and *James H. Woolley*, for appellants:

The rights of the creditors in the land in controversy are superior to any claims of the wife for money advanced

to her husband in 1871. (*Besson v. Eveland*, 26 N. J. Eq., 472; *Post v. Stiger*, 29 N. J. Eq., 556; *Aultman v. Obermeyer*, 6 Neb., 260; *Steele v. Coon*, 27 Neb., 587; Pomeroy, Equity Jurisprudence, sec. 1040; *Hanson v. Manley*, 72 Ia., 48; *Beecher v. Wilson*, 6 S. E. Rep. [Va.], 209; *Lee v. Cole*, 15 Atl. Rep. [N. J.], 531; *Strong v. Lawrence*, 58 Ia., 56; Wait, Fraudulent Conveyances, sec. 192; *Humes v. Scruggs*, 94 U. S., 22; *Moyer v. Adams*, 2 Fed. Rep., 182; *Luers v. Brunjes*, 34 N. J. Eq., 19; *Wake v. Griffin*, 9 Neb., 47; *Roy v. McPherson*, 11 Neb., 197; *Hoagland v. Wilson*, 15 Neb., 321; *Early v. Wilson*, 31 Neb., 459; *Swartz v. McClelland*, 31 Neb., 648.)

The decree should have been entered without reservation of homestead rights. (*Rector v. Rotton*, 3 Neb., 178.)

A. S. Churchill, contra, cited, on the first point made by appellants: *Maxwell v. Longenecker*, 89 Ill., 102; *Anderson v. Hubbell*, 93 Ind., 570; *Schribar v. Platt*, 19 Neb., 629; *Norwegian Plow Co. v. Haines*, 21 Neb., 691. On the second point made by appellants: *Bowker v. Collins*, 4 Neb., 494; *McMahon v. Speilman*, 15 Neb., 653; *Stout v. Rapp*, 17 Neb., 462; *McHugh v. Smiley*, 17 Neb., 626; *Hicks v. Mack*, 19 Neb., 339.

IRVINE, C.

This was an action in the nature of a creditor's bill by Brownell & Co., who had a judgment against Elijah Stoddard, seeking to subject to the payment of that judgment certain land in Douglas county, which it was alleged had been conveyed by Stoddard through a third person to Stoddard's wife in fraud of creditors. The Wood River Bank intervened, setting up a judgment in its favor against Stoddard and seeking the same relief. Stoddard and his wife, Mary D. Stoddard, were the defendants. The defendants answered jointly, denying the allegations of fraud and alleging that the conveyances were made for a valuable

consideration and without intent to defraud. It appeared that prior to August, 1887, the title to the land in question was in Elijah Stoddard; that on August 10, 1887, Stoddard and wife joined in a conveyance of the land to Joseph H. Gue; that on November 19, 1887, Gue conveyed to Mrs. Stoddard. The consideration stated in each deed was nominal. It also appeared that at the time of the conveyance to Gue there was a mortgage on the premises, owned by Gue, and that the land was otherwise incumbered. The conveyance to Gue was for the purpose of enabling Gue to obtain satisfaction of his claim, apparently by placing a new loan on the land to cover all the claims; but because of some cloud on the title it was impossible to effect this loan. Mrs. Stoddard was, however, possessed of means with which she then discharged the incumbrances, including that of Gue, and paid out some money for the purpose of removing the cloud from the title. Gue then conveyed the land to her. The court found substantially these facts, and held that by reason thereof Mrs. Stoddard was entitled only to be subrogated to the liens so by her discharged, together with certain taxes since paid by her, and the sum paid to remove the cloud from the title. The court also found that the land had been purchased by Stoddard in October, 1871, at which time Mrs. Stoddard paid $1,000 of the original purchase price. This $1,000, with interest from the time of payment, was added to the amount of Mrs. Stoddard's lien. The whole sum thus found due her amounts to $9,936.51. The land was decreed to be sold to satisfy the judgments of the plaintiff and intervenor, subject to Mrs. Stoddard's lien for this amount. The creditors appeal. No complaint is made of that portion of the decree subrogating Mrs. Stoddard to the rights of those creditors whose liens she paid. Complaint is restricted to the allowance of the $1,000 and interest, and of the taxes, and to a reservation in the decree of the homestead rights, if any, of the Stoddards.

1. The evidence in regard to Mrs. Stoddard's claim for $1,000 is very meager and will be quoted entire. Mrs. Stoddard is the only witness on the subject. She testifies as follows:

Q. State when the land was originally purchased by your husband, Mr. Stoddard, whether you furnished any of the original purchase money.

A. I did.

Q. How much of it did you furnish?

A. $1,000.

Q. And do you remember what the original cost of it was?

A. I think it was about $4,000.

Q. And this $1,000 that you put into the original purchase price, you may state from what that money came.

A. From the sale of a house that I owned in North Brookville, Massachusetts.

Cross-examination by Mr. Adams:

Q. Mrs. Stoddard, when were you married?

A. I was married in 1868.

Q. When did you move to Omaha?

A. I think it was in 1870.

Q. How long before this land was purchased?

A. After we came.

Q. How long did you live here before it was purchased?

A. About two years, I think.

Q. This $1,000, did you have it when you first came out here, or was it sent to you?

A. Sent to me.

Q. How long was it sent to you before the land was purchased?

A. It was sent about the time the land was purchased.

Q. At the time?

A. Yes, sir; first payment.

Q. In what form did it come?

A. I do not think I remember.

Q. When it arrived did you receive it? Did you have it in your possession?

A. I don't remember whether I did or not.

Q. To whom was the money paid? Do you know?

A. To the party the place was purchased from, Mr. Mason.

Q. Paid by your husband to Mr. Mason?

A. Probably.

Q. You don't know?

A. I don't remember.

Q. Your husband never gave you any note to represent this?

A. No, sir.

We are very clearly of the opinion that an error was committed in allowing this sum of $1,000, with interest, as a lien upon the land. It will be observed that in this evidence it does not appear that any evidence of indebtedness was taken; that it was not claimed that even a parol agreement existed whereby Mrs. Stoddard was to have a lien for the amount advanced. If A lend B $1,000, we do not understand that he acquires a specific lien on the land which B purchases with the money so borrowed merely because the money was so used. But the evidence also fails to establish a loan. Mrs. Stoddard says she "furnished" a portion of the purchase money. This word "furnished" is the only word used either by her or her counsel in describing the transaction. It is not pretended that there was any agreement for repayment, much less any lien by contract upon the land. It would seem that if Mrs. Stoddard be entitled to any relief on account of this item, it would be upon the theory that a trust resulted to her to the extent of a quarter interest in the land, it appearing that the whole purchase price was $4,000. In such event the decree would, under the evidence as to value, be without prejudice to appellants. Can a resulting trust be established on such evidence? We think not. The doctrine of

resulting trusts is founded upon the presumed intention of the parties. "A trust is never presumed or implied as intended by the parties unless, taking all the circumstances together, that is the fair and reasonable interpretation of their acts and transactions." (2 Story, Equity Jurisprudence, sec. 1195.) The doctrine of a resulting trust from payment of the consideration money "has its origin in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the money means the purchase to be for his own benefit rather than for that of another." (2 Story, Equity Jurisprudence, sec. 1201.) "As the resulting or implied trust is, in such cases, a mere matter of presumption, it may be rebutted by other circumstances established in evidence, and even by parol proofs which satisfactorily contradict it. * * * Thus, for example, if a parent should purchase in the name of a son, the purchase would be deemed *prima facie* as intended as an advancement, so as to rebut the presumption of a resulting trust for the parent. But this presumption that it is an advancement may be rebutted by evidence manifesting a clear intention that the son shall take as a trustee." (2 Story, Equity Jurisprudence, sec. 1202. See 2 Perry, Trusts, sec. 126.) The foregoing statements seem elementary, but in cases where distinctions were not necessary, the general principle has been so often stated,—that where one pays the consideration and the title is taken in another, a trust results in favor of the one paying the consideration,—that we are apt to regard this as a statement of an absolute legal proposition and not merely as a rule of evidence. In the more careful statements of the rule its operation is restricted to transactions between strangers, and it necessarily fails wherever the relationship of the parties is such that a payment of money would be presumed an advancement rather than a loan. It is always said that in order to establish a resulting trust the evidence should be clear, satisfactory, and conclusive. (*Hoehne v. Breitkreitz*, 5 Neb.,

110.) Mrs. Stoddard's evidence standing without contradiction, it may be said that the fact of her furnishing the $1,000 was sufficiently proved, but her relationship as wife not only raised the presumption of an advancement, but also, in a contest with her husband's creditors, cast upon her the burden of proof of good faith. (*Aultman v. Obermeyer*, 6 Neb., 260; *First Nat. Bank v. Bartlett*, 8 Neb., 319; *Thompson v. Loenig*, 13 Neb., 386; *Stevens v. Carson*, 30 Neb., 544; *Hill v. Fouse*, 32 Neb., 637.) In *Roy v. McPherson*, 11 Neb., 197, Mrs. Roy purchased the land in controversy with her own money, and the title, contrary to her directions, was taken in her husband, a fact which she at once learned. Fourteen years thereafter it was conveyed to her. While her husband held the title he obtained credit and contracted debts on the faith of his being the absolute owner of the land. These debts were put in judgment before Roy parted with the title. It was held that as between Mrs. Roy and the creditors their equity must be preferred. This case has been cited with approval in a number of cases since. (*Goldsmith v. Fuller*, 30 Neb., 563; *Early v. Wilson*, 31 Neb., 458; *Swartz v. McClellan*, 31 Neb., 646.) It is true in these cases much stress was laid on the fact of the husband's obtaining credit on the faith of his ownership, while in the case we are considering it does not appear that the debts out of which these judgments grew were created upon the faith of Stoddard's apparent ownership of this land. These cases, therefore, do not control the present case, but they illustrate the salutary rule of examining with caution evidence offered to establish supposed equities as between husband and wife where the husband's creditors would suffer from establishing the equity. In *Stevens v. Carson*, 30 Neb., 544, certain statements in the opinions in *Aultman v. Obermeyer*, 6 Neb., 260, *Lipscomb v. Lyon*, 19 Neb., 511, and *Woodruff v. White*, 25 Neb., 745, were disapproved in so far as they intimated that in such cases the good faith of the transfer must be established beyond ques-

tion, but it was, nevertheless, reasserted that the wife must establish her good faith by a preponderance of the evidence. Having upon her the burden of proof in this case, she merely established upon this branch of it the furnishing to her husband of a sum of money in 1871. The evidence did not show or tend to show that this was not intended as a gift or advancement or that there was any agreement, understanding, or intention that the money should be repaid or that she should have any interest in the land. We think the evidence was insufficient to establish either a lien upon the land or a resulting trust in a portion of it, and that the decree must be modified to the extent of deducting from the amount established as her lien the sum of $1,000, with interest from the date of the conveyance to Stoddard, October 23, 1871, to the date of the decree, January 4, 1892. This amount we compute to be $2,413.75.

2. As to the allowance made to Mrs. Stoddard for taxes, we think the district court was right. While these taxes were paid before the judgments were recovered, they cannot be deemed a voluntary payment, as Mrs. Stoddard, as an equitable mortgagee, was entitled to redeem, and, indeed, was compellable to do so to protect her equity. Treating her as a mortgagee, she had a right to pay these taxes and have them added to the amount of her mortgage in a foreclosure proceeding. They were in any sense prior to the liens of the judgments and would have been so had the legal title remained in Stoddard.

3. The decree of the district court, after ordering the sale, contains this clause: "Said sale to be without prejudice to the homestead rights, if any, of the said Elijah Stoddard or Mary D. Stoddard, or both, in said premises." It was not pleaded that the premises were a homestead, nor is there any evidence tending to establish such fact. Where proceedings are *ex parte* there is no doubt that the homestead cannot be divested by an attempted execution sale.

(*McHugh v. Smiley*, 17 Neb., 620.) But in this case both of the Stoddards were defendants. If the property was a homestead, that fact was a good defense to the charge of fraudulent alienation, at least to the extent of the homestead exemption. The issue might have been presented and determined. We do not here decide, for the question is not presented by the record, whether or not the homestead may still be claimed prior to the sale, but we do hold that it was improper to order that the sale should be made without prejudice to the homestead right. As repeatedly said, the homestead right is a personal privilege which may be waived, and certainly these defendants, not having asserted any such right in this proceeding, where they have had an opportunity so to do, they should not be permitted after a sale to assert it. (*Rector v. Rotton*, 3 Neb., 171; *McHugh v. Smiley*, 17 Neb., 620.) The decree will be modified by deducting from the amount of Mrs. Stoddard's lien the sum of $2,413.75, as above stated, and by striking out the clause above quoted, reserving the right of homestead.

DECREE ACCORDINGLY.

STATE OF NEBRASKA, EX REL. FRANK T. RANSOM, V. H. B. IREY, COUNTY TREASURER.

FILED OCTOBER 16, 1894. NO. 7068.

1. **Municipal Corporations:** POWERS. A municipal corporation possesses only such powers as are expressly conferred upon it by statute, or are necessary to carry into effect some enumerated power.

2. ——: ——: STREET IMPROVEMENTS: SPECIAL ASSESSMENTS. The power "to levy and collect special taxes and assessments" upon real estate to pay the cost of street improvements, expressed in section 69 of the act governing cities of the metropolitan

class, does not alone carry with it, or include, the power to sell the real estate upon which such tax or assessment is imposed, in case of non-payment.

3. ———: SPECIAL ASSESSMENTS. The mode designated by said section, for the collection of special taxes or assessments by distress or sale of personal property, is not the exclusive method provided by the legislature for enforcing payment of such special taxes.

4. ———: ———. Whether the clause contained in said section, providing for the seizure and sale of property for the satisfaction of special taxes, is constitutional is not decided.

5. ———: ———. The term "all municipal taxes" employed in section 83 of chapter 12*a*, Compiled Statutes, does not include or cover special taxes levied against real estate by the city for the improvement of streets and alleys.

6. Metropolitan Cities: SPECIAL TAXES: SALE OF LAND BY COUNTY TREASURER. Section 91 of said chapter, construed in the light of prior and subsequent sections, confers authority upon the county treasurer to sell real estate for the non-payment of special paving assessments, legally levied thereon by a city of the metropolitan class, although there are no delinquent state, county, or general municipal taxes of any kind against the same property.

ORIGINAL application for *mandamus*.

See opinion for statement of the case.

Frank T. Ransom, relator, *pro se:*

The county treasurer of Douglas county has authority, and it is his duty, to sell real estate upon which the city of Omaha has duly levied a special assessment authorized by law, and which special assessment is delinquent and unpaid, there being no general taxes of any kind delinquent against the property upon which the assessment was levied and is delinquent. (2 Dillon, Municipal Corporations [4th ed.], sec. 819; *City of St. Louis v. Russell*, 9 Mo., 507; *City of St. Louis v. Allen*, 13 Mo., 412; 2 Desty, Taxation, p. 748; Burroughs, Taxation, p. 435.)

George W. Poynton, contra, cited: *Hanscom v. City of Omaha,* 11 Neb., 44; *Ham v. Miller,* 20 Ia., 450; *Merriam v. Moody,* 25 Ia., 163; *McInerny v. Reed,* 23 Ia., 410; *Richardson County v. Miles,* 14 Neb., 313; *Felt v. Felt,* 19 Wis., 193*; *City of Covington v. McNickle,* 18 B. Mon. [Ky.], 286; *Peyton v. Moseley,* 3 Mon. [Ky.], 77; *Fosdick v. Village of Perrysburg,* 14 O. St., 486; *State v. Stoll,* 17 Wall. [U. S.], 425; *Mack v. Jones,* 1 Fos. [N. H.], 393; *Sharp v. Speir,* 4 Hill [N. Y.], 76; *Bergen v. Clarkson,* 1 Hal. [N. J.], 352; *Doe v. Chunn,* 1 Blackf. [Ind.], 336.

John P. Breen, also for respondent, cited: Welty, Law of Assessments, sec. 310; *Craw v. Village of Tolono,* 96 Ill., 255; *Taylor v. Palmer,* 31 Cal., 249; *Mix v. Ross,* 57 Ill., 123; *Neenan v. Smith,* 50 Mo., 529; *Carlin v. Cavender,* 56 Mo., 286; *City of St. Louis v. Bressler,* 56 Mo., 351; *City of Seattle v. Yesler,* 1 Wash., 576; *State v. City of Newark,* 36 N. J. Law, 478; *State v. Taylor,* 59 Md., 338; *McPhee v. Venable,* 77 Ga., 772; *Ansley v. Wilson,* 50 Ga., 418; *Holbrook v. Dickinson,* 46 Ill., 285; *Bucknall v. Story,* 36 Cal., 67; Black, Tax Titles, sec. 153; Cooley, Taxation [2d ed.], pp. 656, 672; 2 Dillon, Municipal Corporations [4th ed.], sec. 769; Endlich, Interpretation of Statutes, sec. 154; *City of Clinton v. Henry County,* 115 Mo., 557; 1 Blackwell, Tax Titles [5th ed.], secs. 396, 413, 521, 591; *Alexander v. Pitts,* 7 Cush. [Mass.], 503; *Chouteau v. Hunt,* 44 Minn., 173; *Sioux City & P. R. Co. v. Washington County,* 3 Neb., 41; *Richards v. County Commissioners, Clay County,* 40 Neb., 45; *McCann v. McLennan,* 2 Neb., 289; *Kittle v. Shervin,* 11 Neb., 65.

NORVAL, C. J.

This is an original application for a peremptory writ of *mandamus* by the state, on the relation of Frank T. Ransom, against H. B. Irey, treasurer of Douglas county, to

compel defendant to accept and receive from relator the amount of paving taxes assessed by the city of Omaha against the west 34½ feet of the north 90 feet of lot 19 in John I. Redick's Addition to Omaha, to sell said real estate to relator at private sale, and to make and issue to him the usual statutory certificate of sale. The cause is submitted upon a general demurrer to the application.

It will not be necessary to set out a copy of the petition in this opinion, or to give even a synopsis thereof, since but a single question is raised by the record for our consideration, namely: Has the treasurer of Douglas county the power or authority to sell real estate for delinquent special paving assessments legally imposed by the city authorities of Omaha, there being no delinquent state, county, or general municipal taxes of any kind against the property upon which such special assessment was levied and is delinquent? This question is a new one, it being now for the first time presented to this court for adjudication, and, in order to reach a correct decision, it will be necessary to examine and construe certain provisions of the act of the legislature governing cities of the metropolitan class. At the outset we remark that it is a well settled doctrine that a municipal corporation possesses only such powers as are expressly conferred upon it by the legislature, or are necessary to carry into effect some enumerated power; and this principle applies in the matter of levying municipal taxes and making local assessments, and extends as well to the mode of their collection. (2 Dillon Municipal Corporations [4th ed.], secs. 763, 769, 815; *Hanscom v. City of Omaha*, 11 Neb., 44; *City of St. Louis v. Russell*, 9 Mo., 507; *Sharp v. Speir*, 4 Hill [N. Y.], 76; *Merriam v. Moody*, 25 Ia., 163; *Mays v. City of Cincinnati*, 1 O. St., 268; *City of Leavenworth v. Norton*, 1 Kan., 432; *Burnes v. City of Atchison*, 2 Kan., 455; *Paine v. Spratley*, 5 Kan., 525; *Doe v. Chunn*, 1 Blackf. [Ind.], 336.) In *Sharp v. Speir, supra*, Bronson J., observes: "A corpora-

tion must show a grant, either in terms or by necessary implication, for all the powers which it attempts to exercise; and especially must this be done when it claims the right, by taxing or otherwise, to divest individuals of their property without their consent." In 2 Dillon, Municipal Corporations, at section 763, the author lays down this rule: "It is a principle universally declared and admitted that municipal corporations can levy no taxes, general or special, upon the inhabitants or their property unless the power be plainly and unmistakably conferred. It has, indeed, often been said that it must be specifically granted in terms; but all courts agree that the authority must be given either in express words or by necessary or unmistakable implication, and that it cannot be collected by doubtful inferences from other powers, or powers relating to other subjects, nor can it be deduced from any consideration of convenience or advantage. * * * It is important to bear in mind that the authority to municipalities to impose burdens of any character upon persons or property is wholly statutory, and, as its exercise may result in a divestiture and transfer of property, it must be clearly given, and strictly pursued. This rule applies, as we have already seen, to proceedings by municipal corporations under the delegated right of eminent domain, and it extends equally to proceedings under the taxing power, including special assessments for local improvements." This court in *Hanscom v. City of Omaha, supra*, in discussing the powers vested in municipal officers to levy or impose special assessments, uses this language: "Their authority is derived wholly from the statute, and they have no powers except such as are expressly given or are incidentally necessary to carry the same into effect; and their actions in excess of such powers are absolutely null and void."

In the light of the doctrine announced in the foregoing authorities let us examine the various provisions of the act

governing cities of the metropolitan class, known as the "Omaha Charter," which bear upon the question under consideration.

By section 69, chapter 12*a*, Compiled Statutes, 1893, it is provided: "The mayor and council shall have power to open, extend, widen, narrow, grade, curb, and gutter, park, beautify, or otherwise improve and keep in good repair, or cause the same to be done in any manner they may deem proper, any street, avenue, or alley within the limits of the city, and may grade partially or to the established grade, or park or otherwise improve any width or part of any such street, avenue, or alley, and may also construct and repair, or cause and compel the construction and repair of sidewalks in such city, of such material and in such manner as they may deem proper and necessary; and to defray the cost and expense of improvements, or any of them, the mayor and council of such city shall have power and authority to levy and collect special taxes and assessments upon the lots and pieces of ground adjacent to or abutting upon the street, avenue, alley, or sidewalk thus in whole or in part opened, widened, curbed, and guttered, graded, parked, extended, constructed, or otherwise improved or repaired, or which may be especially benefited by any of said improvements; *Provided*, That the above provisions shall not apply to ordinary repairs of streets or alleys, and one-half of the expense of bringing streets, avenues, alleys, or parts thereof, to the established grade shall be paid out of the general fund of the city, except as otherwise hereinafter provided; *Provided*, That where any street is to be graded under the provisions provided by this section, but not to the established grade, it shall be done only after the owners representing a majority of the front feet of the property abutting on the part of such street to be so partially graded shall have petitioned the city council for such work to be done; *Provided further*, That whenever the owners of the lots

abutting upon any street or alley, or part thereof, within said city representing three-fifths ($\frac{3}{5}$) of the feet front abutting upon such street or alley desired to be graded shall petition the council to grade such street or alley, or part thereof, without charge to the city, the mayor or the council may order the grading done, and assess the cost thereof against the property abutting upon such street or alley, or such part thereof so graded. The total cost of such grading shall be levied and collected in a single payment upon the completion of such work; or, upon petition of not less than three-fifths ($\frac{3}{5}$) of the feet front along the street or alley so graded, the cost may be made payable in ten (10) equal installments extending over a period of nine years, in the same manner, at the same rate, and subject to the same conditions as are payments for paving, curbing, guttering, and like improvements hereinafter specified. In case of such installment payment the mayor and council shall by ordinance create districts embracing the property represented by such petition, and abutting or which said grading was done, to be known as grading districts and numbered consecutively. * * * The cost of improving the streets and alleys within any improvement district, except the paving of intersection of streets and space opposite alleys within such district, shall be assessed upon the lots and lands abutting upon the streets and alleys in such district, in proportion to the feet front so abutting upon such streets and alleys. The assessments of special taxes for improvement purpose herein provided for shall be made as follows: The total costs of the improvements shall be levied at one time upon the property and become delinquent as herein provided. One-tenth ($\frac{1}{10}$) of the total amount shall be delinquent in fifty days after such levy, one-tenth ($\frac{1}{10}$) in one year, one-tenth ($\frac{1}{10}$) in two years, one-tenth ($\frac{1}{10}$) in three years, one-tenth ($\frac{1}{10}$) in four years, one-tenth ($\frac{1}{10}$) in five years, one-tenth ($\frac{1}{10}$) in six years, one-tenth ($\frac{1}{10}$) in seven years, one-tenth ($\frac{1}{10}$) in eight years,

one-tenth ($\frac{1}{10}$) in nine years; each of said installments, except the first, shall draw interest at the rate of six per cent per annum from the time of levy aforesaid until the same shall become delinquent, and after the same shall become delinquent, interest at the rate of one (1) per cent per month, payable in advance, shall be paid thereon as in the case of other special taxes. Such taxes shall be collected and enforced as in other cases of special taxes. In all cases of special taxes, the city treasurer shall have the right and authority, after the same or any part thereof shall have become delinquent, to seize personal property of the party who owns the real estate upon which such taxes have been levied, and to sell such personal property for the satisfaction of such taxes, upon the same advertisement and in the same manner that constables are now authorized by law to seize and sell personal property upon execution; but failure to seize and sell personal property shall in nowise affect the lien of the tax, or any proceedings authorized by law to enforce the tax. * * * *And provided further*, That whenever the property owners representing three-fifths ($\frac{3}{5}$) of the feet frontage of lots or lands upon any street or alley, or part thereof, shall petition the city council to create an improvement district including street and alley intersections, if any, and to have the same improved without cost to the city, then, and in that case, the council shall have power to create such district and cause a contract to be made for such improvement, and to assess and levy a special tax upon all lots or lands within such improvement district so created, to pay for the said improvement, within the same, including the intersection of streets and alleys, if any. * * * Whenever the mayor and council shall enter into or shall have entered into a contract with any paving contractor to keep the pavement in any paving or street improvement district in repair for a term of years for a specified price per year, said mayor and council shall have the power and it shall

be their duty to levy annually a special tax and assessment upon all the property in the paving or street improvement district to cover the cost of said repairs. Such special tax shall be levied and collected as in other cases of special taxes."

Sections 70 and 71 relate to paving between the rails and tracks of street railways.

Section 72 authorizes and makes it the duty of the mayor and council to require water, gas, and sewer connections to be made in a paving district before the work of paving or repairing is done therein, under such regulations as shall be prescribed by ordinance, and, in certain contingencies, "to assess the cost of any sewer connections upon the property opposite such connections, and to such depth as the council, sitting as a board of equalization, shall deem just and equitable."

By section 73 all special taxes to cover the costs of any public improvement authorized by the charter are required to be "levied and assessed on all lots, parts of lots, lands, and real estate bounding, abutting, or adjacent to such improvement, * * * to the extent of the benefits to such lots, parts of lots, lands, and real estate by reason of such improvement."

Section 74 provides how the real estate shall be described in making a levy or assessment of any tax.

Section 75 declares that "the cost and expense of grading, filling, culverting, curbing, guttering, or otherwise improving, constructing, or repairing streets, avenues, alleys, and sidewalks, at their intersections, may be included in the special tax levied for the construction or improvement of any one street, avenue, alley, or sidewalk, as may be deemed best by the council."

Section 76 fixes the time when special taxes for street improvements shall be levied.

Section 77 reads as follows: "When any special tax is levied it shall be the duty of the city clerk to deliver to the

city treasurer a certified copy of the ordinance levying such tax, who shall without delay give at least five days' notice through the official paper of the city, of the time when such tax will become delinquent. To every such certified ordinance the city clerk shall append a warrant in the usual form, requiring the city treasurer to collect such special tax or taxes by distress and sale of the goods and chattels of the person, persons, or bodies corporate owning [owing] any such special tax or taxes, if the same be not paid before the time fixed for the same to become delinquent."

It will be observed that in neither of the foregoing sections, except the first and last quoted, is the mode or manner of collecting special taxes for street improvements in express terms specified, and in none of the provisions of the charter to which reference has yet been made is it distinctly declared that any special tax or assessment, in case of non-payment, may be collected by the sale of the real estate against which the same has been levied. Nor do we think that it can be successfully maintained that the sections quoted above, when construed either separately or together, impliedly confer the right to enforce the collection of assessments imposed for street improvements by the sale of the property adjacent to such improvements. We have not overlooked the fact that by section 69 the mayor and council are expressly empowered to "levy and collect special taxes and assessments" to defray the costs of paving, and that section 73 authorizes all special taxes to cover the costs of any public improvement to be "levied and assessed on the real estate abutting on such improvement;" but there is no room for doubt that the power thereby granted to a municipal corporation "to levy and collect special taxes and assessments" does not impliedly authorize the sale of real estate in case of the non-payment of a special tax or assessment due thereon. It is not indispensable to the declared objects and purposes of the municipality, nor is it necessary to carry into effect any enumerated

or express power conferred upon the corporation by the charter, that special assessments for street improvements should be collected by the sale and conveyance of the property on which the same was levied, since, where no express mode for the collection of taxes or special assessments is provided by law, their payment may be enforced by judicial proceedings instituted by the corporation. (2 Dillon, Municipal Corporations, sec. 818; *Bergan v. Clarkson*, 1 Hal. [N. J.], 428; *McInerny v. Reed*, 23 Ia., 410; *Merriam v. Moody*, 25 Ia., 163; *Paine v. Spratley*, 5 Kan., 525.) Again, the legislature, by sections 69 and 77, has provided, in unequivocal language, a mode for the collection of special taxes and assessments by distress and sale of personal property. The point is made that this is the exclusive method provided by the legislature for the collection of special benefit assessments. This position is not at all tenable, for section 69, copied above, after providing for the seizure and sale of personal property for the satisfaction of special taxes, in unmistakable language declares that the "failure to seize and sell personal property shall in nowise affect the lien of the tax, or any proceedings authorized by law to enforce the tax." The inference to be drawn from this language is that the legislature did not suppose that the only remedy given for the collection of these special taxes was by the sale of personalty; but that the law-makers intended to and did provide another mode of collection than by the distress and sale of personal property of the party owing the tax. That they have done so will be shown further on.

It is also argued by counsel for respondent that the provisions of said sections relating to the sale of personalty are inimical to section 6, article 9, of the state constitution, and are therefore void, and numerous decisions are cited in the brief in support of the proposition. An examination of the subject discloses a conflict in the authorities, but in our view it is not deemed necessary that the question should be passed upon at this time, inasmuch if said provisions should

be held invalid, it would not aid in the solution of the precise point involved in the case. This must be patent to every one, since if the power exists to sell personalty to pay the costs of street improvements, yet it would not include the authority to sell real estate for the same purpose. We are also fully persuaded, after considerable research and investigation, that the power to "levy and collect special taxes and assessments" conferred by said sections 69 and 73 does not include, or carry with it, the power to sell real property for the payment of any delinquent special tax or assessment. This proposition is abundantly supported by authority. A noted text-writer, in discussing the power of municipal corporations in the matter of the collection of revenues, says: "The power to levy and collect a tax, whether general or special, does not carry with it the authority to collect by distress or sale of property or in any way more summary than by resort to legal proceedings. * * * Municipal power to collect by distress and sale cannot be implied because the state collects its taxes in this manner. It must be given, if not in express terms, yet by the clearest and most indubitable implication." (2 Dillon, Municipal Corporations, sec. 818. See 2 Desty, Taxation, 747; Cooley, Taxation [2d ed.], 672; *Ham v. Miller*, 20 Ia., 450; *McInerny v. Reed*, 23 Ia., 410; *Merriam v. Moody*, 25 Ia., 163; *Paine v. Spratley*, 5 Kan., 525; *City of Leavenworth v. Laing*, 6 Kan., 274.)

It is insisted by the relator that the power given cities of the metropolitan class by section 69, copied above, to "levy and collect" special assessments, when taken in connection with other sections of the charter and provisions of the revenue law not heretofore mentioned in this opinion, authorizes the sale of real estate for the non-payment of special taxes for the improvements of streets and alleys. The respondent contends that there is no such authority, especially where there are no delinquent general state, county, or municipal taxes against the property. It is well

settled that, in construing a legislative enactment, all of its provisions must be considered together, and this principle applies equally in the interpretation of city charters. Mr. Desty, in his valuable treatise on Taxation (vol. 2, p. 748) states the rule thus: "In construing charters all the provisions must be considered together, and a provision in one part for the redemption of property from sale clearly implies the power of sale, and, in connection with the power to 'levy and collect,' justifies the exercise of the power of sale for non-payment of the taxes." We entertain no doubt that while the power to levy and collect taxes will not alone confer the right upon the municipality to collect by a direct sale, yet these words may give such authority in connection with other charter provisions on the same subject, which unequivocally and plainly assume and recognize the existence of a power of sale. The doctrine just stated is in the language used by Judge Dillon in his work on Municipal Corporations, (vol. 2, sec. 819), and is fully sustained by the adjudications. The supreme court of Missouri, in *City of St. Louis v. Allen*, 13 Mo., 412, say: "We admit that the power to levy and collect taxes, when given to a corporation, does not necessarily imply a power to sell lands for the non-payment of the taxes thereon. There are other modes of collecting a tax than by immediate sale of the land. Suit may be brought, judgment obtained, and execution issued as for other debts; but it must also be admitted that the ordinary method of collecting taxes on land, and the only one resorted to by the state herself, is by a direct sale of the property taxed. The words 'levy and collect,' therefore, though not of necessity implying a power of sale, and, consequently, not to be conceded to a municipal corporation by mere implication, are yet capable of receiving such a construction, and when the legislature in the same charter inserts other provisions distinctly and unequivocally assuming the existence of such power, we regard such subsequent assumption or admission as a legis-

lative interpretation of the previous language." The same principle was held and applied in *City of Carondelet v. Picot*, 38 Mo., 129, and *City of St. Louis v. Russell*, 9 Mo., 507.

We will now examine some other provisions of the act governing cities of the metropolitan class, which we have not heretofore in this opinion mentioned.

Section 83 provides: "All municipal taxes shall be collected from the personal property of the person, persons, or body corporate owning the same, whenever the same is practicable, and whenever personal property cannot be found belonging to any such person, persons, or bodies corporate, then, in that case, all such delinquent taxes as may have been levied on any real estate within such city shall be collected by the county treasurer of the county in which such city is situated, by sale of such real estate, the same as in case of delinquent county taxes." The foregoing provision has reference alone to the collection of taxes levied by the corporation for general city purposes. That the words "all municipal taxes," in the section just quoted, do not include or cover special taxes or assessments imposed by the mayor and council for improvements is plain. The power of cities relating to the levying of taxes for general purposes, and their powers of levying special taxes or assessments, are treated of in the statute as separate, distinct, and independent powers. Again, in the charter in the section immediately preceding, and in the one following section 83, as well as in several other places in the act, the words "municipal taxes and special assessments," or other similar expressions, are used, thereby clearly indicating that it was not the legislative will that section 83 should apply to special assessments. Thus, section 82 declares that "all municipal taxes and all local or special assessments in such city shall be paid in cash;" and by section 84 authority is conferred upon the mayor and council to enact ordinances "to secure the speedy and thorough collection of all muni-

cipal taxes and special assessments." If the law-givers had contemplated that "municipal taxes" should embrace "assessments or special taxes" levied to pay the costs of improvements, it is fair to presume that they would have employed language which clearly indicated such purpose. To us it is clear that local assessments are not "municipal taxes" in the sense in which that expression is used in the charter. If, therefore, the grant of power to municipal corporations to sell real estate for the non-payment of special assessments exists, it must be found elsewhere than in said section 83, for the authority therein conferred to sell for non-payment of taxes gives no power to sell for mere local assessments. (Desty, Taxation, 748; *Sharp v. Johnson*, 4 Hill [N. Y.], 92; *Sharp v. Speir*, 4 Hill [N. Y.], 76; *Paine v. Spratley, supra.*)

We will now refer to the other provisions of the charter relied upon by the relator as showing authority for the sale of the real estate in controversy to pay the local assessment, the same being sections 91, 92, and 93, which read as follows:

"Sec. 91. It shall be the duty of the city treasurer, on or before the first Monday in September of each year, to make out a complete delinquent list of all lots, lands, or parcels of real estate, the taxes and assessments on which, for the preceding year, remain uncollected at that time, with the amount of such taxes or assessments, together with penalty and interest due from each lot or parcel of real estate set opposite the same; arranging the several lots, lands, or parcels of real estate in such list in the order that they appear on the tax list; stating also in each case the purpose for which the tax or assessment was levied. The county treasurer shall receive such delinquent list, and he shall advertise the real estate therein described for sale for such delinquent taxes or assessments at the same time he advertises the sale of real estate for delinquent taxes, by adding the amount of such delinquent city taxes and as-

sessments to the amount of delinquent state, county, and other taxes, and he shall sell such lots, lands, or parcels of real estate for the purpose of paying all such delinquent taxes and assessments, and shall credit such city for the amount of taxes or assessments so collected, which shall be subject to the order of the treasurer of such city. In the sale of any real estate as above provided for, and in the giving of certificates of sale and tax deeds therefor, the county treasurer shall proceed in the same manner as is or may be provided by law for his proceedings in the sale of real estate for delinquent county taxes, and with like power and authority; and the real estate so sold may be redeemed within the time and upon the same terms and conditions, in every respect, as is or may be provided by law for the redemption of real estate sold for delinquent county taxes; *Provided,* That under this act the county treasurer shall be authorized to collect only by sale of real estate; *And provided further,* It shall be the duty of the city treasurer, upon any taxes being collected by him after the delinquent tax list shall have been delivered to the county treasurer, to forthwith notify the county treasurer of such collection, that the same may be canceled on the delinquent tax list; *Provided further,* That the failure, neglect, or refusal of the city treasurer to make the tax assessed against any real estate by distress and sale of the personal property of the owners thereof shall not in anywise affect or invalidate the sale of such lands for such tax.

"Sec. 92. Municipal taxes and special assessments upon real estate in any such city are hereby made a perpetual lien thereupon from the day on which the same were levied against all persons or bodies corporate, except the United States and this state. Any person or body corporate purchasing any real estate for any tax or assessment levied by the authorities of any city of the metropolitan class shall, after the lapse of five years from the time of recording the treasurer's deed therefor, acquire and have a complete

title thereto, and thereafter all persons shall be debarred from commencing or sustaining any action in any court of this state to recover possession of the same.

"Sec. 93. Irregularities in making assessments and returns thereof, in the equalization of assessments, and in the mode and manner of advertising the sale of any property, shall not invalidate or affect the sale thereof, when advertised and sold for delinquent city taxes or special assessments as herein provided; nor shall the sale of any real estate for such taxes or assessments be invalid on account of such real estate having been listed in any other name than that of the rightful owner or owners."

In said section 91, for the first time, we find specific authority for the sale of real property for the purpose of paying local assessments or special taxes. Under the provisions of this section the city treasurer is required, on or before the first Monday in September of each year, to make out and deliver to the county treasurer a full and complete list of all lots, lands, or real estate against which, at that time, any taxes and assessments for the preceding year remain uncollected, together with the amount of such taxes or assessments chargeable against each lot or parcel of real estate set opposite the same. It is likewise the duty of the county treasurer to advertise and sell the lots and real estate, in such delinquent list described, for the purpose of paying all such delinquent taxes or assessments. It is, however, argued on behalf of the respondent that the word "assessments," as used in this section, is synonymous with "taxes," and therefore does not include or embrace special taxes or local assessments. We are unwilling to give the word "assessments" such a limited or restricted meaning. It is obvious that the legislature never so intended. If "assessments" and "taxes" in the connection they appear in this section mean the same thing, we ask why were they both employed united as they are by the copulative conjunction "and"? No reason therefor has been, or can be,

suggested. If the words had been separated by the disjunctive conjunction "or," then there would have been some ground upon which to base the construction for which counsel contend. That the word "assessments," in the sense in which it is used here, is not synonymous with the word "taxes" is manifest. If otherwise, there was no necessity for the legislature providing in said section for the sale of real estate to pay delinquent city taxes alone, since that had been already authorized in express terms by section 109 of the revenue law. Then, again, by section 92 of the charter, municipal taxes and special assessments upon real estate are made a perpetual lien, and an action against the purchaser of real estate sold for any such tax or assessment is barred after the expiration of five years from the recording of the treasurer's deed; and by section 93 it is declared that irregularities in the making of assessments, and the equalization thereof, and in the manner of the advertising the sale of any property should not invalidate the sale, "when advertised and sold for delinquent city taxes or special assessments as herein provided." Construing sections 91, 92, and 93 of the charter together, there is no room to doubt that the word "assessments," as employed in section 91, means special taxes or local assessments levied for city improvements, and not the yearly taxes imposed by the corporation for general purposes.

It is strenuously insisted by counsel for respondent that the county treasurer has no authority to sell real estate for special assessments, unless at the time there are delinquent state, county, or general city taxes against the same property. This contention is based upon the clause of section 91, which reads: "The county treasurer shall receive such delinquent list, and he shall advertise the real estate therein described for sale for such delinquent taxes or assessments at the same time he advertises the sale of real estate for delinquent taxes, by adding the amount of such delinquent city taxes and assessments to the amount of delinquent

state, county, and other taxes, and he shall sell such lots, lands, or parcels of real estate for the purpose of paying all such delinquent taxes and assessments." From this provision it is argued that the county treasurer is empowered to advertise real estate for delinquent assessments only when he advertises the same property for sale for a general state or county tax, and that he is not permitted to advertise and sell for these local assessments until he can add them to an advertised list of general state and county taxes delinquent on the same property. The clause above quoted specifies that the treasurer shall advertise for delinquent assessments "at the same time he advertises the sale of real estate for delinquent taxes." By this is meant that he shall advertise at the time fixed by the general revenue law for the giving of notice of tax sales, and not merely when the identical lot against which such special assessment is delinquent is advertised for sale for general taxes. True, the treasurer is required to add the amount of the delinquent city taxes and assessments to the amount of any general taxes against the property, yet it does not necessarily follow that the treasurer cannot advertise and sell for special assessments until such time as there exists an unpaid delinquent state or county tax upon the property; nor do we think that the provisions of section 91, when read in connection with the other sections of the charter already mentioned, should receive the interpretation for which respondent contends. All that the legislature intended was that when both delinquent unpaid special assessments and general taxes should be found against the same property, the treasurer, in giving his notice of sale of lands for taxes, should add the amount of the former to the amount of the latter, and in such case he is required to sell "for the purpose of paying all such delinquent taxes and assessments." In other words, the property must be sold for all delinquent assessments, as well as delinquent taxes, against it. If there should be

found no unpaid state or county tax against the property, of course there would be nothing to which the special taxes could be added. This provision in regard to adding goes to the method or manner of advertising merely, and was inserted to obviate the necessity of giving separate notices, one for the sale for municipal taxes and assessments and another for state and county taxes. It was not intended as a limitation upon the power of the treasurer to sell for special taxes, for, following the clause referred to, the section provides that the treasurer "shall sell such lots, lands, or parcels of real estate for the purpose of paying all such delinquent taxes and assessments," and the section further on authorizes the treasurer in making the sale, giving the certificate of sale, and issuing the tax deed to proceed in the same manner as provided by law for the sale of real property for delinquent county taxes. He is clothed with the same power and authority in making sales for special assessments as possessed by him in making sales of real property for delinquent state and county taxes. Recurring again to section 92 we find that after providing that special assessments shall be a perpetual lien upon the real estate on which the same were imposed, it is declared that "any person or body corporate purchasing any real estate for any tax or assessment levied by the authorities of any city of the metropolitan class shall, after the lapse of five years from the time of recording of the treasurer's deed therefor, acquire and have a complete title thereto," etc. This language clearly contemplates that real estate may be sold for delinquent assessments or special taxes alone. It recognizes and assumes that the power exists to sell for such assessments alone. Further examination of section 93 of the charter will go to confirm the views already expressed. The substance of the provision is that certain enumerated irregularities shall not affect the sale of any property "when advertised and sold for delinquent city taxes or special assessments as herein provided; nor

shall the sale of any real estate for such taxes or assessments be invalid" by reason of the property having been listed in any name other than that of the owner. The words employed indicate that the legislature intended and contemplated that real estate might be advertised and sold for either city taxes or special assessments, although there should be no delinquent state or county taxes against the property. From a consideration of the several provisions of the charter, we are constrained to hold that the power of the county treasurer of Douglas county to sell lands for special assessments imposed by the city of Omaha is not limited or restricted to cases in which there shall be general municipal taxes, or state or county taxes, delinquent and unpaid against the same property upon which such special tax or assessment was levied. Such authority is not only specifically conferred, but it impliedly exists from the authority "to levy and collect special taxes and assessments" granted by section 69, when construed with reference to the clause making such assessments a perpetual lien upon real estate, the provision relating to the redemption of property from the sale for such special taxes, and other charter provisions heretofore alluded to. (See 2 Desty, Taxation, 748; *City of St. Louis v. Russell, supra.*)

In the precedent last cited the court had under consideration two provisions in the charter of the city of St. Louis. By one of which the city was given the power "to levy and collect taxes upon all persons and property made taxable by law for state purposes," and by the other it was provided that "the mayor and city council shall have power, by ordinance, to direct the manner in which any property, real or personal, advertised for sale, or sold for taxes by authority of the corporation, may be redeemed." It was held that these two provisions conferred upon the city the power to sell lands for the non-payment of taxes. The court in the opinion, in discussing the question, say: "The charter of 1841 gives to the city council of St.

Louis power 'to levy and collect taxes, not exceeding one-half of one per centum, upon all persons and property made taxable by law for state purposes.' If this section of the act were alone on this subject, there might be room for contending that the sale of land was not the only or necessary mode by which the tax could be collected, and therefore the power of sale would not arise by implication from the granted power 'to levy and collect.' But we regard the 8th section of the 6th article of the charter as a legislative interpretation of this power 'to levy and collect taxes.' That section provides that the mayor and city council shall have power, by ordinance, to direct the manner in which any property, real or personal, advertised for sale, or sold for taxes by authority of the corporation, may be redeemed. This is a clear and distinct recognition of the power in the city to sell land for the non-payment of 'taxes, and is sufficient to remove any doubts which the general phraseology of the previous article might create." The language of the foregoing opinion is unquestionably broad enough to cover the case at bar. In fact, stronger reasons exist for sustaining the power of sale here than in the Missouri case, since there are so many provisions in the statute under consideration bearing upon the power of sale which are not to be found in the St. Louis charter construed by the court.

The construction we have adopted is in harmony with the provisions of the general revenue law of the state, under section 109 of which law the county treasurer is required to offer for sale, at the time and place therein specified, "all lands on which the taxes levied for state, county, township, village, city, school district, or any other purpose for the previous year still remaining unpaid," etc. Power is thereby given to sell real estate for the taxes levied thereon for city or any other purpose, and the legislature has, by section 182 of the same law, defined the word "taxes," wherever used in the act, to

mean "any tax, special assessments, or costs, interest or penalty imposed upon property." The petition in the case before us discloses, and the defendant by his demurrer admits, that every requirement of the statute has been by the proper officers strictly followed in the matter of levying the special taxes or assessments upon the lot in controversy, and that such taxes are valid and remain unpaid, the sole ground upon which respondent places his refusal to sell the property to the relator being that the petition shows that there were no delinquent unpaid general taxes, state, county, or municipal, against said lot. From the conclusions stated above in this opinion, it follows that the demurrer should be overruled, and a peremptory writ of *mandamus* issued as prayed.

WRIT ALLOWED.

BURLINGTON INSURANCE COMPANY V. CAMPBELL & TALBOT.

FILED OCTOBER 16, 1894. NO. 5742.

1. **Insurance**: REMOVAL OF PROPERTY: WAIVER OF TERMS OF POLICY BY AGENT. An insurance policy upon personal property contained a provision, in effect, that the company should not be liable for loss or damage to the property in any other place than in the building in which the same was situated when the risk was written; and also another clause that "No officer, agent, or representative of this company shall be held to have waived any of the terms and conditions of this policy, unless such waiver shall be indorsed hereon in writing." The insured removed the property covered by the policy to another building, and while therein the loss occurred. Oral consent to such removal was given by the person who, as local agent, issued and delivered the policy, although several weeks prior thereto he had ceased to act for or represent the company. No notice to the company was given by the insured, nor did it, or any officer or agent thereof, consent in writing to the removal. *Held*, That the oral consent

of the person who had ceased to act as agent of the insurer did not bind the company, and that the removal of the property without the written consent therefor being indorsed upon the policy avoided the contract.

2. ———: LOCATION OF PROPERTY: WAIVER OF TERMS OF POLICY: PLEADING. A condition in a policy of insurance fixing the location of the property insured may be waived by the company, but such waiver must be pleaded, to avail the insured.

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

The opinion contains a statement of the case.

Wharton & Baird, for plaintiff in error:

The evidence clearly justifies the conclusion that no consent was ever given by the company to the removal of the goods in question, and that no notice of such removal was ever given until after the fire occurred, and that no waiver of the conditions of the policy, actual or by implication, can be claimed. The defendants in error cannot, therefore, recover on the policy. (*Lyons v. Providence Washington Ins. Co.*, 14 R. I., 111; *Wood v. Hartford Fire Ins. Co.*, 13 Conn., 544; *Wall v. East River Mutual Ins. Co.*, 3 Seld. [N. Y.], 370; *Boynton v. Clinton & Essex Mutual Ins. Co.*, 16 Barb. [N. Y.], 254; *Harris v. Royal Canadian Ins. Co.*, 53 Ia., 236; *McCluer v. Girard Fire & Marine Ins. Co.*, 43 Ia., 349.)

The company had no valid notice of the removal of the goods. (*Hill v. Helton*, 80 Ala., 528; *Bohart v. Oberne*, 36 Kan., 284; *Russell v. Cedar Rapids Ins. Co.*, 42 N. W. Rep. [Ia.], 654.)

Where written consent to a waiver of the terms of the policy is required as a part of the contract of insurance, no waiver can be held binding upon the company unless the same is in writing, as provided in its policy; and no agent or officer of the company could possibly waive such requirement. (*Kyte v. Commercial Union Assurance Co.*, 10

N. E. Rep. [Mass.], 518; *Hankins v. Rockford Ins. Co. of Rockford, Ill.*, 35 N. W. Rep. [Wis.], 34; *Birmingham Fire Ins. Co. v. Kroegher*, 2 Norris [Pa.], 264; *Walsh v. Hartford Fire Ins Co.*, 7 Ins. L. J. [N. Y.], 423; *German Ins. Co. v. Heiduk*, 30 Neb., 288.)

V. O. Strickler, contra:

Where the relation of principal and agent has once been established, it will be presumed to continue until shown to have been dissolved. (*Columbus Co. v. Hurford*, 1 Neb., 146.)

Where the knowledge of a broken condition comes home to the company, and it retains all the premium and says nothing whatever about forfeiture, it will be deemed to have waived the forfeiture. (*Phœnix Ins. Co. v. Lansing*, 15 Neb., 495; *Ins. Co. of North America v. McLimans*, 28 Neb., 658; *Schoneman v. Western Horse & Cattle Ins. Co.*, 16 Neb., 405; *Viele v. Germania Ins. Co.*, 26 Ia., 9; *Miner v. Phœnix Ins. Co.*, 27 Wis., 698; *Franklin v. Atlantic Fire Ins. Co.*, 42 Mo., 456.)

NORVAL, C. J.

This action was brought by Campbell & Talbot against the Burlington Insurance Company on a policy of insurance against loss or damage by fire. There was a trial by jury, and at the close of the testimony the defendant moved that the jury be instructed to find in its favor, which was overruled by the court, and a verdict was returned for the plaintiffs, upon which judgment was entered. The defendant company prosecutes a petition in error to this court.

There is but little controversy as to most of the facts. The policy was issued on the 16th day of April, 1889, to continue in force for the period of one year, and the amount of the insurance was $350 on plaintiffs' "printing press, type, paper, and other printing supplies and office furniture and fixtures, all while contained in the five-story brick,

metal or composition roof building, known as the 'Ramge Building,' and situated on the southeast corner of Fifteenth and Harney streets, Omaha, Nebraska." The property covered by the policy was removed by the plaintiffs about the 1st day of January, 1890, from the said building in which it was situated when the policy was issued, and placed in the Hill Building, located at the southwest corner of Fifteenth and Douglas streets, in the said city of Omaha. The last mentioned building was burned on the 13th day of April, 1890, and a portion of plaintiffs' said printing outfit, was likewise destroyed by fire, and thereafter the plaintiffs made due proofs of loss as required by the policy. The defense to the action is that the policy was avoided by reason of the removal of the property from the building in which it was contained when the risk was written. The policy, after giving a description of the property, and its location, provides that Campbell & Talbot are insured "against all such immediate loss or damage sustained by the assured as may occur by fire to the property above described, only while contained on or in the premises herein described, not exceeding the sum insured." The policy also contained the following condition: "This company shall not be liable for theft at, or after, a fire, * * * nor for loss or damage to the property in any other locality than herein specified." The contention of the plaintiffs is that the company waived the foregoing stipulations of the policy by consenting to the removal of the property, both prior and subsequent to such removal. This is the sole question we are called upon to consider. It appears that Ayerst & Taffinder were the local agents of the company at Omaha when the risk was taken, and that they issued the policy in question. It is insisted that notice of the intention of the assured to remove the property to the Hill Building was given to Mr. Ayerst, of the firm of Ayerst & Taffinder, and that he consented to such removal. The evidence relating thereto is conflicting. On

one side is the testimony of N. O. Talbot, one of the defendants in error, to the effect that shortly before January 1, 1890, he informed Mr. Ayerst that it was the intention to remove the insured property from the Ramge Building into the Hill Building about the first of the month, and requested that permission therefor be entered upon the books of the company; and that shortly after the first of January, Mr. Talbot again saw Mr. Ayerst, and notified him that the property had been removed, and was assured by the latter that everything was all right. On behalf of the company is the direct and positive testimony of Mr. Ayerst, denying that Mr. Talbot had any conversation with him upon the subject. The jury having found in favor of the plaintiffs, we must accept as a fact that the conversations testified to by Mr. Talbot occurred as stated by him. It is not claimed that any attempt was made to notify the company of the removal of the property prior to the loss, except as stated above. The question is presented whether the insurer was bound by the notice which was given to Ayerst & Taffinder. We think not, for two reasons. In the first place the undisputed evidence shows that the aforesaid Ayerst & Taffinder ceased to act as agents for the insurance company some time prior to the conversations testified to by Mr. Talbot, and that Daniels & Baldridge were, from and after the 19th day of November, 1889, the sole representatives or agents of the plaintiff in error in the city of Omaha. It requires no argument to show that notice to Ayerst & Taffinder, of the intention of Campbell & Talbot to remove the property into another building, as well as the consent given by them to such removal, is of no validity whatever. To hold otherwise would make the insurer liable for the acts and conduct of those who confessedly were not its agents, and who were no longer in its employ. Counsel for defendants in error invoke the familiar rule that where the relation of principal and agent has once been established it will be presumed to continue

until shown to have terminated. The answer to this is that this presumption of law was entirely overcome by undisputed evidence that the relation of principal and agent which had once existed between Ayerst & Taffinder and the company had been terminated. It can make no difference that the insured had no notice that the agency had ceased, and that other agents had been appointed. Had Ayerst & Taffinder continued to represent the company after their removal, which the evidence fails to disclose, the latter, perhaps, might have been bound for such acts as were committed within the scope of their apparent authority.

There is another reason why the condition in the policy as to the location of the property has not been waived by the plaintiff in error. The contract of insurance contains this provision: "And it is further expressly covenanted by the parties hereto, that no officer, agent, or representative of this company shall be held to have waived any of the terms and conditions of this policy, unless such waiver shall be indorsed hereon in writing." As applicable to this branch of the case the court below instructed the jury as follows:

"4. Unless you find from the evidence that the defendant had notice of such removal of said goods, and has waived such conditions of the policy, with knowledge of the alleged fact, the plaintiffs cannot recover. The defendant's agents had no right under the law to consent to such removal, unless such consent was in writing on the policy in question."

It is not claimed that any written consent was given for the removal of the property by any officer or agent, or that a waiver of any of the conditions contained in the contract of insurance was ever indorsed upon the policy. The verdict, therefore, was not only contrary to the above instruction, but against the evidence as well. The policy became void upon the removal of the property. Assent to such

removal, indorsed upon the policy by an authorized agent of the company, would revive it and continue the contract in force. (*German Ins. Co. v. Heiduk*, 30 Neb., 288, and cases there cited. See also authorities cited in the brief of plaintiff in error.) No notice having been given to this company, or its authorized agent, of the removal of the property in question from the building in which the same was insured, and no consent to such removal having been indorsed upon the policy, we are constrained to hold that the oral consent of Ayerst & Taffinder is a nullity.

It is insisted that the company waived the forfeiture of the policy by accepting and retaining the premium for the entire year. No such question is presented by the pleadings, since the plaintiffs below failed to allege that the company waived the forfeiture by failing to return the unearned premium and canceling the policy. The premium was paid when the risk was written, and the company had no notice of the removal of the property until after the loss. Had it been notified of the removal prior to the fire, and then failed to return, or offer to return, the unearned premium, such facts might be deemed a waiver of the forfeiture. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

M. ISABEL BOND ET AL. V. ABRAHAM N. WYCOFF.

FILED OCTOBER 16, 1894. No. 5210.

1. **County Courts: CALENDARS.** Under the provisions of section 15, chapter 20, Compiled Statutes, it is the duty of the county judge, on the first day of each term of the county court, or as soon thereafter as practicable, to prepare a calendar for all the causes for trial at such term, arranging the cases thereon in their numerical order, and setting the same down for trial, in the same order, for particular days during such term.

2. ———: ———: PRESUMPTION OF CORRECTNESS. It will be presumed by the appellate court, in the absence of any showing upon the subject, that such calendar was prepared and the causes set down for trial in strict compliance with the terms of the statute.

3. ———: DEFAULT: JUDGMENT. In cases brought in the county court which are not within the jurisdiction of the justice court, where no answer is filed on or before the first day of the term, in a cause to be tried at such term, the plaintiff is entitled to have the default of the defendant taken and proceed to judgment on any succeeding day of the term, upon proving his damages.

4. ———: MOTION TO VACATE JUDGMENT BY DEFAULT: REVIEW. Where judgment on default has been entered by the county court against a defendant and which he seeks by motion to have vacated because the same was prematurely rendered, the motion must be accompanied by an answer showing a meritorious defense, either in whole or in part, to the action. If no defense is alleged, it is not error to overrule the motion to vacate the judgment.

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

John H. Ames and *E. F. Pettis*, for plaintiffs in error.

Stevens, Love & Cochran, contra.

NORVAL, C. J.

This is a proceeding in error to reverse the judgment of the district court of Lancaster county affirming the judgment of the county court of said county. The action was instituted in the county court on the 7th day of October, 1890, by the defendant in error to recover from M. Isabel Bond and Clara B. Colby, the plaintiffs in error, the sum of $242.50, with interest, as commissions for the sale of real estate. Summons was personally served upon each of the defendants on October 7 and October 17, respectively. On November 3, 1890, the defendant Colby, by her attorney, appeared and filed a motion to require the plaintiff to

make his petition more definite and certain, which motion the county court sustained on November 21; and upon the same day plaintiff, by leave of court, filed an amended petition complying with the requirements of defendants' said motion, and the cause was thereupon continued until December, 1890, term. On the 15th day of December the cause was again continued by the court until the January, 1891, term. On January 6, that being the second day of said January term, the defendants having failed to plead, answer, or demur, their defaults were entered, the case was tried, and upon the evidence adduced the court rendered judgment in favor of the plaintiff for $255.43, besides the costs. Afterwards, on the 29th day of January, 1891, the defendants filed a motion to vacate and set aside said judgment upon the following grounds:

1. The court did not on the first day of the term at which said judgment was rendered, or at any time thereafter, prepare a calendar of the causes standing for trial at such term.

2. That said cause was not at any time by the court assigned or set down upon the calendar, or otherwise, for trial on any particular day.

3. Because of mistake, neglect, and omission of the court and clerk in said proceeding, and irregularity in obtaining said judgment.

4. That said finding and judgment were made and rendered before said action regularly stood for trial in said court according to law.

On April 20, 1891, the foregoing motion was overruled by the county court, and thereupon the defendants prosecuted a petition in error to the district court, where the judgment of the county court was in all things affirmed.

A single point is urged by counsel for plaintiffs in error for the reversal of the case, and that is that the judgment was rendered by the county court on the second day of the term without having made out a calendar of the cases for

trial at said term, or assigning this cause for trial on any particular day. Section 15 of chapter 20 of the Compiled Statutes provides that "the probate judge shall, on the first day of each term, or as soon thereafter as may be, prepare a calendar of the causes standing for trial at such term, placing the causes upon such calendar in the order in which the same are numbered on the docket, and setting the causes for trial, in such order, upon convenient days during such term; and the provisions of this code relative to the trial docket in the district court shall, so far as they are in their nature applicable, apply to such calendar." Section 323 of the Code of Civil Procedure declares: "The trial docket shall be made out by the clerk of the court at least twelve days before the first day of each term of the court; and the actions shall be set for particular days in the order in which the issues were made up, whether of law or of fact, and so arranged that the cases set for each day shall be tried as nearly as may be on that day. For the purpose of arranging said docket, an issue shall be considered as made up when either party is in default of a pleading. If the defendant fails to answer or demur, the cause, for the purpose of this section, shall be deemed to be at issue upon questions of fact; but in every such case the plaintiff may move for and take such judgment as he is entitled to, on the defendant's default, on or after the day on which the said action shall be set for trial."

From the foregoing statutory provisions it would seem that it is the duty of the county judge to make out, on the first day of each term of the court, or as soon thereafter as practicable, a calendar or trial docket of the causes in a condition to be tried at that term. The order in which the cases shall be placed upon the calendar is prescribed, and such judge is required to assign the cases for trial for particular days during the term in the order in which they appear upon the docket. At this time it is unnecessary to stop and inquire whether the provisions of the sections

quoted above are mandatory, or directory merely, for if the more rigid construction should obtain, owing to the state of the record under review, the judgment of the district court cannot be disturbed. In the first place it does not appear but what the county judge prepared a calendar of the causes for the January, 1891, term of the county court, in strict compliance with the letter of the statute, nor does the record disclose that this action was not tried and the judgment rendered on the very day the same was assigned for hearing. On the contrary, the transcript prepared by the county court recites that on January 6, 1891, there was a call of the docket, from which entry it may be inferred that the proper calendar, or trial docket, of the causes for the term at which the judgment was rendered was made out in conformity to law. If none was prepared, plaintiffs in error should have made such fact appear by a bill of exceptions. Error in the proceedings of the trial court is never presumed, but must affirmatively appear from the record. It is a well settled rule that an appellate tribunal will indulge all reasonable presumptions in favor of the regularity of the proceedings of the trial court. Again, section 12 of said chapter 20 is applicable to the case at bar. This section provides that "if no answer is filed on or before the first day of the term, in any action to be tried during such term, the plaintiff may have the default of the defendant entered, and may proceed to judgment on any succeeding day during the term, upon proving his cause of action." In the case under review the plaintiffs in error were in default of an answer, and had been for more than thirty days. The defendant in error therefore had a right to have their defaults entered and to proceed to judgment against them. This section 12 authorizes judgment to be rendered at any time after the first day of the term where the defendant is in default for want of an answer. The procedure adopted by the county court in this case was according to the requirements of said section 12.

Another valid reason why the county court did not err in refusing to vacate the judgment is that the plaintiffs in error did not accompany their motion with an answer presenting a good and meritorious defense to the action. By section 606 of the Code it is provided that "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." This section applies to applications to county courts to set aside judgments in actions brought therein in which the amount claimed exceeds a justice's jurisdiction. Under the foregoing provisions, 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. (*Osborn v. Gehr*, 29 Neb., 661; *Janes v. Howell*, 37 Neb., 320.) For anything this record shows, there is no defense to the action. Should the judgment be vacated, it does not appear that a different result would likely be obtained on the next trial from the one in the first. The judgment is

AFFIRMED.

CITIZENS STATE BANK V. Z. M. BAIRD ET AL.

FILED OCTOBER 16, 1894. No. 5687.

1. **Trial: ARGUMENTS: OPENING AND CLOSING: HARMLESS ERROR.** In trials by the court without the assistance of a jury, it is not reversible error to deny the party holding the affirmative leave to open and close the argument, where it is apparent from the record that he has not been prejudiced thereby.
2. **Argument on Motion to Dissolve Attachment: OPENING AND CLOSING.** *Olds Wagon Co. v. Benedict*, 25 Neb., 372, distinguished.

3. **Attachment: DISSOLUTION: BURDEN OF PROOF.** Where the allegations of an affidavit for attachment are put in issue by a motion to discharge, it is not sufficient for the plaintiff to establish his good faith and reasonable grounds for believing the statements of his affidavit to be true. He is required to establish the truth of such statements to the satisfaction of the court.

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

Jay & Beck and *Gantt & Briggs*, for plaintiff in error.

Robert Hunter and *J. R. Hays, contra.*

POST, J.

This is a petition in error and presents for review an order of the district court for Dakota county discharging an attachment on the motion of the defendant in an action between the parties hereto. It is shown by the record that at the hearing of the motion the plaintiff claimed the right to open and close, which was denied. The defendant then introduced his proofs, in the form of affidavits, after which the plaintiffs presented affidavits in support of the attachment. At the conclusion of the plaintiff's evidence defendant offered affidavits in rebuttal, to which the plaintiff objected on the ground that "rebutting evidence is inadmissible, and because there is no provision for filing counter-affidavits in such case; also on the ground that the affidavits offered are not rebutting evidence." That objection was sustained and the defendant permitted, over the plaintiff's objection, to open and close the argument and which is the ruling first assigned as error.

We are referred by counsel for plaintiff, as sustaining their contention upon this branch of the case, to *Olds Wagon Co. v. Benedict*, 25 Neb., 372. It was in that case held, in effect, that the order of argument is a matter of right and follows the burden of proof; and such is conceded to be the established rule both in the courts of this country

and England. That rule is, without doubt, applicable to actions at law and special proceedings triable to a jury. There is, however, reason to doubt the soundness of decisions holding it applicable to trials before the court without the assistance of a jury. Particularly is that true under a practice like ours, where the order of proof is the subject of statutory regulation. It is provided by section 283, Civil Code, under the title "Jury Trials," that, upon the conclusion of the evidence, "the parties may then submit, or argue, the case to the jury. In the argument the party required first to produce his evidence shall have the opening and conclusion. If several defendants having separate defenses appear by different counsel, the court shall arrange their relative order," etc. Provision is made by sections 296 and 297, under the title "Trial by the Court," for the waiving of a jury and trial in such cases to the court, but no reference is therein made to the order of argument. It would seem that the procedure upon the hearing of motions, particularly those of the character involved in this proceeding, should be assimilated to the practice in equity causes rather than that which obtains in actions tried by jury. In equity the argument is regulated by rule and generally within the discretion of the chancellor, and we are not aware that a decree has ever been reversed on appeal for an abuse of discretion in that respect or even for the refusal to hear argument. If it were an open question, we should not hesitate to hold that the rule invoked has no application to issues triable by the court. It is certain we can conceive of no reason for denying to the district court discretion to regulate argument in those cases which will not apply with equal force to this court, where such has been the practice almost since its organization; but as *Olds Wagon Co. v. Benedict* is not decisive of this case, the question of its authority is left for further consideration. The precise point there decided is that the order of argument is a matter of right that prejudice will, as a rule, be

presumed from a denial of that right; and in the absence of a record tending to prove the contrary, the ruling in that case was held reversible error. It should be noted also that upon rehearing (27 Neb., 344), although the former decision was adhered to, a vigorous dissenting opinion was filed by REESE, C. J. It is a universal rule, applicable to appellate proceeding, and often asserted by this court, that error which is not prejudicial to the complaining party is no ground for the reversal of a judgment. In the case at bar the ruling alleged, if erroneous, was error without prejudice, for the reason that the order of the district court discharging the attachment is clearly right. In fact it is the only order which could have been made on the record. The grounds alleged in the affidavit for the attachment are that the defendant is about to convert his property into money for the purpose of placing it beyond the reach of his creditors; that he has assigned his property, or a part thereof, with an intent to defraud his creditors. The most that can be claimed for the evidence in support of the attachment is that it tends to establish reasonable grounds for believing the statements in the original affidavit to be true; but probable cause will not answer the requirements of the statute. The plaintiff is required to establish the truth of the statements of his affidavits to the satisfaction of the court or judge. (Waples, Attachment, 433; *Folsom v. Teichner*, 27 Mich., 107; *Greene County Savings Bank v. Michigan Barge Co.*, 52 Mich., 164.) The order discharging the attachment is right and is therefore

AFFIRMED.

LOUIS LITTLEFIELD V. STATE OF NEBRASKA.

FILED OCTOBER 16, 1894. NO. 6995.

1. **Municipal Corporations**: EXERCISE OF POWER TO LICENSE A BUSINESS OR OCCUPATION. Where authority is conferred upon a municipal body to license and regulate a particular business or occupation as a sanitary measure, such power must be exercised as a means of regulation only, and not as a means of producing revenue.
2. ———: ———: SALE OF MILK. Authority is conferred by its charter upon the city of Omaha to license and regulate the production and sale of milk within its limits, and it may lawfully exact a reasonable license fee from all persons engaged in such business.
3. ———: ———: REASONABLENESS OF FEE. While the courts have power to inquire into the reasonableness of the fee exacted in the exercise of the power to regulate, a considerable latitude will be allowed for the exercise of legislative discretion over the subject.
4. **License**: POLICE REGULATIONS. Such a measure will be upheld by the courts when plainly intended as a police regulation and the revenue derived therefrom is not disproportionate to the cost of issuing the license and the regulation of the business to which it applies.
5. ———: REASONABLENESS OF FEE: VALIDITY OF ORDINANCE. Where such an ordinance is clearly within the general powers of a municipal body it is presumed to be reasonable, and the judicial power of the state will not be exercised to declare it void, unless from its inherent character, or by proofs adduced, it is shown to be unreasonable.

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

The opinion contains a statement of the case.

Estabrook & Davis, for plaintiff in error:

The license fee cannot be sustained as an exercise of the

taxing power. (Dillon, Municipal Corporations, sec. 357; *Templeton v. City of Tekamah*, 32 Neb., 545.)

The requirement of a license fee cannot be upheld as an exercise of police power. (Tiedeman, Municipal Corporations, sec. 123; *City of Leavenworth v. Booth*, 15 Kan., 627; *Mühlenbrinck v. Long Branch Commissioners*, 13 Vroom [N. J.], 364; *City of St. Paul v. Traeger* 25 Minn., 248.)

George H. Hastings, Attorney General, E. J. Cornish, and *W. S. Shoemaker*, for the state, cited: Tiedeman, Limitations of Police Power, p. 274; *People v. Mulholland*, 82 N. Y., 324; *City of Chicago v. Bartee*, 100 Ill., 57; *Kinsley v. City of Chicago*, 16 N. E. Rep. [Ill.], 260; 1 Dillon, Municipal Corporations, pp. 441, 442; 2 Beach, Public Corporations, sec. 1255; *City of Cincinnati v. Buckingham*, 10 O., 261; *City of Cincinnati v. Bryson*, 15 O., 643.

POST, J.

The plaintiff in error was by the district court for Douglas county found guilty of the violation of an ordinance of the city of Omaha, which prohibits the selling, or keeping for sale therein, of milk by any person without a license. From the judgment against him he has prosecuted proceedings in error to this court. The proposition upon which he relies for a reversal of the judgment of the district court is that the ordinance in question, in so far as it exacts the payment from him of a license fee of $10, is in excess of the authority conferred upon the city, and therefore void. The ordinance is too voluminous to be set out at length in this opinion, but its scope and character are indicated by the title thereof, to-wit, "An ordinance regulating the production and sale of milk in the city of Omaha and providing for the appointment of a milk inspector and prescribing his duties." The provision thereof with respect to license fees is as follows: "Every person, firm, or corporation producing milk or cream for sale and selling the same in the city of Omaha,

and every person, firm, or corporation selling or offering for sale, or keeping for sale, any milk or cream from any milk depot, store, or other establishment or place of business in the city of Omaha, and every person selling or delivering milk from any wagon or other vehicle within the city of Omaha shall pay a license fee of $10 per year; *Provided*, That when more than one wagon or other vehicle is used by any person, firm, or corporation in the delivery of milk or cream in the city of Omaha an additional license fee of $10 per year shall be paid for each additional wagon; *And provided further*, That any person owning only one cow and delivering milk by hand shall pay a license fee of $2 per year, and any person owning only two cows and delivering milk by hand, or any person delivering milk by hand from any milk depot, store, or other establishment or place of business shall pay a license of $5 per year."

The sections of the city's charter which relate to the subject under consideration are: Section 41, chapter 12*a*, Compiled Statutes, entitled "Cities of the Metropolitan Class," by which it is provided that "the mayor and council shall have power * * * to provide for, license, and regulate the inspection and sale of meats, flour, poultry, fish, milk, vegetables, and all other provisions or articles of food exposed or offered for sale in the city," etc. Section 30, which provides for a board of health which "shall have control and supervision of meats, food, drinks, and the inspection, condemnation, use, sale, and disposition thereof. * * * Inspectors of meats, milk, food, and of any and all other matters and things relating to the sanitary condition of such city shall be under the control and direction of said board of health." Section 79, providing for a system of taxation, among other purposes named, "for payment of the expenses of the board of health not exceeding one mill on the dollar valuation in any one year, taxes levied for said purpose to constitute a special fund therefor," etc.

In the able brief submitted by counsel for the plaintiff in error they conceded the power of the city by ordinance to prescribe needful and proper rules for the inspection and sale of milk and like commodities therein as a reasonable sanitary measure. They also admit the power of the city to require dealers in such commodities to procure license and to exact a reasonable fee therefor; but they argue that it cannot require the payment of a fee in excess of the cost of issuing the license, on the ground that such a demand is unreasonable and therefore prohibited both by its charter and the general rules defining the powers of municipal bodies. In support of that contention we are referred to Tiedeman, Limitations of Police Power, 101; *City of Leavenworth v. Booth*, 15 Kan., 627; *City of St. Paul v. Traeger*, 25 Minn., 248, and *Mühlenbrinck v. Commissioners of Long Branch*, 42 N. J. Law, 364. The doctrine of those authorities and many others which we have examined is that the legislature cannot authorize the power of taxation under the pretence of sanitary regulations or other exercise of the police power of the state in the interest of the public health or safety. That principle was distinctly recognized by this court in the recent case of *Smiley v. MacDonald*, 42 Neb., 5, in which the test is said to be, whether the measure in question has some relation to the public welfare and whether such is in fact the object sought to be attained; but by taxation, as the term is here employed, is meant the providing of revenue for the ordinary expenses of state or municipal government. It does not follow, therefore, that an ordinance will be held void simply because it provides for a fund to be derived from license fees. Such a measure will be upheld by the courts whenever it appears to have been designed to promote the welfare of the public, and the revenue derived therefrom is not disproportionate to the cost of its enforcement and the regulation of the business to which it applies (See Cooley, Taxation [2d ed.], 598; Tiedeman, Limitations of Police Power, 101; 2 Beach, Public Cor-

porations, sec. 1255; *North Hudson R. Co. v. City of Hoboken*, 41 N. J. Law, 71; *People v. Mulholland*, 82 N. Y., 324; *Van Baalen v. People*, 40 Mich., 258; *City of Chicago v. Bartee*, 100 Ill., 57; *Kinsley v. City of Chicago*, 124 Ill., 359.) As said by Professor Tiedeman in the section above cited, "What is a reasonable sum must be determined by the facts of each case; but where it is a plain case of police regulation, the courts are not inclined to be too exact in determining the expense of procuring the license as long as the sum demanded is not altogether unreasonable;" and in section 123, Tiedeman, Municipal Corporations, the same author says: "And although it is a judicial question whether the sum exacted is a reasonable one, a wide latitude is given to the exercise of legislative discretion in the determination of the amount of the license fee." In some of the cases cited the courts have taken notice, without proof, that the fee exacted is unreasonable. For instance, in *North Hudson R. Co. v. City of Hoboken, supra*, the court declared as a matter of law that a fee of $15 for each one-horse car and $25 for each two-horse car was unreasonable. On the other hand, in *People v. Mulholland* the fee named was not less than $5, and not more than $10, to be fixed by the mayor, for each wagon used in selling milk, yet it was held reasonable; and in *Kinsley v. City of Chicago* the ordinance which was upheld imposed a license fee of $15 per year upon all vendors of meat.

In the case at bar there is a stipulation of record by the plaintiff in error to the effect that he was at the time named engaged in selling milk, as charged, in the city of Omaha without license; and that in case the ordinance, which exacts from him a fee of $10, is held to be valid, judgment shall be entered as on a plea of guilty. It will thus be observed that the case is submitted to us as if upon demurrer to the information. When the measure, which is the subject of the ordinance, is, as in this instance, clearly within the general powers of the city, the presumptions are

in favor of its reasonableness, and the judicial power of the state cannot be invoked for the purpose of declaring it void unless from the inherent character thereof, or from proofs adduced, it is shown to be in fact unreasonable. (See *State v. City of Trenton*, 53 N. J. Law, 132; *Van Hook v. City of Selma*, 70 Ala., 361; *Atkins v. Phillips*, 26 Fla., 281; *City of St. Louis v. Weber*, 44 Mo., 547; *Commonwealth v. Patch*, 97 Mass., 221; Parker & Worthington, Public Health & Safety, 312.) By an application of that rule to the case before us we reach the conclusion that the ordinance assailed is a reasonable exercise of the power conferred by law upon the city.

But it is suggested by counsel that the rule as here stated is inapplicable to this case, since by provision of the constitution all license money belongs to the school fund of the city, the fees provided for cannot be applied to the purpose of enforcing the ordinance, and are, therefore, unnecessary and unreasonable. In this connection they refer also to the provision contained in section 79 of the city's charter for the levy of a tax to defray the expenses of the board of health, and which is to constitute a special fund for that purpose. The constitutional provision referred to is section 5 of article 8, which reads as follows: "All fines, penalties, and license moneys arising under the general laws of the state shall belong and be paid over to the counties, respectively, where the same may be levied or imposed, and all fines, penalties, and license moneys arising under the rules, by-laws, or ordinance of cities, villages, towns, precincts, or other municipal subdivision less than a county shall belong and be paid over to the same respectively. All such fines, penalties, and license moneys shall be appropriated exclusively to the use and support of common schools in the respective subdivisions where the same may accrue." If that provision applies to ordinances like the one here involved, and which for the purposes of the present controversy may be conceded, it follows that the cost of enforcing

the ordinance and regulating the business of producing and selling milk must be paid from funds provided by taxation instead of by license fees. But of what avail is that fact to the accused in this prosecution? Upon what ground can he be heard to complain because the fees realized are not applied directly to relieve the burdens which are by means of his business imposed upon the city? We take notice that provision is made by statute for the levy of a school tax by cities of the metropolitan class not exceeding two per cent annually upon their assessed valuation. To the extent that the school fund of the city is enriched by the proceeds of fines and licenses is the necessity for taxation diminished. The fact, therefore, that the expenses incident to an enforcement of the ordinance are payable out of a fund provided by taxation is a matter of no consequence either to the accused or the city. That view is in accordance with the rule stated by Professor Tiedeman, as will be observed from the foregoing citations. It follows that the judgment of the district court is right and should be

AFFIRMED.

JEFF W. BEDFORD V. DAVID W. VAN COTT ET AL., APPELLEES, AND SIMONS BROTHERS ET AL., INTERVENORS, APPELLANTS.

FILED OCTOBER 16, 1894. No. 5333.

1. **Chattel Mortgages: LIENS.** The mortgagee under a chattel mortgage acquires a lien only upon the property conveyed and not the legal title thereof.
2. **Fraudulent Conveyances.** Evidence examined, and *held* to sustain the decree of the district court.

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

William E. Healey, H. P. Stoddart, and *George D. Meiklejohn,* for appellants.

Cornish & Robertson, contra.

POST, J.

This is an appeal from a decree of the district court for Douglas county and involves the validity of a chattel mortgage executed by one David W. Van Cott to the National Bank of Commerce of the city of Omaha. The mortgage in controversy was executed on the 14th day of August, 1890, to secure three several notes of the mortgagor, to-wit: One for $4,500, dated February 21, 1890; one for $250, dated August 6, 1890; and one dated August 13, 1890, for $457.42; all payable on demand and all bearing interest at the rate of ten per cent per annum. On the same day Van Cott executed a second mortgage covering the same property, in favor of Bedford, the plaintiff herein, to secure a note of $1,256.93, of the same date, payable on demand, with interest at ten per cent, and which contains a recital to the effect that it is subject to the mortgage herein first described. Upon the execution of the mortgages named Bedford and the bank, it appears, took immediate possession of the property conveyed, and gave notice of the sale thereof in the manner provided by law; but previous to the day of sale named in said notice, Bedford commenced this action, in which he seeks to assert his mortgage subject to the lien of the bank. Afterwards, on the application of the plaintiff, a receiver was appointed, who took possession of the mortgaged property and converted it into money. Subsequent to the appointment of the receiver, the appellants Simons Bros. & Co. and Samuel Eichberg, creditors of Van Cott, obtained leave to proceed against said property by attachment, and also to intervene in this action for the purpose of asserting their claims to the property as attaching creditors, adverse to those of the

plaintiff and the bank. In their petitions of intervention, which are substantially alike, they assail the mortgages on the ground that they were executed in fraud of the rights of the other creditors of Van Cott, and allege that both plaintiff and the bank had notice of and actively participated in such fraud. The allegation of fraud having been put in issue by proper pleadings, a final hearing was had, resulting in a decree in favor of the appellees, and from which the intervenors have prosecuted an appeal.

In addition to the facts above stated, appellants rely upon the evidence given by Mr. Johnson, a former cashier of the defendant bank, who testified that on the 21st day of February, 1890, Van Cott and wife executed in favor of the bank a mortgage on certain real estate of the latter to secure the $4,500 indebtedness above mentioned. He also testified that it was then, in substance, agreed between Van Cott and the bank that in case the business of the former should prove unsuccessful and he should be unable to pay his creditors in full, the real estate mortgage above mentioned should be released by the bank and the indebtedness therein described secured by a mortgage upon the stock of jewelry in controversy; or, in the language of the witness, "If anything occurred so he could not pull through, he would give a chattel mortgage on the jewelry stock." The purpose of that agreement, it is contended, was to enable Van Cott, who was then hopelessly insolvent, to place his property beyond the reach of creditors, and that the mortgage involved in this controversy, having been executed in pursuance of that agreement, must be adjudged fraudulent as against the intervenors. Another fact to which considerable emphasis is given in the brief of the appellants is that on the 20th day of January, 1891, six days after the confirmation of the sale of the mortgaged property by the receiver, Bedford, the plaintiff and purchaser at said sale, L. Van Cott, wife of the mortgagor, David W. Van Cott, D. W. Haynes, H. D. Shull, and

Thomas W. Boyd executed articles of incorporation for "The Van Cott Jewelry Company;" said corporation was organized for the purpose of dealing in jewelry in the city of Omaha, with an authorized capital stock of $20,000, and immediately proceeded to transact business, apparently as the successor of Van Cott, with the latter as general manager. On the part of the bank, Mr. Cornish, the president, testified positively that the only inducement for the satisfying of the real estate mortgage was the securing of the two notes, for $457.42 and $250, respectively, and the better security for the $4,500 note. That about that time Van Cott applied for further accommodations, which were refused, the bank demanding to be protected on account of his unsecured indebtedness. He then offered to secure his entire indebtedness to the bank by mortgage upon his stock of jewelry, provided the bank would release the real estate mortgage, which proposition was accepted by the bank and the mortgage in controversy executed in accordance with that agreement.

In view of that record the finding of the trial court should not be disturbed on the ground that it is not supported by the evidence. The facts relied on for reversal of the decree are consistent with the theory of good faith on the part of the bank, and the claim of the latter, if not sustained by a preponderance of the evidence, has ample support therein for the purposes of this appeal. The theory of appellants with respect to the plaintiff's rights is that the legal title to the property passed by the first mortgage to the defendant bank, that plaintiff acquired a mere equitable interest therein by his mortgage, and has no standing as against their claims as attaching creditors. To sustain that contention they rely upon the case of *Adams v. Nebraska City Nat. Bank*, 4 Neb., 373, and *Marseilles Mfg. Co. v. Morgan*, 12 Neb., 66; but those cases, in so far as they tend to sustain that proposition, cannot be regarded as the law of the state. According to recent cases the mort-

gagee under a chattel mortgage acquires not the legal title to the property, but merely a lien thereon, the legal title remaining in the mortgagor. (See *Musser v. King*, 40 Neb., 892.) The decree of the district court is therefore

AFFIRMED.

BART FOLEY V. STATE OF NEBRASKA.

FILED OCTOBER 16, 1894. No. 6463.

1. **Judicial Notice of Municipal Ordinances:** EVIDENCE. Courts will not, as a rule, take notice of municipal ordinances, unless required to do so by special charter or general law.
2. **Municipal Courts:** JUDICIAL NOTICE OF CITY ORDINANCES. But to that rule an exception is recognized in favor of the courts of municipal corporations, which will take notice of their own ordinances, since they stand in the same relation to the municipal laws as do courts of general jurisdiction toward the general laws of the state.
3. **Appeal from Judgment of Conviction for Violation of City Ordinance:** TRIAL DE NOVO. On appeal from a judgment of conviction before a police judge for the violation of a city ordinance the district court will, upon a trial *de novo*, take notice of whatever facts the former could have noticed judicially before the removal of the cause.
4. ———: ———: PRACTICE. The strict rule of the common law in that respect *held* not applicable to our more liberal practice.

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

The opinion contains a statement of the case.

Silas Cobb, for plaintiff in error:

The complaint was insufficient. It failed to set out the ordinance under which the accused was prosecuted. (*Oshe*

v. State, 37 O. St., 494; *Miller v. State*, 3 O. St., 475; *Kern v. State*, 7 O. St., 411; 1 Dillon, Municipal Corporations [3d ed.], secs. 413, 414, 442; *City of Memphis v. O'Connor*, 53 Mo., 468; *Mooney v. Bennett*, 19 Mo., 552; *Keeler v. Milledge*, 4 Zab. [N. J.], 142; *People v. Mayor of City of New York*, 7 How. Pr. [N. Y.], 81; *Harker v. Mayor of City of New York*, 17 Wend. [N. Y.], 199; *Whitson v. City of Franklin*, 34 Ind., 392; *Commonwealth v. Bean*, 14 Gray [Mass.], 52, 11 Cush. [Mass.], 414; *Commonwealth v. Stout*, 7 B. Mon. [Ky.], 247.)

The district court should not have taken judicial notice of the ordinance. (*Culbertson v. City of Galena*, 2 Gil. [Ill.], 129; *Stevens v. City of Chicago*, 48 Ill., 498; *People v. Buchanan*, 1 Idaho, 681; *City of Austin v. Walton*, 68 Tex., 507; *Wilson v. State*, 16 Tex. App., 497; *City of Winona v. Burke*, 23 Minn., 254; *City of New Orleans v. Labatt*, 33 La. Ann., 107; *Lucker v. Commonwealth*, 4 Bush [Ky.], 440; *Case v. City of Mobile*, 30 Ala., 538; *Garvin v. Wells*, 8 Ia., 286; *Goodrich v. Brown*, 30 Ia., 291; *Chicago & A. R. Co. v. Engle*, 76 Ill., 317; *Moor v. Newfield*, 4 Greenl. [Me.], 44; *Lumbard v. Aldrich*, 8 N. H. 31; *Augusta Bank v. Hamlin*, 14 Mass., 178.)

The court erred in excusing a juror for cause on its own motion. (*Barton v. Erickson*, 14 Neb., 164.)

The court gave an erroneous instruction defining the term "reasonable doubt." (*Olive v. State*, 11 Neb., 4; *Mutual Hail Ins. Co. v. Wilde*, 8 Neb., 427; *Clark v. State*, 32 Neb., 246.)

George H. Hastings, Attorney General, and *H. E. Cochran*, for the state.

POST, J.

This was a prosecution in the police court of the city of Omaha, where the accused, plaintiff in error, was convicted of the violation of an ordinance of said city which pro-

hibits the keeping open of saloons between the hours of 12 o'clock at night and 4 o'clock in the morning. An appeal was taken to the district court for Douglas county, where a trial was had, resulting in a verdict of guilty, upon which judgment was entered and which it is sought to reverse by this proceeding. The first proposition argued in the brief of counsel for the accused is that the information is insufficient, for the reason that the ordinance above referred to was not therein set out. It is proper to state in this connection that the trial in the district court was upon the information filed before the police judge, and which, after an allegation of the acts relied on by the prosecutor, concludes as follows: "Contrary to the ordinances of said city and the statutes of the state in that behalf made and provided, and against the peace and dignity of the state."

Courts will not, as a rule, take notice of municipal ordinances, unless required to do so by special charter or general law; but to that rule there are recognized exceptions, among which is that courts of a municipal corporation will take notice, without allegations or proof, of its own ordinances. The ground of the exception noted is that such courts stand in the same relation toward the municipal laws of the city, or other corporation, as do courts of general jurisdiction toward the public laws of the state; and on appeal from a judgment of conviction before a police magistrate of a city for the violation of an ordinance thereof the court will, upon a trial *de novo*, take notice of such ordinance. In short, the district court, or court of like general jurisdiction, will, on appeal from a municipal court, take notice of whatever facts the latter could have noticed judicially before the removal of the cause therefrom. The court exercising appellate jurisdiction in such cases is, as remarked by Horton, C. J., in *Smith v. City of Emporia*, 27 Kan., 578, for the time being regarded as a substitute for the police magistrate. (See, also, *West v. City of Columbus*, 20 Kan., 633; *City of Solomon v. Hughes*, 24 Kan., 211;

Downing v. City of Miltonvale, 36 Kan., 740; *Town of Moundsville v. Velton*, 35 W. Va., 217; *State v. Leiber*, 11 Ia., 407.) Cases are not wanting which sustain a different rule and holding in effect that in every prosecution under a city ordinance it is essential to set out, or in unmistakable terms refer to, the section or provision thereof relied upon for a conviction. In fact, the weight of authority, judged by the number of cases, may be said to sustain that view; but the question being an open one in this state, notwithstanding the dictum in *Perry v. State*, 37 Neb., 625, we feel at liberty to adopt the rule most in harmony with the spirit of our liberal practice, and most promotive of a prompt and efficient enforcement of municipal laws. The reason for the strict rule of the common law which required every by-law, ordinance, or private statute to be specially pleaded cannot be said to exist under our system. At common law, prosecutions under statutes imposing a penalty against the offender, as distinguished from the body of the criminal law, were upon information and generally by a common informer, who claimed a part of the fine or penalty. (Short, Informations, 1.) Such prosecutions were by leave of court and differed from indictments in one respect only, viz., that whereas the latter were upon the oath of twelve men, the former was upon the oath of the prosecutor alone. In such cases the same certainty was required as in prosecutions by indictment. (2 Hawkins, Pleas of the Crown, 260, 261.) It seems neither necessary nor advisable to require in complaints for the violation of mere municipal regulations the same strictness as in prosecutions under the provisions of the Criminal Code. According to the better doctrine such offenses, although frequently prosecuted in the name of the state, are criminal in form merely, while in substance and effect they are civil proceedings, and, therefore, not within the provision of the constitution which declares that the right of trial by jury shall remain inviolate. (1 Bishop, Criminal Law, 32; 1

Bishop, Criminal Procedure, 892; *Liberman v. State*, 26 Neb., 464.) It follows that the district court did not err in overruling the objection to the information.

2. The second assignment relates to the ruling of the court in excusing a juror for cause on its own motion. There is nothing in the record to suggest that the jury as selected was not altogether impartial and entirely satisfactory to the accused. It does not appear that he availed himself of the peremptory challenges to which he was entitled, or has been in any way prejudiced by the ruling complained of. Some discretion must be allowed the trial court in selecting jurors, and its action in that regard presents no ground for reversal in the absence of a clear abuse of discretion. (*Omaha Southern R. Co. v. Beeson*, 36 Neb., 361.)

3. Finally, it is urged that the court erred in its definition of the term "reasonable doubt." The charge, which we deem unnecessary to set out in this connection, was approved in *Polin v. State*, 14 Neb., 540, and was properly given. There is no error in the record and the judgment is

AFFIRMED.

KATE TOOTLE ET AL. V. FIRST NATIONAL BANK OF CHADRON.

FILED OCTOBER 16, 1894. No. 4689.

Sales: FRAUD: RESCISSION. The views expressed and rules announced in the opinion rendered in this case at the time of its original hearing in this court (34 Neb., 863) affirmed and adhered to.

REHEARING of case reported in 34 Neb., 863.

Spargur & Fisher and *F. M. Dorrington & Sons*, for plaintiffs in error.

Albert W. Crites, contra.

HARRISON, J.

This case was presented to the court by petition in error to review the proceedings in the trial in the district court of Dawes county. It was submitted, and the points raised by the petition in error, and discussed at the hearing in this court, were decided in an opinion filed June 11, 1892, reported in 34 Neb., 863. As a result of the conclusions reached the case was reversed and remanded. For a later decision of this court on the same subject see *McKinney v. First Nat. Bank of Chadron*, 36 Neb., 629. The losing party herein filed a motion for a rehearing, which was sustained and the rehearing granted. We have again carefully examined the pleadings and evidence and the arguments in the briefs filed, but discover no reason for changing the views expressed and the rules promulgated in the opinion rendered at the former hearing. Consequently, they will be adhered to and the case

REVERSED AND REMANDED.

EIDEMILLER ICE CO., APPELLEE, V. DAVID GUTHRIE ET AL., APPELLANTS.

FILED OCTOBER 16, 1894. NO. 5552.

1. **Water and Water-Courses:** ICE ON MILL-DAM: RIGHTS OF OWNER OF MILL: RIPARIAN PROPRIETORS. The owner of a mill who has the right to maintain a pond or flow back the water of a stream upon the land of another and to use such water to operate his mill possesses, as to the water, the dominant right, and while not the absolute owner of ice which may form on the pond, is entitled to have it remain there during the time and when its so remaining will be, or is, useful and necessary to

the legitimate exercise of his right to use the water as motive power for the mill or to successfully operate the mill, but the owner of the land, if upon a non-navigable stream, may make any use he desires of ice which forms over and above so much of the bed of the stream to which his ownership extends as does not interfere with, or injure, the rights of the mill owner.

2. ———: DESTRUCTION OF ICE BY OWNER OF MILL-DAM: LIABILITY TO RIPARIAN PROPRIETOR FOR DAMAGES. If the owner of a mill and the dam subservient thereto wantonly and unnecessarily draws the water from, or lowers the water, in the pond, and by so doing injures or destroys the ice privileges of the owner of land bordering upon the pond, he thereby renders himself liable in damages to such owner.

3. **Injunction.** An injunction will not be granted or sustained where the injury complained of in the petition filed is not shown to be such as is irreparable, or the party complainant without a full and adequate remedy at law.

4. ———: IRREPARABLE INJURIES. An injury may be said to be irreparable when it is of such a character or nature that the party injured cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard (*Wilson v. City of Mineral Point*, 39 Wis., 164); and we will add if such as may be atoned for in damages, if in the particular case it is shown that the party who must respond is insolvent, and for that reason incapable of responding in damages, the injury is irreparable.

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

The facts appear in the opinion.

W. F. Buck and *H. W. Short*, for appellants:

Injunction will not be granted unless the applicant has a clear and well-established right to the remedy. (*Snowden v. Noah*, 14 Am. Dec. [N. Y.], 547; *Hinchman v. Patterson Horse R. Co.*, 86 Am. Dec. [N. J.], 252; *Rhodes v. Dunbar*, 98 Am. Dec. [Pa.], 221; *Roath v. Driscoll*, 52 Am. Dec. [Conn.], 352; *Sheldon v. Rockwell*, 76 Am. Dec. [Wis.], 265; 7 Lawson, Rights, Remedies & Practice, p. 5769.)

The remedy of injunction will not be granted where the plaintiff has an adequate remedy at law. (*Tigard v. Moffitt*, 13 Neb., 565; *Schurmeier v. St. Paul & P. R. Co.*, 83 Am. Dec. [Minn.], 770; *Goodrich v. Moore*, 72 Am. Dec. [Minn.], 74; *Richard's Appeal*, 98 Am. Dec. [Pa.], 202; *Peterson v. Orr*, 58 Am. Dec. [Ga.], 484; 1 High, Injunctions, secs. 8, 13, 28; *Torry v. Camden & A. R. Co.*, 18 N. J. Eq., 293; *Swift v. Jenks*, 19 Fed. Rep., 641; 10 Am. & Eng. Ency. Law, 783.)

Injunction will not be granted unless the applicant shows undisputed special interest in, or ownership of, the property. (1 High, Injunctions, sec. 9; *State v. McGlynn*, 20 Cal., 233; *Crowell v. Horacek*, 12 Neb., 622.)

Injunction will not be granted except where the legal right is well established. A legal right will not be established and settled in an equitable proceeding. (1 High, Injunctions, sec. 8; *Cummings v. Barrett*, 10 Cush. [Mass.], 186; 9 Am. & Eng. Ency. Law, 859; 10 Am. & Eng. Ency. Law, 789, note 2.)

J. W. Green and *Searle & Coleman, contra*, contending that the destruction of plaintiff's ice would be an irreparable injury which equity should restrain by injunction, cited: *Gilbert v. Arnold*, 30 Md., 29; *Gause v. Perkins*, 3 Jones Eq. [N. Car.], 179; *Wilson v. City of Mineral Point*, 39 Wis., 160; *Commonwealth v. Pittsburg & C. R. Co.*, 24 Pa. St., 160; *Mitchel v. Dors*, 6 Ves. [Eng.], 147; *Merced Mining Co. v. Fremont*, 7 Cal., 317; *McLaughlin, v. Kelley*, 22 Cal., 212; *United States v. Gear*, 3 How. [U. S.], 121; *West Point Iron Co. v. Reymert*, 45 N. Y., 703; *Thomas v. Oakley*, 18 Ves. [Eng.], 184; *More v. Massini*, 32 Cal., 590; *Boggs v. Merced Mining Co.*, 14 Cal., 379; *Belknap v. Belknap*, 2 Johns. Ch. [N. Y.], 463; *Davis v. Reed*, 14 Md., 152; *White v. Flannigain*, 54 Am. Dec. [Md.], 668; *Dudley v. Hurst*, 1 Am. St. Rep. [Md.], 368; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq.,

335; *Erhardt v. Boaro*, 113 U. S., 537; *Mayor of City of Frederick v. Groshon*, 96 Am. Dec. [Md.], 591; *Webber v. Gage*, 39 N. H., 182; *Reddall v. Bryan*, 74 Am. Dec. [Md.], 550; 1 Joyce, Doctrines & Principles of Injunction, 218; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H., 35; *Milhan v. Sharp*, 27 N. Y., 611; *Burnley v. Cook*, 65 Am. Dec. [Tex.], 79; *Manhattan Mfg. Co. v. New Jersey Stock Yard & Market Co.*, 23 N. J. Eq., 161.

The ice belonged to the plaintiff. (*Bigelow v. Shaw*, 8 Am. St. Rep. [Mich.], 902; *Washington Ice Co. v. Shortall*, 101 Ill., 46; *State v. Pottmeyer*, 30 Ind., 287; *Lorman v. Benson*, 8 Mich., 18; *Mill River Mfg. Co. v. Smith*, 34 Conn., 462; *Paine v. Woods*, 108 Mass., 173.)

The grievances complained of were trespasses upon the property rights of plaintiff of which it has a right to complain. (*Stevens v. Kelley*, 78 Me., 445; *Woodman v. Pitman*, 79 Me., 456; *People's Ice Co. v. Steamer Excelsior*, 44 Mich., 229.)

HARRISON, J.

March 9, 1891, the appellee herein, the Eidemiller Ice Company (hereinafter referred to as the "company"), instituted an action against Robert and David Guthrie, partners under the firm name and style of Guthrie Bros., and in order that a full understanding of the issues may be had, we think it best to copy the petition and answer. The original petition was demurred to and an amended one filed, which was as follows:

"Comes now the Eidemiller Ice Company, a corporation duly incorporated and doing business as such, and complaining of Robert Guthrie and David Guthrie, partners doing business under the firm name and style of Guthrie Bros., defendants, says:

"1. That said plaintiff is duly incorporated under the laws of the state of Kansas, and doing business as such in

the states of Kansas and Nebraska, and as such authorized to sue and be sued.

"2. The said plaintiff is the owner of lots numbered 3 and 4 in section No. 27, in township No. 1 north, range No. 7 west of the 6th P. M., in Nuckolls county, Nebraska, according to the United States survey thereof, and containing about forty acres of land.

"3. That defendants are the owners of a mill-dam located on the Republican river, at about the distance of one thousand feet to the south of plaintiff's said premises, which has remained in the same condition as it now is for several years last past, which said dam backs the water up and upon plaintiff's premises, but confines the waters thereof during the greater portion of the year to the river bed of said Republican river, which is about two hundred feet in width at the point where it courses along and through plaintiff's said premises.

"4. That upon and along the south and west line of plaintiff's said land and premises courses the said Republican river, which river is, and for a long time past has been, permanently dammed by said defendants as aforesaid, making the water in the bed of the river, where it courses along and through plaintiff's said premises, at an average depth of about five feet, at its usual stage and condition, while the mill of defendants is being operated, and said mill-dam used and kept in its usual condition for milling purposes and use, on which said river bed is annually frozen a large amount of ice, of great value to plaintiff.

"5. That plaintiff purchased said premises described in the second paragraph of this petition, for the purpose of erecting thereon ice storage houses, and for the purpose of harvesting and storing the ice so frozen on said river bed, where it courses on, upon, and along plaintiff's said premises, and that plaintiff has expended large sums of money in constructing ice storage houses on their said premises, to-wit, the sum of about $3,000, and that

plaintiff, in and about its said business of cutting and storing ice on said premises, have expended other and divers large sums of money, and that in the conducting of plaintiff's business plaintiff has now outstanding large and valuable contracts for the delivery of ice, by it to be cut and stored on said premises, and that plaintiff so constructed its said storage houses and embarked in said business with the full knowledge of defendants, and without any objection on their part, and that plaintiff now has its said storage houses about half filled, and plaintiff's said contract for future delivery of ice cannot be filled and kept on its part unless it is able to fill its storage house with ice, and its said storage and other improvements and expenditures will be of no use or value to plaintiff unless it is allowed to fill the same, all of which is necessary to be done.

"6. That on or about the 9th day of March, A. D. 1891, ice had formed on the surface of said river adjacent and opposite to the premises, hereinbefore described as belonging to plaintiff, to a great thickness, to-wit, about twelve inches, which said ice was merchantable and of great value, and that said plaintiff had, by its servants and agents, taken possession of and appropriated said ice adjacent to and opposite to said premises, by surveying and marking the same off into squares and blocks, and had defined its said possession of said ice adjacent and opposite to said premises by marking and staking the same off into squares and blocks; and said plaintiff was then and there, by its servants and agents, engaged in cutting and removing said ice and storing said ice for preservation in its said storage houses.

"7. That on the 9th day of March, A. D. 1891, said defendants, in person, and by and through their orders and direction to their employes, did open the flood gates and spill-ways of their said dam across said river for the sole and only purpose of drawing off the water from underneath the ice upon and along plaintiff's said premises, which

plaintiff was then and there cutting and harvesting and storing as aforesaid, and that defendants might by so doing prevent plaintiff from so cutting and storing said ice, and that said defendants are preparing to, and threaten to, open still other flood-gates and spill-ways for those purposes and none other.

"8. Said plaintiff says that if said defendants persist in so opening said flood gates and spill-ways, and drawing off said water, it will render it impossible for plaintiff to cut and harvest said crop of ice, for the reasons, among others, that it will allow said ice to rest upon the mud and slimy bottom of said body of water and river bed, covering the ice with mud and impurities and cause it to crack and break into irregular pieces, and to honeycomb and float away when the water shall again rise thereunder, thus rendering it valueless, and impossible for plaintiff to cut and harvest and preserve the same fit for use.

"9. That all of said acts of defendants in opening said flood gates and spill-ways, and in drawing off said water, were done, and are threatened to be done, without the consent of plaintiff.

"10. That the injuries so caused to plaintiff and its said land and improvements and its use and occupation thereof, and to plaintiff's said business, are continuing injuries; that plaintiff's improvements and storage house aforesaid are permanent and calculated for and adapted to use as aforesaid from year to year, and if defendants shall continue to so draw off said water and open said flood gates and spill-ways, plaintiff's premises and improvements will be rendered unfit for use, and the ice so by plaintiff taken possession of, marked off into squares, staked off, and taken possession of by plaintiff as aforesaid opposite to and adjacent to their said premises will be destroyed, and that, from the nature of the injury, damages cannot be computed in money, and the plaintiff has no adequate remedy at law.

"The plaintiff therefore prays for a temporary order of

injunction restraining the defendants, and each of them, from opening said flood gates and spill-ways, and from drawing off the water from under said ice, either by themselves in person, or by their agents and employes, until the final hearing of the case; and that upon such final hearing said temporary order of injunction may be made perpetual, and that the plaintiff recover from the defendants the sum of $5,000, its damages in the premises, and for such other and further relief as is just and equitable."

To this the appellants filed their answer, and at a subsequent date filed an amended answer, as follows:

"Comes now the defendants, and for their answer to the plaintiff's petition in this case say:

"1. That said petition does not state sufficient facts to constitute a cause of action in this case in favor of said plaintiff and against defendants.

"2. That the pretended plaintiff has no right to prosecute its alleged action in this court, for the reason that at the commencement of this action said plaintiff had no legal capacity to sue and be sued in this state; that said plaintiff was, at the time of the commencement of said cause of action, a non-resident corporation, and had not become a domestic corporation under the laws of this state.

"3. That defendants admit that they are the owners of the mill-dam located on the Republican river, and that said dam is located about one thousand feet south of lots numbered 3 and 4, in section 27, township 1 north, of range 7 west of the 6th P. M., Nuckolls county, Nebraska, which dam has been constructed for many years, and has remained in the same condition that it now is for several years last past, except certain improvements thereto made some time prior to the commencement of this action. They admit that said dam caused the water at that point in the Republican river to rise a certain distance higher and above the ordinary height of the water in the bed and channel of said river, and when the sluice gates constructed

in said dam, and as a part of said dam, are closed that said dam causes the water at that place, and for some distance above said dam, to rise a certain distance higher than the usual depth of water in the bed and channel of said river at that place. They admit that the waters so backed up by defendant's dam are confined and remain within the natural banks of said river at that place, but the defendants expressly deny that said dam backs the water up or upon the land alleged and described in plaintiff's petition as belonging to said plaintiff, and further expressly deny that the course of said river or that its channel or bed passes through or over the said land as claimed by the plaintiff.

"4. Defendants further admit that usually there is a large amount of ice frozen annually at that place on said river, but deny that the plaintiff in the case has any special right or interest or ownership to or in said ice.

"5. The defendants deny that the plaintiff is the owner of lots numbered 3 and 4, in section 27, township 1 north, range 7 west of 6th P. M., Nuckolls county, as described in second paragraph of plaintiff's petition, and allege that whatever interest or rights said plaintiff has to or in said land, if any were acquired, are held, owned, and controlled, if at all, by said plaintiff subsequent to and subject to the rights of these defendants, all of which said plaintiff well knew at the time of its alleged purchase or acquirement of interest, if any it has, in the said lots 3 and 4, in section 27, above referred to, and that if said plaintiff has expended any money in the way of buildings or improvements on said alleged acquired lots it has done so with the full knowledge of the facts that these defendants had erected a permanent mill-dam across said Republican, as hereinbefore described, and that said defendants had vested rights in said mill-dam and the back waters of said river above said dam, and the right to raise the water in said river above the natural depth of the water in the channel and bed of said

river and to back the water of said river for a certain distance above the said dam, upon lots numbered 3 and 4, in section 27, as described in plaintiff's petition.

"6. These defendants further answering deny that on March 9, 1891, or at any other time, they opened their flood gates or spill-ways in their said dam across the Republican river for the purpose of injury to the ice on said river, or for the purpose of injury to plaintiff's alleged rights in said ice for its purpose of injury to the plaintiff's business interests and contracts, or to injure the plaintiff in any way, and affirm that they have not used said dam, or their rights, water power, and water privileges in connection with said dam, at any time except when necessary for the operation of their vested rights in said dam and mill-race, and the necessary and successful operation of the mill, and for no other purpose.

"7. Defendants further answering say that they have been in open and notorious possession of and enjoyed the exclusive right to the privileges, the mill-dam, flood gates, sluice gates, spill-ways, and mill-race at and across the Republican river, located at the point hereinbefore described, for about fifteen years last past, during all of which time they operated said mill with all the privileges and appurtenances thereto, including said mill-dam, flood gates, sluice gates, spill-ways, and mill-race, and that the right of the exclusive control and use of said dam, water power, flood gates, sluice gates, spill-ways, and mill-race are necessary for the successful operation of their mill, located on said Republican river.

"8. That these defendants own and operate a flouring mill by use of its water power and water privileges derived from the construction and maintenance of their aforesaid mill-dam; that they have invested in said mill, mill-dam, mill-race, and the other necessary appurtenances for the construction, maintenance, and operation of their aforesaid flouring mill a large amount of money, to-wit, a sum not

less than $20,000, and that the exclusive control and use of said mill-dam and its appurtenances and the water privileges heretofore had by these defendants are necessary to the protection of defendants' interests and investment hereinbefore described, and without which they would be subject to great inconvenience and injury.

"9. The defendants further alleged that more than ten years ago they obtained from the then owners of said lots 3 and 4, in section 27, township 1 north, range 7 west of 6th P. M., Nuckolls county, Nebraska, the water privileges along said lots 3 and 4, and over and across the Republican river adjacent thereto, with all the rights and title of said owners thereof, and that they have been in continuous, open, and notorious possession and use thereof to the present time in and by virtue of a deed thereto, which instrument is of record with the county clerk of Nuckolls county, Nebraska.

"10. That these defendants have vested rights and both legal and equitable title to said water privileges and to said mill power and mill-dam and the lots adjacent thereto, and have maintained their said mill and mill-dam and the appurtenances thereto at a great cost and outlay of money, all of which will be rendered valueless to these defendants and to the public as a mill if the order of injunction prayed for by the plaintiff be made perpetual, and will be a total loss to these defendants.

"11. These defendants say they have been damaged by the issuance of the temporary order of injunction granted by the county court of Nuckolls county in this case in the sum of $1,000.

"12. The defendants deny each count and each and every allegation in the several counts in plaintiff's petition not herein expressly admitted. Defendants further answering say that they are worth $25,000 over and above all exemptions and liabilities, which property is in Nuckolls county, Nebraska, and within the jurisdiction of this court.

"Defendants therefore pray that said injunction may be dissolved and a perpetual injunction be denied to the plaintiff, and that it go hence without day and that the plaintiff takes nothing by its writ, and for judgment against the plaintiff for $1,000, costs, and such other relief as equity may suggest."

The reply filed by the company was a general denial of all new matter contained in the answer. A motion was filed by appellants to vacate the injunction, and after some preliminary proceedings the case was tried by the court, the following journal entry showing fully the findings of the court and the disposition made of the cause.

"Now on this 23d day of March, 1892, this cause came on to be heard upon the motion of the defendantsto vacate and set aside the injunction heretofore granted in this case and was submitted to the court, on consideration whereof said motion of the defendants is hereby overruled, to which ruling of the court the defendants except; whereupon the plaintiff, in open court, dismissed as to any claim for damages in this action, without prejudice; and now on this 24th day of March this cause came on to be heard upon the petition, answer, and reply, and the evidence, and was submitted to the court, on consideration whereof the court finds (1) that said plaintiff is duly incorporated under the laws of the state of Kansas, and that articles of their incorporation, together with the resolution of its board of directors, by them adopted, accepting the provisions of an act relating to foreign corporations and enabling them to become domestic corporations of this state, is now on file in the office of the secretary of state of Nebraska, and doing business in the states of Kansas and Nebraska; (2) that said plaintiff is the owner of, and in possession of, lots numbered 3 and 4, in section 27, in township No. 1 north, range No. 7 west of the sixth P. M., in Nuckolls county, Nebraska, according to the United States survey thereof; (3) that the Republican river courses along and through

said premises, and that said river on the 9th day of March, A. D. 1891, was frozen over with good, clear, merchantable ice to the thickness of eight to nine iches, which said plaintiff was then and there engaged in cutting and harvesting and storing in ice storage houses which plaintiff had on and before said date erected on its said premises on the bank of said river, and that said ice storage houses were of a permanent nature and of the value of about $3,000; (4) that said defendants are copartners, and are the owners of a mill-dam located on and across said river, about one thousand feet below the premises of said plaintiff, which said dam causes the waters of said river to stand at an average depth of five feet, where it courses along and through plaintiff's said premises, while the mill owned and operated by the defendants is being operated by the use of said dam and the water flowing therefrom, the flood and sluice gates in said dam are kept closed; that said mill-dam is about two hundred feet in length and at its eastern end it is provided with four flood or sluice gates, each of these gates being about six feet in width, and extending downwards two feet below the bed of said river when said sluice gates are closed; (5) that on the 9th day of March, A. D. 1891, while the plaintiff was engaged, by and through its agents and employes, in harvesting, cutting and storing said ice, so formed on said river, where it coursed along and through plaintiff's said premises, the said defendants raised said flood and sluice gates in their said dam, and then and there and thereby drew the water from underneath the ice belonging to said plaintiff and caused said ice to drop into the bed of said river, thereby cracking and injuring said ice, and forcing plaintiff to stop its work; that on the evening of said day said defendants closed their said gate, whereupon said water and ice in said river rose to their natural and usual position; that on the 10th day of March, A. D. 1891, there was served upon defendants a temporary order of injunction,

issued out of this court, in this case, enjoining the defendants from opening the said flood or sluice gates in their said dam, and from drawing off the water from underneath the ice belonging to said plaintiff; that on the morning of the 10th of March, 1891, the plaintiff, with about seventy employes and six teams, resumed the work of cutting, harvesting, and storing of said ice on their said premises, whereupon the defendants, at about 8 o'clock on said morning of said day, again raised the said flood or sluice gates of their said dam, again thereby drawing the water from under the ice of said plaintiff, causing it again to drop into the bed of said stream, rendering it impossible for plaintiff to proceed with the harvesting and storing of said ice and thus forcing plaintiff and its employes to quit the work; that at about 11 o'clock of that day defendants again closed said flood gates, sometimes called 'sluice gates,' and that thereupon the water and ice in the bed of said river again resumed its usual and ordinary position; that thereupon, at about 1 o'clock in the afternoon of said 10th day of March, 1891, said plaintiff again resumed the cutting and storing of said ice on their said premises, and that immediately upon said plaintiff's resuming its said work said defendants again raised said flood or sluice gates in their said dam, and again drew the water from under plaintiff's ice, again letting it into the bed of said stream, causing the water to flow over it and cover it with sand and impurities and ruined a portion of plaintiff's said ice, and that on the night of the 11th of March said gates were again closed and the water and ice in said river again resumed their relative position; that about 7 o'clock on the morning of the 12th of March, 1891, the plaintiff again resumed said work of harvesting and storing said ice; and that thereafter, in the morning of the said 12th of March, defendants again opened said gates in said dam, and thereby drew off the water from underneath said ice, and that the repeated dropping of said ice upon the bed of said river

destroyed said ice and rendered it wholly unfit for storage and unfit for use, and entirely valueless, thereby rendering it impossible for plaintiff to fill its said ice house to exceed one-third of its capacity; (6) that the opening of said gates in said dam by said defendants on said dates was not necessary to the proper operation of defendant's mill, nor were they so opened for the purpose of operating the same, but the court finds that the defendants opened the same for the purpose of destroying plaintiff's ice, and preventing plaintiff from harvesting the same; (7) that in the conducting of the milling business by said defendants they have never before March, 1891, found it necessary to open said gates while the ice was formed on the waters confined by said dam, and fit to be harvested and stored, and that it was not necessary for the conducting of defendants' business in March, 1891, to open said gates; (8) that plaintiff's harvesting and storing of said ice did not diminish the volume of water flowing to plaintiff's mill, but that when said gates were closed there was flowing over the top of said mill-dam a sheet of water across the whole length of said dam from six to eight inches in depth. (9) the court finds generally upon the issues joined in favor of the plaintiff.

"It is therefore considered, ordered, and adjudged by the court that the defendants be, and they hereby are, perpetually enjoined from opening the flood gates or sluice gates of their said mill-dam while ice suitable for cutting is forming on the back water confined by said dam, and while the ice formed thereon remains suitable for cutting and harvesting, and the defendants are perpetually enjoined from drawing off the water of said dam through the flood gates or sluice gates of their said dam while the ice which may hereafter be formed thereon remains suitable for harvesting and storing. It is further ordered, considered, and adjudged by the court that the injunction heretofore granted in this case also be and remain in full force as it now stands. It is further considered and adjudged by

the court that the plaintiff recover from the defendants its costs in this action, taxed at $——."

From this decree the Guthrie Bros. have perfected an appeal to this court. It is contended by counsel for appellants that by reason of their ownership of the mill and the dam which flowed or held back the water and created the pond, a portion of which, by the action of the frost, had congealed and formed the ice which the company was cutting and storing, they were the owners of and entitled to the ice, claiming the right by virtue of a transfer made September 27, 1887, from the then owner of the land to appellants, and the length of time they had maintained the dam in the river and exercised the right which they assert authorized them to flow the land or to back water over it, in such manner and quantity as was necessary to maintain the dam and operate their mill. There is, or probably it may more correctly be stated there was, some contrariety of opinion as expressed in the decisions of the courts in reference to which is the owner of ice upon a mill pond,—the party who erected the dam and owns the right to the water and to flow or hold it back, or the party holding the legal title to the land, the riparian owner; but where the stream is of the character of the one which figures in this case, that is, not navigable, we are satisfied both reason and precedent support the doctrine that the riparian owner has the right to use all the water which it is necessary for him to employ for any purpose and to cut and remove the ice which may form upon the stream adjoining his land, in any quantity or to any extent, for his own use, or to store for sale, provided he does not, by so doing, diminish or decrease the flow of water to the mill, below what is required to successfully operate or run the mill. (Gould, Waters, sec. 191, and cases cited; *Stevens v. Kelley*, 3 New Eng. Rep. [Me.], 230; *Brookville & Metamora Hydraulic Co. v. Butler*, 91 Ind., 134, and cases cited; *Washington Ice Co. v. Shortall*, 101 Ill., 46.) "The ripa-

rian owner and the person who flows have each a qualified right in the ice which forms in an artificial pond; *i. e.*, the mill owner has the right to have the ice remain if its removal will appreciably diminish the head of water at his dam; and the riparian owner the right to cut and remove the ice if its removal will not appreciably diminish such head." (*Bigelow v. Shaw*, 65 Mich., 341; *Paine v. Woods*, 108 Mass., 172; *Searle v. Gardner*, 12 Cent. Rep. [Pa.], 420; *Cummings v. Barrett*, 10 Cush. [Mass.], 186; *Marsh v. McNider*, 55 N. W. Rep. [Ia.], 469; *Howe v. Andrews*, 62 Conn., 398.) The rights of a mill owner in the water of the stream upon which his mill is situated and in which he has constructed a dam, and to the full and necessary supply of water, have been recognized in this court. (*Culver v. Garbe*, 27 Neb., 312.)

It is further argued that the injunction granted in this case is too indefinite and uncertain, and if fully complied with by appellants in its full scope, it will render the mill privileges valueless to quite a large and appreciable extent. The evidence tended to or did establish that the head of the race by which the water was conducted to the mill from the reservoir or pond at times became clogged or partially filled with sand or broken ice or other matter which obstructed the free and full flow of the water, and when this was sufficient to become apparent at the mill by the lack of water sufficient in the race to furnish power when applied to the machinery to run the mill to its fullest capacity, the gates were raised, the spill-ways opened, and by thus allowing the water to escape at the dam, a current was formed at the head of the race some distance above sufficient to sluice it or remove the sand or other obstructions. Appellants claimed that this was the least expensive and most efficacious manner in which the object sought could be accomplished, and that they did it and had so done during about fifteen years they had been operating this mill. If so, this was one of the necessary and reasonable uses of the

water confined by their dam, connected with the most successful and economical running of the mill, and one which they would have a right to exercise at any time when the conditions were such that without so doing the full and complete operation of the mill would be retarded. If it is true that the above was the cheapest and most efficacious manner in which this sluicing or cleaning the head of the race could be done, and was requisite to a successful operation of the mill, then they had a right to resort to it whenever it was needed. At the time the injunction in this case was first granted, the company had been cutting ice on the mill pond for about thirty days, when the appellants raised the gates in the dam and allowed the water to escape and ruined the remaining ice which the company purposed storing, and to which, if they were the owners of the land and bed of the stream, they were entitled, if its harvesting did not appreciably diminish the flow of the water to appellants' mill necessary for its operation. The petition filed by the company to procure an injunction was directed to the immediate threatened act or acts of the appellants and the effect produced or which would ensue to the ice then upon the pond, and not to any future or other crops of ice. The evidence was similarly directed or limited in its application, and the court confined its findings to the particular instances complained of in the petition and in issue in this case; but the order of injunction is much more extended and broader in its scope where it states, "That the defendants be, and they hereby are, perpetually enjoined from opening the flood gates or sluice gates of their said mill-dam while ice suitable for cutting is forming on the back water confined by said dam, and while the ice formed thereon remains suitable for cutting and harvesting, and the defendants are perpetually enjoined from drawing off the water of said dam through the flood gates or sluice gates of their said dam while the ice which may hereafter be formed thereon remains suitable for harvest-

ing and storing. It is further ordered, considered, and adjudged by the court that the injunction heretofore granted in this case also be and remain in full force as it now stands." The injunction was, we think, extended far beyond what was contemplated or warranted by either the pleadings, evidence, or findings of the court, which findings were fairly sustained by the testimony, and would at least require to be modified if continued in force. It is true the court reached the conclusion that at this particular time it was unnecessary for the appellants to raise the gates and thus lower the water in the dam; but we do not consider this a sufficient finding, even when coupled with the further one that it had never before been necessary to raise the gates at the same season of the year, upon which to base such an injunction as was made perpetual in this case, restraining and preventing an act which it was clearly shown was a necessity to the appellants in the conduct of their milling business. We further think the order is open to the objection that it is uncertain and indefinite, covering as it does and prohibiting the performance of the act complained of during several weeks and possibly during several months of each year, the time when, and its continuance to be governed by the formation of ice on the stream and its fitness for cutting and storing and the commencement and continuance of these conditions.

It is further argued by counsel for appellants that the company was not entitled to an injunction, as they had, if injured, a full and adequate remedy at law, in an action for damages. Counsel for the company combat this with the argument that the relief afforded in a suit for damages, if any, could not be made full and adequate from the very nature of the injury, involving elements of damage which could not be recovered in an action and which make up a case so peculiarly constituted as to call for the aid of a court of equity and the exercise of its controlling powers by injunction. We have no doubt that where the owner

of a mill-dam, either maliciously or unnecessarily, draws the water from the pond, or materially lowers it, and by so doing destroys the ice privilege, he becomes liable to an action for so doing. (*Stevens v. Kelley*, 3 New Eng. Rep. [Me.], 230.) In this case, quoting from *Phillips v. Sherman*, 64 Me., 174, it is said: "'A wanton or vexatious or unnecessary detention would render the mill owner so detaining, liable in damages to those injured by such unlawful detention;'" and the court adds: "If the owner of the dam has no right unreasonably to detain the water, for the same reason he would have no right wantonly to accelerate it, to the injury of owners above or below." It is true, we presume, that the appellants might abandon their mill and tear out the dam if they so desired, and thus restore the river to its original condition, and destroy the ice privilege, and do so with impunity and no one be heard to complain; but this is not their case. They are still operating the mill and still maintain the dam, and desire so to do, and the case must be considered and determined from a view of the conditions and relations of the various parties and properties as they existed, and not what the rights might have been under other conditions or relations. If the water was wantonly or unnecessarily drawn out of the pond and the ice which belonged to appellants thereby broken, injured, or destroyed, the parties who did it became liable in damages to the owners. (*Stevens v. Kelly, supra; Richards v. Gauffret*, 14 N. E. Rep. [Mass.], 535; *Handforth v. Maynard*, 28 N. E. Rep. [Mass.], 348; *Lorman v. Benson*, 8 Mich., 18; 30 Central L. J., 6.) If the action for damages will afford adequate relief, compensation in full for the injury inflicted, it will suffice, and an action for injunction will not be entertained. It is a well settled general rule that the remedy by injunction will not be granted unless the plaintiff is about to suffer an irreparable injury, or one for which there is not an adequate remedy at law. (*Tigard v. Moffitt*, 13 Neb., 565; 1 High, Injunctions, p. 28.) An irreparable

injury, within the meaning of the law of injunctions, has been defined by Pearson, J., in *Gause v. Perkins*, 3 Jones Eq. [N. Car.], 177, as follows: "The injury must be of a peculiar nature, so that compensation in money cannot atone for it. Where, from its nature, it may be thus atoned for, if, in the particular case, the party be insolvent, and on that account unable to atone for it, it will be considered irreparable." This is, we think, quite an accurate and clear definition and one under which, when applied to the facts and circumstances disclosed by the pleadings and evidence in the present case and enforced, it must be held that there has not been sufficient showing of irreparable injury or one which cannot be fully compensated in an action at law for damages. We are fully convinced that in such an action the appellee could receive full and adequate compensation for the loss of its right to cut or harvest the ice and for the destruction of the ice itself, or for any and all legitimate and competent elements of damage which had been suffered. For the measure of damages in such a case and a discussion of the rules applicable see *Handforth v. Maynard, supra; Stauffer v. Miller*, 25 Atl. Rep. [Pa.], 95. That a petition or application for an injunction will not be sustained in a case such as the one at bar see *Cummings v. Barrett*, 10 Cush. [Mass.], 186; *Marshall v. Peters*, 12 How Pr. [N. Y.], 218.

There are some other questions argued in the briefs, but as the conclusion we have reached on the points so far considered will dispose of the case, we do not deem it necessary to discuss them. The decree of the district court is reversed and a decree entered in this court vacating the injunction and dismissing plaintiff's petition at costs of plaintiff, appellee herein.

REVERSED AND DISMISSED.

RAGAN, C., took no part in the decision.

WILLIAM C. GALLOWAY ET AL., APPELLEES, V. MERCHANTS BANK OF NELIGH ET AL., APPELLANTS.

FILED OCTOBER 16, 1894. No. 5846.

1. **Decree Canceling Mortgage and Ordering Return of Notes:** FRAUD. The evidence examined, and *held* sufficient to sustain the finding and decree of the lower court.
2. **Fraud in Procuring Notes and Mortgage: Cancellation:** EQUITY. Where a party intentionally misrepresents a material fact or produces a false impression with the purpose to mislead or to obtain an undue advantage of another, it amounts to a positive fraud, to remove the results of which a court of equity will afford a remedy.

APPEAL from the district court of Antelope county. Heard below before ALLEN, J.

W. M. Robertson, for appellants.

N. D. Jackson, contra.

HARRISON, J.

April 30, 1891, the appellees herein filed a petition in the district court of Antelope county alleging, in substance, after pleading the corporate character of appellant and defendant the Merchants Bank of Neligh, that on or about January 25, 1890, appellees were indebted to the bank, and being desirous of effecting a loan on some real estate then owned by them and situated in Antelope county, in order to pay the debt to the bank, and being solicited by the bank to make an application to or through it for such loan, made an application in writing in which all the terms and conditions of the loan to be made were generally stated, except that no mention was therein made of the rate of interest which should be paid on the money loaned if the loan should be obtained, the contract in regard to the rate

of interest to be paid by appellees on any loan effected for them being that they were to pay such a rate of interest as might be demanded by the party with whom the loan was negotiated or effected, and no more, the bank not to charge or receive any commission or bonus for making the loan. It was further agreed that the president of the bank should go east for the purpose of procuring the loan, the appellees to pay all the necessary expenses of the journey. Pursuant to this understanding a trip was made to New York by the president of the bank, and a loan of $12,000 negotiated for appellees with one Henry L. Pratt, the rate of interest to be seven per centum per annum; that the appellee executed notes for the $12,000, payable to Henry L. Pratt, or order, with interest at seven per cent per annum, and a real estate mortgage to secure its payment, and executed ten notes of $120 each, payable to Henry L. Pratt, or order or bearer, whether to order or bearer being one of the facts in dispute in the case, the appellees stating that these ten notes were made payable to Henry L. Pratt or order, and altered after delivery and without their knowledge by the erasure of the word "order" and insertion of "bearer." These ten notes were payable on the first of the months of January and July of the five years succeeding 1889, ending with January, 1894, and were secured by a mortgage on real estate in Antelope county, which was particularly described in the petition; that appellees were induced to execute the ten notes and the mortgage securing the same by the representations of the officers of the bank to the effect that Henry L. Pratt demanded nine per cent interest per annum on the $12,000 loaned to appellees, but desired it divided as above indicated for his convenience, which representations were false and untrue, but were relied upon by appellees and by them taken as true, and believed; that the bank retained the ten notes and the mortgage securing them, and three of them were paid by appellees before they discovered that they belonged to the bank

and not to Pratt, and had been retained by it as a commission or bonus for making the loan contrary to the terms of the agreement between the bank and appellees, and the further fact that Pratt had demanded and was to receive only seven per cent on the $12,000 loan. It is further alleged that they paid a bill of $365, claimed by the bank to be the expenses of effecting and perfecting the loan. The prayer of the petition was for a cancellation of the remaining seven notes of $120 each and the mortgage securing them, the quieting of title in plaintiffs to the real estate covered by the mortgage, and a judgment against the bank for the amount of the three notes paid to it. The answer of the bank admitted the existence and corporate character of the bank and denied each and every other allegation of the petition except the payment of the three notes of $120, and stated, or admitted, they were paid to Pratt. The answer filed for Henry L. Pratt admitted that the bank existed and was incorporated as stated in the petition; further admitted the execution of the notes and mortgages as alleged in the petition, and that he made the loan of $12,000 to bear interest at the rate of seven per centum per annum, and stated his understanding was and is that the ten notes for $120 each were for the sum charged by the bank as a commission for negotiating or effecting the loan of $12,000, and denied all the other allegations of the petition, and for further answer or cross-bill declared upon the seven notes of $120 each as belonging to and being owned by the defendant Henry L. Pratt, and asked for foreclosure of the mortgage securing them for alleged breach of its conditions in regard to payment of the notes. The appellees filed a reply to these several answers, in which all new matter in the answers was denied and the fact of the alteration of the ten notes was pleaded, and it was further alleged that Pratt was not the owner of the seven $120 notes, but that they had been delivered to him in fraud of appellees' rights, and to prevent them from obtaining relief in this

action, and that Pratt well knew, and was informed at the time the notes were delivered to him, all the facts and circumstances attending their execution as pleaded in the petition. A trial of the issues to the court resulted in the following findings and decree, from which the bank and Pratt have appealed to this court, to-wit:

"Be it remembered, that on this 29th day of June, A. D. 1892, this cause came on to be heard before the court, the plaintiffs appearing by N. D. Jackson, their attorney, the defendant by W. M. Robertson, its attorney, and the evidence was submitted to the court, and the court, after hearing the argument of counsel, and being fully advised in the premises, finds for the plaintiffs, and that the allegations contained in the plaintiffs' petition are true; that on or about the 25th day of January, 1889, the defendant the Merchants Bank of Neligh negotiated for the plaintiffs a loan for the sum of $12,000 from the defendant Henry L. Pratt; that the contract between the plaintiffs and the defendant the Merchants Bank of Neligh for the negotiation of said loan was in writing, except the contract as to the rate of interest to be paid by the plaintiffs; that the defendant the Merchants Bank of Neligh agreed with the plaintiffs, at the time of the execution of said contract, that the rate of interest on said loan would be such rate of interest as the said defendant the Merchants Bank of Neligh would be enabled to negotiate said loan for in the east, and that the plaintiffs would not be required to pay any other or greater rate of interest than that for which the note could be negotiated, and that plaintiffs should not be required to pay the defendant the Merchants Bank of Neligh any commission fees or charges except the actual expenses incurred in negotiating said loan; that the said loan was negotiated for the purpose of paying an indebtedness to the said defendant the Merchants Bank of Neligh; that at the time of the execution of the notes and mortgages securing the said loan, the defendant the Merchants Bank

of Neligh falsely represented to the plaintiffs that the rate of interest demanded by the defendant Henry L. Pratt, to whom the said note had been negotiated, was nine per cent, and that the defendant Henry L. Pratt desired the plaintiffs to execute and deliver to the defendant Henry L. Pratt a note for the sum of $12,000, drawing interest at the rate of seven per cent per annum, payable semi-annually, and ten notes for the sum of $120 each, representing the remainder of the nine per cent interest, one payable in six months from the date of execution of said notes and one each six months thereafter, until said notes were fully paid; that thereupon the plaintiffs, relying upon the representations of the defendant the Merchants Bank of Neligh, executed and delivered to the defendant the Merchants Bank of Neligh, for the use and benefit of the defendant Henry L. Pratt, a note for the sum of $12,000, drawing interest at the rate of seven per cent per annum, and a mortgage upon the property in Antelope county securing the same, and ten notes of $120 each, payable to Henry L. Pratt or bearer, one payable on the 1st day of July, 1889, and one each six months thereafter, and to secure the payments of said notes executed and delivered to the defendant the Merchants Bank of Neligh, for the use and benefit of the defendant Henry L. Pratt, a mortgage upon the following described real estate, situate in Antelope county, Nebraska, to-wit, block 22, in the city of Neligh, and the said mortgage was filed for record in the office of the county clerk of Antelope county, Nebraska, on the 28th day of January, 1889, at 3 o'clock P. M. and recorded in book 'W' of Mortgages, at page 483; and that the plaintiffs also paid the defendant the Merchants Bank of Neligh about the sum of $365 expenses in negotiating said loan; the plaintiffs have paid the note for $120 which matured on the 1st day of July, 1889, and the note for $120 which matured on the 1st day of January, 1890, and the note for $120 which matured on the 1st day of July, 1890. The court

further finds that the defendant the Merchants Bank of Neligh negotiated said loan to the defendant Henry L. Pratt at an agreed rate of interest, and that the rate charged and received by the defendant Henry L. Pratt was seven per cent, and no more; that the defendant the Merchants Bank of Neligh did not deliver to the defendant Henry L. Pratt the said ten promissory notes of $120 each, nor the proceeds thereof, but unlawfully, and in fraud of the plaintiffs' rights, converted said ten notes to their own use and benefit. The court further finds that the three notes paid aforesaid by plaintiffs were paid to the defendant the Merchants Bank of Neligh, believing that said notes belonged to the defendant Henry L. Pratt, and before the discovery of the fact that the defendant the Merchants Bank of Neligh had converted said notes to its own use. The court further finds that after the payment of the three notes aforesaid the defendant the Merchants Bank of Neligh conveyed the remaining seven notes to the defendant Henry L. Pratt, but that the defendant Henry L. Pratt acquired the title and possession of said notes with a full knowledge of the fact hereinbefore enumerated. The court further finds that no consideration was ever paid by the defendant the Merchants Bank of Neligh or received by the plaintiffs for the said ten notes of $120 each and the mortgage securing the same, and that said notes and mortgage are fraudulent and void and that the plaintiffs are entitled to have the same surrendered to them and the said mortgage canceled and the cloud created thereby upon the title to the plaintiffs' property, to-wit, block 22, in the city of Neligh, Antelope county, Nebraska, removed.

"It is therefore considered, adjudged, and decreed by the court that the defendant surrender to the plaintiffs the seven notes of $120 each, payable as follows: One each on the first days of the months of January and July, 1891; one each on the first days of January and July, 1892; one each on the first days of January and July, 1893, and the

one which matures on the first day of January, 1894; and that the mortgage given to secure the same, to-wit, the mortgage executed by the plaintiffs and filed in the office of the county clerk of Antelope county, Nebraska, on the 28th day of January, 1889, at 3 o'clock P. M., and recorded in book 'W' of Mortgages at page 483, be, and the same hereby is, canceled and annulled and rendered wholly void and of no force and effect, and that the cloud created by the said mortgage upon the title of the plaintiff be, and the same hereby is, removed; and the defendants, and each of them, are enjoined and restrained from claiming any lien, title, or other interest in said property by virtue of said mortgage, and that the plaintiffs have and recover from the defendant the Merchants Bank of Neligh the sum of $410, with interest thereon at the rate of seven per cent per annum from this date; to all of which findings the defendants at the time excepted.

"And afterwards, to-wit, on the same day, the day the said cause came on for hearing upon the motion of the defendant for a new trial, and the court, after hearing the argument of the counsel, and being fully advised in the premises, overruled said motion, to which order, ruling, and judgment of the court the defendants then and there duly excepted, and forty days are allowed to settle bill of exceptions. It is further ordered that the defendants have and recover from the plaintiffs herein the costs of this action, taxed at $6.93. Plaintiffs except to that portion of the decree wherein the court finds that the notes in controversy were made payable to Henry L. Pratt or bearer."

The main contention of counsel for appellants in their brief filed is that the findings and decree were not supported by the evidence. We have read and carefully examined all the testimony in the case and deem it unnecessary to quote from it at large and comment upon it here, but a full consideration of it leads us to conclude that the determination of the district court was sustained by the evidence.

Counsel for appellants further contend that appellees should at least have offered to pay what it was reasonably worth to procure the loan, before asking to have the commission notes and their accompanying mortgage canceled, under the rule that "he who seeks equity must do equity." The evidence shows that they paid the bank $365 for procuring the loan, or as expenses of the trip to New York by the president or officers of the bank to negotiate this loan, in exact pursuance of the terms of the agreement of the parties as contended by appellees, and having determined that the finding of the lower court that the contract was as alleged or claimed by the appellees was sustained by the testimony, the bank must be held to its terms, and having been paid what it agreed to take according to such contract, it has received its whole compensation, and it was unnecessary for the appellees to offer to pay more before they were in a position to ask relief in a court of equity.

Having reached the conclusion that the findings of fact as announced by the judge of the district court were supported by the evidence, we must apply to them the rules which govern courts of equity in affording relief in cases of the nature of the one at bar, and we are satisfied that the case was one that by its facts and circumstances warranted the remedy granted. The rule has been stated in *Barnard v. Roane Iron Co.*, 2 S. W. Rep. [Tenn.], 25, as follows: "It is likewise true that where a party intentionally or by design misrepresents a material fact or produces a false impression, in order to mislead another or to obtain an undue advantage of him, in every such case there is a positive fraud in the fullest sense of the term; nor can it be maintained that the evidence of the fraudulent representations is to be excluded upon the doctrine that all representations are merged in the writings subsequently executed by the parties. This rule has no application when a suit is brought to be relieved against a written instrument on the ground of fraud. The purpose is not to contradict or vary

the terms of the written agreement, but relief is sought upon the ground that, by false representations, the parties are entrapped into an agreement which they would not otherwise have made. It is not denying the deed nor its terms to insist that it is vitiated by fraud;" citing *Finlay v. King*, 3 Pet. [U. S.], 382. (See, also, *Union Central Life Ins. Co. v. Huyck*, 32 N. E. Rep. [Ind.], 580, and citations.) The decree of the district court is

AFFIRMED.

WILLIAM H. PICKENS, APPELLEE, V. MILTON D. POLK ET AL., APPELLANTS.

FILED OCTOBER 16, 1894. No. 5568.

1. **Mechanics' Liens**: FORECLOSURE: PARTIES: PURCHASER OF PREMISES: SUMMONS: PUBLICATION. A purchaser of real estate, during the life of a mechanic's lien to which it is subject, is a necessary party to an action to foreclose the lien, and where a petition is filed in which the party who owned the premises when the lien attached, and who contracted for the labor and materials, the account of which was the basis for the claim and lien, together with the purchaser of the premises and holder of the legal title, are named as defendants, the owner must be served with summons issued of date prior to the expiration of the two years during which the lien can be enforced, or, if a non-resident, service of notice by publishing it must be effected, the first publication of which was of a date prior to the termination of the two years the lien had to run, and that such person's name appears in the petition as a defendant, or that service of summons is completed on the party against whom a personal judgment on the account is sought before the time for bringing the action to foreclose the lien expires, does not constitute the said purchaser of the premises a party to the suit, nor will it be deemed such a commencement of the suit, as to him, as to admit of his being brought in by service of process, either personally or by publishing notice when proper, the date of the issuance or first publication of which is subsequent to the expiration of the term of the life of the lien.

2. ——: ——: LIABILITY OF VENDOR OF PREMISES UPON ACCOUNT FOR MATERIAL: PERSONAL JUDGMENTS. The party who owned the premises when the improvements were made, and who contracted therefor, having sold the property, was not a necessary party to the suit to foreclose the lien; but where the petition was framed to state a cause of action against him on the account, and a portion of the relief asked was a personal judgment against him for the amount of the debt, and he was personally served with process in the action and appeared therein and answered, *held*, that it was competent for the court to adjudicate the issues arising in the case between the plaintiff and such party defendant, and, if the evidence warranted, to render judgment against him for the amount due upon the account.

3. COSTS: JURISDICTION OF COURTS. Where an action is instituted in the district court, which is within the jurisdiction of a justice of the peace, the plaintiff in such action will not be entitled to his costs.

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

C. S. Polk and *E. H. Wooley*, for appellants.

Matthew Gering, contra.

HARRISON, J.

On or about the —— day of ——, 1889, Milton D. Polk, one of the defendants in this case in the district court, it appears, was the owner of the west twenty feet of lot 12, in block 29, in the city of Plattsmouth, and entered into a contract with William H. Pickens, appellee, for the erection by him for Polk of an addition to a store-room situated on the portion of the lot above described. On August 30, 1889, Milton D. Polk sold the property and conveyed the title to John F. Polk, who, on May 16, 1891, sold the premises and transferred the title to one S. O. Leeson, who was then, and continued to be, a resident of the state of Indiana. July 10, 1889, appellee Pickens filed a lien for the price of material furnished and value of labor performed under the contract, and on the 9th day of July,

1891, filed his petition in the district court of Cass county, by which he sought to foreclose his lien, naming in such petition as defendants Milton D. Polk and S. O. Leeson, and on the same day he filed the petition, procured a summons to issue, directed to the sheriff of Cass county, which, by its terms, commanded service upon Milton D. Polk and S. O. Leeson. This writ was, the record discloses, returned the date of its issuance, indorsed as follows:

"STATE OF NEBRASKA, } ss.
CASS COUNTY. }

"I hereby accept personal service of the within summons this 9th day of July, 1891, and enter voluntary appearance in said cause. MILTON D. POLK."

September 14, 1891, there was filed in the office of the clerk of the district court an affidavit, the object of which was to procure service by publication upon S. O. Leeson, and upon December 15, 1891, proof of publication was filed, showing that publication of the notice was commenced of date November 20, 1891. The defendants appeared and answered, the answer of Leeson containing the following as one of the defenses to the action of appellees and is the only one which need be noticed here, to-wit: "Further answering, said defendant alleges that more than two years have elapsed since the filing of the pretended lien of plaintiff before the commencing of this action against this defendant and service of process upon him by actual or constructive service, and that as to this pretended lien plaintiff is barred by statute of limitation." There was a trial to the court, a determination of the issues, and a decree in favor of plaintiff, from which the defendants have appealed.

The main question presented to the court for consideration and determination relates to the validity of the lien, or its being rendered incapable of enforcement against the property because of the length of time which had elapsed or intervened between its filing and the date of the commencement of the action, and this depends upon whether

the action was commenced against Leeson, the owner of the property and holder of the title when the petition was filed and the summons issued which was not and could not be served on him, or when the first publication of the notice was made upon which the decree foreclosing the lien as to the rights of Leeson was based. The law of this state governing mechanics' liens and their enforcement provides its own rule limiting the time of the existence of any lien, and within which an action must be instituted for subjecting the property against which it stands as a lien to the payment of the debt or account for which it is security, to two years, and it is conceded in this case that the petition was filed and the summons which was served on Polk was issued before the expiration of two years from the date of the filing of the lien, but that the affidavit for further and indeed all proceedings relating to the service by publication of the notice upon Leeson were all subsequent to the two years limitation. Section 19 of the Code, in reference to the time when an action shall be commenced, is as follows: "An action shall be deemed commenced, within the meaning of this title, as to the defendant, at the date of the summons which is served on him; where service by publication is proper, the action shall be deemed commenced at the date of the first publication, which publication shall be regularly made;" and a portion of section 17, on the same page of the statutes cited, states: "The absence from the state, death, or other disability of a non-resident, save the cases mentioned in this section, shall not operate to extend the period within which actions *in rem* shall be commenced by and against such non-resident or his representatives." This is an action *in rem*, and one in which either constructive service or service by summons was proper and sufficient under other provisions of our law governing service in such actions, and service by publication could have been made on Leeson, he being a non-resident of the state, and he was a necessary party

to the action and the one against whom the action to foreclose must be instituted. (See *McCormick v. Lawton*, 3 Neb., 480; Phillips, Mechanics' Liens [3d ed.], sec. 399.) Milton D. Polk was not a necessary party to the action to foreclose. The action, so far as it was one against him, was for judgment upon the account. He had no further interest in the property. (*McCormick v. Lawton, supra;* Phillips, Mechanics' Liens [3d ed.], sec. 396.) The relief sought as against each of the appellants was entirely distinct and separate, and disconnected from that demanded against the one whom the petition attempted to join with him in the action. The cause could have been dismissed as to either, and proceeded to completion as to the other, and the same relief obtained as to him as in the action as it was prosecuted in which they were attempted to be joined. The remedy as against the one was in no manner or degree dependent for its enforcement upon the enforcement of the remedy against the other, and we are satisfied that the issuance of the summons and its service upon Milton D. Polk was not a commencement of the action to foreclose the lien as against the rights of Leeson, the then owner of the real estate, and the action must be considered as not commenced as to Leeson until the date of the first publication of notice to him, which was too late. The lien had become incapable of enforcement before the affidavit of publication was filed. The fact that he was named in the petition did not make him a party to the action. He did not become a party until served with notice, in this case, nor until publication of the notice. (*Geisecke Boot & Shoe Mfg. Co. v. Seevers*, 52 N. W. Rep. [Ia.], 555.) The suit could not be deemed commenced as to Leeson until he was brought in as a party. (See *Green v. Sanford*, 34 Neb., 363; *Aultman v. Cole*, 16 Neb., 4; *Burlingim v. Cooper*, 36 Neb., 73.) Judgment was rendered in the district court against Milton D. Polk for the amount of the account. The court had jurisdiction of the

subject-matter. The case as against Polk was for a judgment on the account, and he had been duly served with summons, or had accepted service, answered, and joined issues. We think the action of the court, by which it retained and tried the controversy between appellee and Milton D. Polk on the account and adjudicated it, was proper and right. Judgment was also rendered against Milton D. Polk for the costs. This, it is contended, should not have been done, for the reason that by the amount involved, and for which the appellee recovered a judgment, it was within the jurisdiction of a justice of the peace and the action on the account should have been commenced in the lower court, and hence the appellee was not entitled to his costs on this branch of the case. This contention is correct and the appellee cannot recover his costs. (*Goodman v. Pence*, 21 Neb., 459.) The decree of the district court, in so far as it awards a foreclosure of the mechanic's lien and costs of the action to appellee, is reversed. The action is dismissed as to S. O. Leeson, and, as thus modified, the decree of the district court is affirmed.

JUDGMENT ACCORDINGLY.

WILLIAM R. JONES V. WILLIAM A. WOLFE.

FILED OCTOBER 16, 1894. No. 5204.

After a bill of exceptions has been quashed it can be considered for no further purpose in the case in which it was originally filed in this court.

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

E. O. Kretsinger and *Geo. B. Everitt*, for plaintiff in error.

George A. Murphy, contra.

RYAN, C.

On motion, the bill of exceptions in this case was quashed at the September term of this court, 1892. The questions argued pertained to matters of fact which render it necessary to resort to the bill of exceptions to determine what, if any, merit is involved. Counsel for plaintiff in error cite the cases of *Donavan v. Sherwin*, 16 Neb., 130, *Scott v. Waldeck*, 11 Neb., 525, and *City of Seward v. Klenk*, 27 Neb., 615, in support of the proposition that a bill of exceptions, though quashed, may be examined to ascertain whether or not there was sufficient evidence to sustain the verdict. One of the cases cited tends to sustain the view contended for, and yet it seems to us, upon full consideration of the matter, that this is wholly without warrant, for if the bill of exceptions is quashed, its contents, as showing what the evidence was, are no more matters for the consideration of this court than if there had been no attempt to evidence them by a bill of exceptions. In Webster's International Dictionary the law definition of the word "quash" is given as "to abate, annul, overthrow, or make void; as, to quash an indictment." By the ruling of this court quashing the bill of exceptions, it was rendered void; hence it can be consulted for no purpose connected with the further proceedings in the case. The judgment of the district court is, therefore,

AFFIRMED.

WILLARD KENT ET AL. V. SHICKLE, HARRISON & HOWARD IRON COMPANY ET AL.

FILED OCTOBER 16, 1894. No. 5683.

Sheriff's Commission on Execution Sale. Where, on a sheriff's sale of real property, a check of the purchaser has been received and used by the sheriff with the assent of all parties concerned, the commission of the sheriff will not be denied simply because, technically speaking, no money was received or disbursed by him.

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

J. R. Webster, for plaintiffs in error.

M. H. Fleming, contra.

RYAN, C.

The proceeding, from which error is taken to this court, was the ruling of the district court of Saline county on a motion to retax costs. The motion was sustained as to a part of the items and overruled as to the commission of the sheriff, and to review the ruling last named the case is brought into this court. A decree was rendered in the original case, which was entitled "The Shickle, Harrison & Howard Iron Company v. Willard Kent et al.," including John R. Johnston and George D. Stevens. The Shickle, Harrison & Howard Iron Company had a judgment against Willard Kent and Horace G. H. Tarr for the enforcement of a lien against the real property afterwards sold for the sum of $14,977.39; Zephania Waterman, a like judgment and decree for the sum of $708.68; John Hawk, a like judgment and decree for the sum of $323.69; all of which parties had equal priority. The lien second in priority and subject to those above was that of the Crete

Improvement & Investment Company, John R. Johnston, and George D. Stevens for the sum of $15,393.75. On the order of sale issued for the satisfaction of the above liens, the property was sold to John R. Johnston and George D. Stevens for the sum of $30,000. These matters appear from a certified copy of the decree, order of sale, and return of the sheriff thereon. In the itemized bill attached to the sheriff's return he taxed for commission on sale the sum of $240.27. The sole ground on which the payment of this commission is resisted appears in the affidavit of J. R. Webster, introduced in evidence and considered in the district court on the motion to retax costs. In this affidavit the only facts pertinent to our present inquiry were stated in the following language: "The sale was made to John R. Johnston and George D. Stevens, to whom, with the Crete Investment Company, the second lien on the property was payable, and they never paid to the sheriff any money, but the purchasers, John R. Johnston and George D. Stevens, merely gave, April 19, 1892, the day of sale, a check of $10,000 to the sheriff, and no more, and the sheriff never reduced the same to money but returned the same to them that day, and the parties interested settled with the clerk and between themselves and not through the sheriff, who neither received nor disbursed any money in or about the business of said sale."

The contention of the plaintiff in error is that the sheriff, under the statute, was entitled to collect no commission because of the showing of facts above made and not contradicted. Section 5, chapter 28, Compiled Statutes, fixes the fees of the sheriff, who thereby is allowed "commission on all money received and disbursed by him on execution, or order of sale, order of attachment, decree, or on sale of real or personal property, shall be for each dollar not exceeding four hundred dollars, three cents; for every dollar above four hundred dollars and not exceeding one thousand dollars, two cents; for every dollar above one thousand

dollars, one cent." In section 10 of the same chapter it is provided that "in all cases in the district or supreme court, when persons, in whose favor the execution or order of sale is issued, shall bid in the property sold on execution or decree, the sheriff or master making such sale shall receive five dollars as his per cent on such sale, and no more." The criticism of the commission charged seems to be largely based upon the fact that payment was made of the $10,000, not by the use of money, but by a check of Johnston and Stevens. We are of the opinion that as none of the parties to the sale made any objection to the medium of payment of this $10,000, that it cannot now be insisted, merely for the purpose of retaxing costs, that such payment never was in fact made. It is not contended that the bid was satisfied by receipting for a certain amount on the execution, but it is insisted that payment by a check is covered by the proviso "where any money is received or disbursed." As the check in question was received and disbursed as money between the parties concerned, and for all purposes performed every function that money could have done, it cannot now properly be insisted that the sheriff should not be allowed his commission for receiving and disbursing the amount evidenced by the check. In this connection it may be remarked that the property was not bidden in by a party in whose favor the order of sale issued, for, so far as the second lien is concerned, it was in favor of Johnston and Stevens and the Crete Improvement & Investment Company, while the bid itself was in favor of Johnston and Stevens alone. From the affidavit it seems quite clear that it was necessary that payment of the bid should be made in some form, and, accordingly, a check was drawn by Johnston and Stevens in favor of the sheriff. We conclude, therefore, that the judgment of the district court was right, and it is

AFFIRMED.

DUNCAN LIVINGSTON, APPELLANT, V. BOARD OF COUNTY COMMISSIONERS OF JOHNSON COUNTY, APPELLEE.

FILED OCTOBER 16, 1894. No. 5310.

Eminent Domain: PAYMENT OF DAMAGES. The just compensation required to be made for taking private property for public use, by section 21 of article 1 of the constitution, must, before such taking, be ascertained and payment made accordingly, whether the appropriation of such property is by a municipal or other corporation.

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

S. P. Davidson, for appellant.

J. Hall Hitchcock, contra, cited: *Walsh v. Rogers*, 15 Neb., 311; *Hamlin v. Meadville*, 6 Neb., 227; *Reckner v. Warner*, 22 O. St., 275.

RYAN, C.

This action was commenced in the district court of Johnson county by the appellant to enjoin the appellee, the Board of County Commissioners of Johnson County, from opening a public road along the section line between sections 1 and 12, in township 6 north, range 11 east of the 6th P. M., in said county, until the damages caused by the opening of such road should be paid. In respect to the opening of this road the following order, made by the board, was of date July 22, 1890: "The board of county commissioners hereby order the following section line opened as a public road, and instruct the county clerk to advertise the same for objections and claims for damages, according to law, to-wit: Commencing at the southeast corner of section one (1), running thence

west one mile on the section line between sections one (1) and twelve (12), town six (6), range eleven (11). The same to be advertised for damages." No notice of any kind was published or served on the appellant previous to the entry of this order. A few days prior to its date an informal colloquy was had between the members of the board and the appellant at appellant's house, in which the chairman of the board proposed and plaintiff agreed to accept $300 as his damages. This was the appellant's version of what transpired. One member of the board testified that he thought the appellant clearly understood that the board agreed to allow him $300 as his damages, and that in June, 1890, appellant asked him if a warrant for that amount had been drawn, to which the witness answered no, but did not tell him that nothing would be allowed. The testimony of the other two members of the board, while not as strongly showing grounds for the reliance of appellant upon the promise to pay him $300 for the property taken, yet was somewhat corroborative of the testimony already set out. The appellant claims to have relied upon this promise as he understood it, and for that reason deemed it unnecessary to present any claim for damages, and consequently filed no such claim. The notice published after the entry of the order of July 22, 1890, was as follows:

"ROAD NOTICE.

"To all whom it may concern: The following section line, being deemed for the good of the public, required for a public road, viz: Commencing at the southeast corner of section one (1), town six (6), range eleven (11), thence running west on the section line one mile and terminating at the southeast corner of section two (2), town six (6), range eleven (11); and all objections thereto or claims for damages must be filed in the office of the county clerk on or before noon of the 1st day of December, A. D. 1890, or such road will be established without reference thereto.

Said road to be opened under section 24, chapter 78, of the Compiled Statutes of Nebraska. J. G. O'CONNELL,

"County Clerk."

For the purpose of this case it may be conceded that this notice was published and proof of that fact made as required by law. The records of the board of county commissioners show no other proceedings with reference to the opening of this road than those above set out. It is not questioned that the averments of the plaintiff's petition as to the intention to open the road was held by the county commissioners when this suit was begun, and, as charged in the petition, that but for this injunction the road would have been opened on the line designated.

It is argued by the appellee that the failure of the appellant to file his claim for damages within the time fixed by the notice for that purpose barred him of any right to insist upon compensation for the taking of his property as a condition precedent to opening the road in question. Probably our statute on this subject is open to this construction, and yet it seems to us that to sustain the contention of the appellee would be to ignore entirely the provisions of section 21, article 1, of our constitution, which is in the following language: "The property of no person shall be taken or damaged for public use without just compensation therefor." It has uniformly been held, when railroad corporations have attempted to exercise the right of eminent domain, that the provision of the section of the constitution just quoted requires that they must institute proceedings, ascertain the probable damages, and make payment of them, as a condition precedent to entering upon the property to be appropriated. The inference that the same rule should be applied to counties is justified by the opinion in the case of *Zimmerman v. County of Kearney*, 33 Neb., 620. The syllabus of that case is as follows: "Before a county can appropriate lands to public use for a public road, it must provide for the payment of damages for

the right of way, either by the appropriation of money from the proper fund for that purpose, or the levy of sufficient taxes to pay the damages upon which a warrant may be drawn. In either case the compensation must be sure and the land-owner may enjoin the use of his property by the public until such compensation is made." In the consideration of the case just cited the following language was used by MAXWELL, J., by whom the opinion of the court was delivered: "If we understand the position of the defendant in error, it is that the plaintiff must give up his land and take the chances of recovering payment therefor. This is not the law. The rule as stated in *Republican V. R. Co. v. Fink*, 18 Neb., 82, is applicable in case of a municipal corporation with this exception, that where the damages have been allowed and taxes levied to pay the same, so that warrant may be drawn thereon, the levy constitutes a fund that is available to the land-owner and the property may be appropriated therefor. In other words, the proper authorities must be able to deliver to him a warrant drawn upon the proper levy before the public can appropriate his property to its use. This is the means by which public corporations, like counties, townships, etc., effect payment. There must be an absolute provision for payment, however, or the property cannot be appropriated. Here there is no such provision and the land-owner may enjoin the proceedings." To give section 21 of article 1 of the constitution full effect it is necessary that a corporation which proposes to appropriate private property for public use shall take such steps as may be necessary to determine the amount of damages resulting from such appropriation and provide payment therefor. This duty should be in no way dependent upon whether or not a claim for damages has been filed by the person whose property is to be taken. If the amount of damages assessed for the taking of the property is deemed by the property owner inadequate, he may make a showing of that inadequacy be-

fore the county commissioners, who are authorized by section 26, chapter 78, Compiled Statutes, to increase the amount allowed by the appraisers, and thereafter may exercise his right of appeal; but in the first instance he is not required to take affirmative action as a condition upon which depends his right of compensation for taking his property for public use. The decree of the district court which denied the appellant relief was wrong and its judgment is, therefore,

REVERSED.

BOHN SASH & DOOR COMPANY ET AL., APPELLANTS, V. HENRY O. CASE ET AL., APPELLEES.

FILED OCTOBER 16, 1894. NO. 5524.

1. **Mechanics' Liens:** RIGHTS OF SUBCONTRACTOR: TIME TO FILE CLAIMS. The statute gives a certain time for filing a claim for a lien by a subcontractor, and the mere fact that a subcontractor has postponed the filing of his lien till toward the end of the time limited for that purpose, will not interfere with his said statutory right, no matter what may have been his motive.
2. ———: MORTGAGES: SUBROGATION. The right of subrogation for moneys loaned on a mortgage used to pay prior mortgages must be predicated upon some recognized equitable principle, such as mistake, an agreement or understanding that the loan was for the express purpose designated, or the like. The mere fact that with the proceeds of a later mortgage prior mortgages have been paid that the lien of them might be removed affords no ground for subrogation thereto.
3. ———: CLAIM AGAINST SEPARATE PROPERTIES. Under an entire contract for the erection of buildings on lots not contiguous to each other, one claim for a mechanic's lien may properly be filed against both improved properties where the claimant of such lien has contributed material or labor to both improvements.

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

The facts are stated by the commissioner.

B. G. Burbank, for Bohn Sash & Door Company:

The lower court was not justified, under the law and the evidence, in postponing the mechanic's lien of the Bohn Sash & Door Company to the mortgage lien of Jeffries & Sons, trustees, and certain mechanics' liens. The doctrine of estoppel does not apply. (*De Nayer v. State Nat. Bank*, 8 Neb., 108; *Mills v. Graves*, 38 Ill., 455; *Commonwealth v. Moltz*, 10 Pa. St., 527; *Crest v. Jack*, 3 Watts [Pa.], 238; *Hepburn v. McDowell*, 17 Serg. & R. [Pa.], 383; *Wallis v. Truesdell*, 6 Pick. [Mass.], 455; *Whitney v. Holmes*, 15 Mass., 152; *Miller v. Cresson*, 5 Watts & S. [Pa.], 284; *Welland Canal Co. v. Hathaway*, 8 Wend. [N. Y.], 480; *Carter v. Darby*, 15 Ala., 696; *Newman v. Hook*, 37 Mo., 207; *Dezell v. Odell*, 3 Hill [N. Y.], 219; *Taylor v. Zepp*, 14 Mo., 482; *Simpson v. Pearson*, 31 Ind., 1; *Plumer v. Lord*, 9 Allen [Mass.], 455; *Audenried v. Betteley*, 5 Allen [Mass.], 382; *Howard v. Hudson*, 2 El. & B. [Eng.], 1; *Burnell v. Maloney*, 39 Vt., 579; *Mills v. Graves*, 38 Ill., 455; *Gordon v. Torrey*, 15 N. J. Eq., 112.)

The doctrine of subrogation does not apply in favor of John Jeffries & Sons, trustees. (*Shinn v. Budd*, 14 N. J. Eq., 237; *Nolte v. Creditors*, 9 Martin [La.], 89; *Curtis v. Kitchen*, 8 Martin o. s. [La.], 706; *Bank of United States v. Winston*, 2 Broch. [U. S. C. C.], 254; *Gadsden v. Brown*, 1 Speer Eq. [S. Car.], 41; *Sandford v. McLean*, 3 Paige Ch. [N. Y.], 122; *Hayes v. Ward*, 4 Johns. Ch. [N. Y.], 130; *Banta v. Garmo*, 1 Sandf. Ch. [N. Y.], 384; *Wilkes v. Harper*, 1 Comst. [N. Y.], 586; *Swan v. Patterson*, 7 Md., 164; *Copio v. Middleton*, 1 T. & R. [Eng.], 224; *Hodgson v. Shaw*, 3 Myl. & K. [Eng.], 183; *Williams v. Owen*, 5 Myl. & Cr. [Eng.], 597; *Bowker v. Bull*, 1 Simons n. s. [Eng.], 29; *Downer v. Wilson*, 33 Vt., 1; *Marvin v. Vedder*, 5 Cow. [N. Y.], 676.)

William S. Curtis, for W. B. Millard:

The lien of James F. Morton should be declared subordinate to the mortgage lien of W. B. Millard.

The liens of George A. Hoagland, J. L. Coughlin, Edward C. Tighe, Omaha Oil & Paint Company, and Carl Bradley should be declared void. (Phillips, Mechanics' Liens [2d ed.], secs. 376, 377; *Fitzgerald v. Thomas*, 61 Mo., 502; *Culver v. Elwell*, 73 Ill., 536; *Davis v. Alvord*, 94 U. S., 545; *Morris County Bank v. Rockaway Mfg. Co.*, 16 N. J. Eq., 150; *Beckel v. Petticrew*, 6 O. St., 247; *Hill v. Braden*, 54 Ind., 72; *Hill v. Ryan*, 54 Ind., 118.)

The payments of two thousand dollars made on the George A. Hoagland account should be credited upon the material furnished for the Twenty-fifth street block. (Phillips, Mechanics' Liens [2d ed.], sec. 289; *Beckel v. Petticrew*, 6 O. St., 247.)

Switzler & McIntosh, for George A. Hoagland and Charles A. Harvey:

Where the contract is in gross for material furnished for all houses, the lien attaches to all for the amount due. (*Chadbourn v. Williams*, 71 N. Car., 444; *Sergeant v. Denby*, 12 S. E. Rep. [Va.], 402; *Bowman Lumber Co. v. Newton*, 72 Ia., 90; *Lewis v. Saylors*, 73 Ia., 504; *Fullerton v. Leonard*, 52 N. W. Rep. [S. Dak.], 325; Phillips, Mechanics' Liens, sec. 369; *Doolittle v. Plenz*, 16 Neb., 153; *Batchelder v. Rand*, 117 Mass., 176.)

The lien dates from the delivery of the first material. (Sec. 2157, Con. Stats; *Courtney v. Insurance Co. of North America*, 1 C. C. A., 249; *Ansley v. Pasharo*, 22 Neb., 662.)

Where a mortgage is given by owner of premises after delivery of a part of material, under a contract for delivery of still other material, for erection of buildings, such mortgage is junior and inferior to lien of material-man for all

goods furnished under said contract, both prior and subsequent to execution of the mortgage. (*Batchelder v. Rand*, 117 Mass., 176; *Courtney v. Insurance Co. of North America*, 1 C. C. A., 249; *Stout v. Sower*, 22 Ill. App., 65; *Morse v. Dole*, 73 Me., 351.)

Cook & Gossett, for John Jeffries & Sons:

The appellants' lien should not be allowed, because it is not so itemized as to comply with the mechanics' lien law, and because it is so grossly exaggerated in amount as to show intentional fraud in the claim it asserts. (*Noll v. Swineford*, 6 Pa., 187; *Carson v. White*, 6 Gill [Md.], 17; *Thomas v. Barber*, 10 Md., 381; *McDonald v. Rosengarten*, 134 Ill., 126; *Rude v. Mitchell*, 97 Mo., 372; *Graves v. Pierce*, 53 Mo., 423; *McWilliams v. Allan*, 45 Mo., 573; *Coe v. Ritter*, 86 Mo., 287; *Shackleford v. Beck*, 80 Va., 576; *Cannon v. Williams*, 14 Col., 21; *Lynch v. Cronan*, 6 Gray [Mass.], 531; *Hoffman v. Walton*, 36 Mo., 613; *Gibbs v. Hanchette*, 51 N. W. Rep. [Mich.], 691; *Foster v. Schneider*, 2 N. Y. Sup., 875; *Whitenack v. Noe*, 11 N. J. Eq., 321; *Reeve v. Elmendorf*, 38 N. J. Law, 125; *Stubbs v. Clarinda College Springs & S. W. R. Co.*, 65 Ia., 513.)

Appellants' lien, even if allowed, should be postponed to the Myers mortgage.

The ruling of the court in regard to the subrogation of the Myers mortgages to the lien of those which the money was used to pay off was right and consistent with sound principles of equity and justice. (*Blodgett v. Hitt*, 29 Wis., 169; *Valle v. Fleming*, 29 Mo., 152; *Levy v. Martin*, 48 Wis., 198; *Wilton v. Mayberry*, 75 Wis., 191; *Plapp v. Meyer*, 40 Ia., 705; *Johnson v. Barrett*, 117 Ind., 551; *Gilbert v. Gilbert*, 39 Ia., 657; *Crippen v. Chappel*, 35 Kan., 495; *Perry v. Adams*, 98 N. Car., 167; *Fears v. Albea*, 69 Tex., 437; *Walker v. King*, 44 Vt., 601; *Wheeler v. Willard*, 44 Vt., 640; *Robinson v. Urquhart*, 12 N. J. Eq., 524; *Tradesmen's Building Association v. Thompson*,

32 N. J. Eq., 133; *Coe v. New Jersey M. R. Co.*, 31 N. J. Eq., 105; *Payne v. Hathaway*, 3 Vt., 212; *Trenton Bank Co. v. Woodruff*, 2 N. J. Eq., 117; *Bruse v. Nelson*, 35 Ia., 157; *Price v. Davis*, 14 S. E. Rep. [Va.], 704; *Emmert v. Thompson*, 52 N. W. Rep. [Minn.], 31; *Hobgood v. Schuler*, 10 So. Rep. [La.], 812; Pomeroy, Equity Jurisprudence, sec. 1212.)

E. R. Duffie, for E. C. Tighe.

Meikle & Perley, F. A. Brogan, Bradley & De Lamatre, Mahoney, Minahan & Smyth, M. S. Lindsay, Chas. E. Clapp, Leavitt Burnham, J. W. Houder, McCoy & Olmsted, Tunnicliff & Page, Congdon & Clarkson, Edgar S. Bradley, Wharton & Baird, Brown & Talbott, De France & Richardson, Henry W. Pennock, Clinton N. Powell, Cornish & Robertson, Parke Godwin, A. C. Read, Montgomery, Charlton & Hall, Kennedy & Learned, and *J. J. O'Connor*, for other appellees.

RYAN, C.

The Bohn Sash & Door Company, M. A. Disbrow, and George A. Hoagland each began a separate action for the foreclosure of a mechanic's lien in the district court of Douglas county. These three cases were consolidated and tried as one, and upon final hearing a decree was rendered granting each plaintiff and cross-complainant relief, though not in each instance in the measure prayed. The facts out of which arose the controversy adjusted by the above decree were, in substance, as follows: On the first of October, 1889, William J. Paul, one of the defendants, was the owner and in possession of the following described real property: Lots 3 and 4, in block 1, in Capitol Hill Addition to the city of Omaha, being a tract of land situate at the northeast corner of Twenty-sixth and Harney streets in said city, and hereinafter mentioned and called the

"Twenty-sixth street property;" also the north 120 feet of a subdivision of lot 13 of lot 6, in Capitol Hill Addition to the city of Omaha, being a tract of land situate at the southeast corner of Twenty-fifth and Harney streets and hereinafter mentioned and called the "Twenty-fifth street property." These tracts were separated from each other by the space of an intervening block or more. On the 9th day of October 1889, William J. Paul entered into a written contract with the firm of Case & Kennedy, by the terms of which Case & Kennedy undertook to construct a block of ten contiguous residences on said Twenty-sixth street property, and also a block of five contiguous residences on the Twenty-fifth street property. By the terms of this contract the firm of Case & Kennedy were to perform all work and furnish all material necessary to construct the aforesaid two blocks according to plans and specifications agreed on, in payment for which the said firm was to receive $51,650 in money and real property, to be conveyed at an agreed price. Immediately the erection of the Twenty-fifth street property was begun, and afterwards, in 1890, the building contemplated was commenced on the Twenty-sixth street property. Afterwards there was completed the block on Twenty-fifth street. That on Twenty-sixth street was never finished. For the satisfaction of the unpaid claims of subcontractors under Case & Kennedy, and of mortgages on the properties on Twenty-fifth and Twenty-sixth streets, foreclosure proceedings were begun, and because some of the causes of action affected both properties, the consolidation hereinbefore referred to was rendered indispensably necessary. The decree fixed the priorities of the several claimants and directed a sale of the property on Twenty-sixth street and Twenty-fifth street respectively, directing the application of the proceeds of sale of each property to be made to such parties as were respectively entitled to liens thereon. While there were thirty-two parties whose rights were thus determined, there has

been an appeal taken by but six, and to a consideration of these appeals alone need our attention be directed.

Before the contract was made for the erection of the block of buildings on the Twenty-sixth street property, that property had been mortgaged by a former owner, one Andrew J. Rosewater, to John P. Schoning, who had assigned his mortgage to the Omaha Savings Bank. By this mortgage there was secured the payment of three promissory notes for $5,022.22 each, but one of these notes meantime had been paid. On the Twenty-sixth street property William J. Paul, on May 1, 1888, made another mortgage to secure payment of his promissory note for $6,500, held by J. H. Millard, trustee. On the 27th of May, 1890, William J. Paul executed to W. B. Millard, trustee, a mortgage on the Twenty-sixth street property to secure payment of his note for $10,000, due August 27 following. On the 13th day of June, 1890, said Paul made another mortgage on the Twenty-sixth street property to W. B. Millard, trustee, for $5,000, due in ninety days after date. Each of said mortgages was duly recorded. On July 7, 1890, Mahoney & Co. filed a subcontractor's claim for a mechanic's lien for $178.85. So far as is shown by the record this was the condition of the Twenty-sixth street property when, in July, 1890, Mr. Paul applied to the Omaha agent of the Kansas City Loan Company for a loan thereon to be made by Willis G. Myers. This loan was afterwards effected, and with a part of the proceeds thereof there were paid on the mortgages above referred to the following sums, to-wit: To the Omaha Savings Bank, $11,203.91; to J. H. Millard, $6,933.74; to W. B. Millard, $16,258.91. Mr. Myers procured the release of these mortgages of record, and forebore to take any assignment of them; but, in consideration of the fact that the loan was effected for the purpose of taking up these mortgages, the district court subrogated Mr. Myers to the rights of the holders of the original mortgages which he had paid

with the proceeds of the loan made by him to Paul. This right of subrogation will be considered later. Incidentally, however, to this loan there arose other questions, which by the district court were held of sufficient importance to postpone the lien of the Bohn Sash & Door Company and Edward C. Tighe to the lien of the mortgage for $35,000 held by Myers. This mortgage, after it had been recorded, was transferred, with the bond which it secured, to Jeffries & Sons, who were parties to the foreclosure proceedings in the district court. The lien of the Bohn Sash & Door Company for $3,331.67, with which we have to deal, was for material furnished between March 1 and July 30, 1890. In like manner we must consider the claim of Edward C. Tighe for labor performed and material furnished between the 25th day of November, 1889, and the 5th day of August, 1890, to the amount of $844.03.

1. The district court, after describing the manner in which the loan of $35,000 was made and expended, made the following findings as to the Bohn Sash & Door Company and Edward C. Tighe: "That the Bohn Sash & Door Company, by its officers and agents, had knowledge that the said William J. Paul was negotiating and endeavoring to procure said loan, and the making to and acceptance by said Myers of said note and mortgage before the same was actually made, and while the said Paul was negotiating with the said Myers to obtain said loan, and although intending at that time to file said claim as a lien upon said premises, the said company, at the request of and by collusion with said Paul, withheld its claim against said premises, and the lien filed by it as aforesaid, until about the time said loan was made and the said note and mortgage executed and accepted by the said Myers, for the purpose of enabling the said Paul to procure said loan and the acceptance thereof, to and with the intent of concealing, and did conceal, from the said Myers the fact that they had or claimed any lien upon said premises until said loan should

be made, and did not file said lien until they knew said loan had been made." As to Edward C. Tighe, the findings were the same as those above set out with reference to the Bohn Sash & Door Company. On account of the facts found as above stated and described with reference to the Bohn Sash & Door Company and Edward C. Tighe, it was decreed by the district court that their liens as subcontractors should be postponed to the lien of Jeffries & Sons, and as Jeffries & Sons had liens in the third, seventh, and ninth classes, the result was that the Bohn Sash & Door Company and Edward C. Tighe's claims were adjudged to belong to the tenth class. As the first origin of the claim of the Bohn Sash & Door Company was March 1, 1890, and that of Edward C. Tighe was of date November 25, 1889, it is evident that under the rule laid down in *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207, the Bohn Sash & Door Company and Edward C. Tighe have, by the aforesaid special findings of the district court, been placed in a rank which, but for those findings, they should not have occupied. We have carefully considered the evidence in support of the findings of the district court, and are unable to discover any fraud or deceit practiced by either the Bohn Sash & Door Company or Edward C. Tighe, or the attorneys or agents of either of these parties. The testimony simply shows that these claims were called to the attention of Mr. Case and Mr. Paul and that a request was made that the claims for liens should not be filed until later, for, it was said, Mr. Paul was obtaining a loan out of which these claims should be paid, and that if the claims were filed before that loan was made, it would interfere with, and perhaps prevent, its consummation. Acting on this suggestion, the claims of these parties were not filed until nearly the expiration of the sixty days given by law for that purpose. There was, however, no communication between any agent or officer of the Bohn Sash & Door Company and Willis G. Myers, or his agent; neither was there

any communication between Edward C. Tighe and said Myers, nor was Myers by either party in any way led to consummate the loan by reason of the claim being withheld from record as above described. It was simply a case where the holder of a right to a lien, a subcontractor, was given sixty days by law within which his lien should be filed. The filing of such a lien would be just as operative and effective on the fifty-ninth day as though filed sooner. We are unable to discover, in withholding these claims from the record until nearly the close of the sixty days provided by law, without meantime any inducement having been offered for the consummation of the loan by either holder of the liens, that there was any fraud or any improper conduct on the part of either the Bohn Sash & Door Company or Edward C. Tighe. The evidence shows that Mr. Myers knew that the building was in course of construction and that he nevertheless made no inquiry as to whether or not the subcontractors had been paid; but the evidence does show that he had confidence in the financial ability of Case & Kennedy. In addition to this, a bond was taken as indemnity against any liens being filed in the nature of those held by the Bohn Sash & Door Company and Edward C. Tighe, and from all these considerations we are led to the conclusion that the withholding of these liens from the record in no way fraudulently induced the consummation of the loan of $35,000. Considered solely with reference to the time at which the Bohn Sash & Door Company's lien for $3,331.67 had its origin, and the date at which began the claim of Tighe (November 25, 1889), these liens should have ranked with that of Mahoney & Co.; that is to say, should have been in the second class, and superior to all rights of Jeffries & Sons under the mortgage assigned to them by Myers.

2. It is insisted, however, and the district court so found, that Jeffries & Sons are entitled to be subrogated to the rights of certain mortgagees whose mortgages were paid

out of the proceeds of the mortgage for $35,000. The first of these was for the amount of the two notes of Andrew J. Rosewater, held by the Omaha Savings Bank, amounting to $11,203.91; the other was the mortgage of Paul to Rosewater, assigned to J. H. Millard, which was discharged by the payment of $6,933.74. The sum total of these two mortgages—probably with some accrued interest—the court found was $19,770.09, and decreed the same the third lien on the Twenty-sixth street property. The inducements upon which Jeffries & Sons predicate their right to subrogation as to these amounts are thus stated in the brief filed on their behalf: "To induce the making of said loan he (Paul) represented that he held the title to the property; that the only liens against it were the four mortgages above mentioned and the mechanic's lien of Mahoney & Co., the amount and validity of which were in dispute; that he had paid some $20,000 in cash on the building then in progress of construction and had arranged for the payment of the balance with real estate; that the contractors were solvent and responsible; that his contract for such payments was valid and enforceable, and that the contract would be carried out; that no other indebtedness then existed or could arise for work or materials which could become a lien thereon, and upon the release of the four mortgages then upon the property, his mortgage for the proposed loan would be a first lien upon the property, prior to any claims, actual or contingent, against it. Relying upon these representations, Myers agreed with Paul and the holders of the four mortgages to make the loan of $35,000 on Paul's note and a mortgage on the Twenty-sixth street property, and with the proceeds pay to the Omaha Savings Bank $11,203.91, the amount of the first mortgage; to J. H. Millard, $6,933.74, the amount of the second mortgage; to William B. Millard, $16,258.91, the amount of the third and fourth mortgages. He procured the release of these mortgages of record and forebore to

take any assignment of them for the reason that he believed and relied upon Paul's representations above stated. On August 19, 1890, his mortgage was recorded; the four prior mortgages were paid off with the proceeds of the loan, and thereupon the mortgage to Myers appeared as a first lien, except as to the claim of Mahoney & Co."

We are now confining our attention to the discharged mortgage held by the Omaha Savings Bank, and to that held by J. H. Millard, for the reason that the third and fourth mortgages, being those to William B. Millard, were filed later than the inception of the lien of the Bohn Sash & Door Company and of Edward C. Tighe, and it matters not, therefore, whether or not there was subrogation as to these last named mortgages, for if subrogated the party so entitled would only find himself holding a lien junior and inferior to that of the Bohn Sash & Door Company and Edward C. Tighe. In each of the cases cited to sustain the right of subrogation there was a recognized equity upon which to found that right. For instance, in the case of *Blodgett v. Hitt*, 29 Wis., 169, land had been sold at administrator's sale. The notice of the sale was insufficient and the proceedings void, and the heirs of the deceased were entitled to the land. It was held, however, that the money which the purchaser paid, having been used to pay off a mortgage on the land and other debts of the ancestor which the heirs would have been obliged to pay in order to hold their inheritance, it was but equitable that the purchaser should be subrogated to the lien of the mortgagee and to the rights of all creditors whose claims had been discharged. What was regarded as the pivotal inquiry in that case is indicated by the following language quoted from the opinion: "But the question is not, alone, what is the natural and inherent justice of the case? but it is, are the principles and rules of equity jurisprudence, as recognized and enforced by courts of equity, sufficiently broad and comprehensive to reach the case and compel the heirs to repay

the sums which the defendant has thus paid for their benefit before they will be permitted to take possession of the land in controversy?" It will be noted in this language that the conclusion reached could not have been attained alone on the consideration of what is the natural and inherent justice of the case, but it was required that there should concur with this some well recognized principle of equity jurisprudence which would compel the heirs to repay the sums which the defendant had paid out for their benefit. The consensus of all the cases cited to sustain the subrogation in favor of Jeffries & Sons is that there must exist the equitable principle just noted. In some instances this equitable principle forbids that heirs shall profit by invalid administrators' sales made under misapprehension, causing such invalidity. So, where money has been advanced by way of loan or otherwise because of misconception of the condition of the title, it has been held that there should exist the right of subrogation to the mortgage or other security released by payment of the money advanced. Of this class was *Betts v. Sims*, 35 Neb., 840. In all the cases, however, it is noticeable that there exists a sufficient basis for equitable relief. In some it is because of mistake,—a well recognized equitable ground for the interference of courts, irrespective of whether there is involved the right of subrogation or some other right. In another class of cases there exists the right of subrogation because of the intent with which loans have been made for the payment of prior mortgages. Of the class just mentioned, the case of *Emmert v. Thomas*, 52 N. W. Rep. [Minn.], 31, is an example. Because in this case there is concisely stated the conditions necessary to entitle to subrogation of the nature just mentioned, the following language is quoted: "The better opinion now is that one who loans his money upon real estate security for the express purpose of taking up and discharging liens or incumbrances on the same property, has thus paid the debt at the instance, request, and solicita-

tion of the debtor, expecting and believing in good faith that his security will of record be substituted in fact in place of that which he discharges, is neither a volunteer, stranger, nor intermeddler, nor is the debt, lien, or incumbrance regarded as extinguished if justice requires that it should be kept alive for the benefit of the person advancing the money who thereby becomes the creditor." If Jeffries & Sons were properly entitled to subrogation as decreed by the district court, it must have been upon the application of the principles just quoted, for they are most nearly applicable.

Let us now consider the evidence of Mr. Pease, who was the agent through whom the $35,000 loan was made. He testified as follows: "In 1890 I was the representative of the Kansas City Investment Company at Omaha, and negotiated the mortgage with William J. Paul on the property at the corner of Twenty-sixth and Harney streets, in the city just mentioned. This mortgage was taken in the name of Willis G. Myers. I examined the property at the time I made the loan, and made an estimate of its value. I also examined the records, or had them examined, in regard to the condition of the title. Only one mechanic's lien of a small amount appeared against the property, if I recollect right, for about $100. I entered into as particular inquiry as I could and asked all the questions of Mr. Paul that pertained to the subject; and he informed me and made figures to show that the amount of the loan we were making,—that the balance above that was to be paid out, that the prior mortgages would pay all the incumbrances up,—all the liens; that they were provided for, all the larger ones were provided for; and that there would be cash enough come out of the loan to pay the balance. He said he had paid the contractor $16,000 in cash, if I recollect right, and that they were to take real estate to the amount of the balance that was coming to them. He had arranged to sell them certain real estate; that they should

take certain lots, and told me what they were. I do not recollect now, but there was no more money coming to them. I do not think that the subject of the solvency of Case & Kennedy was raised. There was no question in my mind about the solvency of Case & Kennedy. I don't think there was any doubt as to their solvency at that time. These negotiations were carried on for about thirty days previous to the filing of their mortgage, probably five or six weeks; and they were continued up to the time of the filing of the mortgage to pay off all prior mortgages. I paid off the prior incumbrances, except the mechanic's lien. That was a matter of dispute between the men and Mr. Paul. There was money still in my hands to take care of that. At no time before the making and recording of the mortgage did Mr. Paul give me any intimation that a mechanic's lien was filed or any demand made upon which any mechanic's lien would be filed. I relied upon his statement that the payments of the building were provided for. I never would have made the loan in this case if I had known that as a matter of fact the subcontractors had not been paid the amount of five or six or seven or eight thousand dollars. I paid three mortgages with accrued interest, amounting to three thousand and some hundred dollars. [In this connection the witness described the mortgages held by J. H. Millard and the Omaha Savings Bank.] The note I took of Mr. Paul was sold to John Jeffries & Sons, trustees. It was for $35,000. Before I made the loan I personally looked over the property. The buildings were partially finished on the inside. It was finished in part. I think they were up and inclosed. Some of them were entirely finished, and others partly. I cannot say that I knew who the contractors were on the building. Mr. Paul told me,—in fact showed me his contract. I did not ask Case & Kennedy whether they had received their pay. I knew nothing about the subcontractors. I did not go to them. As to their re-

sponsibility, or as to whether they had been paid, all my information came from Mr. Paul. I saw a release made of two of the mortgages. The parties holding the mortgage, the third one, had to await Mr. J. H. Millard's return from Europe. Part of our contract was to take up these mortgages. I would not have paid them without their being satisfied of record. The object in having these mortgages released was to give me a mortgage of $35,000 against and over which no other mortgages would be of record for priority. The prior mortgages were destroyed for the purpose of making this the first mortgage on the property. We did not take anything but a first mortgage. Mr. Paul told me that arrangements had been made for the other liens in addition to these mortgages. When he borrowed the money everything was provided for. I believed that and made the loan relying upon it. I saw the property mortgaged on dozens of occasions myself. I saw it two or three times before this examination, when the president of the company was with me. The date of the mortgage was August 1. I cannot tell whether I saw the property after the 25th of July prior to seeing it in August, the date of the mortgage. I saw it on a great many occasions. I was up there several times. I cannot tell you the date of any visit to the property. I lived on Twenty-fifth street at that time and I saw the property frequently. There was no money paid on the mortgage until after it was acknowledged, I presume. I believe the contractors were continuing work on the property on the date on which the mortgage was acknowledged. There was somebody at work all the time, I think. When I made the examination with Mr. Holmes there were several men at work on the inside finish of the house, and it is my recollection that that was about three weeks prior to the first of August. I had no occasion to make any inquiry to ascertain whether or not there was anybody at work on the house, or ascertain whether Case & Kennedy were at work on the house at the time when

the mortgage was acknowledged." In this evidence there is no such mistake shown as would afford grounds for equitable relief. It is true Mr. Pease testified that he relied upon the representations of Mr. Paul as to the manner in which payments would be made and had been provided for, and that he believed the statement that no mechanic's lien, except one as to which there was a dispute, had been or would be filed. He admits, however, that he knew that the buildings were in course of erection, but that he on that account made no inquiry of such parties as were supplying the material or doing the work of constructing. The rule as to what Mr. Pease was bound to ascertain and know is thus stated in the fourth paragraph of the syllabus of the case of *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207: "A party taking a mortgage on real estate is bound at the time to know whether material has been furnished or labor performed in the erection, reparation, or removal of improvements on the premises within the four prior months." The language quoted was used specially with reference to principal contractors, but it is equally applicable to subcontractors. Since it was the duty of Mr. Pease to ascertain what liens not appearing of record had existence by reason of the condition of the work in progress, he could not relieve himself of the effect of the knowledge which proper inquiry would have developed, by refusing or failing to make that inquiry. The constructive notice imparted by the building operations were as effective within the time allowed for filing mechanics' liens as would have been after the actual filing. Had there been on file the liens of the Bohn Sash & Door Company and of Edward C. Tighe, there could be no doubt that the mortgage taken by the agent Pease for money used to discharge prior mortgages would have entitled him to no subrogation because of a mistake as to the condition of the title. Equally it must result that, under the circumstances disclosed in his testimony, the mortgage taken by him was

not taken because of a mistake as to the rights of these subcontractors. There is no equitable right of subrogation shown on the ground of mistake. The evidence of Mr. Pease leaves no room for doubt that the payment of the mortgages prior to that taken by him in favor of Myers was made simply to remove and cancel those incumbrances, so that thereby the mortgage for the security of the $35,000 should be the first lien. It is not enough to entitle to subrogation that with the proceeds of the Myers mortgage prior mortgages have been discharged. "The real question in all such cases is whether the payment made by the stranger was a loan to the debtor through a mere desire to aid him or whether it was made with the expectation of being substituted in the place of a creditor. If the former is the case, he is not entitled to subrogation; if the latter, he is" (*Tradesmen's Building Association v. Thompson*, 32 N. J. Eq., 133); citing *Coe v. New Jersey M. R. Co.*, 4 Stew. [N. J.], 105, 106. We conclude, therefore, that no good reason has been shown for the subrogation of Jeffries & Sons to the rights of the holders of the mortgages which with the proceeds of the Myers mortgage were satisfied. The lien of the Bohn Sash & Door Company for $3,331.67, and that of Edward C. Tighe for $381.97, will be placed in the second class, equal in priority with that of Mahoney & Co., and superior to the rights of Jeffries & Sons. There were two liens in favor of the Bohn Sash & Door Company, recognized in the decree of the district court, of which the first is mentioned above. The second lien was for material furnished between September 17 and November 29, 1890, and was furnished under a contract with Mr. Paul himself, while the first lien was that of a subcontractor. As the second lien was for material the commencement of the furnishing of which was subsequent to the recording of the mortgage now held by Jeffries & Sons, there exists no reason why it should be taken out of the class in which it was placed by the district court.

3. The lien of Henry E. Cox was placed in the tenth class, for the reason found by the district court that the material was furnished and labor done by Mr. Cox after December, 1890. This finding was probably based on the dates given in the claim filed by Mr. Cox for a lien, for therein it was stated that the material and labor required to be furnished and performed were furnished and performed between December 13, 1890, and April 29, 1891. It is true that Mr. Cox in his oral evidence explained that the first date should have been December 13, 1889, instead of 1890, as it was by mistake stated. There is no itemized statement filed with the affidavit in which was contained the above statement of such definiteness as would suggest that there was the alleged mistake in the date on which the furnishing of material and doing of work was begun. The mistake, it may be, cut off a part of the time during which there was the furnishing of material and doing of work, yet we see no way of avoiding the conclusion reached by the district court, for the priority of this lien depends as well upon the filing of a correct claim as upon doing the work and furnishing the material. The lien of Mr. Cox must, therefore, occupy the place assigned it by the district court.

4. The contract of Case & Kennedy was entire for the erection of the buildings on Twenty-sixth street as well as on Twenty-fifth street. Among the subcontractors was George A. Hoagland, who furnished lumber for the buildings in course of erection at both localities. His claim for a lien was filed against both the Twenty-fifth and Twenty-sixth street properties. The comparative size of these erections afforded him a basis on which to base calculations as to the amount of lumber furnished each locality, and these calculations were satisfactory as evidence to the district court. We can see no reason for criticising the method by which the apportionment of liens and application of credits were made in view of the evidence adduced, and

for that reason shall not disturb the results attained. It is insisted, however, that there should have been filed separate claims for liens, in each of which should have appeared a definite description of the property to be affected by such lien, and that a claim for a lien cannot properly be filed *in solido* against distinct properties not contiguous. In *Doolittle v. Plenz*, 16 Neb., 153, this court held that where a contract was made as an entirety for the erection of separate buildings on distinct contiguous lots, that one claim for a lien might embrace all the lots improved. It is difficult to see why the fact that the lots happened to be contiguous should be a controlling consideration, when the ownership of the several lots had, between the making of the improvements and the enforcement of the liens, become vested in different parties. For all practical purposes these lots were then as much separated as though between them intervened streets or blocks. It is the entirety of the contract and not the location of the property which must determine whether a claim or claims shall be filed for a lien or liens. A joint lien upon several buildings, situated upon different lots owned by the same person, could not be maintained where a separate contract had been entered into by the owner and contractor; for by the several contracts the inference would be that a separate account should be kept with each building. Not so when the contract covered several buildings to be erected for a gross sum without regard to the cost of each. It may result to the owner of separate properties to be improved under a joint contract that hardships will be caused incidentally by the fact that a lien may be filed against all the parcels *in solido*, whereby sales of the several lots separately may be prevented. Against this it is easy to guard by avoiding a joint contract, or, if one is used, the contingency mentioned may be guarded against by requiring that the material to be furnished or labor for each building to be erected shall be shown by distinct accounts kept with that purpose in view. In such

cases as that with which we are now dealing it may happen that there shall be a necessity for apportioning the entire lien for the preservation of the rights and remedies of material-men or laborers who have contributed to only one of the erections contemplated in an entire contract. This consideration, however, concerns rather the ability to make necessary proof than the abstract right to claim a joint lien. A failure in this respect is a mere failure of proof entitling plaintiff to a judgment; but that result ought not to be so far assumed in advance that other rights given by statute must be denied. The views above expressed have received approving consideration in *Chadbourn v. Williams*, 71 N. Car., 444; *Sergeant v. Denby*, 87 Va., 206; *Lewis v. Saylors*, 73 Ia., 504; Jones, Liens, sec. 1317, and authorities therein cited. The finding of the district court was, as to this claim, that the sale and delivery was "between the 23d day of October, 1889, which was the date of the first delivery, and the 25th day of July, 1890, which was the date of the last delivery." As the first delivery in this account antedated the filing of the mortgage in favor of Willis G. Myers, now held by Jeffries & Sons, it results that its priority should in like manner be fixed. The amount by the district court found due George A. Hoagland must be established, enforced, and paid as a lien of the second class, equal in priority with the amounts due Mahoney & Co., Bohn Sash & Door Company, and Edward C. Tighe, as hereinbefore set forth, and superior to all rights of Jeffries & Sons.

5. The claim of Charles A. Harvey was for furnishing mantels, hearths, etc., for both the Twenty-fifth and Twenty-sixth street properties. It appears from the evidence that the articles furnished for the Twenty-fifth street property have been fully paid for, and that the controversy is now as to the date from which the rights of Harvey should be held to have their origin. There is in the bill of exceptions what appears to have been a proposition for

furnishing mantels, etc., written by Charles A. Harvey to William J. Paul, accepted by Paul. This was marked "Exhibit V," and appears in its proper place. There seems to have been introduced in evidence, as Exhibit U, the affidavit filed for a lien on behalf of Mr. Harvey, but the most diligent search for this exhibit in the bill of exceptions has resulted in a failure to find it. There is a reference in the testimony to Exhibit U attached to Mr. Harvey's cross-bill, but this does not supply the lack of it in the bill of exceptions. Especially is this true when, as in this case, the exhibit referred to as part of the cross-bill can only be found in what appears to be the original pleading filed in the district court, refiled in this court long after the docketing of this appeal.

6. In relation to the Twenty-fifth street property, W. B. Millard, trustee, urges that the claim of James Morton & Son for $298.29 was improperly adjudged entitled to priority over his mortgage. The mortgage to W. B. Millard, trustee, was filed for record March 26, 1890, while the finding of the district court was that the materials for which Morton & Son claim a lien were furnished between March 31, 1890, and September 5, immediately following. It was probably by an oversight that the rights of Millard were postponed to those of Morton & Son. As between these parties, the order of priority declared by the district court will be reversed and the mortgage of Millard established as a prior lien to that of Morton & Son.

The judgment of the district court is modified in the particulars above indicated, and a decree accordingly will be entered in this court.

DECREE ACCORDINGLY.

IRVINE, C., having been of counsel, took no part in the determination of this case.

BRETTA SVANSON V. CITY OF OMAHA.

FILED OCTOBER 16, 1894. NO. 5387.

Review: SUFFICIENCY OF EVIDENCE. This case examined, and *held* that the verdict of the jury was supported by sufficient competent evidence, and the judgment of the district court is affirmed.

REHEARING of case reported in 38 Neb., 550.

B. G. Burbank and *J. W. Roudebush*, for plaintiff in error.

W. J. Connell and *E. J. Cornish, contra.*

RAGAN, C.

This is a rehearing of *Svanson v. City of Omaha*, 38 Neb., 550, where a sufficient statement of the facts will be found for a proper understanding of the matter in controversy. There is no question of law involved in the case. The finding of the jury is supported by sufficient competent evidence, and we cannot, therefore, disturb it. The case as reported in 38 Neb., 550, is overruled and the judgment of the district court is

AFFIRMED.

SARAH N. STANWOOD V. CITY OF OMAHA.

FILED OCTOBER 16, 1894. NO. 5639.

Review: SUFFICIENCY OF EVIDENCE. This case examined, and *held* that the verdict of the jury was supported by sufficient competent evidence, and the judgment of the district court is affirmed.

REHEARING of case reported in 38 Neb., 552.

Charles B. Keller, for plaintiff in error.

W. J. Connell and *E. J. Cornish, contra.*

RAGAN, C.

This is a rehearing of *Stanwood v. City of Omaha*, 38 Neb., 552, where a sufficient statement of the facts will be found for a proper understanding of the matter in controversy. There is no question of law involved in the case. The finding of the jury is supported by sufficient competent evidence, and we cannot, therefore, disturb it. The case as reported in 38 Neb., 552, is overruled and the judgment of the district court is

AFFIRMED.

JAMES H. POPE V. JOSHUA G. BENSTER.

FILED OCTOBER 16, 1894. No. 5528.

1. **Execution After Payment of Judgment:** SALE OF LAND: REMEDY OF OWNER. Where the owner of a judgment which has, to his knowledge, been paid, but which has not been satisfied of record, and which judgment remains an apparent lien upon the real estate of another person, causes an execution to be issued on said judgment, the real estate, upon which it is an apparent lien, to be levied upon and sold, such sale to be confirmed, and a conveyance therefor to be executed and delivered to the purchaser at such execution sale, and accepts the proceeds of such sale, the owner of the real estate so sold may treat such sale as void and recover the land, or he may, at his election, waive the invalidity of the sale, and sue the owner of such judgment for the value of the real estate.
2. **Damages:** WRONGFUL SALE OF LAND. In such action the measure of damages of the real estate owner is the fair market

value of his interest in the real estate at the time of the sale thereof on execution.

3. Estoppel: VALIDITY OF EXECUTION SALE AFTER PAYMENT OF JUDGMENT. In such an action the owner of the judgment is estopped from asserting, as a defense thereto, that such execution sale and the proceedings subsequent thereto were void.

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

The facts are stated by the commissioner.

John Patterson, for plaintiff in error:

Where a judgment has been satisfied, no valid sale can be made under an execution issued thereon. The defendant in error cannot, therefore, recover. (*King v. Goodwin*, 16 Mass., 63; *Wood v. Colvin*, 2 Hill [N. Y.], 566; *Sherman v. Boyce*, 15 Johns. [N. Y.], 443; *Jackson v. Anderson*, 4 Wend. [N. Y.], 474; *Lewis v. Palmer*, 6 Wend. [N. Y.], 367; *McGuinty v. Herrick*, 5 Wend. [N. Y.], 240; *Swan v. Saddlemire*, 8 Wend. [N. Y.], 676; Rorer, Judicial Sales, pp. 344-346; Murfree, Sheriffs, sec. 990; *Ferrier v. Deutchman*, 12 N. E. Rep. [Ind.], 497.)

J. C. Martin and *Albert & Reeder, contra.*

RAGAN, C.

Joshua G. Benster brought this suit in the district court of Merrick county against James H. Pope, alleging in his petition, in substance, that on January 23, 1886, D. Martin & Co. recovered a judgment against one Phœbe Asher and another in the county court of Merrick county; that Martin & Co. duly sold and assigned said judgment to one John A. Carley; that Carley, in the year 1887, caused a duly certified transcript of said judgment to be filed and docketed in the office of the clerk of the district court of Platte county, Nebraska; that on March 8, 1888, said Asher

owned the following described real estate, situate in said Platte county, to-wit: The southwest quarter of the southeast quarter of section 17, and the northwest quarter of the northeast quarter of section 20, all in township 16 north and range 2 west of the 6th principal meridian; that on said 8th day of May, 1888, said Asher duly sold and conveyed said real estate to him, the said Benster; that on the 8th day of June, 1889, said Carley sold and assigned said judgment to the said James H. Pope; that about March 4, 1890, said judgment was paid in full to Pope and that he on said date entered a satisfaction and discharge of the same in the office of the clerk of the district court of Merrick county, Nebraska, (it seems that a duly certified transcript of said judgment had also been filed in the office of the clerk of the district court of Merrick county); that Pope did not file in the office of the clerk of the district court of Platte county any release and discharge of said judgment; that on April 15, 1890, said Pope caused the clerk of the district court of Platte county to issue an execution on said transcripted judgment, and caused the sheriff of said county to levy the same on the above described real estate, then and there the property of said Benster, and caused said sheriff to appraise, advertise, and sell said real estate at public auction to make and raise the amount apparently due and unpaid on said transcripted judgment; that the clerk of said court, in pursuance of the instructions of said Pope, did issue such execution; that the same was by the sheriff of Platte county levied upon said lands; that they were duly appraised, advertised, and sold and purchased by one McAllister; that the sale was duly reported to the district court of said Platte county and by said court confirmed, and in pursuance thereof a deed of conveyance of said premises was executed by said sheriff to the said McAllister; and the proceeds of said sale paid to and received by said Pope; that at the time of the sale of said real estate by said sheriff the said Benster re-

sided in Merrick county, Nebraska, and had no knowledge or notice whatever of the levy upon or sale of said premises until after such sale had been confirmed and a deed executed to McAllister in pursuance thereof. The prayer of the petition was for a judgment against Pope for $1,000 as damages. The answer of Pope to this petition, so far as the same need be noticed here, was a traverse or general denial of all the material allegations thereof. Benster had a verdict and judgment for $600, to reverse which Pope brings the case here for review. To reverse the judgment of the district court plaintiff in error argues in his brief here four points:

1. The first point is that instructions Nos. 7 and 9, given by the court to the jury on its own motion, were inconsistent and misleading. The assignment of error in the motion for a new trial and in the petition in error, as well as to these instructions, is: "The court erred in giving paragraphs 7, 8, 9, and 10 of the instructions given by the court on its own motion." Instruction number 8 complained of was as follows: "The jury are instructed that if from the evidence they believe that the defendant caused or procured an execution to be issued out of the district court of Platte county after the same had been by the defendant discharged upon the judgment record of the district court of Merrick county, and thereby satisfied or canceled, then such causing or procuring of said execution to be issued out of the district court of Platte county would be illegal and wrongful on the part of the defendant, and in that event he would be liable to the plaintiff for the value of the interest of the plaintiff in said lands." We are quite clear that the court did not err in giving this instruction; and since the assignment is that the court erred in giving all four of the instructions, we cannot consider this assignment of error any further.

2. The second assignment of error is that the court erred in rendering a judgment in favor of Benster for $600. No

such an error as this is assigned either in the motion for a new trial filed in the district court or in the petition in error filed here, and for that reason we cannot consider it.

3. The third alleged error argued is that the damages awarded Benster by the jury are excessive. The verdict of the jury was for $1,500, or $500 more than claimed by Benster in his petition; but the judgment rendered by the court in favor of Benster on the verdict is for $600 only. The evidence as to the value of the real estate was conflicting, many of the witnesses placing the value as high as $20 per acre, or $1,600, while others placed its value at $10 per acre, or $800. It appears also from the record that at the time the land was sold by the sheriff there was an incumbrance upon it of $900, so that the evidence would have supported a finding of the jury that the value of Benster's interest in the land at the time it was sold on execution by the sheriff was as much as $700. We cannot say, therefore, that the judgment of $600 rendered in favor of Benster is greater than the value of his interest in the real estate at the time it was sold by the sheriff.

4. The fourth argument relied upon by counsel is that the judgment pronounced is contrary to the law of the case. The argument made to support this contention is, that as the judgment owned by Pope against Asher had in fact been paid and discharged, that therefore the sale of the real estate made by the sheriff of Platte county, at the instance of Pope, was absolutely void, as a sale made under an execution issued upon a judgment which has in fact been paid is not voidable, but absolutely void. We do not question the correctness of counsel's position that the sale made of Benster's real estate by the sheriff of Platte county on the execution issued by the clerk of the district court thereof on the judgment which had been rendered against Asher, and which was owned by Pope, was void; but what we do say is, that such judgment having been paid to Pope, and, notwithstanding its payment, he having caused the clerk

of the district court of Platte county to issue an execution on the judgment, having caused the sheriff of that county to levy upon this real estate and sell it, having caused the sale made thereof to be confirmed and a deed executed to the purchaser thereof, and having received and converted to his own use the proceeds of such sale, he is now estopped from alleging as a defense to this action that the sale was void. It is true that this action is, in effect, one brought by Benster against Pope to recover damages of the latter because of his wrongful conversion to his own use of the real estate of the former. It is also true that we have been unable to find any case where real estate has been made the subject of a suit in the nature of conversion; but we know of no good reason why it cannot be. It is true that the rule of *caveat emptor* applies to one who purchases real estate at a judicial sale thereof; and that if real estate be sold upon an execution issued upon a judgment which has in fact been paid and satisfied, that such sale would be void as against the owner thereof, and the purchaser thereat would not be protected as against such owner. This is as true of a sale made of personal property as it is of one made of real estate. If one should purchase a horse and buggy sold under an execution issued on a judgment, which judgment had in fact been paid, such purchaser would acquire no title to said property as against the owner; but such owner would undoubtedly have the right to take the property itself, or to waive the taking of the property and the invalidity of the sale and sue the officer and the plaintiff in execution for a conversion thereof; and if he did sue for conversion, his action would have to be founded upon the fact that the judgment on which the execution was issued had been paid and satisfied and that the sale was therefore void. Why, then, should not one whose real estate has been levied upon and sold on a satisfied judgment have the same right to treat the sale as void, or voidable, and, at his election, recover the real estate sold, or sue the execution

creditor for the value of his interest in the real estate? The judgment of the district court is

AFFIRMED.

POST, J., not sitting.

ROBERT H. THOMAS, APPELLANT, V. VOCANCES FRANKLIN ET AL., APPELLEES.

FILED OCTOBER 16, 1894. NO. 6299.

1. **Elections**: CONTEST: CHARACTER OF ACTION. The proceeding for contesting an election provided for by chapter 26, Compiled Statutes, 1893, is, strictly speaking, neither an action at law nor in equity. It is a summary proceeding of a political character, and the proceeding cannot be maintained by any person unless authority therefor is found in the statute itself.

2. **Review**: PLEADING: PRACTICE. This court in an action at law or in equity will, on its own motion, look into the record of a case brought here on appeal or error, for the purpose of determining whether the petition upon which the action is founded states a cause of action, and whether the court has jurisdiction of the subject-matter of the suit.

3. ———: ———: ———. In a special proceeding founded solely upon a statute it is not only the privilege, but it is the duty of this court, on its own motion, to look into the record of the proceeding brought here and determine whether such proceeding is authorized by such statute, and whether the party prosecuting the proceeding is by the statute authorized to do so.

4. **Elections**: RIGHT OF ELECTOR TO CONTEST: DISMISSAL. When one elector of a county, in his own name and on his own behalf, seeks to defeat the presumed will of the people of his county upon any subject as declared by a canvass of their votes at an election, and for that purpose invokes the provisions of a special statute for contesting the validity of such election, then the special statute invoked must, expressly or by necessary implication, authorize such elector to maintain in his own name and on his own behalf such proceeding, or it will be dismissed.

APPEAL from the district court of Red Willow county. Heard below before WELTY, J.

Reese & Gilkeson, S. R. Smith, H. W. Keyes, and *W. R. Starr,* for appellant.

T. M. Marquett, A. J. Rittenhouse, and *W. S. Morlan, contra.*

RAGAN, C.

Robert H. Thomas brought this proceeding in the district court of Red Willow county against Vocances Franklin and others to contest the validity of an election which had been held in said county for the relocation of the county seat of such county. The district court, after hearing the evidence, rendered a judgment dismissing the complaint of Thomas, and the proceeding is now before us on appeal.

Thomas, in his complaint filed in the district court, alleged that he was an elector of Red Willow county, and as such interested in the relocation of the county seat of said county at Indianola, a city in said county, and was competent to contest the election which had been held for the purpose of relocating said county seat. Can the appellant maintain this proceeding? If he can, it must be because the statute authorizes any elector of a county to contest the result of an election held for the purpose of relocating the county seat thereof. The statutory provisons for contesting elections are found in chapter 26, Compiled Statutes, 1893. Section 64 of this chapter provides: "The election of any person to any public office, the location or relocation of a county seat, or any proposition submitted to the vote of the people, may be contested." The remainder of the section provides upon what grounds the validity of an election held may be contested. Section 70 of said chapter is as follows: "The district courts of the respective counties

shall hear and determine contests of the election of county judge, and in regard to the removal of county seats, and in regard to any other subject which may by law be submitted to the vote of the people of the county, and the proceedings therein shall be conducted as near as may be hereinafter provided for contesting the election of county officers." Secton 72 of said chapter provides that any elector of the state may contest the validity of the election of any of the officers of the executive department of the state, and that an elector of a county or legislative district may contest the election of a member of the legislature from such county or district; and section 80 provides as follows: "The election of any person declared elected to any office other than executive state officers and members of the legislature may be contested by any elector of the state, judicial district, county, township, precinct, city, or incorporated village in and for which the person is declared elected." It will thus be seen that while the legislature has provided that the validity of an election locating or relocating a county seat may be contested, it has not provided by whom such contest may be instituted and carried on. The proceeding for contesting an election provided for by this statute is, strictly speaking, neither an action at law nor in equity. It is a summary proceeding of a political character, and the proceeding cannot be maintained by any person, unless express authority therefor is found within the statute itself. (*Wright v. Fawcett*, 42 Tex., 203; *Rogers v. Johns*, 42 Tex., 339; *Williamson v. Lane*, 52 Tex., 335; *Saunders v. Haynes*, 13 Cal., 150; *Hartman v. Young*, 20 Pac. Rep. [Ore.], 17; *Hughes v. Holman*, 32 Pac. Rep. [Ore.], 298.) But for the fact that this statute expressly so provides, an appeal would not lie to this court from the judgment pronounced by a court or tribunal in a proceeding to contest an election duly brought and tried therein. (*French v. Lighty*, 9 Ind., 475.) The statute does not expressly provide that a court or tribunal in which has been tried an

election contest shall have authority to set aside its finding or judgment made therein and grant a new trial; and, doubtless, if a court, after having tried an election contest, should set aside its proceedings and grant one of the parties thereto a new trial, such action on the part of the court would be a nullity. (*Dorsey v. Barry*, 24 Cal., 449; *Casgrave v. Howland*, 24 Cal., 457.)

It is said by counsel for the appellant that the question of the right of Thomas to institute and maintain this proceeding in his own name was not raised in any manner in the court below. Assuming this to be correct, we do not think it any reason why the supreme court should be precluded from considering it. This court, in ordinary actions at law and in equity, will, on its own motion, look into the record of a case brought here on appeal or error for the purpose of determining whether the petition upon which the action is founded states a cause of action, and whether the court has jurisdiction of the subject-matter of the suit; and in a special proceeding founded solely upon a statute of the state it is not only a privilege, but it is the duty of this court, on its own motion, to look into the record and determine whether the proceeding is authorized by such statute, and whether the party prosecuting the proceeding is thereto authorized by the statute. When one elector of a county, in his own name and on his own behalf, seeks to defeat the presumed will of the people of his county upon any subject as declared by a canvass, by their votes at an election, and for that purpose invokes the provisions of a special statute for contesting the validity of such election, then the special statute invoked must expressly, or by necessary implication, authorize such elector to maintain in his own name and on his own behalf such proceeding, or it will be dismissed. We therefore conclude that this statute confers no authority upon an elector of a county to institute and maintain in his own name the proceeding contemplated by the statute for the contesting of an election for the re-

locating of a county seat, and that the district court had no jurisdiction of the subject-matter of this proceeding or of the parties thereto, and had no jurisdiction to render any judgment whatever, and, of course, this court acquired none by an appeal of the proceedings here. A judgment will, therefore, be entered here dismissing the proceeding.

JUDGMENT ACCORDINGLY.

CLAUS THOMSEN, APPELLEE, V. J. B. DICKEY, APPELLANT.

FILED OCTOBER 16, 1894. No. 5626.

1. **Taxation:** VALIDITY OF TAX DEEDS: TREASURER'S SEAL: NOTICE TO REDEEM: SERVICE OF NOTICE: STATUTES: CONSTRUCTION. Section 3, article 9, of the constitution of 1875, and section 123, chapter 77, Compiled Statutes, 1893 (Revenue Act, 1879), construed, and *held*, (1) that said statute was enacted for the benefit of the owners of real estate which had been previously sold for taxes, the time to redeem from which sale was about to expire; (2) that the intention of the framers of the constitution, and the intention of the legislature as well, was to provide for the giving of such "notice to redeem" as, in the judgment of the legislature, would be most likely to reach the then owner of real estate which had been sold for taxes, advise him when his right to redeem would expire, and thus afford him an opportunity to prevent the divestiture of his title; (3) both the framers of the constitution and the legislature realized that it is often difficult and sometimes impossible to determine who the owner of a certain piece of real estate at a given time is, and for that reason the word "owner" is not used in the statute; (4) it is not for the court to say whether the legislature, in prescribing the character of the notice to redeem, how, when, and upon whom it shall be served, has prescribed that rule which is best calculated to give to the then owner of real estate the notice contemplated by the constitution and the law; (5) the only question with which the court is concerned is, on whom

does the law require the notice to redeem to be served? (6) the presumption of law is that one in whose name real estate stands assessed at any given time is the owner thereof; (7) said section 123 must be construed as if it read: Such purchaser or assignee shall serve, or cause to be served, a written or printed, or partly written and partly printed, notice of such purchase on every person in actual possession or occupancy of such land or lot; and also the person in whose name the same is taxed, or specially assessed, as then appears from the assessment thereof from the tax books then in the office of the county treasurer, if upon diligent inquiry he can be found in the county, at least three months before the expiration of the time of redemption from such sale, in which notice he shall state when he purchased the land or lot, in whose name taxed at the time he purchased, and therefore a notice to redeem must be served on the person in whose name the real estate stands assessed at the time of serving the notice to redeem, as then appears from the last assessment thereof from the tax books then in the county treasurer's office; (8) if the notice to redeem is served between April 1 and October 1 of any year, and if the tax books for such year have then been delivered to the county treasurer, the notice to redeem should be served on the person in whose name the real estate is assessed in such books; (9) if the notice to redeem is served between April 1 and October 1 of any year, and the tax books for such year have not then been delivered to the county treasurer, such notice to redeem must be served on the person in whose name the real estate was assessed at the preceding assessment, as shown by the tax books in the county treasurer's office at the time of serving the notice to redeem; (10) the notice to redeem, to be of any validity, must be served upon the very party designated by the statute, and must contain the precise information required by the statute; (11) the statements required by the statute to be embodied in the notice to redeem are as jurisdictional as the service of the notice itself; (12) the law has put on the holder of a tax sale certificate the duty of determining in whose name real estate already sold for taxes stands assessed at the time of serving a notice to redeem from such sale.

2. **Tax Sales:** DEEDS: CONSTITUTIONAL LAW. *Larson v. Dickey*, 39 Neb., 471, reaffirmed.

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

The facts are stated by the commissioner.

Saunders & Macfarland, for appellant, contending that the failure to serve notice to redeem upon Miles and Thomsen did not invalidate appellant's title, cited: *Kessey v. Connell*, 68 Ia., 430; *Parker v. Cochran*, 64 Ia., 757; *Burdick v. Connell*, 69 Ia., 458; *Clifton Heights Land Co. v. Randell*, 47 N. W. Rep. [Ia.], 905; *Hillyer v. Farneman*, 65 Ia., 227.

Jacob Fawcett, *F. M. Sturdevant*, and *J. P. Davis*, *contra*, cited: Cooley, Taxation [ed. 1883], p. 363; *Zahradnicek v. Selby*, 15 Neb., 582; *Lane v. Bommelmann*, 21 Ill., 147; *Dalton v. Lucas*, 63 Ill., 339; *Hendrix v. Boggs*, 15 Neb., 471; *Wilson v. McKenna*, 52 Ill., 48; *Morrill v. Taylor*, 6 Neb., 242; *Seaman v. Thompson*, 16 Neb., 547; *Lammers v. Comstock*, 20 Neb., 344.

RAGAN, C.

In 1885, lot 16, in block 17, Walnut Hill Addition to the city of Omaha, was owned by and assessed for taxation in the name of S. D. Mercer. On November 4, 1886, this lot was sold at public sale by the county treasurer of Douglas county for the delinquent taxes of 1885, to one Louis Dickey, and a treasurer's certificate of tax sale duly issued to him. The lot was assessed for taxation in the years 1887 and 1888, in the name of John L. Miles. On the 29th day of June, 1888, one J. B. Dickey, having become the owner, by assignment, of the treasurer's certificate of tax sale issued to Louis Dickey, served on S. D. Mercer a notice of when the time to redeem said lot from the tax sale made November 4, 1886, or a notice to redeem, would expire. No notice to redeem was served upon John L. Miles. November 21, 1888, the county treasurer of Douglas county issued and delivered to J. B. Dickey a tax deed for said lot, in pursuance of the sale made thereof on the 4th day of November, 1886. Claus Thomsen, having become owner of the lot by *mesne* conveyances from S.

D. Mercer, brought this suit in the district court of Douglas county against J. B. Dickey to cancel said tax deed. The district court found and decreed that the tax deed was void, and permitted Thomsen to redeem the lot. From this decree Dickey appeals. We notice only two questions involved in the decree appealed from.

1. One question presented by this appeal is whether the notice to redeem was served on the proper party. The precise question is, Must a notice to redeem be served upon the party in whose name the real estate is assessed at the time of giving the notice to redeem, or must it be served upon the party in whose name the real estate was assessed for the taxes for which it was sold? Section 3, article 9, of the constitution of 1875 provides: "The right of redemption from all sales of real estate, for the nonpayment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate for a period of not less than two years from such sales thereof; *Provided*, That occupants shall in all cases be served with personal notice before the time of redemption expires." And section 123, chapter 77, Compiled Statutes, 1893 (Revenue Law, 1879), provides: "Hereafter no purchaser or assignee of such purchaser of any land, town, or city lot, at any sale of lands or lots for taxes or special assessments due, either to the state or any county or any incorporated town or city within the same, or at any sale for taxes or levies authorized by the laws of this state, shall be entitled to a deed for the lands or lots so purchased, until the following conditions have been complied with, to-wit: Such purchaser or assignee shall serve, or cause to be served, a written or printed, or partly written and partly printed, notice of such purchase on every person in actual possession or occupancy of such land or lot, and also the person in whose name the same was taxed or specially assessed, if upon diligent inquiry he can be found in the county, at least three months

before the expiration of the time of redemption on [from] such sale, in which notice he shall state when he purchased the land or lot, in whose name taxed, the description of the land or lot he has purchased, for what year taxed or specially assessed, and when the time of redemption will expire. If no person is in actual possession or occupancy of such land or lot, and the person in whose name the same was taxed or specially assessed, upon diligent inquiry, cannot be found in the county, then such person or his assignee shall publish such notice in some newspaper printed in such county, and if no newspaper is printed in the county, then in the nearest newspaper that is published in this state to the county seat of the county in which such land or lot is situated, which notice shall be inserted three times, the first time not more than five months, and the last time not less than three months before the time of redemption shall expire." Here then is a constitutional guaranty of the right of an owner of real estate to redeem the same from a sale made thereof for delinquent taxes at any time within two years from the date of such sale; and the command that a personal notice shall be served upon the occupant of such real estate before the time for the redemption of the same from the tax sale shall expire. Reading this constitutional provision and the statute just quoted together, there can be no doubt that this notice to redeem is for the benefit of the then owner of the real estate; that the intention of the framers of the constitution and the intention of the legislature as well was to provide for the giving of such notice to redeem as, in the judgment of the legislature, would be most likely to reach the then owner, advise him when his right to redeem would expire, and thus afford him an opportunity to prevent the divestiture of his title. It is to be observed that neither the constitution nor the statute requires the notice to redeem to be served upon the owner of the real estate. Doubtless both the framers of the constitution and the

legislature realized that it would often be difficult and sometimes impossible to determine who the owner of a certain piece of real estate at a given time is, and it is for this reason that the word "owner" is not used in the statute. It must also be remembered that it is not for the court to say whether the legislature, in prescribing the character of the notice to redeem, how, when, and upon whom it shall be served, has prescribed that rule which is best calculated to give to the then owner of real estate the notice contemplated by the constitution and the law.

The only question with which the court is concerned is on whom does the law require the notice to redeem to be served? This section 123 is a literal copy of section 216 of the Illinois Revised Statutes of 1877. We have been unable to find whether the question here has been decided by the Illinois courts. We have been unable to find any other statute in the precise language of ours.

In *Hall v. Guthridge*, 52 Ia., 408, it was held that the provision for service of a notice to redeem upon the person in whose name the land is taxed has reference to the person in whose name it is taxed at the time of the service of the notice and not at the time of the sale; but this was a construction of section 894 of the Iowa Code, and that provision required the holder of a tax sale certificate to serve the notice to redeem upon the person in whose name the land is taxed, whereas the provision in our statute is that the notice to redeem must be served upon the person in whose name the land was taxed. The holding of the Iowa court, then, does not help us.

Keeping in view the objects of the constitutional and legislative enactments quoted above, and that the presumption of law is that one in whose name real estate stands assessed at any given time is the owner thereof, we think that said section must be construed as if it read: Such purchaser or assignee shall serve, or cause to be served, a written or printed, or partly written and partly printed,

notice of such purchase on every person in actual possession or occupancy of such land or lot, and also the person in whose name the same is taxed or specially assessed, as then appears from the last assessment thereof from the tax books then in the office of the county treasurer, if upon diligent inquiry he can be found in the county, at least three months before the expiration of the time of redemption from such sale, in which notice he shall state when he purchased the land or lot, in whose name taxed at the date he purchased. We reach the conclusion, therefore, that a notice to redeem must be served on the person in whose name the real estate stands assessed at the time of serving the notice to redeem as then appears from the last assessment thereof from the tax books then in the county treasurer's office.

It is argued that this construction places on the holder of a tax sale certificate the burden and duty of determining at his peril when he serves the notice to redeem in whose name the real estate then stands assessed for taxation; that this fact can never be certainly ascertained between April 1 and October 1 of any year, as the tax books for that year are between said dates in the hands of the assessor or county clerk, who have authority, and whose duty it is, to change an assessment of real estate made to one person to another on learning that such other person has become the owner thereof; that a piece of real estate might stand assessed on the 1st day of April to A, and on the last day of September the county clerk might change the assessment to B; therefore it is unreasonable to suppose the legislature intended to require the holder of a tax sale certificate to assume the burden of determining in whose name a certain piece of real estate is assessed between April 1 and October 1 of any year, and, therefore, the law, to avoid uncertainty and mistakes, has designated the person in whose name the real estate was assessed for the taxes for which it was sold as the person on whom the notice to redeem

shall be served; thus making the duty of the holder of a tax sale certificate a plain and certain one. The force of this argument, however, is overthrown by an examination of the requirements of the statute as to what the notice to redeem served shall contain. It reads: "In which notice he shall state when he purchased the land or lot, in whose name taxed." The notice to redeem, to be of any validity, must be served upon the very party designated by the statute, and such notice must also contain the precise information required by the statute. In other words, the statements required by the statute to be contained in the notice are as jurisdictional as the service of the notice itself. Now, if the statute has to be so construed as to compel the holder of a tax sale certificate to serve the notice to redeem on the person in whose name the real estate was assessed for the taxes for which it was sold, then clearly the notice to redeem must state in whose name the real estate is taxed or assessed at the time of the service of such notice to redeem. It would be absurd to say that the legislature intended the holder of a tax sale certificate to serve the notice to redeem on the person in whose name the real estate was assessed for the taxes for which sold, and in such notice give him the information that the real estate was assessed in his name for the taxes for which sold. So that, in either construction of the statute, the law has put on the holder of a tax sale certificate the duty to determine in whose name real estate already sold for taxes stands assessed at the time of serving a notice to redeem. But this duty is not a burdensome one; nor need there be the least uncertainty about it. Within the meaning of said section 123, real estate is assessed for any year as appears from the tax books of such year delivered by the county clerk to the county treasurer on or before October 1. The notice to redeem should be served on the person in whose name the real estate stands assessed for taxes

the year the notice to redeem is served, as shown by the tax books then in the county treasurer's office. If this notice is served between April 1 and October 1 of any year, and if the tax books for such year have been delivered to the county treasurer, then on the person in whose name the real estate is assessed in such books. If the notice is served between April 1 and October 1 of any year and before the tax books have been delivered to the county treasurer, then the notice must be served on the person in whose name was assessed the real estate at the preceding assessment, as shown by the tax books in the county treasurer's office at the time of the service of the notice. The notice to redeem having been served on Mercer, the person in whose name the lot was assessed for the taxes for which sold, and not on Miles, the person in whose name the lot stood assessed at the time of serving the notice to redeem, as then appeared from the last assessment of such real estate from the tax books in the county treasurer's office at the time of serving said notice, the tax deed issued in pursuance of such notice to redeem was void.

2. We do not know from the record what were the views of the learned judge of the district court on the question already discussed. His decree was nevertheless correct. The tax deed in question was executed by the county treasurer of Douglas county in conformity with the requirements of section 127, chapter 77, Compiled Statutes, 1893 (Revenue Law of 1879). This section makes it the duty of the county treasurer to execute tax deeds under the official seal of his office. The deed in question bears the seal of the county treasurer of Douglas county; but in *Larsen v. Dickey*, 39 Neb., 463, it was held that there was no such thing as a county treasurer's official seal provided for or recognized by our statutes, and until the legislature should provide an official seal for county treasurers, they could not execute tax deeds of any validity under the present revenue law. The tax deed in controversy was, therefore, void

for that reason. The decree of the district court was right and is

AFFIRMED.

IRVINE, C., not sitting.

WORTHY T. NEWCOMB v. BENJAMIN R. ROYCE.

FILED OCTOBER 16, 1894. No. 5407.

1. **Mills and Mill-Dams:** ERECTION AND MAINTENANCE: DAMAGES: ASSESSMENT: TRIAL: ISSUES. In a proceeding by the owner of land alleged to have been injured by the erection and maintenance of a mill-dam, the proceeding being under chapter 57, Compiled Statutes, upon the return of the jury of inquest the owner of the mill may by answer traverse both the petition and inquest as to their allegations and finding of damages; and if he do so, the questions of damage or no damage and the amount of damage become issues for the jury on trial of the case, subject to the same rules of evidence and burden of proof as in other cases. The damages found by the jury of inquest are not in such case final.

2. ———: ———: ASSESSMENT OF DAMAGES: TRIAL. The statute gives to the defendant in such case the right to put in issue and have tried according to the regular forms of law every fact alleged in the petition or found in the inquest.

3. ———: RIGHT TO OVERFLOW LAND: PAROL AGREEMENT: ENFORCEMENT. If one owning land traversed by a stream sells a portion thereof to another and at the same time gives such other person by parol the right to overflow the remainder of the land by erecting a dam on the land so conveyed, and the purchaser, relying on such parol agreement, erects such dam and a mill operated by water, and maintains the same, the parol agreement becomes enforceable. If viewed as a license, the acts of the purchaser render the license irrevocable. If viewed as an easement, they take the grant out of the statute of frauds.

4. ———: ———: ASSESSMENT OF DAMAGES: TRIAL: ISSUE. In an *ad quod damnum* proceeding by the vendor in such case, where the vendee by answer pleads such grant, it is error to

submit to the trial jury simply the question as to whether the damages assessed by the jury of inquest had been paid, the issue being not whether the damages so assessed have been paid, but whether there has been a grant of the water rights exercised.

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

The facts are stated in the opinion.

Thomas H. Matters, for plaintiff in error:

The court erred in not submitting to the jury the issue as to whether or not any or all of the claim of defendant in error had been paid. (6 Lawson, Rights, Remedies & Practice, sec. 2924; *Cowles v. Kidder*, 24 N. H., 364; *Rerick v. Kern*, 14 S. & R. [Pa.], 267; *M'Kellip v. M'Illhenney*, 4 Watts [Pa.], 317.)

The court erred in submitting the question whether or not the damage was paid, to be answered "yes" or "no," the true question being, what amount of the damages was unpaid? (*Clarke v. Chicago, K. & N. R. Co.*, 23 Neb., 616; *Omaha Belt R. Co. v. Johnson*, 24 Neb., 708.)

J. L. Epperson and *Leslie G. Hurd*, *contra*:

The remedy invoked by plaintiff is exclusive. (*Nosser v. Seeley*, 10 Neb., 467; *Pierce Mill Co. v. Koltermann*, 26 Neb., 722; *Kyner v. Upstill*, 29 Neb., 780.)

IRVINE, C.

This was a proceeding under section 14 of chapter 57, Compiled Statutes, entitled "Mills and Mill-Dams." The petition was filed by Royce after notice to Newcomb, and it alleged that Royce was the owner and in possession of certain land in Clay county; that in 1888 Newcomb became the owner of other land; that the Blue river, a stream of water with sufficient flow for a mill-dam, traversed both Royce's and Newcomb's land; that Royce's land

lay above Newcomb's; that Newcomb, from the time he obtained his land, operated thereon a mill for the grinding of grain for toll; that for the purpose of operating said mill there had been erected across the river a dam; that Newcomb had raised the dam to a height of thirty inches over and above its former elevation, whereby a portion of Royce's land had been overflowed to the depth of twenty inches, to Royce's damage in the sum of $600; that there had been no proceedings to condemn any land for such mill, or with reference to raising the elevation of said dam, nor had Royce received compensation for his damage. The prayer was for a writ of *ad quod damnum*, an assessment of damages, and judgment therefor. A writ of *ad quod damnum* was issued on this petition. A jury of inquest was struck by the parties, and its return made, assessing Royce's damages in the sum of $420. An answer was filed by Newcomb, admitting the allegations of the petition in regard to the ownership of the two tracts of land, the fact that they were traversed by the river, that Royce's land lay above Newcomb's, and that Newcomb used his land as a mill-site. The answer denied the other allegations of the petition. Then the answer averred that Newcomb had purchased his land of Royce and had paid double its value in consideration of the privilege given him by Royce to raise his dam, and to use all the back water necessary to run his mill; that Newcomb had raised his dam and maintained it peaceably in accordance with the agreement, and that if Royce suffered any damage it "had been fully paid for and fully settled as before stated, and was a right which has been acquired by the purchase and held by the peaceable possession ever since the date of said purchase." There were certain other averments in the answer which need not be noticed. To this answer a reply, in the form of a general denial, was filed. On the issues so made up there was the trial to a jury, the evidence being almost entirely, if not entirely, directed to those issues raised by

averments of the purchase and grant of the water rights exercised. The court by its charge submitted to the jury for its answer a single question, "Has the defendant paid the plaintiff for the damages appraised to plaintiff herein?" The jury answered, "No." Whereupon, after a motion for a new trial had been overruled, the court entered an order ratifying and affirming the return of the jury of inquest, and awarding execution for the damages assessed by that jury. This judgment Newcomb seeks to reverse.

The peculiar character of these proceedings renders it somewhat difficult to apply, in reviewing the case, the rules governing our appellate procedure. An examination of the other cases arising under the mill-dam act shows that the court has always been sensible of this embarrassment. We think, however, that the principal questions presented by counsel have been preserved in such a manner as to entitle them to review. It is contended on behalf of Newcomb that the court erred in submitting the single question of payment to the jury and in withholding the other issues; that when the allegations of damage were traversed the return of the jury of inquest lost its vitality and the case stood for trial on the question of damage or no damage, with the burden resting upon Royce, after the analogy of appeals in ordinary condemnation proceedings. We think this view is substantially correct. The question of the constitutionality of a statute which would leave to the determination of a jury of inquest, selected in the manner provided by this act, the final determination of the value of property taken or damaged by the improvement, and the public utility or necessity of such improvement, is not raised in argument and will not be considered. We do not think a proper construction of the act calls for such an investigation. Section 14, providing for a petition by one claiming to be injured, requires that like proceedings shall be had *mutatis mutandis*, as where the owner of the dam brings his petition. What are these proceedings? The

first sections of the act provide for calling into action the powers of the court by filing a petition and serving notice. They then provide for impaneling a jury of inquest and its return. Section 11 then provides that "Any defendant may, after the return of the sheriff aforesaid, traverse, by way of answer, any material fact stated in the petition or inquest, or he may plead any valid matter in bar of the plaintiff's right to have the benefit of the writ; or he may file exceptions for substantial defects in the writ, the inquest, or any of the proceedings herein provided for; and issues of law and of fact may be made up and tried as in other cases; and the court may quash the writ, or set aside the inquest, and may award a new writ on payment of all costs by the party who has built, or proposes to build, such mill-dam, or the court may dismiss the proceedings, or may ratify and confirm such inquest." It will be observed that this section permits the defendant, after the return of the writ, to interpose either by exceptions for defects in the proceedings or by traverse or by "plea in bar" to the petition or inquest. In other words, the defendant is bound neither by the petition nor by the inquest. He may put in issue any fact averred or found in either and may have on such issue a trial as in other cases. We do not regard the final clause of the section exclusive as to the form of judgment. It merely indicates what orders the court may make in view of certain determinations of some issues or upon the development of defects in the proceedings. No argument can be drawn against the right to put in issue the question of damages upon the ground that the section does not contain a special provision for the judgment in such case. The other sections of the act do not bear with sufficient directness upon the question to demand detailed discussion; but in so far as they throw any light, it is all in support of the construction we have just placed upon it, to-wit, that the inquest may be traversed with the petition, and if this be done, it loses its force, and the issues formed

must be tried in the same manner and with the same rules as to the burden of proof as in other cases. While this question has not heretofore been directly presented or decided, the opinions in the cases which have arisen under the act all indicate that the court has assumed this as the proper construction of the law. Thus, in *Sutliff v. Johnson*, 17 Neb., 575, the only question presented was as to the *quantum* of damages. These damages had been assessed by the trial jury apparently without regard to the finding of the jury of inquest. This was treated as a correct proceeding. So also in *Pierce Mill Co. v. Koltermann*, 26 Neb., 722, the court treated the question of damages or no damages as properly in issue to the trial jury, where the damages assessed by the trial jury were very different from those found by the jury of inquest. In *Kyner v. Upstill*, 29 Neb., 768, the question of procedure was to a certain extent considered, and adverse comment passed upon the fact that the assignments of error related to the proceedings had under the sheriff's writ instead of to the proceedings upon the trial. It was said that the case had proceeded upon the theory that action according to the first thirteen sections of law was necessary to give the court jurisdiction; that the whole of this theory was believed to be erroneous, and the following significant language was used: "Nor does it seem that the verdict of the jury summoned therein by the sheriff advanced the plaintiff's cause in any degree." The court should, therefore, have treated all the material allegations of the petition and findings of the inquest as in issue where met by the denial in the answer. Instead of so doing the following instructions were given:

"1. The question submitted to you to answer arises from the fact that the plaintiff brought proceedings in this court looking to the ascertainment of his damages by reason of the overflow of his land by reason of the erection of a dam across the river known as the Little Blue, in this

county, and such proceedings were had that a jury was impaneled to view the premises and assess the damages of the plaintiff, and such jury reported their findings and assessed damages to the plaintiff in the sum of $420.

"2. The defendant, as of right he may do, herein filed his answer, in which he alleges that he has paid such damages. This the plaintiff denies. Hence arises the question submitted to you for your consideration, to-wit, Has the defendant W. T. Newcomb paid to the plaintiff the damages assessed to him herein?

"3. Keeping in mind the question submitted to you, consider all the testimony introduced before you, and say from a consideration of all the evidence as to how you shall answer the question submitted to you."

The giving of these instructions is assigned as error. The assignment is to the whole group, and we think the error reaches to all the instructions. As to the second instruction complained of, a single question was presented to the jury instead of all the issues raised by the pleadings. In the first and third instructions the fact that the jury was to confine itself to the consideration of one question was in each suggested, while in the first instruction the fact that the jury of inquest had assessed damages in the sum of $420 was stated to the jury as if it were controlling on that question. We think that each one of these instructions, viewed in the light of the others, was erroneous and that the joint assignment of error is well taken. Moreover, the question submitted was not proper under the issues. It was practically whether or not Newcomb had paid the damages assessed by the jury of inquest. The question presented by the pleadings and the question tried was whether or not Newcomb, when he purchased the land of Royce, obtained at the same time a grant of the water rights exercised by him. There was evidence fairly tending to show that it was the agreement between Royce and Newcomb that if Newcomb purchased the land at a stipulated price

he should have the privilege of erecting a dam sufficient to properly conduct his mill and to overflow Royce's land as much as would be required for that purpose. If this evidence is to be treated as in support of a claim of license, the erection of the dam and its maintenance by Newcomb coupled the license with an interest and rendered it irrevocable. (*M'Kellip v. M'Ilhenny*, 4 Watts [Pa.], 317; *McBroom v. Thompson*, 37 Pac. Rep. [Ore.], 57.) If the answer be treated as pleading an easement, the expense undergone by Newcomb in erecting his dam in pursuance of the parol agreement took the case out of the statute of frauds. On this subject, then, the precise question for the jury was whether or not there had been such a grant, and not whether the damages allowed by the jury of inquest had been paid.

REVERSED AND REMANDED.

ANTHONY KOEHLER V. CHARLES E. SUMMERS.

FILED OCTOBER 16, 1894. NO. 5584.

Review: TRANSCRIPT: MOTION FOR NEW TRIAL: ASSIGNMENTS OF ERROR. In order to obtain a review in this court of matters occurring on the trial in the district court, it must appear that the errors complained of were called to the attention of the district court by a motion for a new trial. A record which discloses that a motion for a new trial was filed and overruled, but which does not disclose the grounds of such motion, is insufficient for this purpose.

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

Charles H. Sloan, for plaintiff in error.

John D. Carson, and *D. H. Conant, contra.*

IRVINE, C.

All the errors assigned in this case relate to matters occurring upon the trial. None of these can be considered, for the reason that the record does not contain any motion for a new trial. It is true that the transcript shows that a motion for a new trial was filed and overruled; but in order to obtain a review in this court of matters occurring on the trial it is essential, not only that there should have been a motion for a new trial, but that the errors complained of should have been in that motion called to the attention of the district court. In the absence from the transcript of the motion for a new trial we cannot say, or presume, that the errors complained of were called to the attention of the trial court.

JUDGMENT AFFIRMED.

HOME INSURANCE COMPANY OF NEW YORK v. J. W. WINN & COMPANY.

FILED OCTOBER 16, 1894. No. 5676.

1. **Insurance: NOTICE OF LOSS: FRAUD.** A policy of insurance required the assured, in case of loss, to obtain and present to the company certified copies of all bills and invoices, the originals of which had been lost; to produce his books and accounts, and, if required, to submit to an examination on the subject of the loss. The policy also provided that "all fraud, or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy." The insured procured copies of invoices and willfully raised the amounts thereof so as to show purchases $1,700 greater than they were in fact, and by affidavit verified such false invoices. The jury, by its verdict, found that the actual value of the goods was less than the aggregate insurance. *Held*, That there had been false swearing and an attempt at fraud which constituted a good defense to an action on the policy.

2. ———. *Springfield Fire & Marine Ins. Co. v. Winn*, 27 Neb., 649, distinguished.

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

The facts are stated by the commissioner.

S. P. Davidson and *Fyke & Hamilton*, for plaintiff in error:

If assured willfully changed his invoices by increasing the amounts, and then swore said changed bills were true and correct, and presented them to the insurance company for the purpose of inducing it to make a more favorable settlement with him, he should not recover, and the court erred in refusing to thus instruct the jury. (*Virginia Fire & Marine Ins. Co. v. Saunders*, 22 Ins. L. J. [Va.], 270; *Claflin v. Commonwealth Ins. Co.*, 110 U. S., 81; *Moore v. Virginia Fire & Marine Ins. Co.*, 28 Gratt. [Va.], 518; *Weide v. Germania Ins. Co.*, 1 Dill. [U. S. C. C.], 442; *Hansen v. American Ins. Co.*, 57 Ia., 743; *Dolloff v. Phœnix Ins. Co.*, 82 Me., 266; *Lion Fire Ins. Co. v. Starr*, 12 S. W. Rep. [Tex.], 45; *Hammatt v. Emerson*, 27 Me., 308; *Foster v. Charles*, 7 Bing. [Eng.], 105; *Sleeper v. New Hampshire Fire Ins. Co.*, 56 N. H., 401; *Leach v. Republic Fire Ins. Co.*, 58 N. H., 245; *Smith v. Queen Ins. Co.*, 1 Hannay [N. B.], 311; *Security Ins. Co. v. Bronger*, 6 Bush [Ky.], 146; *Security Ins. Co. v. Fay*, 22 Mich., 467.)

T. Appelget and *C. K. Chamberlain, contra.*

IRVINE, C.

An action was instituted in the district court of Johnson county, wherein the plaintiff, styled as J. W. Winn, doing business under the firm name and style of J. W. Winn & Co., sued the Home Insurance Company to recover on a policy of insurance, written by that company in favor of

J. W. Winn & Co., on a stock of goods at Elk Creek, which, the petition alleged, had been destroyed December 22, 1886. A number of defenses were set up in the answer. Among these were that it had been represented to the company that the firm of J. W. Winn & Co. was not composed of Winn alone, but of Winn, one Nail, and other persons; that misrepresentations had been made to the insurer as to the value of the property; that no notice or proper proofs of loss had been presented, and that in violation of the terms of the policy the assured had fraudulently changed the accounts of purchases from wholesale houses which the policy required him to furnish, and had falsely and fraudulently, in an examination taken under the policy, represented his purchases of goods to be largely in excess of what they were in fact. There was a verdict and judgment for Winn, from which the insurance company prosecutes error.

The policy contained the following provision, immediately following the provisions in regard to proof of loss: "All fraud, or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy." Prior to this there was a requirement that the assured should produce certified copies of all bills and invoices, the originals of which had been lost. Winn presented proofs of loss, containing what purported to be copies of such invoices, and this statement was subscribed by him and he made oath thereto. He testifies himself that he knowingly and deliberately altered these invoices in such a manner as to make his purchases appear some $1,700 greater than shown by the invoices and greater than they had in fact been. His only explanation of this was that he had been informed by a Mr. Dale, who is not shown to have been connected with the plaintiff in error, that the company would cut his estimated loss in two and not allow as much as he proved. It is clearly established, without the slightest contradiction, that Winn's affidavit as to his

purchases was false; that he knew it to be false; that he made it deliberately with such knowledge for the purpose of deceiving the plaintiff in error in regard to the value of his stock. It has often been held under similar policies that a false statement as to a material fact, made willfully, entirely defeats a recovery. (*Claflin v. Commonwealth Ins. Co.*, 110 U. S., 81; *Geib v. International Ins. Co.*, 1 Dill. [U. S. C. C.], 443; *Huchberger v. Merchants Fire Ins. Co.*, 4 Biss. [U. S. C. C.], 265; *Dolloff v. Phœnix Ins. Co.*, 82 Me., 266; *Sleeper v. New Hampshire Fire Ins. Co.*, 56 N. H., 401; *Moore v. Virginia Fire & Marine Ins. Co.*, 28 Gratt. [Va.], 508; *Hanover Fire Ins. Co. v. Mannasson*, 29 Mich., 316.) Many of these cases hold that to avoid the policy under such a condition it need not appear that the false statement be such as to operate to defraud the insurance company; but in *Springfield Fire & Marine Ins. Co. v. Winn*, 27 Neb., 649, a case growing out of this same fire, a different rule was established in this state. It is there suggested that the testimony did not show a design to defraud the company, a conclusion which certainly could not be reached on the testimony in this case. The rule was there established that under such a policy a recovery would not be barred, provided the actual value was greater than the aggregate insurance. In other words, if the actual value of the stock was greater than the aggregate insurance, the overvaluation in the proofs, although willfully made, could not operate to defraud the company, and would, therefore, not be material. To this extent the case last cited has modified in this state the rule generally established. In the case of the *Springfield Fire & Marine Ins. Co. v. Winn* it was said that the proof clearly established that the value of the stock was greater than the aggregate insurance, while in this case the policy was for $1,000 and the verdict for $945.79, rendered under an instruction that the full amount of the policy, with interest, should be recovered if the value of the stock exceeded the aggregate insurance, but

that the loss should be apportioned among the different insurers if the value was less than the aggregate insurance. It is clear, then, that the jury found that the actual value was less than the aggregate insurance. In accordance with the rule established in *Springfield Fire & Marine Ins. Co. v. Winn*, the plaintiff in error requested the following instruction, which was refused: "(2.) The court instructs the jury that if you find from the evidence that plaintiff, after the fire, knowingly and willfully changed some of his bills of purchases by increasing the amounts thereof, and willfully made false affidavits that said bills which had been so changed by him were correct, and furnished said changed bills to defendant for the fraudulent purpose of deceiving defendant as to the amount of goods purchased by him between the time he took his last inventory and the time of the fire, he was guilty of such fraud and false swearing as vitiates said policy, and you will find for said defendant, unless the evidence shows that, at the time of the fire, plaintiff had on hand more than seven thousand dollars' worth of goods, and the burden is on the plaintiff to show that at the time of the fire he had in the store seven thousand dollars' worth of goods or more." This instruction was in accordance with the rule already referred to. It was applicable to the evidence and should have been given. The refusal to give this instruction was not corrected by any other portion of the charge. On the contrary, the court charged the jury that upon this point the fact that false affidavits had been made in the proofs would not defeat a recovery, but might be taken into consideration only as throwing light on the credibility of Winn as a witness.

A number of other questions are discussed in the briefs. Some of them are not based upon any sufficient assignments in the petition in error, others relate to questions which may not arise upon a new trial, and will, therefore, not be considered.

REVERSED AND REMANDED.

JOHN D. GLADE V. CHARLES C. WHITE.

FILED OCTOBER 16, 1894. No. 5170.

1. **Partnership:** SETTLEMENT: ACTION AT LAW BETWEEN PARTNERS. Where a partnership has been dissolved and in the settlement of the partnership affairs one partner has become the owner of the accounts and debts payable to the partnership, such partner may maintain an action at law against the other for moneys collected on such accounts by such other partner and withheld by him without the knowledge of the plaintiff.

2. **County Courts:** JURISDICTION. The jurisdiction of the county court depends upon section 16 of article 6 of the constitution, defining and limiting its jurisdiction, and on acts of the legislature in pursuance thereof, and not upon ancient distinctions between proceedings at law and in equity or between forms of action.

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

M. A. Hartigan, for plaintiff in error cited: 2 Bates, Partnership [ed. 1888], sec. 849; *Younglove v. Liebhardt*, 13 Neb., 557; *Miner v. Lorman*, 56 Mich., 212; *Larned v. Ayers*, 41 Mich, 677; *Casey v. Brush*, 2 Caines' Cases [N. Y.], 293; *Murray v. Bogert*, 14 Johns. [N. Y.], 318; *Westerlo v. Evertson*, 1 Wend. [N. Y.], 533; 2 Chitty, Pleading [ed. 1879], p. 215; Parsons, Partnership, p. 268; *De Jarnette v. McQueen*, 68 Am. Dec. [Ala.], 164; *Bruce v. Hastings*, 98 Am. Dec. [Vt.], 592; *Borven v. School District*, 10 Neb., 265; *Emery v. Pease*, 20 N. Y., 62; *Howard v. Patrick*, 38 Mich., 795; *Whitney v. Purrington*, 59 Cal., 36; *Hanks v. Baber*, 53 Ill., 292; *Johnson v. Wilson*, 54 Ill., 419; *Holyoke v. Mayo*, 50 Me., 385.

F. I. Foss, contra.

IRVINE, C.

White sued Glade in the county court of Saline county. To White's petition Glade demurred. The demurrer was

overruled, and the defendant electing to stand thereon, judgment was entered for plaintiff. From this judgment Glade prosecuted error to the district court, which affirmed the judgment of the county court, and Glade now seeks to reverse the judgment of the district court affirming that of the county court.

An amended petition appears in the transcript, but it was not filed until February 15, while the demurrer was overruled February 13. The record does not show any leave to file the amended petition, and the judgment recites that the cause came on for hearing on the petition. The demurrer must, therefore, be treated as attacking the original petition and not the amended petition. The prayer was the same in each petition and the differences were only that in the amended petition the facts are pleaded with greater certainty. We do not regard these differences as very material in considering the demurrer. The petition alleged, in substance, that the plaintiff and defendant had been partners; that the partnership was dissolved in December, 1888, at which time all claims, as they appeared on the books of the firm, were bought by the plaintiff; that the books were not in all instances correct; that in November, 1888, the defendant had drawn a check upon the bank account of the firm amounting to $118.45 and appropriated its proceeds to his own use without accounting therefor; that the defendant had obtained possession of certain grain, describing it, which he had appropriated to his own use and not accounted for; and that certain accounts had been collected by the defendant and the money not turned over to the plaintiff. While the petition is not very artistically drawn it does charge that there had been a partnership; that there had been a dissolution; that by the dissolution the plaintiff had become entitled to the indebtedness owing the firm; and that certain items of this indebtedness the defendant had collected and appropriated to his own use. The allegations in regard to the appropriation of the grain

may be disregarded. If they belonged in a separate count, the remedy was by a motion to require a separate statement; and if the averments in regard to the accounts would in themselves be sufficient against demurrer, those in regard to the grain were, at most, surplusage.

The demurrer was upon three grounds: 1. That plaintiff had not legal capacity to sue. 2. That the court had no jurisdiction of the subject-matter. 3. That the petition did not state facts sufficient to constitute a cause of action. We hardly understand upon what theory the defendant contends that the plaintiff had not legal capacity to sue. Certainly no incapacity is disclosed in the petition. It would seem from the argument that the only point claimed under this head is that the petition discloses that the action concerned partnership matters, and that therefore the plaintiff could not sue at law. This objection does not go to his legal capacity and will be considered in connection with the third assignment of the demurrer.

It is urged that the county court had no jurisdiction of the subject-matter because, if the petition did state a cause of action, it must be one in equity for an accounting, and the county court has no jurisdiction of such cases. The petition does not state a case for an accounting. It must stand or fall as an action for the recovery of specific sums of money, and, therefore, if it does state a cause of action, it is clearly one within the jurisdiction of the county court, less than $1,000 being claimed; but we wish here to take occasion to say that the jurisdiction of the county court does not depend upon the old distinctions between actions at law and in equity. Section 16 of article 6 of the constitution confers jurisdiction upon the county court in certain cases and provides that it may have such other jurisdiction as may be given by general law. It then expressly excludes jurisdiction in criminal cases in which the punishment may exceed six months' imprisonment, or a fine of over $500, in actions in which title to real estate is sought

to be recovered or may be drawn in question, in actions on mortgages or contracts for the conveyance of real estate, and in civil actions where the debt or sum claimed shall exceed $1,000. The legislature may, therefore, confer upon the county court jurisdiction in all cases not excluded by this constitutional provision. (*Wilson v. Coburn*, 35 Neb., 530.) In determining whether the county court has jurisdiction in a particular case we must look to this constitutional provision and the acts of the legislature conferring and limiting jurisdiction in pursuance thereof, and not to the ancient distinctions between modes of procedure and forms of action.

Does the petition state facts sufficient to constitute a cause of action? It has been recently held that an action at law cannot be maintained by one partner against his copartner to recover moneys alleged to be due him on account of partnership transactions where no settlement of the partnership accounts and business has been had. (*Lord v. Peaks*, 41 Neb., 891.) This case declares that the general rule in such matters is in force in this state. In view of the abandonment here of technical distinctions between law and equity the rule means that a petition under such a state of facts must, in order to state a cause of action, present a case for dissolution or accounting, and that single transactions cannot be selected and made the basis of independent suits. The reasons for this rule are by a late writer summarized as follows: That the mutual balances fluctuate, and to permit actions on single transactions would disregard the rights of other partners on the state of their accounts; that such actions would lead to a multiplicity of suits; that the ascertainment of balances requires an examination which cannot be safely submitted to a jury; that actions by one partner, if enforceable, would be to appropriate partnership property to the exclusion of creditors and in violation of the liens of the others; that such an action would be really against the firm, and a partner suing would

be on both sides of the record, and that the debt would be partnership assets not collectible by one member. (Bates, Partnership, 849.) This petition avers a state of facts which removes all of these objections. It avers that the partnership had been dissolved; that the indebtedness due the firm had been purchased by plaintiff, and was, therefore, no longer partnership assets. The petition in effect alleges the partnership transactions merely by way of inducement, and charges in substance that the defendant had received certain moneys which, *ex æquo et bono*, belonged to the plaintiff. This would make a case for money had and received under the old procedure. The authorities support this view. Thus, on the settlement of partnership matters there was a disputed item which one of the partners alleged he had paid to a third person for the other partner and promised to pay it to him if the third person did not. A settlement was made on that basis, the item being charged to the partner for whom it was claimed to have been paid. It was afterwards learned that the money had not been paid to such third person, and it was held that the partner to whom the amount had been charged could recover the same against the other partner in an action at law. The court said: "On the allowance of it by Funk, moved thereto by the false pretense of Adams, it became money in Adams' hands for the use of Funk, and for which he could maintain an action for money had and received. (*Adams v. Funk*, 53 Ill., 219.)

Russell v. Grimes, 46 Mo., 410, was a case very similar to the present. There had been a partnership accounting by action in which the debts due the firm were divided between the partners. Thereafter it was ascertained that one of the partners had collected a portion of certain notes payable to the firm which had been turned in to the other partner at their face. The court said: "The petition so far does not seek to settle the partnership accounts, nor does it attack the settlement already made. It simply charges the

defendant with having received money upon claims which, by the settlement, became the individual property of the plaintiff; and the plaintiff then acquired a separate property, not only in the balance due upon those claims, but, as against his partner, to their full amount." It was held that a petition charging such facts stated a cause of action. To the same effect are *Ross v. West*, 2 Bosw. [N. Y.], 360; *Crosby v. Nichols*, 3 Bosw. [N. Y.], 450; *Wicks v. Lippman*, 13 Nev., 499. The case of *Russell v. Grimes, supra*, contains language and reasoning supporting the petition in this case, both as to the moneys received and the appropriation of specific property. We think the petition stated a cause of action and that the judgments of the district and county courts were right.

AFFIRMED.

EMILY C. BARR ET AL. V. CITY OF OMAHA.

FILED OCTOBER 17, 1894. NO. 5725.

1. **The allowing an amendment to a pleading,** so as to make it conform to the evidence received without objection, is a matter largely within the discretion of the trial court; and this court will not interfere with the exercise of such discretion, unless the record presents a clear case of abuse.
2. **To make available an error in giving an instruction** that does not fully state the issues in a case, the party complaining must properly request a full and complete instruction upon the point.
3. **Unless the record shows that an instruction was excepted to** in the trial court when given, the instruction will not be reviewed by this court.
4. **Objections to the giving or the refusing of instructions** will not be considered by the supreme court, unless presented to the trial court by the motion for a new trial.

5. **The ruling of the trial court in sustaining an objection** to a question put to one's own witness cannot be reviewed where the complaining party has failed to make an offer of the testimony indicating what he expects to prove by the witness, in response to the question propounded and overruled.

6. **The exclusion of evidence** of a fact fully established by other competent and uncontradicted evidence is not reversible error.

7. **The special benefits which may be properly set off against damages** are such as increase the value of adjacent property, and these benefits are none the less special because an increased value has been thereby added to many adjacent private properties other than that to which a particular litigation is pending. Common benefits are such as are enjoyed by the public at large without reference to the ownership of private property adjacent to the public improvement out of which arose the benefits under consideration. (*Kirkendall v. City of Omaha*, 39 Neb., 1.)

8. **A verdict on conflicting evidence** will not be disturbed unless manifestly wrong.

9. **Evidence** *held* to sustain the verdict and judgment.

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

Moriarty & Langdon, for plaintiffs in error.

W. J. Connell and *E. J. Cornish, contra.*

NORVAL, C. J.

This action was brought by the plaintiffs in error against the city of Omaha to recover damages to their lot because of street improvements. There was judgment for the city, dismissing the action, and plaintiffs prosecute error.

The plaintiffs are, and they have been for several years, the owners of lot 20 of the S. E. Rodgers' Oklahoma Addition to the city of Omaha, and lived in the residence situate upon said lot. The premises are situated on the east side of Thirteenth street, and south of Blaine street in said

city. In March, 1889, the city of Omaha passed an ordinance establishing the grade of said Thirteenth street along and in front of plaintiffs' lot, whereby the grade of said street was raised several feet above the natural surface of said lot. In May, 1889, an ordinance was passed authorizing and directing the grading to the established grade said Thirteenth street along and in front of plaintiffs' real estate and for several blocks north and south thereof, and during the years 1889 and 1890 said portion of said street was brought to the established grade, and by reason thereof plaintiffs' lot was left some twelve feet below the surface of the street. Plaintiffs claim that by reason of said grading, and the negligent and careless manner in which the work was done, they have sustained damages.

The first point raised by plaintiffs in their brief as a ground for reversal is based upon the ruling of the trial court in permitting the city to file an amended answer. In the original answer filed special benefits had not been pleaded as a defense. The case, however, was tried by both parties, and testimony was admitted without objection, upon the theory that the question of special benefits was in issue in the case. After the evidence was all in and plaintiffs' counsel was making the opening argument to the jury, counsel for the city asked permission to file an amended answer to conform to the facts proved, by setting up special benefits, which request was granted by the court, and an amended answer was filed, over the objections and exceptions of plaintiffs. It was clearly within the discretion of the court to permit the amendment. Our statute and practice thereunder, as is shown by the decisions, are very liberal in allowing amendments, and especially where the object is to make the pleading correspond to the proofs. The allowance of an amendment of a pleading, either before or after judgment, is a matter almost entirely within the discretion of the trial court, and this court will not interfere with the exercise of such discretion of permitting a

pleading to be amended to conform to the evidence admitted without objection, unless the record presents a clear case of abuse. (*Keim v. Avery*, 7 Neb., 54; *Catron v. Shepherd*, 8 Neb., 309; *Brown v. Rogers*, 20 Neb., 547; *Klosterman v. Olcott*, 25 Neb., 382.) This record discloses no abuse of the power of the court. No objection was made to the admission of the testimony when received. It is not very clear that the evidence respecting special benefits was improperly admitted under the original answer. Moreover, if plaintiffs were taken by surprise by the amendment, their remedy was to make the fact appear to the court, and it would doubtless have protected their rights by granting a continuance; but no postponement of the trial was asked.

It is contended on behalf of plaintiffs that there was prejudicial error in the paragraph of the instructions which states the issues in the case, in that it omitted to state that the allegations of special benefits in the answer were denied by the reply, and that the instruction failed to inform the jury that one of the issues which they were called upon to try was whether the work of grading was performed by the city in a negligent manner or not. It is not claimed that there was a misstatement of the issues, but that the statement was not full enough. The question of negligence in the construction of the work was fully covered by the paragraph alluded to. Plaintiffs cannot predicate error in the giving of this instruction on the ground that it did not comprehend or state every issue in the case, for reason the plaintiffs did not present to the trial court an instruction covering the point omitted from the instruction given. Had this been refused, the plaintiffs would be in a position to have the question reviewed. (*Post v. Garrow*, 18 Neb., 688; *Klosterman v. Olcott*, 25 Neb., 387; *Woodruff v. White*, 23 Neb., 753; *Burris v. Court*, 34 Neb., 190.) Another reason why the paragraph of the charge already mentioned cannot be considered is that no exception was taken to the giving thereof when the

same was read to the jury. An exception at the time an instruction is given is necessary in order to have an objection to such instruction noticed or considered by the court. (*Warrick v. Rounds*, 17 Neb., 415; *Heldt v. State*, 20 Neb., 499; *Nyce v. Shaffer*, 20 Neb., 509; *Scofield v. Brown*, 7 Neb., 221; *Downing v. Glenn*, 26 Neb., 323; *Fremont, E. & M. V. R. Co. v. Mecker*, 28 Neb., 94; *Holloway v. Schooley*, 27 Neb., 553.)

Criticisms are made in the brief of plaintiffs upon instructions numbered from 3 to 10 inclusive, given by the court on its own motion. These instructions cannot be reviewed by us, for the reason that none of them were brought to the attention of the court below in the motion for a new trial. Repeatedly this court has said, in effect, that where no objection is made to an instruction in the motion for a new trial, such instruction cannot be considered on a review of the cause in the appellate court. (*Schreckengast v. Ealy*, 16 Neb., 514; *Weir v. Burlington & M. R. R. Co.*, 19 Neb., 213; *Nyce v. Shaffer*, 20 Neb., 509; *Omaha, N. & B. H. R. Co. v. O'Donnell*, 22 Neb., 475; *Sherwin v. O'Connor*, 24 Neb., 605.)

It is insisted that the court erred in refusing certain instructions requested by plaintiffs. We must decline to review plaintiffs' requests to charge, inasmuch as the same were not pointed out in the motion for a new trial. (*Omaha & R. V. R. Co. v. Walker*, 17 Neb., 435, and cases last above cited.)

Some nineteen different rulings of the trial judge in excluding testimony offered by the plaintiffs are complained of in the brief of counsel. Except in three instances, no foundation was laid by plaintiffs in the lower court to have these rulings on the admission of testimony reviewed. While an exception was taken in most instances to the sustaining of objections to questions propounded by plaintiffs to their own witnesses, on their examination in chief, the record fails to disclose that the plaintiffs followed up their

exceptions with the statement of the fact or facts they expected to establish by the witness then upon the stand. This was indispensable to a review of the rulings by this court. We cannot presume that, if permitted, the witness would have made answers favorable to the party propounding the questions. (*Mordhorst v. Nebraska Telephone Co.*, 28 Neb., 610; *Sellers v. Foster*, 27 Neb., 118; *Yates v. Kinney*, 25 Neb., 120.) We have with care examined each ruling on the exclusion of testimony in which the proper foundation was laid in the trial court for the review of the decision, and find that the plaintiffs were not in the least prejudiced by the exclusion of the evidence, since the fact about which the witness was interrogated was clearly proved by other competent and undisputed evidence in the case. The exclusion of evidence of a matter which is fully established by other uncontradicted evidence is harmless error. (*Clough v. State*, 7 Neb., 333; *Delaney v. Errickson*, 11 Neb., 533.)

It is contended that error prejudicial to the plaintiffs was committed in admitting the testimony of John Groves, offered on behalf of the city. One of the defenses interposed in the answer of the defendant was that the grading of the street in question in front of plaintiffs' real estate was done in pursuance of an ordinance of the city duly enacted, approved, and published; that appraisers were called to assess the damages, who reported that plaintiffs, property had not been damaged by reason of the improvement, and that no appeal was taken from the award of the appraisers. For the purpose of establishing said defense the city called as a witness John Groves, city treasurer, who was permitted to testify that the ordinance providing for the grading of the street, and the appointment of appraisers, was published in the *World*, the official paper of the city, on July 13, 1889. It is argued that the testimony of the witness was incompetent, and that the publication of the ordinance could only be established by the

affidavit of a person having cognizance of the publication, and to sustain this contention section 403 of the Code of Civil Procedure is cited, which declares that "Publications required by law to be made in a newspaper, may be proved by affidavit of any person having knowledge of the fact, specifying the time when and the paper in which the publication was made." Doubtless the usual and proper method of establishing the fact that a city ordinance has been duly published in a newspaper, is by the affidavit of the publisher, or other person familiar with the fact; but whether the same may not also be proved by the oral testimony of a witness upon the stand it is not necessary now to decide, since the trial court by its instructions did not submit to the jury the question whether plaintiffs' damages had been assessed by appraisers appointed under the ordinance. If any error, therefore, was committed by the admission of oral testimony as to the publication of the ordinance, the rights of the plaintiffs were not in the least prejudiced thereby.

It appears that in bringing Thirteenth street to grade at the place in dispute the city filled plaintiffs' premises for some distance from the lot line, and to a considerable depth, with earth. This is made the basis of plaintiffs' second cause of action. The record fails to disclose that any damages resulted from filling in the lot with earth. The testimony of all the witnesses is to the effect, and the plaintiffs in the first count of their petition so allege, that in order to make the lot and the dwelling thereon accessible from the street, and to put the property to the most desirable and valuable use after the street was brought to the established grade, it was necessary to bring the lot to said grade by filling the same with earth. It is not made to appear how plaintiffs were damaged by reason of the city aiding them in filling the lot. There was no evidence before the jury which would have authorized them to find for the plaintiffs under the second count of their petition. The

rule of compensation for damages resulting from the grading by a municipality of a street upon which property abuts is no longer an open one in this state. Following *Schaller v. City of Omaha*, 23 Neb., 325, and *City of Omaha v. Kramer*, 25 Neb., 489, this court, in *Lowe v. City of Omaha*, 33 Neb., 587, said: "That when private property is damaged by reason of the construction of a public improvement near it, remuneration must be made; and the difference in the market value of the property with the public improvement and that without it, not considering general benefits shared by the general public, is the rule of compensation. Special and peculiar advantage which the property receives from the improvement is to be considered in determining whether there is injury or not. In other words, special benefits to the property may be set off against the damages sustained by the owner." In *Kirkendall v. City of Omaha*, 39 Neb., 1, a case similar to the one at bar, RYAN, C., used the following language: "The term 'special benefits' implies benefits such as are conferred specially upon private property by public improvement, as distinguished from such benefits as the general public is entitled to receive therefrom. In common with the general public, the owner of adjacent property is entitled to travel upon the improved highway; and although by reason of the improvement such travel may be rendered easier or more pleasant, yet the benefit is general, because it is enjoyed by the public in common with the owners of adjacent property. If the improvement should result in an increase in the value of adjacent property, which increase is enjoyed by other adjacent property owners, as to the property of each exclusively, the benefit is special, and it is none the less so because several adjacent lot owners derive, in like manner, special benefits, each to his own individual property. Such fact, if it exists, in no respect decreases the increment in value enjoyed by one of the adjacent property owners, and by way of offset such an

increment should therefore be treated as a special benefit in favor of whomsoever it may arise." In view of the foregoing adjudications it must be regarded as the settled law of this state that general benefits cannot be taken into consideration in an action for damages to adjoining property occasioned by the grading of a street, but that to the extent the abutting property has been specially benefited by the improvement, it must be allowed as a set-off against the damages proved. The rule as to the measure of damages was correctly given to the jury in the charge of the court. It therefore only remains to be determined whether the verdict is unsupported by, or is contrary to, the evidence. Upon the question of damages, as is usual in such cases, the evidence is of the most conflicting character. J. B. Ayers, a witness for the plaintiffs, in his testimony states that the property was worth $7,000 just prior to the grading of Thirteenth street, and about $2,000 after the making of the improvement. Robert Herrick, another witness for the plaintiffs, testified that the lot was of the value of $6,000 or $7,000 before the grading, and about $2,500 after. Thomas Grocox testified that the property was worth $4,000 less after the grading than it was immediately prior thereto. Jacob Kendis swore that the value of the property just prior to the grading was from $50 to $60 per front foot, and that it was not worth more than half that much after the work was done. The testimony of the witnesses examined on behalf of the city tends to establish that the property in controversy was worth from one-third to one-half more after the grading was completed than before the same was commenced; that such increase in value was directly attributable to the improvement of the street, which made the lot more accessible and desirable as a residence property; and that in place of an impassable road, as it was before the grading, there is now a first-class street.

The record before us shows that the jury were permitted,

under the charge of an officer, to have a view of plaintiffs' premises. The object of this view was to acquaint the jurors with the physical situation, condition, and surroundings of the property, thereby to enable them better to weigh and apply the testimony of the different witnesses. The jury, with the knowledge which the view of the premises afforded, have passed upon the conflicting evidence relating to value and damages, and by their verdict have said, in effect, that plaintiffs' property has not been depreciated in value by reason of the grading of the street upon which the same abuts, and we think the evidence fully justifies the finding. There being no material error in the record, the judgment is

AFFIRMED.

FIRST NATIONAL BANK OF CHICAGO, APPELLEE, V. CORA H. SLOMAN, APPELLANT, ET AL.

FILED OCTOBER 17, 1894. No. 5214.

1. **Pleading:** PARTIES DEFENDANT. A petition wherein the defendants are described as "M. H. S. and E. H. S., partners doing business as S. Bros.," is not an action against the firm named, but will sustain a personal judgment against the individual defendants therein named.
2. **Judgments:** UNITED STATES CIRCUIT COURTS. The courts of the United States within this jurisdiction are not regarded as foreign courts, and their judgments will be treated for many purposes as domestic judgments.
3. **Creditors' Bill:** JUDGMENTS OF UNITED STATES CIRCUIT COURTS. An action in the nature of a creditors' bill can be maintained in this state upon a judgment of the circuit court of the United States for the district of Nebraska.
4. **Judgment Against Individual Partners.** Evidence examined, and *held* to sustain the decree of the district court.

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

The facts are stated in the opinion.

Brome, Andrews & Sheean, for appellant:

Appellees are not judgment creditors of Morris H. Sloman. They allege and prove only a judgment against the firm of Sloman Bros. (*Morrissey v. Schindler*, 18 Neb., 672; *Herron v. Cole Bros.*, 25 Neb., 692; *Ruth v. Lowrey*, 10 Neb., 260; *Leach v. Milburn Wagon Co.*, 14 Neb., 106.)

The judgment upon which the creditors' bill is based is not a domestic judgment. It is the judgment of a court of limited jurisdiction, and, so far as the courts of this state are concerned, a foreign judgment. (*Tarbell v. Griggs*, 3 Paige Ch. [N. Y.], 207; *Steere v. Hoagland*, 39 Ill., 264; *Winslow v. Leland*, 128 Ill., 338.)

E. M. Bartlett and *A. C. Wakeley, contra:*

The judgment was rendered against Morris H. Sloman and Eugene H. Sloman individually, and not against the firm of Sloman Bros.

The judgment of a United States circuit court, sitting within a particular state, is as to that state a domestic judgment, upon which a creditors' bill may be brought. (*Ballin v. Loeb*, 78 Wis., 404; *Bullitt v. Taylor*, 34 Miss., 708; *Turrel v. Warren*, 25 Minn., 9; *Adams v. Way*, 33 Conn., 419; *Wandling v. Straw*, 25 W. Va., 705; *Thompson v. County of Lee*, 22 Ia., 208; *Town of St. Albans v. Bush*, 4 Vt., 58; *Embry v. Palmer*, 107 U. S., 10; *Barney v. Patterson*, 6 Har. & J. [Md.], 182; *McCauley v. Hargroves*, 48 Ga., 50; *Williams v. Wilkes*, 14 Pa. St., 228; *Womack v. Dearman*, 7 Porter [Ala.], 513; *Trumbull v. Payson*, 95 U. S., 418; *Earl v. Raymond*, 4 McLean [U. S. C. C.], 235; 12 Am. & Eng. Ency. Law, 148.)

A judgment of a state court will be regarded by the federal courts, sitting within the territorial limits within the state in which the same is rendered, as a domestic judgment. (*Owens v. Gotzian*, 4 Dill. [U. S.], 437; *Wilkinson v. Yale*, 6 McLean [U. S.], 17; *Lanmon v. Clark*, 4 McLean [U. S.], 18.)

POST, J.

This is a proceeding in the nature of a creditors' bill, and comes into this court by appeal from a decree of the district court for Douglas county. It is alleged in the petition that in the year 1866 the plaintiff recovered judgment in the circuit court of the United States for the district of Nebraska against the defendants Morris H. Sloman and Eugene H. Sloman, doing business in the firm name of Sloman Bros.; that execution has been issued thereon and returned unsatisfied, said defendants, as well as the firm of Sloman Bros., being wholly insolvent. It is further charged that in the years 1887 and 1888 the said Morris H. Sloman purchased certain real estate, described therein, situated in Douglas county, with his individual means, and for the purpose of defrauding his creditors procured deeds therefor to be executed in the name of his wife, Cora H. Sloman, who is also made a defendant. A. F. Risser & Co., William B. Riley & Co., and Charles H. Wentz, judgment creditors of the Slomans, were also made defendants and answered, joining in the plaintiff's prayer to have the real estate in controversy subjected to the payment of their claims in the order to be determined by the court, and for general equitable relief. The allegations of the petition having been put in issue by answer, a hearing was had, resulting in a decree for the plaintiff and cross-petitioners substantially as prayed by them, and from which the defendant Cora H. Sloman alone appeals.

1. The first contention on this appeal is that appellees are not shown to be creditors of Morris H. Sloman, the al-

leged equitable owner of the property mentioned, and that the judgments proved are against the firm of Sloman Bros. only. The title of the action by the plaintiff in the circuit court of the United States was "The First National Bank of Chicago v. Morris H. Sloman and Eugene H. Sloman, late partners doing business as Sloman Bros." The judgment therein is as follows: "It is therefore considered and adjudged by the court that the plaintiff the First National Bank of Chicago recover from the defendants Morris H. Sloman and Eugene H. Sloman, partners doing business as Sloman Bros., the sum of fifteen hundred and four and $\frac{50}{100}$ dollars ($1,504.50) and costs, herein taxed at $——." The other judgments mentioned were rendered by the same court and are similar in form to the above. In *King v. Bell*, 13 Neb., 409, which is a case in point, it is said: "Where the parties are designated by name as defendants in the title, the addition of the relation they occupy to each other, such as a description of them as 'partners,' will not restrict the action to one against the firm alone." The case of *Morrissey v. Schindler*, 18 Neb., 672, relied upon by appellant, does not conflict with the above. The question involved in that case was whether a contract executed in the name of M. Bros. was admissible in the absence of an allegation that the defendants were doing business as partners. From the title of the cause against "J. C. M. and M. M., doing business under the name and style of M. Bros.," it was held so far an action against the firm as to render the contract admissible. It does not follow from the reasoning therein that such an allegation will not support a judgment against the individual defendants; but the question of the regularity of the proceedings in the circuit court not being involved in this appeal, it is apparent that further consideration of the subject would be out of place in this opinion. It is a sufficient answer to appellant's argument that the record set out above shows a judgment in fact against the

Slomans individually and not against the firm of Sloman Bros.

2. It is next contended that "the judgment upon which the plaintiff's bill is based is not a domestic judgment, but is the judgment of a court of limited jurisdiction, and, so far as the courts of this state are concerned, a foreign judgment." That proposition, we admit, is not without support, but it is believed to be in conflict with the pronounced weight of authority. The question of the relation of the United States courts to the courts of the different states was recently considered by the supreme court of Wisconsin in the case of *Ballin v. Loeb*, 78 Wis., 404, in which it was held that the judgments of those courts should be treated as domestic judgments of the superior courts of the state, for the following reasons (we quote from the opinion), viz.: "1. They are liens on the land of the defendants. (Ch. 729, Acts Cong., 1888.) 2. They are admissible in evidence as such when properly authenticated. (Sec. 4145, Rev. Stats.) 3. In common law causes the plaintiff is entitled to the same remedies by attachment or other process against the property of the defendant (sec. 915, Rev. Stats., U. S., and by section 914 the same practice, etc.), and modes and forms of proceeding in civil causes may be the same. By section 916 the judgment plaintiff in common law causes is entitled to similar remedies upon the same to reach the property of the judgment debtor. 4. They are respected by our courts, and the property of the defendant in the hands of a receiver appointed by the United States court in a Wisconsin district will not be disturbed by our courts. 5. They are treated, in all respects as to remedies, like domestic judgments of the state within which they are rendered." To the same effect are *Wandling v. Straw*, 25 W. Va., 705; *Thompson v. Lee County*, 22 Ia., 206; *Barney v. Patterson*, 6 Harr. & J. [Md.], 182; *Embry v. Palmer*, 107 U. S., 3; *Adams v. Way*, 33 Conn., 419; *McCauley v. Hargroves*, 48 Ga., 50. The records of the judgments of the circuit court were, we think, properly admitted in evidence.

3. Finally, it is urged that the decree of the district court is not warranted by the proofs. This is shown by the record to be a typical case of its kind. In the year 1883 or 1884 Morris H. Sloman entered into partnership with his brother Samuel in the wholesale saddlery and harness business in the city of Omaha. Afterward Eugene H. Sloman also became a member of the firm. In the year 1886 Samuel withdrew and the business was thereafter conducted by the other members, in the name of Sloman Bros., until June, 1886, when it failed with liabilities amounting to $100,000, nearly if not quite twice the amount of its assets. Of the original capital of the firm, Samuel Sloman contributed about $15,000, and Morris H. less than $3,000. The amount drawn out by the former at the time he retired from the firm is not disclosed by the record, but presumably the amount of his contribution thereto. The circumstances attending the failure are of a suspicious character and sufficient to suggest grave doubts of the good faith of the partners. The appellant Cora H. Sloman, at the time of her marriage in 1884, was possessed of a small sum of money, not exceeding $250, the proceeds of her own earnings. Shortly after the failure she built a house in the city of Omaha which cost in the neighborhood of $18,000, and the family lived in a style indicating abundant means. About that time Morris H. Sloman engaged in business as a real estate broker in the city of Omaha in the name of his wife, the appellant, and is shown to have speculated extensively in real estate, ostensibly in her name under and by virtue of a power of attorney executed by her. It is admitted that no accounting was ever had between them of the business carried on in her name, nor does she appear to have a very definite idea of the amount or character of such transactions. About one year later Sloman opened a bank in his wife's name and thereafter transacted a banking business until about the time of the institution of proceedings in the circuit court of the United States by other creditors of

Sloman Bros., to subject the property in his wife's name to the satisfaction of the partnership indebtedness. There are other facts tending to sustain the finding of the district court, but it is evident from the foregoing statement that the decree should not be disturbed on this appeal, and it is accordingly

AFFIRMED.

ACH SMITH V. STATE OF NEBRASKA.

FILED OCTOBER 17, 1894. NO. 7156.

1. **Criminal Law:** INDICTMENT AND INFORMATION: PLEA IN BAR: DEMURRER: REPLICATION. When a plea in bar to an indictment or information is insufficient in form, or when it appears from the face thereof that the facts alleged are not in law a bar to the prosecution, the state may demur; otherwise it should join issue by means of a replication.
2. ———: PLEA IN BAR: DEMURRER. By demurring to a plea in bar the state will be held to have admitted all of the facts well pleaded therein.
3. ———: ———: ———. The state cannot deprive the accused of his right to a trial upon a plea in bar by introducing evidence tending to controvert the facts therein alleged in connection with a demurrer to the plea.
4. ———: EVIDENCE: TRANSCRIPT OF REPORTER'S NOTES. The law makes no provision for the certification by the short-hand reporter of the proceedings of the district court, hence a transcript of his notes, although accompanied by a formal certificate, is not admissible as independent evidence.

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

Robert W. Richardson and *A. G. Wolfenbarger*, for plaintiff in error.

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

POST, J.

This is a petition in error to review a judgment of the district court for Douglas county, whereby the plaintiff in error was convicted on the charge of shooting with intent to kill one Reese Robinson. To the information the following plea was filed:

"THE STATE OF NEBRASKA, PLAINTIFF,
v.
ACH SMITH, DEFENDANT. } Plea in Bar.

"Now comes Ach Smith, defendant, in his own proper person, into court here, and having heard the information read, says that the state of Nebraska ought not further to prosecute said information against him because at the February term, 1894, of the district court of Douglas county the prosecuting attorney of said county, duly authorized by law so to do, presented an information against him for the same offense with which the defendant is charged in the present information; that said defendant was duly arraigned in said court on said information and pleaded not guilty thereto; that thereupon a jury was duly impaneled and sworn in said cause in said court, and the trial proceeded with, when said jury were discharged by the court without the consent of the defendant, and over and against his protest and objection, without agreeing on a verdict and without disagreeing or other special cause, there being no special necessity for the discharge of the said jury. Wherefore, the defendant prays judgment of the court that he may be dismissed and discharged from the premises in the present information specified."

A demurrer was interposed by the state on the ground that the above did "not contain facts sufficient to constitute a plea in bar." The demurrer having been sustained, the accused entered a plea of not guilty, and a trial followed, resulting in a verdict of guilty, upon which judgment was subsequently entered, and which we are asked to reverse on account of alleged error.

The first and only assignment of error which it is deemed necessary to notice is the sustaining of the demurrer to the plea in bar. No objection is made at the time to the plea on the ground that it is insufficient in form, hence the facts therein alleged, we assume, are well pleaded. In fact, the pleader appears to have followed closely, both in form and substance, the plea which was sustained in the case of *Conklin v. State*, 25 Neb., 784. In *State v. Shuchardt*, 18 Neb., 454, it is said: "When a jury is impaneled the state must proceed with the prosecution, * * * And if, after the jury has been sworn and the jeopardy thus begun, the court without sufficient cause discharges them without a verdict, this in law is equivalent to an acquittal;" and such must be accepted as the settled law of the state. When the plea is inadequate in form, or when it appears from its face that the facts alleged are in law not at bar to the prosecution, the state may demur; otherwise it should join issue by means of a replication, since by demurring it will be held to have admitted all that is well pleaded by the accused. (*State v. Shuchardt* and *Conklin v. State, supra*, and cases cited; 1 Bishop, Criminal Procedure, 817.) It is shown by the transcript that on a previous day of the same term the accused was arraigned upon an information substantially like the one now before us, except that it was not therein alleged that the shooting was malicious. Having entered a plea of not guilty, a jury was called and sworn, when he objected to the introduction of evidence by the state on the ground that the information failed to charge a crime. That objection was sustained and the jury discharged, the accused being required to give bail conditioned that he would answer to a second information for shooting with intent to kill. It is further shown by the transcript that, accompanying the demurrer, there was filed by the prosecutor a statement of the court stenographer in the following words:

"In the District Court in and for Douglas County, Nebraska.

"STATE OF NEBRASKA
v.
ACH SMITH.

"After the impaneling of the jury the state moves that the jury be discharged and the defendant be remanded for the filing of a new information.

"The defendant objects to the discharge of the jury without a verdict being found, he having been once put upon his trial; and it having appeared to the court that by an oversight the word 'malicious' was left out of the information, and from an investigation of the facts the court is satisfied a crime has been committed and ought to be investigated by a jury, the jury is discharged. The defendant is required to appear at the next term of court, and on failure to give bond, remanded to jail until the next term of the court, and the witnesses will be recognized to appear. Defendant excepts.

"I hereby certify the foregoing to be a full, true, and correct transcript of the proceedings had in the above named case on the hearing thereof in the district court in and for Douglas county, Nebraska, as shown by my short-hand notes taken on the trial thereof.

"E. B. HENDERSON,
"*Reporter.*"

It may be inferred from the foregoing statement that the parties, by agreement, submitted to the court, not only the sufficiency of the plea when tested by demurrer, but also submitted the plea on its merits; but granting such to be the fact, it will not avail the state in this proceeding, for two reasons: First—No provision is made for the certification of the proceedings of the court by the short-hand reporter. It is true that some of the cases in this court appear to sustain a different rule, but from a careful examination they will be found to harmonize with the views here

stated. For instance, in *Spielman v. Flynn*, 19 Neb., 342, the question was the admissibility, under a stipulation, of the testimony of an absent witness given at a former trial, and the objection thereto in the district court was directed to the form of the certificate and not its admissibility as independent evidence. In that case it is said, in effect, that a certified copy of the stenographer's notes of proceedings is admissible in all cases where the original would be; but the question was not, as we have seen, presented by the record; hence the remarks of the court on the subject must be regarded as mere *dicta*. That it was so understood by the court is at least probable from the fact that in *Lipscomb v. Lyon*, 19 Neb., 511, decided at the same term, it was distinctly decided that the stenographer's transcript of the testimony of a witness, although duly certified by him, is inadmissible as documentary or independent evidence.

In *City of Omaha v. Jensen*, 35 Neb., 68, although *Spielman v. Flynn* is cited with approval, the only objection was "that no sufficient cause has been shown for the reading of that testimony;" and from the syllabus prepared by the court it is apparent that the decision rests upon the ground that the question of the manner of authenticating the evidence was not raised by the objection. The act for the appointment of stenographic reporters (secs. 45–49, ch. 19, Comp. Stats.) provides that such reporters shall attend at all terms of the district court and shall make stenographic reports of all oral proceedings had, including the testimony of witnesses, and any further proceedings or matter when directed by the trial judge. He is required to keep an office in the district of his appointment, in which he shall preserve all stenographic reports made by him, and shall furnish, on application of the district attorney or any party to the suit, a long-hand copy of the proceedings so recorded. Section 408 of the Code provides: "Duly certified copies of all records and entries or papers belonging to any public office, or by authority of law filed to be kept

therein, shall be evidence in all cases of equal credibility with the original records or papers so filed." That provision we understand to be declaratory merely of the rule at common law and adds nothing thereto. An extraordinary degree of confidence is reposed in the class of documents contemplated by the rule, on account of the credit due to agents by whom they are made and the public nature of the facts themselves. Where matters are recorded for the benefit of the public, the persons authorized to make such records are regarded as agents of the state, and each member of the community is presumed to be privy to act. Copies of such records, when properly certified, are therefore received in evidence, because required by law to be kept, because they are of public interest and notoriety and made under the sanction of an oath of office, or official duty. (1 Greenleaf, Evidence, 128, 483, 484, 485; 1 Starkie, Evidence, 195.) The reporter's stenographic notes are preserved, not for the benefit of the community at large, but of the parties to the action or proceeding in which they were taken. The information which they impart is not entrusted to the public, but, aside from the prosecuting attorney, is confined to the parties directly interested. They are, in short, not public records within the meaning of the Code, and the statement mentioned cannot be considered for that reason. And, second, the provision of the Criminal Code for the trial to a jury of the issues presented by a plea in bar is held to be mandatory. (See *Arnold v. State*, 38 Neb., 752, and authorities cited.) In the light of those authorities it would seem that the state could not deprive the accused of a jury trial by presenting its proofs in connection with a demurrer to the plea in bar. It follows that in sustaining the demurrer to the plea the district court erred, for which the judgment must be reversed and the cause remanded for further proceedings therein.

REVERSED.

WENZEL S. CHMELIR ET AL. V. MARY E. SAWYER ET AL.

FILED OCTOBER 17, 1894. No. 5611.

1. **In an action on the bond of a saloon-keeper** the fact essential to be shown is the disqualification to support those thereto entitled, caused or contributed to by sales of intoxicating liquors to one upon whom legally devolves the duty of furnishing such support, and this disqualification may be either partial in effect or limited in duration by reason of physical disability, or it may become complete, as by death.
2. **Whether or not the disqualification alleged as partial, limited, or complete was contributed to** by any or all of the defendants is a question of fact to be determined by the jury upon consideration of all the evidence adduced.
3. **An affidavit for a new trial** which only showed that the affiant was told by another person that certain physicians named had said that they believed that a *post mortem* examination held by them justified a certain theory as to the cause of death, was too remote a showing, even though the theory advanced would probably become an important factor in the retrial of the case wherein such affidavit was filed.

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

W. H. Morris, for plaintiffs in error, cited: *Elshire v. Schuyler*, 15 Neb., 561; *McClay v. Worrell*, 18 Neb., 52; *Wardell v. McConnell*, 23 Neb., 152; *Kerkow v. Bauer*, 15 Neb., 150; *Jones v. Bates*, 26 Neb., 693; *Roose v. Perkins*, 9 Neb., 304; *Curran v. Percival*, 21 Neb., 442; *Murphy v. Curran*, 24 Ill App., 475; *Steele v. Thompson*, 42 Mich., 594; *Raymond v. Miller*, 34 Neb., 381; *Wasson v. Palmer*, 13 Neb., 378; *Morehead v. Adams*, 18 Neb., 569; *Sandwich Mfg. Co. v. Shiley*, 15 Neb., 109.

W. Henry Smith, *J. H. Grim*, and *A. G. Wolfenbarger*, *contra*, cited: *Roberts v. Taylor*, 19 Neb., 184; *Buckmaster*

v. McElroy, 20 Neb., 557; *Warrick v. Rounds*, 17 Neb., 411; *McDougal v. Giacomini*, 13 Neb., 431; *Gaunt v. Wainman*, 3 Bing. N. C. [Eng.], 67; *Marchant v. Errington*, 6 Bing. N. C. [Eng.], 79; *Bissell v. Spring Valley Township*, 124 U. S., 225; *Daggett v. Daggett*, 143 Mass., 516; *Phillips v. Root*, 68 Wis., 128; *Rantz v. Barnes*, 40 O. St., 43; *Arnold v. Barkalow*, 73 Ia., 183; Black, Intoxicating Liquors, sec. 300; *Miller v. Patterson*, 31 O. St., 419.

RYAN, C.

This action was brought in the district court of Saline county by the defendants in error against Vencil Kubicek and the sureties on his bond, Wenzel S. Chmelir and the sureties on his bond, and Frank Nedela and the sureties on his bond. Plaintiff Mary E. Sawyer sued on behalf of herself as the widow of Andrew J. Sawyer, deceased, and on behalf of the minor children of herself and the said Andrew J. Sawyer. The bonds above referred to were given in compliance with section 6 of chapter 50 of the Compiled Statutes. The facts charged as breaches of the conditions of the bonds aforesaid during the years 1888, 1889, and 1890, as against the principals Chmelir and Nedela, and upon the bond of Kubicek, which covered the time intervening between April 30, 1888, and April 30, 1889, and the resulting damages therefrom, were in the petition stated in the following language: "That the deceased, Andrew J. Sawyer, had been addicted more or less during the period aforesaid to the intemperate use of intoxicating liquors; that plaintiff personally notified said saloon-keepers, defendants, doing business in the city of Crete, aforesaid, on several different occasions, not to sell intoxicating drinks or liquors to said Sawyer, but they continued [selling intoxicating drinks and liquors to said Sawyer]; that by reason of such sales said Sawyer became so addicted to strong drink that he became unfit and unable to

take care of his family or himself and spent most of his time and money in said saloons; that his health became greatly impaired and his family were reduced to very destitute circumstances; that he was forced to mortgage and finally sell most of his stock and other necessary equipments for carrying on his work and thereby leaving himself without proper means for the support of his family and for carrying on the farming business in which he was engaged; that he left the farm upon which he had been living and moved to the city of Crete afterwards, to-wit, on the 10th day of March, 1890; that for some time previous to moving to said city of Crete he was in a state of intoxication a considerable portion of his time, hardly recovering from one period of intoxication until he was in another; that the defendants sold the liquor which produced said intoxication; that said saloon-keepers, defendants, sold and furnished said Sawyer intoxicating drinks and liquors steadily until afterwards, to-wit, on April 12, 1890, he visited the saloon of said defendants, and was by them furnished intoxicating drinks and liquor which he there drank, and by reason of said drinking became intoxicated; that he never returned to his home again; that afterwards, to-wit, on the 20th day of April, 1890, he was found in the Big Blue river dead; that the death of said Sawyer was caused by the intoxicating drinks and liquor sold to him and drank by him in the saloons of said defendants, producing said intoxication as aforesaid. The plaintiff further alleges that aside from the effects of the drink habit said Sawyer was possessed of good health, and when not drinking was industrious and possessed of good practical business ability; that he was a kind husband and father and provided well for his family, and was well capable of providing not only for their present comfort, but of making good provision for their future wants; that the plaintiffs were dependent upon the said Sawyer for their support; that the proceeds of his labor and earnings amounted to about the sum of $1,000 per

year, which he applied to the support of these plaintiffs; that the plaintiff and said minor children constitute one family and are entirely without the necessary means of support; that the plaintiffs have sustained damages in the premises in the sum of $10,000." There was an answer in the nature of a denial of each of the allegations of the petition, except such as described the relation of the plaintiff and her children to Andrew J. Sawyer, and the fact alleged in the petition that the defendants were engaged in the retail traffic of intoxicating liquors in the city of Crete, in Saline county, Nebraska, and had executed and filed bonds substantially in the terms alleged in plaintiff's petition. There were other averments of the answer which demand no consideration, because not insisted upon in argument; but there was in the answer a general denial of each averment of the petition not specifically admitted. By a supplemental answer the defendants averred that said plaintiffs recovered a judgment in said court for the sum of $700 on the 28th day of June, 1891, on account of damages sustained by said plaintiffs and in full of said damages by reason of the sale of intoxicating liquors to Andrew J. Sawyer during the time from and including May 1, 1888, until February 14, 1889, and that since said 29th day of June, 1891, the said judgment of $700 had been fully paid and the damages so sustained by said plaintiffs by the sale of said intoxicating liquors had been fully satisfied, and that all liability therefor on the part of the defendants had thereby been fully discharged. By reply the affirmative allegations of the answer were denied. There was a verdict and judgment in favor of the plaintiffs against the defendants for the sum of $1,500.

1. It is argued by the plaintiffs in error that the issue presented was as to the damages occasioned to the defendants in error by reason of the sale of intoxicating liquors to deceased on the 12th day of April, 1890, and that all else "is matter by way of recital of the happenings that

led to the event of death, but that the issue intended to be presented was that defendants in error have suffered in their means of support by reason of the excessive use of intoxicating liquors by Sawyer, furnished by plaintiffs in error on the 12th day of April, 1890, and that the death of Sawyer resulted therefrom, thereby rendering the loss to defendants in error permanent." In this construction of the petition we cannot concur. It is true the culmination of results attendant upon the sale of liquors charged was the death of Andrew J. Sawyer, on or soon after the 12th day of April, 1890, but the other matters alleged were such as partially withdrew, if they did not wholly destroy, the support to which the plaintiff and her children were entitled. It is true that just preceding the statement of the death of Andrew J. Sawyer it was alleged in the petition that the defendants furnished intoxicating drinks and liquors, which he drank, and by reason of which drinking became intoxicated. The connection between the intoxication and the death is stated in this language: That the death of Sawyer "was caused by the intoxicating drinks and liquors sold to him and drank by him in the saloons of said defendants, producing intoxication as aforesaid." The antecedent intoxication referred to may be that of the 12th of April, 1890. It is not, however, necessarily limited to the intoxication of that date. The petition alleged that for some time previous to moving to the city of Crete (on March 10, 1890), he was in a state of intoxication a considerable portion of his time, hardly recovering from one state of intoxication until he was in another. There is no such limitation contained in the petition as would restrict these allegations to any particular time or year, especially when it is borne in mind that preceding the above averments there were allegations in effect that Sawyer had, during the periods in which the plaintiffs in error were doing business, been addicted to the intemperate use of intoxicating liquors. A fair construction of the pleading

under consideration would refer the intoxication to which was attributable the death of Andrew J. Sawyer, as well to what had preceded that on the 12th day of April, 1890, as to the intoxication brought on by the sales of liquor to him on that day. In *Elshire v. Schuyler*, 15 Neb., 561, it was held that the statute in effect declares the act of producing intoxication a wrong, and makes every one who has contributed to it by furnishing intoxicating liquors a wrong-doer and liable. Section 15, chapter 50, Compiled Statutes, provides: "The person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic; he shall support all paupers, widows, and orphans, and the expenses of all civil and criminal prosecutions growing out of or justly attributed to his traffic in intoxicating drinks; said damages and expenses to be recovered in any court of competent jurisdiction by a civil action on the bond named and required in section 6 of this act." By section 16 of the same chapter it is provided: "It shall be lawful for any married woman, or any other person at her request, to institute and maintain, in her own name, a suit on any such bond for all damages sustained by herself and children on account of such traffic." As to the evidence necessary on a trial of a case of the kind above contemplated, it is provided in section 18 of this chapter that "in an action for damages brought by a married woman, or other person whose support legally devolves upon a person disqualified by intemperance from earning the same, it shall only be necessary to prove that the defendant has given or sold intoxicating drinks to such person during the period of such disqualification." In apt language it was charged in the petition that the "disqualification" of the deceased arose in 1888 and was continued until his death, which occurred between April 12 and April 20, 1890. As there was sufficient proof to show that each of the principals in the bonds referred to sold intoxicating liquors to Andrew J.

Sawyer within the period covered by the bond of each and while the disqualification of the deceased had existence, and as it was shown that the death of Andrew J. Sawyer simply rendered permanent and complete his previously existing disqualification, it results, in our opinion, that the defendant Kubicek, equally with the other saloon-keepers,—principals in the bonds sued on,—was properly held liable. This holding is not new in the jurisprudence of this state, for in the case of *Wardell v. McConnell*, 23 Neb., on page 152, this language is used: "There can be no apportionment of the damages among the different defendants. If they are liable at all, they are liable for the whole term of the disqualification, provided that during that time the principal, while held by the bond signed by his sureties, contributed to the disqualification by the sale of intoxicating drinks. (*Roose v. Perkins*, 9 Neb., 304; *McClay v. Worrall*, 18 Neb., 44.) If the disqualification terminated with the end of the license year, the further liability of the principal and his sureties would be thus ended; but if it continue without any intermission for a longer period, the liability must also be held to continue with it." In *McClay v. Worrall*, 18 Neb., on page 52, it is said: "By the fifth and sixth prayers the court is asked to tell the jury that the plaintiff cannot recover unless the death of David S. Worrall was caused solely by the traffic of the defendants. I understand the law to be otherwise, and that if—whatever the fatal cause was—if it was inspired or contributed to by the state of intoxication caused in whole or in part by the said traffic of the defendants, they are liable."

2. It is contended that the district court did not limit the right of recovery of the defendants in error, by instruction or otherwise, to such damages as were shown to have resulted from the disqualification of Sawyer after February 20, 1889, the date of filing the petition in the case of Mary E. Sawyer v. Albert Kempkas, for the recovery of damages on like grounds with those on which damages are

claimed in this case. This contention has led to a discussion between counsel for the respective parties as to the extent to which the doctrine of *res judicata* should be held applicable on account of the adjudication referred to. In the introduction of evidence no objection seems to have been made on the grounds stated; the court, however, instructed the jury thus: "4. In this action the defendants pleaded, by way of supplemental answer, that the plaintiffs herein have heretofore in an action in this court, wherein the same plaintiffs were plaintiffs and one Albert Kempkas and others were defendants, and that said supplemental answer contained an allegation that a judgment was recovered in said action for the same damages occurring during the same period, which damages are sued for and claimed in this action. Wherefore the jury are instructed that the plaintiffs will be estopped from recovering in this action for any of said items of damages included and considered in the action mentioned in said supplemental answer." Again, in instruction No. 3 the following language is used: "A recovery and satisfaction by the parties injured against one or more would constitute an effectual bar to any recovery against another or others who may have in part likewise contributed to cause the intoxication for such items of damages as the testimony in the case shows were litigated in any former action." Whether or not there was a technical estoppel is immaterial in view of the language employed in the instructions from which quotations have just been made. The plaintiffs in error could claim no more than that for the items for which a recovery was had in a former case, no further recovery should be permitted. The instructions required the jury to leave out of consideration all items for which a recovery had been had, thus rendering unavoidable the result for which plaintiffs in error contend.

It is further insisted that the jury were not properly instructed as to the measure of damages which should govern

the recovery of the defendants in error. In this respect the instructions are not as full and clear as is desirable in such cases. The second of the instructions asked by the plaintiffs and given was in the following language: "If you believe the said Andrew J. Sawyer became disqualified by intemperance for the support of his wife and children, the plaintiffs, because of excessive drinking in the licensed saloons of the defendants during the period of such licenses as set forth in the plaintiffs' petition, and by means of such traffic and drinking became periodically or frequently intoxicated so as to disqualify him for the support of his wife and children, the plaintiff would be entitled to recover all damages sustained by them by means of such traffic and by means of such sales by defendants to said Andrew J. Sawyer while so intoxicated or under the influence of liquor." It would perhaps have been better if there had been an instruction which restricted the right of recovery to the loss of support of Sawyer's wife and children in specific terms. It is probable, however, that the jury understood the instruction just quoted as implying such a limitation. In instruction No. 5, asked by the plaintiffs in error, the limitation just referred to was embodied in express terms. In the petitions in error, however, each assignment of error as to the refusal to give this fifth instruction was coupled with the conjunctive assignment as to the refusal to give the first instruction asked by the plaintiffs in error, which was to the effect that the contribution of liquor by the wife to the intoxication of her husband would bar a right of recovery in an action of this nature brought by her. The court properly refused the first instruction asked by the plaintiffs in error. We, therefore, cannot consider the alleged error as to the fifth instruction, for the reason that the assignment is directed against the refusal as to both the first and fifth jointly.

3. The final contention of the plaintiffs in error is that the district court erred in refusing a new trial because of

newly discovered evidence shown to exist by affidavits attached to the motion for a new trial. The chief affidavit referred to was made by W. H. Morris, one of the attorneys for the plaintiffs in error. The other affidavit simply referred to that, and the affiants in each stated that they never knew until after the trial of the existence of the facts stated in the chief affidavit. The material statements in the affidavit of W. H. Morris were as follows: "That this affiant knew not that any *post mortem* examination had ever been had of the body of said Sawyer, and never learned of the same until after this cause had been submitted to the jury impaneled in above entitled cause, and only learned of the same from one Pratt, a brother-in-law of the plaintiff, who informed this affiant that within a few days after said deceased Sawyer had been buried his body was taken up by request and direction of the family and friends of said deceased, and that they procured Doctors Baird of Pleasant Hill, Butin and Painter of Dorchester to make such *post mortem*, and that said doctors would testify and had so stated from such *post mortem* they had concluded that said Sawyer was not drowned, but was dead before he was placed in the Blue river, and affiant further says that knowledge of such facts and of the witnesses of them was kept from the defendants by the plaintiffs." It would seem from these statements that the affiant W. H. Morris in his affidavit simply stated what he had been told by Mr. Pratt what three doctors had said was their opinion of the result of the *post mortem* examination of the body of Andrew J. Sawyer, had several days after his death. At best, the testimony of alleged experts as to probabilities of the nature of those above indicated is sufficiently unreliable when given at first hands. It would be unendurable if these doubts were doubly intensified by the correctness of the facts being made to depend upon two hearsay statements. We conclude, therefore, that the district court was right in holding that the showing as to newly discovered evidence

was insufficient to entitle the plaintiffs in error to a new trial. The judgment of the district court is

AFFIRMED.

WELCOME SMITH V. RIVERSIDE PARK ASSOCIATION.

FILED OCTOBER 17, 1894. No. 5871.

1. **Justice of the Peace: JUDGMENT BY DEFAULT.** Where judgment has been rendered by default against a defendant in his absence, it is the duty of the justice of the peace by whom it has been rendered to set aside such judgment upon compliance on the part of the defendant with the conditions prescribed by section 1001 of the Code of Civil Procedure.
2. ——: **ORDER OPENING JUDGMENT.** Before defendant can be held to a compliance with the third condition prescribed in section 1001 of the Code of Civil Procedure, the justice of the peace by whom the judgment was rendered should make such order as to opening the judgment, and as to the time and place of the trial to be had, as will enable the defendant to give the notice required by the statute.

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

M. Randall, for plaintiff in error.

J. W. Sparks, contra.

RYAN, C.

This action was commenced before a justice of the peace in Merrick county on the 11th day of October, 1892. Summons was issued and placed in the hands of the sheriff for service, returnable October 17, 1892, at 10 o'clock A. M. Service was made on the defendant on October 12 following. After service on the defendant, the sheriff held

the summons in his possession until after the return day thereof, and made his return on the 18th day of October, 1892. On the 17th day of that month, the return day of the summons, the case was continued, without the knowledge of defendant, to October 19, at 9 o'clock A. M., at which time judgment was rendered against the defendant by default in his absence. On the 25th of October, 1892, which was within ten days of the rendition of said judgment, the defendant appeared before the aforesaid justice and moved the court to open said judgment, then and there offering in said motion to confess judgment for costs made up to that time, and assigning, among other reasons, that judgment had been rendered in defendant's absence by default. This motion was overruled, to which ruling the defendant took an exception. The case was thereupon removed to the district court of Merrick county, wherein said judgment was reversed and the costs taxed to the defendant in error accruing up to the time of filing his motion to open the judgment; all subsequent costs being taxed to the plaintiff in error.

Section 1001 of the Code of Civil Procedure provides that when judgment shall have been rendered against a defendant in his absence, in the court of a justice of the peace, the same may be set aside upon the following conditions: First, that his motion be made within ten days after such judgment was entered; second, that he pay or confess judgment for the costs awarded against him; third, that he notify in writing the opposite party, his agent or attorney, or cause it to be done, of the opening of said judgment and of the time and place of trial, at least five days before the time, if the party reside in the county, and if he be not a resident of the county, by leaving a written notice thereof at the office of the justice ten days before the trial. Before the justice of the peace the conditions above prescribed were literally complied with by the defendant, except, of course, that he gave no notice of the

opening of the judgment and of the time and place of trial, for the very good reason that the judgment was not opened, conditionally or otherwise, and the justice of the peace, whose duty it was to fix the time and place of trial, refused to do either. Very properly then, under such circumstances, the district court held the ruling of the justice of the peace erroneous, reversed the case, and set it down for trial. The judgment of the district court is

AFFIRMED.

J. L. WARD ET AL., V. WESTERN HORSE & CATTLE INSURANCE COMPANY.

FILED OCTOBER 17, 1894. NO. 5439.

1. **Appearance.** A general appearance may be made in the district court by prosecuting error proceedings thereto, by cross-examining a witness whose evidence was taken by deposition, and by consenting to a trial of the merits of the case to the court, in open court, waiving a jury at the same time.
2. **Review: FAILURE TO FILE MOTION FOR NEW TRIAL.** Errors of law alleged to have taken place in the district court cannot be reviewed in this court when no motion for a new trial was filed in the trial court.

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

William M. Clark and *S. W. Christy*, for plaintiffs in error.

Thomas H. Matters, contra.

RYAN, C.

This action was originally commenced before a justice of the peace of Harvard precinct, in Clay county, by the de-

fendant in error against the plaintiffs in error, for the recovery of $60, a balance alleged to have been due on account, with interest thereon. A summons was duly issued, returnable on September 10, 1888. After several continuances, judgment was rendered in favor of defendant in error on December 4 following. To set aside this judgment, error proceedings were prosecuted to the district court, wherein the judgment was vacated because of error made to appear in the record, and the cause was set down for trial in said district court, the plaintiffs being required to file petition in thirty days, and defendant to file answer in thirty days thereafter. The petition was not filed as required by said order, but afterward, on leave thereto granted, it was filed *instanter*. A trial was had and judgment rendered in favor of the defendant in error for the amount by it claimed. The plaintiffs in error entered a special appearance in the district court and filed objections to the jurisdiction of that court over their persons. It is now insisted that there was no general appearance, and that, therefore, the plaintiffs in error are in a situation such that they can raise this question of jurisdiction. In this view we cannot concur, for the reasons, first, the proceedings which brought the case into the district court were prosecuted by the present plaintiffs in error; second, the plaintiffs in error made an appearance by attorney for the purpose of cross-examining C. E. Burmester, a witness whose testimony was taken by deposition in Omaha; and third, in the record of the final judgment rendered it is recited that "this cause coming on for trial, it is, by consent of both parties in open court, tried to the court without the intervention of a jury." To enable us to review a judgment rendered as this was on account of alleged errors it is essential that there should have been filed a motion for a new trial in the trial court. This was not done. The judgment of the district court is

AFFIRMED.

WILLIAM J. TURNER ET AL. v. TIMOTHY W. TOWNSEND.

FILED OCTOBER 17, 1894. No. 5649.

1. **Landlord and Tenant: REPAIR OF PREMISES.** The obligation of a landlord, in any case, to repair leased premises rests solely on express contract, and without an express contract to that effect, a landlord is neither bound to repair leased premises himself nor to pay for repairs made by his tenant.

2. ———: **LEASE: INJURY TO PREMISES CAUSED BY STORM: COST OF REPAIR.** A lease of premises between a landlord and his tenant contained the following provision: "And the said party of the second part further covenants with the said parties of the first part that at the expiration of the time in this lease mentioned he will yield up the said demised premises to the said parties of the first part in as good condition as when the same were entered upon by the said party of the second part, loss by fire or inevitable accident excepted." During the tenancy a front window of the building on the leased premises was destroyed by a storm. The landlord refused to restore the window. The tenant caused the window to be restored, and sued the landlord for the expense thereof. *Held*, That the tenant had no cause of action.

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

M. L. Easterday, for plaintiffs in error, cited: Gear, Landlord & Tenant, sec. 104; 1 Wood, Landlord & Tenant [2d ed.], p. 311; *Witty v. Matthews*, 52 N. Y., 512; *Mumford v. Brown*, 6 Cow. [N. Y.], 475; *Foster v. Peyser*, 9 Cush. [Mass.], 242; *Krueger v. Ferrant*, 43 Am. Rep. [Minn.], 223; 12 Am. & Eng. Ency. Law, p. 720; *Weigall v. Waters*, 6 Term Rep. [Eng.], 488.

Atkinson & Doty, contra, cited: *Johnson v. Dixon*, 1 Daly [N. Y.], 178; *Ball v. Wyeth*, 90 Mass., 279; *United States v. Bostwick*, 94 U. S., 66; *Levey v. Dyess*, 51 Miss., 501; *Van Wormer v. Crane*, 16 N. W. Rep. [Mich.], 686;

Phillips v. Stevens, 16 Mass., 238; Wood, Landlord & Tenant, sec. 602; *Warner v. Hitchins*, 5 Barb. [N. Y.], 666; *Miller v. Morris*, 55 Tex., 412; *Hughes v. Vanstone*, 24 Mo. App., 637; *Myers v. Burns*, 35 N. Y., 269; *Buck v. Rodgers*, 39 Ind., 222; *Wright v. Latin*, 38 Ill., 293; *Lewis v. Chisholm*, 68 Ga., 40; *Warren v. Wagner*, 75 Ala., 188.

RAGAN, C.

On the 14th day of August, 1888, William J. Turner leased lot A of Baird's subdivision of lots 7 and 8, in block 67, in the city of Lincoln, Lancaster county, Nebraska, to Timothy W. Townsend for a term of two years from October 1, 1888. The lease was in writing, and by the terms thereof Townsend was to pay Turner $135 per month rent for said premises. The first payment of rent to be made on the 1st of October, 1888, and a like payment on the first of each month thereafter. The lease contained the following clauses: "And the said party of the second part [Townsend] further covenants with the said party of the first part [Turner] that at the expiration of the time he will yield up the said demised premises to the said party of the first part in as good condition as when the same were entered upon by the party of the second part, loss by fire or inevitable accident excepted. And it is also agreed by and between said parties that the party of the first part shall be at no expense for repairs, or water, or gas, or for anything else during the term of this lease." Townsend paid all his rent promptly up to and including the payment due May 1, 1890. Some time in the last named month one of the front windows in the leased building was broken out by a storm of wind and rain. Townsend notified Turner of the destruction of the window, and requested him to restore it, which Turner refused to do. Townsend thereupon caused the window to be restored at a cost to himself of $9.50; and when the rent fell due on

June 1, 1890, tendered Turner in payment thereof $125.50 in money and the bill of $9.50 which he had paid for restoring the window. Turner refused to accept this money and bill in full for the rent, and brought suit therefor before a justice of the peace. On the trial before the justice Turner accepted the $125.50 tendered by Townsend in part payment of the month's rent, but not in full; and recovered a judgment against Townsend before the justice for the remainder of the rent, $9.50. Townsend appealed from the judgment of the justice of the peace to the district court. Turner filed in that court his petition in the action, setting up substantially the facts above. To this petition Townsend filed an answer setting up the lease, the terms of it, the destruction of the window by the storm, Turner's refusal to restore the window, that he, Townsend, had caused it to be restored at a cost to himself of $9.50, and asked to have said sum set off against the rent due Turner for the month of June, 1890. To this answer Turner filed a general demurrer, which the court overruled, and rendered a judgment dismissing Turner's action. To reverse this action of the district court Turner has prosecuted proceedings in error here.

It will be seen from this statement that the only question involved in this case is whether Turner was under any legal obligation to keep the premises he had leased to Townsend in repair during the existence of the lease. The obligation of a landlord in any case to repair and rebuild leased premises rests solely on express contract, and without an express contract to that effect the landlord is neither bound to repair leased premises himself, nor to pay for repairs made by the tenant. (*Witty v. Matthews*, 52 N. Y., 512.) It is not in the power of a tenant to make repairs at the expense of his landlord, unless there be a special agreement between them authorizing him to do so. (*Mumford v. Brown*, 6 Cow. [N. Y.], 474.) The lease, then, contains no covenant or contract on the part of the landlord to make

repairs, but expressly provides that the landlord shall not be liable for any repairs made. There is nothing in the lease which can be construed into a covenant on the part of the lessor to keep the premises he had leased to Townsend in repair.

Counsel for Townsend have argued this case upon the theory that the destruction of the window by a storm was an inevitable accident, and for that reason that their client could not be compelled by Turner to restore the window, or to pay for its restoration had it been restored by Turner, and they therefore conclude that Turner is liable for the restoration of the window. Whether or not Townsend could be compelled by Turner to restore the destroyed window or to pay for its restoration is not in this case. It may be that the destruction of the window by a storm was an inevitable accident within the meaning of the lease; and that if the window had not been restored at the expiration of the lease, Townsend could not then be compelled to restore it or to pay for its being restored. The judgment of the district court is

REVERSED.

LEROY H. GATES V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED OCTOBER 17, 1894. No. 5804.

1. **Carriers of Goods:** DUTY TO DELIVER CONSIGNMENT. The duty of a common carrier of goods is not only to safely carry, but to deliver; and delivery must be made within a reasonable time, at the place, and to the person to whom the goods were consigned.

2. ———: ———. The delivery of goods by a common carrier to the consignee thereof is made at the peril of the carrier, unless when made the consignee surrenders the bill of lading either made or indorsed to himself.

3. **Assignability of Bill of Lading.** The bill of lading issued by carrier to the owner or shipper is the symbol of ownership of the goods shipped, and though not negotiable is assignable.

4. **Carriers:** DELIVERY OF GOODS: SURRENDER OF BILL OF LADING. A railway company received from a connecting carrier at Omaha, Nebraska, a car of potatoes, consigned to W. at Bradshaw, Nebraska. W. was the agent of the owner of the potatoes. On arrival of the car of potatoes at Bradshaw the railway company notified W. thereof, and at his direction delivered the potatoes to one K., to whom W., acting for the owner, had sold the potatoes. *Held*, (1) That the delivery to K. was, in effect, a delivery to W., the consignee; (2) that K. having failed to pay for the potatoes, the carrier was not liable to the owner thereof for their value, although the bill of lading for the goods was not surrendered to the carrier before delivery, as the instruction of W. to deliver to K. was, in effect, the owner's instruction, and it not appearing that the bill of lading for the goods had been assigned or indorsed to any one by the owner or shipper.

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

A statement of the case appears in the opinion.

W. T. Thompson, for plaintiff in error:

In argument reference was made to the following authorities: On the first proposition discussed in the first paragraph of the opinion: *Tootle v. Maben*, 21 Neb., 618; *Easterly v. Van Slyke*, 21 Neb., 611; *Newton Wagon Co. v. Diers*, 10 Neb., 284; *Turner v. O'Brien*, 11 Neb., 108; *Steele v. Russell*, 5 Neb., 211; *Smith v. Evans*, 13 Neb., 314. On the second point in the first paragraph of the opinion: *Shepherd v. Lanfear*, 25 Am. Dec. [La.], 181; *Russell v. Livingston*, 16 N. Y., 515; *Adams v. Blankenstein*, 2 Cal., 413. On the third point in the first paragraph of the opinion: 1 Thompson, Trials, sec. 1160; Con. Stats., sec. 1791.

The second instruction given by the court upon request of the company was erroneous. (*Turner v. O'Brien*, 11 Neb., 109; *Sheldon v. Williams*, 11 Neb., 275; *Dunbier v. Day*, 12 Neb., 607; *Meredith v. Kennard*, 1 Neb., 319;

Curry v. State, 4 Neb., 545; *High v. Merchants Bank*, 6 Neb., 155; *Walrath v. State*, 8 Neb., 81; *Cropsey v. Averill*, 8 Neb., 152; *Hitchcock v. Shager*, 32 Neb., 477.)

The third instruction given by the court upon request of the company was erroneous. (*Edmunds v. Merchants Dispatch Transportation Co.*, 135 Mass., 283; *Price v. Oswego & S. R. Co.*, 50 N. Y., 213; *Duff v. Budd*, 3 Brad. & B. [Eng.], 177; *Sword v. Young*, 14 S. W. Rep. [Tenn.], 481; *Furman v. Union P. R. Co.*, 13 N. E. Rep. [N. Y.], 590; *Bank of Rochester v. Jones*, 4 Denio [N. Y.], 489; *Bean v. Sturtevant*, 28 Am. Dec. [N. H.], 389; *Harrington v. McShane*, 27 Am. Dec. [Pa.], 321; *Ward v. Green*, 16 Am. Dec. [N. Y.], 437.)

A. W. Agee and *Marquett & Deweese, contra*, cited: 1 Rorer, Railroads, 665; *Sumner v. Charlotte, C. & A. R. Co.*, 78 N. Car., 289.

RAGAN, C.

Leroy H. Gates sued the Chicago, Burlington & Quincy Railway Company (hereinafter called the "railway company") in the district court of Merrick county. Gates alleged as his cause of action against the railway company that on the 10th day of October, 1894, he delivered to it at Omaha, Nebraska, a car load of potatoes belonging to him, of the value of $513; that the railway company, for a consideration, undertook to safely and securely carry the car of potatoes to Bradshaw, Nebraska, and there deliver them to one A. B. Warrell, who was then and there his, Gates', agent; that the railway company did not deliver said car of potatoes to said Warrell or to any person authorized to receive the same. The answer of the railway company admitted that it received the car of potatoes, and contracted to carry them to Bradshaw, Nebraska, and there deliver them to Warrell, Gates' agent; and alleged that on their arrival at Bradshaw it delivered said car of

potatoes to Klock & Hankins by order of said consignee, Warrell. The reply of Gates denied the allegations of new matter in the answer. It will thus be seen that the chief issue litigated in this case was, whether Warrell instructed or authorized the railway company to deliver the car of potatoes to Klock & Hankins. The jury found this issue in favor of the railway company, and from the judgment pronounced upon such finding Gates brings the case here for review.

The errors assigned and argued in the brief of counsel for the plaintiff in error relate to the giving to the jury by the court of three instructions at the request of the railway company:

1. "The law does not favor double agencies; and where a person employs or procures an agent of a railroad company to act for him in the buying or selling of merchandise of any kind, such agent will, so far as such transaction is concerned, be deemed the agent alone of the person for whom he so acts in buying or selling of such merchandise, and not the agent of the railroad company. In this case, if you believe from the evidence that B. L. Foster acted in the interest and on the behalf of A. B. Warrell, and at his request in securing from Klock & Hankins an order for the car load of potatoes in question, and making the sale of such potatoes to Klock & Hankins, and in arranging for the assorting and weighing of the same, then you are instructed that in procuring such order and making such sale, and in conducting the transaction with Klock & Hankins concerning the sale and delivery of said potatoes, said Foster must be deemed the agent of said Warrell, and not of the said railroad company, and his action in delivering such potatoes to said Klock & Hankins will be binding on the plaintiff and said Warrell, and the defendant cannot be held liable for any of the acts of said Foster in delivering said potatoes to said Klock & Hankins." The correctness of this instruction is assailed on

three grounds: (1.) It is said that there was no issue made, either in the pleadings or evidence in the case, as to whether Foster, who was the railway company's agent at Bradshaw, was the agent of Warrell, the consignee of the car of potatoes, and for that reason the instruction is erroneous. The evidence in the case tended to show that Warrell had inquired of Foster whether the latter could find a purchaser for a car load or two of potatoes in Bradshaw; that Foster made some inquiries in Bradshaw for persons desiring to purchase a car load of potatoes, and that Klock & Hankins agreed to purchase a car load of potatoes of a certain quality at a certain price; that the car load of potatoes in controversy was shipped by Gates, or by Warrell, acting for him, to Bradshaw, consigned to Warrell, to fill the order given by Klock & Hankins to Foster; that after the car of potatoes arrived in Bradshaw, Klock & Hankins inspected them, and refused to take them because they were not of the quality they had agreed to buy; that communications immediately passed by wire between Warrell and Foster to the effect that Warrell instructed Foster to allow Klock & Hankins to take the potatoes, assort them, and do the best they could with them; and that in pursuance of these instructions from Warrell, Foster delivered the car of potatoes to Klock & Hankins. In view of this evidence we do not think that the instruction complained of is erroneous. (2.) The second objection urged to the instruction relates to the first sentence thereof. Counsel says: "The instruction is erroneous, because it contains a partial or incomplete statement of an abstract proposition of law, in this, that it contains the statement that 'Where a person employs or procures an agent of a railroad company to act for him in the buying or selling of merchandise, such agent will, so far as such transaction is concerned, be deemed the agent of the person for whom he so acts in the buying and selling of such merchandise, and not the agent of the railroad company.' * * * This rule is

given to the jury as an inflexible, inelastic, invariable rule. It is given without any exceptions, qualifications, or limitations whatever, while it is not an invariable rule that such an agent 'will be deemed alone the agent of the one for whom he acts in the buying or selling of such merchandise,' and especially is it not as applied to the case at bar." We do not think that the first sentence of this instruction misstated the law applicable to the facts in this case. The court did not tell the jury that one might not be an agent for two principals. He did tell them, and perhaps unnecessarily, that the law does not favor double agencies; and he told them that where a person employs the agent of a railroad company to act for him in the buying and selling of merchandise, such agent in such transaction is deemed to be the agent of the person for whom he acts in buying and selling, and that was correct. (3.) The third objection urged to the instruction is that it was couched in such langurge as to lead the jury to believe that there had been an actual sale of the potatoes in controversy to Klock & Hankins. We do not think that a fair criticism of the instruction.

2. The second error assigned relates to the giving by the court of instruction No. 2, as follows: "If you believe from a preponderance of the evidence that Klock & Hankins refused to accept the potatoes on their arrival, on the ground that they were in a bad condition and rotting, and that this fact was communicated to Warrell by Foster, and that Warrell thereupon directed Foster to have Klock & Hankins take the potatoes and assort them, and that Foster did, in pursuance of such direction, have Klock & Hankins take the potatoes from the car and assort them, then you are instructed that the defendant cannot be held liable for said potatoes, or for any difficulty or dispute which may have arisen between the plaintiff or Warrell on the one hand and Klock & Hankins on the other hand, and your verdict should be for the defendant." Counsel says

that this instruction is erroneous because it assumes that there was evidence in the record to show that Foster, the agent at Bradshaw, notified Warrell, Gates' agent, that Klock & Hankins has refused to accept the potatoes; and counsel insists that the record contains no such evidence. The evidence in the record is undisputed that Klock & Hankins did refuse to accept the potatoes, and that immediately afterwards communications by wire took place between Foster and Warrell with reference to the potatoes. Their testimony is as follows:

Foster's: Q. When you and Messrs. Klock & Hankins examined the potatoes in the car, state what they said about accepting the car load of potatoes.

A. They refused to accept them. I cannot quote their words, but they refused to accept them.

Q. Then what was done in the matter between you and them?

A. I tried to get them to take the car, and do the best they could with them, provided Mr. Warrell was willing, and told them I would go in and talk with him; and we all three went to the depot together.

Q. What occurred after you went to the depot?

A. Messrs. Klock & Hankins stopped at the window. I went into the office and called Mr. Warrell on the wire at Central City, and the following conversation took place: I explained as fully as I could to him the condition of the potatoes, and Mr. Warrell said, "Tell them to have the potatoes assorted." I turned around to the window and told them the conversation, and whether it was one of them or myself that said, "Have them assorted, and do the best you can with them," I don't remember, but I do distinctly remember that we three understood that that was the proposition to be made to Mr. Warrell on the wire in those words, and that Warrell assented to it.

Q. Now, please state, as near as you can, the language

you used in submitting their proposition to Mr. Warrell, and his reply.

A. To Mr. Warrell: "Shall they take the potatoes, and assort them, and do the best they can with them?" His reply was, "ay, ay,"—the customary assent in telegraphy.

Warrell's: Q. He wired you that the potatoes were rotten and that they would not accept them?

A. No, he did not.

Q. Do you want this jury to understand that, without having any notice that Klock & Hankins refused to accept the potatoes, you wired the agent at Bradshaw that they would have to sort them and weigh them?

A. He did not notify me.

Q. Do you mean to have the jury understand, at the time you wired the agent at Bradshaw, that Klock & Hankins would have to sort and weigh the potatoes; that you did not understand at that time they had refused to accept the potatoes?

A. I did not understand at that time.

Q. Why was it that you was telling the agent at Bradshaw that they would have to sort and weigh the potatoes, which you supposed they had accepted, sir?

A. He communicated with me, and it was just our talk over the wire.

Q. Do you mean to say that it is customary for an agent of a railroad company, when potatoes or merchandise are in a bad condition, to arrange with the customer about any settlement of any dispute between the seller and the purchaser of those things, or about arriving at their condition, the quantity of the good potatoes?

A. I did not consider there was anything to arrange at the time.

Q. Then why did you say to Foster that they would have to sort and weigh the potatoes, if there was nothing to arrange?

A. Simply because he asked me about it,—stated that there were some rotten potatoes in the car.

Q. What did he ask about the potatoes?

A. Simply told me there were some rotten potatoes in the car.

Q. You just now stated he asked you about the potatoes on account of rotten ones. What do you mean by that?

A. I mean he called me up and told me there were some rotten potatoes in the car.

Q. You mean to say that was after Klock & Hankins had accepted the potatoes?

A. My understanding was that they had accepted the potatoes at that time.

We think that this evidence was sufficient to justify the court in submitting to the jury the question as to whether Foster notified Warrell in the communication had with him by wire, that Klock & Hankins had refused to accept the potatoes.

3. "If you believe from all the evidence in this case that Warrell, the person to whom the potatoes were consigned, gave such instructions or directions to Foster concerning the assorting of the potatoes by Klock & Hankins, as might reasonably be, and were, understood by Foster to constitute an order or direction to deliver the potatoes to Klock & Hankins, and, acting on such instructions, Foster did deliver the same to Klock & Hankins, then such delivery must be deemed a delivery to said Warrell, and your verdict must be for the defendant." Of this instruction counsel says: "This instruction is prejudicial and erroneous, for the reason that it, in substance, tells the jury that the defendant will be released from liability for a delivery to other than the consignee upon the slightest showing of care." We do not think that the plaintiff in error has any just cause of complaint by reason of the giving of this instruction. It is undoubtedly true that the contract of a common carrier is not only to safely carry but to deliver;

and delivery must be made within a reasonable time, at the place, and to the person to whom the goods are consigned. The whole question litigated in this case was whether the railway company delivered the goods to Klock & Hankins by order of the consignee, Warrell. The jury found that Warrell directed the railway company to deliver the goods to Klock & Hankins, and the evidence supports that finding. Such delivery, then, was, in effect, a delivery to Warrell, the consignee.

It is said by counsel that the delivery of this car of potatoes to Klock & Hankins was negligently made and unauthorized, because the bill of lading was not presented by them. Doubtless the rule is that the delivery of goods by a common carrier to the consignee thereof is made at the peril of the carrier, unless when made the consignee surrenders the bill of lading either made or indorsed to himself. (*Furman v. Union P. R. Co.*, 106 N. Y., 579; *Weyand v. Atchison, T. & S. F. R. Co.*, 39 N. W. Rep. [Ia.], 899.) The reason for this rule is that the bill of lading is the symbol of ownership of the property, and though not negotiable is assignable. A shipper may deliver goods to a common carrier consigned to a purchaser of such goods, and at the same time make a draft or bill of exchange on the purchaser for the price of the goods shipped and attach thereto the bill of lading and his indorsement thereon for the goods. In such a case as this, and like cases, if the carrier deliver goods to the consignee thereof without the surrender by him of such a bill of lading, such delivery would be made at the peril of the carrier; and if the consignee failed to pay for the goods the carrier would be liable to the shipper or owner for their value. (*Furman v. Union P. R. Co.*, 106 N. Y., 579.) But the case at bar does not fall within the rules stated above. Warrell represented the owner of the potatoes, and acted for him, and the evidence tends to show, and the jury have found, that the owner of the potatoes, or Warrell for him,

contracted for their delivery to Klock & Hankins. The railway company, then, has not violated its contract, and is not liable in this action. (*Dobbin v. Michigan C. R. Co.*, 21 Am. & Eng. R. Cases [Mich.], 85.) The judgment of the district court is

AFFIRMED.

JOSEPH HOLUB V. MALCOLM C. MITCHELL.

FILED OCTOBER 17, 1894. NO. 5700.

1. **Appeal:** JUSTICE OF THE PEACE: JUDGMENT ON AWARD. A judgment rendered by a justice of the peace on an award made by arbitrators under the provisions of article 3, chapter 2, Compiled Statutes, 1893, is no more conclusive or final than an ordinary judgment at law rendered by such justice, and may be appealed from by either of the parties to such award.
2. ———: TRIAL DE NOVO. A party who duly appeals to the district court from a judgment rendered against him by a justice of the peace is entitled to a trial *de novo*, in the appellate court, of the facts upon which the judgment appealed from was rendered.
3. ———: HERD LAW: AWARD. The provisions of sections 991-995 of the Code of Civil Procedure are not applicable to awards made under article 3, chapter 2, Compiled Statutes, 1893.

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

Hastings & McGintie and *Robert Ryan*, for plaintiff in error.

O. M. Quackenbush, contra.

RAGAN, C.

On the 31st day of March, 1891, Malcolm C. Mitchell caused some hogs belonging to one Joseph Holub, which were found trespassing upon the cultivated lands of the

former, to be impounded in pursuance of the provisions of article 3, chapter 2, Compiled Statutes, 1893. Mitchell and Holub being unable to agree on the amount of damages and costs sustained by the former and resulting from the trespassing of said hogs, arbitrators, selected by said parties under section 5 of said article, assessed such damages, and, according to section 6 of said article, made in writing an award of such damages. Holub having failed for five days to pay the award so made, Mitchell filed said award with a justice of the peace of Saline county, who rendered judgment thereon in favor of Mitchell and against Holub for $19 and costs. Within ten days after the filing of said award with said justice of the peace, Holub duly appealed therefrom to the district court, and Mitchell there filed a petition against Holub in words and figures as follows:

"Now comes said plaintiff and alleges for cause of action against the defendant:

"1. That on the 21st day of March, 1891, the defendant's hogs, nine in number, did trespass upon the cultivated lands in the possession of this plaintiff, and thereupon the plaintiff took up and impounded said stock.

"2. That on the same day plaintiff served upon the defendant a notice of the taking up of said stock, a copy of said notice being hereto attached and marked 'Exhibit A.'

"3. That on the 23d day of March, A. D. 1891, the defendant notified this plaintiff that he objected to the amount of damages claimed, and appointed William Denton as his arbitrator; that on the same day the said William Denton and Henry Hicks, the arbitrators appointed by the defendant and this plaintiff, inquired into the damages done and made an award in writing which is hereto attached and marked 'Exhibit B;' that the said defendant Joseph Holub failed and refused to pay said award for five days after the rendition of the same, whereupon, on the 31st day of March, A. D. 1891, plaintiff filed said award with J. H. Squires, a justice of the peace in and for said county,

and asked the court to render judgment thereon, and on the 1st day of April, A. D. 1891, said justice did render judgment thereon for the sum of $19 and costs, taxed at $1.05; that said judgment has never been reversed, and now unpaid. Wherefore plaintiff prays that said award be adjudged valid and that he have and recover thereon from the defendant the sum of $19 and costs of suit."

To this petition Holub filed a demurrer, alleging as grounds thereof that said petition did not state facts sufficient to constitute a cause of action. The district court overruled the demurrer and rendered judgment in favor of Mitchell for the amount claimed in his petition, to reverse which judgment Holub prosecutes proceedings in error to this court.

It will be observed that there is no allegation in the petition of any damages sustained by Mitchell by reason of the trespassing of Holub's hogs. It appears that the learned judge of the district court was of opinion that the validity and conclusiveness of the award made in this case by the arbitrators, and filed with the justice of the peace, were to be determined in the manner provided by sections 991–995, of the Code of Civil Procedure, and that, as the appellant Holub had not filed with said justice an affidavit stating that he verily believed that such award was obtained by fraud, corruption, or other undue means, therefore the award made was final, and that neither it nor the judgment rendered thereon by the justice of the peace could be appealed from. We are of opinion that said sections of the Code of Civil Procedure are not applicable to awards made under said article 3 of said chapter 2. By the provisions of said sections of the Code of Civil Procedure, parties between whom a dispute exists are permitted to submit the matter in dispute to arbitrators, and the award made by them and filed with the justice of the peace is conclusive and binding upon parties to the dispute, unless attacked for fraud, corruption, or other undue means; but in the arbi-

tration proceedings provided for by said sections of the Code of Civil Procedure the disputing parties, and each of them, act voluntarily, whereas by the provisions of section 4 of said article 3, chapter 2, it is provided that if the owner of the trespassing stock shall refuse, within forty-eight hours after being notified in writing, to pay the damages claimed to have been done by his stock, and he shall refuse to appoint an arbitrator to represent his interest, his stock shall be sold as upon execution. The arbitration, then, provided for by said article 3 of said chapter 2 is not a voluntary one; and by section 6 of said article it is expressly provided that either party may appeal from the award made by the arbitrators, or from the judgment rendered on such award by a justice of the peace. A judgment rendered by a justice of the peace on an award made by arbitrators under said article 3 of said chapter 2 is no more conclusive or final than an ordinary judgment at law rendered by such justice of the peace, and may be appealed from by either of the parties to said dispute or award; and a party who duly appeals to the district court from a judgment rendered against him by a justice of the peace is entitled to a trial *de novo*, in the appellate court, of the facts upon which the judgment or award appealed from was rendered. The judgment of the district court is reversed and the case remanded with instructions to sustain the demurrer of Holub to Mitchell's petition, with leave to Mitchell, if he so desires, to amend his petition.

REVERSED AND REMANDED.

RYAN, C., not sitting.

CARRIE STOVER ET AL. V. THOMAS A. HAZELBAKER.

FILED OCTOBER 17, 1894. NO. 5002.

1. **Forcible Entry and Detainer:** FINDING OF FACT. The only finding of fact that can be lawfully made in the trial of a forcible detainer case is whether or not the defendant therein is guilty of forcibly detaining the premises.

2. ———: JUDGMENT. The only judgment that can be pronounced in such a case is that the plaintiff have restitution of the premises sued for, or that the plaintiff's action be dismissed and that the defendant go hence without day.

3. **Landlord and Tenant:** FORFEITURE OF LEASE: WAIVER BY ACCEPTANCE OF RENT. The acceptance of rent, by a landlord from his tenant, which falls due after the forfeiture of the lease, declared by the landlord for the non-payment of an installment of rent by the tenant, operates as a waiver by the landlord of his right to insist upon a forfeiture of the lease because of the tenant's default.

4. ———: FORCIBLE ENTRY AND DETENTION. A landlord brought before a justice of the peace a forcible detainer suit against his tenant to recover the leased premises. The basis of the action was that the tenant had failed to pay the installment of rent due by the terms of the lease on April 5, 1890. The landlord had judgment of restitution, and the tenant appealed to the district court. Pending the appeal, the monthly installments of rent due subsequent to April 5, 1890, by the terms of the lease, were paid by the tenant and accepted by the landlord. The appellate court found the defendant guilty. *Held*, Error.

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

The opinion contains a statement of the case.

S. W. Christy, for plaintiffs in error:

The acceptance of rent on a lease is a waiver of all defaults then existing. (*Collins v. Hasbrauck*, 15 Am. Rep. [N. Y.], 412; *Hornbrooks v. Lucas*, 49 Am. Rep. [W.

Va.], 277; *Wolffe v. Wolffe*, 44 Am. Rep. [Ala.], 526; *Paulman v. Cheney*, 18 Neb., 394; *Izard v. Kimmell*, 26 Neb., 51; *Schneider v. Lord*, 28 N. W. Rep. [Mich.], 773; *Gluck v. Elkan*, 30 N. W. Rep. [Minn.], 446.)

William M. Clark, contra.

Defendant in error did not file a brief.

RAGAN, C.

Thomas A. Hazelbaker leased to Carrie Stover a hotel in the village of Edgar, in Clay county, Nebraska. The lease was in writing, and by its terms Mrs. Stover was to occupy the premises from the 5th of March, 1890, to the 5th day of March, 1891, paying Hazelbaker as rent $50 on the 5th day of March, 1890, and a like sum on the 5th day of each month thereafter. When the rent fell due on the 5th of April, 1890, Mrs. Stover tendered in payment thereof to Hazelbaker a past due note she held against him, on which there was due as much as the rent amounted to. Hazelbaker refused to accept this note in payment of the rent due on April 5, 1890, and on the 19th of the same month brought a suit before a justice of the peace in forcible detainer against Mrs. Stover, alleging as ground for such suit her failure to pay the rent due April 5, 1890. From the judgment rendered by the justice of the peace an appeal was prosecuted to the district court, where the case was tried and a judgment rendered on the 29th day of May, 1891.

The installment of rent which was due to Hazelbaker by the terms of the lease on the 5th day of May, 1890, was on that date paid by Mrs. Stover to Hazelbaker, and accepted by him as rent from May 5 to June 5, 1890. All other installments of rent that matured after the 5th of May, 1890, by the terms of the lease, were promptly paid when due by Mrs. Stover and accepted by Hazelbaker in payment and discharge of the rent of the leased premises

up to and including the payment that fell due on March 5, 1891. These facts appearing on the trial had in the district court, the judge of that court, to whom the case was tried without the intervention of a jury, made the following finding: "That the defendant in this case * * * has not paid rent on the premises herein for the month beginning April 5, 1890, and ending May 5, 1890, and that the same was demanded; and court finds the defendant guilty. The court further finds that for each succeeding month since May, 5, 1890, the rent for the said premises has been paid by defendant and accepted by plaintiff. The court further finds that the plaintiff is entitled to a judgment against the defendant * * * for the sum of $50, the accrued rent for the month beginning April 5, 1890, and ending May 5, 1890, and interest thereon at the rate of seven per cent per annum from April 5, 1890." And thereupon the district court pronounced the following judgment: "It is therefore considered and adjudged by the court that the plaintiff * * * have and recover from the defendant * * * the sum of $53.85, and costs of this action." To reverse this judgment Mrs. Stover has prosecuted a petition in error to this court.

1. We do not see how it is possible to sustain this judgment. The only finding of fact that can be lawfully made in the trial of a forcible detainer case is whether or not the defendant therein is guilty of forcibly detaining the premises, and the only judgment that can be pronounced in such case is that the plaintiff have restitution of the premises sued for, or that the plaintiff's action be dismissed and that the defendant go hence without day. In the case at bar the right of Hazelbaker to recover from Mrs. Stover the rent for the premises from April 5, 1890, to May 5, 1890, or the right of Mrs. Stover to set-off against said rent the note she held against Hazelbaker, were not in issue. This was not a suit by Hazelbaker to recover rent for the premises.

2. But we are of opinion that the finding made by the district court, that Mrs. Stover was guilty of forcibly detaining the premises sued for, because the rent which matured on April 5, 1890, had not been paid, is contrary to the law of the case. The acceptance by Hazelbaker of the installment of rent which matured after the failure of Mrs. Stover to pay the installment which fell due on April 5, 1890, was a waiver by Hazelbaker of his right to insist on a forfeiture of the lease by reason of Mrs. Stover's failing to pay the rent from April 5 to May 5, 1890. The acceptance of rent by a landlord from his tenant, falling due after a forfeiture declared by the landlord for non-payment of an installment of rent, operates as a waiver of the breach complained of. (2 Taylor, Landlord & Tenant, sec. 497.) *Gomber v. Hackett*, 6 Wis., 323, is a case very much like the one at bar. The action was forcible detainer brought before a justice of the peace. The basis of the action was that the lessee, contrary to the terms of the lease, had cut some timber on the leased premises. The case was tried before a justice of the peace, and a judgment rendered in favor of the landlord. An appeal was then taken to the county court, and on a trial there the lessee proved that since the cutting of the timber by him he had paid to the landlord a year's rent of the leased premises, which by the terms of the lease became due subsequent to the time that he had cut the timber, which act was made the basis of the forcible detainer suit. The county court, however, decided that the acceptance of this rent by the landlord was not a defense, and a judgment of restitution was again rendered in favor of the landlord. The tenant then took the case on error to the supreme court of Wisconsin. Cole, justice, delivering the opinion of that court, said: "By this act [the acceptance of rent by the landlord from the tenant which accrued by the terms of the lease after the cutting of timber by the tenant] the landlord recognized the lease as a subsisting, operative con-

tract; and he ought not, therefore, to be permitted further to insist upon the forfeiture, if there had been one. It was optional with him to consider the estate forfeited for condition broken, and proceed to recover possession, or to waive the forfeiture and consider the lease valid. He has made his election and must abide by it. It would be very inequitable and unjust to permit the landlord to recover possession of the premises when he had already received from his tenant the rent for the use of the same to March, 1858;" and the judgment of the district court was reversed. To the same effect see *Watson v. Fletcher*, 49 Ill., 498; *Garnhart v. Finney*, 40 Mo., 449; *Lewis v. City of St. Louis*, 69 Mo., 595; *Johnson v. Douglass*, 73 Mo., 168. In the case at bar, if Mrs. Stover failed to pay the rent due by the terms of the lease on April 5, 1890, Hazelbaker then had the option of declaring the lease at an end and retaking possession of the leased premises; but having accepted the rent due him by the terms of the lease which matured on the 5th of the months of May, June, July, etc., he thereby estopped himself from insisting on a forfeiture of the lease for the failure of his tenant to pay rent from April 5 to May 5. The judgment of the district court is

REVERSED.

JAMES W. PORTER V. MERRICK COUNTY.

FILED OCTOBER 17, 1894. No. 5911.

Sheriffs: MILEAGE. For conveying insane patients to the hospital a sheriff is entitled to mileage at the rate of five cents per mile and not at the rate of ten cents per mile.

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

J. W. Sparks, for plaintiff in error.

A. Ewing, contra.

IRVINE, C.

A single question is presented by this record, to-wit: Is a sheriff, for conveying insane patients to the hospital entitled to mileage at ten or at five cents per mile? Chapter 28 of the Compiled Statutes relates generally to the subject of fees, and section 5 of that chapter relates to the fees of a sheriff. Among the items of that section is the following: "Traveling expenses for each mile actually and necessarily traveled, five cents." This section, without material difference, appeared in the Revised Statutes of 1866. Chapter 86, Compiled Statutes, relates to the penitentiary, and section 33 of that chapter is as follows: "The expenses and legal fees of sheriffs and other officers, incurred in conveying convicts to the penitentiary, shall be approved by the auditor of state, and paid out of the state treasury; said auditor may allow for said expenses and fees the following rates: For sheriff, three dollars per day; for each assistant or guard absolutely necessary, two dollars per day, and ten cents per mile for traveling expenses in going and coming." This section was in an act adopted in 1870. In 1873 an act was passed providing for the hospital for the insane. This act became chapter 40 of the Compiled Statutes, and section 50 of that chapter relates to the compensation of the commissioners of insanity and other officers. Among other things the section provides: "The examining physician shall be entitled to $5 for each case examined, and mileage at the rate of ten cents per mile each way. The sheriff shall be allowed for his personal service in conveying a patient to the hospital and returning therefrom, at the rate of $3 per day for the time necessary and actually employed, and mileage the same as is allowed in other cases, and for other service the same fees as for like serv-

ices in other cases." On the one side it is contended that the language, "mileage the same as is allowed in other cases," refers to the cases provided for in section 5, chapter 28. On the other side it is claimed that the phrase refers back either to the allowance in the same section of ten cents a mile to the examining physician, or if not that, then to chapter 86, section 33, fixing ten cents per mile for the conveyance of prisoners to the penitentiary, it being argued that the services there performed are analogous to this, and that is, therefore, the same mileage as is allowed in other cases within the meaning of the section we are construing. We think the former construction is correct. Had the legislature intended to measure the sheriff's mileage by that allowed the examining physician, it certainly would have used language more apt for that purpose. Had it intended to fix the same mileage as for conveying a prisoner, a reference would be made to that service, as the section providing for such mileage is the only one of that character. We think that section 50 plainly refers back to section 5 of chapter 28. The language is not that the sheriff shall receive such mileage as is allowed in like cases, but the same as is allowed in other cases, and this provision is immediately followed by one allowing for other services the same fees as for like services in other cases. The latter clause evidently refers back to section 5, which fixes the sheriff's fees for different services which he may perform, and we can see no reason for giving the section such a construction that the provision for mileage shall be made to refer to one section and the provision for other services to another one, when the latter contains an express and general provision as to mileage.

It is said, in argument, that there is no reason why the sheriff's mileage for conveying a patient to the hospital should be less than for conveying a prisoner to the penitentiary, or less than the mileage of the examining physician in cases of insanity. Were the question of construc-

tion very close, this argument might have sufficient weight to control the decision; but we think it so clearly appears that the legislature intended to refer back to section 5, chapter 28, that we cannot attach much importance to the argument. For some reason the legislature has seen fit to provide a different compensation in such cases. The conclusion so reached accords with the judgment rendered in the district court, which is, therefore,

AFFIRMED.

JOHN M. BARBER ET AL. V. JULIA A. HILDEBRAND ET AL.

FILED OCTOBER 17, 1894. No. 5504.

1. **Real Estate Brokers:** WHEN RIGHT TO COMMISSION ACCRUES: CONTRACTS. A real estate broker is ordinarily entitled to his commission when he has produced a purchaser willing and able to purchase on the terms proposed by the principal, but the broker and principal may agree on different terms, and if they do so, the broker is only entitled to commission when he has complied with the terms of the special contract.
2. **Evidence:** CONTRACT BETWEEN BROKER AND PRINCIPAL. In establishing the contract between the broker and his principal the parties are not bound by the terms of the written contract between the principal and purchaser, although it may evidence a portion of the broker's contract. In such a case parol evidence may be introduced, even if it operate to contradict or vary the terms of the written contract between the principals.
3. **Real Estate Brokers:** COMMISSION. Where the contract between the principal and the broker was that no commission should be paid unless an exchange of land were actually consummated, and a contract of exchange was entered into whereby the exchange was made conditional upon the purchaser's furnishing an abstract showing perfect title to the land to be given by him in exchange, and the purchaser furnished an abstract which did not show good title in him, and the exchange was not effected, *held*, that the broker was not entitled to his commission.

4. Evidence: FOREIGN LAWS. The law of a sister state, when involved in the determination of an action here, is a fact to be established by evidence, and, so far, at least, as it is not statutory, is the proper subject of expert testimony.

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

The facts are stated by the commissioner.

Talbot & Bryan, for plaintiffs in error:

Everything talked of before the written contract was signed was merged in that contract, and the court erred in allowing witnesses to testify, over plaintiff's objections, to matters previously discussed. (2 Parsons, Contracts, pp. 679, 680; *Kain v. Old*, 2 Barn. & C. [Eng.], 627; *Mumford v. M'Pherson*, 1 Johns. [N. Y.], 414; *Hamilton v. Thrall*, 7 Neb., 210; *Mills v. Miller*, 4 Neb., 441; *Dodge v. Kiene*, 28 Neb., 216.)

The contract between the two principals was binding in law. (1 Parsons, Contracts, p. 6; 3 Am. & Eng. Ency. Law, 41; *Baker v. Kansas City, St. J. & C. B. R. Co.*, 3 S. W. Rep. [Mo.], 486; *McGavock v. Woodlief*, 20 How. [U. S.], 221; *Kock v. Emerling*, 22 How. [U. S.], 69; *Sibbald v. Bethlehem Iron Co.*, 38 Am. Rep. [N. Y.], 444.)

There was no condition outside of the contract binding upon the parties, and the verdict is contrary to instructions. (*Goss v. Stevens*, 32 Minn., 472; *Middleton v. Findla*, 25 Cal., 76; *Barnard v. Monnot*, 3 Keyes [N. Y.], 203.)

The broker earned his commission when he procured parties to sign the contract introduced in evidence which was acceptable to themselves. (*Barnard v. Monnot*, 3 Keyes, [N. Y.], 203; *Love v. Miller*, 53 Ind. 294; *Pearsen v. Mason*, 120 Mass., 53; *Leete v. Norton*, 43 Conn., 219; *Knapp v. Wallace*, 41 N. Y., 477; *Cook v. Fiske*, 12 Gray [Mass.], 491; *Glentworth v. Luther*, 21 Barb. [N. Y.], 145;

Doty v. Miller, 43 Barb. [N. Y.], 529; *Shepperd v. Hedden*, 29 N. J. Law, 341; *Lincoln v. McClatchie*, 36 Conn., 136; *Mooney v. Elder*, 56 N. Y., 238; *Higgins v. Moore*, 34 N. Y., 424.)

The broker is not a guarantor of title and the court erred in allowing the abstract to the property in controversy to be introduced in evidence. (*Doty v. Miller*, 43 Barb. [N. Y.], 529; *Moses v. Bierling*, 31 N. Y., 462; *Glentworth v. Luther*, 21 Barb. [N. Y.], 147; *Van Lien v. Byrnes*, 1 Hilt. [N. Y.], 134.)

Thomas C. Munger, contra:

Reference was made in argument to authorities as follows: On first point made by plaintiffs in error: *Morrissey v. Schindler*, 18 Neb., 672; *Oberfelder v. Kavanaugh*, 29 Neb., 430; *Palmer v. Witcherly*, 15 Neb., 100; *Stevenson v. Anderson*, 12 Neb., 83; *Wright v. Greenwood*, 7 Neb., 435; *Norman v. Waite*, 30 Neb., 302. On second point made by plaintiffs in error: *Fraser v. Wyckoff*, 63 N. Y., 445. On third point made by plaintiffs in error: *Delaney v. Linder*, 22 Neb., 274.

The brokers would not be entitled to a commission under the contract, and Hildebrand was not liable, until the condition for furnishing an abstract showing a perfect title was performed. (*Fraser v. Wyckoff*, 63 N. Y., 445; *Rockwell v. Newton*, 44 Conn., 333; *Pierce v. Truitt*, 12 Atl. Rep. [Pa.], 661; *Hyams v. Miller*, 71 Ga., 608; *Ward v. Cobb*, 148 Mass., 518.)

The rule that a broker is entitled to his commissions when he has made a contract between the parties is limited to contracts binding the parties, and of which the courts will decree a specific performance. (*Ward v. Cobb*, 148 Mass., 518; *Love v. Miller*, 53 Ind., 294; *Rice v. Mayo*, 107 Mass., 550.)

Specific performance will not be decreed where the vendor's title is defective. It must be free from reasonable

doubt. (Pomeroy, Equity Jurisprudence, sec. 1405; Maxwell, Pleading and Practice, 630; *Bensel v. Gray*, 80 N. Y., 517.)

IRVINE, C.

Barber and Fowler, the plaintiffs in error, sued Julia A. Hildebrand and Fred Hildebrand, her husband, for $250, alleged to have been earned by the plaintiffs as brokers in effecting an exchange of real estate for the defendants. There was a verdict and judgment for the defendants which the plaintiffs seek to reverse. Thirty errors are assigned. In argument the plaintiffs in error do not treat them separately, but discuss several general propositions, to one or another of which each of the assignments of error relates. We shall pursue the same course.

Mrs. Hildebrand was the owner of certain real estate and personal property in Lancaster county, and of what the parties style a "relinquishment of filing" on certain land in Holt county. There is no doubt that there was some arrangement made with the plaintiffs, who were real estate brokers, to obtain an exchange of this property. It is equally clear that through the efforts of the plaintiffs a contract, the nature of which will be hereafter referred to, was entered into between the Hildebrands and one Wright, whereby Wright was to exchange for the property certain hotel property in Shenandoah, Iowa. It further appears that the contract was not carried into effect and the exchange was never in fact made. The plaintiffs contend that their duties were discharged and their commissions earned when they produced Wright, able and willing to make the exchange on terms fixed by Hildebrand. The answer of Fred Hildebrand was a general denial. The evidence clearly showed that he was merely agent for Julia. The court instructed a verdict in his favor, and we do not understand that the plaintiffs now complain of that action. The defenses of Julia Hildebrand were: (1) A denial of

the contract with Wright, set out in the petition; (2) that the contract between her and the plaintiffs was that no commission should be paid except upon an exchange made upon terms fixed by her, and upon the consummation of the exchange to the satisfaction of both parties by the delivery of deeds; (3) that one of the terms of Mrs. Hildebrand's contract with plaintiffs was that any purchaser must produce an abstract of title of the property to be exchanged showing perfect title, and that unless perfect title should be shown by such abstract, no exchange should be effected and no compensation paid plaintiffs; (4) that Wright's property was not as represented, either as to incumbrances or description. The contract between Wright and Hildebrand described the property to be exchanged and stated the price, and then concluded as follows: "Each party furnishing abstract showing perfect title and deeding property with good and sufficient warranty deed. * * * Second party reserves the right to see said property again, and if property is not as represented, then this contract to be void, otherwise in full force and effect. Each party agrees to pay one-half commission on said deal, commission to be $500." This was signed by Wright and by "Julia Hildebrand, by Fred Hildebrand." Below the signatures was the following: "This is to certify that I have examined said property in the within contract and find same as represented, and this day accept same." This last sentence was subscribed by Julia Hildebrand. The evidence was conflicting as to whether she signed her name below this statement, knowing it was there, or whether she subscribed the contract and this statement was thereafter written above her signature. For the purpose of considering the questions presented for review this question is not very important.

The first proposition of the plaintiff in error is that all oral negotiations were merged in the written contract, and that the court erred in allowing witnesses to testify as to

such oral negotiations. An examination of the record and of the assignments of error does not show that any effort was made to prove that the actual contract between Wright and Mrs. Hildebrand was other than as embodied in the writing. The evidence objected to related not to the contract between Wright and Mrs. Hildebrand, but to the contract between the brokers and Mrs. Hildebrand, upon which this suit is based. The writing did not embody this contract. The final clause, that each party should pay one-half of the commission, amounting to $500, was simply an agreement between vendor and purchaser to divide this commission between them. It was not a contract with the brokers for the payment of a commission. Whatever the contract may have been between Wright and Mrs. Hildebrand, the right of the brokers to their commission depended not upon this contract, except as it might evidence the performance of the brokers' contract, but it depended upon the agreement between the vendor and the brokers. This lay in parol and the evidence was properly admitted.

The second proposition of plaintiffs is as follows: "That the contract between the two principals was binding in law." The sixth proposition is that "the written contract for the purchase of the real estate, binding the purchaser and seller, was a sale, and the broker was, therefore, entitled to his commission." There is no doubt that the written contract was sufficient to satisfy the statute of frauds, but it does not follow that the brokers were, therefore, entitled to their commissions. The contract was conditional in two respects. In the first place "perfect title" was required to be shown by an abstract furnished by the vendor, and in the next place Mrs. Hildebrand reserved the right to examine the property, and if she found it not as represented the contract became void. There was evidence tending to show that the contract of employment was substantially as alleged in Mrs. Hildebrand's answer, in which case the contract of sale would not entitle the brok-

ers to commission unless these conditions were satisfied and the sale in fact made.

The third proposition is "that there was no condition outside of the contract binding on the parties, and that the verdict is contrary" to certain instructions. The point urged here is that if an enforceable contract of sale was entered into between the principals their failure to perform it, or its subsequent rescission, would not defeat the brokers' right to commission. There is no doubt of the correctness of this proposition, but the instructions which it is said that the jury must have disregarded in this respect submitted the question as to whether or not the conditions upon which alone the contract was to become operative had been satisfied. Upon this the evidence warranted the finding that one at least, to-wit, that in regard to abstracts disclosing perfect title, was not satisfied. The jury evidently found that the contract of employment was as asserted by Mrs. Hildebrand, and that the contract did not become enforceable by reason of defects in Wright's title. These findings were sustained by the evidence and warranted by the instructions, and the result was not in violation of the principle that an enforceable contract between the principals entitled the brokers to their commission, without regard to unenforceable parol conditions or subsequent conduct.

The fourth proposition is that the brokers earned their commission when they procured parties to sign a contract acceptable to the principal. Nothing need be said on this except that it overlooks the condition attached to the contract of sale, and would only be applicable to this case, had the contract been unconditional, or if the condition had been performed, a state of affairs evidently contrary to the finding of the jury here.

The fifth proposition is that the broker is not a guarantor of title, and the court erred in allowing in evidence the abstract of title and extrinsic evidence as to its condition.

The brokers were not guarantors of title, and had the sale failed because of a defect in the Hildebrand title, Mrs. Hildebrand could hardly defeat the action upon that ground. But we reiterate that it was a condition of the contract that perfect title to land acquired should be shown by an abstract to be furnished for that purpose, and it was the brokers' duty to procure not only a purchaser willing to buy but one able to buy, and if they procured a purchaser who was not able to show the title the contract required, to the property which he was to give in exchange, he was not able to meet the vendor's terms and the commission was not earned. By the contract the parties rested the title upon abstracts to be furnished. The abstract which was furnished by Wright was competent evidence as to the state of his title and property admitted for that purpose. Several lawyers were called as witnesses, who testified that they had examined the abstract and that it did not show title in Wright. We think that this evidence was competent. Wright's property was in Iowa. The law of Iowa determined his title. The law of Iowa, as applicable to the facts shown by the abstract, was a fact in this case and, except as to statute at least, the proper subject of expert testimony. (Code of Civil Procedure, sec. 420.)

A more detailed discussion we think would be without profit. The fundamental error running through the argument of plaintiffs is that they conceive the written contract to be an absolute and enforceable contract between the principals, whereas it was a conditional contract. There was evidence tending to show that the conditions were not complied with; that Hildebrand was not at fault, and that her agreement was to pay only in case an exchange was consummated. The determination of these general questions practically disposes of all the assignments of error.

JUDGMENT AFFIRMED.

CHARLES NYGREN, APPELLANT, V. KATIE NYGREN, APPELLEE.

FILED NOVEMBER 7, 1894. No. 5681.

1. **Divorce**: DECREE: REVIEW. The supreme court will not disturb a decree granting a divorce where no question of law is involved and the finding of the trial court is based upon conflicting testimony.
2. ———: LIEN OF DECREE FOR ALIMONY. Since the enactment of section 4*a*, chapter 25, Compiled Statutes, a decree for alimony is a lien upon real estate the same as a judgment at law, and is enforceable in the same manner.
3. ———: DECREE FOR ALIMONY: ORDER OF SALE. The decree of the lower court, in so far as it orders the sale of specific real estate for the payment of alimony, is reversed.

APPEAL from the district court of Antelope county. Heard below before ALLEN, J.

Simpson & Sornborger, for appellant.

Good & Good, contra.

NORVAL, C. J.

The plaintiff and appellant filed in the district court of Antelope county a petition for divorce, which, it is conceded, failed to state a cause of action, and no evidence was offered by the plaintiff to sustain the averments of the petition. The defendant filed an answer and cross-petition, setting up numerous specific acts of cruel and inhuman treatment of the defendant by the plaintiff, and praying for a divorce and alimony. The reply was a general denial. The district court found the facts in favor of the defendant, and a decree of divorce was entered. Defendant was restored to her maiden name, and awarded $1,000 alimony. The decree for alimony was made a specific lien upon a quarter

section of land in Antelope county, which was ordered sold to pay the $1,000, unless the plaintiff should pay the same within sixty days from the rendition of the decree.

The first contention of appellant is that the decree for divorce is not supported by the evidence. It is not important that we should review the testimony in the case, and it certainly would serve no useful purpose to do so. It is sufficient to state that the defendant's testimony is to the effect that the plaintiff's treatment of her during the time they lived together, which was but a trifle over a year, was cruel and brutal in the extreme; that he committed more than one act of personal violence toward defendant, that in other respects he was cruel and inhuman in his conduct toward her, and called her vile and opprobrious names. The defendant's testimony, in part at least, is corroborated by her mother, Bettie Olson, and one Ingri Hulsted, who testified by deposition. The plaintiff denies in his testimony, substantially, that he was guilty of any of the acts of extreme cruelty testified to by his wife. The trial court was in a better position to pass upon the conflicting testimony adduced before it than this court can from a mere reading of the evidence. Our conclusion from the testimony accords with that of the court below. There is sufficient evidence to sustain the finding that the plaintiff is guilty of the extreme cruelty charged in the defendant's cross-petition. The decree granting the divorce, therefore, cannot be molested.

We will now consider whether the court erred in making the amount of alimony allowed the defendant a lien upon specific real estate of the plaintiff, and ordering the land sold for the payment of the sum awarded as alimony. This court, in *Swansen v. Swansen*, 12 Neb., 210, and *Brotherton v. Brotherton*, 14 Neb., 186, held that a decree for alimony is not a lien upon the real estate of the husband, and that the trial court has no power to make such a decree a lien; but since these cases were decided the state legislature, in 1883, passed "An act to provide additional

remedies for enforcement and collection of judgments and orders for alimony or maintenance." Sections 1 and 2 of said act, the same being sections 4*a* and 4*b*, chapter 25, Compiled Statutes of 1893, read as follows:

"Sec. 4*a*. All judgments and orders for payment of alimony or of maintenance in actions of divorce or maintenance shall be liens upon property in like manner as in other actions, and may in the same manner be enforced and collected by execution and proceedings in aid thereof, or other action or process as other judgments.

"Sec. 4*b*. The remedy given by this act shall be held to be cumulative and in no respect take away or abridge any subsisting remedy or power of the court for the enforcement of such judgments and orders; *Provided*, Nothing in this act shall affect the title of any *bona fide* purchaser for value holding by reason of such *bona fide* purchase at the date of its passage."

Section 26 of the same chapter, as amended in 1883, reads as follows:

"Sec. 26. In all cases where alimony or other allowance shall be decreed for the wife or for the children, the court may require sufficient security to be given by the husband for the payment thereof, according to the terms of the decree. And upon the neglect or refusal of the husband to give such security, or upon his failure to pay such alimony or allowance, his real or personal estate may be sold as upon execution for the payment of any sums due upon such decree. And in default of security for the payment of installments in future to fall due, the court may also appoint a receiver to take charge of his real or personal estate, or both, and hold the same, and the rents, issues, interests, and profits thereof, for security for the payment of installments in future falling due. And judgments and decrees for alimony or maintenance shall be liens upon the property of the husband, and may be enforced and collected in the same manner as other judgments of the court wherein they are rendered."

By virtue of the section first above copied all judgments or orders for the payment of alimony are made liens upon property the same as judgments in actions at law, and their collection is enforceable in the same manner as other judgments. In *Atkins v. Atkins*, 18 Neb., 474, it was held that said section 4*a* was applicable to decrees for alimony existing at the time of its adoption. If said section has any force and validity and means what it says, the decree for the payment of alimony in the case at bar immediately upon its rendition became a lien upon the quarter section in question, as well as all other real estate of the plaintiff which he owned in Antelope county. Therefore the plaintiff was not the least prejudiced or injured by the making of the decree for alimony a specific lien upon the 160 acres. By force of the state it was a lien thereon, without any order of the court; hence the decisions in *Swansen v. Swansen* and *Brotherton v. Brotherton*, *supra*, are not now in point, by reason of the change in the statute.

It only remains to be considered whether the court should have ordered the sale of the quarter section to pay the sum decreed as alimony. Neither of the sections quoted above confers any express authority, while the import of section 4*a* is that a decree of alimony is a general judgment, which can be enforced as an ordinary judgment, in which case an execution may issue, and the personal property be seized thereunder; and for want of personalty the writ may be levied upon real estate. Section 26 authorizes the court to require the husband to give security for the payment of alimony allowed the wife, and upon the neglect or refusal of the husband to give such security or pay such alimony, execution may issue and his real estate and personalty may be sold thereunder for the payment thereof. The statute nowhere confers power upon the court to make the decree for alimony a charge upon particular real estate. This court, in *Segear v. Segear*, 23 Neb., 306, in construing said section 4*a*, in an opinion delivered by Justice

COBB, says: "The provisions of this section establish the character of an order for the payment of alimony with that of a judgment at law, and limit the enforcement and collection to the same means. It is not in the nature of a tort, and in the absence of fraud, by the defendant, he could not be subjected to a more summary method of collection than that of levy and sale of property as upon executions at law." Cases may arise where it would not be erroneous for the court to order the sale of specific real estate, as where that was the only property the husband owned; but such is not the case under review, since the defendant is possessed of a quantity of personal property subject to levy upon execution. The decree of the district court is reversed so far as the same orders the sale of specific real estate for the payment of alimony, and in all other respects the decree is affirmed.

JUDGMENT ACCORDINGLY.

LOVE H. JAMESON V. OMAR L. KENT.

FILED NOVEMBER 7, 1894. No. 4797.

1. **Replevin**: JUDGMENT: HARMLESS ERROR. A defendant in replevin, where the issues are found in his favor, that he had the right of possession merely of the property in controversy at the commencement of the action, and that the property cannot be returned, is entitled to a judgment for the value of such possession, together with damages for withholding the property; but in such case the failure to find the value of the defendant's right of possession, or to render judgment for the same, is not an error of which the plaintiff can complain.
2. **Evidence**: DAMAGES. A party cannot testify as to his opinion of the amount of his damages, but the facts upon which the court or jury can make such estimates are to be given.
3. **Replevin**: BUILDINGS: DAMAGES. In an action of replevin for

a building, injury to personal property therein occasioned by the removal of the building cannot be recovered by the defendant as an element of damage.

4. ———: EVIDENCE: ESTOPPEL. The evidence in the case *held* not to sustain the findings and judgment.

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

L. W. Colby and *L. M. Pemberton*, for plaintiff in error.

Hastings & McGintie, contra.

NORVAL, C. J.

This is a suit in replevin, brought by the plaintiff in error for the possession of a frame barn. There was a trial to the court, and the following findings were made in the cause: "The court finds, on the issues joined, for the defendant, and finds that the defendant was entitled at the commencement of this action to possession of the property in controversy herein, and the court assesses the damages of the defendant at the sum of one hundred and thirty-five dollars, and the court finds the value of the property replevied to be the sum of eighty dollars. The court further finds that the property has passed out of the possession of the plaintiff, and cannot be returned." Plaintiff filed a motion for a new trial, which was overruled, and thereupon judgment was rendered on the findings as follows: "It is therefore considered by the court that the defendant, Omar L. Kent, have and recover of and from the plaintiff, Love H. Jameson, the sum of one hundred and thirty-five dollars, his damages so as aforesaid assessed, and his costs herein expended." The proceedings are brought to this court for review by plaintiff.

It is alleged that the judgment pronounced is erroneous and contrary to the statute relating to actions in replevin. Sections 191 and 191*a* of the Code of Civil Procedure read as follows:

"Sec. 191. In all cases, when the property has been delivered to the plaintiff, where the jury shall find, upon issue joined, for the defendant, they shall also find whether the defendant had the right of property or the right of possession only, at the commencement of the suit; and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant; for which, with costs of suit, the court shall render judgment for the defendant.

"Sec. 191*a*. The judgment in the cases mentioned in sections one hundred and ninety and one hundred and ninety-one, and in section one thousand and forty-one of said code, shall be for a return of the property or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property, and costs of suit."

Under the foregoing sections where, in an action of replevin, the property has been delivered to the plaintiff and a return thereof cannot be had, the defendant, if successful in the suit, is entitled to a judgment for the value of the property, or the value of his right of possession of the same, together with legal interest thereon from the date of the unlawful taking, and damages for withholding the property. In this case the defendant makes no claim of ownership in the barn, but insists that he is entitled to the possession of the same. It will be observed that the trial court found the defendant had the right of possession only at the commencement of the suit; but it failed to assess the value of such possession. The court, therefore, could not, and did not, render judgment in any amount for the value of the right of possession. We fail to discover in what manner the plaintiff was prejudiced by the failure to render a judgment against him for the value of the defendant's right of possession of the property. The error was in his favor. Kent is in no position to complain, since he introduced no evidence as to the value of his right of possession of the barn.

Another ground urged for reversal is that the findings and judgment are not sustained by sufficient evidence. It appears that the barn in controversy was formerly owned by one Jefferys, who in May, 1889, sold it to one F. F. Nichols, granting the latter the privilege of allowing the building to remain on the lot, but to be moved therefrom inside of a year. About the 20th day of February, 1890, Nichols sold the barn to the plaintiff, Love H. Jameson. Prior to said date, the defendant, Omar L. Kent, by permission of Nichols, stored in said building nine tons of broom corn then owned by him, which remained in the building up to the time this action was brought. Nichols, during said period, kept some grain in a bin in said barn. At the time permission was given to store the broom corn it was not specified how long it was to remain; but it was then stated by Nichols that he wanted to sell the barn, and should he do so he expected the broom corn to be moved at once. Prior to the sale to plaintiff, Nichols saw Kent and notified him he desired the barn, as he was about to sell it, and requested that the broom corn be taken away so that Jameson could move the barn the following Friday. The defendant replied, "I will not promise to move the broom corn on that day, but will move it the first part of the coming week." Both before and at the time plaintiff purchased the building he informed Kent of his intention to buy, and that he should want possession in a week or two, as he intended to move the building off the lot. To this Kent said: "All right; buy it, and I will get the broom corn out and give possession in a few days." This conversation is undisputed by defendant. On the strength of the above assurance plaintiff bought the property, and the defendant having failed to vacate as agreed, plaintiff, on March 24, 1890, replevied the barn and moved the same from the lot on which it was standing. There is some evidence, although not of the most convincing character, to the effect that the understanding between Nichols

and the defendant was that the latter was to have possession of the building until May 1, 1890. This is positively denied by Nichols; but considering the arrangement between defendant and Nichols was that the former was to have the right to the use of the building until May 1, 1890, still Kent was not entitled to such possession at the commencement of this action as against the plaintiff, inasmuch as Kent had promised Jameson, prior to the latter's purchase, that he would move the broom corn and give possession of the barn in a few days. He thereby estopped himself to claim the right of possession of the barn. Kent never paid rent, nor did he agree so to do with either Nichols or the plaintiff. As an accommodation merely he was permitted to store his broom corn in the barn.

We think the court erred in the assessment of damages. The evidence shows that the officer in executing the writ of replevin did not in any manner interfere with the broom corn which was then in the barn, but that the building was removed from the lot on which it was standing, thereby leaving the broom corn exposed after such removal. The defendant insists, and on the trial he was permitted to prove, that the day the barn was taken away he went to town to see a doctor and on returning home the constable met the defendant and informed him that he had moved the building; that the same evening defendant had his sons procure a quantity of boards from a lumber yard and cover the broom corn therewith; that during the following night there was a severe storm which blew all the boards off and covered the broom corn completely with snow, materially damaging the same. The court permitted the defendant, over the plaintiff's objection, to testify that the damage to the broom corn by reason of its becoming wet was $15 per ton, or $135. It was upon this testimony alone that the court rendered the judgment against the plaintiff for damages. This judgment is erroneous and cannot stand, for two reasons: In the first place there was no competent evidence before the

court to show in what sum the broom corn was damaged by reason of the removal of the building. The only witness for the defendant was himself, who gave his opinion merely as to the amount of his loss over the objections of the plaintiff. To the question, "How much, and to what extent was it [the broom corn] damaged?" he answered: "I had been offered $60 a ton for it, and after it was damaged I had to take less than $45 a ton." In answer to the question, "What was it worth after the act of the plaintiff in moving the barn at that time?" he said: "I consider it worth $15 a ton less." The foregoing are fair specimens of the questions propounded to the defendant and his answers thereto relating to the amount of damages. The facts should have been stated by the witness, instead of his conclusions. It was for the trial court alone to determine the amount of damages from the facts proved on the trial. There was no competent evidence showing the market value of the broom corn just before or immediately after it became injured, hence the assessment of damages was erroneous. Again, the injury to the broom corn was not a proper element of damage in this case. Plaintiff did not sue out a writ of replevin for the broom corn, but for the building in which it was stored. The latter alone was taken under the writ, the former being left upon the ground, where it was piled, unmolested and undisturbed. The defendant was notified before suit was commenced to take away his broom corn and he agreed to do so. He was also notified immediately of the removal of the building, in order that he might protect the broom corn from exposure and damage. What more had the defendant a right to expect? The plaintiff could not reasonably anticipate that there would be a storm which would injure the property. The damages claimed are too remote.

The question we have just been considering has been passed upon by this court in *Deitrichs v. Lincoln & N. W. R. Co.*, 13 Neb., 47. That was an action of replevin to re-

cover the possession of a frame dwelling, the cause being tried before a referee. Chief Justice LAKE, in delivering the opinion of the court, says: "Upon the trial the plaintiff in error offered to show that in the removal of the house under the order of replevin, damage was done to certain of her personal effects therein. This offer was wholly immaterial, and in rejecting it the referee ruled correctly. That was a matter that could not be properly adjudicated in this action, which concerned only the claims of the respective parties to the house." Upon principle, as well as authority, we are of the opinion that the defendant was not entitled to a judgment for damages. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

PATRICK FORD, JR., v. STATE OF NEBRASKA.

FILED NOVEMBER 7, 1894. NO. 7091.

1. **Bail:** CONSTITUTIONAL PROVISION. The provision of section 9, article 1, of the constitution, that "all persons shall be bailable by sufficient sureties," etc., adds nothing to the law of the subject, but is merely the declaration of an existing right.
2. ———: ———. The above provision has reference to bail as understood at common law, and in accordance with the practice before the adoption of the constitution.
3. **Bail Pending Review in Supreme Court.** The right to give bail pending proceedings by petition in error in this court, after conviction for a felony, is not absolute, but rests in the discretion of the court.
4. ———. Bail will be allowed in this court upon a showing of probable error calling for a reversal of the judgment.

APPLICATION to supreme court by plaintiff in error to be released on bail pending proceedings to review a judgment of the district court for Douglas county, whereby he

was sentenced for having committed the crime of larceny as bailee. *Application allowed.*

Mahoney, Minahan & Smyth and *Reese & Gilkeson*, for plaintiff in error.

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

POST, J.

This is an application by Patrick Ford, Jr., to be admitted to bail pending proceedings in error to review a judgment of the district court for Douglas county, whereby the petitioner was convicted of the crime of larceny as bailee. The practice has long prevailed in this court to admit to bail in like cases upon a showing of probable error. The application is, however, in this instance, resisted by the state, not because of the absence of sufficient showing of error in the record, but on the broad ground that no authority has been conferred upon the courts of this state to admit to bail persons convicted of felonies pending proceedings in error. That contention is based upon the provision contained in section 505 of the Criminal Code, viz.: "Whenever a person shall be convicted of a felony, and judgment shall be suspended as aforesaid, it shall be the duty of the court to order the person so convicted into the custody of the sheriff, to be imprisoned until the case in error is disposed of." The meaning of that provision is too obvious to be aided by construction, the only question being whether it is in conflict with the fundamental law of the state. It might be supposed that so important a question, and one so frequently arising in the administration of the criminal laws, has been definitely settled by the courts of this country, but a reference to the cases discloses a wide diversity of opinion on the subject. The constitutional provisions of the several states, so far as they relate to the subject here involved, may be divided into two classes. In one class, which includes Iowa, Maine, Michigan, Minne-

sota, Mississippi, South Carolina, Wisconsin, and perhaps others, the provision is that all persons before conviction shall be entitled to bail, etc., while in the other class, including this state, we find the provision, in substance, that all persons shall be bailable by sufficient sureties. It is evident that constructions of the provision first named will not materially assist in the solution of the question before us, hence our examination will be confined in the main to cases arising under constitutions similar to ours.

In *State v. Ward*, 2 Hawks [N. Car.], 443, (decided in 1832), it was held, no reference being made to the authorities in this country or England, that the provision in question was not applicable to prisoners after conviction, and that no discretion was conferred upon the court or judge to admit to bail in such a case.

In *Re Langworth*, 7 La. Ann., 247, (decided in 1852), after a review of the cases bearing upon the subject, and a reference to the practice in the court of king's bench, it was held that the prisoner was entitled to bail as a matter of right, after conviction as well as before, and that it was not within the discretion of the court to deny it.

The question was before the supreme court of California in *Ex parte Voll*, 41 Cal., 29, and the conclusion announced without reference to authority (two justices expressing no opinion), that the right to bail, after conviction, was not absolute, but was a matter within the discretion of the court.

In *Ex parte Ezell*, 40 Tex., 451, the court, after a review of the authorities, rejected the doctrine of Langworth's case and followed *State v. Ward, supra*, holding the prisoner not entitled, under any circumstances, to bail after conviction, and the doctrine of that case was reasserted in *Ex parte Scwartz*, 2 Tex. App., 75.

In *Bennett v. People*, 94 Ill., 581, it was said that bail should be denied pending an appeal, unless clearly shown that there could be no conviction on a second trial, no reference being made to the provision of the constitution.

In *Hampton v. State*, 42 O. St., 401, it was said that the trial court may, in its discretion, allow bail after verdict and before sentence, but a doubt was expressed respecting the right after sentence, pending appeal.

The constitution of Mississippi, as we have seen, provides that all persons shall be entitled to bail before conviction. It was held, however, in *Ex parte Dyson*, 25 Miss., 356, that the right to give bail after sentence, pending an appeal to the supreme court, was not regulated by the constitution but governed by the rules and practice of the common law. A like view is expressed by Gilfillan, C. J., under the constitution of Minnesota, in *State v. Levy*, 24 Minn., 362.

In the supreme court of the United States, where it has not been made the subject of either constitutional or statutory enactment, the practice is regulated by rule, which provides, in substance, that upon the allowance of a writ of error in case of conviction of infamous crimes, the circuit or district court, or any justice or judge thereof, shall have power to admit the accused to bail in such amount as may be fixed. And in this connection we are reminded of a recent decision of the district court of the United States for the western district of Arkansas, *Ex parte Hudson*, not yet reported, which appears to sustain the contention of the state in this controversy. It seems that after conviction on the charge of assault with intent to kill, the petitioner procured the allowance of a writ of error for the purpose of securing a review of the judgment. At the same time Mr. Justice White of the supreme court made an order to the effect that the writ of error should operate as a supersedeas upon the giving of bond by the accused in the sum of $5,000, to be approved by the district judge; but the latter, it seems, declined to act upon the bond tendered, holding not only the order above mentioned, but the rule under which it was allowed, to be without jurisdiction and void, on the ground that authority had not been conferred upon

the supreme court to admit to bail pending proceedings by writ of error.

But turning from the decisions to the constitution, we are impressed with the thought that the use of the words therein, "all persons," instead of "all persons before conviction," was for a purpose and not accidental, since the one proposition then settled by forty years of judicial discussion was that the two provisions could not be interpreted to mean the same thing. Another thought suggested in this connection is that the constitutional guaranty is not the beginning of the law of the subject, but like kindred provisions is merely a declaration of existing rights. The use, therefore, of the term "bail," without words of limitation or qualification, would seem to imply bail as understood by the common law, or, more accurately speaking, in accordance with the practice before the adoption of the constitution. But in their reference to that practice the authorities are unfortunately not harmonious. For instance, it is intimated in *Langworth's Case, supra*, that the allowance of bail both before and after sentence was, at common law, within the discretion of the court, while in *Ex parte Ezell* the opposite conclusion is reached after a review of the authorities. This diversity of opinion may, it is believed, be accounted for from the fact that while it was customary for the king's bench to admit to bail after verdict and sentence, such practice was not, strictly speaking, in accordance with the course of the common law, since the writ of error was not allowed as matter of right to review judgments of conviction for felonies, but by the favor of the king or attorney general. (2 Hawkins, Pleas of the Crown, 654, 655; 1 Bac. Abr., 175; 2 Hale, Pleas of the Crown, 129; *Rex v. Mayor*, 2 Shower [Eng.], 96; *Rex v. Elwell*, 2 Strange [Eng.], 794; Hurd, Habeas Corpus, secs. 428–433.) Perhaps the practice in the supreme court of the United States affords the most satisfactory interpretation of the rule at common law, since, as we have seen,

the power of that court with respect to the subject is not defined either by statute or by the constitution. We must, therefore reject the doctrine of the cases which on the one hand deny the discretion of the court to admit to bail after sentence, and which on the other hand deny the discretion to refuse. The sound rule, as already intimated, is that of the common law, and which recognizes the power of the court to admit to bail, upon a showing of probable error which would call for a reversal of the judgment in all save the exceptional cases mentioned in the constitution. It follows that the provision of the Criminal Code above set out, in so far as it denies the discretion of this court to admit to bail in proper cases after sentence, is in conflict with the constitution of the state. It is conceded that the showing of error is in this instance sufficient under the rule here announced. The petitioner will therefore be permitted to give bail, conditioned according to law.

APPLICATION ALLOWED.

ROBERT R. KELLEY ET AL. V. LUCIUS B. PALMER.

FILED NOVEMBER 7, 1894. No. 5414.

Statute of Frauds: PAROL WARRANTY. A parol promise of the grantor of real estate to warrant and defend the title of his grantee is within the provisions of section 3, chapter 32, Compiled Statutes, and therefore void.

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

The facts are stated in the opinion.

Capps & Stevens, for plaintiffs in error:

A condition cannot be ingrafted by parol upon a convey-

ance of real estate. An oral promise to warrant title is within the statute of frauds. (*Marshall County High School Co. v. Iowa Evangelical Synod*, 28 Ia., 360; *Thompson v. Thompson*, 9 Ind., 323; *Moser v. Miller*, 7 Watts [Pa.], 156; *Chapman v. Gordan*, 29 Ga., 250; *Dunbar v. Stickler*, 45 Ia., 384; Consolidated Statutes, sec. 1787; *Mitchell v. Warner*, 5 Conn., 521; *Commonwealth v. Robinson*, 1 Watts [Pa.], 160; *Bliss v. Thompson*, 4 Mass., 488; *Kerr v. Shaw*, 13 Johns. [N. Y.], 236.)

J. B. Cessna, contra:

When title to a portion of land fails and there was a parol agreement made at the time of sale to warrant the title, there may be a recovery back of part of the purchase money. (*Close v. Zell*, 21 Atl. Rep. [Pa.], 770; *Drinker v. Byers*, 2 Pen. & W. [Pa.], 528; *Brown v. Moorhead*, 8 S. & R. [Pa.], 569.)

The statute of frauds does not prevent a recovery of damages for the breach of a verbal contract for the sale of land. (*Bell v. Andrews*, 4 Dall. [U. S.], 152; *George v. Bartoner*, 7 Watts [Pa.], 530; *Allen's Estate*, 1 W. & S. [Pa.], 387; *Moore v. Small*, 19 Pa. St., 461; *Thurston v. Franklin College*, 16 Pa. St., 154; *Bowser v. Cessna*, 62 Pa. St., 148; *Walker v. France*, 5 Atl. Rep. [Pa.], 208; *Meason v. Kaine*, 63 Pa. St., 335; *Goettel v. Sage*, 27 Am. L. Reg. [Pa.], 253.)

Money paid on purchase of land with belief that purchaser is getting a good title may be recovered back. (*Wamsley v. Crook*, 3 Neb., 344; *McMurtry v. Brown*, 6 Neb., 368; *Frederick v. Campbell*, 13 S. & R. [Pa.], 136.)

POST, J.

This is a petition in error from the district court for Adams county, and presents for review a judgment therein in favor of the defendant in error and against the plaintiffs in error. The cause of action alleged in the district court

is that the plaintiff therein purchased from the defendants certain real estate in the city of Hastings and accepted a deed therefor from one Craig, who, it was agreed, held the legal title that the defendants, at the time of the sale aforesaid, verbally promised "to warrant and guaranty" the title to said premises, and that, relying upon such promise, the plaintiff paid the full consideration therefor. There is a further allegation of an ouster under a judgment in favor of one Weigel, the holder of the paramount title, with prayer for judgment. The answer is a general denial. Numerous errors are assigned, but one of which will be noticed, viz., that the trial court erred in receiving evidence of the alleged contract of warranty. The first proposition of the plaintiffs in error is that the contract alleged is within the express terms of the statute of frauds, and, therefore, void. The provision of statute to which we are referred is found in section 3, chapter 32, Compiled Statutes, entitled "Frauds," as follows: "No estate or interest in land, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, or surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same." The contention of the defendant in error is in effect that the words "or in any manner relating thereto" apply to what immediately precedes them only, or, in other words, to trusts concerning lands, and not to estates or interests therein; that the contract alleged is a mere promise to repay the purchase money upon a failure of title, and accordingly not within the provisions of the statute. To support that contention we are referred to *Bell v. Andrews*, 4 Dall. [U. S.], 152; *George v. Bartoner*, 7 Watts [Pa.], 532, and other cases from the same court. While the earlier Pennsylvania cases fully sustain the proposition that a verbal promise to

warrant the title to real estate is not within the statute, those cases cannot be accepted as authority in this state, for the reason that the fourth section of the English statute of frauds, of which the provision above set out is a substantial copy, had not then been enacted in that state. It is, for instance, said in *George v. Bartoner*, *supra*, that "We have not re-enacted the fourth section of the 29 Ch. 2, c. 3, which forbids it; and the provisions of the three first sections, condensed by our statute into one, merely operate upon the estate. We might as well doubt whether an action could be maintained on a parol contract of marriage." A warranty, according to the law of real estate, was formerly understood to mean a covenant real, by which the feoffor, or donor, of lands undertook to defend the feoffee, or donee, in possession, and to give land of equal value in case the latter was evicted therefrom (Rap. & Law. Dic., title "Warranty.") A covenant was a promise under seal and usually contained in a deed or instrument sealed and delivered by the promisor. (Rap. & Law. Dic., title "Covenant.") The action of covenant at common law was allowed only for the breach of a promise in writing under seal. (Burrell's Law Dic., 3971; Chitty, Pleading, 115; Brown, Actions, 352; *Kerr v. Shaw*, 13 Johns. [N. Y.], 236.) Viewed in the light of those authorities, it seems that an undertaking by the grantor of land to warrant and defend the title of his grantee is an interest in land within the meaning of the statute. In fact, that proposition appears never to have been seriously questioned except in Pennsylvania, where, as we have seen, the fourth section of the statute of frauds was not in force, and in Maine, where such a contract is declared to be obviously within the statute. (See *Bishop v. Little*, 5 Greenl. [Me.], 362.) The suggestion that the action below was one to recover the purchase money on a failure of title is evidently an after-thought. It was essentially an action for breach of the alleged contract of warranty and not within

the rule, whereby in exceptional cases the purchaser of real estate may maintain an action for the recovery of the purchase money independent of the covenants contained in his deed. The judgment of the district court is reversed and the cause remanded for further proceedings therein.

REVERSED.

CHARLES M. LEIGHTON, APPELLEE, v. HENRY T. CLARKE, APPELLANT.

FILED NOVEMBER 7, 1894. No. 5220.

1. **Review:** CONFLICTING EVIDENCE. The finding of a lower court, based upon conflicting testimony, will not be disturbed by this court unless clearly and manifestly wrong.
2. **Partnership:** AGREEMENT OF DISSOLUTION. Where parties engaged in a copartnership business enter into and make written agreement or agreements governing the dissolution of such copartnership, *held*, that so far as practicable and reasonable, the court, in settling the business and adjusting the relations between such parties, will be governed by the directions of the articles of agreement of dissolution, to the extent that they are applicable to such adjustment and settlement.
3. ———. The evidence in relation to the accounting between the parties examined, and *held* sufficient to sustain the finding of the lower court.

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

Pound & Burr, for appellant.

Marquett, Deweese & Hall, contra.

HARRISON, J.

Charles M. Leighton, the appellee, commenced this action in the district court of Lancaster county, the object of the

suit, as declared in the petition filed, being an accounting of the affairs of a copartnership which had previously existed between him and Henry T. Clarke, appellant. The articles of agreement pursuant to which the partnership was formed and existed were as follows:

"This agreement, made and entered into by and between Henry T. Clarke, of Omaha, Nebraska, and Charles M. Leighton, of Lincoln, Nebraska, witnesseth: That the said parties have and do hereby agree to enter into partnership for the purpose of engaging in the drug, paint, and oil trade in the cities of Omaha and Lincoln, Nebraska, under the following stipulations and agreements, to-wit:

"First—The name and style of the said firm in Omaha shall be Leighton and Clarke, and in Lincoln, Leighton and company.

"Second—That during the first year of said copartnership, commencing on the 6th day of September, 1883, each of said parties shall contribute to said business the sum of fifty thousand (50,000) dollars, and each shall share equally in the profits of said business.

"Third—The said Leighton shall devote all his time and his best skill and energy to said business and shall have the management and conduct of the same, with and under the advice of said Clarke; and for his said services he shall receive a salary at the rate of twenty-five hundred (2,500) dollars per annum, and in addition thereto his necessary and reasonable expenses when travelling on the business of said firm.

"Fourth—There shall be kept, at all times during the existence of said partnership, just and true books of account, which shall be at all times open to the inspection and examination of both of said parties, who shall for that purpose have free access thereto at any and all times.

"Fifth—The said parties also agree that once in each year, or oftener if required, upon the request of either of said partners, a true, just, and perfect account shall be made

and rendered of all profits or losses made or sustained in the course of the business of the firm, and also of all payments, receipts, and disbursements, made or received, connected with said business, and the said account being so made, the shares of profits to which each may be entitled shall be then divided and paid.

"Sixth—It is also agreed that upon any excess of capital which either of said parties may contribute to the business of said firm, over and above that contributed by the other party, interest shall be allowed upon such excess in favor of the party so contributing the same, at the rate of nine per cent per annum."

The copartnership engaged in the business named in the agreement in the cities indicated, and continued in the city of Omaha until December 1, 1884, when the partnership business there was discontinued, and the copartnership dissolved, the following being the contract of dissolution entered into regarding the Omaha portion of the business:

"This memorandum of agreement, made this 19th day of December, 1884, by and between C. M. Leighton and Henry T. Clarke, constituting the firm of Leighton & Clarke, and doing business in the city of Omaha, Douglas county, Nebraska, witnesseth: That said Leighton has sold and hereby conveys unto said Clarke all his interest in and to all drugs and goods of every nature and description whatever of the said firm of Leighton & Clarke, in the said city of Omaha, and the said Leighton hereby relinquishes unto said Clarke all his interest in and to the business of said firm in said city and hereby withdraws from said firm. The business of said firm of Leighton in said city of Omaha shall be settled between the parties hereto, upon the following basis, viz.: 1. The said Clarke shall have all the goods and stock of said firm in said city of Omaha, the value thereof to be calculated and computed at the cost price of the same, adding freightage thereto, and the cost price aforesaid shall be reckoned according to the

inventory of said goods and stock made December 1, 1884; that is to say, the said Clarke shall account to said Leighton on final computation for the said goods and stock, reckoning the value of the same upon the basis of said inventory, adding cost of freightage thereto; provided that in case any errors may hereafter be discovered in said inventory, then the same shall be corrected in that regard so as to be in accordance with the true amount of goods and stock on hand at the date aforesaid. 2. The said Clarke is to collect all debts due to said firm. 3. The said Clarke is to pay all the indebtedness of said firm now outstanding against the same as shown by the books of said firm. 4. All matters relating to insurance of any stock heretofore owned by said firm in said city of Omaha are to remain undivided and precisely the same as if this agreement had not been made. 5. The said Clarke shall proceed as speedily as may be convenient and advisable to settle and wind up the business of said firm in the city of Omaha, and after the said business shall have been cleared up, a computation shall be made by the parties hereto of the amount received by said Clarke, including the value of the goods mentioned in paragraph 1 above, and also of the amount paid out by him, including the capital stock paid in, and therefrom a payment shall be made by one to the other, sufficient to make equal the amount paid and received by each of the parties hereto."

In the city of Lincoln the partnership and business was continued until March 4, 1885, when the following agreement of dissolution and settlement with reference to it was entered into, to-wit:

"This memorandum of an agreement made and entered into this 4th day of March, 1885, by and between Charles M. Leighton, of Lincoln, Nebraska, and Henry T. Clarke, of Omaha, Nebraska, witnesseth:

"1. That the partnership relation heretofore existing between the parties above named, under the firm name of

Leighton & Co., of said city of Lincoln, is this day dissolved by mutual consent.

"2. That the said Clarke is to be and remain the sole owner of the business and good-will of said firm, with authority to continue said business should he so desire.

"3. That the said Clarke is to have all of the store fixtures and also all of the goods of said firm, both now on hand and in transit.

"4. That the said Clarke is to assume and pay off all of the indebtedness of said firm as shown by the books of said firm.

"5. That said Leighton is to have and collect all indebtedness due or owing to said firm of every nature and description whatever as shown by the books of said firm.

"6. That an invoice shall be taken of the store fixtures and goods of said firm, immediately upon the signing of this agreement.

"7. That the final settlement between the parties hereto, of the matters growing out of said firm's business, shall be made as follows: (1.) The said Clarke shall be charged with the goods of said firm received by him, including store fixtures, the same to be calculated at their actual value, less two per cent for discount, to which value freight shall be added. (2.) The said Leighton shall be charged with the par or face value of all indebtedness due to said firm and turned over to him, as stated in the fifth paragraph of this agreement, but from said par or face value two per cent shall be deducted for discount; and he shall also be charged with one-half of the amount of unpaid insurance now in litigation, deducting the one-half of the profits made by the firm of Leighton & Clarke in said city of Omaha. (3.) The said Clarke is to be credited with all sums paid or agreed to be paid by him upon the indebtedness of said firm, as stated in the fourth paragraph of this agreement. (4.) That as soon as the invoice mentioned in the sixth paragraph of this agreement is completed, a bal-

ance shall be struck between the parties hereto of all matters growing out of said firm's business, and whatever balance shall be found to be due from either of said parties to the other shall be paid as follows: If the balance shall be due from the said Leighton he shall turn over to the said Clarke a sufficient amount of the accounts received by said Leighton from said firm's business to pay off such balance, the said accounts to be selected by said Clarke from those turned over to said Leighton. But if the balance shall be found to be due from the said Clarke, that such balance shall be paid from the said Clarke in goods, and, in case said Leighton shall desire them, such goods to be selected by said Leighton for a general stock for retail drug business, reckoning the prices of such goods the same as in the invoice hereafter to be made, as previously stated in their contract; in case, however, said Clarke should prefer to do so, he may pay such balance to said Leighton in money within sixty days after the completion of said invoice.

"8. That all matters growing out of any insurance in Omaha shall remain undivided and unsettled between the parties hereto precisely as if this agreement had not been made.

"9. That in case any difference should hereafter arise between the parties hereto in relation to the settlement and balancing up of the business mentioned in this agreement, then each of the parties hereto shall select an arbitrator, and the two then chosen shall select a third, and the three so chosen shall arbitrate and adjust the matter in difference between said parties and fix and determine the amount to be paid from one to the other of said parties under this agreement, and such determination shall be final and conclusive."

The answer of appellant admitted the copartnership and the ensuing business relations between the parties and dissolution and agreements therefor as pleaded in the petition. The appellant further states in his answer that in the month

of August, 1884, the firm suffered a loss by fire which destroyed a large portion of the stock of goods in its store at Omaha, and that at the time of the fire the stock was insured in the sum of $84,500, and Leighton, appellee herein, who was in charge of the business, in the process of adjustment by the insurance companies of the loss, in an attempt to defraud said insurance companies, made, or caused to be made, a false inventory of the goods which were undamaged by the fire, by which it appeared that the loss was greater than it really was; that this was done without the consent or knowledge of Clarke. The amount of loss as figured in the first instance was $54,351.60, which, after some controversy between the companies and the firm, was reduced to $39,401.45, which was agreed to be the amount of the loss. A number of the insurance companies, probably half of them, paid the sums due from them respectively, amounting in the aggregate to $19,854.91; that the insurance companies gained information which excited their suspicions in regard to the accuracy of the inventory upon which the adjustment had been based, and those companies which had made payment instituted suits for the return of the sums so paid, and the others refused payment, thus forcing Clarke to sue them; that the action of the companies was predicated upon the clause contained in each of the policies providing in substance that if any fraud is practiced by the assured, or misrepresentation made, a forfeiture of all rights under the terms of the policy ensues. The result of the actions was adverse to the firm; the companies which had paid recovering a portion of the amounts paid, and the ones against whom actions were commenced by the firm succeeding in reducing the amounts claimed, the aggregate amounts as fixed by the juries being $25,902.30, which, it is alleged, is much less than the loss suffered, and the difference between this sum and what he alleges was actually lost the appellant claims should be allowed him against Leighton

as damages. There are further allegations in the answer setting forth the failure of the appellee to contribute his full share of the stock of the firm as contemplated by the articles of copartnership, his paying interest from funds belonging to the firm on his individual note due a bank, and some other matters in which it is charged he designed to defraud or cheat his partner. The answer concluded with a prayer for accounting along the lines stated in the answer or bearing in mind the affirmative matters alleged therein. The reply gives the appellee's version of the fire and the actions of the different parties in reference to the adjustment of the loss and other matters connected therewith; denies any intent on the part of appellee to defraud the insurance companies or in any manner to misrepresent the value of the goods not destroyed, or to falsely swell or increase the amount of the loss; relates the history of the payment by some of the companies and their suits for and recovery of a portion of such payments, the actions against the others by the firm, and agrees in the amounts recovered, and, in the main, with the allegations in regard to the same facts in the answer, but denies all charges of fraud or deceit in all other matters as strenuously as those referring to the loss by fire and its adjustment, and further states that Clarke had as full and free access to the business of the firm in all its particulars, after the fire, as the appellee, and was as fully cognizant of all the actions of the parties in the insurance matters referring to the loss and its adjustment as had or was the appellee. There are some further allegations in the reply denying the appellant's statements in his answer wherein the appellee's conduct and good faith are called in question regarding his contributions to the stock by executing his individual note for $10,000 and delivering it to the firm and crediting himself with a like sum of stock, and the reference in the answer to a $5,000 note and his payment of the interest to the bank with money belonging to the firm, which need not

here be more specifically noted. The reply closes with a general denial of each and every allegation not specifically admitted. There was a trial to the court which resulted in the following findings and judgment, viz.:

"This cause having been heretofore on a day of a former term of this court, to-wit, April 16, 1890, tried and submitted to the court, now comes on for final determination, and after due consideration, and being fully advised in the premises, the court finds that there is nothing due the plaintiff upon the cause of action set forth in the petition herein from the defendant. The court further finds that the evidence fails to establish the charge of fraud against the plaintiff made in the defendant's answer and cross-petition against the plaintiff concerning the loss by fire in Omaha, and the court further finds that there is nothing due the defendant from the plaintiff upon the cause of action set forth in the answer and cross-petition of the said defendant. Finds that the costs should be apportioned between the parties as follows: Each party to pay his own witness fees, and all other costs to be equally divided between the parties to this action. It is therefore considered and adjudged by the court that the plaintiff take nothing upon the cause of action set forth in his petition, and that as to such cause of action the defendant go hence without day; and that the defendant take nothing upon the cause of action set forth in his answer and cross-petition, and that as to said cause of action the plaintiff go hence without day, and that the plaintiff and defendant each pay their own witness fees and also that each party hereto, plaintiff and defendant, pay one-half the costs of this action; the costs of the plaintiff, including witness fees, being taxed at $47.74, and the defendant's costs, including witness fees, being taxed at $59.74, and for all of which execution is hereby awarded. To all of which findings and decree each of the parties hereto duly and severally except and pray an appeal, which is by the court allowed, and forty days from the rising of

the court are hereby given them to reduce their exceptions to writing."

The case was brought to this court by an appeal on the part of Henry T. Clarke.

We will first dispose of the question of the fraud and deceit of plaintiff alleged in the answer. The court below finds that "the evidence fails to establish the charge of fraud against the plaintiff, made in the defendant's answer," and after a careful examination of all the testimony bearing upon this particular point we cannot say that this finding is manifestly or clearly wrong; this being true, in accordance with the established rule of this court, we will not disturb it. This eliminates from our further consideration of the case all questions arising from and connected with the main one of the fraud and deceit of plaintiff as a foundation for a claim of damages in favor of appellant against appellee, and our task is narrowed to an accounting between the parties, in which we have furnished us by them the articles of copartnership and the two contracts of dissolution for our direction and government, and with the provisions of which, in so far as we are able to understand, construe, and apply them, we will attempt to comply, for certainly wherein the parties themselves have mapped out the course of settlement, if reasonable and practicable, it should be observed and followed. We have in evidence in the case some statements of the accounts between the parties referring to the business as conducted in Omaha, and also in Lincoln, and considerable testimony of the same nature in regard to certain items of account which were not included in any of the statements or lists furnished by the book-keeper or experts who examined the books. Taking our figures then from the testimony, not from any particular lists or portions of the testimony, but using such as seemed from a consideration of all the evidence the true figures as to particular items in the account, and accepting and being guided in our estimates by the

articles of dissolution as viewed or construed in connection with the agreement of copartnership and comparison of the figures, a balancing of the accounts brings us to the same conclusion as that reached by the trial court,—that neither appellee nor appellant has proven anything due him from the other, and that the judgment in accordance with such finding is correct, hence it is

AFFIRMED.

CHARLES MCDONALD V. B. BEER.

FILED NOVEMBER 7, 1894. No. 5690.

Usury: RENEWAL NOTES. Where a loan is made at a legal rate of interest and a note executed as evidence of the indebtedness thereby created, and at the maturity of the note a contract is made by which the time of payment is extended and a new note is given in which is included interest on the amount of the loan at a usurious rate for the time of the extension, the renewal note is tainted with usury.

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

George E. French and *J. S. Hoagland*, for plaintiff in error.

B. I. Hinman and *T. Fulton Gantt, contra.*

HARRISON, J.

On the 6th day of April, 1889, the plaintiff instituted an action against the defendant, the object of which, as stated in the petition then filed, was the recovery of a judgment against the defendant in the sum of $5,863.11 and interest, the aggregate sum then due plaintiff, according to his petition, from defendant, as evidenced by two promis-

sory notes which had theretofore been executed by defendant and delivered to plaintiff. The defendant's answer was a plea of usury, alleging, in substance, that the notes upon which the suit was brought were renewals of other and prior notes and these were renewals of prior notes, and thus carrying the history back through a series of notes to the originals, and alleging that all were tainted with usury by reason of the contract which was made between the parties, regarding interest, at the time of the execution of the original notes which were given by defendant to plaintiff as evidence of the indebtedness created by a loan of money then made by plaintiff to defendant. The allegations of the answer relating to usury were denied in reply filed by the plaintiff. The case was tried to the court without the intervention of a jury, and resulted in a finding in favor of defendant as to his plea of usury, and judgment was rendered accordingly, reducing the amount of plaintiff's recovery and allowing costs to defendant. Plaintiff filed a motion for a new trial, which, on the hearing, was overruled, and the case was brought to this court for review by petition in error on behalf of plaintiff. The counsel for plaintiff contend that the original contract was for the payment of interest at the rate of ten per centum per annum, and that the loan in its inception being legal and not usurious, that the facts of the interest being raised to a higher rate than the lawful one at the date of a renewal or renewals, of which there were several, would not constitute the contract a usurious one, and cause his client to suffer the result of contracting for or taking or receiving a usurious rate of interest. The evidence shows that the loans were effected and the original notes given, one for $5,000 November 23, 1883, and one for $2,000 February 14, 1889, the first due in ninety days after date, and the second in sixty, and each drawing interest at ten per centum per annum; that on March 22, 1884, the $5,000 note was renewed by a note in the sum of $5,140, the $140 being the

interest as figured on the five thousand from November 23, 1883, to March 22, 1884. The note for $2,000 of date February 14, 1884, and the note for $5,140 were neither of them paid at maturity, but were allowed to run until January 16, 1885, at which date new notes were given, including interest at a usurious rate, and the old notes were canceled and returned to the defendant in error. The judge who tried the case in the district court evidently adopted the view that the transaction was an illegal one or tainted with usury from the date January 16, 1885, when the first renewal notes were given in part for the interest figured at a usurious rate, and rendered judgment for the amounts loaned with legal interest from the dates of inception to January 16, 1885, deducting therefrom the several sums paid, and this we think was right and according to the correct rule of law as applied to such transactions. Where a loan is made at a legal rate of interest and a note executed as evidence of the indebtedness thereby created, and at the maturity of the note a contract is made by which the time of payment is extended and a new note is given in which is included interest on the amount of the loan at a usurious rate for the time of the extension, the renewal note is tainted with usury. (Tyler, Usury, 352; *Webb v. Bishop*, 7 S. E. Rep. [N. Car.], 698, and cases cited.) The judgment of the district court is therefore

AFFIRMED.

JENNIE LEWIS V. SCOTIA BUILDING & LOAN ASSOCIATION.

FILED NOVEMBER 7, 1894. No. 5786.

Review: FINDINGS AND JUDGMENT: VARIANCE. Where the facts admitted by the pleadings and established by the special findings of the trial court are at variance with its final judgment, such judgment in an error proceeding must be reversed.

ERROR from the district court of Greeley county. Tried below before COFFIN, J.

James Lewis, G. C. Wright, E. E. Wright, and *J. R. Hanna,* for plaintiff in error.

T. J. Doyle, contra.

RYAN, C.

There was submitted with this case a motion to quash the bill of exceptions, which will not be passed upon, because no necessity exists for a ruling thereon in the view which we take of the pleadings and special findings made. In the petition filed by the appellant in the district court of Greeley county, it was alleged that the defendant was organized as a corporation, under the laws of Nebraska, on or about June 29, 1885, and that plaintiff at that time signed for and became the owner of one share of its stock; that afterwards plaintiff became the owner of other shares of stock; that plaintiff gave notice to the said corporation, as by its constitution and by-laws she was required to do for that purpose, of her withdrawal of her stock, and that more than thirty days have elapsed since said notice was given, but that defendant has refused to permit such withdrawal and has refused an accounting in respect to plaintiff's said shares of stock. Following these averments was this language: "That this plaintiff has paid into said corporation or association, as weekly dues on the first share above mentioned, 233 weeks at forty cents per week, making the sum of $93.20, upon which this plaintiff is entitled to interest at the rate of six per cent, making the sum of $15.38, and in all making the sum of $108.58 now due this plaintiff from said corporation or association upon the first above mentioned share; that there has been paid by this plaintiff to the above S. K. Paxton, a party from whom she alleged that she had purchased her other shares

of stock, into said corporation or association as weekly dues thereon upon her two remaining shares above mentioned, for 215 weeks at eighty cents per week, making the sum of $172, upon which this plaintiff is entitled to interest at the rate of six per cent, making the sum of $28.40, and making in all the sum of $200.40 due this plaintiff from said corporation or association upon her two shares assigned to this plaintiff by S. K. Paxton above named; that said corporation, the Scotia Building & Loan Association, is indebted to this plaintiff upon the shares of stock above mentioned the full sum of $308.99, and that the same is now due and owing to this plaintiff upon the said three shares of stock in the said corporation or association, and that she is now the lawful owner and holder of the same." There was a prayer for judgment for the sum of $308.99, with interest and costs of suit. The defendant answered, admitting that it was a corporation as alleged in the petition, and that plaintiff signed for and became the owner of one share of stock in said association, and became a member thereof on or about the 29th day of June, 1885. Following the above admissions were averments as follows:

"Defendant, for further answer, avers that on or about the 8th day of October, A. D. 1885, plaintiff redeemed and purchased her said share of stock from said association in the manner provided in the constitution and by-laws of said association for so doing, viz., there being $200 accumulated in the treasury of said association, one share of the capital stock of said defendant was offered for sale at public auction, and one J. M. Marsh, a member of said association, bid therefor a premium of $57 and said share was declared sold to said Marsh, whereupon said Marsh, at the request of plaintiff, transferred his said bid to plaintiff; whereupon plaintiff, in pursuance of the by-laws and constitution of said association, executed and delivered to defendant her bond in the sum of $200 for the payment of

said share of stock so redeemed by her, payable in weekly installments of forty cents principal and thirty cents interest. * * * To secure the payment of said bond said plaintiff, in conjunction with her husband, James Lewis, executed to defendant a mortgage deed upon the premises therein described. * * * Upon the execution and delivery of said bond and mortgage, defendant paid to plaintiff said sum of $200 in full, including said $57 premium bid therefor, in the manner following, viz.: Defendant executed and delivered to plaintiff its order upon the treasurer of said association in the words and figures following, viz.:

"'$143. SCOTIA, NEB., Oct. 8, 1885.

"'Treasurer Scotia Building & Loan Association, pay to Jennie Lewis, or order, $143, account of one share redeemed at 28½ per cent. W. L. JOHNSON, *President.*

"'J. M. MARSH, *Secretary.* No. 9.'

which said order was duly honored and paid by said treasurer of said association, and indorsed as follows: 'Received payment, James Lewis.' At the time of indorsing said order James Lewis was the duly authorized and acting agent of plaintiff, and as such indorsed said order; defendant therefore avers that in the manner foregoing defendant paid to plaintiff in full said share of stock, and plaintiff's interest therein became extinguished except as a debtor of said association.

"Defendant, for further answer, says that after the execution of said bond and mortgage plaintiff became in arrears in payment of her weekly dues and interest for more than three months, and defendant commenced an action of foreclosure against said plaintiff on said bond and mortgage and caused summons to be served upon plaintiff, and thereafter plaintiff went to the clerk of said court in person and paid the costs of said action, and to the treasurer of said association and paid her arrears, weekly dues, interest, and fines, and kept the pass-book furnished by

defendant containing a record of the payments of the same, and has at all times since the redemption of said share of stock recognized the redemption thereof and said obligation to pay the same. Wherefore defendant avers plaintiff is estopped from denying the redemption of said share of stock; that said share was the only share of stock owned or possessed by said plaintiff in defendant at the time of the redemption thereof.

"Defendant, for further answer to said petition, denies that S. K. Paxton transferred or sold two shares of stock in said association to plaintiff, and alleges the fact to be that one James Lewis, husband of plaintiff, bought at the date set forth in said petition from S. K. Paxton and G. C. Paxton real estate in the village of Scotia, Nebraska, which said real estate was subject to and incumbered by a mortgage in favor of defendant to secure the payment of five shares of stock redeemed by said Paxton, and said James Lewis, as an incident to the purchase of said property and as part consideration therefor, assumed the payment of said mortgage indebtedness to defendant and took an assignment of ten shares of stock in defendant, all of which had been redeemed or assigned to defendant as security for said shares redeemed prior to the purchase of said property and the assignment thereof to said James Lewis. At the date of purchase of said premises and taking assignment of said shares of stock, said James Lewis was the owner and holder of two shares of stock in defendant, and each member is limited to ten shares of stock, and to avoid a violation of said by-laws, said James Lewis directed two shares of said stock assigned to Jennie Lewis, which was done. Said two shares of stock so assigned to said Jennie Lewis, plaintiff, had been fully redeemed by and paid to Paxton long prior to the transfer thereof, and the bond of said Paxton secured by mortgage deed upon said premises purchased by said James Lewis, executed to defendant; that plaintiff had no knowledge of the assignment of said shares to her at the

time same was made and paid no consideration therefor, and upon the part of assignee it was simply assuming the payment of a debt to the defendant for shares redeemed before the same were assigned. Said association has not yet paid out in the manner provided by its by-laws and constitution by a payment of all its shares of stock."

The answer also contained a further allegation as to losses sustained in which plaintiff should participate, as well as a general denial of all allegations not admitted or qualified. To this answer there appears to have been no reply. Upon these issues the parties, having waived a jury, submitted the case to the district court, and on the 4th day of December, 1891, said court made a finding and judgment for defendant and overruled plaintiff's motion for a new trial. There was afterwards, on January 6, 1892, special findings of fact made by the court and filed in the case which, as no objections were made thereto, we shall consider as properly in the record. These special findings were as follows:

"First—Did the plaintiff become the legal owner of one share of stock in the association on or about the 29th day of June, 1885?

"Ans. Yes, about that date.

"Second—If the plaintiff did own one share of stock in said association, did she transfer or redeem the same? If so, when, how, and to whom?

"Ans. Yes, she redeemed it. Money paid to her agent, James Lewis, and which fact she has since also ratified about July 27, 1887.

"Third—Did the plaintiff at any time own two shares of stock in said association known as the Paxton shares; and if so, when, how, and to whom do you find she transferred or redeemed them, if you find that she transferred or that they were redeemed?

"Ans. Were placed in her name because James Lewis could not hold; they were at the time pledged; she did not pay or pledge, and they were afterwards turned in by

James Lewis to pay debt for which they were pledged; she paid no money on them.

"Fourth—Did the plaintiff give notice of her desire to withdraw from the association as provided by its by-laws, thirty days before the commencement of this action?

"Ans. I find she did.

"Fifth—How much money, if any, do you find that the plaintiff paid to said association, and the amount paid on each share?

"Ans. About $100 on the two shares secured on her property.

"Sixth—Was the plaintiff at the time she commenced this action the owner, or did she have any interest in the shares of the stock of the building and loan association; and if so, what was the value of such interest?

"Ans. She owns the share secured on her property and which has been paid out, and she received on it $170, and has paid on it about forty cents per week from June 29, 1885, to October 5, 1885, and forty cents weekly dues and thirty cents weekly interest from October 12, 1885, to about July 29, 1889, and eighty cents dues and sixty cents weekly interest from August 5, 1889, to September 29, 1890, and the main portion of the payment was her money. It was to the extent of $100, possibly a little over that sum. She and her husband, James Lewis, paid all, or nearly all, money to the association without separation or distinguishing any fund from another, if any special fund existed, and it is quite hard to tell from the evidence the plaintiff's intention in regard to it further than she desired to pay the loan secured on her premises."

The above liberal quotations are made from the petition and answer, followed by the special findings of the court, that it may be made to appear, first, what facts were admitted, and, second, upon each of the disputed facts, what was the judgment of the court. These two classes of facts having been settled, it is not difficult to determine the nature

of the transaction between the plaintiff and defendant. In the first place the plaintiff took one share of stock of $200 par value, in exchange for which she seems neither to have paid anything or assumed any obligation. There was afterwards paid into the treasury of the association of accumulations the sum of $200. For the privilege of borrowing this $200 Mr. Marsh, whose signature is attached to the order above quoted as secretary of the association, agreed to pay $57 premium. His right to borrow $200 on payment of this premium was assigned to the plaintiff, who executed her bond for the full amount of the principal, payable in installments of forty cents per week, interest thirty cents per week. To secure the payment of these amounts plaintiff and her husband executed a mortgage upon the plaintiff's real estate for the security of the amounts agreed to be paid. At this point occurs what is called the redemption of her share of stock; that is to say, when plaintiff borrowed the $200 evidenced by her bond, secured by mortgage, and received the amount of said loan less the premium, the defendant, as it is alleged in its answer, "paid to plaintiff in full said share of stock, and plaintiff's interest therein became extinguished except as a debtor of said association." It seems that the real nature of this transaction was that plaintiff gave her bond and mortgage, her husband joining in the latter, for the sum of $200, and actually received the difference between that amount and $57 denominated premium; that is to say, she actually received $143 on her bond for $200, and thenceforward her relations with the defendant wholly ceased, except that she remained its debtor. Ordinarily, we understand that a share of stock entitles the person holding it to a certain interest in the profits of the corporation as well as to a certain right to control its action. In this case, however, the payment for and destruction of the share of plaintiff's stock were simultaneous, and she really acquired nothing but a loan of $200, from which in advance was

taken $57 as a premium. It would be difficult to imagine what results might follow if there shall in the future chance to be a sufficient number of $200 accumulations to redeem all the shares of stock of this building and loan association. Should there not in such event be a residuum of $200 notes secured by mortgage, and if so, by whom would they be held? If by the loan and building association, who could control its affairs and share in its dividends and effects, there being no holders of its stock? Would it not be true that its complete redemption must of necessity extinguish all hope for its immortality? It was pleaded by the defendant that the plaintiff owned no shares of stock except this one; that the two shares of stock which she claims to have obtained from the Paxtons were owned by her husband and taken in her name without her knowledge. These averments are sustained by the third finding of the court, from which it also appears that James Lewis was the real owner and turned in these shares of stock in payment of the amount for which they had been pledged. The transaction as to these two shares of stock certainly does not, under the averments of the answer and findings of the court, create, as against the plaintiff, a personal liability, whatever rights in the future she may be able to show.

We have now to deal with but the first share of stock, and indeed the only share of which plaintiff was ever the owner so far as the record discloses. It would seem from the averments of the answer that plaintiff has paid the full amount which was due on her bond and mortgage, together with all liabilities owing by her to the association in respect of the single share of stock of which, as we have seen, she was the owner, though there is no certainty that this assumption is correct. The finding of the district court is not exact as to the amounts which she has paid as distinguished from what her husband has paid on account of stock held by him. It is clear, however, that, under the pleadings and the special findings as made, there should not

have been, as there was, a general judgment in favor of the defendant. It may be that a fuller disclosure would show that in fact there is nothing due to the plaintiff. On the allegations quoted and special findings made, such does not seem to be the case. It is evident that to the ascertainment whether or not there is anything due from either party to the other, an accounting is indispensably necessary. The judgment of the district court is, therefore, reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

SPOONER R. HOWELL, APPELLEE, V. EMMA SCHLOTFELDT ET AL., APPELLANTS.

FILED NOVEMBER 7, 1894. No. 5163.

Review: CONFLICTING EVIDENCE. There is presented by this appeal only questions of fact in respect to which the evidence was conflicting. The judgment appealed from is, therefore, affirmed.

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

W. H. Thompson, for appellants.

Abbott & Caldwell and *Thummel & Platt, contra.*

RYAN, C.

This action was brought by appellee Howell in the district court of Hall county, for the foreclosure of a mechanic's lien for lumber furnished for the erection of a dwelling house on a lot owned by Emma Schlotfeldt. William Willer, Frank C. Phillips, and Rittenhouse & Brage, as holders of mechanics' liens against the same property, were

made defendants, and each filed an answer in which was prayed the foreclosure of such lien as was held by such defendant. On the cross-petition of Frank C. Phillips a judgment and decree was entered December 23, 1890. Nothing was filed in this court until January 5, 1892, too late for review of this particular decree. On the 13th of January, 1891, the issues were tried as between the other parties, and a judgment and decree was entered, respectively, in favor of Spooner R. Howell, William Willer, and the firm of Rittenhouse & Brage.

In the brief for appellants it is said that "as to the defendant Willer, there is no contention except as he is connected with the general decree rendered by the court." Probably by this it is meant that he is brought into this court that all parties concerned may be here either as appellants or appellees. Whatever the intention may be in the use of this language, it presents no question by way of argument, and hence we dismiss Mr. Willer from further consideration.

As to the claim of appellee Howell, the contention was, and is, that he agreed to furnish lumber at a certain rate as fixed by a statement submitted to him as the proposition of some lumber dealer in Omaha. On the one hand it was testified that there was, at the time of the original agreement, a stipulation that to the list price a margin should be allowed for trouble of hauling the lumber, etc. This was denied by the Schlotfeldts. There was also a credit claimed by the Schlotfeldts on account of lumber returned. Mr. Schlotfeldt, in giving his evidence, was unable to state whether the lumber which he had testified that he returned had been charged in Howell's bill or not. Both these matters were heard on conflicting evidence, and the judgment of the district court in respect to them, therefore, cannot be reviewed.

As against the claim of Rittenhouse & Brage, there were set up counter-claims by way of damages. This firm drew

the plans and prepared the specifications for the house which was built for the Schlotfeldts, and appellants claim it was represented that the cost would not exceed $3,500, whereas in fact it was in excess of $6,000. There is no question made that in the progress of the work changes were made, each involving a departure from the plans of these architects. What additional cost these changes involved we have no means of determining accurately. We do not deem this specially important, however, for the sum of $3,500 was only mentioned as the architects' opinions as to what the cost would be. There was nothing in the nature of a warranty as to this figure, neither, on the other hand, is there any showing that but for this representation appellants would have declined to accept the plans as submitted to them. Under these conditions there was no foundation for a claim for damages because the house cost more than $3,500.

There was also a claim made that by reason of certain plate glass being placed outside, as required by the specifications, instead of inside the sash, appellants were greatly damaged. There was a conflict in the evidence as to whether plate glass should be placed outside or inside, and we cannot say the trial court erred in giving the weight it did to the evidence on this point. The judgment of the district court is

AFFIRMED.

HARRISON, J., not sitting.

J. MCGREGOR ADAMS V. RALPH R. OSGOOD.

FILED NOVEMBER 7, 1894. NO. 5750.

1. **Taxation:** VALIDITY OF SALE FOR PORTION OF TAXES. A county treasurer cannot make a valid public or private sale of real estate for non-payment of delinquent taxes due thereon,

unless in such sale are included all taxes, with interest and costs, then delinquent against such real estate. *State v. Helmer*, 10 Neb., 25, *Tillotson v. Small*, 13 Neb., 202, and *O'Donohue v. Hendrix*, 13 Neb., 257, reaffirmed.

2. ———: PURCHASERS AT SALE. The rule of *caveat emptor* applies with full force to a purchaser of real estate sold for the non-payment of delinquent taxes. *Pennock v. Douglas County*, 39 Neb., 293, re-affirmed.

3. ———: SALES: DISCHARGE OF TAXES NOT INCLUDED. The sale of real estate by a county treasurer for delinquent taxes due thereon for one year does not discharge either state, county, or city taxes assessed against such real estate for prior years, which taxes were not included in such sale.

4. ———: LIENS: FORECLOSURE. The only way by which a valid tax assessed against real estate in this state can be discharged is by the payment of such tax, unless such real estate be sold therefor and the holder of the tax lien fails to bring suit to foreclose the same for five years after the expiration of the time to redeem.

5. ———: ———: SALES. The tax sales and liens mentioned in sections 119 and 181 of the revenue law of 1879 have reference only to valid tax sales and valid liens arising therefrom.

6. ———: SALES: RETURN: PRIVATE SALES. Until a county treasurer has made a return to the county clerk of his county of the public sale of lands for taxes held by him in pursuance of section 109 of the revenue act of 1879, he has no authority to sell lands at private sale for delinquent taxes due thereon.

7. **Invalid Tax Sales:** RIGHTS OF PURCHASERS: SUBROGATION. Where a sale made of real estate for taxes is invalid the purchaser thereat, for the taxes for which he purchased the real estate, and for all prior and subsequent taxes existing against said real estate paid by him because of his purchase, becomes subrogated to all the rights of the public to the liens existing against said real estate for such taxes, and entitled to the same rate of interest, and no greater, on the taxes paid, which the delinquent taxes were drawing when he paid them. *Dillon v. Merriam*, 22 Neb., 151, reaffirmed.

8. ———: CANCELLATION OF CERTIFICATE: ATTORNEY'S FEE. Where an owner of real estate brings suit to cancel an alleged invalid tax sale certificate, and the holder of such certificate admits, in his answer to the action, its invalidity, asks to be subrogated

to the rights of the public to the lien for the taxes on which said certificate is based, and to foreclose such lien against said real estate, he is not entitled to an attorney's fee of ten per cent of the amount of the decree he may recover, to be taxed as part of the costs in the case.

9. **Taxes**: FORECLOSURE OF LIEN: ATTORNEY'S FEE. Whether a holder of a tax lien, on obtaining a decree foreclosing the same, is entitled to an attorney's fee under section 181 of the revenue law of 1879 is not to be determined by the status of the lien-holder in the case. Whether he be a plaintiff or a defendant is wholly immaterial. The test as to whether such lien-holder is entitled to an attorney's fee is whether the lien foreclosed has for its basis a valid tax sale. If the sale on which the lien is based was valid, then the holder of the lien is entitled to an attorney's fee. If the sale was invalid, he is not entitled to the attorney's fee.

10. ———: INVALID SALE: ACTION TO CANCEL CERTIFICATE: TENDER: BURDEN OF PROOF: EVIDENCE. An owner of real estate brought suit to cancel a tax sale certificate and taxes assessed against said real estate for certain years and paid by the holder of the certificate. The owner alleged in his petition, in general terms, that the tax sale certificate was void; that the taxes paid were never assessed against the real estate and were not liens thereon. At the same time he tendered into court an amount of money which he alleged was sufficient to pay and discharge said tax liens for said years. The holder of the tax certificate admitted its invalidity, asked to be subrogated to the rights of the public to the lien for the taxes on which said certificate was based, and taxes paid by him assessed against said real estate by reason of his purchase thereof, and prayed to foreclose said tax lien and taxes against said real estate. *Held*, (1) That the owner, by his tender of a sum of money in payment of the taxes for certain years, thereby admitted that the taxes appearing against said real estate on the treasurer's books for said years were legally assessed against it; (2) that the burden of showing that any of the taxes for any of said years had never been assessed against the real estate, were for any cause illegal, had been discharged, or that they were not liens upon the real estate, was upon the owner; (3) that the holder of the tax sale certificate and tax liens, to prove his case and establish his lien, was only required to prove what amount of taxes he paid, when he paid them, and the tax sale certificate and tax receipts of the treasurer of the county were competent evidence for that purpose.

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

John L. Webster, for plaintiff.

Henry W. Pennock, for defendant.

See opinion for citations upon the questions discussed.

RAGAN, C.

On the 13th day of August, 1889, Ralph R. Osgood purchased lots 3 and 4, in block 52, in the city of Omaha, Douglas county, from the treasurer of said county at private tax sale for the city taxes of the city of Omaha due and delinquent on said lots for the year 1888. At this time there were unpaid delinquent state and county taxes standing against these lots on the books of said county treasurer for the years 1880, '81, '82, '83, '84, '85, '86, '87, and '88, and unpaid delinquent city taxes of the city of Omaha for the years 1868, '69, '70, '71, '72, '80, '81, '82, '83, '84, '85, '86, and '87, all of which Osgood paid; and he subsequently paid as they fell due the state, county, and city of Omaha taxes against said lots for the years 1889 and 1890. From 1873 to the 25th of July, 1890, these lots were owned by one George W. Frost, or his heirs, and were sold in the year 1873 by the county treasurer of Douglas county for the delinquent state and county taxes of 1872. Sales of these lots for state and county taxes thereon for the years 1873, '74, '75, '76, and '77, or some of them, were afterwards made. The purchaser of these lots at these sales, or his assignee, paid all state and county taxes against the lots up to and including the taxes for the year 1879. All the liens acquired against these lots by these tax sales, and for payments of taxes on the lots up to and including the year 1879, finally came to be owned by one Bryant, and he, by a decree of the circuit court of the

United States for the district of Nebraska, was given a lien against these lots for all such taxes. This decree or judgment Bryant assigned to J. McGregor Adams, who on July 25, 1890, became the owner of the lots by deed from the heirs of George W. Frost. When the county treasurer sold the lots in 1873 he did not sell them for the city of Omaha taxes then due and delinquent thereon, nor were the city of Omaha taxes included in any sale of the lot subsequently made. The state and county taxes against these lots prior to the year 1880 are in no manner involved in this action.

Adams brought this suit in the district court of Douglas county against Osgood, and tendered in court a sum of money which he alleged was sufficient to pay all taxes, with interest thereon, assessed against said lots after and including the year 1880. He alleged in his petition, in substance, that the lien of the city of Omaha for all taxes on these lots prior to the year 1880 had been divested and discharged by the sale of the lots, for delinquent state and county taxes only, in the years 1873,' 74, '75, '76, and '77, and that the sale made by the county treasurer of these lots to Osgood on the 13th of August, 1889, was void, and that the city taxes paid on said lots by Osgood for all years prior to 1880 were void or voluntary payments, and he prayed for a decree canceling the tax sale certificate issued by the county treasurer to Osgood on the 13th of August, 1889, and a decree that Osgood had no lien on the lots on account of said tax sale certificates or on account of the payment of taxes made by him on said property for years prior to the year 1880. Osgood filed an answer in the nature of a cross-bill, setting out the purchase of the lots from the treasurer of Douglas county on August 13, 1889, and the taxes paid by him for state, county, and city purposes, as already stated herein, and prayed the court to award him a decree against said lots for such taxes and interests and an attorney's fee. The district court found and decreed that

the defendant Osgood was entitled to a lien upon said lots for taxes and special assessments paid by him and assessed against said lots for the year 1880 and thereafter, and that the amount of Osgood's lien against said lots for said time should draw interest at the rate of twenty per cent per annum for two years from the dates of the payments made by him and ten per cent per annum thereafter. The court further found and decreed that Osgood was entitled to an attorney's fee of $429.24, to be taxed as part of the costs in the action. The court also found and decreed that the city taxes for the years 1868, '70, '71, and '72 upon each of said lots, and the city taxes for the year 1869 upon said lot 3, which had been paid by Osgood, were not a lien upon said lots or either of them, and that by paying said taxes Osgood had acquired no lien upon said lots. The court further found and decreed that the failure of the county treasurer to include the city of Omaha taxes delinquent on said lots for the years 1868 to 1872, inclusive, in the sale made of said lots for taxes in the year 1873, divested the lien of said city taxes from 1868 to 1872, both inclusive. From this decree both parties have appealed to this court.

1. The first question for consideration is the holding of the district court that the sale of these lots by the county treasurer in 1873, for state and county taxes only, divested the lien of the city of Omaha for the taxes previously assessed and then delinquent on the lots for the years 1868, '69, '70, '71, and '72. Section 54 of the revenue act of 1866 provided that taxes upon real property should be a perpetual lien thereon against all persons and corporations, except the United States and this state. (Revised Statutes, 1866, ch. 46, sec. 54.) This law remained in force until replaced by section 138 of the revenue law of 1879, the law now in force, which provides: "The taxes assessed on real property shall be a lien thereon from and including the first day of April in the year in which they are

levied until the same are paid." Section 116 of the revenue act of 1879 provides: "The purchaser of any tract of land sold by the county treasurer for taxes, * * * acquires a perpetual lien of the tax on the land," etc. This last section is, in substance, a re-enactment of section 61 of the revenue law of 1869. Section 109 of the revenue act of 1879 provides: "On the first Monday of November in each year, between the hours of nine o'clock A. M. and four P. M., the treasurer is directed to offer at public sale at the court house or place of holding court in his county, or at the treasurer's office, all lands on which the taxes levied for state, county, township, village, city, school district, or any other purpose, for the previous year, still remain unpaid," etc. This is substantially a re-enactment of section 56 of the revenue law of 1869, in force when the county treasurer sold the lots in question for the state and county taxes thereon for the year 1872.

In *State v. Helmer*, 10 Neb., 25, it was held: "It is doubtless the true intent and meaning of the [revenue] law that lands or town lots can only be sold for taxes to those who offer to pay and do pay the amount of all taxes 'due on any parcel of land or town lot or the smallest portion of the same.'"

In *Tillotson v. Small*, 13 Neb., 202, the facts were: Taxes were delinquent upon certain real estate for the years 1872, '73, '74, and '75. The county treasurer sold the lands for the delinquent taxes of 1875 only, and a tax deed was made to the purchaser in 1881. The county treasurer of the county where the lands were situate subsequently sold them to the county commissioners of that county for the delinquent taxes for the years 1872, '73, and '74. The commissioners assigned the certificates of purchase to Small. Tillotson, the holder of the tax deed, then brought a suit in equity to the district court of Nuckolls county to cancel these certificates of sale issued by the treasurer to the county commissioners and by them assigned to Small. It was

argued by counsel for Tillotson, as appears from the briefs that the sale of the lands by the county treasurer for the delinquent state and county taxes of the year 1875 divested and discharged the taxes for the years 1872, '73, and '74, which were not included in the sale. This court held that the treasurer had no authority to sell the lands in 1876 for the taxes of 1875, without including in such sale all taxes then due and delinquent against said lands.

In *O'Donohue v. Hendrix*, 13 Neb., 257, it was held: "Under our revenue law a sale of land can be lawfully made only by including all the taxes, interest, and costs due thereon at the time," etc.

Section 99 of the revenue law of 1854 of the state of California provided that taxes on real estate should continue a lien thereon until such taxes were paid. The supreme court of that state construed that statute in *Cowell v. Washburn*, 22 Cal., 520. The real estate involved in the controversy in the case was sold for taxes for the year 1858, and a certificate of sale issued to the purchaser. The taxes for the year 1857, though delinquent and unpaid, were not included in the sale made of the premises in 1858, and the suit was brought to restrain the tax collector from again selling the real estate for the delinquent taxes of 1857. The court held that the failure of the officer to include the delinquent taxes for the year 1857 in the sale made for the taxes of the year 1858 did not divest the lien of the taxes for the year 1857. To the same effect see *Reeve v. Kennedy*, 43 Cal., 643, and *Justice v. City of Logansport*, 101 Ind., 326.

In *Dennison v. City of Keokuk*, 45 Ia., 266, the facts were: Dennison purchased certain lots in the city of Keokuk at a sale made thereof by the city for taxes of one year. At the time of his purchase there were unpaid and delinquent city taxes against the lots for a number of previous years. The taxes for these previous years were not included in the sale made to Dennison. He obtained a tax

deed for the lots and brought suit against the city to quiet his title. The city claimed a lien upon the lots for the delinquent and unpaid taxes for the years prior to the year for which Dennison bought the lots. By the charter of the city of Keokuk city taxes were made a perpetual lien upon real estate upon which they were assessed until such taxes were paid. The supreme court held: "A sale for city taxes of one year does not divest the lien of the city for the unpaid taxes of prior years."

It appears, then, that under our revenue laws taxes assessed upon real estate are a lien thereon until paid, and that a sale of real estate made by a county treasurer, for delinquent taxes of one year due on said real estate, will be absolutely void if taxes assessed and delinquent against said real estate for prior years are not included in such sale. It follows from this that the sale made of the lots in controversy in this action by the county treasurer of Douglas county in 1872 to Bryant were void. We do not think that it should be held that a void tax sale for the taxes of one year divests and discharges valid taxes assessed and delinquent against such real estate for prior years. We are aware that on this question there is a conflict of authority.

The holding of the supreme court of Iowa is that a sale of land for taxes for one year discharges and frees the land from the taxes assessed and delinquent thereon for the years prior to the one for which the sale was made. (*Preston v. Van Gorder*, 31 Ia., 250; *Hough v. Easley*, 47 Ia., 330.) The statutes of Iowa make taxes on real estate a perpetual lien thereon; but their statute also provides that the county treasurer in selling real estate for taxes shall make such sale for and in payment of the total amount of taxes, interest, and costs due and unpaid on such real estate at the time of the sale.

The holding of the Wisconsin court is that a valid sale and conveyance of land for taxes under a junior assessment cuts off all former titles or liens. (*Jarvis v. Peck*, 19 Wis.,

84; *Sayles v. Davis*, 22 Wis., 225; *Eaton v. North*, 29 Wis., 75.)

In *McFadden v. Goff*, 32 Kan., 415, it is said: "A valid tax deed extinguishes and destroys all other titles and liens existing or based upon anything existing at the time of the levying of the taxes upon which the tax deed is founded."

In *Robbins v. Barron*, 32 Mich., 36, it is said: "A tax title, if valid, destroys and cuts off all liens and encumbrances previously existing against the land."

In *Langley v. Chapin*, 134 Mass., 82, it is said that "A sale of land for non-payment of taxes, if valid, creates a title paramount to any existing estate therein."

An extended review of these cases would subserve no useful purpose here. In no case which I have examined, and which holds that the sale of real estate for the taxes of one year divests the lien of taxes thereon for prior years, is there any intimation that the sale made was invalid. In Iowa the statute made the taxes on real estate a perpetual lien thereon. This fact, if not overlooked, seems to have been ignored by that court, as its decision was based solely on a section of their Code which provided that the annual sales of real estate for taxes made by the treasurer should be made for, and in payment of, the total amount of taxes due on the real estate; and while it would seem to be the duty of a county treasurer in Iowa, when making a sale of real estate for taxes, to sell it for all taxes then delinquent and due against the real estate, still it would seem that the courts of that state do not regard a sale made by the treasurer for the taxes of one year without including taxes of prior years as invalid. In some of the cases it is intimated that the rule is based on the doctrine of estoppel; that is, that the county treasurer is the agent of the public, and in making a sale of real estate for taxes that he acts ministerially; and as the law makes it his duty when he sells real estate for the non-payment of taxes to include therein all taxes then delinquent against the real estate, that the

public warrants to the purchaser that the taxes for which he has bought a piece of real estate are all the taxes that were then due and delinquent against it; and therefore the public is afterwards estopped from averring the contrary by again selling the real estate for taxes delinquent thereon at the time of the other sale. It is true that a county treasurer in making a sale of real estate acts ministerially, but that the public warrants that such sale is made for all the taxes then due on the land or in accordance with law, is not in harmony with the decided weight of authority in this country. The rule of *caveat emptor* applies to one who purchases property sold by a treasurer for delinquent taxes quite as much as it does to the purchaser of property at a judicial sale. (*Pennock v. Douglas County*, 39 Neb., 293, and cases there cited.) To our minds the argument that the public warrants that in a sale of real estate made by a county treasurer for delinquent taxes are included all taxes then due on said real estate, is not sound. Such a rule would contravene the express provisions of our statute making taxes on real estate a perpetual lien thereon until paid. Such a rule would be contrary to good public policy. It would open the door to fraud and put a premium on the carelessness of public officials. The tax books and records showing the taxes assessed and delinquent against real estate are at all times open to the inspection of every one, and the law, which every one is presumed to know, specifically enumerates what steps must be taken by a county treasurer in making a sale of real estate for delinquent taxes in order that such sale may be valid. Whatever may be the rule elsewhere, we think, under our statutes, that the only way by which a valid tax existing against real estate here can be discharged is by the payment of such tax, unless such real estate be sold for taxes and the holder of the tax lien fails to bring suit to foreclose the same for five years after the expiration of the time to redeem. (*Alexander*

v. Shaffer, 38 Neb., 812); and that a void treasurer's sale made of real estate for the taxes of one year will not divest the taxes of prior years which are a valid lien thereon. We think, therefore, that Osgood is entitled to a lien upon the lots herein for the amount of all taxes which he paid thereon for the years prior to the year 1880, and which taxes were legally levied and assessed, unpaid or delinquent, and therefore liens upon said real estate.

2. The second point for consideration in this appeal is whether or not the district court was correct in its finding and decree that Osgood should be allowed interest upon the taxes paid by him at the rate of twenty per cent per annum for a period of two years from the date of such payments. And this leads us to inquire what rights Osgood acquired against these lots by his purchase of them at private tax sale on the 13th day of August, 1889. Sections 119 and 181 of the revenue act of 1879 provide:

"Sec. 119. The owner or occupant of any land sold for taxes, or any person having a lien or interest thereon, may redeem the same at any time within two years after the day of such sale, by paying the county treasurer for the use of such purchaser, his heirs or assigns, the sum mentioned in his certificate, with interest thereon at the rate of twenty per cent per annum from the date of purchase, together with all other taxes subsequently paid, whether for any year or years previous or subsequent to said sale, and interest thereon at the same rate from the date of such payment," etc.

"Sec. 181. In any case in which the plaintiff shall recover in an action for the foreclosure of tax liens, as provided in this act, he shall be entitled to interest on each amount paid by him, and evidenced by his certificates of tax sale and receipts for taxes paid, at the rate of twenty per cent per annum from the date of each payment for the term of two years, and at the rate of ten per cent per annum on each of said amounts from and after the expiration of

said two years, and until the rendition of the decree of foreclosure, which decree shall draw interest as in other cases."

But these sections have reference to valid tax sales and liens by virtue thereof existing against real estate. The county treasurer of Douglas county, on the 13th of August, 1889, sold these lots to Osgood at private tax sale, and issued him a treasurer's certificate of such tax sale. The lots were sold to Osgood for the delinquent city of Omaha taxes due on the lots for the year 1888. The treasurer did not sell these lots to Osgood for the delinquent city of Omaha taxes of any year prior to the year 1888. At the date of this sale there were due and delinquent against these lots not only city taxes of the city of Omaha for a number of years prior to 1888, but state and county taxes for the years 1880 to 1888, both inclusive. Section 113 of the revenue act of 1879 provides: "After the tax sale shall have closed, and after the treasurer has made his return thereof to the county clerk as provided in the preceding section, if any real estate remain unsold for the want of bidders therefor, the county treasurer is authorized and required to sell the same at private sale at his office, to any person who will pay the amount of the taxes, penalty, and costs thereof for the same," etc. The county treasurer had no authority to sell these lots at private tax sale for the taxes of the year 1888, without including in such sale all the taxes then due and delinquent against the lots for taxes for prior years. The sale, then, made by the treasurer to Osgood of these lots was void. Another point deserves notice in this connection, and that is, Osgood is here seeking to foreclose a lien against these lots for the taxes of 1888, and for taxes which he paid prior and subsequent to that date, to protect the lien he acquired at the tax sale. If the treasurer had included all taxes delinquent against the lots in the sale he made thereof to Osgood, to make such sale a valid one it would still devolve upon Osgood to show

that the county treasurer had made a return to the county clerk of the public sale for delinquent taxes held by the treasurer on the first Monday of November preceding, in pursuance of section 109 of the revenue act. For until the treasurer had made such return to the county clerk he had no jurisdiction to sell the real estate at private sale. It nowhere appears in this record that the county treasurer of Douglas county, at any time prior to selling this land to Osgood at private sale, had made to the county clerk of his county a return of the public sale for taxes held in the preceding November. Osgood, then, by virtue of the purchase he made of these lots in 1888, and by virtue of the taxes paid thereon both prior and subsequent to that date to protect the lien he acquired by his purchase, became subrogated to the rights which the public had against these lots by virtue of these tax liens, and consequently became entitled to receive on the payments he made the same rate of interest, and no greater, which the taxes were drawing when he paid them. (*Pettit v. Black*, 8 Neb., 52; *Lynam v. Anderson*, 9 Neb., 367; *Miller v. Hurford*, 11 Neb., 377; *Reed v. Merriam*, 15 Neb., 323; *Merriam v. Hemple*, 17 Neb., 345; *Alexander v. Goodwin*, 20 Neb., 216; *Dillon v. Merriam*, 22 Neb., 151.)

What rate of interest were the taxes, delinquent and paid by Osgood on these lots, drawing at the date of his payments? Section 105 of the revenue act of 1879 provides: "On the first day of May of the year after which taxes shall have been assessed, all unpaid state, county, school, township, precinct, city and village taxes, except city taxes in cities of the first class, shall become delinquent, and shall draw thereafter ten per cent per annum, which interest shall be collected the same as the tax so due." For all state and county taxes, then, which Osgood paid on these lots, and which taxes became delinquent in the year 1880 or subsequently, he was entitled to interest at the rate of ten per cent per annum. Section 86, chapter 12*a*, entitled "Cities of the

Metropolitan Class" (Comp. Stats., 1893), provides: "On the first of July next succeeding the levy thereof, all unpaid city taxes in cities of the metropolitan class shall be and become delinquent, and shall thereafter draw interest at the rate of one per cent per month, payable in advance, which interest shall be collected the same as the tax due," etc. This section is a re-enactment of section 30, chapter 8, entitled "Cities of the First Class," which went into effect on the 28th of March, 1873. It follows from this that on all delinquent city of Omaha taxes paid by Osgood, and which taxes became delinquent in 1880, or since that time, he should be allowed interest at the rate of twelve per cent per annum. Sections 52 and 53 of the revenue act of 1866 were as follows:

"Sec. 52. On the first day of May of the year after which taxes shall have been assessed, all unpaid taxes shall become delinquent and shall draw interest at the rate of ten per cent per annum from the date of such delinquency.

"Sec. 53. To all taxes which remain unpaid at the time the same become delinquent, there shall be added, as a penalty, ten per cent on the amount so remaining unpaid, which shall be added to the amount assessed, and collected by the county treasurer."

On all taxes, then, paid by Osgood on these lots, which taxes were due and delinquent prior to the year 1869, he should be allowed interest on the amount paid at ten per cent per annum. By section 50 of the revenue act of 1869, and by section 30 of chapter 8, entitled "Cities of the First Class," passed and approved March 28, 1873, taxes became delinquent on the first day of May in the year after they were levied, and drew interest from the date they became delinquent at the rate of twelve per cent per annum. On all taxes paid on these lots by Osgood, which taxes became delinquent in the year 1869, or in any year subsequent thereto until and including the year 1879, he should be allowed interest at the rate of twelve per cent per annum.

3. A further question is whether Osgood was entitled to an attorney's fee of ten per centum of the amount of the decree awarded him by the court on his tax lien and for taxes paid in support thereof. Section 181 of the revenue act of 1879 provides that when a plaintiff shall recover in an action brought to foreclose a tax lien, that at the time of the rendition of such decree the court shall award him an attorney's fee of ten per cent thereof to be taxed as part of the costs in the case. The argument of appellant Adams is that Osgood has not brought suit to foreclose a tax lien within the meaning of said section; that he, Adams, brought the suit to cancel the liens held by Osgood; and although the latter filed an answer in the nature of a cross-petition praying for a foreclosure of his lien, he is not a plaintiff within the meaning of the statute, and therefore not entitled to the attorney's fee. Whether the holder of a tax lien on obtaining a decree foreclosing the same is entitled to an attorney's fee under said section 181 is not to be determined by the status of the lienholder in the case. Whether he be a plaintiff or a defendant is wholly immaterial. To be entitled to the attorney's fee he must obtain a decree foreclosing a tax lien in his favor, and the true test as to whether he is entitled to an attorney's fee is whether the lien foreclosed has for its basis a valid tax sale. If the sale made was invalid, then the holder of the lien is not entitled to the attorney's fee. If the sale made was valid, then the holder of the lien is entitled to an attorney's fee of ten per cent of the amount of the decree recovered. The decree may embrace taxes upon the real estate paid by the holder of the tax lien to protect the same, and such taxes may have been liens upon the real estate prior or subsequent, or both, to the date of the tax sale. The lien of the holder may be an invalid tax deed the test still remains as to the attorney's fee whether the sale on which the deed is based was a valid one. In the case at bar, as already seen, the lien of Osgood is based on an invalid tax

sale, and therefore he is not entitled to an attorney's fee to be taxed as part of the costs in his case. The tax sale being invalid, Osgood's rights and only rights are those of the public to which, by reason of the invalid tax sale, he became subrogated. This rule is not in conflict with *Otoe County v. Brown*, 16 Neb., 398. It was held in that case that where a county had purchased real estate for taxes and sought to foreclose the lien that it was not entitled to an attorney's fee to be taxed as part of the costs. It appears, however, from a statement of the facts of the case, that the sale made of the lands for taxes did not include all taxes delinquent at the time against the real estate. The conclusion reached in that case was correct and in harmony with the rule just announced for the reason that the lien acquired by the county against the real estate was based on an invalid tax sale thereof, although the decision is not put upon that ground. *Towle v. Shelly*, 19 Neb., 632, is a case in harmony with the rule we have announced in this case, although it is not stated in the opinion that the court reached the conclusion which it did because the lien foreclosed was based upon a valid tax sale of the real estate. *Wygant v. Dahl*, 26 Neb., 562, is another case in harmony with the rule announced in the case at bar, although it is not stated in the opinion that the defendant, who filed a cross-petition to foreclose a tax lien, and who was awarded by the court an attorney's fee of ten per cent of the amount of the decree recovered by him, was entitled to such decree by reason of the fact that his tax lien was based upon a valid tax sale. In *Stegeman v. Faulkner*, 42 Neb., 53, it was distinctly held: "A purchaser at an invalid tax sale is not entitled to have taxed in his favor an attorney's fee as part of the cost of the foreclosure of the lien to which he has by payment become subrogated." It follows, therefore, that the learned district court erred in allowing Osgood an attorney's fee to be taxed as part of the costs in this case.

4. Finally, it is suggested by the appellant Adams that the decree of the district court in favor of Osgood is not supported by sufficient competent evidence. This contention is based upon the fact that Osgood introduced in evidence the certificates of tax sales of the lots issued to him by the county treasurer of Douglas county, and the tax receipts issued to him by the treasurer for taxes he paid on said lots, and which taxes were delinquent; but Osgood offered no proof to show that the taxes called for by said certificates of tax sales and tax receipts had been legally levied and assessed against the lots, and the argument is that these tax receipts were not competent to prove the existence of the taxes. As a general principle, tax receipts alone are not evidence of the existence of the taxes to which they relate; that is, the tax receipt does not prove that the taxes for which it calls were legally assessed or levied upon the property. (*Miller v. Hurford*, 13 Neb., 13; *Clark v. Blair*, 14 Fed. Rep., 812.) The only taxes involved in this suit to which appellant's argument is applicable are the taxes delinquent on these lots in the year 1880 and since then, as these were the only taxes for which the district court gave Osgood a lien. Adams, in his petition filed herein, tendered into court a sum of money which he alleged was sufficient to pay the principal and interest of these taxes. This tender, then, was an admission on the part of Adams that the taxes assessed and delinquent against the property for the year 1880 and since then, and which Osgood had paid, were valid liens against the lots. (*Huntington v. Ziegler*, 2 O. St., 10.) The allegation in Adams' petition is that Osgood had paid to the county treasurer for "pretended delinquent county taxes and for a pretended sewer tax, and for pretended delinquent city taxes," certain sums of money for certain years including the year 1880, and subsequently; and the petition also alleged that all city taxes for all years prior to 1880 were illegal; and it must be remembered that Adams brought this suit to

quiet his title to these lots as against these taxes. The burden, then, was on him to show that any of the taxes alleged by him to be void were illegal taxes or had been paid. (*Towle v. Holt*, 14 Neb., 221; *Dillon v. Merriam*, 22 Neb., 151.) If an owner of real estate should file a bill in equity to cancel a mortgage which appeared of record against such real estate, and allege in general terms that such mortgage was a forgery, and the defendant in his answer to such petition should allege that such mortgage was a valid one, and ask to have it foreclosed, then it is clear that the existence of the mortgage of record would stand as admitted by the owner, and the burden would be upon him to prove that such mortgage was in fact a forgery before he would be entitled to a decree for its cancellation. The rule is the same in a case like the one at bar. Here, Adams brings a suit to cancel certain taxes and tax liens on his real estate, and he alleges, in general terms, that some of these taxes were never assessed, and that all the taxes are illegal and void, and do not constitute liens upon his real estate. Osgood, by his answer, sets out his purchase of Adams' real estate at a sale made thereof for these taxes, and his payment of other taxes to protect the lien he acquired by such purchase, and asks to have the lien which he acquired thereby foreclosed against the real estate. Adams, then, by his pleading and his position in court, admitted that these taxes stand assessed against this property on the tax books of Douglas county, and the burden was on him to show that the taxes were wrongfully on said books; that they had in fact never been levied; that they had been paid or otherwise discharged, or, for some reason, that they were not liens upon his real estate; and until he did make such proof he was not entitled to a decree cancelling them. Adams having admitted by his pleading that the taxes which Osgood had paid existed on the tax records of Douglas county, and that Osgood had paid these taxes, and having offered no proof that the taxes

had not been assessed, or that for any reason they were illegal, or that they had been discharged, Osgood, then, to make his case and establish his lien, was only required to prove what taxes he paid, when he paid them, and the tax receipts of the treasurer of Douglas county were competent evidence for the purpose.

There are some other questions discussed in the briefs of counsel which we deem it unnecessary to examine at the present time. The decree of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion; the parties to each pay one-half the costs of this appeal.

JUDGMENT ACCORDINGLY.

IRVINE, C., not sitting.

UNION PACIFIC RAILWAY COMPANY, APPELLANT, V. DOUGLAS COUNTY BANK ET AL., APPELLEES, IMPLEADED WITH J. ADAMS ET AL., EMPLOYES, APPELLANTS.

FILED NOVEMBER 7, 1894. No. 5495.

Contract for Transferring Freight: ASSIGNMENT: RIGHTS OF LABORERS TO LIEN ON FUND CREATED: LIABILITY OF ASSIGNEES. W. had a contract with a railway company for loading and unloading cars and transferring freight, the compensation to be payable monthly. W. requiring money to carry on the business he procured P. and C. to make their joint note to a bank, the proceeds of which were passed to W.'s credit. For the purpose of securing P. and C. he delivered to C. the contract with the railway company indorsed as follows: "For value received, I hereby sell, assign, and transfer to J. R. C. all my right, title, and interest in and to the above contract, hereby authorizing and empowering him to do any and all manner of things in the premises as I myself could." C. then wrote an

assignment upon the contract and delivered it to the bank as security to the note. There was at the time nothing due W. under the contract. When the note matured W. failed to pay his employes, who demanded that the railway company protect them. C., and the bank also, claimed the funds in the hands of the company under the assignment. The railway company filed a bill of interpleader, making the bank, P., C., and the employes defendants. All parties yielded to the proceeding and set up their claims upon their merits. *Held*, (1) That the assignment of the contract by W. to C. was intended not merely as an assignment of the moneys to be earned but an assignment of the whole contract *cum onere;* (2) that the assignees could not in equity be permitted to receive the advantages of the contract without discharging its obligations; (3) that inasmuch as the employes by garnishment proceedings might have obtained payment from the fund in dispute by actions against W. or his assignee, the institution of this suit having prevented a resort to such proceedings, the court should herein distribute the fund as if such proceedings had been in fact taken; (4) under the foregoing circumstances, the equity of the employes to the fund held superior to that of the assignee.

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

The facts are stated by the commissioner.

Chas. Offutt, for employes, appellants:

Any assignment of the contract was subject to all equities, not only between the parties thereto, but to all equities which third persons could enforce against the assignor. (2 Pomeroy, Equity Jurisprudence [2d ed.], secs. 703, 708, 709; *Davies v. Austen*, 1 Ves. [Eng.], 247; *Bush v. Lathrop*, 22 N. Y., 535; *Trustees of Union College v. Wheeler*, 61 N. Y., 105; *Green v. Warnick*, 64 N. Y., 220; 2 Wharton, Contracts, sec. 842.)

The employes have an equity in the contract or fund representing it. (1 Pomeroy, Equity Jurisprudence [2d ed.], sec. 59; *Daggett v. Rankin*, 31 Cal., 321; *Loney v. Courtnay*, 24 Neb., 584; *Neeson v. Clarkson*, 4 Hare [Eng.], 97;

Norris v. Caledonian Ins. Co., L. R., 8 Eq. [Eng.], 127; *Gill v. Downing*, L. R., 17 Eq. [Eng.], 316.)

Similar equities are recognized and enforced by positive statutes. (Comp. Stats., ch. 54, art. 2; *Wilson v. Taylor*, 8 So. Rep. [Ala.], 149.)

Similar equities have been recognized and enforced by courts of chancery. (*Meyer v. Johnston*, 53 Ala., 237; *Fosdick v. Schall*, 99 U. S., 235; *Miltenberger v. Logansport R. Co.*, 106 U. S., 286; *Union Trust Co. v. Souther*, 107 U. S., 591; *Burnham v. Bowen*, 111 U. S., 776; *Union Trust Co. v. Illinois M. R. Co.*, 117 U. S., 434; *Dow v. Memphis & L. R. R. Co.*, 124 U. S., 652; *Union Trust Co. v. Morrison*, 125 U. S., 612; *Farmers Loan & Trust Co. v. Missouri I. & N. R. Co.*, 21 Fed. Rep., 265; *Reyburn v. Consumers Gas, Fuel & Light Co.*, 29 Fed. Rep., 562; *Tooth v. Hallett*, L. R., 4 Ch. App. [Eng.], 242; *Bristow v. Whitmore*, 9 H. L. Cas. [Eng.], 392.)

Where money coming due on a contract is assigned, the assignee's claim is subject to all the conditions and terms of the contract. (*Tooth v. Hallett*, L. R., 4 Ch. App. [Eng.], 242; *Bristow v. Whitmore*, 9 H. L. Cas. [Eng.], 391.)

The nature of the contract in question is such that it was not assignable. (Pollock, Contracts [4th ed.], 425; *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U. S., 379.) If there was an assignment of future earnings of the contract, it was void. (Comp. Stats., ch. 32, secs. 11, 17; Wait, Fraudulent Conveyances, sec. 379; *Booker v. Jones*, 55 Ala., 266; *Cole v. Kerr*, 19 Neb., 557; *Moody v. Wright*, 13 Met. [Mass.], 17; *Seymour v. Delancy*, 3 Cow. [N. Y.], 445; *Pigg v. Corder*, 12 Leigh [Va.], 69.)

John M. Thurston and *W. R. Kelly*, for Union Pacific Railway Company, appellant.

Lake, Hamilton & Maxwell, for appellees:

The employes had no contractual relations, expressed or

implied, with the railway company, and can have no claim against it for their labor. The contract was signed alone by the railway company and S. F. Wells. (1 Jones, Liens, sec. 50; *Hoyt v. Story*, 3 Barb. [N. Y.], 262; *Wright v. Ellison*, 1 Wall. [U. S.], 16; *Dillon v. Barnard*, 21 Wall. [U. S.], 430; *McCloskey v. City and County of San Francisco*, 66 Cal., 104.)

The appellees, Douglas County Bank, Joseph R. Clarkson and C. S. Parrotte, are entitled as creditors of S. F. Wells to receive the money in the hands of the railway company acknowledged by it to be due and owing under the transfer contract. (Pomeroy, Remedies & Remedial Rights, 184; *Field v. Mayor of City of New York*, 6 N. Y., 179; Lawson, Rights, Remedies & Practice, sec. 2652; *Wade v. Bessey*, 76 Me., 413; *Hawley v. Bristol*, 39 Conn., 27; *Augur v. New York Belting & Packing Co.*, 39 Conn., 536; *Payne v. Mayor of Mobile*, 4 Ala., 333; *Bradley v. Root*, 5 Paige Ch. [N. Y.], 632; *Bower v. Hadden Blue Stone Co.*, 30 N. J. Eq., 171; *Nimocks v. Woody*, 97 N. Car., 1; *Bank of Commerce v. Bogy*, 44 Mo., 13; *Wheatley v. Strobe*, 12 Cal., 92; *Fonner v. Smith*, 31 Neb., 107; *Ruple v. Bindley*, 91 Pa. St., 296; *McWilliams v. Webb*, 32 Ia., 577; *Moore v. Lowrey*, 25 Ia., 336.)

The appellees are not liable to the employes for any unpaid balance due the latter for labor performed which was necessary to carry out the provisions of the contract. (*Whitney v. Cooper*, 1 Hill [N. Y.], 632; *Miller v. Franklin*, 20 Wend. [N. Y.], 629; *Chester v. Bank of Kingston*, 16 N. Y., 343; *Champlin v. Butler*, 18 Johns. [N. Y.], 169; *Marks v. Pell*, 1 Johns. Ch. [N. Y.], 594; *James v. Johnson*, 6 Johns. Ch. [N. Y.], 429; *Hodges v. Tennessee Marine & Fire Ins. Co.*, 8 N. Y., 416; *Hahn v. Doolittle*, 18 Wis., 206; *Eiseman v. Gallagher*, 24 Neb., 81; *Newman v. Edwards*, 22 Neb., 248; *Omaha Book Co. v. Sutherland*, 10 Neb., 334.)

IRVINE, C.

In 1887 Mrs. S. F. Wells entered into a contract with the Union Pacific Railway company, whereby Mrs. Wells undertook to load, unload, and transfer from car to car all freight necessary to be so transferred, to and from the cars of the Union Pacific Railway and its connecting lines at Council Bluffs. Mrs. Wells was required to furnish all employes necessary for the purpose, and the railway company provided certain facilities in the way of platforms, tools, and switching. The compensation for this work was at a specified rate per ton and was payable monthly, not later than the tenth day of each month for the month preceding. While the contract was signed by Mrs. S. F. Wells and the business was carried on in her name, it was in fact conducted by her husband, Charles Wells, and in all transactions connected with this business which we shall have occasion to refer to Charles Wells was the person who actually performed all acts in the Wells' interest, but they were performed in the name of S. F. Wells. No question arises as to Charles Wells' authority to so represent Mrs. Wells. On the 10th of August, 1888, Wells requiring money to carry on the business, C. S. Parrotte and Joseph R. Clarkson made their joint note to the Douglas County Bank for $3,600, payable in thirty days. The proceeds of this note were passed to Mrs. Wells' credit. At the same time there was indorsed on the contract referred to the following:

"AUG. 10, 1888.

"For value received, I hereby sell, assign, and transfer to Joseph R. Clarkson all my right, title, and interest in and to the above contract, hereby authorizing and empowering him to do any and all manner of things in the premises as I myself could. S. F. WELLS,

"By C. WELLS, *Att'y in Fact.*

"Witness: SAMUEL C. SAMPLE.

"S. F. WELLS."

Clarkson, in his turn, again indorsed the contract as follows:

"AUG. 10, 1888.

"I hereby assign, sell, and transfer to the Douglas County Bank above contract as collateral security for loan this day made. JOSEPH R. CLARKSON.

"Witness:

"LOUIS NEESE."

The contract bearing these indorsements was then delivered to Parrotte, who was president of the bank. The note referred to was undoubtedly executed by Parrotte and Clarkson solely for the accommodation of Wells, and the object of the assignment of the contract to Clarkson was to secure him and Parrotte in the matter, while the assignment from Clarkson to the bank was, as stated, for the purpose of affording collateral security to the note. On the 10th of September, 1888, a check was drawn by the Union Pacific in favor of the Douglas County Bank for the amount then due Mrs. Wells under the contract. With the sum realized the note referred to was paid and the remainder of the check passed to Mrs. Wells' credit. Immediately upon the payment of this note, and the same day, Wells besought Parrotte and Clarkson to renew the transaction for another month. This they did, making a new note for $3,600, and delivering the contract with the same indorsements to Parrotte. The evidence is very indistinct as to the details of this occurrence. The business was conducted chiefly by Wells and Parrotte. Wells' testimony was not procurable, or at least was not procured at the trial, and the evidence shows that Parrotte's mental condition was then such that he could not testify. Sufficient appears, however, to indicate that there was an intention, whether or not it was well executed, to deposit the contract primarily as security to Parrotte and to Clarkson on the note, and secondarily as security to the bank against overdrafts which, as a matter of fact, accrued during the currency of the note to the amount

of $1,600. About the time of the second loan the parties to the contract, acting under a provision thereof, arranged for its termination at the end of thirty days, to-wit, October 10th. When that day came Wells did not appear and his employes were not paid. The employes, through a committee appointed for the purpose, made a demand upon the railway company that they should be secured the wages earned by them out of the moneys then owing by the railway company under the contract. In the meantime Mrs. Wells had executed an order upon the local treasurer directing the payment of the money to the Douglas County Bank. In this state of affairs the Union Pacific Railway Company filed its petition in the district court of Douglas county in the nature of a bill of interpleader, making defendants the Douglas County Bank, Clarkson, Mrs. Wells, and Charles Wells, and the employes referred to, one hundred and thirteen in number. These employes have joined in the proceedings throughout and will be hereafter referred to simply as the "employes." The petition set up the facts practically as above stated, averring that there was due under the contract the sum of $5,119.23; that Clarkson and the bank were claiming said sum on one side and that some of the employes had already begun suit to recover their money and garnished the railway company, and that the other employes were about to do so. The prayer was that the railway company might be permitted to deposit said sum in court; that the defendants be required to interplead as to their rights, and that they be enjoined from prosecuting any other actions against the railway company pending the determination of their rights in this suit. The bank, Clarkson, and Mrs. Wells answered, setting up the claims of Clarkson and the bank by virtue of the facts above stated. The employes also answered asserting a claim based on the alleged invalidity of the assignments of the contract, at least so far as they would operate to deprive the employes of their wages out of the fund. Some facts

occurred subsequently to the institution of the suit which should be stated. The note of September 10th was several times renewed and finally paid by Clarkson. The overdraft referred to was never paid by Mrs. Wells, but Parrotte seems to have regarded himself as surety therefor, and when his interest in the bank was disposed of he gave his own note to cover certain indebtedness to the bank including this overdraft. This note he afterwards paid. The employes, not receiving their wages promptly, threatened to precipitate a strike of all the railway's employes, and in order to avoid this the railway company made an arrangement with Mr. Richard S. Carrier, whereby the latter advanced to the employes the amounts due them respectively and took from them an instrument in the form of a several promissory note dated October 20, 1888, and payable within sixty days after date, and also containing an assignment to Carrier of the employes' claims against Mrs. Wells and her assigns. The Union Pacific Railway Company at the same time executed a written guaranty to Carrier of the repayment of the sums so lent by him. Carrier has not been repaid either by the employes or the railway company. He was by the district court permitted to intervene and set up his claim under the assignment from the employes. The railway company sought to set up the same facts by supplemental petition; but leave to do so was refused, and we think properly. It had not fulfilled its guaranty, and could not assert any right to the fund thereunder even if its position as plaintiff in a bill of interpleader did not operate to prevent its assertion of a right in itself to the fund. (Story, Equity Jurisprudence, sec. 807.) There was no dispute as to the material facts. The district court found in favor of Clarkson and the bank and entered judgment in favor of the bank for the sum in dispute, in trust, however, for the payment therefrom of the costs and also of $3,600 and interest to Clarkson. The Union Pacific Railway Company and the employes appeal from this de-

cree. We cannot see in what respect the Union Pacific can complain thereof. By filing its bill of interpleader it placed itself in the position of a stakeholder, and the decree merely provides for the distribution of the fund paid by the railway company into court, and does not subject the railway company either to costs or to any other burden. As we have already said, we think the court was right in refusing to allow the railway company to assert a claim in its own right to the fund by reason of its guarantying the Carrier loan; so that if the railway company were the only appellant the decree could not be disturbed. We shall consider the case, therefore, solely from the standpoint of the employes and of Carrier, whose rights depend upon theirs.

In considering the rights of the parties the first question which presents itself is the nature of the assignments of Mrs. Wells' contract. Was the assignment to Clarkson intended to pass to him only the money earned or to be earned under the contract, or was it intended to transfer the benefits of the contract *cum onere*—that is, to substitute Clarkson in place of Mrs. Wells both as to benefits and obligations? The language of the assignment goes far to compel the latter construction. When it is contemplated to assign merely money accruing by virtue of a contract, language confining the assignment to that purpose is naturally used. It is hard to conceive that with such an object in view Mrs. Wells should express herself as assigning her right, title, and interest "in and to the above contract," and then expressly authorize and empower the assignee "to do any and all manner of things in the premises" as she herself could. If the language of the assignment clause would, standing alone, permit the construction of assigning the benefits only, the language following would necessarily extend the meaning. This language was inserted in the assignment for a purpose, and we are bound to give it effect if possible. Its only purpose, so far as we can discover, must have been to authorize Clarkson to perform

the obligations imposed by the contract upon Mrs. Wells. When we look at the assignment in the light of the circumstances this construction is reinforced. The assignment was made at a time when nothing was due Mrs. Wells, a fact which the evidence shows was known to Clarkson. It is true that payment had not been made for the work done within the past ten days, but it would not become due for a month and would be wholly inadequate to secure the debt, the securing of which was the plain object of the assignment. In order to make the assignment adequate security, it became necessary that the work required of Mrs. Wells by the contract should be performed throughout the month. Clarkson's security lay not in what had already been done, but in what was to be done in the future. Had Wells abandoned the work the day the assignment was made, Clarkson would have derived no benefit thereunder unless he were permitted to take up and carry on the work. It is true that a contract of such a nature is probably not assignable in the sense that Mrs. Wells might, without the consent of the railway company, substitute another to perform her duties, but this might be done with the consent of the company, and Clarkson may have had some assurance that in the event of Mrs. Wells' failure to perform the work his rights would be recognized, or at least he might be willing to assume this risk. We do not mean that the intention of the parties was by the assignment *eo instante* to impose upon Clarkson Mrs. Wells' obligations, but we do think that the object of the assignment was to secure Clarkson, not merely by a present appropriation of moneys to be earned in the future by Mrs. Wells, but by authorizing him to see that the moneys were earned and to avail himself of the profits. We do not think that the nature of Clarkson's assignment to the bank is very material to this discussion. It would seem from the evidence that Clarkson became subrogated or rather reinvested with the security afforded, by paying the note, and

that Parrotte became subrogated to the surplus by discharging the overdraft, provided the assignment was at all operative. But we cannot see that either the bank or Parrotte could under their assignment claim higher rights than Clarkson possessed. It was only the rights passing to Clarkson under the contract that were by him transferred to the bank. It follows, from the construction we have given this assignment, that Clarkson could not assume the benefits of the contract without assuming its burdens. We do not here determine that by the assignment he *ipso facto* rendered himself liable personally for the wages of the employes. What we do hold is that under such an assignment he cannot be permitted in equity to avail himself of the benefits of the contract without discharging its obligations, and that in a case where he seeks to assert his right to the benefits as against another party in whose favor obligations have arisen, he must perform those obligations before he will be permitted to receive the benefits.

With this construction fixed upon the assignment of the contract its application to the present controversy is to be determined. This case was instituted by a bill of interpleader. The object of such a bill and the foundation of such a proceeding is to relieve one, who has in his possession property or funds claimed by different persons, from vexatious litigation and the peril of being compelled to a double satisfaction. (Story, Equity Jurisprudence, sec. 806.) In order to sustain such a proceeding the plaintiff must show that at least two claimants have colorable demands upon the fund. It may be doubted whether the plaintiff's bill was sufficient for this purpose, because it might well have been contended that the employes had no colorable claim against the Union Pacific and could only acquire such claim by garnishment proceedings for the purpose of reaching the fund either as the property of Mrs. Wells or of her assignees, and not adversely to either, but these were questions to be determined before the court ordered

an interpleader. It does not appear that the court made any such order, but the parties by their voluntary act supplied the place of the order. Without awaiting the order to interplead they answered the bill and set up their claims for adjudication against one another. So that, whether or not the bill of interpleader by the plaintiff was well founded, the defendants, having yielded thereto, and elected to submit their claims to the fund for adjudication, the case must be treated as properly in court on the interpleader. (11 Am. & Eng. Ency. of Law, 504, and cases cited.) We must therefore treat the fund as properly in court for distribution according to the equities of the respective claimants. If the assignment to Clarkson had been entirely inoperative, Mrs. Wells' employes might have proceeded at law against her and by appropriate process of garnishment obtained a legal claim upon the fund in dispute. If, on the other hand, the assignment became operative, and is to be construed as we have construed it, they might have proceeded against Clarkson and by the same process obtained a similar claim. The bill was founded upon the danger of subjecting the Union Pacific to a multiplicity of suits because of such proceedings, and it was certainly beyond the power of the Union Pacific, by adopting this procedure and paying the money into court, to deprive the employes of the effect of the remedies which were open to them before the suit was brought but which the bringing of the suit prevented them from pursuing. The fund being in court for the purpose of protecting the Union Pacific against such proceedings, and the employes therefore prevented from so proceeding, their equities should be considered in the same light as if such steps had actually been taken. In other words, the employes cannot be deprived of any claim which they might have established upon the fund because an innocent third person has been permitted to deprive them of the right to enforce such claim by the ordinary methods simply for the protection of

that third person and not because of any illegality in such proposed proceedings.

The foregoing discussion is, we think, sufficient to establish the propositions which govern the determination of the case. These are:

1. The assignment either became operative or it did not. If it did not, neither Clarkson nor the bank had any claim to the funds.

2. If it did become operative, then Clarkson cannot in equity be permitted to receive the advantages of the contract without submitting to its obligations.

3. As between Mrs. Wells and the employes, the employes might have by legal proceeding enforced their claim for wages out of the fund.

4. Under the construction given the contract, if Clarkson took advantage of the assignment, the employes might have similarly enforced their claims against him out of the fund.

5. The institution of this action by the Union Pacific and the payment of the money into court deprived the employes of the ordinary remedies for enforcing such claims.

6. All parties having yielded to the correctness of this proceeding, the fund in court should be distributed in the same manner in which it would have been distributed if by the institution of the suit the ordinary legal proceedings had not been prevented.

7. Consequently, to the extent of the fund in court, the employes should be first satisfied their demands.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.