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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY TERM, 1895.

VOLUME XLIV.

D. A. CAMPBELL,
OFFICIAL REPORTER.

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BY D. A. CAMPBELL, REPORTER OF THE SUPREME COURT,
In behalf of the people of Nebraska.

THE SUPREME COURT

OF

NEBRASKA.

1895.

CHIEF JUSTICE,

T. L. NORVAL.

JUDGES,

A. M. POST,
T. O. C. HARRISON.

COMMISSIONERS,

ROBERT RYAN,
JOHN M. RAGAN,
FRANK IRVINE.

OFFICERS.

ATTORNEY GENERAL,

A. S. CHURCHILL.

CLERK AND REPORTER,

D. A. CAMPBELL.

DEPUTY CLERK,

W. B. ROSE.

DISTRICT COURTS OF NEBRASKA.

JUDGES.

First District—

A. H. BABCOCK.....Beatrice.
J. E. BUSH.....Beatrice.

Second District—

S. M. CHAPMAN.....Plattsmouth.

Third District—

CHARLES L. HALL.....Lincoln.
E. P. HOLMES,.....Lincoln.
A. S. TIBBETS.....Lincoln.

Fourth District—

G. W. AMBROSE.....Omaha.
J. H. BLAIR.....Omaha.
E. R. DUFFIE.....Omaha.
A. N. FERGUSON.....Omaha.
M. R. HOPEWELL.....Tekamah.
W. W. KEYSOR.....Omaha.
C. R. SCOTT.....Omaha.

Fifth District—

EDWARD BATES.....York.
ROBERT WHEELER.....Osceola.

Sixth District—

WM. MARSHALL.....Fremont.
J. J. SULLIVAN.....Columbus.

Seventh District—

W. G. HASTINGS.....Wilber.

Eighth District—

W. F. NORRIS.....Ponca.

Ninth District—

J. S. ROBINSON.....Madison.

Tenth District—

F. B. BEALL.....Alma.

Eleventh District—

A. A. KENDALL.....St. Paul.
J. R. THOMPSON.....Grand Island.

Twelfth District—
H. M. SINCLAIR.....Kearney.

Thirteenth District—
WILLIAM NEVILLE.....North Platte.

Fourteenth District—
D. T. WELTY.....Cambridge.

Fifteenth District—
ALFRED BARTOW.....Chadron.
M. P. KINKAID.....O'Neill.

PRACTICING ATTORNEYS.

ADMITTED SINCE THE PUBLICATION OF VOLUME XLIII.

ARTHUR, J. G.
BABCOCK, G. T. H.
BEELER, J. G.
DUNN, I. J.
GILBERT, WILLIAM O.
HABEGGER, J. ARNOLD.
HELLER, FRANK.

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.

RULES OF SUPREME COURT.

IN FORCE SEPTEMBER 17, 1895.

1. The regular public sessions of this court will be held on the first and third Tuesdays of each month at 9 o'clock A. M., standard time, during each term.

2. Causes will be taken up and heard in their order on the docket. Any cause may, however, be submitted upon a written stipulation of the parties thereto providing for such submission on printed briefs accompanied by or containing an agreed printed abstract of all the evidence upon which the case is to be determined. Whenever a cause is reached and the party having the affirmative fails to appear, and his brief is not on file, the proceeding will be dismissed, the cause remanded, or otherwise disposed of at the discretion of the court. When default has been made by the other party and there is due proof of service of summons in error, or of notice, and the briefs of the party holding the affirmative are on file, with proof of service thereof within the time provided by rule 9, he may proceed *ex parte*.

3. The court, in advance, shall, by order, designate what cases shall be submitted and when, having reference to the order of time in which such cases were originally docketed.

4. Whenever, in a criminal case, a writ of error shall be issued upon a certified transcript of a record, no further transcript shall be required or allowed to be taxed in the bill of costs, but the same transcript shall be returned with the writ, and shall be deemed sufficient, unless diminution or other objection thereto be suggested.

5. In the oral argument of a cause, the time allowed the parties on each side shall not exceed thirty minutes, unless

for special reasons the court shall extend the time. Oral argument on a motion will be limited to five minutes on a side.

6. Every application for an order in any case shall be in writing, and except as to motions for rehearing, shall be granted only upon the filing thereof, and due proof of service of notice on the adverse party, or his attorneys, at least three days before the hearing, which, in all cases, must be fixed for one of the session days provided for by rule 1. The notice herein provided for shall conform to the provisions of section 574 of the Code of Civil Procedure, and may be served by a bailiff of this court, or by any sheriff or constable in this state, or by any disinterested person; in the latter case, however, the return must be under oath. Fees for service of said notice shall be allowed and taxed as for the service of summons in proper cases.

7. A motion for rehearing may be filed as of course at any time within forty days from the filing of the opinion of the court in the case. Such motion must specify distinctly the grounds upon which it is based, and be accompanied by a separate printed brief.

8. No mandate shall issue in any civil case during the time allowed for the filing of a motion for rehearing, or pending the consideration thereof, unless specially ordered by the court.

9. Within twenty days after service of summons in error, or of notice of the pendency of an action by appeal or otherwise in this court, and within the same time after a rehearing shall have been allowed, the party holding the affirmative shall furnish a printed brief of his points and citations in support thereof, to the opposite party or his attorney of record, by whom in turn a like brief in reply shall be served within twenty days after service of the first required brief, or, if none such shall have been served, then within twenty days after the expiration of the time allowed for that purpose. Before the submission of any cause, each party shall file with the clerk of this court ten

printed copies of the brief which he has furnished the opposite party or his attorney of record, with proof of service thereof. Each brief shall by number designate the several pages of the record containing matter bearing upon the questions discussed in such brief. Every reference to an adjudicated case shall be by the title thereof, as well as by the volume and page where it may be found, and the particular edition of any text-book referred to must be given in connection with the cited page or section thereof.

10. All briefs shall be printed on good book paper, small pica type, leaded lines; the printed page to be four inches wide and seven inches long, with a margin of two inches; but the type in which extracts are printed may be small pica solid, or brevier leaded. The heading of each brief shall show the title of the cause, the court from which the cause is brought, and the names of counsel for both parties.

11. When the parties or their attorneys shall furnish their printed briefs in conformity to the rules of this court, or briefs and printed abstract under stipulation for submission as provided for in rule 2, it shall be the duty of the clerk to tax a printer's fee at the rate of one dollar for every five hundred words embraced in a single copy of the same, against the unsuccessful party not furnishing the same, to be collected and paid to the successful party as other costs. When unnecessary costs have been made by either party, the court will, upon application, order the same taxed to the party making them, without reference to the disposition of the case.

12. In each cause brought to this court the plaintiff in error, appellant, or relator shall, before the entry of the same upon the docket, give security for costs by filing a bond in the sum of $50, with one or more sureties, conditioned for the payment of the costs of this court, which bond, in cases brought on error or appeal, must be approved by the clerk of the district court of the county from which such cause is brought, and in original causes by the clerk

of this court. But this provision shall not apply in causes where a bond or undertaking has been filed in the court below, in accordance with the provisions of sections 588 and 677 of the Code of Civil Procedure, but in such causes the transcript filed must show the giving of such bond or undertaking, with the names of the sureties thereon; nor shall it apply in criminal cases where an affidavit of poverty is filed, as allowed by section 508, Criminal Code. The party bringing the cause to this court may, if he sees fit, deposit an amount with the clerk of this court sufficient to cover the probable costs of the action, and if he do so the bond required by this rule need not be given.

13. In every case of appeal the clerk shall, upon a præcipe being filed, issue a notice to the appellee of the filing of such appeal; such notice shall be served in the same manner as a summons in error, and shall be returned within ten days after the officer receives the same, with the manner and time of service indorsed thereon. The fees for service of such notice shall be the same as allowed by law for serving summons in error, and shall be so taxed.

14. 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 to the oath prescribed by section 1 of chapter 10, Compiled Statutes.

15. Each party shall be entitled to three peremptory challenges, and challenges for cause may be made by either party, the validity of which shall be determined by the

court. If, from challenges or other cause, the panel shall not be full, the court may order the bailiff to fill the same from bystanders or neighboring citizens having the qualifications of electors.

16. The jurors summoned or called as above provided, or such of them as are not set aside or challenged as will make up the number of twelve, shall constitute the jury for the trial of said issue of fact.

17. Each juror shall be entitled to the same compensation and mileage as are provided by law for jurors in civil cases in the district court.

18. A syllabus of the points decided in each case shall be stated in writing by the judge or commissioner preparing the opinion, and such syllabus and opinion shall be examined and approved by the court before the same shall be reported.

19. The clerk of the court is answerable for all records and papers belonging to his office, and they shall not be taken from his custody unless by special order of the court, or a judge or commissioner thereof, but the parties may have copies when desired by paying the clerk therefor.

20. In all cases of application to this court for a writ of *mandamus*, a reasonable notice must be given to the respondent of the time when it will be made, accompanied by a copy of the affidavit on which it is based, unless for special reasons it is otherwise ordered.

21. Examinations of applicants for admission to the bar will be held on the second Tuesday of June and the third Tuesday of November each year.

22. Each applicant for admission shall, at least four weeks before the day set for the beginning of examinations, file with the clerk of this court a written request for admission in his own handwriting, subscribed by himself, together with proofs of his qualifications, as prescribed by section two (2) of an act for the admission to practice of attorneys and counselors at law, etc., approved March 30, 1895.

23. The proofs required under the foregoing subdivision shall be the applicant's affidavit as to his age, residence, and time and place of study, the certificate of his preceptor that the applicant has regularly and attentively studied law under such preceptor's personal direction and supervision for at least two (2) years, and the certificate or affidavit of at least two (2) citizens of good standing in the community where the applicant resides, or formerly resided, that they are well acquainted with him, that he is of good reputation in that community, and that they believe him to be of good moral character. If it be shown by the affidavit of the applicant that his preceptor is dead, or that for other satisfactory reasons his certificate cannot be obtained, there may be substituted therefor the certificate of any member in good standing of the bar of the county in which the applicant pursued his studies, and who may be personally cognizant of the facts.

24. None of the facts required for qualifying an applicant for admission shall be conclusively established by the foregoing proof, but the applicant shall in his application give the names and addresses of at least three (3) persons other than those whose certificates he presents, of whom inquiry can be made in regard to the applicant's character and other qualifications.

25. The applicant shall also, before the examination begins, deposit with the clerk the sum of five ($5.00) dollars. The clerk shall enter all sums so received in a book or account kept for that purpose, showing date and name of applicant, and shall pay the same out on order of the Chief Justice, in payment of the expenses of such examination, and for no other purpose; that is to say, the cost of necessary printing and stationery; to the clerk for each oath and certificate of admission issued to an applicant, one dollar and fifty cents. To each member of the commission conducting the examination, his necessary traveling expenses, and for personal expenses while actually engaged in the performance of his duties, not exceeding five ($5.00) dollars per day.

26. Any practicing attorney in the courts of record of another state or territory, having professional business in either the supreme or district courts of this state, may, on motion to such court, be admitted for the purpose of transacting such business, upon taking the required oath, as provided by section three (3), chapter seven (7), of Compiled Statutes. Any such attorney desiring to be admitted to practice generally in the courts of this state must make his application as required by these rules and present proof by certificate that he is a licensed practitioner in a court of record of such other state or territory.

27. The court will, on or before the opening of the September term in each year, appoint a commission composed of five (5) persons, learned in the law, to conduct examinations for the ensuing year.

28. The commission so appointed shall, prior to the examination, examine the proofs of qualifications filed in accordance with the foregoing rules, and may make such further investigation as to the qualifications of any applicant as it shall deem expedient. On the day appointed it shall commence the examination of applicants. The method of conducting the examinations shall be left to the discretion of the commission, it being expected that the commission will in the conduct of such examinations, and in the investigation of the qualifications of applicants, take care that no person shall be recommended for admission who has not in all particulars shown himself to be well qualified. Oral examinations shall be reported by the stenographer of this court.

29. As soon as practicable after the conclusion of the examination, the commission shall make a written report to the court of its conclusions, and all persons who shall be recommended for admission by a majority of the commissioners shall thereupon be admitted to practice, on taking the oath prescribed by law.

30. If an applicant shall be rejected, he shall not again be admitted to an examination for one year from the time

of such rejection, and until he shall file a certificate that he has studied law for one year since his rejection.

31. Graduates of the College of Law of the University of Nebraska shall make application and present proofs of qualifications in the same manner as other applicants. If found otherwise qualified by the commission, they shall be admitted without examination.

32. Only questions involved in matters of actual litigation before the court will be entertained or judicially determined, and no opinion will be filed in answer to any merely hypothetical question.

33. In all criminal cases brought on error to this court, where it appears that the court below has passed sentence of death upon the plaintiff in error, it is ordered that the sentence and judgment be suspended until the further order of this court, and it shall be the duty of the clerk to indorse such suspension upon the transcript filed in said cause and immediately transmit a certified copy thereof to the officer charged with the execution of said sentence.

See page lvii for table of Nebraska cases overruled.

The syllabus in each case was prepared by the judge or commissioner writing the opinion.

A table of statutes and constitutional provisions cited and construed, numerically arranged, will be found on page lxi.

TABLE OF CASES REPORTED.

A.

PAGE

Affholder, McMullen v. 497
Ambler, Lingonner v. 316
Ashe, Pounder v. 672

B.

Bachler, Insurance Company of North America v. 549
Badger Lumber Co. v. Holmes 244

MECHANICS' LIENS.

Baker, Omaha Street R. Co. v. 511
Barmby v. Wolfe 77

ASSIGNMENTS OF ERROR. NEGOTIABLE INSTRUMENTS. INSTRUCTIONS. HUSBAND AND WIFE.

Barnes v. Hale 355

JUDGMENTS. MODIFICATION.

Barr v. Birkner 197

SLANDER.

Baum, Edney v. 294
Beals, New Home Sewing Machine Co. v. 816
Bell, Chicago, B. & Q. R. Co. v. 44
Bell v. Stowe 210

USURY. PLEADING.

Bennett, Blumer, v. 873
Berg, Omaha Fire Ins. Co. v. 522
Berry v. Wilcox 82

ELECTIONS.

Bingham v. Hartley 682

INSTRUCTIONS.

Birkner, Barr v. 197
Blachford v. Frenzer 829

FORCIBLE ENTRY AND DETAINER. JUSTICE OF THE PEACE.

Blumer v. Bennett 873

TRIAL. EXCEPTIONS. RECORD. FRAUDULENT CONVEYANCES.

PAGE
Boggs, Morrison v. 248
Boughn v. State 889
CRIMINAL LAW. STATUTE OF LIMITATIONS.
Boyd, Felber v. 700
Bremers, Kilpatrick-Koch Dry Goods Co. v. 863
Broatch v. Moore 640
JUDGMENTS. SUMMONS.
Brown v. Cleveland 239
REVIEW. TRIAL.
Browne v. Edwards & McCullough Lumber Co 361
DISTRICT COURTS. INJUNCTION BONDS.
Burgess v. Burgess 16
TRIAL. EVIDENCE. LETTERS.
Burke v. Frye 223
FACTORS AND BROKERS.
Burke, Nebraska Nat. Bank v. 234
Burke, O'Rourke v. 821
Burnham v. State 438
REGISTRATION OF TAX DEEDS. COUNTY TREASURERS' FEES.
Burns, Omaha Consolidated Vinegar Co. v. 21
Burr, Maxwell v. 31
Burr, National Masonic Accident Association v. 256
Burrill, Scott v. 755
Bushnell v. Chamberlain 751
ACTION FOR VALUE OF GOODS SOLD. JUDGMENT. EVIDENCE. INSTRUCTION.
Butler County, Perkins v. 110

C.

Call Publishing Co., Western Union Telegraph Co. v. 326
Central City Bank v. Rice 594
NEGOTIABLE INSTRUMENTS. PLEADING. TRIAL.
Central City Bank, Yenney v. 402
Central Loan & Trust Co. v. O'Sullivan 834
MECHANICS' LIENS. HUSBAND AND WIFE.
Chamberlain, Bushnell v. 751
Chicago, B. & Q. R. Co. v. Bell 44
CORPORATIONS. RELIEF DEPARTMENT OF RAILROAD COMPANY. RELEASE AND DISCHARGE.
Chicago, B. & Q. R. Co. v. Metcalf 848
RAILROAD COMPANIES. SIGNALS AT PUBLIC CROSSINGS. DAMAGES.
Chicago, B. & Q. R. Co., Swindell v. 841

PAGE

Chicago, R. I. & P. R. Co. v. Griffith 690
WITNESSES. EMINENT DOMAIN. REVIEW.

City of Hastings v. Hansen 704
MUNICIPAL CORPORATIONS. BOUNDARIES.

City of Omaha, Houston v 63
Cleveland, Brown v. 239
Cleveland, Flannagan v. 58
Cobb, Stephenson v. 434
Cochran, Hines v. 12
Coffield v. State 417
CRIMINAL LAW. PRELIMINARY EXAMINATION. STATUTES.

Columbus Creamery Co., Pearsall v. 833
Consolidated Tank Line Co. v. Pien 887
EJECTMENT. EVIDENCE.

Continental Building & Loan Association v. Mills 136
APPEAL. FAILURE OF CLERK TO MAKE TRANSCRIPT.

Cooper, School District No. 49, Adams County, v. 714
Corbett v. National Bank of Commerce 230
CONTINUANCE.

Corey v. Schuster 269
HOMESTEAD. ABANDONMENT. INJUNCTION AGAINST JUDGMENTS.

Cornelius v. Hultman 441
INTOXICATING LIQUORS.

Cornish, Scott v. 376
Critchfield, Snyder v. 66
Crites, Vaughn v. 812

D.

Dangler, Snyder v. 600
Davies, Webster v. 301
Dillon v. Starin 881
DIVORCE. ALIMONY. PLEADING AND PROOF.

Dimond, Hammond v. 154
Dolan v. State 643
INSTRUCTIONS IN CRIMINAL CASES.

Doty, Richardson v. 73
Drishaus, Elgutter v. 378
Dufek, Omaha Fire Ins. Co. v. 241

E.

Eagle Fire Co. of New York v. Globe Loan & Trust Co. 380
INSURANCE.

PAGE

Ecklund v. Willis..... 129
CONFIRMATION OF SALE.

Edney v. Baum..... 294
REVIEW. TRIAL. MISCONDUCT OF JURY.

Edwards, Van Etten v..... 57
Edwards & McCullough Lumber Co., Browne v..... 361
Ehrlich v. State..... 810
ORAL INSTRUCTIONS. CRIMINAL LAW.

Elgutter v. Drishaus..... 378
LANDLORD AND TENANT.

Ellsworth v. McDowell..... 707
VENDOR AND VENDEE.

Elwood, Will v..... 847
Erickson v. First Nat. Bank of Oakland..... 622
ALTERATION OF INSTRUMENTS. ESTOPPEL.

F.

Farmers Loan & Trust Co., Burnham v..... 438
Felber v. Boyd..... 700
ALTERATION OF TRANSCRIPT. DISMISSAL OF APPEAL.

Field v. Maxwell..... 900
ATTACHMENT. ACTION ON BOND. SET-OFF. ATTORNEYS' LIENS.

Fillmore County, Martin v..... 719
First Nat. Bank of Fairfield, Meehan v..... 213
First Nat. Bank of Oakland, Erickson v..... 622
First Nat. Bank of Wymore v. Myers..... 306
FRAUDULENT CONVEYANCES. PLEADING.

Fisherdick v. Hutton..... 122
ALTERATION OF INSTRUMENTS.

Fitzgerald v. Fitzgerald & Mallory Construction Co..... 463
CORPORATIONS. LIABILITY FOR TORTS OF OFFICERS. DAMAGES. PAYMENT. RELEASE AND DISCHARGE. PRINCIPAL AND AGENT. RECEIVERS. COURTS.

Fitzgerald & Mallory Construction Co., Fitzgerald v..... 463
Flannagan v. Cleveland..... 58
APPEAL BONDS. ESTOPPEL. DAMAGES. PRINCIPAL AND SURETY.

Frank, Pacific Mutual Life Ins. Co. v..... 320
Frenzer, Blachford v..... 829
Frye, Burke v..... 223

G.

PAGE

George v. State 757
CRIMINAL LAW. RAPE. REVIEW. EVIDENCE. OPINION OF ATTORNEY GENERAL.

German Ins. & Savings Institution v. Kline 395
INSURANCE.

Globe Loan & Trust Co., Eagle Fire Co. of New York v. 380
Grant, Osgood v. 350
Green, Mawhiney v. 688
Griffith, Chicago, R. I. & P. R. Co. v. 690
Grommes v. Leveille 38

H.

Hale, Barnes v. 355
Halstead, Richardson v. 606
Hammang, Home Fire Ins. Co. v. 566
Hammond v. Dimond 154
Hansen, City of Hastings v. 704
Hargreaves v. Korcek 660
MORTGAGES. DURESS.

Harris, Weir v. 507
Hartley, Bingham v. 682
Hastings, City of, v. Hansen 704
Hedge, St. Joseph & G. I. R. Co. v. 448
Hetzel, Standard Stamping Co. v. 105
Hines v. Cochran 12
MECHANICS' LIENS.

Holmes, Badger Lumber Co. v. 244
Home Fire Ins. Co. v. Hammang 566
INSURANCE.

Houston v. City of Omaha 63
ASSIGNMENTS OF ERROR.

Huff, Pollard v. 892
Hultman, Cornelius v. 441
Hutton, Fisherdick v. 122

I.

Insurance Company, Eagle Fire, v. Globe Loan & Trust Co. 380
Insurance Company, German, v. Kline 395
Insurance Company, Home Fire, v. Hammang 566
Insurance Company, Liberty, Rochester Loan & Banking Co. v. 537
Insurance Company, Omaha Fire, v. Berg 522
Insurance Company, Omaha Fire, v. Dufek 241

PAGE
Insurance Company, Pacific Mutual Life, v. Frank 320
Insurance Company, Phenix, of Brooklyn, New York, v. Rollins... 745
Insurance Company of North America v. Bachler 549
INSURANCE. REVIEW. CONTRACTS TO ARBITRATE. COSTS.

J.

Jenkins, McDonald v. 163
Johnson, Nelson v. 7
Johnson, Sharp v. 165

K.

Kansas City Investment Co., Lorenzen v. 99
Kemp, Western Union Telegraph Co. v. 194
Kilpatrick-Koch Dry Goods Co. v. Bremers. 863
ESTOPPEL. CHATTEL MORTGAGES. VOLUNTARY ASSIGNMENTS.
Kirkendall, Weber v. 766
Kissinger v. Staley. 783
REVIEW. TAXATION OF COSTS. JUSTICE OF THE PEACE.
Kline, German Ins. & Savings Institution v. 395
Korcek, Hargreaves v. 660
Korth, Steinkraus v. 777
Korty v. McGill 516
PRINCIPAL AND SURETY. BONDS. GUARANTY.
Kuhl v. Pierce County 584
ERROR PROCEEDINGS. PARTIES. REFERENCE. ACCOUNTING.

L.

Latta, Warnick v. 807
Leveille, Richards v. 38
Liberty Ins. Co., Rochester Loan & Banking Co. v. 537
Lihs v. Lihs 143
WITNESSES. TRIAL. REVIEW.
Lincoln & B. H. R. Co. v. Sutherland. 526
SURFACE WATER. DAMAGES. NEGLIGENCE.
Lincoln Shoe Mfg. Co. v. Seifert 536
CORPORATE STOCK. CONTRACT OF SUBSCRIPTION.
Lincoln Shoe Mfg. Co. v. Sheldon 279
CORPORATIONS. SUBSCRIPTION CONTRACTS. SALES. BREACH OF CONTRACT. DAMAGES.
Lingonner v. Ambler 316
STATUTES. ANIMALS. ESTOPPEL.

PAGE
Lodwick, Peterson v. 771
Lorenzen v. Kansas City Investment Co 99
DECEIT. EVIDENCE.
Lothrop v. Michaelson 633
EJECTMENT. OCCUPYING CLAIMANTS. APPRAISEMENT. LIMITATION OF ACTIONS.
Lucas, Wanser v. 759

M.

McCauley v. Ohenstein 89
QUIETING TITLE. TAX DEEDS.
McClary v. Stull 175
WILLS. PROBATE. TRIAL. ATTORNEYS' FEES.
McCready v. Phillips 790
INSTRUCTIONS. FALSE REPRESENTATIONS. CONVERSION. DAMAGES.
McDonald v. Jenkins 163
PARTNERSHIP. EVIDENCE.
McDowell, Ellsworth v. 707
McGill, Korty v 516
McMullen v. Affholder 497
McMurtry, Sheedy v. 499
McNerney, Woods v. 430
Madsen v. State 631
BRIEFS. CRIMINAL LAW.
Martin v. Fillmore County 719
BILL OF EXCEPTIONS. EMINENT DOMAIN.
Mason, Smith v 610
Mawhiney v. Green 688
REPLEVIN.
Maxwell v. Burr 31
EVIDENCE. GUARANTY.
Maxwell, Field v. 900
Meehan v. First Nat. Bank of Fairfield 213
MORTGAGES.
Merrell, Morris v. 423
Metcalf, Chicago, B. & Q. R. Co. v. 848
Metcalf Cracker Co., Scott v. 93
Michaelson, Lothrop v 633
Miller, Schrage v. 818
Mills, Continental Building & Loan Association v. 136
Missouri P. R. Co., Fitzgerald v. 463
Monday v. O'Neil 724
LANDLORD AND TENANT. RIGHT OF TENANT TO CROP GROWN DURING FORECLOSURE OF MORTGAGE.

PAGE

Moore, Broatch v. 640
Moores v. Peycke 405
EXECUTIONS. DISTRIBUTION OF PROCEEDS OF SALE.
Morris v. Merrell 423
COUNTIES. PROCEEDINGS OF COUNTY BOARD.
Morrison v. Boggs 248
BONDS. PENALTIES. EVIDENCE.
Mullins, Western Union Telegraph Co. v. 732
Myers, First Nat. Bank of Wymore v. 306

N.

National Bank of Commerce, Corbett v. 230
National Bank of Commerce, Spottswood v. 1
National Cordage Co. v. Sims 148
CONDITIONAL SALES. AGENCY. FACTORS AND BROKERS.
National Masonic Accident Association v. Burr 256
MUTUAL BENEFIT SOCIETIES. ACCIDENT INSURANCE. ASSESSMENTS. WAIVER.
Nebraska Nat. Bank v. Burke 234
EVIDENCE. CONVERSATIONS BY TELEPHONE. INSTRUCTIONS.
Nelson v. Johnson 7
BILL OF EXCEPTIONS. CONTINUANCE. INSTRUCTIONS.
New Home Sewing Machine Co. v. Beals 816
ATTACHMENT. LIEN OF LEVY.

O.

Ohenstein, McCauley v. 89
Olsen, Stark v. 646
Omaha, City of, Houston v. 63
Omaha Consolidated Vinegar Co. v. Burns 21
CONTRACT. MECHANIC'S LIEN FOR SINKING WELL. PLEADING.
Omaha Fire Ins. Co. v. Berg 522
INSTRUCTIONS. REVIEW. TRIAL. PLEADING.
Omaha Fire Ins. Co. v. Dufek 241
INSURANCE.
Omaha Street R. Co. v. Baker 511
STREET RAILWAYS. NEGLIGENCE.
Omaha Street R. Co., Pray v. 167
O'Neil, Monday v. 724
O'Rourke v. Burke 821
GUARANTY. BUILDING CONTRACTS.

PAGE

Osgood v. Grant 350
TRIAL. INTEREST ON TAXES. ATTORNEYS' FEES.

O'Sullivan, Central Loan & Trust Co. v. 834

P.

Pacific Mutual Life Ins. Co. v. Frank 320
ACCIDENT INSURANCE. ACTION TO REFORM POLICY. EVIDENCE.

Palmer v. Vance 348
HIGHWAYS. LOCATION. DAMAGES.

Palmer Deposit Bank, Weeks v. 684

Pearsall v. Columbus Creamery Co. 833
MECHANICS' LIENS. EVIDENCE.

Perkins v. Butler County 110
ASSIGNMENT. INSOLVENT PARTNERSHIP. CONTRACTS.

Perry v. State 414
CRIMINAL LAW. LARCENY.

Peterson v. Lodwick 771
REPLEVIN. PROOF. DIRECTING VERDICT.

Peycke, Moores v. 405

Phenix Ins. Co. of Brooklyn, New York, v. Rollins 745
INSURANCE. PREMIUM NOTES. DEFAULT. SUSPENSION OF POLICY. WAIVER.

Philadelphia Mortgage and Trust Co., Hines v 12

Phillips, McCready v. 790

Pien, Consolidated Tank Line Co. v. 887

Pierce County, Kuhl v. 584

Pollard v. Huff 892
NEGOTIABLE INSTRUMENTS. INDORSEMENTS. GUARANTY.

Pounder v. Ashe 672
RELIGIOUS SOCIETIES.

Pray v. Omaha Street R. Co. 167
STREET RAILWAYS. NEGLIGENCE.

R.

Railroad Company, Chicago, B. & Q., v. Bell 44

Railroad Company, Chicago, B. & Q., v. Metcalf 848

Railroad Company, Chicago, B. & Q., Swindell v. 841

Railroad Company, Chicago, R. I. & P., v. Griffith 690

Railroad Company, Lincoln & B. H., v. Sutherland 526

Railroad Company, Missouri P., Fitzgerald v. 463

Railroad Company, Omaha Street, v. Baker 511

Railroad Company, Omaha Street, Pray v. 167

PAGE
Railroad Company, St. Joseph & G. I., v. Hedge..... 448
Rice, Central City Bank v..... 594
Richards v. Leveille..... 38
PARTNERSHIP. DISTRIBUTION OF ASSETS.
Richardson v. Doty..... 73
PARTNERSHIP. SET-OFF.
Richardson v. Halstead..... 606
ANIMALS. ARBITRATION. INSTRUCTIONS.
Rochester Loan & Banking Co. v. Liberty Ins. Co..... 537
INSURANCE.
Rollins, Phenix Ins. Co. of Brooklyn, New York, v..... 745

S.

Schelly v. Schwank..... 504
INSTRUCTIONS. ASSIGNMENTS OF ERROR.
School District No. 49, Adams County, v. Cooper..... 714
TRANSCRIPTS. BILL OF EXCEPTIONS.
Schrage v. Miller..... 818
LANDLORD AND TENANT. MECHANICS' LIENS.
Schuster, Corey v..... 269
Schwank, Schelly v..... 504
Scott v. Burrill..... 755
APPEAL. PROCEDURE. REPLEVIN. JUDGMENT.
Scott v. Cornish..... 376
DISMISSAL OF APPEAL. COSTS.
Scott v. Spencer..... 93
PLEADING. AMENDMENTS. REVIEW.
Seifert, Lincoln Shoe Mfg. Co. v..... 536
Sharp v. Johnson..... 165
REPLEVIN.
Sheedy v. McMurtry..... 499
DISMISSAL. APPEAL. ATTORNEY'S LIEN.
Sheldon, Lincoln Shoe Mfg. Co. v..... 279
Sims, National Cordage Co. v..... 148
Smith v. Mason..... 610
PRINCIPAL AND SURETY. PAYMENT. FOREIGN STATUTES.
Snyder v. Critchfield..... 66
JUDGMENTS. WARRANT OF ATTORNEY. EVIDENCE.
Snyder v. Dangler..... 600
FRAUDULENT CONVEYANCES. SALES.
Spencer, Scott v..... 93
Spotswood v. Nat. Bank of Commerce..... 1
NEW TRIAL. BILL OF EXCEPTIONS.

PAGE

Staley, Kissinger v. 783
Standard Stamping Co. v. Hetzel. 105

ATTACHMENT. AFFIDAVITS.

Starin, Dillon v. 881
Stark v. Olsen 646

CONFLICT OF LAWS. NEGOTIABLE INSTRUMENTS. MORTGAGES. PRINCIPAL AND AGENT.

State, Boughn v. 889
State, Coffield v. 417
State, Dolan v. 643
State, Ehrlich v. 810
State, George v. 757
State, Madsen v. 631
State, Perry v. 414
State, Thompson v. 366
State, ex rel. Farmers Loan & Trust Co., Burnham v. 438
State, ex rel. Hammond, v. Dimond 154

VILLAGES. INCORPORATION. QUO WARRANTO.

State, ex rel. McMullen, v. Affholder 497

MANDAMUS.

State, ex rel. McNerney, Woods v. 430
State, ex rel. Stephenson, v. Cobb 434

MUNICIPAL CORPORATIONS. ROAD TAXES. STATUTES.

Stein v. Vannice 132

INSTRUCTIONS. BILLS OF EXCEPTIONS.

Steinkraus v. Korth. 777

FRAUDULENT CONVEYANCES. REVIEW. EVIDENCE.

Stephenson v. Cobb 434
St. Joseph & G. I. R. Co. v. Hedge 448

TORTS. RAILROAD COMPANIES. CARRIERS. DAMAGES.

Stowe, Bell v. 210
Stull, McClary v. 175
Sutherland, Lincoln & B. H. R. Co. v. 526
Swindell v. Chicago, B. & Q. R. Co. 841

DEATH BY WRONGFUL ACT. NEGLIGENCE.

T.

Thomas, Weir v. 507
Thompson v. State 366

RAPE. EVIDENCE.

Thompson, Windsor v. 228
Thompson, Woodworth v. 311

V.

PAGE

Vance, Palmer v. 348

Van Etten v. Edwards 57

REVIEW.

Vannice, Stein v. 132

Vaughn v. Crites 812

MISCONDUCT OF JUROR. INSTRUCTIONS. BILL OF EXCEPTIONS.

Vlasek v. Wilson 10

JUSTICE OF THE PEACE. BILL OF EXCEPTIONS.

W.

Wanser v. Lucas 759

FRAUDULENT CONVEYANCE. DEED FROM HUSBAND TO WIFE. EVIDENCE. EJECTMENT.

Warnick v. Latta 807

QUIETING TITLE. CANCELLATION OF CONTRACT.

Weber v. Kirkendall 766

REVIEW. MOTION FOR NEW TRIAL. COURTS. PAYMENT.

Webster v. Davies 301

LIMITATION OF ACTIONS.

Weeks v. Palmer Deposit Bank 684

PARTNERSHIP.

Weir v. Thomas 507

MECHANICS' LIENS. MORTGAGES.

Western Union Telegraph Co. v. Call Publishing Co. 326

TELEGRAPH COMPANIES. DISCRIMINATION.

Western Union Telegraph Co. v. Kemp 194

TELEGRAPH COMPANIES. INCORRECT MESSAGES. DAMAGES.

Western Union Telegraph Co. v. Mullins 732

MASTER AND SERVANT. TELEGRAPH COMPANIES. ERRONEOUS DIRECTIONS OF AGENT. DAMAGES. PLEADING.

Wilber v. Woolley 739

SCHOOL BUILDINGS. RELOCATION. INJUNCTION. CONTEMPT. PUNISHMENT FOR DISOBEDIENCE.

Wilcox, Berry v. 82

Will v. Elwood 847

REVIEW.

Willis, Ecklund v. 129

Wilson, Vlasek v. 10

Windsor v. Thompson 228

REVIEW.

PAGE

Wolfe, Barmby v. 77

Woods v. State 430

ELECTIONS. MANDAMUS.

Woodworth v. Thompson 311

LANDLORD AND TENANT. DEPOSITIONS. PLEADING.

Woolley, Wilber v. 739

Y.

Yenney v. Central City Bank 402

NEGOTIABLE INSTRUMENTS. PAYMENT. BILL OF EXCEPTIONS.

Younkin v. Younkin 729

RES ADJUDICATA. ACCOUNTING. REVIEW.

CASES CITED BY THE COURT.

CASES MARKED * ARE OVERRULED IN THIS VOLUME.

A.

PAGE

Acers v. Curtis, 68 Tex., 423 616
Ackerly v. Vilas, 15 Wis., 401 497
Ackerman v. Thummel, 40 Neb., 95 ..... 348, 349
Adams v. Irving Nat. Bank, 116 N. Y., 606 670
Adams v. Osgood, 42 Neb., 450 354
Adams v. State, 29 O. St., 412 646
Adams v. Thompson, 18 Neb., 541 ..... 58, 61
Alexander v. Thacker, 43 Neb., 494 ..... 353, 354
Alkan v. New Hampshire Ins. Co., 10 N. W. Rep. (Wis.), 91 559
Allaire v. Hartshorne, 21 N. J. Law, 665 79
Allerton v. Belden, 49 N. Y., 373 ..... 628, 631
American Ins. Co. v. Gallatin, 3 N. W. Rep. (Wis.), 772 ..... 392, 582
American Ins. Co. v. Henley, 60 Ind., 515 750
American Ins. Co. v. Klink, 65 Mo., 78 750
American Ins. Co. v. Stoy, 41 Mich., 385 750
American Water-Works Co. v. Dougherty, 37 Neb., 373 860
American Water-Works Co. v. Venner, 18 N. Y. Sup., 379 628
Anderson v. Sloan, 1 Col., 484 63
Anderson v. State, 104 Ind., 467, 474; 4 N. E. Rep., 63, 5 N. E. Rep., 711 373
Andres v. Kridler, 42 Neb., 784 589
Anheuser-Busch Brewing Association v. Peterson, 41 Neb., 897, 527, 535
Anthony v. Percifull, 8 Ark., 494 615
Archer v. Ft. Wayne & E. R. Co., 87 Mich., 101 173
Aspinwall v. Sabin, 22 Neb., 76 6
Astley v. Reynolds, 2 Strange (Eng.), 915 492
Atkins v. Boylston Fire & Marine Ins. Co., 5 Met. (Mass.), 440 509
Atkinson v. Stewart, 2 B. Mon. (Ky.), 348 615
Atwater v. Delaware, L. & W. R. Co., 48 N. J. Law, 55 338
Aultman v. Howe, 10 Neb., 8 131
Aurora Fire & Marine Ins. Co. v. Kranich, 36 Mich., 289 548

B.

PAGE

Bagwell v. McTighe, 85 Tenn., 616..... 304
Bailey v. State, 36 Neb., 808..... 421
Ballard v. State, 19 Neb., 609..... 610
Bane v. Detrick, 52 Ill., 19..... 670
Bangs v. Berg, 48 N. W. Rep. (Ia.), 90..... 510
Banks v. Steele, 27 Neb., 138.....38, 42, 117
Barnes v. Hekla Fire Ins. Co., 39 N. W. Rep. (Ia.), 122..... 583
Bartlett v. Cheesbrough, 23 Neb., 771..... 782
Barto v. Abbe, 16 O., 408..... 831
Barton v. McKay, 36 Neb., 632..... 9
Bayles v. Kansas P. R. Co., 13 Col., 181..... 338
Beard v. Beard, 21 Ind., 321..... 883
Becker v. Hibernian Ins. Co., 44 Ind., 95..... 558
Belknap v. Belknap, 2 Johns. Ch. (N. Y.), 472..... 430
Bell v. Boyd, 76 Tex., 133..... 615
Bell v. Mahin, 29 N. W. Rep. (Ia.), 331..... 626
Bell v. Paul, 35 Neb., 240..... 826
Bellevue Improvement Co. v. Village of Bellevue, 39 Neb., 876... 429
Bemis v. Gannett, 8 Neb., 236..... 365
Bennett v. Agricultural Ins. Co., 12 N. E. Rep. (N. Y.), 609..... 548
Bennett v. Council Bluffs Ins. Co., 31 N. W. Rep. (Ia.), 948, 392, 581, 582
Bentley v. Joslin, Hemp. (U. S.), 218..... 365
Berry v. Dryden, 7 Mo., 324..... 208
Bickel v. Dutcher, 35 Neb., 761..... 142
Bigler v. Baker, 40 Neb., 325.....766, 770
Bilby v. Townsend, 29 Neb., 220..... 147
Billings v. German Ins. Co., 34 Neb., 502..... 582
Binfield v. State, 15 Neb., 484..... 755
Birch v. Benton, 26 Mo., 163..... 208
Birdsall v. Carter, 11 Neb., 143..... 632
Blakely v. Chicago, K. & N. R. Co., 25 Neb., 212..... 695
Blakeslee v. Ervin, 40 Neb., 130..... 134
Blodgett v. McMurtry, 39 Neb., 210..... 92
Bloedel v. Zimmerman, 41 Neb., 695..... 620
Bloom v. Warder, 13 Neb., 476..... 899
Blue Valley Bank v. Bane, 20 Neb., 294..... 776
Board of Trade v. Chicago, M. & St. P. R. Co., 1 Int. Com. Rep., 215..... 337
Boardman v. Paige, 11 N. H., 431..... 616
Bodine v. Morgan, 37 N. J. Eq., 426..... 670
Boldt v. Budwig, 19 Neb., 739..... 209
* Bonns v. Carter, 20 Neb., 566.....868, 869
Bonns v. Carter, 22 Neb., 495..... 872

PAGE
Boots v. Canine, 94 Ind., 408 315
Bosley v. Taylor, 5 Dana (Ky.), 157 616
Bowen v. Billings, 13 Neb., 439 117
Bowling v. State, 13 Tex. Ct. App., 338 417
Boyer v. Clark, 3 Neb., 161 ..... 76, 904, 905
Bradee v. Brownfield, 4 Watts (Pa.), 474 69
Bradshaw v. State, 17 Neb., 147 ..... 131, 755
Brady v. Prudential Ins. Co., 29 N. Y. Sup., 44 748
Brandup v. St. Paul Fire & Marine Ins. Co., 7 N. W. Rep. (Minn.), 735 582
Breckinridge v. Taylor, 5 Dana (Ky.), 110 616
Brennan v. Clark, 29 Neb., 385 826
Bridges v. Lanham, 14 Neb., 369 479
Bridges v. Winters, 42 Miss., 135 127
Brisendine v. Martin, 1 Ired. Law (N. Car.), 286 615
Bristol v. Morgan, 3 Edw. Ch. (N. Y.) 142 221
Brokaw v. New Jersey R. & T. Co., 32 N. J. Law, 332 476
Bromberg v. Minnesota Fire Association, 47 N. W. Rep. (Minn.), 975 575
Brown v. Burdick, 25 O. St., 260 831
Brown v. Commonwealth Ins. Co., 41 Pa. St., 187 559
Brown v. Dunn, 38 Neb., 52 ..... 21, 632
Brown v. Galena Mining & Smelting Co., 32 Kan., 528; 4 Pac. Rep., 1013 366
Brown v. State Ins. Co., 38 N. W. Rep. (Ia.), 135 583
Brown v. Straw, 6 Neb., 536 ..... 127, 626
Brumfield v. Union Ins. Co., 7 S. W. Rep. (Ky.), 893 583
Bryant v. Peck & Whipple Co., 154 Mass., 460 670
Bubster v. State, 33 Neb., 663 417
Bucher v. Bush, 45 Mich., 188 165
Buck v. Davenport Savings Bank, 29 Neb., 407 899
Buckner v. Stewart, 34 Ala., 529 616
Bunce v. Reed, 16 Barb. (N. Y.), 347 508
Bunderson v. Burlington & M. R. R. Co., 43 Neb., 545 535
Bundy v. Hart, 2 Am. Rep. (Mo.), 525 208
Bunnell v. Bunnell, 25 Fed. Rep., 214 883
Bunz v. Cornelius, 19 Neb., 107 315
Burdick v. Burdick, 20 Wis., 367 221
Burke v. Frye, 44 Neb., 223 688
Burkett v. Whittemore, 15 S. E. Rep. (S. Car.), 616 183
Burnham v. Ayer, 35 N. H., 351 127
Burnham v. Grand Trunk R. Co., 63 Me., 298 738
Burr v. Boyer, 2 Neb., 265 617
Burroughs v. Lott, 19 Cal., 125 616
Bushnell v. Bushnell, 77 Wis., 435 621

PAGE

Butchart v. Dresser, 10 Hare (Eng.), 453; 4 De Gex, M. & G. (Eng.), 542 119
Byrd v. Cochran, 39 Neb., 109 ..... 12, 15, 244, 246

C.

Caldwell v. Bloomington Mfg. Co., 17 Neb., 489 ..... 38, 42, 117
Canfield v. Continental Ins. Co., 47 Mich., 447 751
Cannon v. Home Ins. Co. of New York, 11 N. W. Rep. (Wis.), 11 575
Carleton v. State, 43 Neb., 373 ..... 80, 643, 645
Carlow v. Aultman, 28 Neb., 672 ..... 361, 768
Carson v. Jersey City Ins. Co., 43 N. J. Law, 300 401
Carson v. Stevens, 40 Neb., 112 610
Cassilly v. Rhodes, 12 O., 88 ..... 726, 727, 728
Castner v. Farmers Mutual Fire Ins. Co., 46 Mich., 15 401
Castner v. Farmers Mutual Ins. Co., 8 N. W. Rep. (Mich.), 554 559
Catlin v. Bell, 4 Camp. (Eng.), 183 227
Chadwick v. Fonner, 69 N. Y., 404 888
Chandler v. Sanger, 114 Mass., 365 492
Chase v. Cheney, 58 Ill., 509; 11 Am. Rep., 95 682
Cheney v. Buckmaster, 29 Neb., 420 141
Chevrier v. Robert, 6 Mont., 319 304
Chicago & A. R. Co. v. People, 67 Ill., 11 337
Chicago, B. & Q. R. Co. v. Landauer, 36 Neb., 642, 39 Neb., 803, 460, 860
Chicago, B. & Q. R. Co. v. Oleson, 40 Neb., 889 860
Chicago, B. & Q. R. Co. v. Wilgus, 40 Neb., 660 860
Chicago, B. & Q. R. Co. v. Wymore, 40 Neb., 645 ..... 55, 860
Chicago, K. & N. R. Co. v. Wiebe, 25 Neb., 542 722
Chicopee Bank v. Chapin, 49 Mass., 40 79
Christie v. Bishop, 1 Barb. Ch. (N. Y.), 105 888
City of Hartford v. Chipman, 21 Conn., 488 274
City of Lincoln v. Gillilan, 18 Neb., 114 859
City of Lincoln v. Staley, 32 Neb., 63 233
City of Omaha v. Howell Lumber Co., 30 Neb., 633 722
City of Sedan v. Church, 29 Kan., 190 770
City of South Omaha v. Taxpayers' League, 42 Neb., 671 438
City R. Co. v. Lee, 50 N. J. Law, 438 173
Clanin v. Fagan, 24 N. E. Rep. (Ind.), 1044 786
Clark v. Clayton, 61 Cal., 634 365
Cleaver v. Traders Ins. Co., 39 N. W. Rep. (Mich.), 571 582
Clemens v. Brillhart, 17 Neb., 335 879
Cleveland v. Banks, 15 Neb., 20 876
Clevenger v. Hansen, 24 Pac. Rep. (Kan.), 61 413
Cobb v. Charter, 32 Conn., 358 492
Cochran v. Cochran, 42 Neb., 612 884

PAGE
Code v. Carlton, 18 Neb., 328 116
Cohn v. Lehman, 6 S. W. Rep. (Mo.), 267 366
Colter v. Calloway, 68 Ind., 219 315
Commercial Ins. Co. v. Spankneble, 52 Ill., 53 548
Commercial Nat. Bank of St. Paul v. Brill, 37 Neb., 626 147
Commercial Union Assurance Co. v. Hocking, 8 Atl. Rep. (Pa.), 589 575
Commonwealth v. Dennison, 24 How. (U. S.), 97 498
Commonwealth v. Drum, 19 Pick. (Mass.), 480 646
Commonwealth v. Hide & Leather Ins. Co., 112 Mass., 136 401
Commonwealth v. McDonald, 110 Mass., 405 ..... 373, 374
Consaul v. Sheldon, 35 Neb., 247 589
Continental Ins. Co. v. Boykin, 25 S. Car., 323 750
Continental Ins. Co. v. Hoffman, 25 S. Car., 327 750
Continental Ins. Co. v. Lippold, 3 Neb., 391 573
Converse v. Shambaugh, 4 Neb., 376 687
Cook v. Chicago, R. I. & P. R. Co., 81 Ia., 551 346
Cooper v. Foss, 15 Neb., 515 221
Cooper v. Hall, 22 Neb., 171 ..... 786, 790
Copeland v. Dwelling House Ins. Co., 43 N. W. Rep. (Mich.), 991 ... 582
Cornwall v. Gould, 4 Pick. (Mass.), 444 615
Cortelyou v. Maben, 40 Neb., 512 620
Costello v. Chamberlain, 36 Neb., 45 871
Cottrill v. Vanduzen, 22 Vt., 511 687
Courcamp v. Weber, 39 Neb., 538 147
Cowan v. State, 22 Neb., 519 421
Craddick v. Pritchett, Peck (Tenn.), 31 140
Crooke v. Andrews, 40 N. Y., 547 274
Cross v. National Fire Ins. Co., 132 N. Y., 133 401
Crouse v. Hartford Fire Ins. Co., 44 N. W. Rep. (Mich.), 496 582
Cumberland Bank v. Hall, 1 Halst. (N. J.), 262 626
Cunningham v. Fuller, 35 Neb., 58 888
Curten v. Atkinson, 29 Neb., 612 589
Curtis v. Tyler, 9 Paige Ch. (N. Y.), 432 221

D.

Dakins v. Wagner, 3 Dowl. P. C. (Eng.) 535 509
Dale v. Hunneman, 12 Neb., 221 765
Dale v. Irwin, 78 Ill., 170 88
Davis v. Bauer, 41 O. St., 257 626
Davis v. Harper, 48 Ia., 513 305
Davis v. Henry, 13 Neb., 497 ..... 127, 626
Davis v. Hilbourn, 41 Neb., 35 ..... 595, 598
Davis v. Londgreen, 8 Neb., 43 532
Davis v. Scott, 22 Neb., 154 690

PAGE
Davis v. State, 31 Neb., 247, 252..... 421
Deitrich v. Hutchinson, 20 Neb., 52.....39, 43
Dennis v. Omaha Nat. Bank, 19 Neb., 675.....270, 278
Densmore v. Tomer, 11 Neb., 118, 14 Neb., 392.....605, 606
Dewey v. Allgire, 37 Neb., 6..... 147
Dewey v. Chicago & N. W. R. Co., 31 Ia., 373.....595, 598
Dietrichs v. Lincoln & N. W. R. Co., 12 Neb., 225..... 697
Dillon v. Russell, 5 Neb., 484..... 617
Dillon v. State, 39 Neb., 92..... 633
Dixon v. Brooklyn C. & N. R. Co., 100 N. Y., 170..... 174
Dobson v. Dobson, 7 Neb., 296.....140, 141
Donnelly v. Cedar Rapids Ins. Co., 28 N. W. Rep. (Ia.), 607..... 582
Doolittle v. Plenz, 16 Neb., 153..... 247
Dorsey v. Monnett, 20 Atl. Rep. (Md.), 196..... 628
Downard v. Groff, 40 Ia., 597 726
Dunbar v. Phenix Ins. Co., 72 Wis., 492 401
Dunphy v. Bartenbach, 40 Neb., 143..... 225
Dunterman v. Story, 40 Neb., 447.....58, 61
Durrell v. Hart, 25 Neb., 610 78
Dwelling House Ins. Co. v. Brewster, 43 Neb., 528,
399, 538, 543, 568, 576
Dyer v. Thorstad, 35 Minn., 534..... 153

E.

Eadie v. Slimmon, 26 N. Y., 9..... 670
Earle v. Earle, 27 Neb., 277..... 884
East Lewisburg Lumber & Mfg. Co. v. Marsh, 91 Pa. St., 96..... 116
East Texas Fire Ins. Co. v. Perkey, 24 S. W. Rep. (Tex.), 1080... 748
Eastman v. Turman, 24 Cal., 380..... 222
Eaton v. Carruth, 11 Neb., 231..... 876
Eaton v. Hasty, 6 Neb., 419..... 69
Edwards v. Kansas City Times Co., 32 Fed. Rep., 813..... 209
Edwards v. Kearney, 14 Neb., 83..... 9
Edwards v. Reid, 39 Neb., 645..... 277
Eggert v. Beyer, 43 Neb., 711.....648, 658
Eggleston v. Council Bluffs Ins. Co., 21 N. W. Rep. (Ia.), 652.... 582
Elliott v. Atkins, 26 Neb., 403..... 503
Ellis v. Karl, 7 Neb., 381.....361, 364
Elshire v. Schuyler, 15 Neb., 561 444
Enyeart v. Davis, 17 Neb., 228..... 147
E. O. Stanard Milling Co. v. White Line Central Transit Co., 26
S. W. Rep. (Mo.), 704.... 769
Equitable Life Ins. Society v. Stevens, 63 N. Y., 341.....220, 221
Erie R. Co. v. Ramsey, 45 N. Y., 637..... 744
Erskine v. State, 1 Tex. Ct. App., 405 417

PAGE
Estep v. Fenton, 66 Ill., 467..... 30
Evansville & C. R. Co. v. Baum, 26 Ind., 70..... 476

F.

Farmer v. Sprague, 57 Wis., 324..... 183
Fay v. Oatley, 6 Wis., 45..... 670
Felton v. State, 39 N. E. Rep. (Ind.), 228..... 373
Fewlass v. Abbott, 28 Mich., 270..... 415
First Nat. Bank v. Lowrey, 36 Neb., 290..... 610
First Nat. Bank v. Sloman, 42 Neb., 350..... 643
First Nat. Bank of North Bend v. Miltonberger, 33 Neb., 847..... 185
First Nat. Bank of Wymore v. Myers, 38 Neb., 152..... 307
Fisher v. Herron, 22 Neb., 185..... 782
Fitch v. Mayor of New York, 88 N. Y., 500..... 97
Fitch v. Sutton, 5 East (Eng.), 230..... 490
Fitzgerald v. Brandt, 36 Neb., 683.....137, 138
Fitzgerald v. Fitzgerald & Mallory Construction Co., 41 Neb., 374, 44 Neb., 463.....466, 656, 766, 770
Fitzgerald v. Meyer, 25 Neb., 77..... 610
Flagg v. Manhattan R. Co., 4 Am. & Eng. R. R. Cas. (N. Y.), 141... 491
Fleck v. Union R. Co., 134 Mass., 481..... 173
Fletcher v. Brown, 35 Neb., 660.....633, 639
Foley v. Greene, 14 R. I., 618..... 670
Foley v. Holtry, 41 Neb., 563..... 494
Forrest v. Price, 29 Atl. Rep. (N. J.), 215..... 744
Foshay v. Ferguson, 5 Hill (N. Y.), 154..... 669
Foss v. Marr, 40 Neb., 559.....726, 727, 728
Fowler v. Palmer, 62 N. Y., 533..... 629
Fox v. Fields, 12 Heisk (Tenn), 31..... 140
Frazer v. Jennison, 42 Mich., 206..... 189
Freeman v. Howe, 24 How. (U. S.), 459.....495, 497
Fremont, E. & M. V. R. Co. v. Marley, 25 Neb., 138..... 533
Fremont, E. & M. V. R. Co. v. Whalen, 11 Neb., 585..... 722
Frost v. Spitley, 121 U. S., 552..... 274
Fry's Election Case, 71 Pa. St., 302..... 86
Furrow v. Athey, 21 Neb., 671..... 763

G.

Gaff v. Greer, 88 Ind., 122..... 682
Gans v. St. Paul Fire & Marine Ins. Co., 43 Wis., 108.....381, 392, 581
Gardels v. Kloke, 36 Neb., 494..... 712
Gardiner v. Harback, 21 Ill., 129..... 127
Gaughran v. Crosby, 33 Neb., 34..... 768
Geitz v. Milwaukee City R. Co., 72 Wis., 307..... 173
Georgia Railroad & Banking Co. v. McCurdy, 45 Ga., 288..... 738

PAGE
German-American Ins. Co. v. Etherton, 25 Neb., 505.....268, 563, 574
German-American Ins. Co. v. Hart, 43 Neb., 441..... 400
German Bank v. Dunn, 62 Mo., 79..... 626
German Ins. Co. v. Eddy, 36 Neb., 461.....550, 562, 563
German Ins. Co. v. Heiduk, 30 Neb., 238.....381, 390
German Ins. Co. v. Hyman, 34 Neb., 704.....538, 545
German Ins. Co. v. Penrod, 35 Neb., 273..... 582
German Ins. Co. v. Rounds, 35 Neb., 752..... 582
German Nat. Bank of Hastings v. Leonard, 40 Neb., 676..... 134
German Reformed Church v. Seibert, 3 Pa. St., 291..... 681
Germantown P. R. Co. v. Walling, 97 Pa. St., 55..... 172
Gifford v. Republican V. & K. R. Co., 20 Neb., 538.....133, 187
Gill v. Lydick, 40 Neb., 508 .....21, 632
Gillespie v. Brown, 16 Neb., 458..... 776
Glass v. Zutavern, 43 Neb., 334 9
Glaze v. Parcel, 40 Neb., 732.....21, 132, 135, 632
Globe Mutual Life Ins. Co. v. Reals, 79 N. Y., 202 .....628, 631
Glore v. Hare, 4 Neb., 131 137
Goodman v. Kennedy, 10 Neb., 274 20
Goodnow v. Stryker, 62 Ia., 221 306
Gordan v. Sizer, 39 Miss., 805 127
Gorder v. Plattsmouth Canning Co., 36 Neb., 548..... 491
Graham v. Burch, 47 Minn., 171 183
Grand Chute v. Winegar, 15 Wall. (U. S.), 373..... 628
Graul v. Strutzel, 53 Ia., 712 225
Gray v. Veirs, 33 Md., 159 365
Green v. Des Moines Fire Ins. Co., 50 N. W. Rep. (Ia.), 558..... 575
Greene v. Bartholomew, 34 Ind., 235 116
Greene v. Greene, 42 Neb., 631 145
Greenwood v. Murray, 26 Minn., 259..... 183
Gregory v. Cameron, 7 Neb., 414..... 248, 251, 252
Grieff v. Cowguill, 2 Dis. (O.), 58..... 227
Griggs v. White, 5 Neb., 467 905
Grimes v. Farrington, 19 Neb., 44.....867, 868
Gristock v. Royal Ins. Co., 47 N. W. Rep. (Mich.), 549..... 582
Gross v. Davis, 87 Tenn., 226 616
Gudtner v. Kilpatrick, 14 Neb., 347.....58, 61
Guest v. New Hampshire Fire Ins. Co., 33 N. W. Rep. (Mich.), 31... 560

H.

Haas v. Bank of Commerce, 41 Neb., 754..... 79
Habig v. Layne, 38 Neb., 743..... 120
Hackett v. King, 6 Allen (Mass.), 58..... 670
Hale v. Sanborn, 16 Neb., 1 .....280, 291
Hall v. State, 40 Neb., 320 810

PAGE

Hamilton v. Cummings, 1 Johns. Ch. (N. Y.), 516..... 430
Hamilton v. Home Ins. Co., 7 S. W. Rep. (Mo.), 261..... 583
Hamilton v. Isaacs, 34 Neb., 709.....869, 870, 871, 872
Hamilton v. People, 29 Mich., 177..... 423
Hammond v. State, 39 Neb., 252..... 373
Hangen v. Hachemeister, 5 L. R. A. (N. Y.), 137..... 786
Hanover Fire Ins. Co. v. Gustin, 40 Neb., 828...542, 550, 564, 567, 574
Harden v. Hardick, 2 Hill (N. Y.), 384..... 503
Hards v. Platte Valley Improvement Co., 35 Neb., 263.....280, 291
Hargreave v. Smee, 6 Bing. (Eng.), 244..... 37
Harmon v. Harmon, 61 Me., 227..... 670
Harmony v. Bingham, 12 N. Y., 99..... 492
Harriman v. Queen Ins. Co. of London, 5 N.W. Rep. (Wis.), 12... 575
Harris v. Carmody, 131 Mass., 51..... 670
Harrison v. Close, 2 Johns. (N. Y.), 448..... 490
Harrison v. Union Nat. Bank, 12 Neb., 499..... 304
Hartford & N. H. R. Co. v. Kennedy, 12 Conn., 499..... 288
Hartford Fire Ins. Co. v. Meyer, 30 Neb., 135.....568, 574
Harty v. Central Railroad Co. of New Jersey, 42 N. Y., 468..... 858
Haskell v. Sells, 14 Mo. App., 91..... 287
Hastings v. Lovejoy, 140 Mass., 261..... 490
Hatwood v. State, 18 Ind., 492.....891, 892
Haverly v. Elliott, 39 Neb., 206..... 633
Hayden v. Cook, 34 Neb., 670..... 826
Hayden v. Cretcher, 75 Ind., 108..... 120
Hayden v. Wulfing, 19 Mo. App., 353..... 510
Hays v. Pennsylvania R. Co., 12 Fed. Rep., 309.....337, 338, 346
Heard v. Dubuque County Bank, 8 Neb., 10.....647, 656, 899
Heathcote v. Crookshanks, 2 T. R. (Eng.), 24..... 490
Hecht v. Dettman, 56 Ia., 679..... 726
Hedrick v. Strauss, 42 Neb., 485..... 376
Helmer v. Commercial Bank, 28 Neb., 474..... 899
Henderson v. McDuffee, 5 N. H., 38..... 616
Hendrickson v. Sullivan, 28 Neb., 329..... 209
Henry & Coatsworth Co. v. Fisherdick, 37 Neb., 207..... 821
Hershiser v. Higman, 31 Neb., 531.....869, 870, 871
Hewitt v. Commercial Banking Co., 40 Neb., 820.....506, 868
Hiatt v. Kinkaid, 40 Neb., 178.....330, 404, 721
Hibbard v. Weil, 5 Neb., 41..... 410
Hicks v. People, 10 Mich., 395..... 423
Hill v. Fouse, 32 Neb., 637..... 763
Hinman v. Hartford Fire Ins. Co., 36 Wis., 159..... 558
Hoagland v. Lowe, 39 Neb., 397..... 821
Hodgkins v. State, 36 Neb., 160.....421, 422
Hodgman v. Thomas, 37 Neb., 568..... 755
Holland v. Fuller, 13 Ind., 195..... 120

PAGE

Holland v. Supreme Council of the Order of Chosen Friends, 25 Atl. Rep. (N. J.), 367 265
Holly v. Atlantic Street R. Co., 61 Ga., 215 174
Holmes v. Hutchins, 38 Neb., 601 821
Holmes v. Jones, 121 N. Y., 461 315
Holt v. Edmondson, 31 Ga., 357 140
Homan v. Steele, 18 Neb., 652 ..... 53, 95, 97
Home Fire Ins. Co. v. Bean, 42 Neb., 537 ..... 258, 268, 551, 563, 566
Home Ins. Co. v. Howell, 9 C. E. Greene (N. J.), 238 497
Hopkins v. Scott, 38 Neb., 666 11
*Horn v. Miller, 20 Neb., 98 142
Horton v. Bloedorn, 37 Neb., 666 670
Hosford v. Stone, 6 Neb., 378 593
Houck v. Heinzman, 37 Neb., 463 868
Housh v. State, 43 Neb., 163 80
Houston v. City of Omaha, 44 Neb., 63 507
Houston & T. C. R. Co. v. Rust, 58 Tex., 98 338
Houts v. Showalter, 10 O. St., 125 ..... 727, 728
Howell v. Hathaway, 28 Neb., 807 840
Hower v. Aultman, 27 Neb., 251 304
Hoy v. Anderson, 39 Neb., 390 279
Hughes v. Insurance Co. of North America, 40 Neb., 626, 380, 391, 567, 581
Hughes v. Trustees, 1 Ves. Sr. (Eng.), 188 430
Hullhorst v. Scharner, 15 Neb., 57 ..... 62, 627, 670
Humphrey v. Cole, 14 Ill. App., 56 305
Humphries v. Spafford, 14 Neb., 488 95
Hunt v. Adams, 6 Mass., 519 127
Hunt v. Kansas & Missouri Bridge Co., 11 Kan., 412 293
Huntington v. Forkson, 7 Hill (N. Y.), 195 503
Hunzinger v. State, 39 Neb., 653 565
Hurlbut v. Hall, 39 Neb., 889 626

I.

Imhoff v. House, 36 Neb., 28 ..... 21, 30
Indianapolis D. & S. R. Co. v. Ervin, 118 Ill., 250 338
In re McClusky, 52 Kan., 34 428
In re Terrill, 52 Kan., 29 428
In re Titlow's Estate, 29 Atl. Rep. (Pa.), 758 193
In re Tritch's Will, 30 Atl. Rep. (Pa.), 1053 189
In re Will of Merriam, 136 N. Y., 58 183
Interstate Commerce Commission v. Baltimore & O. R. Co., 43 Fed. Rep., 37 338

J.

Jackson v. State, 7 Tex. Ct. App., 363 417

PAGE
Jarman v. Wiswall, 24 N. J. Eq., 267 221
Jenkins v. Mitchell, 40 Neb., 664 ..... 367, 376, 506
Jewett v. Valley R. Co., 34 O. St., 601 292
Johnson v. Andrews, 28 Ga., 17 628
Johnson v. Barber, 5 Gilm. (Ill.), 425 476
Johnson v. Bemis, 7 Neb., 224 131
Johnson v. Bouton, 35 Neb., 898 ..... 739, 744
Johnson v. Elwood, 53 N. Y., 431 711
Johnson v. Hahn, 4 Neb., 139 430
Johnson v. Johnson, 31 Neb., 385 884
Johnson v. Philadelphia & R. R. Co., 29 Atl. Rep. (Pa.), 854 54
Johnson v. Powers, 65 Cal., 179 315
Johnson v. Southern Mutual Life Ins. Co., 79 Ky., 403 748
Johnson v. Stout, 44 N. W. Rep. (Minn.), 534 510
Johnson v. Vandervoort, 16 Neb., 144 ..... 763, 765
Jones v. Bates, 26 Neb., 693 444
Jones v. Loree, 37 Neb., 816 ..... 869, 870
Jones v. Roberts, 54 N. W. Rep. (Wis.), 917 183
Jones v. Ross, 29 Pac. Rep. (Kan.), 680 366
Jones v. Stienbergh, 1 Barb. Ch. (N. Y.), 250 221
Judah v. Mieure, 5 Blackf. (Ind.), 171 617

K.

Kansel v. Minnesota Farmers Mutual Fire Ins. Association, 16 N. W. Rep. (Minn.), 430 582
Kauffman v. Beasley, 54 Tex., 563 227
Kavanaugh v. Brodball, 40 Neb., 875 713
Keedy v. Howe, 72 Ill., 136 476
Keele v. Salisbury, 33 N. Y., 648 490
Keeler v. Elston, 22 Neb., 310 69
Keller v. Boatman, 49 Ind., 104 615
Kelman v. Calhoun, 43 Neb., 157 9
Kempe v. Bader, 86 Tenn., 189 304
Kenyon v. Baker, 47 N. W. Rep. (Ia.), 977 360
Kilpatrick-Koch Dry Goods Co. v. McPheely, 37 Neb., 800 ..... 863, 871
King v. Bell, 13 Neb., 412 643
Kinkaid v. Hiatt, 24 Neb., 562 593
Kircher v. Schalk, 39 N. J. Law, 335 711
Kirkendall v. Davis, 41 Neb., 285 620
Kitchen v. Hartford Fire Ins. Co., 23 N. W. Rep. (Mich.), 616 582
Kitchen v. St. Louis, K. C. & N. R. Co., 69 Mo., 204 491
Knapp v. Hyde, 60 Barb. (N. Y.), 80 670
Koen v. State, 35 Neb., 676 565
Kopplekom v. Huffman, 12 Neb., 95 755
Krouskop v. Shontz, 51 Wis., 204 127

L.

PAGE
Laing v. Nelson, 40 Neb., 252 134
Lamaster v. Scofield, 5 Neb., 148 593
Lambeth v. North Carolina R. Co., 66 N. Car., 494 738
Lancaster County v. Hoagland, 8 Neb., 38 789
Lancaster County v. Rush, 35 Neb., 120 161
Lancaster County v. Trimble, 33 Neb., 121 565
Landa v. Obert, 45 Tex., 539 670
Landis v. Campbell, 79 Mo., 433; 49 Am. Rep., 239 682
Lane v. St. Paul Fire & Marine Ins. Co., 52 N. W. Rep. (Minn.), 649 577
Larson v. Dickey, 39 Neb., 463 ..... 90, 92
Lavender v. Atkins, 20 Neb., 206 503
Laymance v. Laymance, 15 Lea (Tenn.), 476 140
Leas v. Pennsylvania R. Co., 37 N. E. Rep. (Ind.), 423 57
Ledley v. State, 4 Ind., 580 373
Lee v. Scudder, 31 N. J. Eq., 633 189
Lehr v. Steinway & H. P. R. Co., 118 N. Y., 556 174
Levi v. Latham, 15 Neb., 509 119
Levy v. Chittenden, 120 Ind., 37 97
Lick v. Ray, 43 Cal., 83 273
Liddell v. Wiswell, 59 Vt., 365 616
Lincoln Brick & Tile Works Co. v. Hall, 27 Neb., 874 ..... 137, 138
Lincoln R. T. Co. v. Nichols, 37 Neb., 332 460
Lincoln Shoe Mfg. Co. v. Sheldon, 44 Neb., 279 ..... 536, 537
Lincoln Street R. Co. v. Adams, 41 Neb., 737 534
Livermore v. Maxwell, 55 N. W. Rep. (Ia.), 37 659
Liverpool & London & Globe Ins. Co. v. Buckstaff, 38 Neb., 146 147
Livesey v. Omaha Hotel Co., 5 Neb., 50 ..... 280, 291
Livingston v. Livingston, 6 Johns. Ch. (N. Y.) 497 430
Lloyd v. Perry, 32 Ia., 144 305
London & N. W. R. Co. v. Evershed, L. R., 3 App. Cas. (Eng.), 1029 338
Lonergan v. Buford, 148 U. S., 581 492
Lonergren v. Illinois C. R. Co., 49 N. W. Rep. (Ia.), 852 858
Lord v. State, 17 Neb., 526 ..... 621, 656
Lorillard Fire Ins. Co. v. McCulloch, 21 O. St., 176 401
Louisville & E. St. L. C. R. Co. v. Wilson, 32 N. E. Rep. (Ind.), 311 346
Love v. Putnam, 41 Neb., 86 131
Lowe v. City of Omaha, 33 Neb., 587 632
Luce v. Foster, 42 Neb., 818 30
Luce v. Hinds, Clarke Ch. (N. Y.), 317 221
Lyman v. City of Lincoln, 38 Neb., 794 117
Lytle v. Lytle, 48 Ind., 200 883

M.

PAGE
McBrien v. Riley, 38 Neb., 561 361
McCabe v. Lewis, 76 Mo., 301 769
McCann v. McDonald, 7 Neb., 305 687
McClay v. City of Lincoln, 32 Neb., 412 ..... 161, 565
McClay v. Worrall, 18 Neb., 44 444
McClelland v. Scroggin, 35 Neb., 536 153
McCleneghan v. Omaha & R. V. R. Co., 25 Neb., 523 610
McConahey v. McConahey, 21 Neb., 463 147
McCormick v. Drummett, 9 Neb., 384 632
McCormick v. Riewe, 14 Neb., 509 710
McDaniel v. Lipp, 41 Neb., 713 710
McDuffie v. Portland & R. R. Co. 52 N. H., 430 338
McEwen v. Montgomery County Mutual Ins. Co., 5 Hill (N. Y.), 101 ..... 392, 582
McGavock v. City of Omaha, 40 Neb., 64 315
McKean v. Smoyer, 37 Neb., 694 727
McKenster v. Van Zandt, 1 Wend. (N. Y.), 13 503
McKibben v. Newell, 41 Ill., 461 127
McPherson v. Rathbone, 7 Wend. (N. Y.), 216 687
Maggard v. Van Duyn, 36 Neb., 862 131
Maguire v. Middlesex R. Co., 115 Mass., 239 173
Mahogany v. Ward, 16 R. I., 479 458
Mallard v. First Nat. Bank of North Platte, 40 Neb., 784 ..... 269, 277
Maney v. Chicago, B. & Q. R. Co., 49 Ill. App., 105 858
Manly v. Downing, 15 Neb., 637 510
Martin v. Mayor, 11 Abb. Pr. (N. Y.), 295 412
Mason v. Pritchard, 12 East (Eng.), 227 37
Mason v. Tiffany, 45 Ill., 392 119
Matthews v. American Ins. Co., 40 O. St., 135 750
Mattocks v. Des Moines Ins. Co., 37 N. W. Rep. (Ia.), 174 ... 392, 583
Matz v. St. Paul City R. Co., 53 N. W. Rep. (Minn.), 1071 173
Maxon v. Payne, L. R., 8 Ch. App. (Eng.), 881 494
Maybee v. Fisk, 42 Barb. (N. Y.), 327 209
Mechanics' Building Association v. Whitacre, 92 Ind., 547 306
Meesel v. Lynn & B. R. Co., 8 Allen (Mass.), 234 172
Mehurin v. Stone, 37 O. St., 58 748
Mercantile Ins. Co. v. Holthouse, 5 N. W. Rep. (Mich.), 642 575
Merriam v. Ranen, 23 Neb., 217 353
Messenger v. Pennsylvania R. Co., 36 N. J. Law, 407 338
Meyer v. Union Bag & Paper Co., 41 Neb., 67 868
Middleditch v. Williams, 45 N. J. Eq., 726 189
Miller v. Camp, 28 Neb., 412 ..... 137, 138
Miller v. Hartford Fire Ins. Co., 29 N. W. Rep. (Ia.), 411 582
Miller v. Miller, 68 Pa. St., 486 669

PAGE
Mills v. Miller, 3 Neb., 87.....584, 593
Mills v. Redick, 1 Neb., 437..... 710
Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S., 469..... 458
Minneapolis Harvester Works v. Smith, 36 Neb., 616..... 304
Minnesota Farmers Mutual Fire Ins. Association v. Oleson, 44 N. W. Rep. (Minn.), 672..... 750
Minturn v. Farmers Loan & Trust Co., 3 N. Y., 498..... 631
Missouri P. R. Co. v. Baier, 37 Neb., 235.....458, 860
Missouri P. R. Co. v. Pierce, 33 Kan., 61..... 857
Mohawk & H. R. R. Co. v. Artcher, 6 Paige Ch. (N. Y.), 88..... 430
Moline, Milburn & Stoddard Co. v. Curtis, 38 Neb., 520.....10, 11
Montgomery v. Pickering, 116 Mass., 227..... 494
Moore v. Kepner, 7 Neb., 291..... 776
Moore v. Waterman, 40 Neb., 498.....137, 714, 717, 719, 721
Moote v. Schriven, 33 Mich., 505..... 127
Morrill v. Nightingale, 28 Pac. Rep. (Cal.), 1068..... 670
Morrill v. Taylor, 6 Neb., 246..... 428
Morrison v. Faulkner, 15 S. W. Rep. (Tex.), 797..... 670
Morrison v. Poyntz, 7 Dana (Ky.), 307..... 616
Morrissey v. Chicago, B. & Q. R. Co., 38 Neb., 406..... 533
Morrissey v. Schindler, 18 Neb., 672..... 643
Morse v. Hovey, 9 Paige Ch. (N. Y.), 197..... 628
Morse v. Woodworth, 29 N. E. Rep. (Mass.), 525..... 667
Mosely v. Jamison, 14 So. Rep. (Miss.), 529..... 503
Moses v. Mayor, 15 Wall. (U. S.), 387..... 365
Mott v. Consumers Ice Co., 73 N. Y., 543..... 476
Moyer v. Strahl, 10 Wis., 74..... 140
Mullen v. Morris, 43 Neb., 592..... 507
Murphy v. Gould, 40 Neb., 728.....506, 507, 755
Murphy v. State, 15 Neb., 383..... 80
Musser v. King, 40 Neb., 892.....165, 166

N.

Nance v. Busby, 15 L. R. A. (Tenn.), 801..... 682
National Masonic Accident Association v. Burr, 44 Neb., 256...550, 563
Nebraska & Iowa Ins. Co. v. Christiensen, 29 Neb., 572..... 748
Neeley v. Charlotte, C. & A. R. Co., 33 S. Car., 136..... 857
Nelson v. Lloyd, 9 Watts (Pa.), 22..... 687
New Albany & Vincennes Plank Road Co. v. Stallcup, 62 Ind., 345..... 315
New England Mortgage & Security Co. v. Sandford, 16 Neb, 689... 213
Nicholas v. Farwell, 24 Neb., 180.....69, 72
Nicoll v. Nicoll, 16 Wend. (N. Y.), 443..... 906
Niland v. Kalish, 37 Neb., 47..... 145
Nolan v. Brooklyn City & N. R. Co., 87 N. Y., 63..... 172

PAGE

Noll v. Kenneally, 37 Neb., 885 510
Norstrum v. Halliday, 39 Neb., 828 687
Northern P. R. Co. v. Cannon, 49 Fed. Rep., 517 628
Northfield Knife Co. v. Shapleigh, 24 Neb., 635 496
Northrup v. Trask, 39 Wis., 515 713
Nostrum v. Halliday, 39 Neb., 831 226

O.

Ober v. Gallagher, 93 U. S., 199 497
Oberfelder v. Kavanaugh, 29 Neb., 427 ..... 240, 241
O'Brien v. Ohio Ins. Co., 52 Mich., 131; 17 N. W. Rep. (Mich.), 726 ..... 401, 559
O'Donnell v. Providence & W. R. Co., 6 R. I., 211 857
Oglesby's Sureties v. State, 11 S. W. Rep. (Tex.), 873 594
Oleson v. State, 11 Neb., 276 ..... 367, 371
Omaha & B. H. R. Co. v. O'Donnell, 22 Neb., 475 ..... 861, 862
Omaha & R. V. R. Co. v. Brady, 39 Neb., 27, 48 ..... 192, 860
Omaha & R. V. R. Co. v. Chollette, 33 Neb., 143 460
Omaha & R. V. R. Co. v. Morgan, 40 Neb., 604 860
Omaha & R. V. R. Co. v. Moschel, 38 Neb., 281 ..... 595, 599
Omaha Belt R. Co. v. McDermott, 25 Neb., 715 695
Omaha Coal, Coke & Lime Co. v. Fay, 37 Neb., 68 141
Omaha Fire Ins. Co. v. Dierks, 43 Neb., 473, 475, 399, 542, 543, 550, 561, 576
Omaha Loan & Trust Co. v. Ayer, 38 Neb., 891 ..... 137, 138
Omaha S. R. Co. v. Beeson, 36 Neb., 361 20
Omaha S. R. Co. v. Todd, 39 Neb., 818 697
Omaha Street R. Co. v. Craig, 39 Neb., 601 860
Omaha Street R. Co. v. Duvall, 40 Neb., 29 861
Opinion of the Judges, 5 Met. (Mass.), 587 86
Osborn v. Hawley, 19 O., 130 69
Oscamp v. Crites, 37 Neb., 837 ..... 710, 711, 713
Osgood v. Artt, 10 Fed. Rep., 365 305
Oshkosh Gas Light Co. v. Germania Fire Ins. Co., 37 N. W. Rep. (Wis.), 819 582
Overton v. Tyler, 3 Pa. St., 346 ..... 70, 71
Owens v. Baltimore & O. R. Co., 35 Fed. Rep., 715 54

P.

Pacific Telegraph Co. v. Underwood, 37 Neb., 315 ..... 194, 197
Packer v. Thompson, 25 Neb., 688 ..... 69, 73
Palmer v. Largent, 5 Neb., 223 129
Palmer v. Sawyer, 114 Mass., 13 748
Palmer v. Witcherly, 15 Neb., 98, 101 ..... 241, 786
Parker v. Kuhn, 19 Neb., 396 141

PAGE
Patch v. Washburn, 16 Gray (Mass.), 82 626
Payne v. Mayor, 4 Ala., 333 116
Pence v. Langdon, 99 U. S., 581 494
Peninsular R. Co. v. Duncan, 28 Mich., 130 288
Pennsylvania Ins. Co. v. Gottsman, 48 Pa. St., 151 559
Penny v. Holberg, 53 Miss., 567 365
People v. Bennett, 29 Mich., 541 160
People v. Chapman, 62 Mich., 280 421
People v. Connor, 27 N. E. Rep. (N. Y.), 252 371
People v. Doe, 31 Cal., 220 412
People v. Dohring, 59 N. Y., 383 372
People v. Jones, 24 Mich., 214 423
People v. Morrison, 1 Parker Crim. Rep. (N. Y.), 625 370
People v. New York C. R. Co., 25 Barb. (N. Y.), 199 858
People v. Williams, 53 N. W. Rep. (Mich.), 779 423
Perrine v. Striker, 7 Paige Ch. (N. Y.), 598 627
Peyser v. Mayor, 70 N. Y., 495 492
Phelps v. Harris, 101 U. S., 370 274
Phenix Ins. Co. v. Bachelder, 32 Neb., 490, 39 Neb., 95, 258, 267, 399, 542, 576, 748
Phenix Ins. Co. v. Covey, 41 Neb., 724 ..... 391, 400, 567, 581
Phenix Ins. Co. v. Dungan, 37 Neb., 469 748
Phenix Ins. Co. v. Gebhart, 32 Neb., 144 ..... 241, 243
Phenix Ins. Co. v. Rad Bila Hora Lodge, 41 Neb., 21 ..... 568, 575
Phenix Ins. Co. v. Reams, 37 Neb., 423 632
Philadelphia Tool Co. v. British-American Assurance Co., 132 Pa. St., 236 401
Phillips v. Scott, 43 Mo., 86 227
Phœnix Life Ins. Co. v. Raddin, 120 U. S., 183 401
Pickens v. Plattsmouth Investment Co., 37 Neb., 272 821
Pinkston v. Taliaferro, 9 Ala., 547 615
Plummer v. Rummel, 26 Neb., 147 ..... 777, 782
Polk v. Covell, 43 Neb., 884 589
Pomeroy v. State, 94 Ind., 96 373
Popplewell v. Hill, 18 S. W. Rep. (Ark.), 1054 906
Potter v. Jones, 20 Ore., 239 189
Powder River Live Stock Co. v. Lamb, 38 Neb., 339 30
Pray v. Omaha Street R. Co., 44 Neb., 167 459
Prewitt v. York County, 43 Neb., 267 507
Pryor v. Hunter, 31 Neb., 678 53
Purcell v. St. Paul City R. Co., 48 Minn., 134 458
Putnam v. Johnson, 10 Mass., 488 86
Pyle v. Richards, 17 Neb., 180 532

R.

Ragan v. Aiken, 9 Lea (Tenn.), 609 338

PAGE
Rainbolt v. Strang, 39 Neb., 339 213
Ralston v. Wood, 15 Ill., 159 615
Randall v. Persons, 42 Neb., 607 ..... 165, 166
Rankin v. Collins, 50 Ind., 158 617
Ransom v. Chicago, St. P., M. & O. R. Co., 62 Wis., 178 858
Ransom v. McCurley, 31 N. E. Rep. (Ill.), 119 208
Raymond v. Green, 12 Neb., 215 903
Real v. Honey, 39 Neb., 516 ..... 11, 550, 563, 564
Record v. Butters, 42 Neb., 786 137
Reed v. Fletcher, 24 Neb., 435 496
Reformed Presbyterian Church v. Nelson, 35 O. St., 638 494
Reg. v. Day, 3 C. & P. (Eng.), 722 373
Reiner v. Dwelling House Ins. Co., 42 N. W. Rep. (Wis.), 208 582
Republican V. R. Co. v. McPherson, 12 Neb., 480 140
Rex v. Atkinson, 5 T. R. (Eng.), 437, note *a* 769
Rex v. Gough, 2 Doug. (Eng.), 796 769
Rex v. Holt, 5 T. R. (Eng.), 438 769
Rex v. Rogers, 2 Campb. (Eng.), 654 417
Reynolds v. Dietz, 39 Neb., 180, 186 ..... 9, 221
Reynolds v. Iowa & Nebraska Ins. Co., 46 N. W. Rep. (Ia), 659 583
Reynolds v. Witte, 13 S. Car., 5 475
Rice v. Day, 33 Neb., 204 905
Rice v. People, 15 Mich., 9 415
Rice v. Rice, 50 Mich., 448 189
Rich v. Baker, 3 Denio (N. Y.), 79 711
Richardson v. Doty, 25 Neb., 420 147
Richardson v. Duncan, 3 N. H., 508 669
Riewe v. McCormick, 11 Neb., 261 710
Rigney v. Rigney, 127 N. Y., 408 883
Rike v. Floyd, 6 O. Cir. Ct. Rep., 80 682
Ripley v. Gage County, 3 Neb., 397 117
Rising v. Brainard, 36 Ill., 79 72
Risse v. Gasch, 43 Neb., 287 507
Robb v. State, 35 Neb., 285 610
Roberts v. Adams, 6 Porter (Ala.), 361 616
Robertson v. Bullions, 9 Barb. (N. Y.) 64 682
Robertson v. Maxcey, 6 Dana (Ky.), 101 615
Robertson v. Shutt, 9 Bush. (Ky.), 660 906
Robinson v. Insurance Co., 51 Ark., 441 750
Robinson v. Uhl, 6 Neb., 238 605
Rockwell v. Blair Savings Bank, 31 Neb., 128 221
Romeyn v. Sickles, 108 N. Y., 650 97
Roop v. Herron, 15 Neb., 73 ..... 38, 42, 43, 117
Root v. Long Island R. Co., 11 Am. St. Rep. (N. Y.), 643 ..... 335, 338
Rose v. Munford, 36 Neb., 148 213
Rothell v. Grimes, 22 Neb., 526 ..... 38, 42, 117

PAGE

Rowe v. Fogle, 10 S. W. Rep. (Ky.), 426 503
Rowland v. Shephard, 27 Neb., 494 643
Ruple v. Bindley, 91 Pa. St., 296 116
Ruth v. Lowrey, 10 Neb., 260 ..... 621, 656
Ryan v. Topeka Bridge Co., 7 Kan., 207 770

S.

Sabin v. Angell, 46 Vt., 740 209
Salem Mill-Dam Corporation v. Ropes, 6 Pick. (Mass.), 23 293
Sample v. Hale, 34 Neb., 220 117
Samuels v. Louisville & N. R. Co., 31 Fed. Rep., 57 346
Sanders v. Getchell, 76 Me., 158 88
Sanford v. Gaddis, 15 Ill., 228 208
Santa Maria, 10 Wheat. (U. S.), 442 731
Sanxay v. Hunger, 42 Ind., 44 274
Sauer v. Steinbauer, 14 Wis., 76 221
Saunders v. Reilly, 12 N. E. Rep. (N. Y.), 170 42
Savings Bank v. Shaffer, 9 Neb., 1 ..... 129, 626
Savitz v. Ohio & M. R. Co., 49 Ill. App., 315; 37 N. E. Rep., 235 ... 338
Schaller v. City of Omaha, 23 Neb., 325 721
Schroeder v. Nielson, 39 Neb., 335 598
Scofield v. Doscher, 72 N. Y., 491 ..... 220, 221
Scofield v. Lake Shore & M. S. R. Co., 43 O. St., 571 ..... 337, 338, 346
Scott v. Chope, 33 Neb., 41 632
Scott v. Spencer, 42 Neb., 632, 44 Neb., 93,
8, 309, 403, 405, 715, 717, 719, 721
Seebrock v. Fedawa, 33 Neb., 413 ..... 191, 192, 193
Shaffer v. Maddox, 9 Neb., 205 632
Shaffner v. Commonwealth, 72 Pa. St., 60 646
Shamp v. Meyer, 20 Neb., 223 53
Shannon v. Frost, 3 B. Mon. (Ky.), 258 682
Shapley v. Bellows, 4 N. H., 353 904
Sharmer v. Johnson, 43 Neb., 509 147
Shaw v. Woodcock, 7 B. & C. (Eng.), 73 492
Sheehy v. Fulton, 38 Neb., 691 821
Sheldon v. Williams, 11 Neb., 272 617
Sheridan v. Brooklyn C. & N. R. Co., 36 N. Y., 39 173
Sherman v. Bates, 15 Neb., 18 29
Sherman v. Dutch, 16 Ill., 285 476
Short v. Home Ins. Co., 90 N. Y., 16 548
Sibbald v. United States, 12 Pet. (U. S.), 491 731
Simpson v. Blunt, 42 Mo., 544 769
Simpson v. Jennings, 15 Neb., 671 76
Sipes v. Whitney, 30 O. St., 69 69
Skinner v. Skinner, 38 Neb., 756 886

PAGE

Slattery v. St. Louis & New Orleans Transportation Co., 91 Mo., 217 494
Slaven v. Hellman, 24 Neb., 646..... 756
Sloan v. Coburn, 26 Neb., 607 879
Sloo v. Pool, 15 Ill., 47..... 616
Smith v. Dean, 15 Neb., 432..... 763
Smith v. Foxworthy, 39 Neb., 214.....130, 131
Smith v. Gugerty, 4 Barb. (N. Y.), 614..... 30
Smith v. James, 72 Ia., 515..... 189
Smith v. Jones, 18 Neb., 481..... 117
Smith v. Mayor of New York, 37 N. Y., 518 96
Smith v. Phelan, 40 Neb., 765..... 869
Smythe v. Boswell, 117 Ind., 365..... 140
Sornberger v. Berggren, 20 Neb., 399..... 727
South & North Alabama R. Co. v. Huffman, 76 Ala., 492..... 737
South Platte Land Co. v. Buffalo County, 15 Neb., 605..... 161
South Platte Land Co. v. City of Crete, 11 Neb., 344..... 429
Southwick v. First Nat. Bank of Memphis, 61 How. Pr. (N. Y.), 164..... 97
Spaids v. Barrett, 57 Ill., 289 492
Spain v. Hamilton's Administrator, 1 Wall. (U. S.), 604..... 116
Spargur v. Romine, 38 Neb., 736..... 429
Spellman v. Frank, 18 Neb., 110..... 95
Spellman v. Lincoln Rapid Transit Co., 36 Neb., 890..... 171
Spence v. Emerine, 46 O. St., 433..... 69
Spratt v. Spratt, 76 Mich., 384..... 189
Stabler v. Gund, 35 Neb., 648..... 147
Staley v. Housel, 35 Neb., 160..... 765
State v. Allen, 43 Neb., 651..... 433
State v. Baltimore & O. R. Co., 36 Fed. Rep., 655..... 54
State v. Berka, 20 Neb., 375..... 565
State v. Bibb Street Church, 4 So. Rep. (Ala.), 40..... 682
State v. Carpenter, 74 N. Car., 230..... 891
State v. Chicago, St. P., M. & O. R. Co., 19 Neb., 482..... 499
State v. Churchill, 3 S. W. Rep. (Ark.), 352..... 594
State v. Cochran, 28 Neb., 798.....248, 252, 253
State v. Dean, 40 Mo., 464..... 127
State v. Griffey, 5 Neb., 161..... 86
State v. Hunger, 17 Neb., 216.....411, 413
State v. Lancaster County, 13 Neb., 223.....497, 498, 499
State v. McCrea, 3 So. Rep. (La.), 380..... 769
State v. McReynolds, 61 Mo., 203..... 159
State v. Moon, 41 Wis., 684..... 417
State v. Morey, 2 Wis., 362..... 417
State v. Norris, 37 Neb., 299..... 565
State v. Pierce, 32 Pac. Rep. (Kan.), 924..... 744

PAGE
State v. Robinson, 35 Neb., 401 565
State v. School District, 30 Neb., 527 499
State v. Village of Minnetonka, 59 N. W. Rep. (Minn.), 972...154, 160
State v. Vinsant, 49 Ia., 241 646
State v. Yates, 36 Neb., 287 891
State Ins. Co. v. Jordan, 29 Neb., 514 582
State Ins. Co. v. Schreck, 27 Neb., 527 .....243, 567, 574
Stenton v. Jerome, 54 N. Y., 480 492
Stevens v. Woodward, 6 Q. B. Div. (Eng.), 318 476
St. Joseph & G. I. R. Co. v. Hedge, 44 Neb., 448 447
St. Louis v. State, 8 Neb., 405 80
St. Louis & S. F. R. Co. v. Payne, 29 Kan., 166 857
Stockwell v. Phelps, 34 N. Y., 363 711
Stoddard v. Penniman, 108 Mass., 366 626
Stoll v. Sheldon, 13 Neb., 207 225
Stone v. Porter, 4 Dana (Ky.), 207 615
St. Paul Fire & Marine Ins. Co. v. Coleman, 43 N. W. Rep. (Dak.), 693 750
St. Paul Fire & Marine Ins. Co. v. Gotthelf, 35 Neb., 351.....461, 574
Strong v. Dwight, 11 Abb. Pr., n. s. (N. Y.), 319 315
Stubbins v. Mitchell, 82 Ky., 536 615
Sturgeon v. Korte, 34 O. St., 525 88
Sumner v. Crane, 155 Mass., 483 183
Swaney v. Hutchins, 13 Neb., 266 86
Sweeney v. Thickstun, 77 Pa. St., 131 70
Sycamore Marsh Harvester Mfg. Co. v. Sturm, 13 Neb., 210 479

T.

Tarkington v. Purvis, 128 Ind., 187 494
Taylor v. Beck, 13 Ill., 376 30
Taylor v. Corryl, 20 How. (U. S.), 583 497
Taylor v. Jaques, 106 Mass., 291 670
Taylor v. Lynch, 5 Gray (Mass.), 49 116
Taylor v. Taintor, 16 Wall. (U. S.), 370 497
Tecumseh Town Site Case, 3 Neb., 267 632
Temmink v. Metropolitan Life Ins. Co., 40 N. W. Rep. (Mich.), 469 582
Tessier v. Englehart, 18 Neb., 167 76
Thatcher v. Adams County, 19 Neb., 485 429
Thomas v. Wooldridge, 23 Wall. (U. S.). 283 365
Thompson v. Alger, 53 Mass., 428 290
Thompson v. Hanks, 14 Fed. Rep., 902 191
Thompson v. Read, 41 Ia., 48 306
Thrall v. Omaha Hotel Co., 5 Neb., 295 .....73, 76
Thrasher v. Pike County R. Co., 25 Ill., 393 290

PAGE
Tiffany v. Stewart, 14 N. W. Rep. (Ia.), 241..... 906
Till's Case, 3 Neb., 261.....42, 117
Tolerton v. McLain, 35 Neb., 725.....38, 42, 112
Tomer v. Densmore, 8 Neb., 384..... 632
Tootle v. Elgutter, 14 Neb., 158..... 36
Topeka City R. Co. v. Higgs, 38 Kan., 379..... 172
Toule v. Shelley, 19 Neb., 632..... 354
Touzalin v. City of Omaha, 25 Neb., 817..... 429
Tower v. Fetz, 26 Neb., 710..... 147
Town of Sharon v. Gager, 46 Conn., 189..... 670
Town of Venice v. Woodruff, 62 N. Y., 462..... 629
Trade Ins. Co. v. Barracliffe, 45 N. J. Law, 543..... 560
Traver v. Shaefle, 33 Neb., 531..... 30
Tubbs v. Dwelling House Ins. Co., 48 N. W. Rep. (Mich.), 296.... 582

U.

Union Ins. Co. v. Barwick, 36 Neb., 223.....268, 568, 575
Union Nat. Bank v. Roberts, 45 Wis., 373..... 79
Union P. R. Co. v. Douglas County Bank, 42 Neb., 469..... 116
Union P. R. Co. v. Erickson, 41 Neb., 1.. 860
Union P. R. Co. v. Porter, 38 Neb., 226..... 458
Union P. R. Co. v. Rassmussen, 25 Neb., 810.....848, 861, 862
United States v. Cook, 17 Wall. (U. S.), 179..... 892
United States v. Huckabee, 16 Wall. (U. S.), 414..... 669
United States Rolling Stock Co. v. Atlantic & G. W. R. Co., 34 O. St., 450..... 491
Upham v. Detroit City R. Co., 85 Mich., 12..... 173

V.

Vanderpoel v. O'Hanlon, 53 Ia., 246..... 85
Van Dorn v. Bodley, 38 Ind., 402..... 306
Vankirk v. Citizens Ins. Co., 48 N. W. Rep. (Wis.), 798...550, 559, 582
Veneman v. McCurtain, 33 Neb., 643..... 300
Verges v. Roush, 1 Neb., 113..... 137
Vestal v. City of Little Rock, 54 Ark., 321..... 160
Village of Ponca v. Crawford, 18 Neb., 555..... 20
Vindquest v. Perky, 16 Neb., 284..... 131
Violet v. Rose, 39 Neb., 660..... 403
Volmer v. State, 24 Neb., 838..... 645
Vought v. Foxworthy, 38 Neb., 790.....130, 131

W.

Wagner v. Gage County, 3 Neb., 237.....719, 722
Walbridge v. Arnold, 21 Conn., 424 669

PAGE
Wakefield v. Latey, 39 Neb., 285 247
Walker v. Lutz, 14 Neb., 274 131
Wallace v. Flierschman, 22 Neb., 203 790
Waller v. Northern Assurance Co., 10 Fed. Rep., 232 558
Walton Plow Co. v. Campbell 127
Wanzer v. State, 41 Neb., 238 620
Ward v. Parlin, 30 Neb., 376 ..... 147, 763
Ward v. Watson, 27 Neb., 768 905
Ware v. Wisner, 50 Fed. Rep., 310 183
Warren v. Martin, 24 Neb., 273 121
Warwick v. Hutchinson, 45 N. J. Law, 61 479
Washburn v. People, 10 Mich., 383 422
Washington Mills Emery Mfg. Co. v. Weymouth & Braintree Mutual Fire Ins. Co., 135 Mass., 503 560
Wasson v. Palmer, 13 Neb., 376, 17 Neb., 330 ..... 290, 607, 610
Waterman v. Stout, 38 Neb., 396 820
Waters v. Reuber, 16 Neb., 99 710
Watson v. Avery, 2 Bush (Ky.), 332 680
Watson v. Jones, 13 Wall. (U. S.), 679 680
Watson v. Sutherland, 72 U. S., 74 591
Waukon & M. R. Co. v. Dwyer, 49 Ia., 121 288
Weeks v. Southwick, 12 How. Pr. (N. Y.), 170 365
Weitz v. Wolfe, 28 Neb., 500 ..... 768, 899
Welton v. Dickson, 38 Neb., 767 591
West v. Place, 23 N. Y. Sup., 1090 193
Western & A. R. Co. v. Jones, 65 Ga., 631 858
Western Assurance Co. v. Mason, 5 Brad. (Ill.), 141 401
Western Building & Loan Association v. Fitzmaurice, 7 Mo. App., 283 127
Western Home Ins. Co. v. Richardson, 40 Neb., 1 ..... 542, 575, 576
Western Horse & Cattle Ins. Co. v. Scheidle, 18 Neb., 495 748
Western Union Telegraph Co. v. Foster, 64 Tex., 220 738
Whipple v. Fowler, 41 Neb., 675 147
White v. Carlton, 52 Ind., 371 615
White v. Smith, 46 N. Y., 418 315
*White v. State, 28 Neb., 341 ..... 418, 421
White v. State, 4 Tex. App., 488 891
White v. Woodruff, 25 Neb., 803 782
White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends, 89 Ind., 136 682
Wiffen v. Roberts, 1 Esp. (Eng.), 261 79
Wilborn v. Odell, 29 Ill., 457 208
Wilbur v. Jeep, 37 Neb., 604 76
Wilcox v. May, 19 O., 408 413
Wilde v. Preuss, 33 Neb., 790 ..... 755, 756
Wilde v. Wilde, 37 Neb., 891 485

PAGE
Wilhelmson v. Bentley, 25 Neb., 473 627
Willard v. Foster, 24 Neb., 213 147
William v. Bayley, L. R. & H. L. (Eng. & Irish App.), 200; 4 Giff., 638, note 670
Williams v. Albany City Ins. Co., 19 Mich., 451 751
Williams v. East India Co., 3 East (Eng.), 192 417
Williams v. Hartford Ins. Co., 54 Cal., 442 562
Williams v. Keyes, 90 Mich., 290 658
Williams v. Niagara Fire Ins. Co., 50 Ia., 561 548
Williams v. State, 5 Mo., 480 769
Wilson v. Fuller, 9 Kan., 176 776
Wilson v. State, 12 Tex. Ct. App., 481 417
Wilson v. Wilson, 23 Neb., 455 756
Wilson's Will, 103 N. Y., 374 193
Winfield Nat. Bank v. Croco, 26 Pac. Rep. (Kan.), 939 670
Wiseman v. Ziegler, 41 Neb., 886 620
Witherby v. Mann, 11 Johns. (N. Y.), 518 615
Woffenden v. Woffenden, 25 Pac. Rep. (Ariz.), 666 360
Wolf v. Murphy, 21 Neb., 472 589
Wonderlick v. Walker, 41 Neb., 806 620
Wright v. Johnson, 42 Ind., 29 306

Y.

Yeazel v. White, 40 Neb., 432 726
Yost v. American Ins. Co., 39 Mich., 531 750
Young v. Bush, 36 How. Pr. (N. Y.), 240 502
Young v. Clark, 2 Ala., 264 616
Young v. Grundy, 6 Cranch (U. S.), 51 365
Young v. Lyons, 8 Gill (Md.), 162 616

Z.

Zielke v. London Assurance Corporation, 25 N. W. Rep. (Wis.), 436 575
Zinck v. Phœnix Ins. Co., 60 Ia., 266 748

TABLE OF NEBRASKA CASES OVERRULED.

Adams v. Nebraska City Nat. Bank, 4 Neb., 370.
Musser v. King, 40 Neb., 893.
Atchison & N. R. Co. v. Baty, 6 Neb., 37.
Graham v. Kibble, 9 Neb., 183.
Aultman v. Obermeyer, 6 Neb., 260.
Stevens v. Carson, 30 Neb., 544.
Bartlett v. Bartlett, 13 Neb., 456.
Bartlett v. Bartlett, 15 Neb., 600.
Becker v. Anderson, 11 Neb., 493.
Marsh v. Burley, 13 Neb., 264.
Bennet v. Fooks, 1 Neb., 465.
Galway v. Malchow, 7 Neb., 285.
Bonns v. Carter, 20 Neb., 566.
Jones v. Loree, 37 Neb., 816.
Kilpatrick-Koch Dry Goods Co. v. Bremers, 44 Neb., 868.
Bradshaw v. City of Omaha, 1 Neb., 16.
Turner v. Althaus, 6 Neb., 77.
Bressler v. Wayne County, 25 Neb., 468.
Bressler v. Wayne County, 32 Neb., 834.
Bryant v. Estabrook, 16 Neb., 217.
Alexander v. Thacker, 43 Neb., 497.
Carkins v. Anderson, 21 Neb., 364.
Anderson v. Carkins, 135 U. S., 483.
Robinson v. Jones, 31 Neb., 20.
Coy v. Jones, 30 Neb., 798.
Globe Publishing Co. v. State Bank of Nebraska, 41 Neb., 176.
Crook v. Vandevoort, 13 Neb., 305.
Johnson v. Hardy, 43 Neb., 368.
Curtin v. Atkinson, 29 Neb., 612.
Curtin v. Atkinson, 36 Neb., 110.
Dawson v. Merrille, 2 Neb., 119.
Carkins v. Anderson, 21 Neb., 368.
Edgington v. Cook, 32 Neb., 551.
Graff v. Ackerman, 38 Neb., 720.
Filley v. Duncan, 1 Neb., 135.
Colt v. Du Bois, 7 Neb., 396.

Geisler v. Brown, 6 Neb., 254.
World Publishing Co. v. Mullen, 43 Neb., 126.
Godman v. Converse, 38 Neb., 657.
Godman v. Converse, 43 Neb., 464.
Hagenbuck v. Reed, 3 Neb., 17.
Graff v. Ackerman, 38 Neb., 724.
Hallenbeck v. Hahn, 2 Neb., 377.
Johnson v. Hahn, 4 Neb., 139.
Handy v. Brong, 4 Neb., 66.
Buckmaster v. McElroy, 20 Neb., 564.
Henry v. Vliet, 33 Neb., 130.
Henry v. Vliet, 36 Neb., 138.
Hollenbeck v. Tarkington, 14 Neb., 430.
Sharp v. Brown, 34 Neb., 406.
Holmes v. Andrews, 16 Neb., 296.
Alexander v. Thacker, 43 Neb., 497.
Horn v. Miller, 20 Neb., 98.
Bickel v. Dutcher, 35 Neb., 761.
Continental Building & Loan Association v. Mills, 44 Neb., 142.
Howell v. Roberts, 29 Neb., 483.
Globe Publishing Co. v. State Bank of Nebraska, 41 Neb., 176.
Hurley v. Estes, 6 Neb., 391.
Hale v. Christy, 8 Neb., 264.
Kittle v. De Lamater, 3 Neb., 325.
Smith v. Columbus State Bank, 9 Neb., 31.
Kyger v. Ryley, 2 Neb., 26.
Hale v. Christy, 8 Neb., 264.
Landauer v. Mack, 39 Neb., 8.
Landauer v. Mack, 43 Neb., 430.
Lipscomb v. Lyon, 19 Neb., 511.
Stevens v. Carson, 30 Neb., 544.
McClure v. Warren, 16 Neb., 417.
Alexander v. Thacker, 43 Neb., 497.
McCord v. Weil, 29 Neb., 682.
McCord v. Weil, 33 Neb., 869.
McDonald v. Bowman, 35 Neb., 93.
McDonald v. Bowman, 40 Neb., 269.
Manly v. Downing, 15 Neb., 637.
Green v. Sanford, 34 Neb., 363.
Nickolls v. Barnes, 32 Neb., 195.
Nickolls v. Barnes, 39 Neb., 103.
Osborne v. Canfield, 33 Neb., 330.
Moline v. Curtis, 38 Neb., 534.
Otoe County v. Brown, 16 Neb., 397.
Alexander v. Thacker, 43 Neb., 497.

Peckinbaugh v. Quillin, 12 Neb., 586.
Burnham v. Doolittle, 14 Neb., 216.
Peters v. Dunnells, 5 Neb., 466.
Hale v. Christy, 8 Neb., 264.
Phenix Ins. Co. v. Swantkowski, 31 Neb., 245.
Sharp v. Brown, 34 Neb., 406.
Phillips v. Bishop, 31 Neb., 853.
Phillips v. Bishop, 35 Neb., 487.
Pickens v. Plattsmouth Investment Co., 31 Neb., 585.
Pickens v. Plattsmouth Investment Co., 37 Neb., 272.
Republican V. R. Co. v. Boyse, 14 Neb., 130.
Donovan v. Sherwin, 16 Neb., 130.
Rice v. Gibbs, 33 Neb., 460.
Rice v. Gibbs, 40 Neb., 265.
Rittenhouse v. Bigelow, 38 Neb., 543.
Rittenhouse v. Bigelow, 38 Neb., 547.
Sandwich Mfg. Co. v. Feary, 34 Neb., 411.
Sandwich Mfg. Co. v. Feary, 40 Neb., 226.
Schoenheit v. Nelson, 16 Neb., 235.
Alexander v. Thacker, 43 Neb., 497.
Shawang v. Love, 15 Neb., 142.
Hurlburt v. Palmer, 39 Neb., 159.
Shellenberger v. Ransom, 31 Neb., 61.
Shellenberger v. Ransom, 41 Neb., 632.
Smith v. Boyer, 29 Neb., 76.
Smith v. Boyer, 35 Neb., 46.
Stanwood v. City of Omaha, 38 Neb., 552.
Stanwood v. City of Omaha, 42 Neb., 304.
State v. Krumpus, 13 Neb., 321.
State v. Wilson, 31 Neb., 464.
State v. Priebnow, 16 Neb., 131.
Arnold v. State, 38 Neb., 752.
State v. Sanford, 12 Neb., 425.
State v. Wilson, 31 Neb., 464.
State v. Sioux City & P. R. Co., 7 Neb., 357.
Foree v. Stubbs, 41 Neb., 271.
Stewart-Chute Lumber Co. v. Missouri P. R. Co., 28 Neb., 39.
Stewart-Chute Lumber Co. v. Missouri P. R. Co., 33 Neb., 29.
St. Joseph & D. R. Co. v. Baldwin, 7 Neb., 247.
St. Joseph & D. R. Co. v. Baldwin, 103 U. S., 426.
Strader v. White, 2 Neb., 348.
Waggoner v. First Nat. Bank of Creighton, 43 Neb., 85.

Svanson v. City of Omaha, 38 Neb., 550.
Svanson v. City of Omaha, 42 Neb., 303.
Thomas v. Edgerton, 36 Neb., 254.
Thomas v. Edgerton, 40 Neb., 26.
Walker v. Morse, 33 Neb., 650.
Moline v. Curtis, 38 Neb., 528.
Westcott v. Archer, 12 Neb., 345.
Grebe v. Jones, 15 Neb., 317.
White v. State, 28 Neb., 341.
Coffield v. State, 44 Neb., 418.
Woodruff v. White, 25 Neb., 745.
Stevens v. Carson, 30 Neb., 551.
Woods v. Shields, 1 Neb., 454.
Kyger v. Ryley, 2 Neb., 27.

STATUTES AND CONSTITUTIONAL PROVISIONS

CITED AND CONSTRUED.

Figures in ( ) indicate corresponding sections in Consolidated Statutes.

STATE.

SESSION LAWS.

1871. PAGE

P. 108. Amendment of fee bill 789
P. 120. Herd law..... 318

1875.

Pp. 80, 82. Amendment of fee bill..... 789

1877.

Pp. 40, 42. Amendment of fee bill..... 789

1889.

P. 179, ch. 14, sec. 49. Cities of the first class; road taxes..... 434
P. 250, ch. 15. Incorporation of cities having less then twenty-five thousand and more than eight thousand inhabitants..... 706

1891.

P. 129, ch. 8. Amendment of act to incorporate cities of the first class..... 436
P. 246, ch. 24, sec. 14. Form and contents of Australian ballots, 433
P. 314, ch. 43. Road taxes..... 436

REVISED STATUTES.

1866.

P. 163, ch. 19, secs. 5, 6. Sheriff's fees.....788, 789

COMPILED STATUTES.

1893.

Ch. 2, art. 3 (97–109). Herd law.....316, 608
Ch. 7, sec. 8 (284). Attorneys' liens 904
Ch. 12 (307–316). Chattel mortgages 872
Ch. 12*a*, sec. 34 (2340). Metropolitan cities; impounding animals.....317, 318
Ch. 14, sec. 40 (2861). Incorporation of villages.....154, 158
sec. 101 (2920). Villages; disconnecting territory, 155, 162, 704, 705, 706

PAGE
Ch. 16, secs. 37-39 (486-488). Manufacturing companies 280, 283
sec. 104 (561). Duty of railroad companies to give signals at crossings.....848, 855
secs. 123-144 (336-357). Corporations..... 283
Ch. 18, secs. 56, 57 (900, 901). Proceedings of county commissioners..... 426
Ch. 19, sec. 39 (1057). Jurisdiction of judges at chambers..... 363
secs. 52-56 (1071-1075). Instructions to juries...810, 811, 875
sec. 57 (1059). Jurisdiction of judges at chambers 363
Ch. 21 (1392, 1393). Death by wrongful act..... 55
Ch. 25, sec. 10 (1426, 1427). Petition for divorce; service 883
sec. 18 (1435). Divorce; restoration of wife's property, 881, 885
Ch. 26, sec. 32 (1613). Residents..... 84
sec. 139 (1759). Australian ballots..... 433
Ch. 28, sec. 30 (3030). Taxation of costs.....783, 786
Ch. 32, sec. 11 (1793). Sale without delivery; presumption of fraud 605, 690, 879
sec. 12 (1794). Definition of creditors 606
sec. 17 (1799). Fraudulent conveyances..... 606
sec. 26 (1808). Sales of land; contracts in writing ...148, 153
Ch. 36, sec. 1 (1961). Homesteads; exemption..... 269
Ch. 41, sec. 5 (2972). Negotiable instruments; evidence of payment..... 404
Ch. 43, sec. 45 (437). Valued insurance policy act; provision for attorney's fee 550, 564
Ch. 53 (1411-1417). Married woman's act..... 886
Ch. 63, sec. 1 (4380). Payment for improvements on land..... 639
sec. 5 (4384). Occupying claimants; appraisement; objections.....633, 637, 638
Ch. 72, art. 1, sec. 3 (572). Railroad companies; injury to passengers; evidence.....449, 458
Ch. 73, sec. 39 (4363). Registration of assignment of mortgage, 647, 657
sec. 46 (4370). Authority for registering assignments of mortgages..... 657
Ch. 77. Revenue law..... 90
sec. 123 (4022). Notice to owner before delivery of tax deed..... 440
sec. 124 (4023). Affidavit for tax deed..... 440
sec. 126 (4025). Purchaser at tax sale; deeds..... 440
sec. 127 (4026). Form of tax deed..... 440
sec. 128 (4027). Registration of tax deeds..... 440
sec. 181 (4080). Taxes; attorneys' fees..... 354
Ch. 78, sec. 53 (1867). Road districts..... 437
sec. 76 (1890). Road taxes.....434, 435

PAGE

Ch. 79, sub. 2, sec. 8 (3539). School districts; site for school house 741
sub. 18 (3758–3767). School districts; ownership of text-books..... 498
Ch. 89 (1539–1581*w*). Drainage..... 722
sec. 28 (1566). Drainage ditches; injunction to restrain collection of assessments.....428, 429
Ch. 89*a* (634–648). Telegraph companies..... 326
sec. 5 (638). Duty of telegraph companies to transmit messages..... 335
sec. 7 (640). Charges of telegraph companies..... 336
sec. 8 (641). Discrimination by telegraph companies.... 334
sec. 9 (642). Law against discrimination by telegraph companies..... 336
sec. 12 (645). Telegraph companies; liability for mistakes and non-delivery.....194, 196, 197

CODE OF CIVIL PROCEDURE.

Secs. 18, 20, 21 (4554, 4556, 4557). Actions barred by laws of other states; conduct preventing the running of the statute..... 302
Sec. 25 (4561). Service of process against companies or firms...640, 642
Secs. 99, 104 (4639, 4644). Pleading; set-off..... 76
Sec. 144 (4681). Pleading; amendments.....93, 94, 95, 97
Sec. 191*a* (4700). Replevin; return of property..... 757
Sec. 198 (4708). Grounds for attachment..... 868
Sec. 252 (4768). Injunction; when allowable..... 363
Sec. 263 (4779). Modification of injunction..... 364
Sec. 280 (4799). Actions; jury trials..... 590
Sec. 281*a* (4801). Actions; when triable.....350, 351
Sec. 292 (4812). Special verdicts..... 184
Sec. 307 (4827). Definition of exceptions..... 875
Sec. 308 (4828). Time to take exceptions..... 875
Sec. 310 (4830). Form of exceptions..... 875
Sec. 311 (4831). Bill of exceptions.....7, 8, 135
Sec. 314 (4835). New trial; misconduct of jury.....64, 78
Sec. 317 (4838). Application for new trial; affidavits.....65, 769
Sec. 324 (4845). Order of trying causes..... 352
Sec. 328 (4848). Competency of witnesses..... 146
Sec. 331 (4851). Witnesses; husband and wife..... 145
Sec. 332 (4852). Evidence of communications between husband and wife..... 146
Sec. 390 (4910). Time to except to depositions..... 314
Secs. 421–427 (4941–4947). Proceedings to perpetuate testimony... 630
Sec. 430 (4954). Dismissal of actions..... 61
Sec. 430*a* (4955). Right of plaintiff to dismiss action..... 502
Sec. 477 (5002). Lien of judgments..... 273

PAGE
Sec. 481. Stay of execution.....251, 252, 253
Sec. 484 (5015). Executions; distribution of proceeds, 409, 410, 411, 412
Sec. 511 (5046). Judgment against principal and surety.....59, 62
Sec. 561 (5097). Justice of the peace; transcript of appeal..... 412
Sec. 562 (5098). Lien of transcriptive judgments..... 412
Sec. 563 (5099). Judgment on appeal to district court; executions..... 412
Sec. 586 (5121). Transcripts for review.....714, 716
Sec. 587*a* (5123). Bills of exceptions..... 717
Sec. 587*b* (5124). Authentication of bills of exceptions.....405, 721
Sec. 602 (5146). Modification of judgments.....355, 360
Sec. 675 (5142). Appeals..... 136
Secs. 847–851 (5314–5318). Mortgage foreclosure; actions for debt..... 213
Secs. 962, 963 (5433, 5434). Issuance of subpœnas; service..... 787
Sec. 976 (5447). Justices of the peace; attendance of constables, 788
Sec. 1011 (5483). Appeals from justices of the peace; time, 138, 756, 757
Sec. 1014 (5486). Liability of surety on appeal bond 62
Sec. 1021 (5493). Landlord and tenant; holding over..... 765
Sec. 1023 (5495). Forcible entry and detainer; complaint...829, 830
Sec. 1030 (5502). Justices of the peace; appeal bonds; liability of sureties.....248, 250, 253, 254
Sec. 1049 (5521). Executions; stay.....252, 253

CRIMINAL CODE.

Sec. 256 (5882). Criminal prosecutions; limitation of actions, 889, 890
Sec. 444 (6071). Demurrer to indictment..... 421
Sec. 449 (6076). Plea in bar..... 892
Sec. 579 (6214). Information; indorsement of names of witnesses, 414
Sec. 585 (6220). Criminal procedure; preliminary examination, 421, 422

CONSTITUTION.

Art. 1, sec. 6. Right of trial by jury..... 590
sec. 13. Courts; remedy by due course of law..... 577
Art. 3, sec. 11. Amendment of laws.....435, 438
sec. 15. Special legislation.....551, 565
Art. 6, sec. 23. Jurisdiction of judges at chambers..... 363
Art. 7, sec. 1. Right of suffrage; electors..... 84
Art. 11, sec. 7. Telegraph companies; discrimination.....326, 335

FEDERAL.

STATUTES AT LARGE.

Vol. 24, ch. 104. Interstate commerce..... 337

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1895.

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.

E. R. SPOTSWOOD & SON v. NATIONAL BANK OF COMMERCE.

FILED FEBRUARY 19, 1895. No. 5886.

1. **New Trial:** HEARING OF MOTION: EVIDENCE. Where a motion for a new trial is made for parties on the grounds that they were never made parties to the action and never appeared therein and never authorized any attorney to appear for them, and that the attorney who claimed to represent them had no authority to do so, and that no proper defense had been made in their behalf, and that they possessed a full and adequate defense to the action which they desired to present, and affidavits are filed in support of and to controvert the grounds of such motion,

it is proper for the trial judge, in determining the motion, to take into consideration matters of record which occurred during the trial of the case and have a bearing upon the issues to be determined in deciding the motion for a new trial.

2. **Review**: BILL OF EXCEPTIONS. Where the certificate to a bill of exceptions filed in this court, purporting to contain the evidence used on the hearing of a motion for a new trial, includes a statement that the evidence introduced and proceedings during the trial were considered in passing upon the motion, and the evidence and record of such proceedings are not preserved by the bill of exceptions, the question of the correctness of the ruling of the trial judge cannot be examined in this court, for the reason of the insufficiency of the bill of exceptions, and the findings of the trial court on the issues of fact involved in such hearing must be presumed to be correct and so treated.

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

John O. Yeiser, for plaintiffs in error.

B. N. Robertson, *contra*.

HARRISON, J.

This action was commenced in the district court of Douglas county June 7, 1890, the relief sought being to enjoin the defendant bank from collecting, or proceeding to collect, the balance of the amount of a promissory note, which we gather from the record was signed by Charles C. Spotswood as principal debtor and E. R. Spotswood & Son as surety. The petition was apparently filed in the interests of both principal and surety, signers of the note. The petition was so entitled and was signed by an attorney under the names of both parties, and by him as their attorney. A restraining order was allowed and a time fixed for hearing, and as a result of the hearing, which was had in due course of the proceedings, the following order was made: "And now, on this 18th day of July, 1890, on hearing the application for the injunction prayed for in the above en-

titled cause, and on hearing the affidavits on file both in support of and against said injunction, it is hereby ordered that the temporary injunction prayed for be, and the same is hereby, allowed and granted as prayed for in the petition filed herein, to continue in force and effect until this cause can be finally heard in its regular order, and the issues in this case fully determined, upon condition, however, that the plaintiff file a good and sufficient bond, to be approved by the clerk of this court, in the sum of $300, and on the further condition that within five days the firm of E. R. Spotswood & Son, mentioned in the petition, enter an appearance herein of record, and become a party plaintiff in this suit, and leave is hereby given to amend the petition now on file herein by interlineation for the purpose of making the said E. R. Spotswood & Son a party plaintiff herein." Answer and reply were filed, and on a trial of the issues judgment was rendered in favor of defendant, and granting it affirmative relief in the amount of the balance the court found from the evidence was due it on the note. This was of date January 18, 1892, and on the same day a motion for new trial was filed by Charles C. Spotswood and a separate motion for new trial in behalf of E. R. Spotswood & Son, in which it was recited that E. R. Spotswood & Son did not commence the action, were not served in any manner, and did not voluntarily appear or submit to the jurisdiction of the court by attorney or in person, and never authorized the attorney who apparently represented them or any other attorney to appear for them in said cause, and had no knowledge that any one had so appeared, or that they had been made parties to the suit until after judgment was rendered; that they had been deprived of the right to their day in court, and to make a full and adequate defense to the action which they possessed. These motions for new trial were overruled, the order in reference to that of E. R. Spotswood & Son being as follows: "This cause coming

on to be heard on the motion of E. R. Spotswood & Son, of Lexington, Kentucky, a firm composed of S. P. Spotswood and O. N. Spotswood, the plaintiffs herein, for a new trial of said cause, the affidavits of O. N. Spotswood, John P. Breen, and John O. Yeiser, and was submitted to the court, on consideration whereof the court finds that the said John P. Breen, attorney, was duly authorized to represent the said E. R. Spotswood & Son on the trial of said cause, and did in fact so represent them with their knowledge and consent, and that the matters in controversy herein have been fully adjudicated herein. It is therefore considered by the court that the said motion be, and the same is hereby overruled, to which the defendants E. R. Spotswood & Son except." And a petition in error has been prosecuted to this court for E. R. Spotswood & Son, to secure a review of the rulings of the trial judge upon their motion for a new trial.

In settling the bill of exceptions the following record was made:

"Received of John O. Yeiser, attorney for E. R. Spotswood & Son, the above proposed bill of exceptions to the rulings of the court on the motion for a new trial by E. R. Spotswood & Son for amendments this 25th day of May, 1892. CORNISH & ROBERTSON,

"*Attorneys for National Bank.*

"I hereby return the within bill of exceptions, but refuse to approve of the same, for the reason that the affidavit of John O. Yeiser was not read, but by consent he was permitted to state its contents and thereafter file the same, provided he would also file his written authority to appear for E R. Spotswood & Son. This last he has not done. Defendant further objects to this bill of exceptions for the reason that no bill of exceptions has ever been prepared and served upon this defendant showing the evidence received upon the trial of this cause, although such bill of exceptions (had it been prepared) would have shown that

the matters of defense set forth in said motion for new trial were fully presented and determined at said trial and the said E. R. Spotswood & Son were then fairly represented and the time for filing such bill of exceptions has long since elapsed.

"NATIONAL BANK OF COMMERCE,
"*Defendant*,
"BY CORNISH & ROBERTSON,
"*Its Attorneys.*

"Received above June 2, 1892. JNO. O. YEISER."

The certificate of the judge was as follows: "The foregoing three affidavits was all the evidence offered and given by either party on the hearing of the said motion for a new trial by E. R. Spotswood & Son, and, on application of the said E. R. Spotswood & Son, this bill of exceptions is allowed by me, and ordered to be made a part of the record in this case; and I further certify that in passing upon said motion for a new trial I considered all the evidence and proceedings upon the trial of the case in addition to said affidavits," and was dated and signed. The foregoing certificate was type-written matter from the first word "The," to and including the word "case," where it first appears in the certificate. The remainder, from the word "and," immediately following the word "case," to the end of the body of the certificate, was in handwriting, presumably, from all indications contained in the record, that of the judge who signed the certificate. From this it will be seen that we have not now before us all the evidence which the judge who passed upon the motion for a new trial considered in deciding such application. The testimony contained in the affidavits which were filed and used at the hearing of the motion was conflicting, and whatever it was, if anything, contained in the record made during the trial bearing upon the questions decided in passing upon the motion, *i. e.*, the appearance or non-appearance of E. R. Spotswood & Son or their representation by attor-

ney, and his authority or want of authority so to do and the care then taken of their interests, which assisted the trial judge in reaching a conclusion, we cannot say, as it is not before us, nor can we say whether it was sufficient, when coupled with the evidence in the affidavits, to warrant his conclusion. As to the propriety of the judge considering what may have appeared in the record of the trial bearing upon the questions presented by the motion, we have no doubt. The complaint was made that plaintiffs in error were not represented in the case or during the trial, and if any one claimed to appear for them it was without authority. If anything transpired during the trial which would assist in determining the controversy it was undoubtedly competent for such purpose and proper to be considered and given its due weight by the court. It is a settled rule that every presumption is in favor of the correctness of the proceedings of a trial court, and error will not be presumed, and it must affirmatively appear that all the testimony submitted or considered at any hearing by a trial court is contained in the bill of exceptions. (*Aspinwall v. Sabin*, 22 Neb., 76.) We think this rule is applicable to a hearing upon a motion for a new trial, at least in a case such as the one at bar, where it appears affirmatively from the certificate of the presiding judge that a portion of the record which it was entirely proper for him to consider was not preserved by the bill of exceptions. The judgment of the district court is

AFFIRMED.

NELSON & COOK V. JOHN F. JOHNSON.

FILED FEBRUARY 19, 1895. No. 6016.

1. **Review:** RULINGS ON EVIDENCE: BILL OF EXCEPTIONS. Where it is sought to present for review alleged errors of a trial court in receiving or rejecting testimony, and also the applicability of an instruction to portions of the evidence, it is necessary that there be a properly authenticated bill of exceptions.
2. **Bill of Exceptions:** ALLOWANCE BY CLERK. A clerk of the district court has no power to settle and allow a bill of exceptions unless it is within the exceptions noted and provided for in section 311 of the Code of Civil Procedure.
3. **Continuance:** AFFIDAVITS: REVIEW. Affidavits used on the hearing of a motion for a continuance cannot be considered in the appellate court unless preserved by a bill of exceptions.
4. **Instructions:** REVIEW. An instruction which was a correct statement of the rule of law applicable to a certain class of testimony, the absence of a properly authenticated bill of exceptions precluding its examination in connection with the evidence, presumed to be without error.

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

H. H. Bowes, for plaintiffs in error.

N. J. Sheckell, contra

HARRISON, J.

This action was commenced by plaintiffs against defendant, in the district court of Burt county, to recover the sum of $—— and interest thereon, alleged in the petition to be the balance due them on an account. The answer pleaded payment. There was a trial and verdict and, after motion for new trial overruled, a judgment for defendant, to reverse which this error proceeding was instituted in this court.

A number of the errors complained of in the petition refer to the overruling or sustaining of objections to questions during the introduction of the testimony. These we cannot examine, for the reason that there is no properly authenticated bill of exceptions in the record. There appears the following stipulation: "It is hereby agreed that F. E. Ward, clerk of the district court, may settle the bill of exceptions herein and allow the same." According to this agreement the clerk of the district court signed the following statement in the record: "In pursuance of the agreement of the attorneys aforesaid the petition in error and bill of exceptions hereto attached are hereby allowed as the true and correct record upon which this cause was tried." This was not sufficient. In *Scott v. Spencer*, 42 Neb., 632, in an opinion written by RAGAN, C., in which an exactly similar question was passed upon, it was said: "Section 311 of the Code of Civil Procedure provides: 'In case of the death of the judge, or when it is shown by affidavit that the judge is prevented by sickness, or absence from his district, as well as in cases where the parties interested shall agree upon the bill of exceptions and shall have attached a written stipulation to that effect to the bill, it shall be the duty of the clerk to settle and sign the bill in the same manner as the judge is by this act required to do.' To confer authority upon the clerk of a district court to sign and allow a bill of exceptions, then, it must appear that the judge of the district court is dead, or that he is prevented by sickness or absence from his district from signing and allowing the bill, or the parties to the litigation or their counsel must agree upon the bill of exceptions, and attach thereto their written stipulation to that effect. Counsel for the parties to this litigation did agree and stipulate that the clerk might sign the bill of exceptions, but they did not agree by stipulation in writing attached to the bill that it was the correct bill of exceptions in the case. Where it is sought to present to this court alleged errors occur-

ring at a trial in the district court, a bill of exceptions, settled and signed by law, is indispensably necessary;" citing *Reynolds v. Dietz*, 39 Neb., 180; *Edwards v. Kearney*, 14 Neb., 83. (See, also, *Glass v. Zutavern*, 43 Neb., 334.)

One ground assigned as a reason for reversing the judgment is the overruling of plaintiffs' motion for a continuance. The granting or refusal of a motion for a continuance is a matter which is discretionary with the trial court, and, judged by the record, there was no abuse of discretion in refusing a continuance in this case. It will not be presumed that the action of the court was erroneous, and if there is nothing in the record from which it appears that the decision was wrong, it will be approved. There are some affidavits in the record which were probably used on the hearing of the motion for a new trial, but they are not identified as having been so used and are not preserved by a bill of exceptions, which renders them unavailable in this court. (*Barton v. McKay*, 36 Neb., 632, and cases cited.)

The only other assignment of error is that the court erred in giving paragraph five of the instructions to the jury, given on its own motion. The instruction attacked was as follows: "The books of account kept by Fried were received in evidence and are to be accorded such weight as under the circumstances you think them entitled to. The plaintiffs have also put in evidence certain admissions alleged to have been made by defendant in regard to the account. Such admissions are to be received with caution, but you should consider them in connection with the other evidence and give them such weight as you think them entitled to." The portion of the instruction to which counsel for plaintiffs objects is contained in the words, "such admissions are to be received with caution," which he claims does not correctly state the law. In the case of *Kelman v. Calhoun*, 43 Neb., 157, in an opinion written by POST, J., this court said in reference to admissions: "It

has been said that mere verbal admissions should be received with caution. That such evidence, 'consisting, as it does, in the mere repetition of oral statements, is subject to much imperfection and mistake' (1 Greenleaf, Evidence, 200), although admissions, deliberately made and precisely identified, may afford proof of the most satisfactory character." From the above it is clear that as to one class of admissions the rule announced by the court, to which exception was taken, was entirely pertinent and applicable. Whether the admissions to which the attention of the jury was by it directed were such as came within its terms could only be determined by an examination of the testimony in which they were contained, and as this was not preserved in a bill of exceptions in a manner authorized by law, it cannot be used for this or any other purpose, and, applying the rule that error will not be presumed but must affirmatively appear, the action of the court in giving the instruction designated must be upheld. It follows that the judgment of the district court will be

AFFIRMED.

IRVINE, C., not sitting.

JOSEPH VLASEK V. WILLIAM WILSON.

FILED FEBRUARY 19, 1895. No. 6038.

Justice of the Peace: BILL OF EXCEPTIONS: REVIEW. No ground of complaint in this case being disclosed independently of a bill of exceptions settled by a justice of the peace, the judgment rendered by said justice of the peace without the intervention of a jury will not be disturbed, since that magistrate had no power to settle such indispensable bill of exceptions. Following *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520, and other cases thereon predicated.

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

Pound & Burr, for plaintiff in error.

Sawyer, Snell & Frost, contra.

RYAN, C.

From a transcript it appears that the defendant in error began a suit before A. D. Borgelt, a justice of the peace of Lancaster county, to recover damages on account of the killing of some live stock by a dog owned by the plaintiff in error. A summons was issued June 21, 1892, and was delivered to E. Hunger, a constable, for service. This was returned served on Joseph Vlasek June 22, 1892. The return of this service was signed "T. A. Hayes, dept. constable." The sole contention of plaintiff in error is that this service did not confer jurisdiction, and that his motion to quash the return should have been sustained, because, as claimed, there was a showing that T. A. Hayes was deputized by the constable and not by the justice of the peace who issued the summons. In the transcript of the docket entries of the justice of the peace there is, as to this matter, nothing more than above stated, and it is clear that the facts claimed to exist are not made to appear thereby. We cannot resort to the alleged bill of exceptions for the data necessary to establish as facts the assertions in the brief of plaintiff in error as to the true history of the authorization of T. A. Hayes to act as deputy constable, for under the circumstances the justice of the peace had no power to settle a bill of exceptions. (*Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520; *Hopkins v. Scott*, 38 Neb., 666; *Real v. Honey*, 39 Neb., 516.) We cannot, therefore, say that the justice of the peace improperly overruled the motion to quash the return of service and that the rendition of judgment by him was without jurisdiction. The judgment

of the district court affirming the judgment rendered by the justice of the peace is, in its turn

AFFIRMED.

THOMAS J. HINES, APPELLEE, V. CHARLOTTE COCHRAN ET AL., APPELLANTS, AND PHILADELPHIA MORTGAGE AND TRUST COMPANY ET AL., APPELLEES.

FILED FEBRUARY 19, 1895. No. 5480.

1. **Mechanics' Liens.** The evidence in this case examined, and *held* to sustain the decree of the district court, except as to the claim of J. A. Fuller & Co.
2. ———. In respect to the rights of J. A. Fuller & Co., the case of *Byrd v. Cochran*, 39 Neb., 109, involving the same questions, is held decisive.

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

B. F. Cochran and *B. G. Burbank*, for appellants.

Montgomery, Charlton & Hall, Wharton & Baird, and *John O. Yeiser*, *contra*.

RYAN, C.

In the district court of Douglas county Thomas J. Hines commenced this action against Charlotte Cochran for the foreclosure of a mechanic's lien on account of plastering and mason work alleged to have been done by him, as a subcontractor, in the erection of a building on premises owned by the said defendant. There were made defendants the Philadelphia Mortgage & Trust Company, the holder of a mortgage on the aforesaid premises, William M. Bell, the principal contractor for the erection of the house aforesaid, and Herman E. Cochran, the husband of Charlotte

Cochran. The amount claimed was $594.40, for which sum plaintiff prayed a personal judgment against Charlotte Cochran and William M. Bell. After the commencement of this action the Bohn Sash & Door Company intervened, and, by virtue of an assignment by Bell of a claim for a mechanic's lien which he held as the principal contractor, asked to be subrogated to his rights, and in such rights prayed a foreclosure for the sum of $1,053.82, the balance alleged to be due to Bell. J. A. Fuller & Co. also intervened and sought the foreclosure of a claim assigned to said firm by a subcontractor, Joe Johnson, in the sum of $88.75, for the painting done on said house. On a trial duly had there was a decree in favor of Thomas J. Hines in the sum of $5. This amount was all that he was entitled to, under one theory sustained by sufficient evidence, and it will therefore be passed without further consideration. The court found due the Bohn Sash & Door Company but $672.20, and decreed in its favor a lien for that amount, subject to the lien of the Philadelphia Mortgage & Trust Company by virtue of its mortgage. The contentions which arise in respect to this claim are three in number. As against any right to a lien it is insisted that the Bohn Sash & Door Company, before the work was begun, executed a written waiver of its right to claim or enforce a lien. It is urged that the above mentioned mortgagee made the loan it did to Mrs. Cochran, greatly influenced by this fact, and that to permit the Bohn Sash & Door Company now to enforce a lien would not be just. This company does not claim a lien in its own right for material furnished by it. The evidence shows, as its name implies, that it is within the scope of the business of the Bohn Sash & Door Company to furnish manufactured building material of certain kinds. Its agreement was made in view of that fact and inhibited only the filing of the claim for a lien when it was for material by it furnished. In this case the claim of Mr. Bell was for a general balance due him on his contract to

furnish the material and erect the building in contemplation. His claim was complete, and all steps required by statute to entitle him to a lien had been complied with before his assignment of it to the Bohn Sash & Door Company. It is true the interim between the filing of this claim and the assignment thereof was of only about fifteen minutes duration, yet the proof was sufficient to justify the conclusion that the lien was in fact perfected before the assignment was made. The agreement of the Bohn Sash & Door Company did not forbid that company's acquisition of a claim already due and owing, but it was that it would not assert a claim on account of material furnished by itself. A complaint made by the Bohn Sash & Door Company and Mr. Bell is that from the claim assigned by the latter to the former, there was a deduction of the sum of $93, an amount paid by the husband of Charlotte Cochran to the firm of Ittner & Cassell for brick furnished and used in the erection of the building of Mrs. Cochran. Mr. Bell testified that this payment was made by Mr. Cochran, the agent of Mrs. Cochran, notwithstanding the fact that before such payment he had informed Mr. Cochran that this bill had, by himself, been fully paid. Mr. Cochran on the other hand testified that a member of the firm of Ittner & Cassell demanded payment of this bill in the presence of Mr. Bell, and that, with Mr. Bell's approval, he, the said Mr. Cochran, paid it. As the firm of Ittner & Cassell was a subcontractor under Mr. Bell it was proper that Mr. Cochran should make payment directly to said subcontractor, if the facts were as stated in the testimony of Mr. Cochran. On conflicting evidence it must be presumed that the conclusion found by the district court was correct and, therefore, this was a duly authorized payment. The Bohn Sash & Door Company claim that Mr. Bell had begun the construction of the aforesaid building before the mortgage of Mr. and Mrs. Cochran to the Philadelphia Mortgage & Trust Company was filed for record, and that, therefore, the dis-

trict court unjustly postponed the lien acquired by Mr. Bell to that of the aforesaid mortgagee. The evidence adduced on only one, and no matter which, side of this question of fact seems absolutely unanswerable. The proofs on the other side afford so complete a demonstration of its correctness that we cannot but be surprised that the district court, upon consideration of the evidence on both sides, could find any preponderance in favor of either. Under such circumstances we must assume that the manner of the witnesses, or some other circumstances of which we have not the advantage of knowledge, destroyed this apparent equilibrium. As the finding of the district court was in favor of the mortgagee it must remain undisturbed.

In the case of *Byrd v. Cochran*, 39 Neb., 109, there were considered the rights of J. A. Fuller & Co., as assignee, of the claim of Joe Johnson for painting by him done on the house erected by E. G. Cochran. In that case Johnson's contract was for the painting of two houses. One of these was in course of erection by E. G. Cochran when this contract was made, the other was the one involved in this case. The right of J. A. Fuller & Co., as the assignee of Joe Johnson for painting by him done on the house of E. G. Cochran, was denied in the case of *Byrd v. Cochran, supra*. As the facts in that case were necessarily the same as those in this, in so far as thereby are to be determined the rights of Fuller & Co., it is unnecessary to repeat them. In the case at bar there is no occasion for doing more than to quote the second paragraph of the syllabus in the case of *Byrd v. Cochran, supra*, for thereby is correctly given the status, and fully stated the rights, of J. A. Fuller & Co. This paragraph is in this language: "When a subcontractor paints two separate houses and furnishes the paint and other materials necessary for use in the painting, contracting for such work and materials with the original contractor, the consideration for such agreement being in one sum for both jobs, in order to recover upon a mechanic's

lien filed against one of the houses and the lot upon which it stands, it must be shown that the amount charged against the one house and lot is the value of the labor performed upon and materials furnished for such house, or an estimate made by some method or plan which will produce a certain definite result, and mere approximation or guesswork will not suffice to establish the lien." The court erred in allowing this lien, and to that extent its decree must be reversed. In all other respects its judgment is affirmed and the cause is remanded with directions to the district court to enter a decree in conformity herewith.

JUDGMENT ACCORDINGLY.

IRVINE, C., not sitting.

WILLIAM J. BURGESS ET AL. V. N. E. BURGESS.

FILED FEBRUARY 19, 1895. No. 4434.

1. **Trial:** ADMISSION OF EVIDENCE: HARMLESS ERROR. Prejudicial error will not be implied from the introduction in evidence of a petition verified by affidavit, in which petition were contained only such statements as were afterwards by said affiant repeated on his oath in the course of the trial in which such petition was introduced in evidence, and in relation to which statements there was thereupon accorded and fully exercised the right of cross-examination.

2. **Evidence:** LETTERS. Where the handwriting in which was affixed the signature to a letter was identified as that of one of the parties to the action on trial, such letter, if otherwise competent and relevant, is admissible in evidence, even though the signature thereto is denied by the testimony of the party charged with writing it.

3. **Trial:** OPENING AND CLOSING. Where, with the tacit consent of his adversary, a party litigant had assumed the burden of proof until the case was ready for presentation to the jury, the

refusal of the district court at that stage of the proceedings to permit the hitherto consenting party to open and close is fully approved.

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

L. W. Colby and *R. S. Bibb*, for plaintiffs in error.

L. M. Pemberton and *Griggs & Rinaker, contra.*

RYAN, C.

This action was tried in the district court of Gage county as an appeal from the probate of the will of Sophia A. Burgess. The contestant was a son of said decedent, whose legacy was but $10. There were two sisters and one brother of the contestant, who made common cause with him, since each was entitled to a legacy of like amount. The residue of the property of the deceased,—eighty acres of lands and perhaps some debts due her,—by the will was to be distributed among two sisters and one brother of the contestant. The objections to the probate of the will were that the testatrix was at the time of the execution thereof unduly influenced by the favored devisees and not of sound mind and competent to dispose of her property. There was a general verdict in favor of the contestants, as well as the following special findings:

"Do you find from the evidence that the testatrix at the time of the making of the will in controversy was possessed of sufficient mental capacity to understand the extent and the nature of the business in which she was engaged? Answer: No.

"Do you find from the evidence that the testatrix, Sophia Burgess, was constrained or coerced through undue influence or restraint in making the will in question? Answer: Yes."

The trial of this cause was one of those interesting ex-

hibitions sometimes given with respect to the distribution of property among the individual members of a family in which there is displayed more zeal than affection. There was sufficient evidence from which the jury might properly find, as they did both generally and specially. It would be unnecessary to discuss any details if complaint had not been made by plaintiffs in error as to certain rulings in the course of the trial. One of these was as to the introduction in evidence of a copy of the petition filed during the lifetime of the testatrix asking for the appointment of a guardian of her person and estate. This petition was sworn to by the contestant, N. E. Burgess, and by Henry Richardson the husband of one of the legatees who now assists in the contest. On the trial of this case there was evidence that the testatrix had been prejudiced against these petitioners by representations to her made by the proponents, that said N. E. Burgess and Henry Richardson had procured the latter to be appointed her guardian by filing a petition in which she was described as crazy,—a descriptive term as applied to herself to which she had decided objections. A letter of one of the daughters of the testatrix, who favored the contest, was on the trial, by the proponents introduced in evidence. In this letter the writer had expressed a decided disapproval of the then pending proceedings for the appointment of a guardian because, as she therein insisted, her mother was not insane. The essential averments of the petition for a guardian were that by reason of Mrs. Burgess' age and the enfeebled condition of her mind she was not mentally competent to have the charge and management of her property. As both N. E. Burgess and Henry Richardson testified orally on the trial and were fully cross-examined as to the above propositions—the only material ones contained in the petition for guardianship—it is not perceived just what prejudice resulted from its introduction in evidence. Indirectly it contradicted the representations made to the testatrix according to some evidence

introduced, and contributed an explanation of what seemed contradictions between the epistolary and oral statements of the writer of the letter above referred to. Probably these last considerations would not, however, have been a sufficient justification of the admission of this evidence, if, by the said petition, there had been presented to the jury material independent statements of facts, as to which there was offered no opportunity of cross-examination on the trial of the case.

It is urged that there was error in permitting to be introduced in evidence a letter signed W. J. B. It is true William J. Burgess, one of the proponents of the will, testified that he never signed by his initials, and that he did not think the above initials were in his handwriting. The statements in the letter which seem to have been regarded as material were that oath had been made in the aforesaid petition for guardianship that Mrs. Burgess was insane, and in that connection it was affirmed in the letter that the appointment of Mr. Richardson, as guardian, had been brought about so that Richardson might "make a raise" on the old lady's property. These charges were followed by threats of measures not described, but which would defeat the plans above referred to. The denial of the signing of the initials was somewhat qualified by Mr. Burgess and made to depend to a considerable degree upon the general proposition that he never signed by his initials alone. It was doubtless regarded as important by him that there should not be conveyed to the jury the impression that the making of the will, under which he was a beneficiary, was, in any way, brought about through his influence. There was, therefore, an inducement to deny that he was the author of the letter which seemed to indicate that, in his mind, there had existed, before the will was made, an intention to influence his mother to punish Mr. Richardson for making oath that she was insane. It would afford a dangerous precedent to hold that where the alleged writer of a letter denied that the sig-

nature thereto was in his handwriting, no other evidence was competent as to the genuineness of such signature; yet this is, in effect, the contention of the plaintiffs in error, for it is shown by the bill of exceptions that at least three witnesses, well acquainted with the handwriting of W. J. Burgess, testified that from such knowledge they were able to say, and did say, that he signed the initials in question. Under these circumstances the court properly allowed the letter to go to the jury.

From the outset of the trial to the close of the rebutting evidence the contestant by common consent was recognized as the proper party to open and close. After the completion of the contestant's rebuttal the proponents asked to be allowed to introduce evidence in rebuttal thereof, which the court refused. There was no explanation made as to what evidence would have been offered if this request had been granted. We cannot conjecture what proofs could have been tendered, for the rebuttal which it was proposed to rebut was confined to contradictions of matters of evidence introduced on the defense by the proponents. Immediately after this ruling was made the proponents asked the privilege and claimed the right to open and close the argument to the jury. As to this the court said: "I think if the case had been tried on that theory all the way through, it would have been all right, but we will not change the arrangement now." In this view expressed by the court we concur, and, even if we differed on this proposition, there would under the circumstances be no interference with this ruling, for the order of trial must largely be left to the discretion of the presiding judge. (*Goodman v. Kennedy*, 10 Neb., 274; *Village of Ponca v. Crawford*, 18 Neb., 555; *Omaha Southern R. Co. v. Beeson*, 36 Neb., 361.)

The petition in error calls in question the correctness of certain instructions, and as to others alleges that there was error in refusing to give them as requested. Each of these

assignments is directed to a group and not to any single instruction. Aside from this, there is in the brief of plaintiff in error no attempt to point out in what respect there was error in either the giving or refusal complained of. These assignments in the petition in error must, therefore, be deemed waived. (*Brown v. Dunn*, 38 Neb., 52; *Gill v. Lydick*, 40 Neb., 508; *Glaze v. Parcel*, 40 Neb., 732.) The judgment of the district court is

AFFIRMED.

OMAHA CONSOLIDATED VINEGAR COMPANY, APPELLANT, V. JOSEPH BURNS, APPELLEE.*

FILED FEBRUARY 19, 1895. No. 5473.

1. **Contract**: MECHANIC'S LIEN FOR SINKING WELL: FORECLOSURE. One who predicates his right to relief upon the alleged performance by him of all the terms of a written contract must show a substantial compliance with each requirement thereof, where there has been neither a waiver nor acceptance of benefits thereunder by the other contracting party.
2. **Pleading**. A party is not allowed to allege in his petition one cause of action and prove another upon the trial. The *allegata* and *probata* must agree. Following *Imhoff v. House*, 36 Neb., 28.

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

Mahoney, Minahan & Smyth, for appellant.

Chas. Offutt, contra.

RYAN, C.

It is necessary to refer to the petition originally filed in the district court of Douglas county merely to explain the

* A rehearing was allowed.

existing attitude of the respective parties to the subject-matter in litigation. Originally there was filed in the office of the register of deeds of said county an affidavit of the defendant Joseph Burns for a mechanic's lien on account of sinking a well on real property of the plaintiff in Omaha. The petition in the first instance filed herein was for the purpose of having the aforesaid claim of lien removed as a cloud on the title of plaintiff. The defendant by his answer, in the nature of a cross-petition, asked the foreclosure of the lien claimed, as though the cross-petition had been the first pleading filed, and thereafter the action proceeded as though it was one brought for such a foreclosure by the defendant. From a decree in favor of the defendant, granting for the most part the relief prayed, the plaintiff has appealed.

By his cross-petition the defendant averred that plaintiff, through its president, its duly authorized agent, entered into a contract in writing, of which the following is a copy:

"SEPTEMBER 11, 1890.

"JOSEPH BURNS: Please sink a tubular well, seven-inch lap-welded iron pipe, at our vinegar factory at Omaha, and continue sinking the same until you get a water supply of 2,000 gallons of water per hour, unless sooner stopped by us. You to furnish all pipe points, point, and working barrel and valves, together with plunger rods and all other material necessary to construct and complete the well in a first-class manner to the surface of the ground, and on the completion of the work we agree to settle for same at the rate of five dollars ($5) per foot; one-half to be paid in cash and the balance to be paid by our note of ninety days without interest. We will furnish at our own expense the pump, or whatever we may decide to use to raise the water with. It is the understanding that you pay all bills for labor and material necessary to complete the work as above, for the above prices, and should the well have to be sunk below 250 feet, then the price shall be six dollars per foot below

the first 250 feet or for the second 250 feet or any part thereof that it may be necessary to sink the well to obtain the necessary amount of water; and it is further understood that in no case shall the well be sunk deeper than 500 feet deep at this price from the surface of the ground. It is the understanding that when the well is completed as above it shall be paid for as first mentioned, namely, one-half cash and the balance in note as above.

"J. H. BARRETT, *Pres.*"

Immediately following the reference in the cross-petition to the above contract attached as an exhibit there were the following averments:

"4. And this defendant alleges that thereupon and in pursuance of said contract he sank a well on said lots or premises, being the same identical premises upon which the buildings, machinery, and manufactory so as aforesaid erected by plaintiff, stood and were situated, and that in sinking said well this defendant did work and furnished material between the 24th day of September, 1890, and the 13th day of January, 1891, inclusive, amounting in the aggregate, according to the terms of said contract, to the sum of $2,890, and that this defendant further performed all the terms and conditions of said contract on his part to be performed."

There was no other description of the manner in which the defendant had entitled himself to the foreclosure prayed, except that there were the usual averments of the filing of a verified account for a mechanic's lien as required by statute. The prayer of the cross-petition was that an accounting might be had of the amount due from plaintiff to defendant; that such amount should be adjudged and decreed to be a valid and subsisting lien upon said premises; that defendant should have judgment against plaintiff for the sum of $2,890, with interest thereon from the 7th day of February, 1891, the day on which was filed the claim of defendant for a lien; that said premises be sold and the

proceeds thereof applied to the payment of such judgment, interest, and costs as should be rendered in behalf of the defendant; that in case such proceeds should be insufficient to fully satisfy the amount found to be due and owing to the defendant, plaintiff might be adjudged to pay the deficiency, and that the defendant might have such other and different relief as in justice and in equity he should be entitled to. The district court made findings, among others, as follows:

"That on the 11th day of September, 1890, the plaintiff made, and the defendant accepted, the written proposition, dated September 11, 1890, and set out in the answer and cross-petition of the defendant; that by the terms of said proposition, which was accepted as aforesaid, the plaintiff employed the defendant to sink a tubular well of seven-inch lap-welded iron pipe at the plaintiff's vinegar factory at Omaha, Nebraska, and to continue to sink the same until the defendant should get a water supply of two thousand gallons of water per hour, unless sooner stopped by the plaintiff; that said well, by the terms of said contract, was required to be cased from top to bottom with lap-welded iron pipe, seven inches in diameter on the inside; that said contract might be performed by the defendant either (1) by sinking a well and casing the same with lap-welded iron pipe of the size aforesaid until the defendant secured thereby a water supply of two thousand gallons of water per hour, or (2) until stopped by the plaintiff; that the defendant in good faith undertook the execution of said contract and proceeded in the performance of the same in a proper and workmanlike manner, and that, in so doing, the defendant sank a seven-inch tubular pipe a distance of one hundred and forty-five feet from the surface of the ground, at which point the defendant struck a hard limestone formation sixty-five feet in thickness; that the defendant then proceeded through said rock formation and extended it a number of feet with a hole seven inches in

diameter, and at the bottom of said hole proceeded further with a hole six and then five inches in diameter, until he reached a point five hundred and twenty feet below the surface of the ground, at which time the defendant determined to ream out and make larger the hole where it would not receive a pipe seven inches in diameter, and to carry the seven-inch pipe down the distance of three hundred and eighty-five feet from the surface of the ground with a view of extending the depth of the well below said five hundred and twenty feet and until the supply of water aforesaid was reached; that while the defendant was proceeding with said work as aforesaid, and before he secured the amount of water required to perform the conditions of said contract, the plaintiff stopped the defendant from work and compelled him to leave the premises and to remove his working tools and materials therefrom, and by reason thereof the defendant was unable to longer continue said work, though the defendant was then willing and in good faith offered to continue the same and to complete said well from top to bottom cased with lap-welded iron pipe, seven inches in diameter, inside measurement; that by the terms of said contract, upon the performance of the same, the defendant was entitled to receive from the plaintiff the following amounts:

"For the first 250 feet, $5 per foot, a total of.....	$1,250
"For the second 250 feet, $6 per foot, a total of...	1,500
"That is to say, a total for the 500 feet of.....	$2,750

"That when the plaintiff stopped the defendant, said well was not complete a distance of five hundred feet from the surface of the ground, but that the work which had been done below the one-hundred and forty-five feet from the ground was a part of the whole work contracted for, and was properly done in order to sink said well a distanee of five hundred feet from the ground with lap-welded iron pipe, seven inches in diameter, inside measurement, from

top to bottom, and in order to enlarge the said well and sink a seven-inch pipe from top to bottom, and to complete the same with the equipments provided for in said contract, the following work and material of the value, as follows, was necessary, that is to say: That the work to enlarge said hole so as to receive a seven-inch pipe from top to bottom was fairly and reasonably worth the sum of..... $100 00

"That it would require an additional 355 feet of seven-inch pipe at $1.10 per foot, making a total of..... 390 50

"That it would require a working barrel of the value of..... 60 00

"That it would require a point to said pipe of the value of..... 30 00

"That it would require a plunging rod of the value of..... 14 00

"Making a total amount of work, material, and equipments necessary to complete said well, in addition to what had been done as aforesaid, the sum of..... $594 50

"The court therefore finds that the defendant is entitled to recover in this case such proportion of the whole contract price of $2,750 as the work done bore to said contract price, and that, therefore, that the work done was of the value of $2,750, less the said sum of $594.50, the total of $2,155.50; that the defendant is entitled to interest thereon from the 7th day of February, 1891, until the first day of the present term of court, that is to say, September 21, 1891, seven months and a half, which said interest, at the rate of seven per cent per annum, makes the sum of $94.27, and that the total amount of the defendant's recovery, with interest to the first day of the present term of court should be the sum of $2,249.77."

The above quoted findings, as far as they go, correctly reflect the evidence as adduced by the defendant, except that

the diameters of the extensions were five and four inches instead of six and five, as incorrectly stated. They, therefore, except as suggested, will be accepted as a correct, though not complete, history of the transactions described. This neither concludes us as to the construction proper to be placed upon the contract referred to, nor with reference to the rights or liabilities of the respective parties thereunder. The language of the contract required the defendant to "sink a tubular well, seven-inch lap-welded iron pipe, and continue sinking the same until you get a water supply of 2,000 gallons of water per hour, unless sooner stopped by us." The district court held that as plaintiff stopped the defendant from work and compelled him to leave the premises and to remove his tools, by reason whereof defendant was unable to longer continue said work, the plaintiff was liable for the contract price of sinking 500 feet, that is, $2,750, less the items above specified, amounting to $594.-50, which would be required to enlarge the hole so that it would be seven inches in diameter throughout the entire 500 feet and provide the additional seven-inch casing thereby rendered necessary, as well as certain equipments required for hoisting water. Very soon after the service of notice upon him to quit work the defendant, in writing, acknowledged receipt of said notice, and thereupon offered to enlarge the well and put in a seven-inch pipe the whole depth, in order as the acknowledgment recited, to fix and determine the price to be paid the said defendant. As the district court construed the contract to require that a well seven inches across should be sunk its entire depth, and as this was the construction also adopted by Mr. Burns, it is with more perfect confidence that we adopt the same understanding, which, independently of these considerations, we believe is the natural import of the language used. But this was not the only requirement, for there were to be supplied 2,000 gallons of water per hour unless Mr. Burns was sooner stopped by the other contracting party. The

district court seems to have assumed that compliance with this requirement was prevented by the work being stopped by plaintiff's notice. In the latter part of the contract quoted above there occurs the following provision: "It is further understood that in no case shall the well be sunk deeper than 500 feet deep at this price from the surface of the ground. It is the understanding that when the well is complete as above it shall be paid for as first mentioned, namely, one-half cash and the balance in note as above." This language the district court probably construed as a limitation with respect to the depth of the proposed well, for, although the well had actually reached the depth of 520 feet, the defendant's right to compensation was limited to 500 feet. This construction is not questioned by any party and is probably correct in the abstract. The stipulated 2,000 gallons of water per hour could not, therefore, be obtained by sinking the well deeper. It was seven inches in diameter for a distance of but 145 feet from the surface. Was there any showing that, by reaming out the well so that its diameter would have been for its entire depth seven inches there would have been even a probability of increasing the flow of water? Mr. Burns testified that the test showed but twelve or fifteen hundred gallons per hour of muddy water. On being recalled he further stated that he had pumped nearly five thousand gallons per hour from a two-inch well, repeatedly, and through a four-inch pipe had pumped seven or eight thousand gallons per hour. There was no pipe of less diameter than that last named in this well, so that we are bound to believe that for the distance of 520 feet there was no pipe which would not admit of a flow of seven or eight thousand gallons of water per hour, provided such an amount of water had been reached. The utmost amount found by the test of Mr. Burns did not exceed fifteen hundred gallons per hour, and, since the pipe which he used admitted of a flow of seven or eight thousand gallons per hour, a capacity in excess of

the water found of at least fifty-five hundred gallons, it conclusively results that at the depth of 500 feet, where this test was made, the well would not yield more than three-fourths of the amount of water stipulated for, irrespective of whether the pipe was of the diameter of four inches or seven inches. While by reaming out the well it was possible to comply with the accepted requirement that the pipe within it should be seven inches in diameter, the proofs are direct and convincing that another indispensable condition, and that, too, of the only value to the other contracting party, could not thereby be met. It is possible that this well might be sunk to the depth of 500 feet, that to this depth a seven-inch pipe could be inserted, and that the tubular well so sunk could be fully equipped for the sum of $594.50 allowed for these purposes by the district court, but what would this avail if there was no water to hoist? It may be urged that there would be 1,500 gallons of muddy water available per hour, but this, as a compliance with the terms of the contract alleged to have been fully performed, would have been as unavailable as though no water whatever had been found. In this case there is no element of acceptance of benefits resulting from a partial compliance, neither is there any waiver of a literal performance of the terms of the written agreement. The contract of the defendant made his right to payment contingent upon a result which he has never accomplished. The district court, by the allowance of $594.50 for the purpose of sinking and equipping a seven-inch tubular well, has attempted to place the parties in the same situation as though Mr. Burns had fulfilled his undertakings. This much alleged and proved would not have entitled him to recover as for the full performance of his contract. (*Sherman v. Bates*, 15 Neb., 18.) Indeed, this proposition is practically admitted by counsel for the appellee, since, in his brief, he quotes with approval the following language from 2 Sutherland, Damages, p. 508: "The action may be

brought on the contract when the contractor can show that he has substantially performed his part, except as he can allege and prove the legal excuse of being prevented by the employer, the act of God, or the law, but not otherwise;" citing *Smith v. Gugerty*, 4 Barb. [N. Y.], 614; *Estep v. Fenton*, 66 Ill., 467; *Taylor v. Beck*, 13 Ill., 376. The questions presented have been considered on this theory of the appellee, conformably with which his entire evidence was introduced.

Under the averments in the cross-petition of defendant of strict performance of the terms of his contract it more than admits of doubt whether in any event the relief decreed could have been granted, for proof of facts which excuse performance can never be said to amount to performance itself. A party will not be allowed to allege in his petition one cause of action and prove an other upon the trial. The *allegata et probata* must agree. (*Imhoff v. House*, 36 Neb., 28; *Powder River Live Stock Co. v. Lamb*, 38 Neb., 339; *Traver v. Shaefle*, 33 Neb., 531; *Luce v. Foster*, 42 Neb., 818.) The cross-petition presented but the right to enforce a mechanic's lien for the full performance of a written contract. The decree recognized under these averments the right to show and recover for but a partial performance.

Appellant has strenuously contended that no right to enforce a mechanic's lien for the sinking of a well exists under the statutes of this state. Of this proposition no decision was necessary, hence it has received no consideration. In our investigations we have not questioned the right to relief of this character upon a proper case being presented, but this has been conceded solely for the purposes of this discussion. The judgment of the district court is

SAMUEL MAXWELL ET AL. v. CARLOS C. BURR.

FILED FEBRUARY 19, 1895. No. 6437.

Evidence to Vary Terms of Contract of Guaranty. Upon the faith thereof, goods were furnished to the party in whose favor there was executed by the defendant to plaintiffs this written guaranty: "In consideration that S. A. Maxwell & Co. furnish to M. Stoughton merchandise to the amount of $762.32 on credit, I, for value received, hereby guaranty due payment thereof." In a suit to recover the purchase price of such goods, less in amount than above named, evidenced by notes of Stoughton, *held*, that it was not competent to vary the terms of said written guaranty by evidence that the credit contemplated thereby had been in advance, by agreement between plaintiffs and defendant, limited to a certain fixed period of duration.

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

Ricketts & Wilson, for plaintiffs in error.

Pound & Burr, contra.

RYAN, C.

In this action brought by the plaintiffs in error in the district court of Lancaster county there was a judgment in favor of the defendant, except as to a small sum, in reference to which no discussion is necessary. The instrument sued on was in the following language:

"GUARANTY.

"In consideration that S. A. Maxwell & Co., of Chicago, Ills., furnish to M. Stoughton, Lincoln, Neb., mdse. to the amount of $762.32 on credit, I, for value received, hereby guaranty due payment thereof. C. C. BURR."

In the petition it was alleged that plaintiffs, wholly relying upon said guaranty, sold and delivered to M. Stough-

ton goods and merchandise, as per statement attached to said petition, of the agreed price and value of $762.32, as ordered by said Stoughton. The defendant in his answer admitted that goods and merchandise of the agreed price and value of $762.32 were sold to Stoughton by the plaintiffs in reliance upon the guaranty set out in the petition, and that no part thereof had been paid. This admission, that no part of the purchase price of the goods purchased has been paid, serves to eliminate from consideration the suggestion that by giving his notes Stoughton paid the account in settlement of which said notes were given.

The district court found specially that about October 1, 1890, plaintiffs, through P. W. Meiksell, plaintiffs' agent, sold a bill of goods amounting to $762.32 to M. Stoughton of Lincoln, Nebraska; that the terms of said sale were that the goods should be shipped from time to time, covered by a written order made between said parties until the full order had been supplied; that for the goods shipped prior to March 1, 1891, Stoughton was to settle at the latter date, by payment in cash at a certain rate of discount, or give his note for such amount as should be delivered before March 1, 1891, as of that date due four months thereafter, and for all goods shipped after March 1 aforesaid Stoughton was to pay cash with a discount off, or give his note due four months from the date of shipment; that before plaintiffs would ship any of the goods after the receipt of the above order they wrote to Stoughton that they must have a guaranty or the payment of the bill, whereupon Stoughton procured the guaranty sued on. The court found specially that after Stoughton sent in the guaranty plaintiffs began shipping goods under the aforesaid order, and before March 1, 1891, had shipped goods of the value of $609.40; that after March 1, aforesaid, goods were shipped in installments, aggregating $129.86; that there were executed to plaintiffs by Stoughton on March 2, 1891, four promissory notes for the sum of $152.35 each, or in all, $609.40,—the value of

the goods sold before March 1, aforesaid; that these notes fell due respectively in 1891 as follows: One on June 1, one on June 20, one on July 10, and finally one on August 1; and that the defendant was ignorant of the terms of the contract made October 1, 1890, between plaintiffs through Meiksell, their agent, and Stoughton, and was also without knowledge of the giving by Stoughton of his notes to plaintiffs.

On the above findings of fact the district court based its conclusions of law, that the contract of guaranty of the defendant should be construed and his liability thereunder determined by the terms of the sale made by Meiksell for plaintiffs to Stoughton, and that by taking notes as above described, instead of taking a single note for $609.40, due July 1, 1891, plaintiffs changed the terms of the contract between themselves and Stoughton from what those terms were when the contract of guaranty was made, whereby the guarantor was relieved of his liability as such. It is not deemed necessary to discuss, separately, the transactions arising out of the sales made after March 1, 1891, for the measure of the defendant's liability applicable to the transactions of previous dates, equally governs these. As to the correctness of the abstract principle applied by the district court there seems to be little, if any, difference between counsel for the respective parties. If we understand them correctly, they agree that if the defendant, as a guarantor, became bound for the payment by Stoughton of a certain sum at a fixed time, an extension of the time of payment by the payee on a sufficient consideration, without the consent of the guarantor thereto, operated to release his collateral liability. As has already been remarked, the claim that the notes given operated as a payment is not presented in this record. The only questions are, first, whether or not there was, when the guaranty was executed, an existing contract of sale, and second, did any contract between plaintiffs and Stoughton inflexibly require that a

note or notes taken March 1, 1891, should fall due July 1 thereafter.

It has already been noted that in the petition it was averred that, relying wholly upon the guaranty and the faith and credit of the guarantor, plaintiffs sold and delivered to M. Stoughton the goods for the payment of which this suit was brought, and that in the answer there was an admission that said goods, of the agreed price and value sued for, were sold to Stoughton in reliance upon the guaranty. The evidence of Mr. Stoughton was without bearing on this point, and the usages of trade were not established by such proofs as would entitle them to consideration as having impliedly been within the minds of both contracting parties when the goods were sold, so that there was in reality only the testimony of Mr. Meiksell as to the manner in which the sale of the goods was made and its terms. Referring to the list of merchandise sold, which was thereupon introduced in evidence, Mr. Meiksell said:

"This is a list of goods that I sold him in two orders, Nos. 27 and 29; but you understand I took these in a manifold copy book and delivered to him a copy of the order. * * * On the one order—the copy of the order that he got—the statement was made on there that that was stock goods. The bill was to be four months from March next. * * * All goods were sold in the regular terms of all wall-paper houses, jobbers and manufacturers, four months from the first of March following the order. * * The understanding was the bill would not be due until next July.

"Q. Now I notice this paragraph in the heading of the bill, 'Terms four months note or 12 per cent per annum discount for unexpired time. Settlement to be made within 30 days from date of invoice (either by note or cash).' Now what do we understand to be the custom under that clause?

"A. Well, it is the custom of all paper houses to require

notes of a man after he receives the goods simply to make a showing that he has got, or has had the goods, because, if we give a man four months' time and required no note he might get up and swear he never got the goods."

It has already been stated that for the introduction of testimony as to custom no sufficient foundation was laid. It is hardly necessary to point out that the above evidence as to the purpose for which notes were taken was incompetent as being in contradiction of the language of the notes themselves. The question and answer quoted are fully set out as a striking illustration of the violation in practice of the rule that parol evidence is inadmissible for the purpose of varying the terms of a written contract. Without doubt, counsel for defendant in error will concede the correctness of this rule and that it is, in this instance, very applicable. Let us now consider the language of the written guaranty, and the parol evidence offered in connection therewith, in the light of the same rule. Its language was as follows: "In consideration that S. A. Maxwell & Co., of Chicago, Ills., furnish to M. Stoughton, Lincoln, Neb., mdse. to the amount of $762.32 on credit, I, for value received, hereby guaranty the payment thereof." In this there is contained no reference to a credit already contracted for, or one of any particular kind or duration. By the above quoted testimony of Mr. Meiksell it was attempted to be shown that when the guaranty was executed an oral contract between plaintiffs and Stoughton was already in existence, by the terms of which inflexibly there had been fixed a credit of four months to be extended to Stoughton dating from March 1, 1891. Why was this evidence admissible if that offered as to the purpose for which Stoughton's notes were given was incompetent? The evidence of Mr. Meiksell tended only to show that an order for goods had been made out by him of which a copy was at that time given to Stoughton. This order was evidently prepared from oral suggestions, perhaps made by Stoughton,

or advanced by Meiksell and assented to by Stoughton. In so far as the plaintiffs are concerned this order was, therefore, but the oral propositions of Stoughton made to plaintiffs' agent and by that agent communicated to his principal. As alleged in the petition, and admitted by the answer, this order was filled on the faith of the guaranty, which, without question, was executed after the order of Stoughton had been given to Meiksell. To demonstrate that evidence of any kind was inadmissible for the purpose of engrafting new conditions upon the written guaranty, as well as with the view of illustrating the applicability of this rule to the facts of this case, and for what purposes alone oral evidence might be receivable, reference is made to *Tootle v. Elgutter*, 14 Neb., 158. The question presented in the case just cited was whether or not a guaranty sued upon had been exhausted by the first credit to the amount therein named, or was one continuing in its nature. While it is not an authority in point as an adjudication, it contains language so appropriate to our above enumerated purposes that, without comment, it is quoted and adopted as part of this opinion.

"The rule is well settled that where a contract has been reduced to writing, without any uncertainty as to the object and extent of the obligation, the presumption is that the entire contract was reduced to writing, and oral testimony as to declarations at the time it was made are not permitted, except in a direct proceeding for that purpose to change the written instrument. In other words, parol contemporaneous evidence is not admissible to change the terms of a valid written contract. (1 Greenleaf, Evidence, sec. 275.) But this restriction applies only to the language of the contract. It may be read by the light of surrounding circumstances—by the construction given to it by the parties themselves, in order more perfectly to understand the intention of the parties. In such cases the court is not to inquire what the parties may have secretly intended, but what is

the meaning of the words they have used. (1 Greenleaf, Evidence, sec. 277.)

"As is said by a late writer, the general rule that unambiguous language in a contract must control, does not exclude extrinsic evidence of the subject-matter and other surrounding circumstances to enable the court to consider what the parties saw and knew in order to ascertain their meaning. (Abbott, Trial Evidence, 508.)

"In *Hargreave v. Smee*, 6 Bing. [Eng.], 244, Chief Justice Tindal said: 'The question is, what is the fair import to be collected from the language used in this guaranty? The words employed are the words of the defendant and there is no reason for putting on a guaranty a construction different from that which the court puts upon any other instrument. With regard to other instruments the rule is, that if the party executing them leave anything ambiguous in his expressions such ambiguity must be taken most strongly against himself.'

"In *Mason v. Pritchard*, 12 East [Eng.], 227, it is said: 'The words were to be taken as strongly against the party giving the guaranty as the sense of them would admit.'"

The language above quoted establishes the propositions that evidence was admissible of the circumstances surrounding the making of the guaranty to enable the court more perfectly to understand the intention of the parties, but not to prove what they secretly intended, nor for the purpose of varying or contradicting the terms of the guaranty itself. The evidence upon which was predicated the finding that when the guaranty was made there existed a contract which required that such notes of Stoughton as should be taken should be for the exact time of four months was insufficient to sustain said finding, and besides was wholly incompetent. The conclusion deduced, that the taking of the notes for periods other than that above indicated relieved the defendant of liability, was, therefore, without warrant. As the discharge of the guarantor wholly de-

pended upon the finding of fact and conclusion of law just referred to, the judgment in the defendant's favor is reversed and this cause is remanded for further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

JAMES RICHARDS, APPELLEE, AND GROMMES & ULLRICH ET AL., APPELLANTS, V. GILBERT I. LEVEILLE ET AL., APPELLEES.

FILED FEBRUARY 19, 1895. No. 5949.

1. **Partnership**: INSOLVENCY: DISTRIBUTION OF ASSETS. Where a copartnership is insolvent a court of equity, when its powers are invoked to that end in a proper proceeding, either by a member of such copartnership or by a firm creditor, will apply the assets of the copartnership to the payment of the firm debts to the exclusion of the debts of the individual partners. (*Roop v. Herron*, 15 Neb., 73; *Caldwell v. Bloomington Mfg. Co.*, 17 Neb., 489; *Rothell v. Grimes*, 22 Neb., 526; *Banks v. Steele*, 27 Neb., 138; *Tolerton v. McLain*, 35 Neb., 725.)

2. ———: ———: ———. Such rule is based on the legal presumption that the creditors of a copartnership have given credit to it on the faith of the firm assets and business, while the debts of the individual members of the firm were contracted on the faith and credit of the individual responsibility and property of the members.

3. ———. A partnership is a distinct entity, having its own property, debts, and credits. For the purposes for which it was created it is a person, and as such is recognized by law. (*Roop v. Herron*, 15 Neb., 73.)

4. ———: SALE OF ASSETS. A copartnership may sell, convey, incumber, and dispose of its property in the same manner that an individual may; and the copartnership assets may be levied upon and sold for the payment of the debts of all the individual members of the copartnership, and such sale will not be invalid because the debt was that of the individual members of the firm.

5. ———: PREFERRING CREDITORS. A copartnership, even though insolvent, has the right to pay a part of its creditors in full to the exclusion of others, so long as such payment is made with an honest purpose. (*Deitrich v. Hutchinson*, 20 Neb., 52.)

6. ———: LIEN OF CREDITORS UPON ASSETS. The creditors of a copartnership, merely because they are creditors, are not given a lien by law upon its assets, whether the firm be solvent or insolvent.

7. ———: ASSETS: TRUSTS. The assets of a copartnership, even though it be insolvent, are not held in trust by the members of the firm for the payment of copartnership debts.

8. ———: EQUITY: DISTRIBUTION OF ASSETS. It is only in a proper proceeding instituted by a member of an insolvent copartnership or by a creditor thereof that the assets of such copartnership are first applied by a court of equity to the payment of copartnership debts.

9. ———: ———: ———. And such application is not thus made because the copartnership assets are trust funds for the payment of firm creditors, nor because creditors of an insolvent copartnership are by law given a lien on such assets to secure the payment of their debts; but such application is based upon the equitable doctrine that that fund, on the faith of the existence of which a credit was given, should be first applied to the liquidation of such credit.

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

The facts are stated by the commissioner.

Albert S. Ritchie, for appellants:

If the debt for which the note was given was a partnership debt, then there is no equity in the claim that the execution was not a lien upon the partnership property, because it would only be levying upon property belonging to the partnership for a firm debt, and this could be done whether the execution ran against them individually or as a partnership. (*Martin v. Davis*, 21 Ia., 335.)

Even if the note was the individual debt of the partners, the execution, levied as it was, became a lien upon the

partnership property. (*Saunders v. Reilly*, 105 N. Y. Ct. App., 12; *Ransom v. Van Deventer*, 41 Barb. [N. Y.], 307; *Wilson v. Robertson*, 21 N. Y., 587; *Kirby v. Schoonmaker*, 3 Barb. Ch. [N. Y.], 46; *Case v. Beauregard*, 99 U. S., 119; *Fitzpatrick v. Flannagan*, 106 U. S., 648; *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq., 30.)

Kennedy & Learned, contra:

Where a partnership is insolvent, the creditors of the firm have the primary claim on the partnership property, and the partnership debts are to be paid before any portion of such funds can be applied to other purposes. (*Banks v. Steele*, 27 Neb., 138; *Rothell v. Grimes*, 22 Neb., 526; *Caldwell v. Bloomington Mfg. Co.*, 17 Neb., 489.)

RAGAN, C.

James Richards and Gilbert I. Leveille constituted a copartnership under the firm name of Richards & Co., domiciled in Douglas county, Nebraska, and engaged in the business of contracting and building. On the 12th of June, 1891, in the county court of said Douglas county, Grommes & Ullrich, a copartnership domiciled in Chicago, Illinois, and dealing in liquors and cigars, recovered a judgment against said James Richards and Gilbert I. Leveille for the sum of $338.70, on a promissory note theretofore executed by said James Richards and Gilbert I. Leveille to the said Grommes & Ullrich. On the 8th of July, 1891, an execution was issued on this judgment and delivered to a constable, who seized certain of the copartnership property of Richards & Co. thereunder. On the 9th of July, 1891, said James Richards brought a suit in equity in the district court of Douglas county against his copartner Leveille. In his petition Richards alleged the existence of the copartnership between himself and Leveille, the insolvency of said copartnership, and that the judg-

ment of Grommes & Ullrich was not a debt of the copartnership of Richards & Co., but was based on the individual debt of his copartner, Leveille, to Grommes & Ullrich for liquors and cigars purchased by Leveille from Grommes & Ullrich for the former's benefit. Richards prayed for a dissolution of the copartnership and for the appointment of a receiver to take charge of the assets of the firm of Richards & Co. A receiver was accordingly appointed, and said constable, in obedience to an order of the court, turned over the property of the copartnership of Richards & Co. which he had seized on the execution in favor of Grommes & Ullrich to said receiver. Grommes & Ullrich and the constable, by permission of the court, then filed a petition of intervention in the action of Richards against Leveille, claiming a lien upon the property levied upon by the constable by virtue of such levy. The district court found and decreed that the intervenors had no lien upon said property seized by the constable, and ordered the receiver to hold and apply the proceeds of the sale of the property in accordance with the further order of the court, and from this decree Grommes & Ullrich and Dingman, the constable, have appealed.

The only issue of fact presented to the district court was whether the judgment of Grommes & Ullrich against James Richards and Gilbert I. Leveille was founded on a debt of the copartnership of Richards & Co., or the debt of the individual members of such copartnership; and from the order made by the district court it must have found on this issue that the judgment was not based upon the debt of the copartnership; and the evidence justifies this finding. Here then we have an insolvent copartnership, the assets of which have been seized on execution for the satisfaction of the individual debt of the members, or one of them, of the firm, and one of the members of such copartnership appealing to a court of equity for a decree directing that the firm debts should be paid out of

the assets of such copartnership before such assets should be used to discharge individual debts of the members of such firm. The rule is that where a copartnership is insolvent a court of equity, when its powers are invoked to that end in a proper proceeding, either by a member of such copartnership or by a copartnership creditor, will apply the assets of the copartnership to the payment of the firm debts to the exclusion of the debts of the individual partners. (*Till's Case*, 3 Neb., 261; *Roop v. Herron*, 15 Neb., 73; *Caldwell v. Bloomington Mfg. Co.*, 17 Neb., 489; *Rothell v. Grimes*, 22 Neb., 526; *Banks v. Steele*, 27 Neb., 138; *Tolerton v. McLain*, 35 Neb., 725.) This rule is based on the legal presumption that the creditors of a copartnership have given credit to the firm on the faith of the copartnership assets and business, while the debts of the individual members thereof were contracted on the faith and credit of the individual responsibility and property of the members; and when the affairs of an insolvent copartnership come to be settled by a court of equity it will apply the assets in accordance with such legal presumptions. *Saunders v. Reilly*, 12 N. E. Rep. [N. Y.], 170, relied upon by counsel for appellants, is not opposed to this rule. In that case a sheriff levied an execution issued on a judgment against the individual members of an insolvent copartnership upon the entire firm assets and sold them. Subsequently a creditor of such copartnership obtained a judgment against it and put an execution in the hands of the sheriff, which he returned unsatisfied. The copartnership judgment creditor then sued the sheriff for making a false return, and the court held that the sheriff was not liable, as the copartnership assets could be levied upon and sold under an execution against all the members thereof for their individual debts. In the case at bar, if the firm creditors of Richards & Co. and the members of such firm had remained inactive and permitted the constable, Dingman, to sell the copartnership assets levied upon, such sale would

not have been invalid, because the copartnership assets were sold to satisfy the individual debts of the copartners. A partnership is a distinct entity, having its own property, debts, and credits. For the purposes for which it was created it is a person, and as such is recognized by the law. (*Roop v. Herron*, 15 Neb., 73.) And a copartnership, even though in failing circumstances, has the right to pay a part of its creditors in full to the exclusion of others, so long as such payments are made with an honest purpose. (*Dietrich v. Hutchinson*, 20 Neb., 52.) The creditors of a copartnership, merely because they are creditors, are not given a lien by law upon its assets whether the firm be solvent or insolvent. If they were, it would be impossible for the copartnership to transact business, as every person who purchased any part of its property would take the property purchased subject to such liens. Nor are the assets of a copartnership, even though insolvent, held in trust by the members of the copartnership for the payment of firm debts. A copartnership may sell, convey, incumber, and dispose of its property in the same manner that an individual may; and the copartnership assets may be levied upon and sold for the payment of the debts of the copartnership, or for the payment of the debts of all the individual members of the copartnership, in the same manner as can the assets of an individual. It is only when in a proper proceeding instituted by a member of the insolvent copartnership or by a creditor thereof that a court of equity interferes and applies the copartnership assets first to the payment of the copartnership debts; and such application is not thus made because the copartnership assets are trust funds for the payment of copartnership creditors, nor because creditors of an insolvent copartnership are by law given a lien thereon to secure the payment of their debts, but such application is based upon the equitable doctrine that that fund, on the faith of the existence of which a credit was given, should

be applied in equity to the liquidation of such credit. The decree appealed from is in harmony with these views and it is accordingly

AFFIRMED.

IRVINE, C., not sitting.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. JOSEPH BELL.

FILED FEBRUARY 19, 1895. No. 5449.

1. **Corporations:** RAILROAD COMPANIES: PARTICIPATION IN RELIEF DEPARTMENT: ULTRA VIRES: PRESUMPTION. The scheme of the Burlington Relief Department, organized and conducted by the Chicago, Burlington & Quincy Railroad Company and its employes, examined and set out in the opinion, and *held*, (1) as said railroad company is a corporation and no part of its charter is set out in the pleadings or evidence in the record, the court is unable to determine whether the act of the railroad company in participating in the organization and conduct of the Relief Department is within or without the express or implied powers conferred by its charter; (2) in the absence of all evidence on the subject, the court cannot presume such act of the railroad company is *ultra vires*.
2. **Contracts with Relief Department of Railroad Company:** CONSIDERATION: CONSTRUCTION: PUBLIC POLICY: ESTOPPEL. The contract signed by an employe of said railroad company on becoming a member of said Relief Department, to the effect that if he should be injured and receive moneys from the relief fund of said Relief Department on account thereof, that the acceptance of such relief fund should operate as a release of such employe's claim against said railroad company for damages because of such injury, construed, and *held*, (1) that such contract of an employe did not lack consideration to support it; (2) that the promise made by the employe to the relief department for the benefit of the railroad company was available to the latter as a cause of action or defense; (3) that such contract was not contrary to public policy; (4) that the effect of such con-

tract was not to enable the railroad company to exonerate itself by contract from liability for the negligence of itself or servants; (5) that the employe did not waive his right of action against the railroad company, in case he should be injured by its negligence, by the execution of the contract; (6) that it is not the execution of the contract that estops the injured employe, but his acceptance of moneys from the Relief Department on account of his injury after his cause of action against the railroad on account thereof arises.

3. **Release and Discharge:** ACCEPTANCE OF MONEY FROM RELIEF DEPARTMENT: RIGHT OF EMPLOYE TO RECOVER FOR NEGLIGENCE OF RAILROAD COMPANY. An employe of said railroad company and a member of said Relief Department was injured through the negligence of the railroad company. After his injury there was paid to him from the funds of the Relief Department $60 on account of such injury. The employe accepted this money and then sued the railroad company for damages for negligently injuring him. There was no showing that such employe was induced to become a member of said Relief Department, or execute said contract of release, or accept the money paid to him by said Relief Department, through fraud or mistake. *Held*, That the employe could not recover.

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

T. M. Marquett and *J. W. Deweese*, for plaintiff in error, cited: *Graft v. Baltimore & O. R. Co.*, 8 Atl. Rep. [Pa.], 206; *Spitze v. Baltimore & O. R. Co.*, 23 Atl. Rep. [Md.], 308; *Owens v. Baltimore & O. R. Co.*, 35 Fed. Rep., 718; *State v. Baltimore & O. R. Co.*, 36 Fed. Rep., 655; *Fuller v. Baltimore & Ohio Employes' Relief Association*, 67 Md., 433; *Kinney v. Baltimore & Ohio Employes' Relief Association*, 53 Am. & Eng. R. Cas. [W. Va.], 34; *Johnson v. Philadelphia & R. R. Co.*, 29 Atl. Rep. [Pa.], 854; *Ringle v. Pennsylvania R. Co.*, 30 Atl. Rep. [Pa.], 492.

Sawyer & Snell, contra, cited: *Miller v. Chicago, B. & Q. R. Co.*, 65 Fed. Rep., 305.

Capps & Stevens, also for defendant in error, cited: *Atchi-*

son, T. & S. F. R. Co. v. Lawler, 40 Neb., 356; *Reynolds v. Nichols*, 12 Ia., 398; *Ray v. Mackin*, 100 Ill., 246; *Lake Shore & M. S. R. Co. v. Spangler*, 44 O. St., 471; *Western & A. R. Co. v. Bishop*, 50 Ga., 465; *Cook v. Western & A. R. Co.*, 72 Ga., 48; *Pickering v. Ilfracombe R. Co.*, L. R., 3 C. P. [Eng.], 250; *United States v. Bradley*, 10 Pet. [U. S.], 343; *Hynds v. Hays*, 25 Ind., 31; *State v. Findley*, 10 O., 51; *Roesner v. Hermann*, 10 Biss. [U. S.], 486; *Kansas P. R. Co. v. Peavey*, 29 Kan., 169; *O'Neil v. Lake Superior Iron Co.*, 63 Mich., 690; *Russell v. Richmond & D. R. Co.*, 47 Fed. Rep., 204; *Omaha Street R. Co. v. Loehneisen*, 40 Neb., 37.

RAGAN, C.

Joseph Bell sued the Chicago, Burlington & Quincy Railroad Company (hereinafter called the "Railroad Company") in the district court of Lancaster county for damages. As a cause of action he alleged that on the 13th of December, 1890, he was a switchman in the employ of the Railroad Company at New Castle, in the state of Wyoming; that as such switchman it was his duty to couple freight and passenger cars with the locomotive engines of the Railroad Company, and in order to do so to step inside the rails and between the engine and the car to which it was to be coupled; that it had been the custom and it was the duty of the Railroad Company to furnish for switching purposes a switching engine so constructed as to enable a switchman to safely pass between such engine and the car to which it was to be attached; that on the date aforesaid the switch engine of the Railroad Company at New Castle was disabled; that there was in the yard at New Castle at that time belonging to the Railroad Company an ordinary road engine used between the towns of New Castle and Cambria for the purpose of hauling heavy freight trains over the grades between said towns; that said road engine had attached to the rear end of its tender two large sand boxes

which extended out to the rear of the tender a distance of some twelve or eighteen inches; that by reason of said sand boxes being attached thereto said road engine was wholly unsafe for switching purposes and especially for switching of passenger coaches, all of which was unknown to Bell; that on said date the yard-master of the Railroad Company, whose orders Bell was obliged to obey, directed him, Bell, to couple a passenger coach on said road engine; that to obey said order it was necessary for Bell to go inside the rails between said coach and said road engine; that Bell, without any negligence on his part, went between said coach and road engine for the purpose of coupling the two together, and while in the act of making such coupling the coach and road engine were pushed together and he was crushed between the coach and one of the sand boxes attached to said engine, and injured.

Among other defenses the Railroad Company pleaded: "Further answering the said petition, the defendant says that prior to the time of this accident, the defendant and its employes organized an association for the relief of employes of said company injured while in the service of the said defendant, known as the Burlington Voluntary Relief Department; that said association thus formed was a department for the protection and relief of employes injured in the service of the said company, providing for the payment of certain sums of money for injuries received in the service of said company, and for maintenance and support under certain specifications and terms and conditions, as provided for in the organization and rules of the said Burlington Voluntary Relief Department; that at and prior to the time of said injury the plaintiff was a member of said association, and when injured, and subsequent thereto on account of being such member, the said plaintiff received and accepted the benefits due to him by reason of his membership in said Relief Department, and the defendant company paid to the plaintiff the amount of the

benefits due to him by reason of his membership in said Relief Department on account of said injury, and the plaintiff received and receipted for the said amounts of money thus paid to the plaintiff as benefits accruing to him by reason of said injury on account of his membership in said association, and in consideration therefor duly released the defendant from any and all liability on account of the said accident, other than the benefits accruing to him by reason of his membership in said Burlington Voluntary Relief Department. The defendant furthermore alleges that it is discharged and released from any and all liability that might exist in favor of the plaintiff on account of the said injury, and the plaintiff is barred and estopped from claiming any damages from this defendant by reason of his membership in the said Relief Department and the acceptance by him of the benefits thereof paid as hereinbefore stated."

Bell replied to this defense as follows: "And plaintiff further replying admits that prior to the time of the accident complained of there had been created an organization known as the Burlington Voluntary Relief Department, and that he had become a member of said organization by paying the usual initiation fee, and ever thereafter maintained his membership therein by paying all regular dues and charges imposed upon him by said association, and that by reason of his membership and continued good standing in said association he did by the terms thereof become and was, upon the happening of the injury complained of, entitled to certain benefits, amounting to the sum of $60, which he received at the hands of said association, but plaintiff says that said benefits so received were not, nor was it ever intended or contemplated that they should be, in settlement or compensation of the injuries most wrongfully and negligently inflicted upon him by defendant. And further replying plaintiff expressly denies that said dues were paid him as a contribution for his releasing de-

fendant from its liability for its wrongs and injuries to him, or that he ever in any way executed to defendant a release for the injury complained of."

Bell had a verdict and judgment and the Railroad Company brings the case here on error.

It appears from the evidence in the record that the Burlington Voluntary Relief Department, mentioned in the answer of the Railroad Company quoted above, and hereinafter called the "Relief Department," is a department of the Railroad Company's service. The object in establishing the Relief Department is declared to be "the establishment and management of a fund to be known as the relief fund, for the payment of definite amounts to employes contributing thereto who are to be known as members of the relief fund, when under the regulations they are entitled to such payment by reason of accident or sickness, or in the event of their death, to the relatives or other beneficiaries designated by them." The relief fund consists of voluntary contributions from employes of the Railroad Company, income derived from investments, and interest paid and appropriations made by the Railroad Company. The Railroad Company has general charge of the Relief Department, guaranties the fulfillment of its obligations, takes charge of all moneys belonging to the relief fund, makes itself responsible for the safe keeping of such moneys, and pays to the Relief Department interest at the rate of four per cent per annum on monthly balances in its hands, supplies the necessary facilities for conducting the business of the Relief Department, and pays all the operating expenses thereof. There is also an advisory committee, which has general supervision of the operations of the Relief Department. This committee is composed of five members of the board of directors of the Railroad Company, and the contributing employes on each division of the Railroad Company furnish one member of the committee, and the general manager of the Railroad Company is *ex-officio* a member

and chairman of such committee. The moneys received for the relief fund are held by the company in trust for the Relief Department, and any money not required for immediate use is invested under direction of the advisory committee. All employes of the Railroad Company who are contributors to the relief fund are designated as members of the relief fund. No employe of the Railroad Company is required to become a member of the Relief Department. All employes of the Railroad Company who volunteer to and do become members of the Relief Department are divided into classes according to the monthly wages received. Those receiving the highest wages per month make the highest contribution to the Relief Department. Each member contributes monthly a specified sum according to the wages received. All employes of the Railroad Company who pass a satisfactory medical examination and are possessed of good moral characters are eligible for membership in the Relief Department. If a contributing member is under disability, that is, if he is unable to work, whether such disability arises from an injury received while at work or arises from sickness, he is entitled to be paid from the relief fund a certain sum per day. This amount varies according to the wages which the employe is receiving at the time his disability occurs. And in case of the death of the employe the beneficiary designated by him is entitled to be paid a specified sum according to the class of employes to which the deceased belonged. The employes of the Railroad Company, in order to become members of the Relief Department, make an application to it in writing, and in this application among other things they agree: "I also agree that in consideration of the amounts paid and to be paid by said [Railroad] Company for the maintenance of the Relief Department, the acceptance of benefits from said relief fund for injury or death, shall operate as a release and satisfaction of all claims for damages against said company arising from such injury or death which could be made by me or my legal representatives."

The evidence shows that this Relief Department was organized on the 1st day of June, 1889, and from that day to the 31st of December, 1891, the employes of the Railroad Company had paid into the Relief Department or relief fund $359,639.96; that the Railroad Company in the time aforesaid had paid to the relief fund, interest on the monthly balances of its money, $1,040.34; that there had been paid during said time to members of the Relief Department on account of sickness and death from sickness $187,885.50; during said time there had been paid to members of the Relief Department on account of accidents and deaths from accidents $193,070.35; that the Railroad Company during said time had paid the entire expenses of of the Relief Department; that no part of the relief fund moneys paid in by the employes had been used for defraying the expenses of the Relief Department; that from the organization of the Relief Department to December 31, 1891, the Railroad Company had paid out of its treasury for expenses of the Relief Department, for interest on monthly balances, and to make up deficiencies under its guaranty, $114,012.08. The undisputed evidence in the record is that Bell was an employe of the Railroad Company; that on the 27th day of October, 1890, he applied to the Relief Department for membership therein, such membership to take effect on the 18th of said month; that his application was approved and he became a member of the Relief Department on November 10, 1890; that he was a member in good standing in said Relief Department at the time he was injured; that he was paid during the time he was disabled by said injury the following sums:

December 15 to 31, 1890, 17 days	$17 00
January 1 to 31, 1891, 31 days	31 00
February 1 to 11, 1891, 11 days	11 00
Or a total of	$59 00

That these payments were made to Bell and received by

him in accordance with the rules and regulations of the Relief Department, of which he was a member, and were paid to him on account of the injury for which he brings this action. Bell does not deny that he voluntarily became a member of the Relief Department; that he signed the application containing the agreement on his part that in case he was injured while in the employ of the company and accepted benefits from the relief fund on account thereof, that the acceptance of such benefits should be in settlement and discharge of the Railroad Company's liability to him for such injury; nor does he deny that during the time he was disabled from the injury sued for there was paid to him from the relief fund of the Relief Department on account of such injury the sums of money above stated, and that he accepted said money. It is not argued here, nor attempted to be shown either by pleading or evidence, that Bell did not voluntarily become a member of the Relief Department; nor that he did not execute the contract in question with full knowledge of its terms and effects. Nor is it claimed that he was induced to become a member of the Relief Department or to accept benefits paid him during his disability by any fraud, coercion, or mistake.

Counsel, for the purpose of overthrowing this defense, argue: (1) That Bell's agreement, that his acceptance of the benefits from the relief fund on account of his injury should operate as a release of his claim for damages against the Railroad Company for such injury, is without consideration; (2) that the act of the Railroad Company in participating in the organization of the Relief Department and conducting it is *ultra vires;* (3) that to enforce Bell's contract or release would be contrary to public policy.

If the contract of Bell is without consideration it must be because he received no consideration for the contract, or that the Railroad Company parted with no consideration by reason thereof. By reason of Bell's membership in the Relief Department, if he was disabled by sickness he be-

came entitled to certain sums of money out of the relief fund; if he was injured and thus disabled he became entitled to certain sums of money out of the relief fund; and if he died from any cause while in the service of the company and a member of the Relief Department, it became liable to a beneficiary designated by him for a specific sum of money. Here, then, was a consideration moving to Bell for the contract and promises he made and the contributions made by him to the Relief Department. The Railroad Company's guaranty of the obligations of the Relief Department and its assumption of the expenses of conducting the Relief Department constitute a consideration moving from it sufficient to support the promises of Bell and every other member of the Relief Department. (*Homan v. Steele*, 18 Neb., 652; *Pryor v. Hunter*, 31 Neb., 678.) If Bell had not been a member of the Relief Department, and after he had received the injury sued for herein had accepted from the Railroad Company the amount of money which he received from the Relief Department, or other sum of money, by virtue of his promise that the payment and acceptance of such money should be in settlement and discharge of his claims against the Railroad Company for damages for his injury, can it be doubted that the payment to and acceptance by Bell of such money, in the absence of fraud or mistake, would bar this action? The fact that Bell contracted and promised the Relief Department that if it paid him the money it did from its relief fund and he accepted such payments that then such payment and acceptance should be in settlement and discharge of the Railroad Company's liability for the injury, does not change the principle. "Where one makes a promise to another for the benefit of a third person, such third person can maintain an action upon the promise, though the consideration does not move directly from him." (*Shamp v. Meyer* 20 Neb., 223.)

The *ultra vires* argument.—For an act of a corporation

to be *ultra vires* such act must be beyond the express and implied powers given such corporation by its charter. The Railroad Company is a corporation. Bell in his replication to the defense under consideration has not set out the Railroad Company's charter, nor any part of it; nor is there any evidence in the record on the subject. We are therefore unable to say whether the act of the Railroad Company in participating in the organization and conduct of this Relief Department is within or without its express and implied powers as fixed by its charter. We certainly cannot presume, in the absence of all pleading and evidence, that the part taken by this Railroad Company in the organization and conduct of the Relief Department—confessedly organized from amongst its own employes and for their benefit—is a power neither granted nor permitted by its charter.

Should this release of Bell's be held void as against public policy? A contract or release similar to the one under consideration was considered and held not to be void as against public policy in *Johnson v. Philadelphia & R. R. Co.*, 29 Atl. Rep. [Pa.], 854. (*Owens v. Baltimore & O. R. Co.*, 35 Fed. Rep., 715; *State v. Baltimore & O. R. Co.*, 36 Fed. Rep., 655.) The argument at the bar is that the effect of Bell's release is to enable the Railroad Company by contract to exonerate itself from liability for the negligence of itself and servants. This is not a fair construction of the contract. Nothing in the rules and regulations of the Relief Department, nor in Bell's contract or release, released or attempted to release the Railroad Company from liability to Bell for negligently injuring him because he was a member of the Relief Department, contributed thereto, and such Relief Department had funds which Bell was entitled to have paid to him on account of his membership and injury. If the rules and regulations of the Relief Department or the terms of Bell's contract were such that his membership in the Relief Department, and its possession

of funds of which Bell had a right to avail himself, of themselves released or attempted to release the Railroad Company from liability to Bell for injuring him, then we agree with counsel that such rules and regulations and contracts would be void as against public policy. Again, if the rules and regulations of the Relief Department compelled him in case of his injury by the Railroad Company to accept the benefits and funds of the Relief Department in release and discharge of the Railroad Company's liability to him for such injury, then such rules and regulations and contract would be void as against public policy. But nothing in the rules and regulations of the Relief Department, and nothing in Bell's contract or release, obligates or compels him in case he is injured by the Railroad Company to accept the funds of the Relief Department in release and discharge of any claim he may have against the Railroad Company for injuring him, nor makes the funds themselves—though Bell is entitled to them and refuses to accept them—a release of the Railroad Company's liability. As was held in *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb., 645, neither the employe's membership in the Relief Department nor his execution of the contract under consideration was a waiver of the employe's right of action against the Railroad Company for injuring him. In that case Wymore was a member of the Relief Department, and was killed through the negligence of the Railroad Company. After his death his widow accepted from the funds of the Relief Department the death benefit to which she was entitled by virtue of being Wymore's widow and his membership in the Relief Department. She then brought a suit as administratrix against the Railroad Company for damages for negligently killing her husband. This suit was brought under chapter 21 of the Compiled Statutes, 1893; and we held that the right of action conferred by the statute was for the benefit of the widow and next of kin of the deceased who had lost his life through the neg-

ligence of the railroad company, and that the acceptance by the widow of the death benefit from the funds of the Relief Department was a release and discharge of her cause of action against the Railroad Company given by that statute for her own benefit; but that neither Wymore's membership in the Relief Department, nor his contract with it, nor the acceptance of the death benefit by the widow, operated to bar or release her cause of action as administratrix against the Railroad Company in favor of Wymore's children. We adhere to that case. After Bell was injured he had the option to decline payment from the relief fund by reason of his injury, and rely upon his cause of action against the Railroad Company, and take as compensation for such injury what a jury might award him. The acts of Bell in becoming a member of the Relief Department and executing the contract under consideration did not and do not bar his right of action against the Railroad Company for negligently injuring him. In other words, by becoming a member of the Relief Department and by executing the release in question he did not waive nor bar any cause of action which might thereafter arise in his favor against the Railroad Company by reason of being injured or killed through the negligence of the Railroad Company or its employes. It was his action in accepting payments from the relief fund after he was injured and after his cause of action arose against the Railroad Company that now estops him. Notwithstanding his agreement and his membership in the Relief Department, whatever right of action he had against the Railroad Company for the injury he received remained unaffected by such membership and agreement; but after his injury, after his cause of action arose, he made his choice between the benefits which he could and did receive from the Relief Department and what he might obtain by litigation, and, so far as this record shows, he made such choice knowingly, deliberately, and without fraud, coercion, or mistake, and

he must be bound thereby. (*Leas v. Pennsylvania R. Co.*, 37 N. E. Rep. [Ind.], 423.) The expression "contrary to public policy" we suppose means good public policy. This phrase has no fixed legal significance. It varies and must vary with the changing conditions and laws of civilizations and peoples. But we have been unable to discover anything in the contract made the subject of defense to this action unconscionable, contrary to law, or subversive of morals or good government. The judgment of the district court is contrary to the law and the evidence of the case and is reversed and the cause remanded.

REVERSED AND REMANDED.

EMMA L. VAN ETTEN V. DELL R. EDWARDS.

FILED FEBRUARY 19, 1895. NO. 5867.

Review: EVIDENCE: FAILURE TO RELEASE MORTGAGE. There is no question of law involved in this case. The evidence examined, and *held* to support the finding of the jury, and the judgment is affirmed.

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

David Van Etten, for plaintiff in error.

Breck & McClanahan, contra.

RAGAN, C.

Emma L. Van Etten sued Dell R. Edwards in the district court of Douglas county for damages for the latter's failure to release and discharge of record three certain chattel mortgages. Mrs. Van Etten alleged that she had executed

and delivered these mortgages to Mrs. Edwards; that she had fully performed all the conditions of the mortgages, and that Mrs. Edwards had refused and neglected for the space of ten days to discharge the same of record after being duly requested so to do. Mrs. Edwards had a verdict and judgment, and Mrs. Van Etten has prosecuted to this court a petition in error.

The only point made in the motion for a new trial, and the only assignment of error here, is that the verdict is not supported by sufficient evidence. It would subserve no useful purpose to quote this evidence or any of it. We have carefully studied it, and we cannot agree with counsel for the plaintiff in error that the verdict rendered lacks evidence to support it. The judgment must be and is accordingly

AFFIRMED.

IRVINE, C., not sitting.

JOHN FLANNAGAN V. ROYAL C. CLEVELAND.

FILED FEBRUARY 19, 1895. No. 5874.

1. **Appeal Bonds:** RECITALS: ESTOPPEL. The signers of an undertaking in appeal are estopped in a suit upon such undertaking from making the defense that no appeal was in fact perfected. *Gudtner v. Kilpatrick*, 14 Neb., 347; *Adams v. Thompson*, 18 Neb., 541; *Dunterman v. Storey*, 40 Neb., 447, reaffirmed.

2. **Damages:** ACTION ON APPEAL BOND: FAILURE TO PERFECT APPEAL. An undertaking in appeal provided that the defendant in the judgment "would prosecute his appeal to effect and without unnecessary delay," and that if judgment should be adjudged against him on appeal the signers of the undertaking would satisfy such judgment and costs. No transcript of the proceedings had in the court where the judgment was rendered was ever filed in the appellate court and no appeal ever perfected.

In a suit by the judgment creditor against the signers of said undertaking, *held*, (1) that the signers of the undertaking promised in effect to make good to the judgment creditor his judgment if it should remain unreversed; (2) the failure to perfect the appeal operated as an affirmance of the judgment rendered; (3) that the promise of the signers of the undertaking had been broken; (4) that the measure of damages of the judgment creditor was the amount due upon the judgment.

3. **Judgment Against Principal and Surety:** ENTRY. The provisions of section 511 of the Code of Civil Procedure are not applicable to a judgment rendered against the signers of an undertaking on appeal.

4. **Principal and Surety:** APPEAL BONDS. The liability of the signers of an appeal undertaking as between them and the judgment creditor is that of principal debtors.

5. **Action on Appeal Bond:** DEFENSE. In a suit against the signer of an appeal undertaking the fact that the judgment debtor has property out of which the judgment creditor could satisfy his judgment is not a defense in a suit at law.

6. ———: EXECUTION: CONDITION PRECEDENT. The issuing of an execution and its return unsatisfied is not a condition precedent to the right of a judgment creditor to maintain an action against the signer of an appeal undertaking executed to enable the the judgment debtor to appeal.

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

David Van Etten, for plaintiff in error.

John P. Breen, contra.

RAGAN, C.

Before a justice of the peace in Douglas county Royal C. Cleveland obtained a judgment against C. D. May, H. L. May, and J. W. Cooper. Within ten days after the rendition of such judgment, Charles E. Seibert and John F. Flannagan executed before, and had approved by, said justice of the peace an appeal undertaking reciting the recovery of said judgment by Cleveland against May, and May

and Cooper, that the latter intended to appeal the case to the district court, and promising that they would prosecute their appeal to effect, and without unnecessary delay; and that said May, and May and Cooper, if judgment should be adjudged against them on appeal, would satisfy such judgment and costs.

No transcript of the proceedings had before said justice of the peace was ever filed in the office of the clerk of the district court, and no attempt seems to have been made to perfect an appeal from said judgment. After more than thirty days from the rendition of said judgment, Cleveland obtained a certificate from the clerk of the district court of Douglas county, certifying that there had been entered in his office no appeal of said case, and thereupon the justice of the peace issued an execution on the judgment against May, and May and Cooper, which was returned wholly unsatisfied. Cleveland then brought a suit before a justice of the peace on said appeal undertaking against Seibert and Flannagan. Flannagan was duly served with process in that action, but the officer returned that Seibert could not be found in Douglas county. Cleveland recovered a judgment against Flannagan, and the latter appealed. After the appeal to the district court, no service was had upon Seibert, and he did not appear either in person or by attorney. A trial was had which resulted in a verdict and judgment in favor of Cleveland against Flannagan, and the latter brings the case here for review.

1. The first assignment of error here is that as the appeal from the justice of the peace was never perfected, the action will not lie. Or, to state it differently, that the promise of Seibert and Flannagan was, that they would satisfy whatever judgment might be recovered against May, and May and Cooper in the appellate court, and that as the appeal was never perfected, and no judgment was ever rendered against them in the appellate court, that Seibert and Flannagan have not broken their promise. This precise

question was before this court in *Adams v. Thompson*, 18 Neb., 541, and it was there held, that the signers of an undertaking in appeal are estopped in a suit upon such undertaking from making the defense, that the appeal was not in fact perfected. (See, also, *Gudtner v. Kilpatrick*, 14 Neb., 347; *Dunterman v. Storey*, 40 Neb., 447.) By the undertaking in suit, Seibert and Flannagan promised that May, and others, would prosecute their appeal to effect, and without unnecessary delay. This they have not done, nor attempted to do, and the promise made by the signers of this undertaking has been broken, and Cleveland's measure of damages is the amount due upon the judgment. At the date of the rendition of the judgment by the justice of the peace, Cleveland was entitled to an execution for the satisfaction of such judgment. Seibert and Flannagan, by the execution of the appeal undertaking, deprived Cleveland of the right to have his judgment satisfied by an execution against the property of May and others. And the effect, if not the language, of their promise was to make good to Cleveland his judgment if it should remain unreversed.

2. At the close of the evidence counsel for the plaintiff in error moved the court to dismiss the action at the costs of Cleveland for failure to prosecute the action as against Seibert. The overruling of this motion is the second error assigned here. One of the defenses made by Flannagan to this action in the district court was that at the time Cleveland instituted this suit before the justice of the peace, and at the time of the trial in the district court Seibert, was a resident of Douglas county, and that Cleveland had made no effort to obtain service upon him, or, in the language of the 4th subdivision of section 430 of the Code of Civil Procedure, that Cleveland had failed to prosecute the action with diligence against Seibert. If the constable made a false return to the summons issued for Seibert and the plaintiff in error has been damaged thereby, he has his remedy against the constable and the sureties on his official

bond, but we cannot say that the district court erred in overruling the motion under consideration. Whether or not Cleveland had failed or was failing to prosecute Seibert with diligence was a question of fact for the district court, to be determined as any other question of fact from the evidence before it. There is no evidence in the record that Seibert was a resident of Douglas county at the time Cleveland instituted the suit on this appeal undertaking before the justice of the peace, nor at any time since that date.

3. The third contention of the plaintiff in error is that the judgment rendered in this action is contrary to law because the clerk of the district court, in recording the judgment, has not certified that May and others were the principal debtors, and Flannagan and Seibert sureties, in accordance with the provisions of section 511 of the Code of Civil Procedure. But that section has no application to a judgment rendered against parties who execute an appeal undertaking. The liability of the signers of an appeal undertaking as between them and the judgment creditor is that of principal debtors. (Code of Civil Procedure, sec. 1014.)

4. Another contention is that the judgment is wrong because Cleveland had not tried in good faith to collect the judgment against May and others from them or their property. Plaintiff in error made this one of the defenses to this action, and was permitted by the district court to introduce evidence tending to show that May and others owned some property in Douglas county. The evidence offered, however, did not show that May and others had any property liable to execution at any time after the judgment was rendered against them in favor of Cleveland. And, as already stated, Cleveland had caused the justice of the peace, before whom his judgment was rendered, to issue an execution against May and others, and the officer had returned this execution unsatisfied. This defense then of the plaintiff in error entirely failed. But where a party

executes an appeal undertaking, in a suit against him on such undertaking, the fact that the judgment debtor has property out of which the judgment creditor could satisfy his judgment is not a defense; and the issuing of an execution and its return unsatisfied is not a condition precedent to the right of the judgment creditor to maintain an action against the signers of an appeal undertaking executed to enable the judgment debtor to appeal from such judgment. (*Anderson v. Sloan*, 1 Col., 484.)

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

AFFIRMED.

IRVINE, C., not sitting.

MARGARET HOUSTON V. CITY OF OMAHA.

FILED FEBRUARY 19, 1895. NO. 5503.

1. **Assignments of Error.** An assignment of error, "irregularity in the proceedings of the court and jury by which plaintiff was prevented from having a fair trial," specifically states no act done or omitted by either court or jury which this court can review.

2. ———. To enable this court to review an assignment of error, "misconduct of the jury," the action of the jury which it is claimed amounted to misconduct must be specifically stated in the petition in error, and the facts showing such misconduct sustained by affidavits filed in and brought to the attention of the district court on the hearing of the motion for a new trial.

3. ———. An assignment, "errors of law occurring at the trial," is sufficient in a motion for a new trial to enable the district court to pass upon the question as to whether it erred in the admission or rejection of evidence; but such an assignment in a petition in error presents nothing that can be reviewed by the supreme court.

4. **Sufficiency of Evidence.** The evidence examined, and *held* to support the verdict of the jury.

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

Fawcett, Churchill & Sturdevant and *John P. Davis*, for plaintiff in error.

E. J. Cornish and *W. J. Connell, contra.*

RAGAN, C.

Margaret Houston sued the city of Omaha in the district court of Douglas county for damages which she alleged she sustained on the 25th day of April, 1889, by falling through a defective sidewalk in said city. The city had a verdict and judgment and she brings the case here for review, and assigns the following errors:

1. "Irregularity in the proceedings of the court and jury, by which plaintiff was prevented from having a fair trial." This is the statutory ground for a new trial given by the first subdivision of section 314 of the Code of Civil Procedure. An assignment like this in the language of the statute, while sufficient in a motion for a new trial, is insufficient in a petition in error. If it is claimed that any act done or omitted by the court or jury was such an irregularity as prevented a party from having a fair trial, the petition in error should specifically state the act or omission complained of, otherwise this court cannot review the alleged error.

2. "Misconduct of the jury." This is the ground for a new trial provided by the second subdivision of said section 314. But to enable this court to review as an assignment of error the "misconduct of the jury," the action of the jury which it is claimed amounted to misconduct must be specifically alleged in the petition in error, and the facts showing such misconduct sustained by affidavits filed in the

district court and brought to the attention of that court on the hearing of a motion for a new trial. The record before us contains no affidavits directed to the subject of the misconduct of the jury. We cannot therefore review this assignment because it is too general and indefinite; and if the assignment were specific we would still be unable to review it because not supported by affidavits as provided by section 317 of the Code of Civil Procedure.

3. "Accident and surprise against which ordinary prudence could not have guarded." What has been said under the second assignment of error disposes of this assignment.

4. "The verdict and decision are not sustained by sufficient evidence and are contrary to law." The evidence is somewhat unsatisfactory, and the case is one of those which appeals strongly to the sympathies of the court, but we are constrained to say that we think that the verdict has sufficient competent evidence to support it.

5. "The plaintiff has newly discovered evidence material for her which she could not, with reasonable diligence, have discovered and produced at the trial, the same being supported by affidavit." We cannot review this assignment because the affidavits filed in the court below by the plaintiff in error, in support of her motion for a new trial on the grounds of newly discovered evidence, are not incorporated in the bill of exceptions. It has been so many times decided by this court that affidavits used in support of a motion for a new trial, to be available here, must be incorporated in the bill of exceptions, that it is unnecessary to cite the cases.

6. "There were errors of law occurring at the trial and excepted to by plaintiff." This assignment is sufficient in a motion for a new trial to enable the district court to pass upon the question as to whether it erred in the admission or rejection of evidence, but under such an assignment in a petition in error this court cannot review anything.

7. "The court erred in giving to the jury on his own

motion the instructions numbered 1, 2, 3, 4, 4½, 5, 6, and the other instructions given by him, and the supplemental instructions given by him." The court did not err in giving all these instructions; and, where the assignment of error is that the court erred in giving all of a number of instructions, if any one of the instructions is good, the assignment must be overruled.

The judgment of the district court is

AFFIRMED.

SNYDER & DULL v. DAVID CRITCHFIELD.

FILED FEBRUARY 19, 1895. No. 5998.

1. **Judgments of Courts of Other States:** ACTION: DEFENSE. A judgment of a court of a sister state, authenticated as prescribed by act of congress, is conclusive here upon the subject-matter of the suit. An action thereon can only be defeated on the ground that the court had no jurisdiction of the case, that there was fraud in procuring the judgment, or by defenses based on matters arising after the judgment was rendered.

2. ———: WARRANT OF ATTORNEY. A judgment entered in pursuance of a warrant of attorney, in a state in which such judgments are authorized, has the same force, when sued on here, as a judgment on adversary proceedings.

3. **Action on Foreign Judgment:** DEFENSE. In an action on such judgment, payment of the debt before judgment, that the foreign action was barred by the statute of limitations, or any other defense which applied to the original cause of action, cannot be availed of. The judgment itself is conclusive against such defenses.

4. ———: EVIDENCE: WARRANT OF ATTORNEY: APPEARANCE. Whether a warrant of attorney is sufficient under the laws of another state to authorize the appearance entered thereunder, is a question to be determined from the evidence as to the laws of that state.

5. **Warrant of Attorney:** EVIDENCE. Evidence in this case examined, and *held* to establish that the assignee of a note containing a warrant of attorney may in Pennsylvania avail himself of such warrant.

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

J. D. Gilman and *C. Gillespie*, for plaintiffs in error, cited: 2 Black, Judgments, sec. 857; *McElmoyle v. Cohen*, 13 Pet. [U. S.], 312; *Chew v. Brumagen*, 13 Wall. [U. S.], 497; *Keeler v. Elston*, 22 Neb., 310; 4 Wait, Actions & Defenses, p. 192, and authorities cited; *Nicholas v. Farwell*, 24 Neb., 180; *Eaton v. Hasty*, 6 Neb., 427; *Spies v. Whitney*, 30 O. St., 69; *Braddee v. Brownfield*, 4 Watts [Pa.], 474; *Packer v. Thompson*, 25 Neb., 688; *Pringle v. Woolworth*, 90 N. Y., 502; *Specklemeyer v. Dailey*, 23 Neb., 101.

Edwin Falloon, contra:

The power of attorney contained in the note to confess judgment destroyed its negotiability. (*Sweeney v. Thickstun*, 77 Pa. St., 131; *First Nat. Bank of Carthage v. Marlow*, 71 Mo., 618; *Overton v. Tyler*, 3 Pa. St., 346; *Samstag v. Conley*, 64 Mo., 476.)

To assign a judgment note renders invalid the power of attorney contained in it. (*Osborn v. Hawley*, 19 O., 130.)

The note was twice assigned before plaintiffs became the owner and the assignees had no authority to confess judgment in favor of plaintiffs. (*Spence v. Emerine*, 15 Am. St. Rep. [O.], 634.)

The judgment was invalid because the rule of court requiring leave to enter it was not complied with. (*Cook v. Staats*, 18 Barb. [N. Y.], 407; *Ball v. State*, 2 S. W. Rep. [Ark.], 462; *Ingram v. Robbins*, 33 N. Y., 409.)

The power of attorney to confess judgment contained in the note is void for uncertainty. (*Carlin v. Taylor*, 7 Lea [Tenn.], 666.)

No greater effect should be given to the judgment than it would have in the state where rendered. (*Wood v. Watkinson*, 17 Conn., 500; *Brown v. Parker*, 28 Wis., 21.)

The action is barred by the statute of limitations. (*Hower v. Aultman*, 27 Neb., 251; *Minneapolis Harvester Works v. Smith*, 36 Neb., 616.)

IRVINE, C.

This was an action by the plaintiffs in error against the defendant in error on a judgment alleged to have been recovered in Pennsylvania. The case was tried to the court, which found for the defendant. The only assignment of error calling for notice is the sufficiency of the evidence. The plaintiffs offered in evidence a transcript from the court of common pleas of Somerset county, Pennsylvania, which discloses the entry of judgment by confession against Critchfield and in favor of Austin Critchfield to the use of Perry Critchfield, to the use of Harrison Snyder and Rufus H. Dull, partners trading as Snyder & Dull. The confession of judgment was entered by attorneys under a warrant of attorney contained in a promissory note as follows:

"$100.00. APRIL 17th, 1873.

"Five months after date I promise to pay to the order of Austin Critchfield, one hundred dollars, without defalcation, value received, and further we do empower any attorney of any court of record within the United States or elsewhere, to appear for me and after one or more declarations filed confess judgment against me as of any term for the above sum with costs of suit, and attorney's commission of ——— per cent for collection and release of all errors and without stay of execution, and inquisition and extension upon any levy on real estate is hereby waived, and condemnation agreed to and the exemption of personal property from levy and sale on any execution hereon, is also hereby expressly waived and no benefit of exemptions

be claimed under and by virtue of any exemption law now in force or which may be hereafter passed.

"Witness my hand and seal.

"DAVID CRITCHFIELD. [SEAL.]"

There is no doubt of the principle that the judgment of a court of a sister state, authenticated as prescribed by the act of congress, is conclusive here upon the subject-matter of the suit. An action thereon can only be defeated on the ground that the court rendering the judgment had no jurisdiction of the case; that there was fraud in procuring the judgment; or by a defense based on matters arising after the judgment was entered, such as payment of the judgment or the statute of limitations. (*Eaton v. Hasty*, 6 Neb., 419; *Keeler v. Elston*, 22 Neb., 310; *Packer v. Thompson*, 25 Neb., 688.) A judgment entered on warrant of attorney in a state recognizing such a proceeding is as much an act of the court as if formally pronounced on *nil dicit* or a *cognovit*, and until it is reversed or set aside it has all the qualities and effects of a judgment on verdict. (*Braddee v. Brownfield*, 4 Watts [Pa.], 474.) A judgment entered in such a manner in a state recognizing such instruments, when sued upon here, must be treated as any other judgment. (*Nicholas v. Farwell*, 24 Neb., 180; *Sipes v. Whitney*, 30 O. St., 69.)

The defendant contends that this was not a valid judgment for a number of reasons. The first is that the note on which it was entered is not negotiable, and the warrant of attorney contained therein not assignable, from which it is argued that, the record disclosing that the note had been assigned and that the judgment was for the benefit of another than the payee, the warrant conferred no authority for the entering of defendant's appearance and the confession of judgment. This argument has the support of the supreme court of Ohio. (*Osborn v. Hawley*, 19 O., 130; *Spence v. Emerine*, 46 O. St., 433.)

It must be remembered that judgments on notes of this

character are not known to the jurisprudence of our state, and that the note having been made in Pennsylvania and the judgment there rendered, the effect and validity of the contract must be determined by the law of Pennsylvania. What that law is was a fact to be established by evidence in this case. The evidence upon the subject consists of a statute, two decisions of the supreme court of Pennsylvania, and the depositions of two Pennsylvania lawyers. The statute is as follows: "It shall be the duty of the prothonotary of any court of record, within this commonwealth, on the application of any person being the original holder (or assignee of such holder) of a note, bond, or other instrument of writing in which judgment is confessed, or containing a warrant for any attorney at law, or other person to confess judgment, to enter judgment, against the person or persons who executed the same, for the amount which, from the face of the instrument, may appear to be due, without the agency of an attorney, or declaration filed with such stay of execution as may be therein mentioned, for the fee of $1, to be paid by the defendant; particularly entering on his docket the date and tenor of the instrument of writing on which the judgment may be founded, which shall have the same force and effect, as if a declaration had been filed, and judgment confessed by an attorney, or judgment obtained in open court, and in term time; and the defendant shall not be compelled to pay any costs or fee to the plaintiff's attorney, when judgment is entered on any instrument of writing as aforesaid." (1 Purdon, Digest [11th ed.], p. 958, sec. 41.) The two decisions are *Overton v. Tyler*, 3 Pa. St., 346, and *Sweeney v. Thickstun*, 77 Pa. St., 131. What these cases decide is that the warrant of attorney in a promissory note renders it non-negotiable. This fact is not, however, important. Whether or not the note was negotiable under the law merchant it was assignable in equity, if not in law, and the right of the plaintiff to recover upon it in Pennsylvania would be a

question for the court which rendered the judgment to decide, and would not affect its jurisdiction. In order to reach the question of jurisdiction it would be necessary that the warrant of attorney should lose its force by the assignment of the note as the Ohio court holds that it does. In *Overton v. Tyler, supra*, the question was whether a note containing a warrant of attorney entitled the maker to days of grace. The court held that it did not because the note was not negotiable by the law merchant, and in the opinion Chief Justice Gibson, *arguendo*, but manifestly *obiter*, says: "A warrant to confess judgment, not being a mercantile instrument, or a legitimate part of one, but a thing collateral, would not pass by indorsement or delivery to a subsequent holder; and a curious question would be, whether it would survive as an accessory separated from its principal, in the hands of the payee for the benefit of his transferee. I am unable to see how it could authorize him to enter up judgment, for the use of another, on a note with which he had parted." The question was not before the court in that case, and the dictum of the learned chief justice cannot, therefore, be accepted as evidence of the law of the state on this point. The statute which we have quoted was adopted long before this decision. No reference is made to it in the report, but an inspection shows that the prothonotary is required to enter judgment on the application, either of the original holder or the assignee of any such holder. This statute would seem to be conclusive. Moreover, the two expert witnesses referred to both testify that the judgment is in due form of law, of a character often sustained by the courts of Pennsylvania, and that it is a valid judgment under the laws of Pennsylvania. We think, therefore, that the evidence requires the court to hold that the warrant of attorney authorized the entry of judgment on behalf of the assignee of the note.

It is next urged that the warrant of attorney is void for uncertainty. The evidence already referred to would seem

to show that it was sufficient to meet the requirements of the law of Pennsylvania; and in *Nicholas v. Farwell*, *supra*, it was said by COBB, J., that a warrant similar in form to this was in the usual form of such instruments and authorized any attorney to enter the appearance of the signer of the note and confess judgment for him; that to this end it was not necessary that the defendant should be in court, nor, indeed, that he should have ever been in the state. The evidence shows that in Somerset county there is a rule of court that in certain cases, of which this appears to be one, leave of court must be obtained by motion for the entry of judgment, and such motion must be supported by affidavit that the warrant was duly executed, that the money is unpaid, and the party living. It is claimed that compliance with this rule was not shown, the affidavit having no venue. This does not, however, go to the jurisdiction of the court to render the judgment. If judgment were entered without such affidavit it would at most be an irregularity in the proceedings and would not oust the court of jurisdiction or subject the judgment to collateral attack. (*Nicholas v. Farwell, supra; Rising v. Brainard*, 36 Ill., 79.)

It is next claimed that the action is barred by the statute of limitations. The note was made in 1873, the judgment was rendered in Pennsylvania in 1891, and this action begun the same year. The claim is, therefore, not that the statute of limitations had run against the judgment, but that it had run against the original cause of action before suit was brought in Pennsylvania. The evidence is that the note being under seal, action on it was not limited by statute in Pennsylvania, but that the lapse of twenty years would raise the presumption of payment; therefore the action was not barred in Pennsylvania. But it is claimed that an action upon the note in this state would have been barred by our law, and that, therefore, the Pennsylvania judgment should not be enforced. We cannot assent to

this reasoning. If the defendant was entitled to the benefit of any limitation that was a matter which must be availed of in the court where the judgment was rendered. It is an issue affecting the original cause of action, upon which the judgment concludes us. (*Packer v. Thompson*, 25 Neb., 688.)

Finally, the defendant claims that he had made a part payment on the note and had given to the original payee, in satisfaction of the remainder, a horse. The time of this transaction is not definitely fixed, but it was at least prior to 1879. This, then, was a defense to the original cause of action, and the judgment is conclusive on this also against the defendant. We think the evidence showed that the judgment was duly rendered by a court having jurisdiction to do so, and that no defense was shown.

REVERSED AND REMANDED.

WILLIS T. RICHARDSON, APPELLANT, V. IRA E. DOTY, APPELLEE.

FILED FEBRUARY 19, 1885. No. 5781.

1. **Partnership:** ACCOUNTING: EVIDENCE. The evidence *held* sufficient to sustain the findings of the trial court.
2. **Set-Off:** INSOLVENCY: EQUITY. The provisions of the Code of Civil Procedure in regard to set-off are not exclusive. The insolvency of a party against whom the set-off is claimed is a sufficient ground for a court of chancery to allow it in cases not provided for by statute. *Thrall v. Omaha Hotel Co.*, 5 Neb., 295, followed.

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

Marquett, Dewcese & Hall, R. S. Norval, and *George P. Sheesley,* for appellant.

Steele Bros. and *G. M. Lambertson, contra.*

IRVINE, C.

This was an action for an accounting between partners, the plaintiff Richardson alleging that about October 10, 1886, he and Doty entered into a partnership under a verbal contract for the purpose of building railroads and dealing in supplies for the construction of railroads; that Doty was to devote his entire time to superintending the work, and that the profits were to be shared equally. He then sets up three separate pieces of work performed during the existence of the partnership. One was the construction of a line of railroad known as the Culbertson Line, which he says that Doty, in disregard of his contract, neglected in such a manner as to cause a loss of $2,000. Another was the construction of a line known as the Beaver Line, which he says yielded a profit of $7,000, which Doty neglected and refused to account for. The third was the construction of bridges on a line known as the Wood River Line, and on which he alleges the profit amounted to $4,000, which Doty neglected and refused to account for. Richardson then avers that on May 3, 1890, a new contract was entered into whereby the plaintiff was to receive two-thirds of the profits and the defendant one-third, except as to profits derived from selling supplies, which were to be equally divided, and avers that under this contract a line known as the Whitewood Line was constructed, but the work was performed by Doty negligently, causing a loss of $4,000.

Doty answered, denying that the contract was as alleged, and averring that the partnership only extended to work performed on contracts made directly with railroad companies, and not to work done on subcontracts with princi-

pal contractors. He then avers that the Beaver Line and Wood River Line were subcontracts in his own favor and entirely outside the object of the partnership, and denies that he undertook to devote his time to the work of the partnership. He admits the construction of the Culbertson Line, but denies that he was guilty of any negligence. He admits the contract of May 3, 1890, and the construction of the Whitewood Line thereunder, and denies that he was guilty of any negligence therein. The answer then proceeds to allege that Doty became surety on certain notes of Richardson, and was compelled to pay the same, on which account he prays judgment for $5,387.49, with interest. The reply admitted the allegations of the answer in regard to the set-off, but averred that they did not constitute any defense to the action. The court found that the subcontract work was not within the scope of the partnership; that on the Whitewood Line Doty should be charged $800 for unfinished work, and that after that charge was made, the accounts of the two partners stood equal. Judgment was entered for the amount of the set-off in favor of Doty, and Richardson appeals.

With a single exception the questions presented are questions of fact. These were determined by the trial court on conflicting evidence. We have made a careful examination of the evidence, a task rendered quite difficult by the manifest incompetency of the reporter who prepared the transcript. It would be useless to encumber the reports with a discussion of the proof. We are satisfied that there was sufficient to sustain the findings of the district court.

The only question of law presented relates to the set-off pleaded and allowed by the district court. Whether the propriety of this set-off was properly questioned by the reply, which admitted the facts and merely as a legal conclusion denied that the set-off constituted a defense, is a point not raised by counsel, and one which we do not determine. The notes which were paid by the defendant do not appear

to have been connected with the partnership, and plaintiff contends that for that reason they did not ground a set-off in this case. He also contends that the set-off was not proper because the notes were not paid until after the commencement of the action. A claim, to fall within the statutory provision as to set-off, must be one upon which the defendant might, at the commencement of the suit, have maintained an action against the plaintiff. (*Simpson v. Jennings*, 15 Neb., 671; *Tessier v. Englehart*, 18 Neb., 167.) But the answer alleges in a portion of the paragraph which the reply admits that the plaintiff was insolvent and that the defendant had no means of securing payment unless permitted to set off the claim in this action.

Sections 99 and 104 of the Code of Civil Procedure providing for set-offs are not exclusive. In *Boyer v. Clark*, 3 Neb., 161, it was said that set-off as a right demandable can only be applied to the purpose for which it is conferred by statute; but that the power to set off one judgment against another is one inherent in the court, the exercise of which is discretionary; and in *Thrall v. Omaha Hotel Co.*, 5 Neb., 295, it was said that the insolvency of the party against whom the set-off is claimed is a sufficient ground for a court of chancery to allow a set-off in cases not provided for by statute, and even in cases where the demands on both sides are not liquidated. In *Wilbur v. Jeep*, 37 Neb., 604, it was said that the insolvency of a judgment debtor invested the court with power to set off the judgment against the claim of the judgment debtor even in a case not provided for by statute. This case falls within the rule announced in the cases cited, and the district court did not err in allowing the set-off.

JUDGMENT AFFIRMED.

WILLIAM BARMBY ET UX. v. WILLIAM A. WOLFE.

FILED FEBRUARY 19, 1895. No. 6078.

1. **Assignments of Error:** EVIDENCE. An assignment of error that the verdict is against the weight of the evidence is not good. The assignment must be that the verdict is not sustained by sufficient evidence.
2. **Invalid Negotiable Instruments:** RIGHTS OF BONA FIDE PLEDGEE. Where a note is valid as between the original parties a pledgee may recover the whole amount thereof, retaining any surplus as trustee for the party beneficially entitled; but where the note is invalid as between the original parties a *bona fide* pledgee may recover only the amount of his advances, provided there be no other party in interest.
3. **Instructions:** WEIGHT OF EVIDENCE: WITNESSES. It is not erroneous to instruct the jury that while the defendants are competent witnesses, yet the jury have a right to take into consideration their interest in the result and all the circumstances surrounding them, and give to their testimony only such weight as in the judgment of the jury it is entitled to.
4. **Husband and Wife:** ACTION ON NOTE: EVIDENCE. Suit was brought on a note purporting to be signed by A and wife; evidence examined, and *held* sufficient to sustain the verdict against A, but insufficient to sustain the verdict against the wife.

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

A. Hardy, for plaintiffs in error.

S. D. Killen and *L. M. Pemberton*, *contra*.

IRVINE, C.

Wolfe sued the plaintiffs in error, who are husband and wife, on a promissory note purporting to be signed by the plaintiffs in error, payable to the order of R. Holben, and by Holben indorsed to Wolfe as collateral security to a loan made by Wolfe to Holben. The Barmbys filed sepa-

rate answers; there was a verdict against both; they filed separate motions for a new trial, which were overruled, and they bring the case here on separate petitions in error. We shall first consider the case of William Barmby.

By his answer he averred that since the making of the note it had been, without his consent and fraudulently, altered by inserting words of negotiability, and by adding a clause whereby his wife pledged her separate estate. He then averred that the plaintiff was not the owner of the note and pleaded a counter-claim in support of which no evidence was offered, and which was evidently waived at the trial. The first assignment of error is that the verdict is against "the great weight of evidence." This is not a proper assignment. A verdict will not be set aside simply because it is against the weight of the evidence. The assignment of error in regard to a matter occurring on the trial must be for some cause for which the Code authorizes a motion for a new trial. The assignment in the motion for a new trial must be that the verdict is not sustained by sufficient evidence. (Code Civil Procedure, sec. 314; *Durrell v. Hart*, 25 Neb., 610.) The next assignment is in proper form, that the verdict is not sustained by sufficient evidence. We think it is. The evidence tends to show that Holben and Barmby made an exchange of land; that there was on the land to be conveyed to Holben a mortgage of $550; that this note was made to protect Holben against this mortgage. Barmby signed both his own and his wife's name to the note. The clause charging the wife's separate estate was inserted before the note was signed. The note contained words of negotiability when delivered to Holben. After its delivery to him, and before they separated, Barmby consulted a friend who advised him that inasmuch as the deeds could not be delivered for some time the note should not be made negotiable. The words of negotiability were then struck out; but, Holben asserting that he did not like this proceeding and that he wished to use the note, Barmby

told him he could insert the words "or order" when the deeds were delivered. The deeds were delivered and Holben restored the words of negotiability. There is also evidence tending to show that Barmby saw the note after the change had been made and repeatedly promised to pay it. This testimony is by no means uncontradicted, but it was sufficient to sustain the verdict against Barmby.

The next assignment is that the verdict is excessive. This is based on the fact that the verdict was returned for the whole amount of the note, while the evidence showed that there remained unpaid to Wolfe on the debt for which the note stood pledged only about $80. In *Haas v. Bank of Commerce*, 41 Neb., 754, it was said: "It is quite well settled that where a note is valid as between the original parties the pledgee may recover the whole amount of the note, retaining any surplus as trustee for the party beneficially entitled; but where the note is invalid as between the original parties the pledgee may recover only the amount of his advances, provided there be no other party in interest. (*Wiffen v. Roberts*, 1 Esp. [Eng.], 261; *Allaire v. Hartshorne*, 21 N. J. Law, 665; *Chicopee Bank v. Chapin*, 49 Mass., 40; *Union Nat. Bank v. Roberts*, 45 Wis., 373.)" This case falls in the former class. The defense was one which, if established, would defeat the note in the hands of an innocent holder. It is only where the plaintiff prevails merely because he is an innocent holder that he recovers simply the amount of the pledge. Where he recovers because a defense against the original payee is not established he recovers the amount of the note.

The giving and refusal of several instructions is assigned as error, but specific attention is called by the brief to only one instruction. The portion of this instruction objected to is as follows: "The court instructs the jury that while the law makes the defendants competent witnesses in this case, yet the jury have a right to take into consideration their interest in the result of your verdict and all the cir-

cumstances which surround them, and give to their testimony only such weight as in your judgment it is entitled to." It has been held that in a criminal case it is not error for the court to refer in a similar manner to the credibility of the prisoner. (*St. Louis v. State*, 8 Neb., 405; *Murphy v. State*, 15 Neb., 383; *Housh v. State*, 43 Neb., 163; *Carleton v. State*, 43 Neb., 373.) In the two latest cases doubts were expressed as to the policy of such instructions, but the question was no longer deemed an open one. The cases referred to being criminal cases, and the witness to whose testimony attention was specifically drawn being the defendant himself, these cases are stronger than that before us. We find no error in the record as to William Barmby and the judgment against him must be affirmed.

The only assignment in Mrs. Barmby's petition in error which we shall consider relates to the sufficiency of the evidence. Mrs. Barmby was in California when the note was signed. She took no part in the transaction and knew nothing about it when it took place. Barmby signed her name to the note. There is no evidence to show that he was authorized to do so. An attempt was made to prove such authority. It was shown that he had exercised authority to buy and sell land on her behalf, but this would not imply authority to issue negotiable instruments and to pledge her separate estate. It is said that the fact that Barmby assumed to sign her name is evidence of his authority to do so. This is not true. Agency cannot be established by the acts or declarations of the agent. A witness was called and a vigorous effort was made to prove by him that Barmby had general authority to sign notes for his wife. The effort completely failed. It resulted only in proof that on one occasion Mrs. Barmby had, in the presence of the witness, authorized her husband to sign for her a particular note which was to be given to the witness. Proof of this special authority did not prove or tend to prove a general authority to sign notes; and while counsel were permitted

to inquire of this witness after the manner of a cross-examination, the witness carefully and persistently refused to say that Mrs. Barmby's statement was anything more than a direction to her husband to sign this one note.

It was attempted to show that Mrs. Barmby had ratified her husband's act. Mr. Wolfe testified that he had written a letter to Mrs. Barmby in California and had received an answer purporting to come from her; that he had mislaid this letter, had searched for it and could not find it. He was then allowed to testify to its contents. The admission of this testimony is assigned as error, but we need not decide whether it was properly admitted, because, if admissible, it was insufficient to establish a ratification. Wolfe had twice sent the note to California for collection and had written several letters to Barmby about it. So far as appears the only effort had been to collect the note from Barmby. Wolfe then wrote a letter to Mrs. Barmby, the only information in the record as to its contents being that it "called her attention to the note." Mr. Wolfe's testimony as to the contents of the answer is: "She said her husband was away; that she would attend to the matter on his return and fix it up some way or another. She spoke about the small payment of $80 which I wrote her would be sufficient to pay my claim as far as it went on the Barmby note. Q. What did she say about that? A. She wanted to know how that could be done." This was not sufficient to establish a ratification. It does not appear that payment was demanded from her, and Wolfe's testimony as to the contents of the letter does not show any promise that Mrs. Barmby would pay it. On the contrary, she said her husband was away; that on his return she would fix it in some way. This would indicate, if it indicates anything, that her language was used with reference to her husband paying the note. It discloses no recognition of the note as a valid obligation against her. The evidence was insufficient to sustain a verdict against Mrs. Barmby, and the

judgment against her is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

DENNIS C. BERRY, APPELLANT, V. H. G. WILCOX, APPELLEE.

FILED FEBRUARY 19, 1895. No. 6052.

1. **Elections**: VOTING PLACE OF UNIVERSITY STUDENTS. The fact that one is a student in a university does not entitle him to vote where the university is situated, nor does it of itself prevent his voting there. He may vote at the seat of the university if he has his residence there and is otherwise qualified.
2. ———: ———: RESIDENCE. One's residence is where he has his established home, the place where he is habitually present, and to which, when he departs, he intends to return. The fact that he may at a future time intend to remove will not necessarily defeat his residence before he actually does remove. It is not necessary that he should have the intention of always remaining, but there must be no intention of presently removing.
3. ———: ———: ———. Persons otherwise qualified as voters who come to the seat of a university mainly for the purpose of obtaining an education, who are not dependent upon their parents for support, who have not the intention of returning to their parental home upon the completion of their studies, who are accustomed to leave the seat of the university during vacation, going wherever they might find employment, and returning to the university when the term opens, regarding the seat of the university as their home and having no purpose formed as to their movements after completing their studies, are entitled to vote at the seat of the university.

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

Abbott, Selleck & Lane, for appellant, cited: *Fry's Election Case*, 71 Pa. St., 302; *Dale v. Irwin*, 78 Ill., 170;

Vanderpoel v. O'Hanlon, 53 Ia., 246; *Pedigo v. Grimes*, 13 N. E. Rep. [Ind.], 703; *Biddle v. Wing*, Clarke & Hall, Digest of Contested Elections, 504; *Barnes v. Adams*, 2 Bartlett, Cases of Contested Elections, 760.

Atkinson & Doty, contra, cited: *Behrensmeyer v. Kreitz*, 135 Ill., 591; *Dale v. Irwin*, 78 Ill., 170; Paine, Elections, secs. 69, 70; *Sturgeon v. Korte*, 34 O. St., 535; *Putnam v. Johnson*, 10 Mass., 487; *Lincoln v. Hapgood*, 11 Mass., 350; *Sanders v. Getchell*, 76 Me., 158.

IRVINE, C.

At an election held in the city of University Place, in Lancaster county, April 7, 1891, Berry and Wilcox were candidates for city clerk. The whole number of votes cast was 116, of which Wilcox received sixty-three and Berry fifty-three. Berry instituted this proceeding to contest the election on the ground that illegal votes had been received on behalf of Wilcox sufficient to change the result. In the county court there was a judgment for the incumbent, from which the contestant appealed to the district court, where a hearing was had with the same result, and the contestant now appeals to this court. The parties entered into a stipulation in regard to the facts, and this stipulation constitutes the only evidence in the case. From the stipulation it appears that seventeen votes were cast for Wilcox by students of the Wesleyan University, which has its seat in University Place. The result depends upon the right of these students to vote, and their right depends solely upon the question of their residence in University Place, it being conceded that they had all other qualifications of voters.

The facts as to the residence of these students appear from the stipulation as follows: "That they had been attending Wesleyan University and living in University Place from the commencement of the school year, some time during the month of September, 1890; that their main

purpose in going to and remaining in University Place was to attend said university for the purpose of obtaining an education; that all the said students had, previous to and immediately preceding the time they went to University Place for the purpose of attending the university, resided with their parents in different parts of the state of Nebraska, but were not dependent upon said parents for their support; that each of the said students expected to remain at said University Place during such time as their studies demanded until they had completed their college course; that none of the said students remained at said University Place during the vacation, but went wherever they could secure employment; that all of said students were uncertain and undecided as to their future course or place of residence upon the completion of their college course; that they did not have any special residence in view; that said students were all unmarried men without any business relations or connections at any other place, and that they were not engaged in any other business than that of attending the university; that none of said students were under parental control and that they regarded University Place as their home; that none of said students had at the time of voting any intention of removing from University Place before the completion of their studies, and that when they took their summer vacation they expected to return to the university upon the opening of the term." It is upon the foregoing facts that the question of their residence must be determined.

Our attention is called to chapter 26, section 32, Compiled Statutes, which provides that the judges of election and registrars of voters, in determining the residence of a person offering to vote, shall be governed by certain rules established in that section. But section one of article seven of the constitution prescribes the qualifications of voters: "Every male person of the age of twenty-one years or upwards belonging to either of the following classes, who

shall have resided in the state six months, and in the county, precinct, or ward, for the term provided by law, shall be an elector," etc. It is the constitution, then, which requires residence as a qualification for voting, although the legislature may fix the term of residence required in a county, precinct, or ward. What constitutes residence within the meaning of the constitution is, therefore, a judicial question and not one for the legislature. The question is, what did the word "reside" mean when the constitution was adopted, not what the legislature may say it shall mean. This is very clear. The constitution says likewise that "every male person," etc., shall be an elector. It would be clearly incompetent for the legislature to extend this provision to females by passing an act declaring that in determining who are male persons, judges of election shall consider both men and women such. We do not say that the section referred to has no force; merely that it cannot be accepted as in anywise enlarging or limiting the provisions of the constitution. We do not even say that the rules prescribed by that section are not correct rules for determining the question of residence; but if they are so, it is because there are only declaratory of the previous law and not because the legislature has adopted them. We therefore proceed with the inquiry without any special reference to this statute. The generally accepted definition of "residence," when the term is used with reference to the qualification of voters, is synonymous with "domicile,"—"that place * * * in which his habitation is fixed, without any present intention of removing therefrom." (Story, Conflict of Laws, 43.) The older cases and some of the modern ones require as an essential element the *animus manendi*, and construe this term as meaning an intention of always remaining. The supreme court of Iowa must have adopted this rule in the case of *Vanderpoel v. O'Hanlon*, 53 Ia., 246, for in that case it was held that a student at the state university was not a resident of Iowa City, although he

did not know what he would do after he graduated, and was not aware that he would leave Iowa City. The case referred to is one of the latest cases in which this extreme view is taken, and the opinion cites with approval the *Opinion of the Judges*, 5 Met. [Mass.], 587, and *Fry's Election Case*, 71 Pa. St., 302. The former case we shall refer to later. *Fry's Election Case* is a carefully considered case, and its result was to hold that students of a college living where it is located, even though they be supported by themselves and emancipated from their father's family with no intention to return to his home, have not such residence as will entitle them to vote at the seat of the college. That case was, however, professedly based to a large extent on early definitions of the terms "inhabitant" and "freeman," as well as upon the debates in the convention which adopted the constitution; and as the reasoning proceeds upon ancient authorities the case should properly be considered as among the ancient cases. It is worthy of remark, however, that the statement of facts shows that the students came to the college for no other purpose than to receive an education and intended to leave after graduating; whereas, in the case before us it is only agreed that their education was the main purpose of the students in coming and that they had no purpose formed as to their movements after graduation.

In *State v. Griffey*, 5 Neb., 161, it was held that persons who went to a military post in Valley county for the purpose of working there, but without the intention of returning to their former domicile, acquired a residence. And in *Swaney v. Hutchins*, 13 Neb., 266, it was said: "The test of residence, when a party removes from one state to another, seems to be, did he remove from his former residence with the intention of abandoning the same?" In *Putnam v. Johnson*, 10 Mass., 488, it was held that a student at Andover, otherwise qualified and being emancipated from his father's family, was entitled to vote at Andover.

This case proceeded upon the ground that he had manifestly abandoned his former domicile, and must therefore be domiciled at Andover, or no place. The old theory of *animus manendi* was perhaps first combated in that case, the court saying: "In this new and enterprising country it is doubtful whether one-half of the young men, at the time of their emancipation, fix themselves in any town with an intention of always staying there. They settle in a place by way of experiment, to see whether it will suit their views of business and advancement in life; and with an intention of removing to some more advantageous position if they should be disappointed. Nevertheless, they have their home in their chosen abode while they remain."

A very instructive opinion was given by the justices of the supreme judicial court to the house of representatives of Massachusetts in 1843 (5 Met., 587); and while, of course, this opinion is open to the criticism of being merely a response to a legislative inquiry, and not an opinion delivered in the judicial determination of a case, still the high character of the judges who signed it, as well as the soundness of the views expressed, entitle it to great weight. The question there proposed was, "Is a residence at a public institution in any town in this commonwealth, for the sole purpose of obtaining an education, a residence within the meaning of the constitution which gives a person, who has his means of support from another place either within or without this commonwealth, a right to vote or subjects him to the liability to pay taxes in said town?" It was said that none of the circumstances mentioned constitute a test, nor are they very decisive upon the question; that one's residence for the purpose of education would not give one the right to vote if he had a domicile elsewhere, nor would his connection with a public institution for the purpose of education preclude him from voting, if his domicile is there. That what place is any one's domicile is a question of fact; that if a student have a father living, if

he remain a member of his father's family, if he return to pass his vacations, if he be maintained by his father—these are strong circumstances repelling a presumption of a change of domicile. But if he be separated from his father's family, not maintained by him; if he remove to a college town and take up his abode there without intending to return to his former domicile, these are circumstances more or less conclusive to show the acquisition of a domicile in the town where the college is situated. The same view was taken in *Sanders v. Getchell*, 76 Me., 158.

The supreme court of Ohio, quoting Story's definition of domicile, adds: "It is not, however, necessary that he should intend to remain there for all time. If he lives in a place with the intention of remaining for an indefinite period of time as a place of fixed present domicile and not as a place of temporary establishment, or for mere transient purposes, it is to all intents and for all purposes his residence." (*Sturgeon v. Korte*, 34 O. St., 525.)

In *Dale v. Irwin*, 78 Ill., 170, the court said: "What is 'a permanent abode'? Must it be held to be an abode which the party does not intend to abandon at any future time? This, it seems to us, would be a definition too stringent for a country whose people and characteristics are ever on the change. No man in active life in this state can say, wherever he may be placed, this is and ever shall be my permanent abode. It would be safe to say a permanent abode, in the sense of the statute, means nothing more than a domicile, a home, which the party is at liberty to leave, as interest or whim may dictate, but without any present intention to change it."

These authorities, we think, present the law in its true aspect. The fact that one is a student in a university does not of itself entitle him to vote where the university is situated, nor does it prevent his voting there. He resides where he has his established home, the place where he is habitually present and to which when he departs he intends

to return. The fact that he may at a future time intend to remove will not necessarily defeat his residence before he actually does remove. It is not necessary that he should have the intention of always remaining, but there must coexist the fact and the intention of making it his present abiding place, and there must be no intention of presently removing. Now in the case before us these students came to University Place, their main purpose being to attend the university. They were emancipated from their parents, apparently with no intention of returning to the home of their parents; they regarded University Place as their home, leaving it during vacation and going wherever they could obtain employment, with the intention of returning to University Place at the close of the vacation. They were uncertain as to their course upon graduation and therefore had no particular future residence in view. There can be no doubt that they had lost their residence at the homes of their parents, and they were men without a country, if they had not acquired one in University Place. We think the county and district courts reached the correct conclusion on these facts in holding that these students had acquired a residence in University Place.

JUDGMENT AFFIRMED.

MICHAEL MCCAULEY, APPELLEE, V. CHARLES OHENSTEIN ET AL., APPELLANTS.

FILED FEBRUARY 20, 1895. No. 5543.

1. **Quieting Title:** PLAINTIFF'S PROOFS. In an action to quiet title, when the plaintiff's title is put in issue by the answer, he is required to establish upon the trial that he is the owner of the legal or equitable title to the property, or has some interest therein, superior to the rights of the defendant, in order to entitle him to the relief demanded.

2. **Tax Deeds**: TREASURERS' SEALS. Inasmuch as the legislature has failed to provide for an official seal for county treasurers, no tax deed executed under the revenue law of 1879 is of any validity. *Larson v. Dickey*, 39 Neb., 463, adhered to.

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

Thomas C. Munger, for appellants.

R. D. Stearns, contra.

NORVAL, C. J.

On the 4th day of August, 1870, the state of Nebraska, by a deed duly executed by the governor, and attested by the secretary of state, conveyed to one Paren England lot one (1) in block two hundred and one (201) in the city of Lincoln, which deed was recorded September 10, 1870. Subsequently, on August 29, 1870, said Paren England, together with his wife, by a deed of general warranty duly executed and acknowledged, conveyed said lot to one Charles Ohenstein, which instrument was filed for record on the next day after its date. On the 22d day of May, 1884, the above described lot was sold by the county treasurer at private sale for taxes levied thereon for the years 1872 to 1882, inclusive, amounting to $17.80, and a tax deed was executed to the purchaser, Bartholomew Mahoney, on the 19th day of April, 1887, who executed and delivered a quitclaim deed for the premises to the plaintiff, Michael McCauley, on December 30, 1889.

On October 26, 1889, J. B. Trickey & Co. commenced an action in the district court of Lancaster county against Charles Ohenstein to recover the balance due upon an account. A writ of attachment was sued out of said court, and the lot in question was seized thereunder. Afterward, judgment was rendered in the action against the defendant for the sum of $10, and costs taxed at $35.35, and the sher-

iff was ordered to proceed as upon execution to advertise and sell said lot to satisfy the judgment and costs aforesaid. Thereupon this action was begun in the court below by Michael McCauley against Charles Ohenstein and J. B. Trickey & Co. to quiet the title to said lot in the plaintiff, alleging in the petition that he is the owner in fee, and in possession of the premises, and has made lasting and valuable improvements thereon; that the judgment in favor of J. B. Trickey & Co. is void; that the same and the deed from England to Ohenstein are a cloud upon the plaintiff's title to said premies.

J. B. Trickey & Co. filed an answer denying the averments of the petition, and setting up the judgment and proceedings in the attachment; that said judgment is unpaid, and is a valid, subsisting lien against said lot. The reply is a general denial. On the trial the court found the issues against the defendants, J. B. Trickey & Co., enjoining them from proceeding to sell the lot under their judgment, and quieted the title thereto in the plaintiff. The defendants appeal.

It is argued that the findings and judgment are not sustained by sufficient evidence. Plaintiff in his petition alleges ownership in himself to the premises in dispute. His title was put in issue by the answer, therefore he was required to establish upon the trial that, at the commencement of the action, he was the owner of the legal or equitable title to the property, or had some interest therein, in order to entitle him to the relief demanded. Upon the trial plaintiff introduced in evidence the tax deed mentioned above, under and through which alone he claims to be the legal owner of the real estate in question. The defendant insists that the tax deed is invalid and conveyed no title to the lot to the grantee therein named, for the reason that the instrument is void on its face for the following reasons:

1. It shows that the sale was not made for all the taxes thereon delinquent against the property.

2. In that it fails to recite that the lot had been previously offered for sale, and not sold for want of bidders, the lot having been sold at private sale.

3. The deed fails to recite when the sale was made.

4. Because no valid tax deed can be executed in this state under the law now in force.

It will be unnecessary to consider the first three objections made, since the decision upon the fourth, or last, ground must be adverse to the plaintiff. The point was raised and passed upon in *Larson v. Dickey*, 39 Neb., 463, in the able and exhaustive opinion of RAGAN, C. The fifth point of the syllabus reads as follows: "There is no such thing as a county treasurer's official seal of office provided for or recognized by the laws of this state, and until the legislature shall provide for an official seal for county treasurers, no tax deed of any validity can be executed under the present revenue law."

We are satisfied with the reasoning of the opinion in *Larson v. Dickey*, and, applying the rule therein stated to the case at bar, the conclusion is irresistible that the tax deed in question is void and was insufficient alone to convey title to the plaintiff to the premises in controversy. The conclusion reached makes it unnecessary to determine whether the judgment in favor of J. B. Trickey & Co. is valid and constitutes a lien upon the real estate involved in this case, since the plaintiff, in an action to quiet title, as in a suit in ejectment, must obtain relief upon the strength of his own title, and not because of the weakness of the title of his adversary. (*Blodgett v. McMurtry*, 39 Neb., 210.)

The evidence fails to support the findings, and the decree of the lower court quieting the title to the lot in the appellee is reversed, and the action dismissed.

REVERSED AND DISMISSED.

W. T. SCOTT, APPELLEE, V. R. L. SPENCER ET AL., IMPLEADED WITH METCALF CRACKER COMPANY, APPELLANT.

FILED FEBRUARY 20, 1895. No. 5943.

1. **Pleading:** AMENDMENT. This court may, under the provisions of section 144 of the Code, allow amendments in order to conform the pleadings to the facts proved in the trial court, provided such amendments do not change substantially the cause of action or defense.
2. ———: AMENDMENTS AFTER JUDGMENT. But amendments will not be allowed after judgment which change substantially the nature of the action or defense.
3. **Review:** BILL OF EXCEPTIONS. The only means provided for the ascertainment by this court of the character of the evidence introduced before the district court is a bill of exceptions authenticated in the manner prescribed by law.

MOTION for rehearing of case reported in 42 Neb., 632.

H. H. Wilson and *Dryden & Main*, for the motion.

POST, J.

As intimated in the opinion heretofore filed in this case (42 Neb., 632), the proceeding below was one for the enforcement of a mechanic's lien against certain property in the city of Kearney, in which the appellant the Metcalf Cracker Company was alleged to have an interest.

The answer was in effect a disclaimer of title by the defendant named, which alone appeals from a decree for the plaintiff based upon a general finding in his favor. The argument of counsel for appellant when the cause was first submitted to us was directed to the merits of the controversy, but an examination of the record disclosed that the so-called bill of exceptions had not been authenticated in the manner prescribed by law in order to give it force or

effect as such. The decree of the district court was accordingly affirmed on that ground without reference to the issues presented by the pleadings. It is on this hearing practically conceded that the Metcalf Cracker Company has according to the pleadings no appealable interest, for the reason, as above shown, that the decree is for the enforcement of a lien against property as to which it has disclaimed title. However, in connection with the motion for a rehearing counsel for the appellant submit an application for leave to amend its answer so as to conform to the issues actually tried. Accompanying said application are certain affidavits, including one by the presiding judge, to the effect that the cause was tried in the district court on its merits, and that the answer was therein construed not as a disclaimer but as putting in issue the validity of the alleged lien.

Our Code makes provision for amendment after judgment in certain cases as follows: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. And whenever any proceeding taken by a party fails to conform in any respect to the provisions of this code, the court may permit the same to be made conformable thereto by amendment." (Sec. 144, Code.) Frequent constructions have been given the above provision, and its meaning as applied to the trial court is, we think, well understood. But in its application to this court, in proceedings brought here by petition in error or appeal, greater difficulty is encountered. The instances in which the rule of the statute has been invoked in favor of parties seeking to amend

in this court are few and will be noticed in the order reported.

In *Humphries v. Spafford*, 14 Neb., 488, LAKE, C. J., said: "We have no doubt whatever that an amendment at this stage of the case is in harmony with section 144 of the Code, where the ends of justice seem to demand it." The facts therein are not fully reported and it does not appear whether the proofs were received without objection, but the inference is that the evidence was before the court. True it is said by the author of the opinion: "If the amount due on the notes be as we infer from the brief of counsel, greater than is alleged," etc. But the argument referred to was evidently predicated on the facts disclosed by the record, since the court could not have based a material finding upon the unsworn statements in the brief.

In *Spellman v. Frank*, 18 Neb., 110, an amendment was allowed by the county court in which the cause originated, but was not in fact made. On the hearing before the district court, on petition in error, leave was asked to amend in conformity with the order of the county court, which was denied and which request was renewed in this court and again refused. The character of the amendment does not appear, but it cannot be inferred from the report that any objection was made on the ground of materiality, or that the amendment sought was not in furtherance of justice.

In *Homan v. Steele*, 18 Neb., 652, it was argued that the plaintiff's remedy was by an action on a *quantum meruit*, and not on the contract alleged. Referring to the subject, Judge MAXWELL said: "Where proof has been introduced without objection, which would entitle a plaintiff to recover, this court would, if necessary, permit an amendment of the petition to conform to the proof, or remand the cause to the district court for that purpose." The language here used appears the more consonant with the spirit of the provision for amendments after judgment after conforming the

pleadings or proceedings to the facts proved when the amendment does not change substantially the claim or defense. The provision referred to is a substantial copy of section 137 of the Ohio Code, which according to Judge Nash had received a definite construction in that state long previous to its adoption by this. The author named, after an exhaustive analysis of the provision under consideration, summarizes as follows: "We conclude, therefore, that the identity of the action cannot be changed by an amendment, whether in regard to the cause of the action or the parties to it. Where the action is founded on a legal right this rule must be strictly applied. In chancery cases the rule heretofore prevailing in courts of equity will still prevail and be liberally applied to cases *in rem* or in equity. No other construction can be given to the section without unsettling all certainty in the administration of justice and all uniformity in the practice of courts; since such practice will be but the individual discretion of the court or judge; whereas a court must have rules even for the exercise of its discretion, so that it may mete out to all the same administration of the law." (1 Nash, Code Pleading, 323.)

In Boone, Code Pleading, sec. 234, it is said: "Amendments after trial are very cautiously allowed, and the general rule is that a party who has not sought to amend until after he has been nonsuited is too late to ask for a new trial and an amendment." And the proposition thus stated is in accord with the views of other writers. (See Bliss, Code Pleading, sec. 429 *et seq.*; Maxwell, Code Pleading, pp. 577, 578; Elliott, Appellate Proceedure, sec. 610.) Nor is the doctrine above asserted without support from the decisions in point. In *Smith v. Mayor of New York*, 37 N. Y., 518, application was made to the court of appeals for leave to amend so as to change the action from one for breach of an implied contract, to one for money had and received; but Hunt, C. J., denied the motion, using the following language: "I have never known the exercise of

such a power by this court. * * * In no event could it be granted except by a motion," etc. In *Fitch v. Mayor of New York*, 88 N. Y., 500, Danforth, J., in denying leave to amend, refers to section 723 of the New York Code, from which section 144 of our Code was copied, in the following language: "If the section (723) applies to this court the power should not be exercised unless it is plain that no substantial right of the adverse party would be affected. Here the case has been tried upon a different issue, and without amendment disposed of by the general term. The application should have been to that court or to the trial court." In *Romeyn v. Sickles*, 108 N. Y., 650, it was held error to permit an amendment in a material respect to be made except at a time which will afford the adverse party an opportunity to meet by proof the new allegations; and in *Southwick v. First Nat. Bank of Memphis*, 61 How. Pr. [N. Y.], 164, it is said: "If a party can allege one cause of action and then recover upon another his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary." In *Levy v. Chittenden*, 120 Ind., 37, it is said: "This court has always held that it is error to allow an amendment to the pleadings which changes the nature of the cause of action or defense, after the trial has been concluded."

But it should be remembered that the Code refers not to forms, but causes of action, a proposition of which *Homan v. Steele* is an excellent illustration. There the action was for money due on contract; but the plaintiff's right to recover on the agreement being in doubt, on account of a failure to complete the building named within the stipulated time, the case was within the letter as well as the spirit of the Code.

The wisdom of the rule is fittingly illustrated by the case at bar. For if it be permissible to a party to a bill for the foreclosure of a mortgage or other lien, to disclaim interest in the subject of the action, and after final decree

assert an adverse title by way of amendment, it may with truth be charged that written pleadings are designed to mislead and ensnare litigants rather than to secure the orderly administration of justice. It remains to be determined whether we shall examine the affidavits presented in order to ascertain what issues were actually tried. The fact must not be overlooked that the object of this proceeding is to secure the reversal or modification in this court of the decree appealed from. Had the application been made to the district judge who heard the proofs, the case would have presented no difficulty, as he would have known whether the proposed amendment conformed to the facts proved or presented a new and distinct issue. But our examination is necessarily confined to the record and that record must be one authorized by law. It must also be authenticated in the manner prescribed by statute. Leave in this instance to amend without a reversal or modification of the decree, accompanied by an order remanding the cause, would be a fruitless result of the appeal. And yet the vacation by this court of a judgment or decree upon *ex parte* affidavits as to what transpired before the trial court would be an anomaly in judicial proceedings, and so radically opposed to the settled rules of practice that an examination of the cases bearing upon the subject would be a work of supererogation. We confess to having vainly sought for safe ground upon which to sustain the application in this case.

We are assured by counsel, whose unsworn statements to us impart absolute verity and who are not responsible for the misadventure resulting in the failure to secure a bill of exceptions, that the question actually tried was the validity of the lien as against the appellant as owner, for building material furnished to Spencer, his co-defendant. Such a case must appeal strongly to any court, and more especially to one exercising equitable powers. But a vacation of this decree implies not only a violation of the let-

ter of the Code, but also a reversal of those rules of practice which experience has shown to be necessary in the due administration of the law, and without which injustice and confusion will inevitably follow. The motion for a rehearing is accordingly denied.

MOTION DENIED.

WILLIAM F. LORENZEN ET AL. v. KANSAS CITY INVESTMENT COMPANY.

FILED FEBRUARY 20, 1895. No. 5646.

1. **Deceit: FALSE REPRESENTATIONS: INJURY.** In an action in the nature of an action of deceit, it is necessary not only to show the making of false representations justifiably relied upon, but in addition it must be made directly and not by conjecture to appear that, from such false representations and reliance upon them, there resulted a direct and actual loss to plaintiff.
2. ———: **EVIDENCE.** The evidence and petition in this case reviewed, and *held* to have justified an instruction to find for the defendant.

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

The facts are stated by the commissioner.

E. J. Cornish, for plaintiffs in error:

If there is any evidence to support a verdict, it is error to direct the jury to find for the defendant. (*Johnson v. Missouri P. R. Co.*, 18 Neb., 690.)

The petition was modeled after the petition sustained in *Booker v. Puyear*, 27 Neb., 346.

A *prima facie* case of conspiracy was proved, although for the purposes of this trial it was not necessary to be proved. (*Booker v. Puyear*, 27 Neb., 346.)

Promises which the promisor does not intend to fulfill at the time of making them, and upon which another has relied to his damage, are fraudulent. (*Oldham v. Bentley*, 6 B. Mon. [Ky.], 430; *Nichols v. Pinner*, 18 N. Y., 306; *Johnson v. Monell*, 2 Keys [N. Y.], 663; *Schufeldt v. Schnitzler*, 21 Hun [N. Y.], 462; *Burrill v. Stevens*, 73 Me., 395; *Rawdon v. Blatchford*, 1 Sandf. Ch. [N. Y.], 344; *Durel v. Haley*, 1 Paige Ch. [N. Y.], 492.)

The representation of a fact in the future, and not a mere promise, which has been acted upon and turns out to be false, will entitle the injured party to the same remedies as fraudulent misrepresentations of an existing fact. (*Abbott v. Abbott*, 18 Neb., 504, and cases cited; *Henderson v. San Antonio & M. G. R. Co.*, 17 Tex., 560.)

It is not necessary, to sustain an action for deceit, that the defendant should be benefited by the deceit, or that he should collude with the person who received the benefit. (*Haycraft v. Creasy*, 2 East [Eng.], 92; *Russell v. Clarke*, 7 Cranch [U. S.], 69; *Upton v. Vail*, 6 Johns. [N. Y.], 181; *Patten v. Gurney*, 17 Mass., 182; *Medbury v. Watson*, 6 Met. [Mass.], 246; *Ewin v. Calhoun*, 7 Vt., 79; *Hubbard v. Briggs*, 31 N. Y., 529.)

The Kansas City Investment Company is bound by the acts of its agent. (*Olmstead v. New England Mortgage Security Co.*, 11 Neb., 487; *Cheney v. White*, 5 Neb., 261; *Cheney v. Woodruff*, 6 Neb., 151; *Cheney v. Eberhardt*, 8 Neb., 423; *Wilson v. Beardsley*, 20 Neb., 451; *McKeighan v. Hopkins*, 19 Neb., 38; *Gerhardt v. Boatmans Saving Institution*, 38 Mo., 60; *Henderson v. San Antonio & M. G. R. Co.*, 17 Tex., 560; *Locke v. Stearns*, 1 Met. [Mass.], 560; *Griswold v. Haven*, 25 N. Y., 595; *Johnson v. Barber*, 5 Gilman [Ill.], 425.)

Slight evidence of collusion is sufficient to let in proof of acts and declarations of co-conspirators. (*Brown v. Herr*, 21 Neb., 125; *Turnbull v. Boggs*, 43 N. W. Rep. [Mich.], 1050.)

Cook & Gossett and *McCoy & Olmstead, contra.*

RYAN, C.

This action was brought in the Douglas county district court by plaintiffs in error against Alfred Lindblom, Nels O. Brown, and the Kansas City Investment Company for the recovery of damages to the amount of $16,000. It was charged in the petition that the defendants entered into a conspiracy having for its object the cheating and defrauding of plaintiffs, and obtaining the title to and the possession of certain real property owned by plaintiffs without paying therefor. The manner in which it was charged that this was undertaken was that to Alfred Lindblom was procured to be sold the property for $16,000, of which sum $4,000 was to be paid in cash, the balance to be evidenced by his notes, secured by a mortgage back on the property sold him; that by fraudulent representations as to the financial responsibility of Nels O. Brown, for whom Alfred Lindblom was the *alter ego*, the plaintiffs were induced to make the proposed sale and consent to have their mortgage security postponed to that of the Kansas City Investment Company. From the record before us it is not made to appear why the Kansas City Investment Company is made the sole defendant in error, but from the brief of plaintiffs in error it appears that a judgment had been rendered against the other defendants before the rendition of the judgment involved in this proceeding. The part which the Kansas City Investment Company was charged with taking in the above alleged scheme was that said company, by its agent, represented and induced plaintiffs to believe that Nels O. Brown was worth $50,000 to $75,000 in his own right; that Lindblom was in his employ, and that Brown and Lindblom had $4,000 in cash to make the above required payment; that the said investment company would loan Brown and Lindblom $21,000,

secured by first mortgage on the property to be conveyed, the proceeds of which loan would be paid by the investment company itself for labor and material to be used in the construction of eight buildings on the lots to be sold Lindblom and Brown; that said investment company further represented that it had taken a good bond which would fully guard against the filing of mechanic's liens against said property when it should be acquired and improved by Lindblom and Brown, and that said investment company agreed that it would see that the application of the proceeds of the loan should be made as above contemplated, and that if the work should not be done according to contract said investment company, upon being notified of that fact by Lindblom and Brown, would withhold further payments until the work should be properly done. It was further alleged that the investment company represented to plaintiffs that Brown and Lindblom were practical carpenters and themselves would do a large part of the work, and that said houses, when completed, would be worth $21,000. Plaintiffs averred that they relied upon these representations whereby they were induced to convey the lots which they owned to Lindblom; that the cash payment of $4,000 was made with a part of the loan advanced for that purpose by the investment company; that both Brown and Lindblom were insolvent; that the payments made of the amount loaned were not applied on material furnished or labor done; that upon notice that the work was not being done according to contract the investment company did not so require it to be done; that all the material used did not cost in excess of $3,800, for which amount a lien had been filed, and that the value of the real estate was $16,000. In general, it was further averred that the investment company had in every respect refused to perform its undertakings, and that by reason thereof and of its false representations the plaintiffs had been damaged in the sum for which judgment was prayed. Is-

sues were duly joined on all the material allegations of the petition, and after the introduction of all the evidence the jury were instructed to find in favor of the defendant in error. From a judgment rendered on this verdict, error proceedings have been prosecuted to this court.

The evidence showed that the terms of the intended sale were arranged between plaintiffs and Lindblom and Brown in the latter part of August, 1889; that the first interview between plaintiffs and the investment company took place on September 10 thereafter; that in this interview it was disclosed by the investment company that it proposed to make a loan of $21,000, secured by first mortgages on the property owned by plaintiffs after it should have been conveyed to the other parties; that a bond had been taken by said company to indemnify it against the filing of mechanics' liens; that Mr. Lorenzen read this bond; that he asked the agent of the investment company if it was intended to furnish the $4,000 to make the cash payment required to induce plaintiffs to convey, and the answer of this agent not being satisfactory Mr. Lorenzen stated to the agent that the sale would not be consummated upon the required cash payment being made in that way. A party who had bargained for the same real property as is now under consideration before plaintiffs agreed to convey to Lindblom, and who had procured the substitution of Lindblom and Brown for himself, after the above conversation, procured a written statement from the agent of the investment company addressed to himself, that the said company would advance upon the proposed loan the sum of $4,800 whenever the mortgages in its favor were made the first recorded liens on the property to be conveyed. The purpose for which this statement was procured was not disclosed to the investment company or its agent, but the party who received it borrowed $4,000 on the faith of it, and with that $4,000 Lindblom and Brown made the cash payment required to satisfy plaintiffs to close up the trade. Afterward, without

the slightest intention of doing wrong, and indeed without knowledge of the purpose for which the aforesaid statement had been procured, or used, the investment company paid the sum of $4,800 as it had indicated that it would, and this enabled the bank to obtain payment of the aforesaid loan. On the trial we have not been able to find that any proof was made of the value of the real property at that time. It was, however, admitted that there had been obtained decrees of foreclosure on the several mortgages which secured the aggregate loan made by the investment company in the United States circuit court for the district of Nebraska, and that a motion to open said decrees was pending when this trial was had. There had, therefore, taken place no judicial sale which would have afforded evidence that the security held by plaintiffs for their deferred payments were of no value. This suit against the defendant in error was in the nature of an action for deceit. The end sought by the false representations as charged was the procuring of plaintiffs to part with their real property upon insufficient security for the payment of the purchase price. The fact that the security so obtained to be accepted was inadequate was an element indispensable to the establishment of an actual loss sustained. As the proofs stood when the case was submitted to the jury, there had been no conspiracy shown, neither had there been proved a single fact tending to connect the investment company with any fraud or misrepresentation. When we take into account the further fact that there had been no affirmative showing that the plaintiffs would not be able to collect the entire amount of their claim by a foreclosure sale of the mortgaged premises, we conclude that the district court properly directed a verdict in favor of the defendant. Its judgment is therefore

AFFIRMED.

STANDARD STAMPING COMPANY V. LEVI G. HETZEL ET AL.

FILED FEBRUARY 20, 1895. No. 5819.

1. **Attachment:** AFFIDAVITS: HEARING ON MOTION TO DISSOLVE. Where it was alleged in the petition in an attachment case that the defendants acted conjunctively, the first named buying on credit and turning over goods to the second to be disposed of by him for the joint benefit of both, it was proper on a motion to dissolve such attachment to consider whether or not there existed the alleged privity between the defendants.
2. ———: MOTION TO DISSOLVE: TRIAL. On a motion to dissolve an attachment the levy upon property, as that of a defendant, forbids plaintiff's denial that such defendant has an ownership interest therein.
3. ———: DISSOLUTION: SPECIAL FINDINGS. Where an attachment had previously been dissolved upon a full hearing of the merits, there existed no requirement that upon request, sustained by affidavits, additional special findings should be made, and it was not erroneous on motion to strike such affidavits from the files.

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

Cavanagh, Thomas & McGilton, for plaintiff in error:

The court erred in considering and determining the question of partnership between the defendants. (Drake, Attachment, sec. 418; *Alexander v. Brown*, 2 Dis. [O.], 396; *Hermann v. Amedee*, 30 La. Ann., 393; *Kuehn v. Paroni*, 19 Pac. Rep. [Nev.], 273; *Olmstead v. Rivers*, 9 Neb., 234.)

Cowin & McHugh, contra:

The affidavit is a sufficient and complete denial of the grounds of attachment and raised an issue which went directly to the right of the plaintiff to maintain its attachment. (*Leach v. Cook*, 10 Vt., 239; *Taylor v. McDonald*,

4 O., 150; *Cowdin v. Hurford*, 4 O., 133; 2 Bates, Partnership, sec. 1117.)

The action of the trial court in considering the evidence introduced upon the question of the alleged partnership of the defendants, for the purpose of determining the truth of the allegations of the affidavit for attachment, was necessary and proper. (*Reed v. Maben*, 21 Neb., 696; *Hamilton v. Johnson*, 32 Neb., 730; *Bundrem v. Denn*, 25 Kan., 430; *Stapleton v. Orr*, 23 Pac. Rep. [Kan.], 109; *Guest v. Ramsey*, 33 Pac. Rep. [Kan.], 17.)

The order of the trial court in discharging the attachment upon motion of defendant Frank J. Hetzel was proper. (*Windt v. Banniza*, 26 Pac. Rep. [Wash.], 189; *Claflin v. Detelbach*, 28 Atl. Rep. [N. J.], 715; *Mayer v. Zingre*, 18 Neb., 458; *Dolan v. Armstrong*, 35 Neb., 339.)

RYAN, C.

Plaintiff brought suit in the district court of Douglas county against the defendants named, as individuals, for the recovery of judgment in the sum of $348.13, alleged to have been due, and the sum of $1,067.71 about to become due when suit was brought. An attachment was, at the commencement of the suit, procured to be issued against the property of the defendants, but was levied on a stock of groceries of which the defendant Frank J. Hetzel claimed to be the owner. From an order dissolving said attachment plaintiff has prosecuted error proceedings to this court. In the petition were averments as follows:

"2. The defendants are a partnership doing business in the city of Omaha, Nebraska, in the wholesale and retail grocery business, but are not doing busines as such partnership under any firm name.

"3. The defendants, although partners, were and are doing business as such wholesale and retail grocers at three points in said city and state; one store under the name of the 'Mammoth,' on the west side of Sixteenth street, between Dodge

and Douglas streets; one store under the name of the 'Bee Grocery Company,' on Sixteenth street, between Cass and California streets; and one store near the corner of Twenty-fourth and Cuming streets under the name of L. G. Hetzel.

"4. That between June 14th and August 11th, 1892, plaintiff sold and delivered to the said defendants, at the special instance and request of the said L. G. Hetzel, goods, wares, and merchandise of the value of $1,415.84, * * which said wares and merchandise were purchased for the said defendants jointly, and exposed for sale in their three several places of business."

Following the above allegations there were averments in the petition that, previous to a date in 1892 not given, the defendants had held themselves out to the public as partners, but had then pretended to dissolve said partnership relation, and, from thenceforward, each defendant had pretended to engage in business for himself and on his own sole account, but, as plaintiff charges upon belief, there existed a conspiracy between the defendants to defraud wholesale houses by buying largely on credit and selling and concealing as many of their goods as it was possible, leaving said wholesale houses unpaid; that to facilitate said fraudulent plan, and as part thereof, the pretense of dissolution had been resorted to, after which Levi G. Hetzel in his own name purchased goods from as many wholesale houses as would give him credit, and from these goods furnished the store which it was pretended was being run by Frank J. Hetzel as his own; that said goods so purchased by Levi G. Hetzel were for the benefit of both of said defendants and were purchased in pursuance of said plan to defraud, and that Frank J. Hetzel received the portion of said goods so furnished him in pursuance of said plan to defraud, and to enable said Levi G. Hetzel to defraud, and for the purpose of defrauding the plaintiff. In connection with the above averments there was given a statement of the dates at which would fall due the amounts for which judgment

was prayed. The affidavit for an attachment likewise described these amounts, and the date of maturity of each, and, in addition, contained allegations that the defendants had sold, conveyed, or otherwise disposed of their property with intent to defraud their creditors, and were about to remove their property, or a material part thereof, with the intent, or to the effect, of cheating or defrauding their creditors, or hindering them in the collection of their debts.

The motion to dissolve the attachment was filed on behalf of Frank J. Hetzel alone. It was heard and determined upon consideration of a large amount of evidence presented by affidavits, and of still more abundant testimony given orally. With the result attained we cannot interfere, for the findings of a trial court as to the existence of facts established upon the consideration of conflicting evidence are conclusive when the proofs are such that different minds therefrom might fairly draw different conclusions.

It is strenuously urged by the plaintiff in error that since in the petition there were averments of the existence of a partnership between the defendants, that question was one which could properly arise only upon the issue made by a denial of this averment in the answer, and that, therefore, the district court erred in considering whether or not the alleged partnership relation actually existed. The goods attached were claimed by Frank J. Hetzel. By the attachment of these goods as the property of both the defendants there was a recognition by plaintiff that Frank J. Hetzel had an interest in them as an owner. If, in fact, Frank J. Hetzel was the sole owner of the attached property he was entitled to have the attachment thereon dissolved unless, in some way, there was shown a privity between the defendants, for the plaintiff itself in its petition had alleged that the sale of the goods was made to Levi G. Hetzel. In this connection there were extended averments of a partnership relation under and by virtue of which the

property purchased was by Levi G. turned over to his brother in pursuance of a common purpose between these brothers of perpetrating a fraud, or series of frauds. These averments, it will be noticed, were not made as mere elaborations of the grounds of attachment prescribed by statute, but rather were the statements of facts upon which it was sought to hold Frank J. liable personally for the goods sold. If the district court could not consider whether or not the privity alleged had an existence, it would result, of necessity, that in the petition there was no averment under which Frank's property could be attached, for in that event there would exist no grounds for holding liable either himself or his property. There was introduced a great deal of evidence which tended, unexplained and uncontradicted, to show that Levi had fraudulently transferred his property to Frank. If the goods had been attached in the hands of Frank, as in reality the property of Levi, placed in Frank's hands for the purpose of defrauding the creditors of Levi, this would have been competent. But such was not the case; the property was attached as that of both Levi and Frank. It was therefore necessary, in view of the plaintiff's averment that the goods were in reality sold to both, though the transaction was with Levi alone in his own name, to show that there existed a privity between Frank and Levi in order to sustain the attachment sued out and levied as it was. Upon consideration of all the evidence adduced there was no sufficient proof to satisfy the court that, in purchasing, Levi acted for Frank, either as a partner or otherwise, hence it resulted that in so far as Frank's interests were concerned the attachment was properly dissolved.

Probably for the purpose of prosecuting with distinctness some questions deemed important, the plaintiff, after the motion to dissolve the attachment had been sustained, filed certain affidavits with a request for specific findings not theretofore made. On motion these affidavits were

stricken from the files. There exists no rule which requires, upon questions of the nature of those presented in this case, that the district court must make special findings of fact or conclusions of law upon request so to do. In this case there had already been made sufficient findings to justify the order dissolving the attachment. There was, therefore, no error in striking the affidavits from the files as was done. The judgment of the district court is

AFFIRMED.

IRVINE, C., not sitting.

B. O. PERKINS ET AL., APPELLANTS, V. BUTLER COUNTY ET AL., APPELLEES.*

FILED FEBRUARY 20, 1895. No. 5659

1. **Assignment of Unearned Money Under Contract.** An assignment of moneys not yet earned, but expected to be earned in the future under an existing contract, is in equity valid and enforceable.
2. **Insolvent Partnership:** DISTRIBUTION OF ASSETS. When a partnership is dissolved and is insolvent, its assets will be treated by a court of equity as a trust fund for the payment of partnership creditors, and the creditors of one partner will not be permitted to divert the assets to the prejudice of the partnership creditors.
3. **Partnership:** CONTRACT FOR BUILDING COURT HOUSE: FIRM ASSETS: RIGHTS OF LABORERS AND MATERIAL-MEN. A and B were partners and had a contract for the construction of a court house for Butler county. During the progress of the work the partnership was dissolved, it being agreed that A should complete the court house and receive for himself any profits accruing thereon. He gave a bond to B to indemnify B against liabilities arising out of the court house contract. B agreed that A might use the firm name in completing the court house.

* A rehearing has been allowed.

Thereafter A borrowed money which he used in completing the court house. The money was borrowed on a note signed by A individually and indorsed by C and D. To secure them A made in the firm name an order upon the county directing the payment to C and D of fifteen per cent of the contract price which was by the contract reserved until the court house was finished. It did not appear that C and D indorsed the note on the credit of the firm of A and B or on the faith that the money would be used in the building. Thereafter A and B gave orders against the same fund to various persons who had performed work or furnished material for the building. C and D were compelled to pay A's note. *Held*, That the finding of the trial court that the debt from A to C and D was the individual debt of A was in accordance with the evidence; that as between A and B, the county, and laborers and material-men the fund was partnership assets, and that the laborers and material-men were entitled to be paid therefrom prior to C and D.

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

George P. Sheesley, R. S. Norval, and *George W. Lowley,* for appellants, cited: 1 Bates, Partnership, sec. 559; 2 Bates, Partnership, secs. 679, 707, 824; *Warren v. Martin,* 24 Neb., 273; 3 Pomeroy, Equity Jurisprudence, secs. 1280, 1283.

Leese & Stewart, also for appellants.

Steele Bros., Evans & Hale, M. A. Hall, and *Frick & Dolezal, contra:*

The assets of an insolvent partnership are a trust fund for the payment of partnership creditors. (*Till's Case,* 3 Neb., 261; *Roop v. Herron,* 15 Neb., 73; *Caldwell v. Bloomington Mfg. Co.,* 17 Neb., 489; *Rothell v. Grimes,* 22 Neb., 526; *Smith v. Jones,* 18 Neb., 481, *Banks v. Steele,* 27 Neb., 138.)

A surviving partner, or a partner who succeeds to the business of a firm for the purpose of completing and winding up its affairs, may pledge property to secure partnership

debts, but such partner cannot enter into a contract by which partnership assets are diverted, or by which an additional liability would be created against the estate of a deceased or retiring partner. (*Holland v. Fuller*, 13 Ind., 195; *Tiemann v. Molliter*, 71 Mo., 512; *Hayden v. Cretcher*, 75 Ind., 108; *Bank of South Carolina v. Humphreys*, 1 McCord [S. Car.], 388; *Cotton v. Evans*, 1 Dev. & B. Eq. [N. Car.], 284; *Veale v. Hassan*, 3 McCord [S. Car.], 278; *Lee v. Stowe*, 57 Tex., 444; *Kendall v. Riley*, 45 Tex., 20; *Dowzelot v. Rawlings*, 58 Mo., 75; *Bank of Port Gibson v. Baugh*, 9 S. & M. [Miss.], 290.)

The claim of appellants is a new obligation. It is one existing in favor of a creditor who was such at the time of dissolution. This new obligation and liability Chidester had no right to incur, even if he had undertaken to do so in the firm name. (*Hayden v. Cretcher*, 75 Ind., 108; *Bowman v. Blodgett*, 2 Met. [Mass.], 308; *Bank of Port Gibson v. Baugh*, 9 S. & M. [Miss.], 290; *Dowzelot v. Rawlings*, 58 Mo., 75; *Rice v. McMartin*, 39 Conn., 573; *Sutton v. Dillaye*, 3 Barb. [N. Y.], 529; *Cotton v. Evans*, 1 Dev. & B. Eq. [N. Car.], 284; *Veale v. Hassan*, 3 McCord [S. Car.], 278; *Van Doren v. Horton*, 19 Hun [N. Y.], 7; *Lee v. Stowe*, 57 Tex., 444; *Kendall v. Riley*, 45 Tex., 20; *Roots v. Mason City Salt & Mining Co.*, 27 W. Va., 483.)

It was the moral duty of the county, and the legal duty of Barras, to see that the labor and material creating the fund was paid out of it. (*Sample v. Hale*, 34 Neb., 220.)

Appellees also made reference to the following cases: *Bennett v. Buchan*, 61 N. Y., 222; *Robbins v. Fuller*, 24 N. Y., 570; *Van Doren v. Horton*, 19 Hun [N. Y.], 7; *McClelland v. Remsen*, 23 How. Pr. [N. Y.], 175; *Thursby v. Lidgerwood*, 69 N. Y., 198.

IRVINE, C.

In 1889 William J. Chidester and C. F. Barras were copartners under the name of Chidester & Barras. In that

year they entered into a contract with Butler county for the construction of a court house, for which they were to receive $47,700. The contract provided for the payment to Chidester & Barras each month of eighty-five per cent on materials furnished and labor performed during the month, the remaining fifteen per cent to be paid after the work was completed. Some time after this contract was entered into work was begun on the court house and continued by Chidester & Barras until October 22, 1890, when the copartnership was dissolved. The terms of the dissolution were evidenced by several instruments. By one of these Barras agreed that if Chidester should give him a good and sufficient bond to hold him harmless against all loss or damage for which Chidester & Barras might become liable for any failure, fraud, or neglect upon their part in and about the construction of the court house, or for any loss for work, labor, or material furnished, or for any failure on the part of Chidester to pay for labor or material used in the construction of the court house, then Barras would waive all claims for any profit which might accrue in the construction of the court house; and Barras further agreed "that the said Chidester shall use the firm name in and about the construction of said court house." Another instrument is the bond referred to. A third instrument is an agreement of dissolution, whereby all unsettled business was to be settled as soon as practicable, and the profits or loss shared equally, and Chidester, in consideration of the relinquishment by Barras of all claims to any profit arising from the court house contract, was to obtain an additional surety on the indemnity bond to Barras. Another instrument is a notice of dissolution signed by both partners and published at the time. This notice recited that the court house contract was to be carried out by Chidester; that he was authorized to receive all payments, and that he was responsible for all bills for labor and material performed and furnished, and that Chidester was to use the

firm name to complete the building, and Barras was not to use the firm name in any future transactions. A still further instrument is a receipt by Barras from Chidester for $150, in full for all claims on the court house contract.

From these instruments it is clear that it was the intention of the parties to effect a dissolution as of October 22, 1890, so far as practicable; that Barras received $150 in lieu of other demands on account of the court house, and Chidester undertook to indemnify him from liability on account of that contract. It is also clear that between the partners it was understood that Chidester should proceed alone with the work. But it is equally clear that Chidester and Barras recognized the fact that as to third persons their existing contract liabilities could not be affected, and so it was expressly agreed that Chidester might use the firm name in the fulfillment of the court house contract. Chidester proceeded with the work, and in December induced Perkins and Spelts, the plaintiffs, to sign as joint makers with him a promissory note, to the order of the Columbia National Bank of Lincoln, for $4,000. This note was discounted by the bank and the proceeds placed to Chidester's credit individually and not to the credit of Chidester & Barras. Chidester testifies that his object in obtaining this money was to use it on the court house contract, and the evidence shows that nearly all of it was so used. At the time this note was made Chidester delivered to Perkins & Spelts the following instrument:

"*To the Honorable Board of Supervisors and County Treasurer of Butler County, Nebraska:* Please pay to B. O. Perkins and L. Spelts all of the fifteen per cent now due and which will be due us on the court house contract and this shall be your receipt for same said 15 per cent, being $7,155. Dated at David City, Neb., this 9th day of Dec., in the year 1890. CHIDESTER & BARRAS,

"By W. J. CHIDESTER."

It does not appear that there was any agreement between Chidester and the plaintiffs that the money should be used for the court house, nor that they supposed that they were dealing with the firm of Chidester & Barras in signing the note. It does not even appear that they were informed what Chidester's purpose was in procuring the loan. The most that can be said is that Perkins at least evidently relied largely on the assignment of the fifteen per cent reserve fund to secure him in his suretyship. This note was once or twice renewed and was finally, on July 6, 1891, paid by Perkins and Spelts. On December 30, 1890, Perkins and Spelts had filed the assignment with the county clerk of Butler county. The court house was completed and accepted about May 28, 1891, and there was found to be due from the county to Chidester & Barras $8,344.82. At the time the work was completed a number of orders were given against this fund in favor of persons who had performed labor or furnished material for the court house. Some of these orders were signed by both Chidester and Barras, some of them were signed in the firm name by Barras alone. There is evidence sufficient, at least to sustain the finding to that effect by the district court, that at the time of the dissolution Chidester & Barras were insolvent. Perkins and Spelts, after paying the note, brought this action against Butler county, Chidester, and the laborers and material-men praying that they be decreed entitled to payment of the money due from Chidester from the fund in the hands of the county, prior to the payment of the other parties.

The county answered, admitting the contract with Chidester & Barras, the completion and acceptance of the court house, and that there was due thereon the amount already stated. It then pleaded the presentment to it of the various orders, and prayed the adjudication by the court of the respective claims of the plaintiffs and of the laborers and material-men, and the protection of the court in

the disbursement of the money. The numerous laborers and material-men filed answers, putting plaintiffs' claims in issue, and cross-petitions setting up claims in themselves to the fund. The court found that the moneys in the hands of Butler county were partnership assets of Chidester & Barras, and that the laborers and material-men were creditors of the firm, and the plaintiffs were individual creditors of Chidester; that Chidester & Barras were insolvent. The court then found the amount due each of the laborers and material men, classifying their claims in groups, but ordering the payment of all before the payment of any money to the plaintiffs. From this decree the plaintiffs appeal.

There is but little controversy as to the facts, but the discussion of law has taken a wide range. We think a few considerations are sufficient to resolve the case to a single question, or group of questions. In the first place, whatever may have been the law formerly, and however such a transaction may be regarded now in a court of law, it is settled that in equity an assignment of moneys not yet due or earned, but which are expected to be earned in the future under an existing contract, is binding and will be enforced. (*East Lewisburg Lumber & Mfg. Co. v. Marsh*, 91 Pa. St., 96; *Ruple v. Bindley*, 91 Pa. St., 296; *Taylor v. Lynch*, 5 Gray [Mass.], 49; *Payne v. Mayor*, 4 Ala., 333; *Greene v. Bartholomew*, 34 Ind., 235; *Spain v. Hamilton's Administrator*, 1 Wall. [U. S.], 604.) The principle of these cases has been fairly recognized by this court. (*Code v. Carlton*, 18 Neb., 328.) The recent case of the *Union P. R. Co. v. Douglas County Bank*, 42 Neb., 469, is not contrary to this rule. In that case the assignment was held subject to the claims of employes because the assignment was construed as an assignment of the contract *cum onere*, and not merely an assignment of moneys to be earned in the future under the contract. In determining priorities as between different assignments of this character, the general

rule is that that assignment which is first brought to the notice of the debtor has priority. Several of the above cases illustrate this principle. The assignment to Perkins and Spelts was undoubtedly founded on a valuable consideration, and in view of the principles already stated would be entitled to priority over the claims of the cross-petitioners, did they emanate from the same source and on the same account. It is suggested in argument that the cross-petitioners are entitled to priority because their work contributed to the creation of the fund, but this view is not tenable. Our mechanic's lien law does not apply to the construction of a court house. (*Ripley v. Gage County*, 3 Neb., 397; *Sample v. Hale*, 34 Neb., 220; *Lyman v. City of Lincoln*, 38 Neb., 794.) In the absence of a statute creating such a lien one obtains no specific lien upon a fund merely because his industry assisted in creating it.

The principal argument in favor of appellees is that the indebtedness to the plaintiffs was the individual indebtedness of Chidester, and that the assignment of the moneys accruing to Chidester and Barras to secure this individual debt of Chidester was inoperative as against the creditors of the partnership. It is certainly well settled in the jurisprudence of this state that when a partnership is dissolved or is insolvent its assets will in a court of equity be treated as a trust fund for the payment of partnership creditors, and that one partner or the creditors of one partner will not be permitted to divert the assets to the prejudice of the partnership creditors. (*Till's Case*, 3 Neb., 261; *Bowen v. Billings*, 13 Neb., 439; *Roop v. Herron*, 15 Neb., 73; *Caldwell v. Bloomington Mfg. Co.*, 17 Neb., 489; *Smith v. Jones*, 18 Neb., 481; *Rothell v. Grimes*, 22 Neb., 526; *Banks v. Steele*, 27 Neb., 138; *Tolerton v. McLain*, 35 Neb., 725.) The case of *Roop v. Herron, supra*, would, indeed, be very closely in point and decisive in favor of the appellees here, were it not that in the former case the indebtedness contracted by the individual partner was very

clearly his own debt, and was not used in any manner on behalf of the firm.

We, therefore, have two rules well established. The first that the assignment to the plaintiffs was one which, in equity, is valid, and would have priority over the claims of the cross-petitioners if all the claims emanated from the same source, and upon the same account. Second—That one member of an insolvent partnership, especially after dissolution, may not dispose of partnership property to the exclusion of partnership creditors. This brings us to the crucial questions in this case. Was the indebtedness to plaintiffs the individual debt of Chidester? Do the cross-petitioners occupy the position of partnership creditors? and, finally, is the fund in dispute partnership assets?

We have no doubt in resolving the last two questions. It was beyond the power of Chidester and Barras to dissolve their partnership in such a manner as to affect the rights of the county, or those of strangers, under the court house contract. This fact they recognized and did not seek to combat. While they arranged between themselves a special settlement of the matters growing out of this contract, it was recognized that Barras' liability to third persons continued and he took a bond to indemnify him therefrom. He also expressly authorized Chidester to use the firm name in prosecuting the contract. For the purpose of completing existing contracts a partnership continues after it is otherwise dissolved; and while the partners may change their relations as between themselves in regard to such contracts, their relations to third persons continue the same. We have no doubt that the fund in dispute, notwithstanding the agreement of Chidester and Barras as to its disposition, remained as between them, the county, and the cross-petitioners partnership assets.

The remaining question is one of greater difficulty. The appellees argue that the loan to Chidester cannot be treated as a partnership transaction because one partner,

after dissolution, can make no new contract; but we have seen that Chidester was given power to complete the existing court house contract, and incidentally, by necessary implication, the power to make new contracts with strangers for the purpose of completing that contract.

In *Mason v. Tiffany*, 45 Ill., 392, George B. Tiffany & Co. made a contract with Mason and others for the manufacture of a number of boilers. Before their delivery Tiffany died. The surviving partners, who continued the business in the old name, received the boilers and in the firm name executed notes for the purchase price. It was held that the estate of Tiffany was liable upon the notes because they were merely given in the fulfillment of a contract made before the dissolution.

In *Butchart v. Dresser*, 10 Hare [Eng.], 453*, A and B were partners as commission brokers, and also bought and sold shares on their own account. The partnership was dissolved, and thereafter A deposited with certain bankers shares which the firm before dissolution had contracted to buy, and obtained advances to pay for the shares on the security of the deposit, signing a power in the name of the firm to sell the shares if the debt was not paid in a certain time. It was held that in the completion of the contract made before dissolution one partner had the power to borrow in the firm name and pledge the partnership assets to secure payment. This case was affirmed on appeal. (*Butchart v. Dresser*, 4 De Gex, M. & G. [Eng.], 542.)

We are aware that in *Levi v. Latham*, 15 Neb., 509, this court held that one partner in a non-trading partnership cannot bind his copartner by a promissory note made in the firm name, unless he has express authority therefor, or the giving of such note is necessary to the carrying on of the business, or is customary in similar partnerships; but we think this case would fall within one of the exceptions. If the borrowing of this money was necessary to complete the court house contract, Chidester would have authority to

borrow it and pledge the firm's credit for its payment. We hold, therefore, that under the terms of the dissolution and the facts of the case Chidester had power to borrow money to complete the court house on the credit of the firm. The question is, did he do so? The note was signed by Chidester alone, and, as we have said, there is no evidence that the plaintiffs, in becoming sureties, relied on the use of the money in building the court house. They did rely on the assignment of the fund, but not on the personal credit of the partnership.

In *Habig v. Layne*, 38 Neb., 743, one partner purchased materials to be used in the construction of a building which was being erected by the partnership. The contract for the material was in writing and in the name of the individual partner. It was held that it was a question of fact for the determination of the jury whether the contract was that of the individual or of the firm.

In *Holland v. Fuller*, 13 Ind., 195, A and B had indorsed the paper of the firm C and D. C died. A and B then indorsed the individual paper of D on his own security alone. With the proceeds of this individual paper D paid off the partnership paper on which A and B were liable. D failed and assigned to A and B certain property, including assets of the late firm of C and D. It was held that the assignment of these assets was void and that A and B could not be substituted in the place of the original creditors of the firm. This case is authority for holding that the mere fact that Chidester used the proceeds of the note in the construction of the court house would not entitle the plaintiffs to rank as partnership creditors.

In *Hayden v. Cretcher*, 75 Ind., 108, after the dissolution of a partnership, one partner, who had agreed to pay the debts of the firm, borrowed money to pay the firm debts and executed a note in the firm name. The payee of the note did not lend the money on the credit of the firm or on that of the retiring partner. He advanced the

money before the note was executed and did not know that the note was to be in the firm name. It was held to be the individual debt of the borrowing partner, and the fact that the money was used to pay the firm's debts did not render the retiring partner liable.

We think, therefore, that the plaintiffs can claim nothing merely because the money was used for the purpose of the partnership. The question is not what was the money used for, but upon whose credit was plaintiffs' indorsement obtained. The transaction was with Chidester; they knew of the dissolution; they signed his individual note and in their petition in this action they recite that they signed the note "for the purpose of aiding the said Chidester to perform said contract * * * and thereby enable said defendant to procure a loan." The petition, then, in alleging the payment by the plaintiff of the note says: "Whereby the said W. J. Chidester became and is now indebted to the plaintiffs," and the prayer is for judgment against Chidester. The plaintiffs did not even make Barras a defendant. He came in by a petition of intervention. We think the finding of the trial court that this was the individual debt of Chidester is supported by the evidence. This being true, Chidester had no right, to the exclusion of partnership creditors, to pledge partnership funds to secure the debt, and the assignment was void as to the partnership creditors.

The appellants place much reliance upon the case of *Warren v. Martin*, 24 Neb., 273. We do not think the case in anywise conflicts with the view we have taken. All that case decides is that one partner may pay his individual debt out of the funds of the partnership when his interest justifies it, and that his creditor receiving partnership funds in payment will be protected either by the acquiescence of the other partners, or by ignorance of the fact that the partner paying the money was not authorized to pay it out of that fund. In this case there is no pre-

tense that the relations of the parties were not understood by the plaintiffs. They chose to become sureties for the individual indebtedness of Chidester; they knew the partnership had been dissolved except for the purpose of completing this contract, and they were bound to know that Chidester could not transfer to them partnership assets to secure his individual debt to the prejudice of partnership creditors.

JUDGMENT AFFIRMED.

NORVAL, C. J., not sitting.

CYRUS W. FISHERDICK V. ALEXANDER H. HUTTON.

FILED MARCH 5, 1895. No. 6401.

1. **Written Instruments:** ALTERATION: MATERIALITY. An alteration of a written instrument after its execution by one party thereto, without the knowledge or consent of the other, which neither varies its meaning nor changes its legal effect, is an immaterial alteration, and will not invalidate the instrument.
2. ——: ——: ——: QUESTION OF LAW. Whether an alteration is material or immaterial, is a question of law for the court.
3. ——: ——: ——: ——. It is error to submit the question of alteration to the jury, where the alteration is immaterial.

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

J. R. Webster and *Halleck F. Rose*, for plaintiff in error:

An alteration is immaterial when the law would supply the matter added. (*Burnham v. Ayer*, 35 N. H., 351; *Western Building & Loan Association v. Fitzmaurice*, 7 Mo. App., 283; *Goodenow v. Curtis*, 33 Mich., 505; *Bridges*

v. Winters, 42 Miss., 135; *Sharpe v. Orme*, 61 Ala., 263; *Crews v. Farmers Bank*, 31 Gratt. [Va.], 348; *Kline v. Raymond*, 70 Ind., 271; *Smith v. Lockridge*, 8 Bush [Ky.], 423; *Palmer v. Sargent*, 5 Neb., 223.)

Neither alterations nor erasures will be regarded when they are wholly unimportant, and the contract would be as valid without as with them. (*McKibben v. Newell*, 41 Ill., 461.)

Nor will the insertion of words in a writing be regarded when they are either entirely immaterial or only explanatory and do not alter the legal sense of the instrument. (*Krouskop v. Shontz*, 51 Wis., 204; *Robertson v. Hay*, 91 Pa. St., 242; *Gordon v. Sizer*, 39 Miss., 818; *Gardiner v. Hatback*, 21 Ill., 129.)

Sawyer, Snell & Frost, contra, cited: *Savings Bank v. Shaffer*, 9 Neb., 1; *Coit v. Churchill*, 61 Ia., 296; *Cox v. Palmer*, 1 McCrary [U. S.], 433.

NORVAL, C. J.

Defendant in error filed a mechanic's lien against lots 15 and 16 in Richard's Addition to the city of Lincoln, claiming a balance due him in the sum of $1,975, with interest thereon at seven per cent from August 25, 1890. Subsequently, suit was brought in the district court to foreclose said lien, and on February 28, 1891, during the pendency of the action, defendant in error, in consideration of the sum of $1,500, sold said mechanic's lien to the plaintiff in error, and assigned the same to him by writing duly acknowledged. The suit to foreclose the mechanic's lien was prosecuted to decree on the 13th day of November, 1891, and the court found and determined that the sum of $1,853.97, and no more, was due upon said lien, which was $288.08 less than the amount claimed to be due in said lien so filed and assigned as above set forth. Afterwards this action was brought by the plaintiff in error to recover

the said sum of $288.08, with interest as damages for the breach of covenants contained in the following written assignment of said mechanic's lien:

"LINCOLN, NEB., February —, 1891.

"For value received I hereby set over and assign to Cyrus W. Fisherdick my mechanic's lien against lots fifteen (15) and sixteen (16) in Richards' subdivision to the city of Lincoln, and the Coffman building thereon, recorded at page 267, book of mechanics' lien records, and I hereby authorize my assignee to collect, receipt for, and discharge said lien, and covenant the full amount therein named is due, and said claim and lien is valid, and that there is no set-off or defense thereto or deductions therefrom; *and I will pay in cash any deductions made from said claim of $1,975 in full amount of said deductions.*

"In presence of A. H. HUTTON.

"J. H. MCMURTRY."

The defendant interposes the defense that when he executed the assignment the words contained therein in italics, to-wit, "and I will pay in cash any deductions made from said claim of $1,975 in full amount of said deductions," were not contained in said written assignment, but have been since inserted without the knowledge or consent of the defendant. It is insisted by the plaintiff that the assignment has not been altered and changed, but was in precisely its present condition when signed and acknowledged by the defendant; and further, if the italicized words were interpolated after the execution of the instrument, as claimed by the defendant, the alteration was an immaterial one, and, therefore, the assignment is a valid and binding obligation.

At the trial the defendant testified that when he executed the assignment the words, "I will pay in cash any deductions made from said claim of $1,975 in full amount of said deductions," were not written therein. If they had been he would have seen them, because he read the paper

over before attaching his signature; that he executed the assignment in McMurtry's office.

J. H. McMurtry testified that the defendant came to his office to sell the mechanic's lien, and that witness told him if he would guaranty the amount, as it was in suit, and Coffman, the owner of the premises, said it was not due him, that he would purchase the claim for his principal; that the witness took the assignment to his clerk, Mr. Cecil, who was in an adjoining room, and had him write in the italicized words, when he brought the paper back and presented it to the defendant, who then signed and acknowledged it.

Mr. Cecil was called as a witness for the plaintiff, who testified as follows:

Q. Do you remember the day Mr. Hutton was there to execute this assignment, in your office?

A. Well, I don't remember the day. I remember the circumstance.

Q. Whose writing is this in?

A. It is in my own.

Q. In whose writing are those last two lines above Hutton's signature?

A. In my own.

Q. State whether or not you wrote this other before or after the name of Mr. Hutton was signed.

A. It was written before his signature was attached to the paper.

Q. State the circumstances under which that was written, as you remember it.

A. I had prepared a number of these copies,—that is in blanks, this was before the signing of them,—and had them in a drawer, and Mr. McMurtry came in the office—I occupied the north room and he the south room for his private office—and got one of these blanks and took it into his office, and in a short time came out and asked me to write those lines in there. He dictated as I wrote.

Q. Then what did he do with the paper?

A. He took the paper back in his office, in his private office.

On cross-examination the witness testified that the disputed words were written in the assignment before the defendant's signature was attached.

It will be observed that the evidence bearing upon the question of the alteration of the assignment was conflicting. The veracity of the witnesses was for the jury to pass upon, and they having returned a verdict in favor of the defendant, we must regard as established that the assignment was altered after its execution, although the testimony of the greater number of witnesses is to the effect that the paper is in the same condition now as when it was signed and delivered.

Exceptions were taken by the plaintiff in the court below to the giving by the court on its own motion the following instructions:

"1. The main question of fact to be by you determined from the evidence in this case is whether or not in the written assignment to the plaintiff of A. H. Hutton's mechanic lien against the Coffman block these words, 'and I will pay in cash any deductions made from said claim of $1,975 in full amount of said deductions,' were in said assignment before defendant A. H. Hutton signed and acknowledged the same.

"2. The law is that if a written instrument has been changed or altered in a material matter after its execution without the knowledge or consent of the person executing the instrument, such change or alteration so made renders such instrument nugatory and void.

"3. If you believe from the evidence in this case touching this matter that said words were written in said assignment after the same was executed by defendant Hutton, and so done without his knowledge or consent, then your verdict should be for the defendant.

"4. If you believe from the evidence that said words were in said assignment prior to its execution by said Hutton, then your verdict should be in favor of the plaintiff for the difference between $1,975, the face of the claim, and $1,853.97, the amount found due said Hutton on said mechanic's lien by the decree of this court of date November 13, 1891, to which amount of difference you should add interest at the rate of seven per cent per annum from said 13th day of November, 1891; and if you so find, render your verdict for the amount of said deduction from the face of said lien with the interest thereon as directed."

The giving of each of these instructions is assigned as error in the motion for a new trial and in the petition in error. The second instruction is doubtless correct as an abstract proposition of law, for it has been more than once decided by this court that a material alteration of a written contract after its execution and delivery by one of the parties to the agreement, without the consent of the other, invalidates the instrument, and that no recovery can be had thereon. (*Brown v. Straw*, 6 Neb., 536; *Davis v. Henry*, 13 Neb., 497; *Walton Plow Co. v. Campbell*, 35 Neb., 173.) It is not every alteration of an instrument that will have that effect. If the change is immaterial, or unimportant—that is, one which does not vary the legal effect of the document, or change its terms and conditions—it will be disregarded. An alteration is regarded as immaterial which only expresses what the law implies. The authorities are uniform in support of the rule just stated. (2 Parsons, Contracts, [8th ed.], 720; *Burnham v. Ayer*, 35 N. H., 351; *State v. Dean*, 40 Mo., 464; *Western Building & Loan Association v. Fitzmaurice*, 7 Mo., App., 283; *Hunt v. Adams*, 6 Mass., 519; *Moote v. Scriven*, 33 Mich., 505; *Bridges v. Winters*, 42 Miss., 135; *McKibben v. Newell*, 41 Ill., 461; *Gardiner v. Harback*, 21 Ill., 129; *Krouskop v. Shontz*, 51 Wis., 204; *Gordan v. Sizer*, 39 Miss., 805.) Tested by the rule above stated, were the instructions quoted applicable

to the case under consideration? The question was submitted to the jury for their determination, whether or not the words, "and I will pay in cash any deduction from said claim of $1,975, in full amount of said deduction," were added to said assignment subsequent to its execution, and further, if they found that they were so inserted, without the defendant's consent or knowledge, the plaintiff could not recover. The question is, therefore, presented whether the addition of the words referred to constituted a material alteration, for if they did not, it is evident they did not affect the liability of the defendant, and hence the instructions should not have been given. If the added words were eliminated from the instrument, what would be the measure of the defendant's liability? As already stated, the sum claimed in the mechanic's lien assigned to the plaintiff was $1,975, and interest thereon from the 25th day of August, 1890. The defendant did not guaranty the collection of the amount of the debt claimed to be due, on the lien, but, independent of the added words, he covenanted that the full amount therein named is due, and that there is no set-off or defense thereto or deductions therefrom. If the full amount of the claim had been correct and just, then the defendant would have incurred no liability by reason of the covenants contained in the assignment, whether the debt mentioned in the lien was uncollectible or not. But as there was a valid set-off against the claim, the defendant obligated himself to make good any and all deductions, by reason thereof. In other words, the measure of damages was the amount the claim was scaled down by the decree in the suit to foreclose the lien. It is insisted that the interpolated words limit the liability to the difference between the amount of the decree rendered and $1,975. If this contention is well founded, then the defendant is released from all liability by reason of the alteration of the assignment, for an alteration of a written contract, which has the effect to decrease the liability of the obligee, is a material one, and

vitiates the contract. (*Savings Bank v. Shaffer*, 9 Neb., 1.) The alteration of the assignment by the inserting of the words in question did not change the obligation of the defendant as it theretofore existed in any respect. He was still holden to pay the full amount of the deductions made from the claim. This is the plain import of the words added to the assignment after it was executed. It follows that the alteration was unimportant, and did not affect the liability of the defendant. Had the added words been entirely omitted the measure of plaintiff's recovery could have been no more, nor any less. Whether the alteration was material or not was a question for the court. (*Palmer v. Largent*, 5 Neb., 223.) The trial court therefore erred in submitting to the jury the question of the alteration of the assignment.

Complaint is made in the brief of the rulings of the court on the admission of the testimony, as well as the refusing of the instructions requested by the defendant; but the conclusion already reached makes it unnecessary to consider the assignments relating thereto. The judgment is reversed and cause remanded.

REVERSED AND REMANDED.

ALFRED ECKLUND, APPELLEE, V. ELIJAH J. WILLIS, APPELLANT, ET AL.

FILED MARCH 5, 1895. No. 6397.

1. **Confirmation of Sale.** Objections to the confirmation of a sale of real estate must be specifically assigned in the motion filed in the lower court to vacate the sale, or they will be unavailing.

2. ———: APPRAISEMENT: ATTACK. The appraisal value of property made under an order of sale can be assailed only for fraud.

3. ———: ———. Objection that the property was appraised too

high should be made and filed in the case with a motion to vacate the appraisement prior to the sale. (*Vought v. Foxworthy*, 38 Neb., 790; *Smith v. Foxworthy*, 39 Neb., 214.)

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

B. F. Johnson and *T. F. Barnes*, for appellant.

Thomas C. Munger, contra.

NORVAL, C. J.

This is an appeal from an order of the district court overruling the objections of the defendant Elijah J. Willis, to the confirmation of the sale of real estate made under a decree of foreclosure, and in confirming said sale. The following are the grounds set up in defendant's motion to set aside the sale:

1. The appraisement is irregular.
2. The appraisement is not in accordance with the law governing sheriffs' sales.
3. The return of the sheriff shows that the appraisers were not sworn as provided by law.
4. The property was not appraised at its fair value, but at about one-half its true value, as shown by the affidavits on file in above case in support of motion to vacate order appointing a receiver.
5. The entire proceedings relative to said sale are irregular and not in accordance with the provisions of the law governing sheriffs' sales.

The cause was submitted to this court without either briefs or oral argument, hence we are not advised which of the several grounds urged against the confirmation in the court below the appellant now relies upon for a reversal of the cause.

It is obvious that the first, second, and fifth objections contained in said motion are too general and indefinite to

call for consideration. In what respect the appraisement and the proceedings leading up to the sale are irregular and not in accordance with the statute relating to judicial sales is not pointed out. Objections to the confirmation of a sale of real property must be specifically assigned in the lower court, or they will be unavailing. (*Johnson v. Bemis*, 7 Neb., 224.)

The third exception to the confirmation is not sustained by the record, since the return of the sheriff to the order of sale recites that the appraisers were sworn by him to impartially appraise the interest of the defendants in the mortgaged premises.

The remaining ground of the motion, namely, that the property was appraised too low, is not well taken for three reasons: First—Affidavits were filed in the court below in support of, and in opposition to, the motion, but they have not been embodied in a bill of exceptions. Therefore, we cannot review the evidence upon which the district court based its decision. (*Aultman v. Howe*, 10 Neb., 8; *Walker v. Lutz*, 14 Neb., 274; *Bradshaw v. State*, 17 Neb., 147; *Vindquest v. Perky*, 16 Neb., 284; *Maggard v. Van Duyn*, 36 Neb., 862.) Second—The objection as to the value fixed by the appraisers was not made until after the sale, which was too late. It should have been urged before the sale was made. (*Smith v. Foxworthy*, 39 Neb., 214; *Vought v. Foxworthy*, 38 Neb., 790.) Third—The fourth assignment of the motion is insufficient, since it is not charged that the appraisers, or any one connected with the case, acted fraudulently in making the appraisal. RAGAN, C., in the case last cited, in passing upon the same question here presented, says: "Appraisers of property about to be sold under execution act judicially, and the value fixed by them on property appraised can only be assailed for fraud. Inadequacy of the appraised value alone is not sufficient cause for setting aside a sale in the absence of fraud. To justify the vacation of a sale on the ground that the appraisement was

too low, the actual value of the property must so greatly exceed its appraised value as to raise a presumption of fraud. All the affidavits filed in this case on the question of the value of the property were immaterial. There was no averment in the motion to set the sale aside of any fraudulent conduct on the part of the appraisers in making this appraisement; nor averment of any fraud or unfair means resorted to by the appraisers at the sale, or other party to the suit, conducing to the making of this appraisement. No facts were stated in the affidavits showing any fraudulent conduct on the part of any one in the making of the appraisement, nor can any such inference be drawn from the facts stated. The appraisement is assailed for error of judgment upon the part of the appraisers, and this furnishes no ground for setting the sale aside."

No error was committed in overruling the motion to vacate the sale in the case at bar, and the order appealed from is, therefore,

AFFIRMED.

PAUL STEIN ET AL. V. JOHN N. VANNICE ET AL.

FILED MARCH 5, 1895. No. 6060.

1. **Instructions** must be considered together and not by selection of detached paragraphs thereof.
2. **———: HARMLESS ERROR.** A slight error in an instruction will not cause a reversal of the judgment, where it is manifest the party complaining was not prejudiced thereby.
3. **An assignment of error** for the overruling of a motion for new trial is bad, if it fails to specify to which of the several points set up in the motion the assignment applies. (*Glaze v. Parcel*, 40 Neb., 732.)
4. **Bill of Exceptions: TIME OF SERVING: EXTENSION.** It is

not error to deny a motion for the extension of time for preparing and serving a bill of exceptions, where the party seeking such extension has not used due diligence in that behalf.

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

G. A. Rutherford and *H. B. Holsman,* for plaintiffs in error.

James B. Sheean and *John H. Grossman, contra.*

NORVAL, C. J.

This action was instituted in the court below by the defendants in error against Paul Stein, as constable, and Herman Busch and Thomas Price as sureties upon his official bond. There was a trial to a jury, with a verdict in favor of the plaintiffs below in the sum of $310. The defendants filed a motion for a new trial, which was overruled by the court, and judgment was entered upon the verdict. The defendants prosecute error to this court. It appears from the pleadings in the case that in an action of forcible detention brought against the defendants in error before a justice of the peace a writ of restitution was placed in the hands of Paul Stein, as constable, for service; that in executing the writ and removing the said John and Carrie Vannice and their personal effects from the premises occupied by them it is alleged that said Stein, while under the influence of liquor, did carelessly, negligently, and willfully break and destroy the furniture and household goods belonging to the said Vannices. This suit is to recover the damages thereby sustained.

The petition in error contains three assignments. The first relates to the giving of the sixth paragraph of the instructions, which is in the following language:

"6. If you find for the plaintiffs under the evidence and instructions of the court, the measure of plaintiffs'

damages, if any, is the injury in dollars and cents which the preponderance shows occurred by reason of the plaintiff's (*sic*) negligent and careless handling and removal of plaintiffs' household goods."

The foregoing paragraph of the charge was not carefully or skillfully drawn, yet it is not believed that the jury could have been, or were, in the least misled. The trial judge in writing the instruction inadvertently used the word "plaintiff's" instead of "defendant's" before the word "negligent." It is a familiar rule that instructions must be considered together, and not by selections of detached paragraphs thereof. (*Blakeslee v. Ervin*, 40 Neb., 130; *Love v. Putnam*, 41 Neb., 86.) Reading this instruction in connection with the remainder of the charge, it is difficult to believe that the jury understood that the plaintiffs were entitled to recover damages from the defendants for their own negligence in handling their own goods. The writing of the word "plaintiff's" was a mere *lapsus calami*, and to hold that the defendants below were prejudiced thereby would cast an unmerited reflection upon the intelligence of the members of the jury. Had the defendants shown that the defendants in error, in a careless and negligent manner, broke their own furniture, the error in this instruction might have been prejudicial; but inasmuch as the evidence adduced on the trial is not embodied in a bill of exceptions, no prejudicial error is shown. The instruction is further complained of by reason of the use of the words "the injury in dollars and cents." The measure of plaintiffs' recovery was the difference in value of the property before and after the injury. It would have been better had the rule been so stated in the instruction, instead of in the language in which it was expressed; but no instruction was requested by the plaintiffs in error upon this point, hence the omission to so charge is not reversible error. (*German Nat. Bank of Hastings v. Leonard*, 40 Neb., 676; *Laing v. Nelson*, 40 Neb., 252.)

The second assignment of the petition in error is in this language: "The court erred in overruling the motion for a new trial." This assignment is too indefinite to be considered, since there are five separate and distinct grounds stated in the motion for a new trial. A petition in error, to be available, must assign alleged errors with particularity. The second assignment of error does not specify to which of the several points set up in the motion for a new trial the assignment applies, and is therefore bad. (*Glaze v. Parcel*, 40 Neb., 732.)

The remaining assignment of error relates to the overruling of the motion of the plaintiff in error Bush for additional time to prepare and serve a bill of exceptions in the case. This assignment is without merit. The cause was tried at the September, 1892, term of the district court, and on the overruling of the motion for a new trial at the same term the defendants were given forty days from the adjournment of the court *sine die* to reduce their exceptions to writing. No steps, however, were taken to that end by either of the defendants. During the following February term of the court a motion for additional time to prepare a bill of exceptions was presented to the court, which was overruled. The affidavit filed in support of the motion contains no showing of diligence, but, on the contrary, it appears that no effort was made by any of the defendants to obtain a bill of exceptions. It is only upon a showing of due diligence by the party seeking the settlement of a bill of exceptions that the court or judge is authorized to extend the time for such settlement after the expiration of the first forty days. (Code, sec. 311.) It follows that there was no error in denying the motion for an extension of time. The judgment is

AFFIRMED.

CONTINENTAL BUILDING & LOAN ASSOCIATION OF KANSAS CITY, MISSOURI, APPELLANT, V. WARD S. MILLS ET AL., APPELLEES.

FILED MARCH 5, 1895. No. 7478.

Appeal: FAILURE OF CLERK TO MAKE TRANSCRIPT: EFFECT. Where a party free from fault or laches is prevented from having his appeal docketed in the appellate court within the statutory period solely through the neglect or failure of the proper officer to prepare the transcript of the proceedings, the law will not permit him thereby to be deprived of his appeal.

MOTION by appellees to dismiss appeal from a decree of the district court of Lancaster county on the ground that the cause was not docketed in the supreme court within six months from rendition of judgment. Appellant resisted the motion on the ground that the delay in docketing the appeal resulted solely from the failure of the clerk below to prepare a transcript. *Motion overruled.*

Mockett, Rainbolt & Polk, for the motion.

Stevens, Love & Cochran, contra.

NORVAL, C. J.

This was an action to foreclose a real estate mortgage. One of the defenses was that the loan was tainted with the vice of usury. The issues were tried on June 30, 1894. The defense of usury was sustained and a decree of foreclosure was entered. The plaintiff appeals, the transcript being filed in this court January 16, 1895. The cause is submitted upon the motion of the appellees to dismiss the appeal, for the reason the same was not docketed in this court within six months after the entry of the decree.

The statute governing appeals to this court in actions in equity (section 675 of the Code) provides: "The party ap-

pealing shall, within six months after the date of the rendition of the judgment or decree, or the making of the final order, procure from the clerk of the district court and file in the office of the clerk of the supreme court a certified transcript of the proceedings had in the cause in the district court, * * * and have the said cause properly docketed in the supreme court; and on failing thereof, the judgment or decree rendered or final order made in the district court shall stand and be proceeded in as if no appeal had been taken." It is the established doctrine in this, as well as other states, that the provision of a statute limiting the time within which appeals must be taken is jurisdictional in its nature, and that the courts cannot ordinarily enlarge or extend the time for perfecting an appeal. (*Verges v. Roush*, 1 Neb., 113; *Glore v. Hare*, 4 Neb., 131; *Gifford v. Republican V. & K. R. Co.*, 20 Neb., 538; *Lincoln Brick & Tile Works v. Hall*, 27 Neb., 874; *Miller v. Camp*, 28 Neb., 412; *Fitzgerald v. Brandt*, 36 Neb., 683; *Omaha Loan & Trust Co. v. Ayer*, 38 Neb., 891; *Moore v. Waterman*, 40 Neb., 498; *Record v. Butters*, 42 Neb., 786.)

In the case at bar the evidence introduced on the hearing of the motion conclusively shows that counsel for appellant, on the 13th day of December, 1894, requested the clerk of the district court to prepare a transcript of the proceedings in the case, for the purpose of taking an appeal, notifying him at the time that it must be completed so that it could be filed in this court during said month; that the clerk promised to comply with said request and then directed one of the employes in his office to prepare it; but owing to the press of other business he failed and neglected to make the transcript until after the expiration of six months from the date of the decree, although it could have been prepared in less than two days after it was ordered; that an attorney for appellants called again upon the clerk of the district court on December 30, and demanded the transcript, and was informed that the order for the same

had been overlooked. It also appears that appellant has not been guilty of any laches, but as soon as the transcript was completed it was filed in this court, and also that the appeal has not been taken for delay.

The proposition presented for our consideration is whether, in the light of the adjudications in this state cited above, a party who, without any fault or negligence on his part, is prevented by the act or neglect of the clerk of the trial court from perfecting an appeal within the time limited by law, can be relieved by the court from the operation of the statute? In other words, must the provison of the law fixing the time for taking appeals be enforced in all cases as it is written, even though the delay is caused alone by the neglect and omission of the clerk of the trial court to make in proper time a transcript of the record? We do not think that the decisions already mentioned are decisive of the question, or if adhered to would deprive the plaintiff in this case of an appeal. In each of the cases to which reference has been made the appellant was not diligent in prosecuting his appeal, and the delay in docketing the same was not attributable to any action or want of action on the part of the appellees, or the trial court, or any officer thereof; but that the failure to file the appeal in the time limited by statute was the appellant's fault. Doubtless, the court cannot aid a party in fault or relieve him of the consequences of his own negligence. *Gifford v. Republican V. & K. R. Co.*, *Miller v. Camp*, *Lincoln Brick & Tile Works v. Hall*, *Fitzgerald v. Brandt*, and *Omaha Loan & Trust Co. v. Ayer*, *supra*, expressly recognize the principle that a party will not be deprived of an appeal when it clearly appears that the failure to perfect the same in time is not attributable to his own laches or negligence, but is occasioned by the default of the trial court or its officers. Thus, in *Lincoln Brick & Tile Works v. Hall*, *supra*, the court, in construing section 1011 of the Code governing appeals from judgments before justices of

the peace, uses this language: "No doubt where due diligence is shown in demanding a transcript, and from any cause the trial court delays the delivery of the same for so long a time that it will be impossible to file it within the thirty days, the court will relieve the appellant, because the fault is with the court." Judge Elliott, in his valuable work on Appellate Procedure, at section 112, uses this language: "The rule that the court cannot enlarge the time for taking an appeal must be regarded as established, but the court may, nevertheless, relieve a party in the proper case against fraud or accident. In relieving a party against fraud or accident the court does not extend the time for taking the appeal by breaking down the provisions of the statute limiting the time within which appeals must be taken. The principle applied is a familiar one, for it is very often applied to the statute of frauds and to the general statute of limitations. The fraud of a party will prevent him from taking advantage of either of the statutes named, and so it will in cases where the statute limits the time for taking appeals." And the learned author at section 117 observes: "It is said in general terms by the authorities to which we have referred, and by many more, that the time for taking an appeal cannot be extended by agreement or by order of the court, but, as we have shown, this rule, general and firmly settled as it is, does not always preclude an appeal, and to the instances upon which it does not fully operate we add another of a different nature. Where the time is lost without the fault of the party, and solely by reason of the action or non-action of the court, the statute does not operate, because the loss of time is not attributable to the acts of the parties. The rule that the delay or wrong of the court shall not prejudice a party rests upon the maxim, 'An act of the court shall prejudice no man.' Where, however, the fault of the party concurs with that of the court, the maxim will not prevail to save an appeal not taken within the time fixed by law." The

text is sustained by the decisions of the courts of other states. (*Fox v. Fields*, 12 Heisk. [Tenn.], 31; *Craddick v. Pritchett*, Peck [Tenn.], 17; *Holt v. Edmondson*, 31 Ga., 357; *Moyer v. Strahl*, 10 Wis., 74; *Laymance v. Laymance*, 15 Lea [Tenn.], 476; *Smythe v. Boswell*, 117 Ind., 365.)

The general doctrine above stated has been asserted and enforced in this court more than once. In *Dobson v. Dobson*, 7 Neb., 296, a party was prevented from taking his appeal in time by reason of the absence of the county judge from the county, before whom the cause was heard. Upon the return of the judge the transcript was made out and filed in the district court, and on motion of the appellee the appeal was dismissed for the reason the same was not taken within the time required by statute. This court reinstated the appeal. In the syllabus it is stated: "Where a party has been prevented from complying with the legal requisites to obtain an appeal, by the default or absence of the justice or judge of the court in which the cause is pending, and not by any default or laches on his part, the appeal may be taken and perfected after the expiration of the time limited by statute, and such appeal must be treated in the appellate court as though it had been taken within the time prescribed by law."

Republican V. R. Co. v. McPherson, 12 Neb., 480, is quite in point. There certain real estate has been condemned by the railroad company for its right of way and the damages sustained by reason thereof were assessed by the commissioners appointed by the county judge for that purpose. At various times within sixty days after the filing of the award of the commissioners with the county judge the land-owner notified said judge of her intention to prosecute an appeal to the district court, and she tendered him the fees and demanded a transcript of the proceedings, but the county judge neglected and refused to furnish such transcript until after the expiration of the sixty days limited

by law for perfecting the appeal. As soon as the transcript was procured it was filed with the clerk of the district court. The appeal was dismissed for the reason that it was not filed in time, and subsequently it was reinstated by the district court. On review of the case, this court said: "The petition and affidavits show diligence on the part of the appellant, and that she made every effort to perfect the appeal within the time limited by statute, but was prevented by the negligence, or failure to perform his duty, of the county judge. The case therefore falls within the rule laid down in *Dobson v. Dobson*, 7 Neb., 296, and is sufficient to entitle the party to an appeal."

In *Parker v. Kuhn*, 19 Neb., 396, it is said: "It is a well established rule that where an individual in the prosecution of a right does every thing which the law requires him to do, and he fails to attain his right by the neglect or misconduct of a public officer, the law will protect him."

The case of *Cheney v. Buckmaster*, 29 Neb., 420, was this: On September 4, 1888, judgment was rendered against the plaintiffs in error in the county court, and within four days thereafter they filed an appeal bond, which was approved, and demanded a transcript for the purpose of taking an appeal. The judge failed and neglected to make out a transcript until October 11, on which date it was filed in the district court, and the appeal was docketed. The failure to perfect the appeal in proper time was without any fault of the appellants, but was caused solely by the failure of the judge to prepare the transcript. The district court, on motion of the appellee, dismissed the appeal on the ground that it was not filed in the district court within thirty days after the rendition of the judgment. This court held that the appeal was erroneously dismissed, and reinstated it. To the same effect is *Omaha Coal, Coke & Lime Co. v. Fay*, 37 Neb., 68, the first paragraph of the syllabus of the opinion in which case is as follows: "A defeated party to an action in the county court, who promptly

orders a transcript of the proceedings to be prepared for the purpose of appealing the case, will not be denied the right of appeal because the county judge fails to prepare the transcript within thirty days after the rendition of judgment."

The same principle running through the above cases was recognized in *Bickel v. Dutcher*, 35 Neb., 761. It was there decided, overruling *Horn v. Miller*, 20 Neb., 98, that the time within which an appeal may be taken from the district court to this court begins to run when the clerk spreads the decree upon the court journal, and not from the announcement of the decision by the court.

A party who has not been negligent cannot be deprived of an appeal to this court either by the failure or refusal of the clerk to enter the decree upon the records of the court within six months after it was pronounced, or for the neglect of such clerk to make a transcript of the proceedings in proper time. The record in this case discloses that the omission to docket the appeal in this court within the statutory period was not through any fault of the appellant, but was caused solely by the neglect of the clerk of the district court to prepare and deliver to it a transcript of the proceedings when demanded. The law will not permit appellant to be deprived of its appeal. In so holding we do not extend the time fixed by law for taking an appeal, but merely declare that the statute does not operate to the appellant's prejudice, since the loss of time is not attributable to its acts, but is chargeable solely to the neglect or non-action of a public officer whose duty it was to make the transcript. The motion to dismiss the appeal is overruled.

MOTION OVERRULED.

CHRISTIAN LIHS V. AUGUST LIHS.

FILED MARCH 5, 1895. NO. 6057.

1. **Witnesses:** HUSBAND AND WIFE: CANCELLATION OF DEED. Under the statutes of this state a wife cannot be examined as a witness against her husband, over his objection, in a suit brought by the latter against his son to obtain the rescission of a deed alleged to have been executed by the father to the son upon a condition subsequent.
2. **Trial to Court:** ADMISSION OF INCOMPETENT TESTIMONY: HARMLESS ERROR. The admission of the testimony of a disqualified witness, over objections and exceptions, in a trial to the court without the intervention of a jury, is not sufficient ground for reversal, if sufficient material and competent evidence was admitted to support the finding and judgment.
3. **Review:** CONFLICTING EVIDENCE. Where the evidence is conflicting, but sufficient competent evidence is in the record to support the finding, the judgment will not be set aside by a reviewing court.

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

Wilbur F. Bryant, for plaintiff in error.

NORVAL, C. J.

This was a suit by Christian Lihs against August Lihs and Ernestine Lihs to procure the rescission of a conveyance of one hundred and sixty acres of land in Cedar county, theretofore alleged to have been executed by the the plaintiff to August Lihs upon a condition subsequent. The amended petition alleges, in substance, that on the 19th day of December, 1882, plaintiff was the owner in fee of the land in dispute, and occupied the same, together with his wife, the said Ernestine, his son, the said August, and an unmarried daughter, as a homestead; that on said date the plaintiff and his said wife conveyed to the defendant,

August Lihs, said premises by deed of general warranty in consideration that the plaintiff, his wife, his unmarried daughter, and his said son should remain upon said premises, and occupy the same as a home, and that said August should support and maintain plaintiff and his wife during their natural lives; that the defendant, August Lihs, on the 19th day of July, 1887, combining and confederating with his mother, and without any valid excuse or provocation, drove the plaintiff from the premises, and ordered him never to return, and since said time said August has refused the plaintiff a home and shelter upon said premises and refuses him support and maintenance, although the plaintiff, by reason of his being aged and infirm, is unable to support himself. The prayer for relief is as follows: "Wherefore the plaintiff prays that the defendant, August Lihs, be required to reconvey the said premises to the said plaintiff, and that the title to the same may be confirmed in the said plaintiff and quieted in him, and for such other and further relief as justice and equity may require." The defendant, August Lihs, for answer, admitted plaintiff was the owner of the land and conveyed the same by deed of general warranty to August, and denied all other allegations contained in the amended petition. For further answer it is alleged "that neither this defendant nor any person authorized by him or the plaintiff ever made, entered into, or signed any contract, agreement, or memorandum thereof, in writing for the sale of said premises or any part thereof, other than the deed aforesaid; that said deed was made upon a good and valuable consideration, but was made on the part of said plaintiff with the intention to defraud, hinder, and delay creditors of the plaintiff and persons about to become creditors of the plaintiff." Plaintiff replied by a general denial. The defendant Ernestine Lihs demurred to the amended petition, which was sustained by the court, and the plaintiff having elected to stand upon his pleading, the court dismissed the action as

to the defendant Ernestine. The cause proceeded to trial against the son alone, and the court found the issues joined against the plaintiff, and dismissed the bill. A motion for a new trial was overruled, to which an exception was taken by the plaintiff, and he prosecutes error to this court.

After the plaintiff had introduced his proof the defendant called Ernestine Lihs, the wife of the plaintiff, as a witness in his behalf, and she was sworn, and testified in effect that at and prior to the time the deed was executed by herself and husband, there was no agreement or contract entered into whereby August covenanted to support and maintain the plaintiff and his wife so long as they should live, or that they were to remain upon the farm; that the plaintiff had shot and injured Mr. Lentz' boy; that a suit for damages against the plaintiff was, by reason thereof, anticipated, and that was the inducement for making the deed. Counsel for the plaintiff objected at the time to Mrs. Lihs testifying, on the ground that she is incompetent to testify against her husband, which objection was overruled by the court, and an exception was taken to the decision. This is the sole error relied upon for reversal of the judgment.

Section 331 of the Code of Civil Procedure declares: "The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by one against the other, but they may in all criminal prosecutions be witnesses for each other."

The foregoing provision was under consideration in *Niland v. Kalish*, 37 Neb., 47, and *Greene v. Greene*, 42 Neb., 634. The first case was an action by the creditors of Soloman Kalish to set aside conveyances claimed to have been fraudulently made by him to his wife. It was held that it was incompetent for Mrs. Kalish to testify against her husband, without his consent, as to facts tending to show the transfer was voluntary and fraudulent as to the creditors of

the husband. The second case was an action by a husband against the wife for the specific performance of a contract for the conveyance of real estate. It was ruled that the statute above quoted prohibited the husband from being examined as a witness against his wife over her objection. In the case at bar the wife was not called as a witness by the husband, but her testimony was against him, and, therefore, under the statute and the decisions mentioned above was clearly incompetent, and should have been excluded. True, she was not, at the time of the trial, a party to the record, but that does not change the rule. That fact is a stronger reason, it seems to us, why her testimony should not have been received. Section 328 of the Civil Code provides: "Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, civil and criminal, except as otherwise herein declared. The following persons shall be incompetent to testify. * * * Third—Husband and wife, concerning any communication made by one to the other during marriage, whether called as a witness while that relation subsisted or afterwards," etc. Section 332 declares: "Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony, any such communication made while the marriage subsisted." It is too plain to admit of argument that neither husband nor wife can give testimony relating to communications between them, nor can either the husband or wife testify, one against the other, in a case like the one at bar.

It only remains to be determined whether the judgment should be reversed for the error committed by the district court in permitting Mrs. Lihs to testify in the case. This court has repeatedly said that a cause tried to the court without the intervention of a jury will not be reversed for the admission of incompetent or irrelevant testimony alone.

(*Enyeart v. Davis*, 17 Neb., 228; *McConahey v. McConahey*, 21 Neb., 463; *Willard v. Foster*, 24 Neb., 213; *Sharmer v. Johnson*, 43 Neb., 509; *Stabler v. Gund*, 35 Neb., 648; *Tower v. Fetz*, 26 Neb., 710; *Ward v. Parlin*, 30 Neb., 376; *Dewey v. Allgire*, 37 Neb., 6; *Liverpool & London & Globe Ins. Co. v. Buckstaff*, 38 Neb., 146; *Courcamp v. Weber*, 39 Neb., 538; *Whipple v. Fowler*, 41 Neb., 675.) The rule in this state is that where the record discloses sufficient legal and competent evidence to sustain the finding, the judgment in a case where there was a trial without a jury will not be disturbed on the ground that the court admitted, over the objection of the party complaining, immaterial or incompetent evidence. (*Richardson v. Doty*, 25 Neb., 420; *Bilby v. Townsend*, 29 Neb., 220; *Commercial Nat. Bank of St. Paul v. Brill*, 37 Neb., 626.) The same rule prevails where an incompetent witness is permitted to testify, over proper objections and exceptions, in a cause where a jury is waived. The admission of the testimony of such a witness will not of itself work a reversal, but this court on a review of the cause will disregard such testimony in passing upon the question whether the evidence supports the findings of the trial court, and if found that the judgment is not sustained by sufficient competent evidence, it will be set aside. (*Commercial Nat. Bank v. Brill, supra.*) The defendant, August Lihs, and Ella Dycus, the married daughter of the plaintiff, each testified that there was no agreement or understanding to the effect that August should support his father in consideration of the conveying of the land to the son, but that the deed was made for the sole purpose of preventing the farm from being taken by Mr. Lentz, in case he should obtain a judgment for damages against the plaintiff herein, for shooting Mr. Lentz' boy. The plaintiff while upon the witness stand admitted that he executed the deed for that purpose. The evidence bearing upon the question whether the conveyance was made upon the condition that the son should

support his father, that the latter should remain upon the land, and that he was driven off by the defendant, is conflicting. Yet, disregarding the testimony of Mrs. Lihs, as we must, still there was sufficient proof in the record upon which to base a finding for the defendant. The judgment is, therefore,

AFFIRMED.

NATIONAL CORDAGE COMPANY V. ALEXANDER SIMS ET AL.

FILED MARCH 5, 1895. NO. 6317.

1. **Conditional Sales**: RECORD. The design of the provision of section 26, chapter 32, Compiled Statutes, requiring conditional sales of personal property to be in writing and filed with the county clerk in order to be valid as against purchasers and judgment creditors, is to notify third persons, who might otherwise be defrauded, that the title thereof remains in the vendor.
2. ———: ———. Said provision has no application where the relation of vendor and vendee does not exist.
3. **Agency.** Where a contract provides for the consignment of goods to be sold on commission for prices fixed by the consignor and returns at stated periods, the consignee guarantying payment thereof, the relation which the law implies is that of an agency for sale upon a *del credere* commission; and not that of vendor and vendee.
4. ———: FACTORS AND BROKERS. The relation of a factor for the sale of goods is that of a trustee for his principal with respect to the property entrusted to him.
5. ———: ———. Property in the possession of a factor to be sold for the benefit of his principal is not liable to execution or attachment in satisfaction of the debts of the former.
6. ———: CONSTRUCTION. Agreement, set out in the opinion, *held*, not a conditional sale but to create a *del credere* agency only.

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

Uriah Bruner, for plaintiff in error.

T. M. Franse and *P. M. Moodie, contra*, cited, contending that the property was subject to attachment as Yoder's: *Forrest v. Nelson*, 108 Pa. St., 481; *Peck v. Heim*, 17 Atl. Rep., [Pa.], 984; *Carleton v. Sumner*, 4 Pick. [Mass.], 516; *Dresser Mfg. Co. v. Waterston*, 3 Met. [Mass.], 18; *Mixer v. Cook*, 31 Me., 340; *Bowen v. Burk*, 13 Pa. St., 146; *Scudder v. Bradbury*, 106 Mass., 427; *Barry v. Palmer*, 19 Me., 303; *Fuller v. Bean*, 34 N. H., 290, 303.

POST, J.

This was an action of replevin in the district court for Cuming county, by which the plaintiff below, plaintiff in error, the National Cordage Company, sought to recover possession of 9,100 pounds of binder twine. The facts essential to an understanding of the questions presented for determination are as follows: On the 7th day of June, 1891, the plaintiff appointed one B. Y. Yoder agent for the sale on commission of its binder twine at West Point, in said county. During the season of 1891 about 20,000 pounds of twine were consigned by the plaintiff to Yoder for sale under the terms and conditions of his agency, and the property now in controversy is the portion thereof undisposed of at the close of that season. The several defendants claim through an order of attachment issued by A. Briggs, a justice of the peace for Cuming county, in an action by L. E. Chubbuck as plaintiff and against B. Y. Yoder as defendant. The appointment above mentioned is in writing and is here set out:

"The National Cordage Co. of New York City and Chicago, Ill. (a corporation organized under the laws of the state of New Jersey), does hereby appoint B. Y. Yoder to be its agent at West Point, in the county of Cuming, state of Nebraska, for the sale of binder twine for and dur-

ing the season of 1891 only. And said agent hereby contracts and agrees to do and perform as follows:

"1st. To keep on hand, in proper season, whatever twine may be required at West Point aforesaid, during said season, and to sell or be interested in the selling of no twine whatever except that obtained from The National Cordage Co. so long as the said company can furnish the same.

"Non-compliance by said agent with these provisions, forfeits all commission or remuneration for services rendered which may be or may become due said agent under this contract, in addition to such damages as may be allowed by law.

"2d. All such twine shall be sold for cash on delivery, at the following prices, and said agent hereby orders shipment to be made by The National Cordage Co. at once:

5,000 lbs. sisal binder twine, at 11 cts. per lb. gross weight.

6,000 lbs. S. D. manilla binder twine, at 13½ cts. per lb. gross weight.

6,000 lbs. pure manilla binder twine, at 14½ cts. per lb. gross weight.

And said agent shall pay all freight and transportation charges from Omaha on all twine ordered under this contract.

"3d. All money received by said agent, accruing from the sale of such twine, shall be and shall remain the property of said The National Cordage Co., and all such twine shall be and remain the property of said The National Cordage Co., until sold pursuant to the terms and conditions of this contract.

"4th. Said agent shall promptly remit to The National Cordage Co., at Chicago, Ill., on the first day of each month, and whenever requested at other times, all moneys received for twine sold under this contract, and shall make no deduction therefrom, and have no lien or interest on, in, or to any money so received. And a failure to so remit shall not be waived by any person whomsoever, nor shall a de-

mand therefor be necessary, or a failure to demand be construed as a waiver of this condition.

"5th. No twine shall be delivered by said agent to any person or persons, or corporation, except upon a *bona fide* sale of the same for cash.

"6th. If any twine ordered by said agent under this contract shall remain on hand in original packages at the close of the season, to-wit, on Sept. 1st, 1891, said agent shall keep said twine safely stored in some dry and secure place until August 1, 1892, and shall keep the same continually insured in some responsible insurance companies, in the name of The National Cordage Co., to the amount of invoice price, at all times subject to the order of The National Cordage Co., free of charge for storage, insurance, or local taxes, and shall have no claim against said The National Cordage Co. for freight and transportation charges paid by said agent on such twine, and shall deliver the same at the nearest railroad depot without charge, on demand.

"7th. In consideration of the faithful performance of all the above conditions, The National Cordage Co. hereby agrees to use its best endeavors to supply all twine ordered during said season by said agent, and to pay said agent as his commission, in cash, at settlement, on or after Sept. 1st, 1891, a sum equal to $2\frac{3}{4}$ cents per pound for all twine sold in conformity with this contract.

"8th. But if the said agent sells and settles for all twine received by him, in cash, and the money is received by said The National Cordage Co., in Chicago, on or before Nov. 1, 1891, a further commission of $\frac{1}{4}$ cent per pound is to be paid said agent; otherwise this provision to be void and of no effect.

"9th. The said agent agrees, at his own expense, to insure all twine immediately upon its receipt by him, to the amount of invoice price, in responsible insurance companies in the name of The National Cordage Co., and to keep the same continually insured, while said twine remains in his possession.

"10th. It is mutually agreed by the parties hereto that this contract cannot be changed in any of its provisions by any one in the employment of The National Cordage Co., nor will any promises or agreements, either written or verbal, be binding upon the said The National Cordage Co., until approved by one of its officers or manager.

"Dated at West Point this 7th day of July, A. D., 1891.

"THE NATIONAL CORDAGE CO.,
"By H. W. VAN SICKEL,
"*Special Agent.*
"B. Y. YODER.

"Approved: THE NATIONAL CORDAGE CO.,
"By B. TIMMEM."

On the 13th day of October, 1891, Mr. Van Sickel, the plaintiff's agent, visited West Point, when an invoice was taken, showing twine on hand as follows: sisal, 5,250 pounds; S. D., 3750 pounds; manilla, 100 pounds; total, 9,100 pounds. On the 1st day of November following Yoder settled for the twine sold, giving in part payment therefor two notes of $400 each, signed by Joseph Faunigle, and which at the date of the trial of this cause were still unpaid. Reference is here made to the Faunigle notes for the reason that they are claimed by defendants to have been received in satisfaction for the twine in controversy, from which it is argued that the title to said property thereby passed to Yoder and that it was accordingly liable to be attached on process against him; but for that contention we can perceive no foundation in the record. It is clearly established by the undisputed evidence of Van Sickel, as well as by the statement of the account with Yoder, that the consideration for said notes was the twine sold, and not that on hand at the date of settlement. But the real controversy is with respect to the character of the transaction between Yoder and the plaintiff company. It is strenuously insisted by the defendant that the evidence discloses a mere conditional sale of the twine, which, not hav-

ing been filed in the office of the county clerk in accordance with the provisions of section 26, chapter 32, Compiled Statutes, must be held void as against attaching creditors. The distinction between conditional sales and consignments of personal property is frequently overlooked by text-writers as well as judges. Perhaps no sounder definition of a conditional sale is to be found in the books than that approved by Mr. Newmark in his valuable work on the Law of Sales, section 19: "Whenever it appears from the contract between the parties that the owner of personal property has transferred the possession thereof to another, reserving to himself the naked title thereof, solely for the purpose of securing payment of the price agreed upon between them, the contract is necessarily a conditional sale and not a bailment." Such an agreement is obviously within the provisions of our registration laws, and must be filed in order to protect the seller against purchasers and execution creditors without notice of the vendee in possession. The manifest purpose of the statute in providing for the filing of the contract is to notify third parties that the title of the property remains in the vendor, and to thus protect persons who might otherwise be defrauded. (*Dyer v. Thorstad*, 35 Minn., 534.) And that it contemplates cases only in which the relation of vendor and vendee exists,—that is, where the title to the property involved is intended to pass from one party to the other upon the performance of the conditions named,—is apparent from the act itself. The law implies a mere consignment of goods for sale upon a *del credere* commission, and not a sale thereof where the contract provides that the consignee shall receive them and return periodically to the consignor the proceeds of sales at prices charged by the latter, the consignee guarantying payment therefor. (Mechem, Agency, 14, 986*a*; Newmark, Sales, 25; *McClelland v. Scroggin*, 35 Neb., 536, and cases cited.) There is in the contract here involved no suggestion whatever of the relation of vendor and vendee,

or of facts from which Yoder could acquire title to the twine in controversy upon the happening of contingencies near or remote. He was, in short, what the contract implies, a mere factor holding the property on consignment for the benefit of his principal. As a factor, his relation was that of a trustee for the plaintiff with respect to the twine in his possession. It follows that said property was not subject to execution or attachment in satisfaction of his debts, and that in allowing the defendants below to recover the district court erred, for which the judgment must be reversed and the cause remanded for further proceedings therein not inconsistent with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL. CHARLES HAMMOND, V. F. N. DIMOND ET AL.

FILED MARCH 5, 1895. No. 7500.

1. **Villages**: INCORPORATION. The provision of section 40, chapter 14, Compiled Statutes, for the incorporation of villages, "Whenever a majority of the taxable inhabitants of any town or village not heretofore incorporated under the laws of this state shall present a petition to the county board," etc., applies to villages in the ordinary and popular sense of the term, and was not intended to clothe large rural districts with extended municipal powers, or subject them to special taxation for purposes to which they are in nowise adapted.

2. ———: ———: OUTSIDE TERRITORY. Lands adjacent to a town or village may be incorporated therewith, provided they are in such close proximity thereto as to be suburban in character and have some unity of interest with the platted portion in the maintenance of municipal government. But the statute does not contemplate the incorporation of remote territory having no natural connection with the village and no adaptability to municipal purposes. (*State v. Village of Minnetonka*, 59 N. W. Rep. [Minn.], 972.)

3. ———: ———: DETACHMENT OF TERRITORY. The provision of section 101, chapter 14, Compiled Statutes, for the disconnecting of territory from a city or village by petition, is available only to legal voters of the territory sought to be detached.

4. ———: ———: QUO WARRANTO: PARTIES. The owner of agricultural lands illegally included within the boundaries of a city or village who is not a voter therein, may maintain proceedings by *quo warranto* for the purpose of determining the validity of the act of incorporation.

5. ———: ———: USER. The effect of a continued user of corporate powers in such a case not presented by the record and not determined.

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

D. F. Osgood, for plaintiff in error.

Morning & Berge, contra.

POST, J.

This was a proceeding in the nature of a writ of *quo warranto* in the district court for Lancaster county. The object of the proceeding was to test the legality of the alleged incorporation of the city, formerly the village, of College View, in said county. A general demurrer to the petition was sustained, and final judgment having been entered thereon, the cause was removed into this court for review upon the petition in error of the relator. The only question presented being the sufficiency of the petition to entitle the relator to relief, it is deemed proper to here copy it at length, omitting caption and conclusion, viz.:

"1. The relator is the owner of the northwest quarter of the southeast quarter of section six (6), township nine (9) north, of range seven (7) east, in Lancaster county, Nebraska, and has been the owner of said land ever since the 15th day of February, 1887, which has ever since said time been farm land and used as such.

"2. The defendants, F. N. Dimond, C. W. Nicola, Joseph

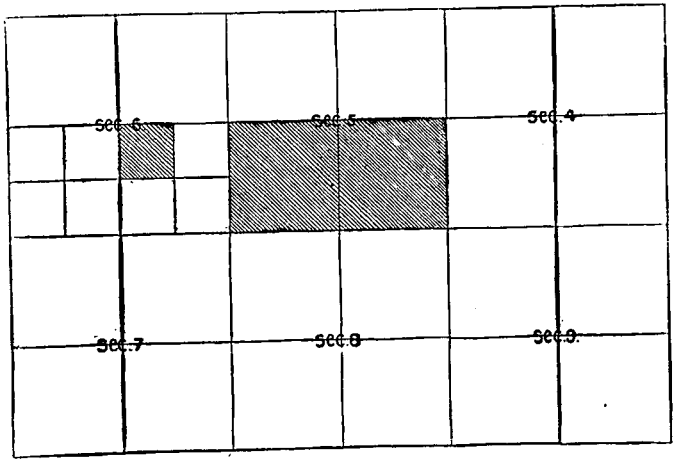
Sutherland, J. A. Childs, L. F. Soucey, F. A. De Wolf and Josephus Hobbs, representing and acting as mayor and council for the defendant, the city of College View, are without authority of law exercising and usurping the rights and duties of mayor and council of the city of College View, county of Lancaster and state of Nebraska, and are passing ordinances and levying taxes without legal authority therefor.

"3. Your relator alleges the fact to be that there is no such incorporated city or municipality as the city of College View.

"4. Your relator alleges that the following tract or parcel of land in section 5, township 9 north, of range 7 east, to-wit, the southwest quarter and the south half of the southeast quarter and the north half of the southeast quarter of section 5, township 9, range 7 east, Lancaster county, Nebraska, was platted as College View; that afterwards, to-wit, on the 25th day of April, 1892, two-thirds of the residents of the platted tract of College View and the other land hereafter described, presented to the county commissioners of Lancaster county, Nebraska, a petition for the incorporation of the village of College View, but said petition described the territory intended to be incorporated in said village, which was as follows: the west one-half of sections 4 and 9, all of sections 5 and 8, and the east one-half of sections 6 and 7 in township 9 north, of range 7 east, of the 6th principal meridian, Lancaster county, Nebraska, containing four sections of land, which include the land above described owned by your relator, together with about 2,240 acres of other land, which was used for farming purposes and was not platted as an addition or subdivison, nor were there any residents upon the land above described owned by your relator, nor was there land platted or occupied for one half mile or more between the above described land of your relator and of the platted land or tract named College View. And the said commissioners of Lancaster county, Nebraska, acting without authority of law, did, on

the 28th day of April, 1892, pretend to incorporate the village of College View, including within the metes and bounds in said pretended incorporation the land of your relator above described, as well as about 2,240 acres of land not platted or subdivided, but being farm land. Such action of the county commissioners was without authority of law and illegal, and was without any notice to your relator, nor did he have any knowledge of the said pretended incorporation and the alleged corporation of the municipality of College View until about the month of April, 1894, when your relator applied to pay his taxes on the above described land to the county treasurer of Lancaster county, Nebraska, when he was informed by said county treasurer that there was the sum of $15 corporation tax against said land levied by the alleged corporation or municipality of the city of College View."

The petition will be more readily understood from the following map of the six sections therein named, the shaded parts being the relator's premises in section 6, and the platted portion of the village, to-wit, the south half of section 5. The boundaries of the village as incorporated are shown by the dark lines extending through sections 6 and 7 and 4 and 9:



It is boldly asserted that there exists no authority by virtue of statute or otherwise in the state for the inclusion within the boundaries of a city or village of a large tract of rural territory having no natural connection therewith and which, as in this case, is in nowise adapted to city or village purposes. A subject of such recognized importance, it might be supposed, has been definitely settled by judicial opinion in the absence of positive statute; but an examination of the cases proves that the precise question has seldom been presented for determination by the courts. The incorporation of cities of the second class and villages is regulated by the provisions of section 40, chapter 14, Compiled Statutes, which reads as follows: "Any town or village containing not less than two hundred nor more than fifteen hundred inhabitants, now incorporated as a city, town, or village, under the laws of this state, or that shall hereafter become organized pursuant to the provisions of this act, and any city of the second class which shall have adopted village government as provided by law, shall be a village and shall have the rights, powers, and immunities hereinafter granted, and none other, and shall be governed by the provisions of this subdivision. * * * *Provided further*, That whenever a majority of the taxable inhabitants of any town or village, not heretofore incorporated under any law of this state, shall present a petition to the county board of the county in which said petitioners reside, praying that they may be incorporated as a village, designating the name they wish to assume, and the metes and bounds of the proposed village, and if such county board or a majority of the members thereof shall be satisfied that a majority of the taxable inhabitants of the proposed village have signed such petition, and that inhabitants to the number of two hundred or more are actual residents of the territory described in the petition, the said board shall declare the said proposed village incorporated, entering the order of incorporation upon their records, and designating

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

In *State v. McReynolds*, 61 Mo., 203, the following statute was presented for construction: "Whenever two-thirds of the inhabitants of any town or village within this state shall present a petition to the county court of the county setting forth the metes and bounds of their village *and commons* and praying that they may be incorporated * * * the county court may declare such town or village incorporated, designating in such order the metes and bounds thereof; and thenceforth the inhabitants within such bounds shall be a body politic and corporate," etc. The foregoing, omitting for the present any reference to the words in italics, is not essentially different from ours. It was held, first, that the act contemplated the incorporation only of towns, villages, and their commons; second, that no authority was conferred upon the court to incorporate a farming community not a part of a town or village or the common belonging thereto; third, that the term commons, as used in the statute, meant lands included in or belonging to the town or village and set apart for public use; fourth, that where the order of incorporation includes a large tract of farming lands it is without jurisdiction and void, that the officers of the town or village have no authority to act even within the proper limits thereof, and that they may be proceeded against by *quo warranto*. The extent of the territory in that case was 1,200 acres, of which 900 acres was farming land and about 300 acres was included in the town and additions thereto.

But perhaps the most satisfactory exposition of the subject is to be found in a recent opinion of the supreme court of Minnesota in *State v. Village of Minnetonka*, 59 N. W. Rep., 972. The act therein involved is the following: "Any district, sections, or parts of sections, which has been platted into lots and blocks, also the lands adjacent thereto, * * * said territory containing a resident population of not less than 175, may be incorporated as a village." The court, in awarding a judgment of ouster, declare the evident purpose thereof to be "the incorporation of villages in the ordinary and popular sense, and not to clothe large rural districts with extended municipal powers or to subject them to special municipal taxation for purposes for which they are wholly unsuited." It is also said: "The law evidently contemplates as a fundamental condition to a village organization a compact center or nucleus of population or platted lands; and in view of the expressed purposes of the act, it is also clear that by the term 'lands adjacent thereto' is meant only those lands lying so near and in such close proximity to the platted portion as to be suburban in their character, and to have some unity of interest with the platted portion, in the maintenance of a village government. It was never designed that remote territory having no natural connection with the village, and no adaptability to village purposes should be included." Similar views are also expressed in *Vestal v. City of Little Rock*, 54 Ark., 321, and *People v. Bennett*, 29 Mich., 541.

It is true the territory sought to be incorporated (*supra*, in *State v. Village of Minnetonka*), some thirty-five sections, is largely in excess of that included within the boundaries of the village herein named; but we are, notwithstanding that fact, unable to perceive that the case cited differs in principle from the one before us. For, assuming the soundness of the respondents' argument, the only limitation upon the liability of rural property for the burdens of municipal government in this state is the discretion of the

county board in a strictly *ex parte* proceeding. It has been argued against the rule recognized in the cases cited that it is wanting in precision, and that it merely substitutes the discretion of one class of officers for that of another. But that criticism is, it seems, entirely unmerited. The rule therein applied is not only a reasonable one, but furnishes a safe and logical test for the ascertainment of the powers of the various officers and tribunals with respect to the boundaries of towns and villages. We do not doubt the unlimited power of the legislature in the absence of constitutional restriction, with respect to the boundaries of municipal corporations. (See 1 Dillon, Municipal Corporations [4th ed.], sec. 183; 2 Beach, Public Corporations, sec. 1400.) The question involved, however, is not one of constitutional, but of statutory construction, and the conclusion reached is believed to be the one most in harmony with the spirit of the act and which best accords with judicial utterance on the subject.

But an examination of the subject is necessarily incomplete which omits a reference to another aspect thereof, viz., that suggested by *South Platte Land Co. v. Buffalo County*, 15 Neb., 605, *McClay v. City of Lincoln*, 32 Neb., 412, and *Lancaster County v. Rush*, 35 Neb., 120. It was therein held that an action will not lie to enjoin the collection of taxes levied upon agricultural property within the boundaries of a city or village, or for the recovery of such taxes paid under protest. The validity of the incorporation, although apparently presented by the argument in each case, was not decided, the court holding that it could not be questioned in a collateral proceeding. In *South Platte Land Co. v. Buffalo County* it is said: "There is no doubt the owners of land not platted may object to such land being included within the boundaries of the corporation, and in a proper proceeding for that purpose may have it excluded. * * * We do not decide that the occupants of a town can by petition take in territory in

which they have no interest and attach it to a town." It is said also: "The petition for incorporation gave the commissioners jurisdiction, * * * and their action cannot be attacked in this collateral manner." The views herein expressed are not only consistent with the doctrine of those cases, but a careful reading of them suggests the conclusion which we have reached.

There remains to be considered the question of the appropriateness of the remedy by *quo warranto*. We were at first strongly impressed with the belief that the relator had an adequate remedy under the special provision of the statute (sec. 101, ch. 14, Comp. Stat.) for the disconnecting of territory from a city or village; but a closer inspection proves that it applies only to legal voters of the territory sought to be detached. The owner of property, therefore, who, as the relator in this case, resides outside the limits of such city or village, is not within the provisions of the statute, and must seek relief by means of a different proceeding; and the cases above cited leave no room to doubt that his remedy is by a direct proceeding for the purpose of determining the validity of the act of incorporation. But the effect of a continued user of corporate powers and functions by the village and afterwards by the city of College View, as suggested on the argument, is not presented by the demurrer, and we must not be understood as expressing any opinion on that subject. It may be that the rights of the respondents as officers of the city, within the actual limits thereof and over such unplatted territory as is attached thereto, with the knowledge and consent of the owners, should not be questioned at this time. The judgment will, therefore, be reversed and the cause remanded with directions to allow the respondents, on proper terms, to answer if they so elect and to proceed to judgment on the merits of the cause.

REVERSED AND REMANDED.

R. L. McDONALD & COMPANY V. EDWARD J. JENKINS ET AL.

FILED MARCH 5, 1895. No. 6155.

1. **Partnership**: EVIDENCE. Where it is sought to charge a defendant as a copartner, the allegations of the petition being put in issue by the answer, the plaintiff is required to prove either a partnership in fact, or that the answering defendant permitted himself to be represented or held out as a partner in such way as to warrant third persons in making contracts relying upon his credit.
2. ——: ——: DIRECTING VERDICT. Evidence examined, and *held* not to sustain the allegation of partnership, and that the district court did not err in directing a verdict for the defendant.

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

Thomas H. Matters, for plaintiffs in error.

J. L. Epperson & Sons, contra, cited, on the question of partnership: *Shriver v. McCloud*, 20 Neb., 474; *Converse v. Shambaugh*, 4 Neb., 376; *McCann v. McDonald*, 7 Neb., 305.

POST, J.

This controversy originated before a justice of the peace for Clay county, from whence it was taken by appeal to the district court of said county. The action was for goods sold and delivered, and against Edward J. Jenkins and John P. Jenkins, doing business in the firm name of E. J. Jenkins & Co. The first named defendant alone answered, denying all of the allegations of the petition, and specifically denying the alleged partnership. At the conclusion of the plaintiffs' case the district court directed a verdict for the answering defendant on the ground that there was a failure

of proof upon the material allegations of the petition, and which is the ruling now assigned as error.

The evidence bearing upon the transaction involved is both meager and unsatisfactory. It may, however, be inferred from the record that during the months of May and June, 1890, John P. Jenkins was, either on his own account or otherwise, engaged in mercantile business in the city of Fairfield, in said county, although the nature of such business does not clearly appear. On the 31st day of May of said year he ordered goods from the plaintiffs amounting to $324.13, and on which there is now due a balance of $131.63 and interest. The plaintiffs' representative who took the order, referring to the transaction, testified: "I sold John P. Jenkins a bill of goods. He told me that his father [the answering defendant] had an interest in the firm." He also consulted the cashier of a local bank regarding the financial standing of the defendant, but did not see or converse with him. The goods above mentioned were in due time shipped by the plaintiffs, consigned to E. J. Jenkins & Co., at Fairfield, and were upon their arrival at that point delivered to John P. Jenkins, the latter paying the charges thereon. The agent for the railroad company, who testified for the plaintiffs, could remember of the one consignment of goods only to E. J. Jenkins & Co., and on cross-examination testified that he had never heard of such a firm. The drayman who received the goods from the railroad company testified that he presented the freight bill to the defendant, but the latter refused payment, saying he had nothing to do with the business, and that the bill was afterward paid by John P. Jenkins, who appeared to be running the store. The foregoing, which is substantially all of the evidence adduced, we think warrants the direction complained of. Under the issues the burden was upon the plaintiffs to prove either a partnership in fact or that the defendant knowingly permitted himself to be represented or held out as a partner

in such way as to warrant third persons in making contracts relying upon his credit. (Lindley, Partnership, 42; *Bucher v. Bush*, 45 Mich., 188.) It does not appear that the defendant was associated with John P. Jenkins as a partner, that he authorized the use of his name in that connection, or that he subsequently ratified the unauthorized contract. It follows that the judgment of the district court is right and must be

AFFIRMED.

LOUIS C. SHARP ET AL. V. CHARLES JOHNSON ET AL.

FILED MARCH 5, 1895. NO. 4985.

Replevin: EVIDENCE OF OWNERSHIP: PLEADING. An allegation of general ownership in an action of replevin is not supported by proof of a mere lien or other special ownership. (*Musser v. King*, 40 Neb., 892; *Randall v. Iverson*, 42 Neb., 607.)

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

M. McLaughlin and *J. C. Crawford*, for plaintiffs in error.

T. M. Franse, contra.

POST, J.

This was an action of replevin in the district court for Cuming county, the subject of the controversy being a field of corn levied upon by Sharp, one of the plaintiffs in error, to satisfy an execution against John Windell, and in favor of George Rowberg. The defendants in error thereupon instituted this action for the recovery of the property described, and were permitted to recover in the district court,

when the cause was removed into this court for review upon the petition in error of the sheriff.

Numerous errors are alleged, of which we shall notice but one, and which is presented by different assignments of the motion for a new trial, and the petition in error, viz., the admission in evidence of Exhibit A, being the instrument upon which defendants in error base their claim of title to the property in dispute. For a perfect understanding of the question under consideration, it is necessary to refer to the pleadings, which consist of an allegation of general ownership on the part of the plaintiff below, and a general denial by the defendant. The instrument offered in evidence, although denominated a "bill of sale," appears from its face to have been intended as security for an indebtedness due from Windell to the plaintiffs below. We have presented, therefore, the question, does proof of a mere lien or other special interest, in an action of replevin, sustain an allegation of general ownership? The precise question was presented in *Musser v. King*, 40 Neb., 892, and was there resolved in the negative, and which was followed in *Randall v. Persons*, 42 Neb., 607. And in view of the careful examination by Commissioner RAGAN of the question therein presented, a further examination of the subject at this time would be entirely superfluous. It follows that the ruling assigned is error, for which the judgment must be reversed and the cause remanded for further proceedings in the district court.

REVERSED AND REMANDED.

GEORGE PRAY V. OMAHA STREET RAILWAY COMPANY.

FILED MARCH 5, 1895. No. 6453.

1. **Street Railways:** NEGLIGENCE OF PASSENGER. It is not such negligence for a passenger to stand on the front steps of a crowded street car while in motion as will *per se* prevent a recovery for injuries received in consequence of the negligence of persons in charge thereof.
2. **Carriers:** STREET RAILWAYS: CROWDED CARS: NEGLIGENCE. It is evidence of negligence on the part of a street railway company to carry passengers greatly in excess of the seating capacity of its trains, and permitting them to stand on the platforms and steps of the cars.
3. ———: ———: ———. A person standing on the steps of a moving street car, being unable to secure a seat or standing room within, is presumed to be there with the consent of the servants in charge of the train.
4. ———: ———: NEGLIGENCE: PERSONAL INJURIES. Street railway companies in this state are common carriers, and are presumptively liable for the concurrent negligence of their servants and third persons resulting in personal injuries to passengers.
5. ———: ———: ———: ———: ACTION FOR DAMAGES: QUESTION FOR JURY. The plaintiff, a lad of fourteen years of age, boarded the defendant's train at South Omaha, bound for the city of Omaha. When he reached the train, which was waiting at the terminus of the line, it was so crowded that he was unable to get inside, but secured standing room on the rear platform of the trailer. When the first stop was made four blocks distant he stepped off the train to assist a fellow passenger to alight and was unable to get upon the platform again, his place being occupied by other passengers. He went forward immediately and secured standing room on the front step of the trailer, holding on to the dash board and to the iron rail attached to the car, for the distance of a block, when he was forced, by the pressure of the other passengers on the platform, to relinquish his hold, and fell, receiving the injuries complained of. There was evidence tending to prove that the pressure which forced him off the train was occasioned by the conductor forcing his way through the crowd while engaged in collecting fares. *Held*, That the question of negligence was for the jury, and that it was error to direct a verdict for the defendant.

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

The opinion contains a statement of the case.

John O. Yeiser, for plaintiff in error:

Street railway companies are common carriers of passengers and are liable for the slightest negligence. (*Spellman v. Lincoln Rapid Transit Co.*, 36 Neb., 890; *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. [Va.], 432; *Farish v. Reigle*, 11 Gratt. [Va.], 697; *North Chicago Street R. Co. v. Cook*, 33 N. E. Rep. [Ill.], 958; *Frink v. Potter*, 17 Ill., 406.)

Ordinary care in protecting himself is all that the law requires of a passenger. (*Sheridan v. Brooklyn C. & N. R. Co.*, 36 N. Y., 39; *Thurber v. Harlem B. M. & F. R. Co.* 60 N. Y., 131.)

The crowded condition of the car was evidence of negligence. The act of plaintiff in standing on the step of a moving car was not such contributory negligence as would prevent a recovery for personal injuries. The court therefore erred in directing a verdict for defendant. (*West Chester & P. R. Co. v. McElvee*, 67 Pa. St., 311; *Germantown P. R. Co. v. Walling*, 97 Pa. St., 60; *Chicago City R. Co. v. Mumford*, 97 Ill., 560; *Dougherty v. Missouri R. Co.*, 81 Mo., 330; *Chicago & A. R. Co. v. Wilson*, 63 Ill., 167; *Chicago W. D. R. Co. v. Mills*, 105 Ill., 63; *Chicago & A. R. Co. v. Arnol*, 33 N. E. Rep. [Ill.], 204; *North Chicago Street R. Co. v. Cook*, 33 N. E. Rep. [Ill.], 958; *Sheridan v. Brooklyn C. & N. R. Co.*, 36 N. Y., 40; *Topeka City R. Co. v. Higgs*, 38 Kan., 379; *Leigh v. Omaha Street R. Co.*, 36 Neb., 131; *O'Mara v. Hudson R. R. Co.*, 38 N. Y., 445; *Bigelow v. Rutland*, 4 Cush. [Mass.], 247; *Spofford v. Harlow*, 85 Mass., 179; *Spooner v. Brooklyn City R. Co.*, 54 N. Y., 230; *Burns v. Bellefontaine R. Co.*, 50 Mo., 140; *Gavett v. Manchester & L. R. Co.*, 16

Gray [Mass.], 501; *Todd v. Old Colony & F. R. R. Co.*, 3 Allen [Mass.], 18; *Gahagan v. Boston & L. R. R. Co.*, 1 Allen [Mass.], 187; *Lucas v. New Bedford & T. R. Co.*, 6 Gray [Mass.], 64; *Meesel v. Lynn & B. R. Co.*, 8 Allen [Mass.], 234; *Thurber v. Harlem B. M. & F. R. Co.*, 60 N. Y., 331; *Haycroft v. Lake Shore & M. S. R.*, 2 Hun [N. Y.], 490; *Village of Orleans v. Perry*, 24 Neb., 833; *Atchison & N. R. Co., v. Bailey*, 11 Neb., 332; *Sioux City & P. R. Co. v. Stout*, 17 Wall. [U. S.], 657; *City of Lincoln v. Gillilan*, 18 Neb., 116; *Bigelow v. Rutland*, 58 Mass., 247.)

John L. Webster, contra, cited: *Nichols v. Middlesex R. Co.*, 106 Mass., 463; *Pitcher v. People's Street R. Co.*, 26 Atl. Rep. [Pa.], 559; *Chicago West Division R. Co. v. Mills*, 91 Ill., 39; *Sanford v. Hestonville, M. & F. P. R. Co.*, 136 Pa. St., 84.)

POST, J.

About 6 o'clock P. M. of the 29th day of November, 1892, the plaintiff, a lad fourteen years of age, employed in one of the packing houses at South Omaha, boarded one of the defendant's motor trains in order to reach his home in the city of Omaha. When he approached the train, which was then waiting at the southern terminus of the line, he observed that the seats were all occupied and that there was not even standing room remaining inside. He, however, secured standing room on the rear platform of the trailer, where he remained until the train started about five minutes later, and until it made the first stop four blocks distant for the purpose of allowing a passenger to alight. At that point he was, according to his testimony, on account of the pressure of passengers from within, compelled to step from his position to the ground in order to make room for the passenger above mentioned, when his place was immediately filled by other passengers, leaving

no standing room on the platform. As the train was in the act of starting again he went forward and took a position on the right front step of the trailer, but was unable to get upon the platform on account of the crowd thereon. He, however, remained clinging to the rod attached to the car and dash board, holding a dinner pail in one hand until the train had run the distance of one block when he was forced to relinquish his hold on account of the pressure of the other passengers and fell, receiving the injuries complained of. He testifies further that the pressure which forced him from the train was occasioned by the movement of the passengers on the platform, but the cause of such movement he does not attempt to explain. Another witness testifies that the conductor was, when the accident occurred, near the front door of the trailer and going forward in the act of collecting fares. So that a reasonable inference is that the movement of the passengers on the front platform was caused by the approach of the conductor forcing his way through the crowd. The district court, on the conclusion of the plaintiff's case, directed a verdict for the defendant and which is the ruling now assigned as error.

It is necessary to notice but a single paragraph of the petition, viz.: "That said defendant, through carelessness and negligence in not providing cars enough for the transportation between said points, caused a dangerously large crowd of people to board said car on which the plaintiff was a passenger; that the said defendant, through its agents and servants, when said car in which the plaintiff was a passenger was loaded with all the passengers it could safely carry, negligently and carelessly suffered and permitted a large additional number of people to board said car and overcrowd the same; that by reason of so dangerously large a crowd negligently and carelessly suffered and permitted on said car by defendant, the plaintiff was forced off said car to allow fellow-passengers to alight therefrom; that immie-

diately plaintiff proceeded to re-enter said car, and before he could reach a safer position, while standing upon the steps, * * * the crowd so negligently and carelessly permitted upon said car * * * shoved back to get room and were forced back by the conductor of said line, one of the defendant's servants, while engaged in collecting the fares from said crowd, which pushed against the plaintiff with such force as to break his hold and to throw him from said moving train; that in said manner plaintiff was crowded off of said car by defendant's negligence and carelessness." It was held in *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb., 890, that street railway companies are common carriers of passengers, and as such are answerable for the negligence of their servants upon the principles of the common law; that in providing for the safety of passengers they are bound to exercise the highest degree of care and diligence consistent with the nature of their undertaking, and are responsible for the slightest negligence on the part of their employes. If it be true, as appears from the plaintiff's evidence, that the defendant's servants in charge of the train undertook to carry a number of persons greatly in excess of its capacity, so that passengers, including the plaintiff, were compelled to stand on the platform and steps of its cars, and the injury complained of is the direct result of such overcrowded conditions, that fact must, in the light of the authorities hereafter cited, be regarded as evidence of negligence; but it is said that the act of riding on the overcrowded train, and particularly on the steps of the trailer, is, under the circumstances of this case, *per se*, contributory negligence, which will prevent a recovery. In the consideration of that question it is deemed necessary to examine some of the authorities which seem to bear directly upon the subject.

In Ray, Negligence of Imposed Duties, 43, it is said that the front platform of a crowded street car is not a place of known danger so as to render it negligence *per se*

for an adult person to stand thereon while the car is in motion.

In *Germantown P. R. Co. v. Walling*, 97 Pa. St., 55, the plaintiff voluntarily got upon a car so crowded that he was obliged to stand on one of the steps of the platform, which was also occupied by two other persons, and where, in order to retain his position, he was required to hold with one hand to the dashboard and with the other to the iron bar under the window of the car. The court, referring to the question of contributory negligence, say: "Street railway companies have all along considered their platforms as a place of safety, and so have the public. Shall the court say that riding on a platform is so dangerous, that one who pays for standing there can recover nothing for an injury arising from the company's default?"

In *Meesel v. Lynn & B. R. Co.*, 8 Allen [Mass.], 234, it is said: "The seats inside are not the only places where the managers expect passengers to remain, but it is notorious that they stop habitually to receive passengers to stand inside until the car is full, and continue to stop and receive them even after there is no place to stand except on the steps of the platforms. Neither the officers of these corporations, nor the managers of the cars, nor the traveling public seem to regard this practice as hazardous, nor does experience thus far seem to require that it should be restrained on account of the danger. There is, therefore, no basis upon which the court can decide, upon the evidence reported, that the plaintiff did not use ordinary care."

In *Nolan v. Brooklyn City & N. R. Co.*, 87 N. Y., 63, the plaintiff, a passenger on a street car, rode on the front platform of his own choice for the purpose of smoking, there being room inside. He was thrown from the car and injured through the defendant's negligence, and was permitted to recover.

In *Topeka City R. Co. v. Higgs*, 38 Kan., 379, it was held gross negligence on the part of a street railway com-

pany to carry persons greatly in excess of the seating capacity of its cars, and permit passengers to ride on the platforms and foot-boards thereof, so as to expose them to danger of collision with its other trains.

In *Geitz v. Milwaukee City R. Co.*, 72 Wis., 307, the plaintiff at the time of the injury was standing on the foot-board extending lengthwise along the car, which was crowded with passengers, yet the question of negligence was held to have been properly submitted to the jury.

City R. Co. v. Lee, 50 N. J. Law, 438, presents substantially the same state of facts as the case last cited, and the judgment in favor of the plaintiff was affirmed. And the doctrine above announced finds support also in the following among many other cases: *Maguire v. Middlesex R. Co.*, 115 Mass., 239; *Fleck v. Union R. Co.*, 134 Mass., 481; *Upham v. Detroit City R. Co.*, 85 Mich., 12; *Archer v. Ft. Wayne & E. R. Co.*, 87 Mich., 101; *Matz v. St. Paul City R. Co.*, 53 N. W. Rep. [Minn.], 1071.

The record is silent on the subject of the defendant's notice of the condition of the train, but in the absence of evidence we must presume that the plaintiff, if not invited to become a passenger, was present with the knowledge and consent of the conductor. It follows that the boarding of the crowded train, under the circumstances disclosed, was not such negligence as to alone justify the trial court in directing a verdict against the plaintiff.

Was the plaintiff guilty of contributory negligence in leaving the rear of the train and taking a position on the front step of the trailer? There are certain material facts which must not be overlooked in the determination of that question. In the first place, the relation of carrier and passenger existed at that time, and the defendant, having voluntarily assumed the responsibility of safely carrying plaintiff, owed him a duty in that regard, and is at least presumptively liable for the concurrent negligence of its servants and third persons. (*Sheridan v. Brooklyn C. & N. R. Co.*, 36 N. Y., 39;

Lehr v. Steinway & H. P. R. Co., 118 N. Y., 556; *Holly v. Atlantic Street R. Co.*, 61 Ga., 215.) It will be remembered, too, that the plaintiff did not voluntarily abandon his position on the rear platform, but was unable to again board the train after standing aside to allow a fellow passenger to alight. The act of going forward to the front platform was not of itself hazardous, for which the plaintiff should be charged with negligence. In *Dixon v. Brooklyn City & N. R. Co.*, 100 N. Y., 170, the plaintiff tried to enter the defendant's car, which was moving slowly, by the rear platform; but finding it crowded he passed along by the car in order to reach the front platform, and in so doing slipped on the snow and ice thrown up by the defendant's plows and fell under the wheels. It was held that the question of contributory negligence was rightly submitted to the jury. Nor does the evidence warrant the inference that the plaintiff's position on the front step was either actually or apparently more dangerous than that which he had been compelled to relinquish on the rear platform. Referring to his position on the front step he testifies:

Q. Were you able to get any further in the car at that time?

A. No, sir.

Q. Why?

A. Because the car was moving and I would have run a great risk to crowd in.

Q. Had the car not started so soon, could you have gotten further on the platform?

A. Yes; I think I could. I am pretty sure I could.

Q. Could you have pulled up any further on the platform without letting go your grip on the hand rails?

A. No.

The rule is too well settled in this state to admit of a doubt or to require a citation of the cases, that where different minds may draw different conclusions from the facts

in evidence to support a charge of negligence, it is a question of fact and not of law. In the case at bar the inference that the injury proved was caused by the concurrent negligence of the defendant in permitting the car to be crowded beyond its capacity, and of the plaintiff's fellow passengers in forcing him from his position on the step, in the absence of contributory negligence on his part, is, to say the least, a reasonable one. The question was, therefore, one upon which the plaintiff was entitled to the verdict of the jury, hence the court erred in its peremptory direction in favor of the defendant, for which the judgment must be reversed, and the cause remanded for further proceedings in accordance with the views herein stated.

REVERSED AND REMANDED.

MIRANDA J. MCCLARY ET AL. V. JOHN S. STULL ET AL.

FILED MARCH 5, 1895. NO. 6512.

1. **Wills**: PROBATE: VALID AND INVALID BEQUESTS: INCAPACITY OF BENEFICIARY. It is no objection to the probate of a will containing one or more valid bequests that a particular bequest or devise is invalid on the ground that the beneficiary thereof is incapable of taking or holding the property sought to be thereby disposed of.

2. ———: ———: ———. The will in such case should be proved for the purpose of giving effect to the valid provisions thereof.

3. **Trial**: VERDICT: FAILURE OF JURY TO MAKE SPECIAL FINDINGS: HARMLESS ERROR. It is not reversible error to receive a general verdict or finding, leaving unanswered special interrogatories submitted to the jury, when, if answered in the form most favorable to the complaining party, they would not be inconsistent with the general verdict.

4. **Wills**: MENTAL CAPACITY OF TESTATOR: SPIRITUALISM. Mere eccentricity of belief, including a belief in spiritualism so-called, is not conclusive evidence of a want of testamentary capacity,

provided the testator is not affected with any delusion respecting matters of fact connected with the making of the will or the objects of his bounty.

5. ———: ———: PROBATE. Where the testator's mind is not so controlled by his peculiar views as to prevent the exercise of a rational judgment touching the disposition of his property the will should be sustained, however absurd or irrational such views may be.

6. ———: ———. Where the testator is not claimed to have been generally insane, but controlled by insane notions with respect to a particular subject, the question to be determined is whether he was the victim of such delusions as controlled his actions and rendered him insensible to the ties of blood and kindred.

7. **Trial:** RECALLING OF JURY: INSTRUCTIONS: REVIEW. The recalling of juries for instructions is so far within the discretion of the trial court as not of itself to present a subject for review.

8. **Instructions:** HARMLESS ERROR. The charge of the court should be confined to questions in issue, although a judgment will not be reversed on account of an instruction directed to a matter foreign to the issues which merely imposes upon the successful party an additional and unnecessary burden, and in no wise prejudicial to the party complaining.

9. **Attorneys' Fees:** ALLOWANCE: FUNDS UNDER CONTROL OF COURT. Courts of equity, in dealing with funds brought directly within their control, frequently order payment therefrom of fees to counsel of the respective parties; but that practice rests upon the theory that the proceeding is primarily for the purpose of securing the direction of the court with respect to such fund, and therefore alike beneficial to all parties.

10. ———: ———. Fees to counsel are not in such cases allowed as a matter of right, but are within the discretion of the court and will be denied unless there appears to be reasonable ground for the controversy by the party applying therefor.

11. **Wills:** CONTESTS: ATTORNEYS' FEES: ALLOWANCE. On an application for attorneys' fees by the contestants who had unsuccessfully resisted the probate of a will, one of them made affidavit to an agreement in writing with their attorneys, whereby the latter were to prosecute the contest for twenty per cent of the amount realized out of the estate. In answer, they denied the existence of a written contract without disclosing their agreement with contestants. *Held*, That the application should be denied.

12. ———: EVIDENCE OF VALIDITY. Evidence examined, and *held* to sustain the verdict establishing the will of the testatrix.

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

The facts are stated in the opinion.

W. C. Sloan and *A. J. Burnham*, for plaintiffs in error:

The pretended will seeks to raise a trust to a charitable use, and in order that there be a good devise or bequest there must be a clearly defined beneficiary who can take under the will; and unless there is such beneficiary the bequest is void, and such beneficiary must be one who can enforce the trust in a court of equity. (*Tilden v. Green*, 130 N. Y., 29; *Levy v. Levy*, 33 N. Y., 97; *Prichard v. Thompson*, 95 N. Y., 76; *Read v. Williams*, 125 N. Y., 560; *Lepage v. McNamara*, 5 Ia., 125; *Fosdick v. Town of Hempstead*, 125 N. Y., 581; *Owens v. Missionary Society*, 14 N. Y., 380; *Dashiell v. Attorney General*, 9 Am. Dec. [Md.], 572; *Bridges v. Pleasants*, 44 Am. Dec. [N. Car.], 100; *Holland v. Alcock*, 108 N. Y., 312; *Heiss v. Murphey*, 40 Wis., 276; *Estate of Hoffen*, 70 Wis., 522; *Gallego v. Attorney General*, 3 Leigh [Va.], 487; *Walderman v. City of Baltimore*, 8 Md., 551; *White v. Fisk*, 22 Conn., 31.)

The will is void for uncertainty as to beneficiaries, and as to its objects and purposes. It substitutes the will of the trustees for that of the testatrix. The court cannot enforce the trust sought to be created by the will. (*Dashiell v. Attorney General*, 9 Am. Dec. [Md.], 572; *Wheeler v. Smith*, 9 How. [U. S.], 55; *Beall v. Drane*, 25 Ga., 430; *Trippe v. Frazier*, 4 Har. & J. [Md.], 344; *Goddard v. Pomeroy*, 36 Barb. [N. Y.], 546; *Grimes v. Harmon*, 35 Ind., 198; *Fontain v. Ravenel*, 17 How. [U. S.], 369; *Beekman v. Bonsor*, 23 N. Y., 298; *Yingling v. Miller*, 26 Atl. Rep. [Md.], 491; *Andrew v. New York Bible Society*, 4 Sandf. [N. Y.], 156; *Rhodes v. Rhodes*, 13 S. W. Rep.

[Tenn.], 590; *Montgomery v. Montgomery*, 11 S. W. Rep. [Ky.], 596; *Sutherland v. Sydnor*, 6 S. E. Rep. [Va.], 430; *Couch v. Eastham*, 3 S. E. Rep. [W. Va.], 23; *Stokes v. Van Wyck*, 3 S. E. Rep. [Va.], 387; *New Orleans v. Hardie*, 9 So. Rep. [La.], 12; *Bristol v. Bristol*, 53 Conn., 242.)

The Society of the Home for the Friendless has no legal capacity to take under the will either absolutely or as trustee. (*State v. Atchison & N. R. Co.*, 24 Neb., 144.)

It was error to recall the jury without a request from them and give an instruction at the request of proponents. (*Yates v. Kinney*, 23 Neb., 648.)

It was error to receive the general verdict and discharge the jury without special findings. (*Doom v. Walker*, 15 Neb., 339.)

Contestants' attorneys are entitled to an allowance for fees out of the proceeds of the estate. (*Seebrock v. Fedawa*, 33 Neb., 413.)

The following authorities were also referred to by counsel for plaintiffs in error in their argument on the question of the capacity of the testratrix to make a will: *Klosterman v. Alcott*, 27 Neb., 685; *Galloway v. Hicks*, 26 Neb., 531; *City of Crete v. Childs*, 11 Neb., 252; *Meyer v. Midland P. R. Co.*, 2 Neb., 319.

J. H. Broady, contra:

The proponents should, in the first instance, make out a *prima facie* case which follows from the proof of execution. Then the burden of proof of insanity is on contestants. Afterward original testimony of sanity may be offered by the proponents. (*Seebrock v. Fedawa*, 30 Neb., 424; *Chrisman v. Chrisman*, 18 Pac. Rep. [Ore.], 6.)

Capacity to make a contract is sufficient capacity to make a will. It is not necessary that the testator be mentally or bodily sound, or that he have no delusions. (*Spratt v. Spratt*, 43 N. W. Rep. [Mich.], 627; *Hoban v. Piquette*,

17 N. W. Rep. [Mich.], 797; *Rice v. Rice*, 15 N. W. Rep. [Mich.], 545; *Dullam v. Wilson*, 19 N. W. Rep. [Mich.], 122; *Otto v. Doty*, 15 N. W. Rep. [Ia.], 578; *Meeker v. Meeker*, 75 Ill., 266; *Rutherford v. Morris*, 77 Ill., 410; *Smith v. Jones*, 34 N. W. Rep. [Ia.], 309.)

Spiritualism is neither insanity nor an insane delusion. An insane delusion does not break a will unless it be proven that the will is the product of the delusion. (*Fifield v. Gaston*, 12 Ia., 218; *In re Smith's Will*, 8 N. W. Rep. [Wis.], 616; *Fraser v. Jennison*, 3 N. W. Rep. [Mich.], 882; *Latham v. Schaal*, 25 Neb., 540.)

Contestants are not entitled to an allowance for attorneys' fees. (*Titlow's Estate*, 29 Atl. Rep. [Pa.], 758; *West v. Place*, 23 N. Y. Sup., 1090.)

The following cases were also cited by counsel for defendants in error: *Walton v. Ambler*, 29 Neb., 643; *Graham v. Birch*, 49 N. W. Rep. [Minn.], 697; *Chadwick v. Chadwick*, 13 Pac. Rep. [Mont.], 385; *American Tract Society v. Atwater*, 30 O. St., 87; *Raley v. County of Umatilla*, 13 Pac. Rep. [Ore.], 892; *Webster v. Morris*, 28 N. W. Rep. [Wis.], 353; *In re Gibson's Estate*, 17 Pac. Rep. [Cal.], 438; *Dodge v. Williams*, 50 N. W. Rep. [Wis.], 1103; Jarman, Wills, 377; Beach, Wills, sec. 137.

POST, J.

This was a proceeding for the proof of the will of Elizabeth C. Handley, deceased, and originated in the county court of Nemaha county. The defendants in error, John S. Stull and Frank E. Johnson, who for convenience will be referred to as the proponents, are named as executors of the will, and the plaintiffs in error, who will be referred to as contestants, are the heirs at law of the deceased. The proceedings in the county court are not involved in the present controversy and will not, therefore, be noticed further in this opinion. The trial in the district court, as will be inferred from what has been said, resulted in a verdict

and judgment establishing the alleged will, and which the contestants have removed into this court for review upon allegations of error. For a more perfect understanding of the issues involved it is deemed proper to set out the will at length, which is as follows:

"In the name of the benevolent Father of All, I, Elizabeth C. Handley, being of sound mind and memory and in fair health, realizing the uncertainty of this life, do hereby make and publish my last will and testament.

"Item First. It is my will and desire that after my death I be buried by the side of my late husband in Walnut Grove cemetery, at the village of Brownville, in Nemaha county, state of Nebraska; and that my executors hereinafter named complete the record upon the monument now erected on the burial lot and to place at my grave suitable head and foot slabs.

"Item Second. I give, grant, and bequeath unto my beloved nephew, John C. Ward, all of my books of every description, my gold watch and chain, and all of my other jewelry of every description, and such of my family pictures as he may desire.

"Item Third. I do hereby give, grant, and bequeath unto the Home for the Friendless, now located at the city of Lincoln, in the state of Nebraska, my piano and all of my china and table ware of every description, to be owned and kept and used by said Home forever.

"Item Fourth. I hereby give, grant, and bequeath unto the said Home for the Friendless all of my household and kitchen furniture of every description; and it is my wish that the officers of said Home shall have the privilege of using said furniture or any part thereof in said Home, or to dispose of the same or any part thereof and to convert the same into money, and to use said money in such manner as they may see fit for the benefit of the inmates of said house.

"Item Fifth. It is my desire and command that my executors hereinafter named shall collect all of my property, both personal and real, bonds, stocks, credits, goods, chattels, choses in action and everything of value, except such as are herein bequeathed as above set forth, and to sell the same either at public or private sale, as may seem to them to be most advantageous; and to convert the same into money as soon after my death as the same can be done without sacrifice, and out of the proceeds of said sale to first pay all of my just debts, funeral expenses and expense of my last sickness, and the expenses of administration, and all the moneys remaining after carrying out the provisions of this will, as above set forth, I hereby give, grant, and bequeath unto the said Home for the Friendless, now located it the city of Lincoln, Nebraska.

"In this my last will and testament I well remember all of my relations, both near and remote, and as I am under no particular obligations to them or either of them, and desiring that my estate may be used for the very unfortunate class of persons who have a right to be admitted into said Home for the Friendless, I feel it to be my sacred duty to give all that I have left in this world to said Home for the benefit of the poor unfortunate people who are cared for by this Home, the grandest institution in the state of Nebraska.

"Item Sixth. I do hereby nominate and appoint Frank E. Johnson, of Lincoln, Nebraska; Harry D. Clark, of Hot Springs, South Dakota, and John S. Stull, of Auburn, Nebraska, or the survivors of them in case of the death of either of them, executors of this my last will and testament, hereby authorizing and empowering them to adjust, release, and discharge in such manner as they may deem proper, the claims, debts, and demands due me. I hereby authorize, direct and empower them to sell at public or private sale, as may seem to them to be the most advantageous, all my real and personal estate, and to execute and acknowledge, and to deliver to the purchaser of the same proper deeds in

fee-simple. I also further authorize and direct my said executors to reduce and convert into money all of my estate except such as is mentioned in items second, third, and fourth, and to first pay the debts and demands mentioned in items first and fifth, and then to pay the entire balance left to the said Home for the Friendless.

"I do hereby revoke all former wills by me at any time made. In testimony whereof, I have hereunto set my hand and seal this 26th day of January, in the year of our Lord one thousand eight hundred and ninety-two.

"ELIZABETH C. HANDLEY.

"Signed and acknowledged by said Elizabeth C. Handley as her last will and testament in our presence and in the presence of each other, and signed by us in her presence and at her request; and we do hereby certify that at this time the said Elizabeth C. Handley is of sound and disposing memory.

"Done at Auburn, Nebraska, this twenty-sixth day of January, A. D. 1892.

"JARVIS S. CHURCH, Auburn, Neb.
"J. L. CARSON, JR., Auburn, Neb.
"R. C. BOYD, Auburn, Neb."

The contestants, who, with the exception of John C. Ward, are the brothers and sisters of the deceased, joined in resisting the probate of the will on the following among other grounds:

1. That the deceased was not of sound and disposing mind at the time in question, and that said alleged will is the result of an insane delusion on her part by reason of which she was altogether incapable of disposing of her property, and is therefore utterly void.

2. Said will is void for the reason that the beneficiaries thereunder are uncertain and cannot be ascertained.

3. The Home for the Friendless named in said will is without legal capacity to take or hold the property thereby sought to be disposed of.

John C. Ward, who is the sole surviving heir of Comfort Ward, *nee* Scott, a deceased sister of the testatrix, and who is the legatee named in the second item or paragraph of the will, separately objected to the allowance of items Nos. 3, 4, 5, and 6 thereof on the ground that the beneficiaries are uncertain, and because the Home for the Friendless has no capacity to take or hold thereunder.

The several contestants who join in the prosecution of this proceeding in error devote many pages of their printed brief to an exhaustive review of the authorities bearing upon the validity of the provision in favor of the Home for the Friendless, and which would without doubt prove instructive in a proceeding having for its object the construction of that provision of the will; but a closer inspection of the pleadings has satisfied us that that question is not thereby put in issue. It appears from a reference to the allegations of the several contestants that no specific objection is made therein to the bequest in favor of John C. Ward. And assuming the deceased to have been possessed of the requisite mental capacity to thus dispose of her property, it follows that the will should be admitted to probate for the purpose of giving effect to that bequest without reference to the other provisions thereof. (*Greenwood v. Murray*, 26 Minn., 259; *Graham v. Burch*, 47 Minn., 171; *Farmer v. Sprague*, 57 Wis., 324; *Jones v. Roberts*, 54 N. W. Rep. [Wis.], 917; *Burkett v. Whittemore*, 15 S. E. Rep. [S. Car.], 616; *In re Will of Merriam*, 136 N. Y., 58; *Ware v. Wisner*, 50 Fed. Rep., 310; *Sumner v. Crane*, 155 Mass., 483.)

Passing to the question of the mental capacity of the deceased, we observe that the first assignment relating to that branch of the case is the giving of instructions Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 at the request of proponents. Some, indeed most, of the propositions in the instructions complained of are admitted to be accurate statements of the law. It has been settled by repeated decisions

of this court that an assignment of the giving or refusing of a group of instructions *en masse* will be considered only so far as to determine whether one or more of them correctly state the law applicable to the cause. But while we are unable to separately examine the several instructions mentioned, the contestants are in no degree prejudiced on that account, since, fortunately for them, the questions there presented are all included within the capacity of the deceased to dispose of her property by will,—a proposition which will be hereafter considered under another assignment.

The next contention which we will notice is that the district court erred in not requiring the jury to answer certain interrogatories in connection with their general verdict, to-wit:

"1. Was the mind of Elizabeth Handley at about the time of the making of the will in question affected with a delusion that she could hold direct communication with the spirit of her deceased husband, and of other deceased persons?

"2. Did such delusion influence or control the mind, actions, and conduct of Mrs. Handley in her business transactions?

"3. Was the mind of Mrs. Handley affected by a delusion at the time she executed the will in question, and was she influenced in making her will by such delusion?

"4. Was Elizabeth C. Handley of sound mind and memory when she executed said will?"

Of the foregoing questions it may be said that all except the fourth, which is in terms answered by the general finding, suggest merely evidential facts, and are not, therefore, within the contemplation of section 292 of the Code, by which it is provided that special verdicts "must present the facts as established by the evidence, and not the evidence to prove them; and they must be so presented that nothing remains for the court but to draw from them conclusions

of law." Mere delusions such as are contemplated by the interrogatories are not, as we shall presently see, conclusive evidence of a want of testamentary capacity. Had said interrogatories been answered in the manner most favorable to contestants, they would not have been entitled to judgment thereon, since such findings would still have been consistent with the general verdict. It follows that the district court did not err in receiving the verdict without requiring the jury to answer the interrogatories submitted to them. (*First Nat. Bank of North Bend v. Miltonberger*, 33 Neb., 847.) The deceased was then sixty years of age and had been a widow about ten years. The estate of her husband, to which she succeeded on his death, was valued at $36,000 or $37,000. She was evidently a woman of average intellectual endowments, and invariably managed or directed her own business affairs. Although she did not, as the result of her management, succeed in accumulating much, if any, during her widowhood, she left unimpaired the fortune inherited from her husband after contributing liberally, for one of her means, to works of charity and to religion and assisting materially her less fortunate relatives. She was a devout church-woman and deeply interested in the cause of temperance. In the summer of 1888 she attended as a delegate the national convention of the prohibition party which met in the city of Indianapolis. She was for several years a member and vice-president of the Society of the Home for the Friendless, and sought earnestly to advance its cause and usefulness. She was also recognized in the city of Brownville, where she resided for nearly if not quite forty years, as a woman of more than the average strength of character and shrewdness, and, barring the single exception, which will now be noticed, gave evidence of no mental infirmity tending in any degree to impair her testamentary capacity. There is in the record evidence which tends to prove that she was a believer in the doctrine of spiritualism and seems to have

been under the impression that she could directly and through the instrumentality of the planchette communicate with the spirits of the dead, including her deceased husband. The only evidence tending directly to establish any relation between such delusions and the execution of the will is that of Mrs. Smith, from which we quote the following:

Q. How did she act or claim to act in connection with spiritualism, or what did she do about it?

A. I think I know she was under the control in a great many of her actions and in all of her trips and business by what Planchette said. * * *

Q. She told you this?

A. Yes, sir; she told me herself.

Q. State as near as you can what she did say.

A. The last time I saw her I went to bid her good-bye. She seemed very much excited in health and looked poorly. She said she had been consulting Planchette, and it had advised her about her affairs, and she wanted to go and see Judge Stull and have him transact some business for her.

Q. When was this conversation?

A. During the last part of January, 1892. * * *

Q. Now, state as well as you can just what she said she would have to do about the latter part of January, 1892, at the time you spoke of.

A. She said she was going to see Judge Stull in regard to some business that Planchette had advised her to. * *

The will, it should be remarked in this connection, was prepared by Judge John S. Stull, and bears date, as we have seen, of January 26, 1892, from which it is argued that her action was the direct result of the delusions above mentioned, and which so controlled her judgment as to render her insensible to the ties of consanguinity. That contention renders necessary an examination of the evidence which bears directly upon the execution of the will. Judge Stull, who had known the deceased intimately for twenty-one years, testified that she requested him to prepare her

will early in January, 1892, but being engaged at the time he made a note of her directions from which he subsequently drew the will and forwarded it to her by mail. She visited him twice or more between that date and the day of its execution, when, after some trifling changes which were made at her direction, it was taken by her to the Carson National Bank, where she had long kept an account, in order that it might be witnessed by some of the officers thereof, most of whom were acquaintances and personal friends. She was, in the opinion of the subscribing witnesses, perfectly sane, and capable of transacting her business. Of said witnesses Judge Church had known the deceased twenty-six years, Mr. Boyd seven years, and Mr. Carson, who was twenty-three years of age, had known her since his earliest recollection, and neither had ever heard her mental soundness called in question. They are corroborated also by Judge Stull's partner, Mr. Edwards, who was present when the deceased gave the directions in accordance with which the will was prepared. To Mr. Johnson, an intimate friend, who had been her neighbor in Brownville for thirty-four years, she had remarked that her property would not go to relatives, but in another direction. A few days subsequent to the making of the will, to-wit, on February 5, she visited the last-named witness at his home in Lincoln *en route* to Hot Springs, South Dakota. Learning that the witness was contemplating a trip to southern Texas in company with a number of friends, including several state officers and their families, she expressed a desire to join the party, which she did, and was absent ten or twelve days. Of the persons who accompanied her on that trip several, including Mr. Hill, state treasurer, Mr. Allen, secretary of state, and the witness Johnson testify that she was in excellent health and spirits, and from all appearances perfectly sane. It is also disclosed by the evidence that she had had other business transactions with Judge Stull and his partner about the time in question, as appears from the following testimony of the latter:

I was acquainted with her a short time only, before the making of the will. We had been doing a little business with her.

Q. How did she transact business?

A. Usually in person.

Q. When she came to the office did she come alone?

A. I do not remember that she ever came with any one. She was always alone when she came to the office to transact business. She came as an ordinary person would, and I saw nothing out of the way that would indicate insanity or anything of the kind.

Conceding all that is claimed for the testimony of the witness Mrs. Smith, it fails to establish the connection between the will and the alleged supernatural manifestations.

But the judgment must be affirmed on other and more substantial grounds. On all subjects except the one above alluded to the testatrix was mentally sound. Indeed, her general sanity is not seriously called in question. The proposition presented by the record is that with respect to the one subject she was laboring under a delusion which controlled her actions in the disposition of her property. Volumes would be required for even a summary of what has been said and written on the subject. In fact, no topic has occasioned a more animated discussion or given rise to a greater diversity of opinion than this particular phase of the problem of insanity. Eminent authority of comparatively recent date, including Lord Brougham, have regarded the human mind as a single indivisible potency not comprising distinct functions, and consequently any impairment thereof must be absolute and not partial. (Mann, Medical Jurisprudence of Insanity, 159.) But from the various opinions there have been evolved certain accepted rules, which are especially applicable to the case at bar, viz.: (1.) Mere eccentricity of belief is not conclusive evidence of a want of testamentary capacity, provided there is no delusion respecting matters of fact connected

with the making of the will or the objects of the testator's bounty. (2.) Where the testator's mind is not so controlled by his peculiar views as to prevent the exercise of a rational judgment in the disposition of his property the will should be sustained, however absurd or irrational such views may be. (3.) Where the testator is not claimed to have been generally insane, but controlled by insane notions, the question to be determined is whether he was the victim of such delusions as controlled his action and rendered him insensible to the ties of blood and kindred? (See Cassady, Wills, 478; Beach, Wills, sec. 102; *Spratt v. Spratt*, 76 Mich., 384; *Frazer v. Jennison*, 42 Mich., 206; *Rice v. Rice*, 50 Mich., 448; *Smith v. James*, 72 Ia., 515; *Lee v. Scudder*, 31 N. J. Eq., 633; *Middleditch v. Williams*, 45 N. J. Eq., 726; *In re Tritch's Will*, 30 Atl. Rep. [Pa.], 1053; *Potter v. Jones*, 20 Ore., 239; 1 Redfield, Wills, p. 90*.)

The foregoing are selected from among the many authorities which sustain the principle above stated, and are believed to embody the law of the subject. A reference to the will itself fails to disclose any evidence of mental incapacity on the part of the testatrix or to suggest that she was controlled in any degree by her imaginary communication with the spirit of her deceased husband or others; nor can the disposition thereby made of her property be said to be unnatural or unreasonable in view of her relation to the principal beneficiary, and the further fact that she inherited said property, not through her own family, but from her husband. Again, we find in the record no evidence tending to prove that the alleged spirits, through their communications with the testatrix, tended to prejudice her mind directly or indirectly against the contestants or in favor of the Home for the Friendless. In fact, any conclusion with respect to the substance even of such communications must rest entirely upon conjecture. Law, it is said, is "of the earth, earthy" and that spirit-wills are

too celestial for cognizance by earthly tribunals,—a proposition readily conceded; and yet the courts have not assumed to deny to spirits of the departed the privilege of holding communion with those of their friends who are still in the flesh so long as they do not interfere with vested rights or by the means of undue influence seek to prejudice the interests of persons still within our jurisdiction. There was, it should be noted, evidence given tending to prove that Mrs. Scott, the mother of the parties hereto, was also a victim of a certain form or type of insanity; but since, as in the case of the testatrix, her sanity was never called in question until about the time of the proof of this will even among her most intimate friends and acquaintances, we think the action of the jury in rejecting all such evidence not so unwarranted as to call for a reversal on that ground.

Another assignment is the recalling of the jury after the submission of the cause and the giving of a further instruction in the following language: "The court instructs the jury that influence to violate a will must be such as to amount to force and coercion, destroying the free agency of the testator, and there must be proof that the will was obtained by this coercion, and it must be shown that the circumstances of its execution are inconsistent with any theory but undue influence, which cannot be presumed, but must be proved in connection with the will and not with other things." The recalling of a jury for instructions is a matter so far within the discretion of the court as not to present a subject for review, assuming, of course, that the attending circumstances do not show an abuse of discretion and that the instructions given embody the law of the case.

The real criticism of the instruction in this case appears from the following quotation from the brief of contestants: "Insane delusion is not undue influence in any sense, and no question of undue influence was raised or submitted to the jury. The instruction complained of has no application to any issue submitted to the jury, and that it was de-

cisive of the jury's verdict is shown by the fact that immediately after the same was given, the jury returned into court a verdict for the proponents." We are not prepared to assent to the proposition that no issue of undue influence was presented by the pleadings. It is, as we have seen, alleged by contestants that "the pretended will is the result of an insane delusion existing in the mind of the testatrix," etc., and therefore, void. It has been held by eminent authority that the ground of relief in such cases is not, strictly speaking, the insanity of the testator but that of undue influence in the execution of the will. (See *Thompson v. Hanks*, 14 Fed. Rep., 902; Mann, Medical Jurisprudence of Insanity, 165.) But assuming the converse of the proposition just stated to be true, the instruction is, at most, error without prejudice, since its effect was merely to impose upon the prevailing party an additional and unnecessary burden. This court has frequently condemned the practice of submitting to the jury by way of instructions questions not presented by the issues, but we are not aware that a judgment has ever been reversed on that account, where it is apparent from the record that the action of the court could not have prejudiced the rights of the complaining party. It is, on the other hand, the settled practice of this court to disregard harmless error at whatever stage of the proceeding it is shown to have occurred.

There remains to be considered the claim of the contestants for an allowance out of the estate of the deceased on account of costs and attorney's fees. Their reliance, so far as that contention is concerned, is upon the case of *Seebrock v. Fedawa*, 33 Neb., 413. Courts of equity have frequently assumed, when dealing with funds brought directly within their control, to order payment therefrom of fees to counsel for the adverse party. That practice had its origin in the theory that such a proceeding is primarily for the purpose of securing the direction of the court with respect to the disposition of a particular fund, and is there-

fore alike beneficial to all parties concerned. Equitable proceedings for the construction of wills may be said to be within the rule above stated, and were evidently so regarded by this court in *Seebrock v. Fedawa*, 33 Neb., 413; but an examination of the record discloses a distinction between that case and the one before us in two essential respects. In the first place, John C. Ward, one of the contestants, in a sworn affidavit, deposes that he has communicated with counsel for the other contestants on the subject of their fees and expenses and has been assured by them that they have a written agreement whereby they are to receive twenty per cent of the amount realized by contestants out of the estate of the deceased as full compensation for their services. That statement is met by the affidavit of Mr. Burnham, who is referred to by Mr. Ward as his informant, in the following language: "This affiant never entered into a written contract with Miranda J. McClary, or any other of the contestants, regarding fees, and no such contract exists or ever did exist." Referring to Ward's affidavit, counsel for contestants dismiss the subject with the remark that the arrangement with their clients regarding compensation for their services is no concern of the proponents, since questions of like character can be raised only in controversies between attorney and client. In support of that proposition we are referred to *Omaha & R. V. R. Co. v. Brady*, 39 Neb., 48. That case would be conclusive if the proponents were seeking to interpose the alleged agreement as a defense to the merits of the cause; but the question presented is altogether different, since counsel are seeking not satisfaction for their clients, but compensation for themselves out of funds belonging to the adverse party. The evidence referred to tends to prove that they relied upon a specific agreement with them. Equity will not permit them to claim the fruits of an advantageous agreement in case of a favorable result of the litigation, and at the same time insist upon compensation out of the fund in

controversy in case of a result adverse to the claim of their clients. The question at issue is the agreement between counsel and contestants, rather than the evidence thereof, and the denial of a written agreement cannot be said to be responsive to the statements of the affidavit. Precedents, so far as our examination has extended, tend to sustain the position of the proponents on this branch of the case. In *re Tillow's Estate*, 29 Atl. Rep. [Pa.], 758, the contestant, a disinherited child, after a judgment in his favor in the trial court, compromised with those claiming adversely whereby the will was sustained. It was held that the fees of the contestant's attorneys could not be paid out of the estate, and as identical in principle see *West v. Place*, 23 N. Y. Sup., 1090; *Wilson's Will*, 103 N. Y., 374. This case is distinguishable from *Seebrock v. Fedawa* on other and more substantial grounds, viz., the attack upon the will in the district court and also in this court is particularly directed against the provision thereof in favor of the Home for the Friendless. But the validity of that bequest, as we have seen, is not involved in this proceeding. It is possible that in a subsequent proceeding for the construction of the will in order to determine the validity of that provision the interests of the beneficiaries and the heirs may be found to be so far mutual as to warrant the payment of expenses out of the estate; but upon the record presented we must decline to interfere in behalf of counsel. The judgment of the district court is accordingly

AFFIRMED.

WESTERN UNION TELEGRAPH COMPANY v. D. KEMP.

FILED MARCH 5, 1895. No. 6479.

1. **Telegraph Companies:** STATUTORY LIABILITY. The provisions of section 12, chapter 89*a*, Compiled Statutes, in reference to telegraph companies and their transmission of dispatches, whereby any such company is made "liable for the non-delivery of dispatches entrusted to its care and for all mistakes in transmitting messages made by any person in its employ, * * * shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks," are not inequitable and are obligatory upon all telegraph companies in the state.

2. ———: ———: INCORRECT MESSAGES. Defendant in error delivered a message written on one of the company's forms, to its agent at its office in a town in this state, to be transmitted to Kansas City, Missouri, to be there delivered to a person to whom it was addressed, which was so changed in its transmission, in a material portion, as to contain incorrect information, by reason of which the sender suffered damages. *Held*, That the company was liable for the damages caused by the mistake in sending the message, and could not limit its liability to the amount received by it for sending the dispatch.

3. ———: ———: PRESENTMENT OF CLAIM: INVALID LIMITATION. On the message form used by a telegraph company was printed the following stipulation: "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message." *Held*, That it thereby aimed to limit its liability, and that this clause, if intended as a contract, or if viewed as such, was unfair and in violation of the provisions of section 12, chapter 89*a*, Compiled Statutes. *Pacific Telegraph Co. v. Underwood*, 37 Neb., 315, followed.

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

Estabrook & Davis, for plaintiff in error, cited, contending that the sixty-day limitation was reasonable and valid: *Sherrill v. Western Union Telegraph Co.*, 109 N. Car., 527;

Young v. Western Union Telegraph Co., 65 N. Y., 165; *Massengale v. Western Union Telegraph Co.*, 17 Mo. App., 259; *Cole v. Western Union Telegraph Co.*, 33 Minn., 227; *Hill v. Telegraph Co.*, 85 Ga., 425; *Western Union Telegraph Co. v. Dunfield*, 11 Col., 335; *Lester v. Western Union Telegraph Co.*, 84 Tex., 313; *Western Union Telegraph Co. v. Culberson*, 79 Tex., 65; *Western Union Telegraph Co. v. Rains*, 63 Tex., 27; *Heimann v. Western Union Telegraph Co.*, 57 Wis., 564; *Wolfe v. Western Union Telegraph Co.*, 62 Pa. St., 83; *Southern Express Co. v. Caldwell*, 21 Wall. [U. S.], 264; *Western Union Telegraph Co. v. Jones*, 95 Ind., 228; *Western Union Telegraph Co. v. Meredith*, 95 Ind., 93; *Western Union Telegraph Co. v. Fairbanks*, 15 Brad. [Ill.], 601; *Western Union Telegraph Co. v. Way*, 83 Ala., 542; *Western Union Telegraph Co. v. Dougherty*, 15 S. W. Rep. [Ark.], 468; *Western Union Telegraph Co. v. James*, 15 S. E. Rep. [Ga.], 83; *Western Union Telegraph Co. v. Yopst*, 118 Ind., 248; *Western Union Telegraph Co. v. Trumbell*, 27 N. E. Rep. [Ind.], 312; *Beasley v. Western Union Telegraph Co.*, 39 Fed. Rep., 181; *Western Union Telegraph Co. v. Brown*, 19 S. W. Rep. [Tex.], 336.

H. C. Brome and *Richard A. Jones*, also for plaintiff in error.

Reed & Ellis, contra.

HARRISON, J.

This action was commenced in the district court of Madison county by the defendant in error to recover damages against plaintiff in error which he alleged were caused by the incorrect transmission of a message from Papillion, this state, to Kansas City, Missouri, delivered by him to the company at its place of business in the former place to be sent to the latter. A jury was waived in the district court and the case submitted to the judge thereof upon a stipulated statement of facts, and from a finding and judgment

in favor of defendant in error these proceedings have been prosecuted to the higher court.

This case was before this court prior to this time for review of the proceedings during the trial to a judge of the district court and a jury, and was reversed and remanded for further action. The opinion rendered at that time is reported in 28 Neb., at page 661. The statement of the issues and facts therein made is sufficiently full and complete, hence we do not deem it necessary to repeat it, but for such statement we here refer to that opinion. It was announced in that decision that the requirements embodied in section 12 of chapter 89*a*, Compiled Statutes, as follows: "Any telegraph company engaged in the transmission of telegraphic dispatches is hereby declared to be liable for the non-delivery of dispatches entrusted to its care, and for all mistakes in transmitting messages made by any person in its employ, and for all damages resulting from a failure to perform any other duty required by law, and any such telegraph company shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks,"—are equitable and fair and obligatory on any and all telegraph companies doing business in this state, and that any such company contracting to correctly send a message to another state, which incorrectly transmits the same, is liable in all the damages for the breach of its contract which are sustained by the sender of the message by reason of such breach, and that, applied to the facts in this case, the defendant in error having delivered the message to the company at its office in Papillion, to be sent in the regular course of its business to Kansas City, Missouri, and the company's operator or agent, having transmitted it incorrectly in material portions, whereby defendant in error suffered damages, the company was liable for such damages. The determination of these questions, as stated in the former opinion, will not now be changed, but will be followed and adhered to.

The only other point discussed in the brief of plaintiff in error and for decision in the present hearing and which was not urged or passed upon at the prior presentation of the case in this court is that one of the agreements or conditions printed on the form upon which the defendant in in error wrote his message was as follows: "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message;" that the sender was bound by the stipulation quoted and, as the facts do not show that he did present his claim in writing to the company within the sixty days therein prescribed, he should not have been allowed a judgment for the damages. A clause such as this particular clause of the stipulations printed upon the form in which the message was written was considered by this court in the case of *Pacific Telegraph Co. v. Underwood*, 37 Neb., 315, and it was then held that if this portion of the conditions printed upon the telegraphic message form was to be looked upon as a contract, it was in violation of section 12, chapter 89*a*, Compiled Statutes, and an attempt to limit the liability of the company in a manner which the law did not allow. We are satisfied with the rule announced at that time and will adhere to it. It follows that the judgment of the district court will be

AFFIRMED.

ESTHER AMELIA BARR V. JOHN M. BIRKNER.

FILED MARCH 5, 1895. No. 6254.

1. **Slander:** WORDS ACTIONABLE PER SE. Words spoken of a woman which falsely charge that she is a prostitute are actionable *per se*, and in an action of slander against the person who made such a charge it is not necessary to either allege or prove special damages in order to maintain the action.

2. ———: PLEADING. Where it is alleged in a petition that defendant spoke certain words of the plaintiff and their meaning is averred in an innuendo, a statement in the answer by which the defendant admits the uttering of the words as alleged, but further states "that it was not in the sense of nor with the intent to convey the idea" claimed in the petition, is not a denial that the words had the signification averred in the petition.

3. ———: ERRONEOUS DIRECTION OF VERDICT. The action of the trial judge in instructing the jury to return a verdict for the defendant examined, and *held* not warranted by the issues as shown by the pleadings in connection with such proof as was introduced, and erroneous.

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

Thomas H. Matters, for plaintiff in error:

The answer was a substantial confession of the averments of the petition and offered no matter of defense. (*Farrar v. Triplett*, 7 Neb., 240; *Dinsmore v. Stimbert*, 12 Neb., 434; *Douglass v. Matting*, 29 Ia., 498; *Kennedy v. McLaughlin*, 5 Gray [Mass.], 3; *Clark v. Munsell*, 6 Met. [Mass.], 373; *Haskins v. Lumsden*, 10 Wis., 302; *Moberly v. Preston*, 8 Mo., 463; *Hampton v. Wilson*, 4 Dev. [N. Car.], 468; *Knight v. Foster*, 39 N. H., 576; *Wolcott v. Hall*, 6 Mass., 514; *Alderman v. French*, 1 Pick. [Mass.], 1; *Wheeler v. Shields*, 2 Scam. [Ill.], 348; *Clark v. Brown*, 116 Mass., 504; *Moore v. Stevenson*, 27 Conn., 14; *Wilson v. Fitch*, 41 Cal., 364; *Daly v. Byrne*, 1 Abb. N. C. [N. Y.], 150; *Littlejohn v. Greeley*, 13 Abb. Pr. [N. Y.], 55; Townsend, Slander & Libel, 132, 352, 353, 357, 374, 600, notes and cases cited.)

The court should have directed a verdict for plaintiff. (Townsend, Slander & Libel, 234, 352, 353, 354, 600, and cases cited; *Gorham v. Ives*, 2 Wend. [N. Y.], 534; *Hotchkiss v. Oliphant*, 2 Hill [N. Y.], 510; *Dinsmore v. Stimbert*, 12 Neb., 434; *Douglass v. Matting*, 29 Ia., 498; *Daly v. Byrne*, 1 Abb. N. C. [N. Y.], 150; *Parkhurst v.*

Ketchum, 88 Mass., 406; *Inman v. Foster*, 8 Wend. [N. Y.], 602; *Kennedy v. Gifford*, 19 Wend. [N. Y.], 296.)

L. P. Crouch and *E. E. Hairgrove, contra.*

HARRISON, J.

The plaintiff commenced an action of slander against the defendant in the district court of Clay county, in which she filed the following petition:

"The plaintiff representing unto this honorable court sets forth that she is now, and has been for more than two years last past, a resident of Clay county, Nebraska, and that during her residence in Clay county she has been engaged in the business of keeping a hotel in the city of Sutton in said county.

"2. That the defendant is a physician and surgeon duly qualified under and by virtue of the laws of the state of Nebraska to practice medicine.

"3. That during the whole time of her residence in Clay county, Nebraska, up to the 15th day of April, 1892, this plaintiff employed said defendant as her family physician.

"4. That during all of said time said defendant waited upon the plaintiff in the capacity of a physician, and was or should have been under and by virtue of his position as physician of this plaintiff fully acquainted with all the ailments of whatsoever kind or nature with which the plaintiff was afflicted.

"5. The plaintiff desires more fully to show that notwithstanding the knowledge within the mind of the defendant regarding this plaintiff during the month of April, 1892, said defendant, wickedly intending to injure the plaintiff in her good name, in a certain discourse which he then had of and concerning the plaintiff in the presence and hearing of divers persons, falsely and maliciously did speak and publish the following false and defamatory words, that

is to say: 'There is a new landlord at the Occidental Hotel,' or words to that effect, meaning that the plaintiff had been delivered of a bastard child. And again in the hearing of divers persons the defendant falsely and maliciously did speak and publish the following false and defamatory words, that is to say: 'I knew that she was in that condition in January last,' meaning that he knew that the plaintiff was pregnant with a bastard child in January, 1892, and said defendant, in the presence and hearing of divers persons during said time, did falsely and maliciously, by innuendoes and insinuations, circulate the report of and concerning this plaintiff that she was pregnant with a bastard child, and later that she had been delivered of a bastard child, and at the time of making such insinuations and the making of said statements the said defendant knew them to be false and untrue in every particular, having been in constant employ of this plaintiff as her physician, and there was within his mind absolute knowledge of the falsity of said statements.

"6. The plaintiff further representing unto this court shows that said defendant, in the presence and hearing of divers persons in the month of April, 1892, in a certain discourse which he then had of and concerning the plaintiff in the presence and hearing of divers persons, did falsely and maliciously speak and publish the following false and defamatory words, that is to say: 'She is an old cat,' meaning that the plaintiff was a prostitute.

"7. The plaintiff further says that said defendant, during said months of April and May, gave circulation to the report that this plaintiff was a woman who is unchaste and impure, and that she is a common prostitute; that each and every one of said statements were made falsely and maliciously and wickedly for the purpose of injuring the plaintiff in her good name, by means of which said several premises the plaintiff has been greatly injured in her good name to her damage in the sum of $5,000."

To this the defendant filed an answer in which he admitted the statements made in the first and second paragraphs of the petition, and further states:

"2. And further answering the said petition of plaintiff, defendant alleges that he did not use the alleged supposed defamatory words, 'There is a new landlord at the Occidental Hotel,' but that he did use instead the following, to-wit: 'Have you heard the report of there being a new landlord at the Occidental Hotel;' that the said language so used by the defendant as aforesaid, and as above set out, was used by him with reference to and concerning the alleged supposed fact that plaintiff had given birth to a child, and was the same occurrence as that alluded to by the innuendo set out in plaintiff's petition, to the form of expression as in the said petition contained.

"3. The defendant herein alleges that the truth and facts in connection with and in regard to his use of the words above set out, his reason therefor, the circumstances under which they were spoken, the spirit in which they were uttered and spoken, and the grounds therefor, and all the matters and things connected therewith are as follows: The hotel referred to and mentioned in plaintiff's petition, and included in the supposed defamatory words aforesaid, was and is the Occidental Hotel in said city of Sutton, Clay county, and state of Nebraska; that the proprietors thereof, at the date of the offense charged against this defendant in plaintiff's said petition, and for a long time prior thereto and also at the present time, is a firm under the firm name and style of J. R. Shope & Co.; that the persons composing the said firm are J. R. Shope and this plaintiff; that each of said proprietors, from the time they first took possession of the said hotel until and including the present time, have represented and held themselves out to the public as single persons; that from the time the said proprietors first took possession of the said hotel they have run, used, and conducted it as a hotel for the accommoda-

tion of the traveling public, furnishing board and lodging for the same, and meals to all who might apply, and furnishing private boarding,—in a word, doing the business that the public would expect a hotel to do, and which is in the line of business of a hotel.

"4. That for a long prior to the date of the alleged offense against this defendant reports obtained circulation in the community from time to time adverse to the virtue and chastity of this plaintiff; that these reports formed topics for general remarks in the community in which the plaintiff resided and was doing business; that these reports were commented on, talked about, and canvassed by different classes of people in the community, both male and female; that these reports, by numbers in the community, came to be believed as true; that they cast a shadow of suspicion on the hotel, affected its business and the social standing of this plaintiff in the community in which she resided.

"5. That late in the fall of 1891, the date of which defendant cannot now recollect, plaintiff withdrew herself from the public and from the public sight, secluded herself from the public gaze and was hid from the public eye in the seclusion of her own private apartments within the said hotel; that this retirement of the said plaintiff into the privacy of her own apartments continued up to a short time following the date of the alleged offense plaintiff charges against defendant in her said petition, when she emerges from her long enforced retirement and again appears on the street and resumes her former habits; that during a part of plaintiff's said retirement she employed by turns the resident physicians to attend upon her in their professional capacity, but toward the close of her said retirement she dispensed with their further service and called in foreign medical aid and service; that her said retirement and seclusion as aforesaid gave rise to public rumor, surmise, and suspicions as to the reason and cause therefor; that the same

became a topic of frequent remark and criticism in the community by all classes of people, both male and female; that the said suspicion and surmises, preceded by the reports hereinbefore mentioned, took formal shape in such remarks as this: 'There must be something wrong at the Occidental Hotel,' the purport of which remark was that the said plaintiff must be pregnant; that the said remark on the part of all classes was frequent, and the truth of which obtained credence among a large number of persons, while a suspicion that it might be true was general among others.

"6. That some time in the early part of the month of April, 1892, the exact date defendant cannot now recall, defendant learned for the first time of a report in circulation to the effect that plaintiff had in the early morning of said day given birth to a child; that defendant found that by evening of the same day the said report had become the topic of general remark on the street; that defendant was repeatedly asked as he circulated among the people on the street if he had heard that 'There is a new landlord at the Occidental Hotel;' that defendant in turn asked the same question of other persons; that the said report was in everybody's mouth; that the various reports and rumors in circulation adverse to the chastity of this plaintiff, together with the seclusion of plaintiff from the public, all of which are more particularly set out above, were well known to defendant at the time of their existence, and in consequence and as a result thereof defendant believed that plaintiff had given birth to a child as alleged by the report in reference thereto.

"7. Further answering the petition of plaintiff the defendant alleges that in regard to the other supposed defamatory words alleged by plaintiff in her said petition to have been used by defendant, to-wit, 'I knew that she was in that condition in January last,' that he has no recollection of using the said language, but if he did, it was not in

the sense of his having absolute knowledge of the truth of the said words, for such knowledge he did not have; but if he did use them, it was in the sense that from the matters and things above set out as relating thereto he believed that they were true; that his said belief in the fact of plaintiff's said pregnancy was based on the said reports and the said seclusion of plaintiff from the public, as hereinbefore more fully made to appear.

"8. Further answering the petition of plaintiff in regard to other supposed defamatory words alleged by plaintiff to have been used by defendant of and concerning the said plaintiff, to-wit, 'She is an old cat,' says with reference thereto that he has no recollection of using the said words, but if he did use them it was not in the sense of, nor with the intent to, convey the idea that the said plaintiff was a prostitute.

"9. The defendant alleges that he has not at any time given circulation to the report that plaintiff was a woman who is unchaste or impure, or a common prostitute; that he has made no effort, sought no opportunity, availed himself of no occasion, nor in any other way has he sought, attempted, or tried to circulate any such report, nor has he done so; that all he has done in that regard is to talk about the said reports as every man and woman in the community has done in which plaintiff resides, as the subject might come up in conversation, and of his belief of their truth.

"10. The defendant alleges that in whatsoever he has said of and concerning the said reports about and concerning plaintiff he has done so without malice, and with no intent to injure either the business or the reputation of the said plaintiff."

There were some further allegations of the answer which were mainly repetitions of what had been before stated, and the answer closed with a denial that the plaintiff had been damaged in any manner or in any amount. The reply was as follows:

"1. Now comes the plaintiff, and replying to the answer of the defendant herein filed says: That she denies each and every allegation therein contained except such as are hereinafter admitted.

"2. Plaintiff admits that the hotel referred to in her petition is the 'Occidental Hotel;' that the proprietors do business under the firm name of J. R. Shope & Co.; that the partners composing said firm are J. R. Shope and this plaintiff; that they are single persons; that ever since they took possession of said hotel they have run it for the accommodation of the traveling public and local patrons; that the report circulated, canvassed, commented upon, and talked about, as set forth in the fourth count of the defendant's answer, are the reports and conversations of and concerning which this plaintiff complains to this court, and they were put in circulation and given circulation by the defendant, and she admits that they affected the business of the hotel and the social standing of the plaintiff.

"3. Plaintiff further says that in the fall of 1891, she being afflicted by the menopause of life, became weak and at times unable to perform her household duties, and called upon the defendant, as a physician, to treat her ailments, whatever they might be, and the defendant, after long and continuous trials to relieve this patient of her sufferings, plaintiff saw fit to call upon Dr. Lee, now of Beatrice, Nebraska, but formerly of Sutton, Nebraska, who seemed to understand her case, and under his care and treatment her health became greatly improved, so much so that she was again able to resume her household duties, and for this reason only was the defendant induced to make his vile and slanderous assertions set out in plaintiff's petition herein filed and consented to in defendant's answer.

"4. Plaintiff further says that the facts set out in defendant's answer constitute no defense to the cause of action of the plaintiff herein, wherefore said plaintiff prays that the prayer of her said petition be granted."

Our reason for copying the pleadings is that the disposition which must be made of the case in this court rests almost, if not entirely, on the conclusion to be reached from a determination of the conditions of the issues as fixed by the pleadings. When the case was called for trial a jury was impaneled and the plaintiff was called to the witness stand, and after a few preliminary questions had been asked and answered the answer of defendant was offered in evidence. As to this the following statements appear in the record.

"The plaintiff now offers in evidence the answer of the defendant John Martin Birkner. The same is received and marked 'Plaintiff's Exhibit 1.'

"Defendant objects to the introduction of the same, as incompetent, irrelevant, and immaterial. Overruled. Exception.

"Court: You may read any part you desire in the case, and read it when you please."

The examination of plaintiff was then continued, but without obtaining much, if any, testimony which in any manner or to any very appreciable extent or degree tended to support the allegations of the petition except to show that reports such as set forth in the answer were in circulation in the community regarding plaintiff and that they had probably, to some extent, affected the social standing of plaintiff unfavorably. The answer, if introduced in evidence, does not appear in the bill of exceptions as a part of the testimony thereby preserved and cannot be considered as a part of the evidence in the case or bearing upon the issues except as it must be considered in its statements as a pleading, as admitting or denying the allegations of the petition, and thus requiring as to some of them, or rendering unnecessary as to others, any proof by plaintiff of the truth of such allegations. There was no cross-examination of the plaintiff and no other witness was called or testimony offered by or in behalf of either party, and at the close of her testimony the defendant made a motion to the

effect that the court instruct the jury to find for the defendant, which motion the court sustained and instructed the jury as follows: "Gentlemen: It appears to the court that plaintiff has produced no proof upon which you would be justified in finding a verdict for the plaintiff. You will therefore render a verdict in this cause for defendant." This action of the court was duly excepted to by counsel for plaintiff and was made one of the grounds of the motion for a new trial filed on behalf of plaintiff and is assigned as error in the petition in this court. There was a verdict in accordance with the direction of the court and judgment thereon for defendant.

The main question to be considered, and upon which hinges the determination of the disposition to be made of the case in this court, is whether the defendant, by some admissions made in his answer, and failure to deny therein some allegations of the petition, rendered it unnecessary for the plaintiff to produce proof of such facts, or is his liability, at least to some extent, shown sufficiently by the pleadings alone? The counsel for plaintiff contends that this is true, and being true, it was error for the court to instruct the jury as it did, to return a verdict for the defendant. The answer contains a denial that the defendant used the words, "There is a new landlord at the Occidental Hotel," and further states that he did use other words in speaking of the same matter, setting out such other words in full. The words the defendant says he used were not a direct statement, but were in an interrogative form and referred to the report of an occurrence and not to the subject itself, and proof of a statement of what the defendant pleads in his answer as being the words used would not have been sufficient to sustain a charge of speaking those alleged in the petition. "It is well settled that to authorize a recovery in an action for slander, the words laid in the declaration, or enough of them to charge the particular offense alleged to have been imputed, must be proved substantially as

charged. Evidence of the speaking of equivalent words, although having the same import and meaning, is not admissible. And words spoken interrogatively are not admissible to sustain an allegation of words spoken affirmatively." (*Sanford v. Gaddis*, 15 Ill., 228; *Wilborn v. Odell*, 29 Ill., 457; *Ransom v. McCurley*, 31 N. E. Rep. [Ill.], 119.) "In an action of slander the words charged and the words proved must be substantially the same; that they both convey the same idea is not sufficient to sustain the action." (*Bundy v. Hart*, 2 Am. Rep. [Mo.], 525; *Berry v. Dryden*, 7 Mo., 324; *Birch v. Benton*, 26 Mo., 163.) It follows that the statement of the words really used was not an admission of the ones claimed to have been spoken, and that proof of those pleaded was necessary under the denial of their use, contained in the answer.

In the sixth paragraph of the petition it was alleged that in the month of April, 1892, the defendant, in the presence and hearing of divers persons, did falsely and maliciously speak and publish of and concerning the plaintiff the following false and defamatory words, "that is to say: 'She is an old cat,' meaning that the plaintiff was a prostitute." The defendant's answer to this is "that he has no recollection of using the words, but if he did use them it was not in the sense of, nor with the intent to, convey the idea that plaintiff was a prostitute." He does not deny that he used the words stated or that they had the meaning alleged and conveyed such meaning to the persons hearing them, or to whom they were spoken. His answer to this allegation of the petition, aside from the admission it contains, is an allegation that he had an intent and used the words spoken with a meaning different from the one which the petition alleges they had and conveyed at the time and to the parties hearing them, and that he had a secret intent and meaning for the words. This is not a denial that they had the meaning to the by-standers when spoken, which the petition states they had, and to be available to the defendant as a de-

fense it would be necessary that it be shown that from the drift of the conversation, or what had been said and done at the time the words were spoken, or the facts and circumstances connected with the conversation or its subject-matter that they had such a bearing upon the import of the words as to limit the meaning conveyed to the hearers, to that entertained by the speaker of them. In the absence of such a showing, the fact that he had such intent and meaning at the time of uttering the words is immaterial. (Folkard's Starkie, Slander & Libel, secs. 591, 592; Moak's Underhill, Torts, pp. 139, 140; *Maybee v. Fisk*, 42 Barb. [N. Y.], 327; *Sabin v. Angell*, 46 Vt., 740.) It being admitted in the answer that the defendant had spoken of the plaintiff the words alleged, and not denied that their meaning was as claimed, this was in effect admitting that defendant had circulated the report that plaintiff was a prostitute, and no proof on this branch of the case was necessary on the part of plaintiff to entitle her to a verdict for at least nominal damages, for this was such a charge against her as was actionable in such a sense that when proved, or as in this case admitted to have been made, entitled her to damages, nominal damages at least being presumed without any further proof. (Cooley, Torts, 196; Townsend, Slander & Libel, 146, 147; *Boldt v. Budwig*, 19 Neb., 739; *Edwards v. Kansas City Times Co.*, 32 Fed. Rep., 813; *Hendrickson v. Sullivan*, 28 Neb., 329.) That other persons had said, or were saying the same, or that such a report was prevalent, or that what defendant had said was merely repeating what he had heard other persons say, would not excuse him from liability. (Cooley, Torts, 220 and cases cited; Folkard's Starkie, Slander & Libel, sec. 405.)

It follows that the action of the court in instructing the jury to return a verdict for defendant was wrong, and the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

ORTHA C. BELL, RECEIVER, v. ROBERT K. STOWE ET AL.

FILED MARCH 5, 1895. No. 6454.

1. Usury: PLEADING. To constitute a plea of usury there must be a statement of the contract claimed to be usurious, with whom it was made, its terms and character, and the amount of interest agreed upon to be reserved, taken, or received.
2. ———: ADMISSION OF TESTIMONY. The rulings of the trial judge in admitting certain testimony *held* erroneous.
3. ———: EVIDENCE. The finding of the jury and verdict in this case *held* to be manifestly wrong and not sustained by the evidence.

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

John O. Yeiser, for plaintiff in error.

Blair & Goss, contra.

HARRISON, J.

The plaintiff in error, also plaintiff below, instituted this action in the district court of Douglas county to obtain judgment against the defendants for the sum of $1,231.66, together with interest thereon at ten per cent per annum from August 16, 1891. The claim for such judgment was based upon a promissory note of date May 16, 1891, due ninety days after date, and in the amount claimed, alleged in the petition to have been executed and delivered by defendants to the bank of which plaintiff afterwards was appointed receiver. The answer, in so far as we need particularly notice it here, was as follows:

"3. That when these defendants made the contract with the First National Bank of Red Cloud, Nebraska, as shown in and evidenced by said note, set out in the petition, said bank contracted for an unlawful rate of interest thereon, and

contracted for and took usury thereon, to-wit: These defendants were on said May 16, 1891, indebted to said bank in the sum of $578.63, and no more, and on said day, and without any other and further consideration whatsoever, they made and delivered to said bank, at its request, the aforesaid note of $1,231.66, and that said note is the sole and only evidence of the indebtedness of these defendants to said bank, and that by said note the said bank took and contracted for usury to the amount of $653.03.

"4. That these defendants are indebted to said bank in the sum of $578.63, and no more, which said sum these defendants are willing and ready to pay."

The reply was in the following words:

"Plaintiff for reply to defendants' answer denies that it contracted for or took any unlawful rate of interest or usury as alleged by defendants, and denies every allegation of new matter contained in defendants' answer."

A trial to the court and a jury resulted in a verdict for the plaintiff in the sum of $578.63, which was in reality a victory for defendants, it being for the amount they pleaded in the answer they were indebted on the note, after deducting an alleged usurious amount from the face of the note. Plaintiff filed a motion for a new trial, which, on hearing, was overruled and judgment was rendered on the verdict.

The trial judge, in his certificate to the bill of exceptions, makes the following statement with reference to a portion of the case, viz.: "The defendants, although having the affirmative, requested plaintiff to introduce the original note sued upon, which was consented to." And in the transcript of the record appears an admission of certain facts which were alleged in the petition and denied in the answer, and the portion of the proceedings alluded to by the judge in his certificate to the bill of exceptions. It is as follows:

"The defendants admit that this First National Bank of Red Cloud was duly incorporated and is now in the hands

of a receiver; that plaintiff, Mr. Bell, is the receiver of this bank now in liquidation, and that the bank went into liquidation on the 21st day of May, 1891.

"Note identified as Exhibit 'A' by plaintiff.

"Note, Exhibit 'A,' which is copied in plaintiff's petition offered in evidence.

"Plaintiff rests."

Robert K. Stowe, one of the defendants, was called and testified in behalf of defendants, he being the only person who testified during the trial. The evidence of Stowe was mainly, if not entirely, confined to an attempt to show that he had commenced borrowing money of the bank August 31, 1887, and at that time executed a note as evidence of debt created by the loan to him; that the contract made between him and the bank was a usurious one, and that from that time until the execution and delivery of the note in suit there had been a continuous transaction between them, of the same nature, and evidenced from time to time by notes and renewal notes, the note in suit being the last of the series and given by him for the amount or balance due as a result of the whole account and dealings between the parties. To almost every one of the number of questions asked of the witness for the purpose of showing the business transactions which had taken place between him and the bank during a number of years prior to the execution of the note in suit, in which he had been a borrower and the bank a lender, and the usurious character thereof, and that it was included in the note upon which the action was brought, the plaintiff objected as being incompetent, immaterial, and irrelevant, which was in almost, if not every instance overruled by the trial judge and the evidence received. Exception was taken to the rulings and the reception of this testimony is assigned as error in the petition. There was no sufficient allegations of usury in the answer, and clearly none under which the evidence, to the introduction of which the plaintiff interposed an objection, was

competent, relevant, or material, or could be received, and the court erred in overruling the objections. (*New England Mortgage & Security Co. v. Sandford*, 16 Neb., 689; *Rose v. Munford*, 36 Neb., 148; *Rainbolt v. Strang*, 39 Neb., 339.) Moreover, the evidence of the defendants disclosed that some of the transactions with the bank never were or could have been in any manner connected with or included in the note in suit, and the findings which the jurors made as to the amount which should be deducted from the face of the note, based as it was, upon this and other incompetent evidence, was manifestly erroneous and was not supported by the testimony, there being an entire lack of evidence as to some portions of it. It follows that the judgment of the district court must be reversed and the case remanded.

REVERSED AND REMANDED.

MARY MEEHAN V. FIRST NATIONAL BANK OF FAIRFIELD.

FILED MARCH 5, 1895. No. 5954.

1. **Mortgages:** FORECLOSURE: ACTION TO RECOVER DEBT: ELECTION. Under the provisions of sections 847, 848, 849, 850, and 851 of the Code of Civil Procedure, which should be construed together, and when so construed show that it was the intention of the law-maker not to allow two actions for the one debt to be pending or prosecuted concurrently in point of time, a creditor whose debt is secured by mortgage may either commence and prosecute to judgment an action at law for the recovery of the amount of the debt, or enforce its payment by means of foreclosure; but, having elected which means he will first adopt and commenced proceedings accordingly, he must exhaust the remedy so chosen before resorting to the other.

2. ———: ———: AUTHORITY TO BRING ACTION FOR DEBT. Where a mortgage debt is secured by the obligation or other evidence of debt of any other person besides the mortgagor, the mortgagee

cannot, during the pendency or after decree rendered in the action to foreclose the mortgage, enforce such obligation or evidence of debt in an action at law, unless authorized to commence such action by the court having jurisdiction of the suit of foreclosure.

3. ———: ———: ———: PLEADING. The lack of authorization to bring such an action is not a defense necessary to be pleaded, but the contrary should be alleged, or at least proved by the plaintiff, as, without such authorization, the action cannot be maintained.

4. ———: ———: ———: PARTIES. A mortgagee, who by indorsing the notes evidencing the debt which a mortgage is given to secure becomes liable for their payment or for the payment of any sum or balance remaining after foreclosure of the mortgage and application of the proceeds of a sale made under the decree upon the indebtedness, is a proper party to an action to foreclose the mortgage, and as such cannot be sued at law for the recovery of the amount of the debt during pendency or after judgment in such foreclosure proceedings without leave obtained of the court having jurisdiction of the action of foreclosure to commence such suit at law.

5. **Pleading and Proof.** The pleadings and evidence in this case *held* insufficient to sustain the verdict.

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

J. L. Epperson & Sons, for plaintiff in error.

S. W. Christy and *E. E. Hairgrove, contra.*

HARRISON, J.

The bank, defendant in error, commenced an action against plaintiff in error in the district court of Clay county to recover the sum of $614.47, alleged in the petition to be due it from her as indorser of two promissory notes executed and delivered to her by one Ralph J. Little and indorsed by her and transferred to Fowler and Cowles or order and by them regularly transferred to the bank. In her answer defendant in error admitted the execution and delivery of the notes by Ralph J. Little to her and that she

indorsed and transferred them to the parties alleged in the petition, and denied all other allegations of the petition, and further alleged that Ralph J. Little, at the time of making the notes in suit, also gave her a mortgage upon the west half of the northwest quarter and the north half of the southwest quarter of section 10, town 5 north, range 8 west, in Clay county, Nebraska, to secure the payment of them; that the land was ample security for their payment, being worth the sum of $4,000; that the bank had foreclosed the mortgage on the land, and under and by virtue of an order of the district court of Clay county sold the land September 24, 1888, and at the foreclosure sale purchased the land, but failed and neglected to credit the amount for which the land sold, or any part of it, on the notes secured by the mortgage sued upon in this action, and that the bank received in the land more than the amount of the debt evidenced by the notes; that the bank has not further proceeded against Ralph J. Little, either to avail itself of a deficiency judgment against him in the foreclosure suit or in any other manner, although he is fully able to pay the amount due upon the notes. There is the further allegation in the answer that these were the notes secured by the mortgage which had been foreclosed and no authority had been granted by the court to the bank to institute this action. The reply of the bank admitted that the notes had been secured by the mortgage on the land, that it had been foreclosed and the land appraised, advertised, and sold according to law under order of sale issued in the foreclosure suit, and stated that there was a prior mortgage on the land, in payment of which the proceeds were applied, there not being sufficient realized to pay the amount of the debt secured by the prior mortgage; that the land was worth not to exceed $1,200, and brought at foreclosure sale $800, being sold subject to taxes amounting to $72.40; that the amount of the debt secured by prior mortgage at the time of the sale was more than $1,300. It was admitted that the

bank had instituted no further proceedings than the foreclosure against Ralph J. Little to collect the amount due on the notes, and further stated that Little was a non-resident of the state of Nebraska, and his residence unknown to the bank; that the only service had upon him in the foreclosure proceedings was constructive or service by publication, and that he had not made a personal appearance therein. There was also a general denial of all statements of the answer not admitted in the reply. To try the issues presented a jury was impaneled, and the bank introduced evidence to prove its ownership of the notes in suit by indorsement and transfer to it, confining its evidence solely to this purpose and rested. The record then states:

"The defendants now offer to prove that the mortgaged premises mortgaged to secure these notes were worth the sum of $3,000 and were at the time of the sale of the premises worth $3,000, and also offer to prove that the notes and mortgage which secured the payment thereof were put in the foreclosure suit of the first mortgage and that the total amount of the notes there foreclosed was less than the value of the land.

"Objected to, as incompetent, immaterial, and irrelevant. Sustained. Defendant excepts.

"Defendants further offer to prove that foreclosure proceedings were instituted as set forth in the defendants' answer by the plaintiff, and decree entered and the property sold and no credits placed upon these notes.

"Objected to, as incompetent, immaterial, and irrelevant. Sustained. Exception.

"Defendant further offers to prove that no especial authorization appears of record for the institution of this action and subsequent to the decree of foreclosure mentioned in defendants' answer.

"Objected to, as incompetent, immaterial, and irrelevant. Sustained. Exception taken.

"Defendant rests."

We presume from the record that the jury received no instructions. None appear therein, and there is a statement that "after hearing the evidence adduced" and arguments of counsel, they returned a verdict in favor of the bank in the sum of $704.25. Motion for new trial was filed for plaintiff in error, which was overruled and judgment rendered on the verdict.

One of the contentions made in behalf of plaintiff in error is that the court erred in excluding the evidence offered to prove that no authorization appears of record for the institution of this action, obtained from the court, in which the decree foreclosing the mortgage was entered. This was alleged in the answer as a defense and the offer to prove as herein quoted was made, and, upon objection, refused. The question raised by this assignment of error may be stated as follows: Was it necessary for the defendant in error to obtain leave of the court in which the foreclosure proceedings were prosecuted, before commencing this suit for any amount remaining due on the notes or the whole sum, if nothing was derived from the foreclosure decree to apply in their payment, it being a court of this state and in this particular instance the same court? The answer to this depends upon the meaning, scope, and effect to be given to the provisions of certain sections of our Code of Civil Procedure under the title "Foreclosure of Mortgages by Action." In sections 850 and 851 it is provided that in every petition filed to foreclose a mortgage it must be stated whether any proceedings at law have been had for the recovery of the debt secured by the mortgage or any part of it, and if it appear that a judgment at law has been obtained for such debt or any part of it, no proceedings shall be had in the foreclosure case unless it further appear that an execution has been issued and returned by the proper officer that the execution is unsatisfied in whole or in part, and that the defendant has no property whereof to satisfy such execution, except the

mortgaged premises. From this it is clear that if the creditor first proceeds at law for the collection of a debt which is secured by mortgage, he must exhaust the remedy at law before he will be allowed to prosecute foreclosure proceedings. Sections 847 and 849 are as follows:

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

"Sec. 849. If the mortgage debt be secured by the obligation or other evidence of debt of any other person besides the mortgagor, the complainant may make such person a party to the petition, and the court may decree payment of the balance of such debt remaining unsatisfied after a sale of the mortgaged premises, as well against such other person as the mortgagor, and may enforce such decree as in other cases."

By these two sections it is made possible for the creditor foreclosing a mortgage to combine with the remedy by foreclosure the remedy at law, by what is termed "a deficiency judgment" for the amount of the debt which remains after sale of the mortgaged premises and the application of the proceeds to the extinguishment of the debt secured by the mortgage. Section 848 is as follows:

"After such petition shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court."

By reading and construing these sections together, as they should be, we reach the following conclusions: That if a creditor whose debt is secured by mortgage commences an action at law for the recovery of the debt and obtains judgment, before he can afterwards foreclose his mortgage by suit, he must show that he has exhausted the remedy at law; and if he first begins an action of foreclosure to enforce payment of the debt, inasmuch as he may, in the suit by foreclosure, recover a deficiency judgment against all proper parties who are liable for the payment of the indebtedness for any amount of the debt which the proceeds of the sale of the mortgaged property under the decree are insufficient to meet, then he must, if for any reason they have not been made parties to the foreclosure suit, or for any valid reason he desires to commence an action at law against any one of them, obtain permission so to do of the court before which foreclosure proceedings are pending or were instituted. It seems to have been contemplated by the law-maker in the enactment of these provisions embodied in the sections alluded to that whichever course of procedure the creditor might elect to pursue for the recovery of his debt he should pursue it to the end, and that while either a suit at law or action of foreclosure was in progress, the other should not and could not be, and whichever was first commenced, full relief should be afforded and obtained by it if possible before resorting to the other. The purpose of these provisions is evidently to avoid the two actions being in progress at the same time, and also the double costs and expenses, and to confine the creditor as closely as may be consistent with justice to him and his demands to the one action, and more especially does this seem true of the foreclosure action in which he is allowed to first subject the mortgaged property to the payment of the debt and the further remedy of a deficiency judgment for any balance of the debt remaining unextinguished. The courts of New York have so construed and applied similar sections

or statutory provisions in that state, and have held, in regard to the necessity of being authorized to sue at law after decree in suit by foreclosure,—the section of the statute under consideration being as follows: "After such bill shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court of chancery,"—that "The owner of a debt secured by mortgage who holds an obligation or covenant for its payment or collection, given by a person other than the mortgagor, cannot enforce the obligation by action during the pendency of, or after judgment in, an action to foreclose the mortgage, unless authorized by the court. Also held that the lack of authority to sue was not a defense necessary to be pleaded and proved affirmatively by defendants, but as there was no right of action without the authority, it was for the plaintiff to allege, or at least to prove it, in order to maintain his action." (See *Scofield v. Doscher*, 72 N. Y., 491; *Equitable Life Ins. Society v. Stevens*, 63 N. Y., 341.)

One of the sections of the Code under consideration provides specifically for a deficiency judgment against a mortgagor in an action of foreclosure, but in this case we must determine who are within the authorization contained in section 849, where it states that if the mortgage debt be secured by the obligation or other evidence of debt of any other person besides the mortgagor, such person may be made a party to the petition and a deficiency judgment obtained against such person as well as the mortgagor. Does it include a person who, as in this case, indorses and transfers the note secured by the mortgage, and by the indorsement becomes liable to the holder for its payment? A grantee of the mortgaged premises who assumed or agreed to pay the debt secured by the mortgage, as the whole or part of the consideration for such purchase, may be made a party to an action to foreclose the mortgage, and judgment

for any deficiency may be rendered against him in the action. (*Cooper v. Foss*, 15 Neb., 515; *Rockwell v. Blair Savings Bank*, 31 Neb., 128; *Reynolds v. Dietz*, 39 Neb., 186.)

In New Jersey the statute provides as follows: "It shall be lawful for the chancellor, in any suit for the foreclosure or sale of mortgaged premises, to decree the payment of any excess of the mortgage debt above the net proceeds of the sale, by any of the parties to such suit who may be liable, either at law or in equity, for the payment of the same;" and, in construing the provision in so far as it relates to parties, in the case of *Jarman v. Wiswall*, 24 N. J. Eq., 267, it was held: "A mortgagee who assigns the mortgage and guaranties the debt is a proper party in a suit to foreclose the mortgage and a personal decree may be made against him for any deficiency;" and it was said by the court in the opinion: "The defendant insists that the word 'parties' in that act must be construed to mean necessary parties, and he further insists that a mere guarantor is not a necessary, nor even a proper, party to a suit for foreclosure. I do not think so. A guarantor in such a case is not a necessary party, but he is a proper party. He is interested in the account to be taken in the suit of the amount due on the security, the payment of which he has guarantied. He is interested in the judicial sale in which the proceedings may result; that it shall be lawfully conducted, and that the property shall not be unnecessarily sacrificed." (See *Curtis v. Tyler*, 9 Paige Ch. [N. Y.], 432; *Jones v. Stienbergh*, 1 Barb. Ch. [N. Y.], 250; *Luce v. Hinds*, Clarke, Ch. [N. Y.], 317; *Sauer v. Steinbauer*, 14 Wis., 76; *Equitable Life Ins. Society v. Stevens, supra; Scofield v. Doscher, supra; Burdick v. Burdick*, 20 Wis., 367.) See, also, *Bristol v. Morgan*, 3 Edw. Ch. [N. Y.], 142, where it was stated that, regardless of statutory provisions, a mortgagee who assigns the mortgage and guaranties its payment is a proper party to an action to foreclose it. With reference to an indorser of a note secured by mortgage being made a

party to the foreclosure suit see *Eastman v. Turman*, 24 Cal., 380. We conclude that, under the provisions of our Code with reference to foreclosure actions, the indorser of a note or notes secured by mortgage, having become liable, by the indorsement and transfer, for the payment to the holder of the whole amount of the debt evidenced by the note, or any sum remaining due thereon after the sale of the mortgaged premises and application of the proceeds to its payment, if not a necessary party to an action to foreclose the mortgage, is a proper party and may be made a party, and judgment rendered against such indorser therein for any such deficiency; and this being true, it follows that in order to bring suit at law against the indorser of a note secured by mortgage during pendency of a suit to foreclose, or after decree therein, the creditor must comply with the requirements of section 848 and obtain leave of the court having jurisdiction of the foreclosure suit to commence the action at law. This was not done, so far as the record discloses, in the case at bar, and as the issues were joined the plaintiff in error had assumed the burden of proving that it had not been done and should have been allowed to do so. But aside from this the defendant in error, in the reply, admitted the beginning of the foreclosure proceedings and decree obtained therein; and no authorization, by the court, of the institution of the suit of law is either pleaded or appears from the testimony, and hence the pleadings and proof are insufficient to sustain the verdict rendered and the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

GEORGE BURKE ET AL. V. CHARLES H. FRYE ET AL.

FILED MARCH 5, 1895. NO. 6027.

1. **Agency: PROOF.** The fact of his agency cannot be established by the mere declarations of one assuming to act in that capacity. Without other proofs of authority, compliance with directions given by such assumed agent will not bind the party for whom he claims to act.

2. **Factors and Brokers: IMPLIED DUTY TO SELL AT DESTINATION.** Where a consignment was made to a commission merchant for sale without instruction, in the absence of an established usage to the contrary, of which the consignor has or must be presumed to have knowledge, the consignee's authority to sell cannot be delegated, and its exercise is limited to the place to which the consignment was originally made.

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

Hall & McCulloch, for plaintiffs in error.

Charles Offutt and *Charles S. Lobingier, contra*, cited, contending that agency could not be proved merely by declarations of the alleged agent: 1 Greenleaf, Evidence [14th ed.], sec. 114, and cases there cited; *Cleveland Stove Co. v. Hovey*, 26 Neb., 624; contending that plaintiffs in error owed the implied duty to sell at South Omaha: The authorities cited in the opinion, and *Phy v. Clark*, 35 Ill., 377–382.

RYAN, C.

In September, 1888, the firm of Frye & Bruhn shipped from Idaho to the firm of George Burke & Frazier, a live stock commission firm in South Omaha, sixty-two head of cattle. The firm first named had, previous to said shipment, written to that last named that the number of cattle proposed to be shipped was seventy-three. After shipment, however, there was written the following letter:

"POCATELLO, September 9, 1888.

"*Messrs. Burke & Frazier, South Omaha*—DEAR SIRS: Instead of shipping four car loads of cattle which we started with from Shoshone, we culled them some and sent three car loads, or sixty-three head, all pretty good cattle, which we hope you will sell to the best of your ability. We met Mr. Gallup here, and he wrote to you also. You can deposit the proceeds to our credit at First National Bank, Butte City, Montana. We sent a young man, and paid him, with the cattle, and hope he will come through all right. The cattle ought to be at North Platte Wednesday evening. If you have some man there we wish you would instruct him to look out for the cattle and see they leave North Platte all right. Wire us weight and price for cattle here at Pocatello.

"Yours respectfully, FRYE & BRUHN,
"Butte City, Mon.

"P. S.—The contract calls for four cars cattle. The agent here says we will have to straighten the matter in Omaha, as we only sent three from Pocatello. Perhaps you can fix it all right with the freight agent for us.

"FRYE & BRUHN."

Upon receipt of the cattle the firm of George Burke & Frazier offered them for sale, one day receiving an offer of $3.65 per hundredweight, the next an offer of $3.85 per hundred. Neither of these offers were accepted, but instead the cattle were forwarded to Chicago and there sold by a commission firm at such figures as, compared with the highest offer made in South Omaha, netted a loss of at least the amount of the judgment rendered upon a suit therefor brought in the district court of Douglas county by Frye & Bruhn against George Burke & Frazier. During the trial there was an attempt to prove that the failure to sell in the South Omaha market was attributable to directions given by the "young man sent with the cattle," as he was described in the above letter. This question was presented

by asking J. A. Frazier, a member of the firm of George Burke & Frazier, what conversation was had between witness and the aforesaid young man at the time the cattle came in, supplemented by the following offer of proof to be elicited by it if there should be permitted an answer, to-wit: "We offer to prove by this witness that the three car loads of cattle in controversy were in charge of a man by the name of Frye, with whom the witness Frazier had a conversation with regard to the advisability of selling the cattle in South Omaha, or sending them on to Chicago; that in this conversation said Frye told the witness that the cattle should not be sold in South Omaha unless he could receive $4.10 per hundred and that they should hold them one day after the offer of $3.85 which has been testified to, and unless $4.10 could be obtained they should be shipped on to Chicago; that not being able to obtain the amount specified the cattle were shipped to Chicago and sold there." In *Dunphy v. Bartenbach*, 40 Neb., 143, it was said: "While an offer to prove is necessary to illustrate the purpose for which the question has been asked, we do not understand that by a mere offer to prove certain facts the materiality, relevancy, or competency of testimony which by no possible means could be responsive to the question propounded is presented for determination." The question propounded to Mr. Frazier required that he should state what conversation took place between himself and Mr. Frye. The offer of proof was, first, to establish the fact that Mr. Frye was the agent of Frye & Bruhn, and, second, to show what instructions as such agent he gave to Mr. Frazier. In *Stoll v. Sheldon*, 13 Neb., 207, this court made use of the following language: "In the case of *Graul v. Strutzel*, 53 Ia., 712, it was held by the supreme court of Iowa that an agent's authority cannot be shown by his own testimony. That is, where an agent is acting under a special authority, the principal will only be bound to the extent of the authority. An attorney in releasing a surety

is acting under a special power which must be proved. As there is an entire failure of proof upon that point, the court did not err in directing a verdict for the defendant in error." As was pointed out in *Nostrum v. Halliday*, 39 Neb., on page 831, the denial of the right to prove an agent's authority by his own testimony attributed to the supreme court of Iowa, was but a *lapsus linguæ*, and that the intention was evidently to state the familiar proposition that an agent's authority cannot be proved by his own mere declaration. This proposition without question embodies sound law.

The first matter to be established by the testimony of Mr. Frazier was that in a conversation had with Mr. Frye the witness was told by Mr. Frye that he was in charge of the cattle; in other words, as related to the subject-matter of this action, that he was the agent of Messrs. Frye & Bruhn with respect to said cattle. This, under the rule above recognized, was clearly incompetent. From this it inevitably resulted that the second matter proposed to be proved—that is, that this Mr. Frye gave certain directions, as agent, regarding the disposition to be made of this stock under certain contingencies—was not competent unless founded upon authority independent of that above contemplated. No such showing was attempted. So far as the proofs go there was nothing to indicate to what extent, if at all, this Mr. Frye represented, or was authorized to act for Messrs. Frye & Bruhn with respect to the cattle with which he had been sent from Pocatello except as this may be assumed from the letter to George Burke & Frazier. A careful consideration of the language employed and of the circumstances under which this letter was written satisfies us that the district court was correct in its assumption that the firm of George Burke & Frazier had no right to act upon or be governed by any directions given by the young man who had simply been sent with the stock which said firm was expected to sell. In various ways implied au-

thority of George Burke & Frazier as commission merchants to forward the cattle received by them at South Omaha to another market was presented. The letter of the consignor in no way indicates that the consignee in turn might consign to Chicago. While the commission merchants named sometimes sent stock to Chicago to be sold the evidence discloses the fact that in such cases the sales were conducted by commission brokers in Chicago, and that George Burke & Frazier had no office in Chicago for that purpose. There is no proof whatever that the original consignors knew that under any circumstances George Burke & Frazier forwarded consignments from South Omaha to Chicago. There could therefore be entertained no presumption that such procedure would be approved. The right of commission merchants to take this course, if it at all exists, must be implied from the mere fact of being employed in that capacity. In *Phillips v. Scott*, 43 Mo., 86, there was used the following apposite language: "It would seem to be altogether reasonable, as well as consistent with the general principles of law regulating agency, to presume that, where a consignment is made to a factor for sale unaccompanied with instructions from the principal and in the absence of an established usage of trade to the contrary, it is intended to be sold at the place of residence of the factor. The intent of the principal, which in such a case is to be gathered from the circumstances alone, fixes the character of the contract between the parties as to the place of sale, and the factor is not at liberty to disregard it." The same doctrine prevailed in *Catlin v. Bell*, 4 Camp. [Eng.], 183; *Kauffman v. Beasley*, 54 Tex., 563; *Grieff v. Cowguill*, 2 Dis. [O.], 58; Smith, Mercantile Law, 148; Dunlap's Paley, Agency, 177, and Story, Agency, secs. 33 and 34. In this case there was an offer to prove that among South Omaha live stock commission merchants it was customary, when prices offered were unsatisfactory at that place, to send cattle for-

ward to Chicago for sale in that market. There was no claim that the firm of Frye & Bruhn had knowledge of this usage, neither was there a pretense that this custom was anything but local and confined to South Omaha. It would be very unfair by mere implication to bind shippers from distant points like Pocatello by a local usage peculiar to South Omaha, solely because of an election to consign to commission merchants at that market. These general observations cover all the questions presented in this court for consideration. The judgment of the district court is

AFFIRMED.

HENRY J. WINDSOR v. JAMES THOMPSON.

FILED MARCH 5, 1895. No. 6119.

Review. Where the right of plaintiff to recover was not affirmatively established by the proofs in the district court, its judgment in favor of the defendant will not be disturbed in this court.

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

Switzler & McIntosh, for plaintiff in error.

Tiffany & Vinsonhaler and *J. W. Houder, contra.*

RYAN, C.

This action was brought by the plaintiff in error for the recovery of damages caused by the failure of the firm of Miles & Thompson to return, upon his demand, certain abstracts of title furnished to and used by said firm in ascertaining the nature of plaintiff's title to certain real property, upon the faith of which afterwards a desired loan secured by mortgage on said real property had been con-

summated. After there had been an appeal to the district court of Douglas county John L. Miles, one of the defendants, died, and thenceforward the suit was prosecuted against James Thompson as a surviving partner. There was a trial to the court, without the intervention of a jury, resulting in a judgment in favor of Mr. Thompson.

It was not alleged in the petition that any obligation of returning the abstracts of title after consummation of the loan devolved upon the defendants, either by express contract or otherwise. It was averred in the answer that the abstracts in question had been furnished for the purpose above indicated, and that, in consideration of the furnishing of said abstracts and the giving of a mortgage on the property in reference to which the abstracts had been made, the defendants Miles & Thompson had loaned to plaintiff the sum of $5,000, which loan by its terms did not become payable until June 12, 1891; that on March 2, 1891, the said defendants sold to the German Savings Bank of Davenport, Iowa, the note evidencing the obligation to pay said sum, and that the mortgage and abstracts aforesaid were as part of the security for said loan transferred with said note, and at the time of filing the answer were held by said bank. The demand for the abstracts was alleged in the petition to have been made of the same date as was that of the above averred transfer to the German Savings Bank. The evidence showed that Mr. Thompson took no part in making the loan to plaintiff, the entire business in that respect having been conducted by Mr. Miles, since deceased. In respect to plaintiff's part in this transaction, his testimony was that he did not remember whether he made a written application for a loan or not; that he did not know whether or not it was part of the agreement that he was to furnish an abstract, for witness at that time was in Cheyenne and Mr. Lander, as his agent, was attending to his business; that Mr. Lander sent for the abstracts and plaintiff sent them to him, and that Lander delivered these ab-

stracts to Miles & Thompson. Owing to the death of Mr. Miles we have not the advantage of his testimony on the one hand, and, on the other hand, Mr. Lander was not sworn, so that there is no evidence whatever as to the agreement under which the abstracts were intrusted to the firm of Miles & Thompson. If the proof of general custom in Omaha as to the retention of abstracts by the party making the loan is taken into consideration, there was a decided preponderance in favor of the defendant. This testimony, however, might properly be rejected, since the trial was to the court, and in that event the sole question would be whether or not its finding was contrary to the weight of the remaining evidence. We cannot say that it was, and as plaintiff's right of recovery depends upon an affirmative showing of his right to a return of the abstracts on demand, the judgment of the district court is

AFFIRMED.

CHARLES CORBETT V. NATIONAL BANK OF COMMERCE.

FILED MARCH 5, 1895. No. 6163.

1. **Continuance: GROUNDS: TRIAL.** Where a cause was regularly reached for trial on a call of the trial docket and one of the attorneys for the defendant orally announced that the attorney for the defendant was unavoidably absent from the state, but would soon return and attend to the trial of the case called, if it should be postponed for a short time, *held*, no abuse of discretion for the presiding judge to insist that the case must be dismissed, tried, or continued generally.

2. ———: ———: ———. An attorney whose case is called for trial, if unprepared, should at once make such showing to entitle him to a postponement as lies within his power, and if he fails so to do, he will not be permitted in support of a motion for a new trial to urge such matters within his knowledge as, properly presented, should have operated to excuse his entering upon a trial in the first instance.

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

B. G. Burbank, for plaintiff in error, cited, contending that the judgment should have been set aside: Sec. 602 of the Code; *McCann v. McLennan*, 3 Neb., 25; *Town of Storm Lake v. Iowa Falls & S. C. R. Co.*, 62 Ia., 218; *Callanan v. Ætna Nat. Bank*, 50 N. W. Rep. [Ia.], 69; *Ellis v. Butler*, 78 Ia., 632, and citations; *Frazier v. Williams*, 18 Ind., 417; *Elston v. Schilling*, 7 Rob. [N. Y.], 74; *Buell v. Emerich*, 85 Cal., 116; Code, sec. 99.

E. J. Cornish, contra.

RYAN, C.

The defendant in error sued the plaintiff in error on two promissory notes made by the latter to the former for the aggregate sum of over twenty thousand dollars. The defense was that these notes had been given to close up a series of loans in which the usurious interest exacted and paid more than equaled the amount of the aforesaid notes. On the 15th day of March, 1892, in the absence of the plaintiff in error, a judgment was rendered against him for the full amount claimed in the petition. This proceeding in error presents for review the refusal of the district court to set aside the above judgment and grant a new trial on a motion for such relief filed April 8, 1892. On the trial bulletin board in February, 1892, of the district court of Douglas county the entries as to this case show: "21–26, Nat. Bk. Commerce v. Chas. Corbett, P. for Cornish; Feby. 19, case marked P.; 23, foot of call; 24, foot of call; 29, P. for Cornish; Mar. 1, P. for Cornish; Mar. 7, foot of call; Mar. 14, foot of call; Mar. 15, the case was tried and marked from call." It is not clear what is meant by the expression, "21–26, Nat. Bk. of Commerce v. Chas. Corbett, P. for Cornish." It was shown by the proofs that

the letter "P." was used to indicate that the case was passed on a call of the case for trial. If the expression above specially referred to indicated that on the 21st and 26th of February this case was passed at request of Mr. Cornish, there would be five entries of that kind; at any rate the case was in February passed three times at his instance.

There was filed in support of the above described motion an affidavit of Mr. Breen, an attorney for the defendant, by which it was made to appear that the several postponements at the instance of Mr. Cornish were, by affiant, consented to as courtesies extended Mr. Cornish on his request, and, inferentially at least, it was intimated that the defendant should not therefore by Mr. Cornish have been compelled to go to trial when the affiant was necessarily absent from this state. In justification of Mr. Cornish it is but fair to state that the uncontradicted evidence disclosed that when this case was called for trial on February 15, Mr. Cornish stated that he was willing that a trial should be postponed, and a temporary adjournment had to enable Mr. Breen to be present. The district judge refused to permit this course to be taken and informed counsel that the case must be disposed of, either by a trial, dismissal, or continuance, whereupon Mr. Cornish elected to have a trial, which thereupon took place with the result above described. Mr. Cornish made affidavit, without contradiction, that on the day following the trial, as he remembered it, he saw Mr. Breen and stated to him that he would make no objection to the granting of a new trial in said case provided it could be set down for immediate hearing; that Mr. Breen did not until April 8, being twenty-four days after the rendition of judgment, make said motion, and that this was too late to admit of another trial of said cause at the said term of court. The answer was signed "Chas. Corbett, by John P. Breen, Byron G. Burbank, his att'ys." Mr. Burbank above named was present at the final call of this case for trial on February 15. There was attempted no

explanation of the fact that his name was affixed to the answer as counsel for the defendant. In his own affidavit is found the nearest approach to a denial of his being one of the defendant's attorneys which anywhere appears in the record or bill of exceptions. His language was that upon Judge Doane inquiring whether or not this cause was ready for trial affiant "informed his honor, Judge Doane, that affiant was not the attorney in the case and that the case was not ready for trial at that time, for the reason that John P. Breen, attorney of record for defendant, was then absent at Little Rock or Hot Springs, Arkansas." This affiant further stated that he said to Judge Doane that immediately upon the hearing in which Mr. Breen was engaged being closed, Mr. Breen would stand ready for the trial of this action. It is noticeable that by this affidavit it was not attempted to be asserted that the affiant was not an attorney in the case. Very guardedly, possibly from innate modesty, the affiant only disclaimed being the attorney for defendant. He did not show that the defendant was unrepresented, indeed quite of a contrary tendency was this affiant's failure to account for the appearance of his name upon the answer. Under these circumstances it was no abuse of discretion for the district court to insist that upon the case being reached on the regular call of the trial docket it must be disposed of for the current term. If there existed any sufficient reason why the course indicated should not have been pursued it should have been made to appear by the affidavit of Mr. Burbank, or of defendant, or it might have been shown by any other proper method, if such reason existed. After a trial had, it was too late to urge these matters as grounds for granting a new trial. (*City of Lincoln v. Staley*, 32 Neb., 63.) Aside from these circumstances it is worthy of remark that the district court had opportunities of determining whether due diligence had been employed, which are, of necessity, denied this court. The proper dispatch of business requires, too, that the pre-

siding judge should exercise a certain discretion in the disposition to be made of cases when regularly reached for trial. It does not appear from the proofs submitted that the district court improperly exercised this discretion, its judgment is therefore

AFFIRMED.

NEBRASKA NATIONAL BANK ET AL. V. GEORGE BURKE & FRAZIER.

FILED MARCH 5, 1895. No. 6445.

1. **Evidence:** CONVERSATIONS BY TELEPHONE. The admission of a party sought to be charged, that, at a certain time, he had had a conversation in given terms by telephone, renders immaterial the objection that independently of such admission there was no direct evidence of the scope of such conversation.
2. **Instructions.** It is not required that each instruction shall state the different theories upon which the liability of the defendant may depend. If by one instruction is described one ground of liability, and by another instruction there is set forth another reason for defendant's liability, there exists no good reason why these distinct predicates should of necessity be mentioned in the same instruction.

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

Chas. Offutt, for plaintiffs in error.

Hall & McCulloch, contra.

RYAN, C.

This action was instituted in the district court of Douglas county by George Burke & Frazier, a copartnership, against the Nebraska National Bank of Beatrice and Lillie May Sigman, to recover the sum of $1,000, with interest

thereon from June 5, 1890. It is not disputed that in June, 1890, Mr. Sigman, the husband of Lillie, deposited to his credit and had cashed by the Nebraska National Bank of Beatrice two drafts which he drew on George Burke & Frazier through said bank, one for $1,000 the other for $600. These drafts were forwarded by the Nebraska National Bank of Beatrice through the regular commercial channels for presentation to George Burke & Frazier and collection from them. These drafts were accepted when presented, and at the expiration of three days' grace they were paid.

George Burke & Frazier, in this action, sought to recover the amount of the money thus paid to the bank, on the allegations that when the drafts were presented to them they telephoned to Beatrice to the said Nebraska National Bank to inquire whether the cattle would be shipped to meet the drafts, and being informed by the said bank that the cattle would be shipped to meet the drafts, the said George Burke & Frazier accepted the same; that Lillie May Sigman had entrusted to the Nebraska National Bank certain blank drafts to which her signature had been attached, to be filled out and used whenever shipments would be made by her, and that said bank drew upon plaintiffs by using two of the above described blank drafts. Plaintiffs alleged further that afterwards said cattle were diverted to Chicago and marketed there, and were not shipped to plaintiffs as the said bank agreed. They further charged that when the drafts became due, at the end of the days of grace, the cattle not having been received, they again telephoned to said bank at Beatrice, and were informed by it that they might draw for the money and that the bank would pay the same; and that thereupon they did draw upon Sigman for the amount of the money so fraudulently held back by said bank, and payment of said draft was refused. The Nebraska National Bank of Beatrice denied that any such agreements were made between and it

George Burke & Frazier. The case was tried to a jury and a verdict rendered in behalf of George Burke & Frazier for the amount of the two drafts with interest. A motion for a new trial was overruled and a judgment entered upon the verdict. The case is now here on error to reverse this judgment upon two grounds, to-wit:

"1. Incompetent evidence was admitted in behalf of George Burke & Frazier, and against the objection of the bank.

"2. The instructions of the trial court were erroneous and contradictory."

1. The incompetent evidence complained of was given by George Burke, a member of the firm of George Burke & Frazier. His testimony was descriptive of a conversation which he said his firm, on June 5, 1890, had with the cashier of the bank at Beatrice by telephone between the place of business of the bank and South Omaha, the place of business of plaintiffs. The material part of this conversation was as follows:

Q. What communication did you have with them?

A. We asked them what the drafts were drawn for, and they answered that they were drawn on some stock that would be shipped in a day or so.

Q. What, if anything, further was said?

A. We asked them if they would guaranty the shipment of stock, and they said they would.

Q. After this communication, then, what, if anything, was done by you?

A. We paid the drafts, or accepted them, as they show.

Q. After those drafts were accepted on that date, when, if at all, were they presented for payment?

A. They were presented on the 7th.

Q. At that time had the stock arrived?

A. It had not.

Q. Did you then have any further communication with the Nebraska National Bank of Beatrice?

A. We did. We called them up.

Q. In what way?

A. By telephone.

Q. You may state what that communication was.

A. We called them up by telephone, and told them that the stock had not arrived to meet that draft. They informed us that the stock had been shipped to Chicago, and that we should draw through their bank on Sigman for the amount of these drafts, and that it would be paid.

Q. Did you draw a draft pursuant to the instructions that you received from this bank?

A. We did.

Q. You may tell the jury whether or not that draft was paid.

A. It was not.

There was afterward developed by cross-examination of Mr. Burke the fact that he, in person, did not carry on the above conversation on behalf of the firm of which he was a member, but that this was done by Mr. Harris, who, at the telephone as the conversation progressed, reported the same to Mr. Burke. On the ground that the testimony of Mr. Burke was but hearsay there was a motion to exclude it. This was not passed upon until after there had been evidence given by Mr. Burke that at a time subsequent to June 5, aforesaid, he had had a conversation with the cashier of the bank at Beatrice, by whom it was admitted that with some one representing George Burke & Frazier he, the said cashier, at the time above indicated, had had a conversation, the language of which was substantially the same as that above detailed. Mr. Burke's testimony was to some extent confirmed by that of R. S. Hall, Esq., who was present at the time the last mentioned conversation took place. This being the condition of the proofs at the time the motion to exclude was overruled, it is manifest that it would have been error to have excluded Mr. Burke's version of the conversation which had been had over the telephone,

for his knowledge thereof acquired by admission of the cashier was not based upon mere hearsay.

2. It is insisted that between instruction No. 4 given by the court on its own motion and instruction No. 4 given at the request of the bank there was an irreconcilable inconsistency. These, given in the order in which they have just been referred to, were as follows:

"4. I instruct you that if you find from the evidence that the plaintiffs did, on June 5, 1890, accept the two drafts sued on without being at the time informed by the defendant bank that cattle would be shipped to meet said drafts to plaintiffs, and relying thereon, that if you so find from the evidence, the plaintiffs cannot recover in this action against the bank. If, on the other hand, you find from the evidence that on June 5, 1890, at the time plaintiffs accepted the two drafts in question, the defendant bank had informed said plaintiffs by telephone that cattle would be shipped to meet said drafts, and that plaintiffs relied on said information, and by reason thereof accepted said drafts, and you further find that said cattle were not shipped and that plaintiffs paid said drafts upon said acceptance, then, if you so find from the evidence, the plaintiffs would be entitled to recover in this case from said bank."

The instruction asked on behalf of George Burke & Frazier was as follows:

"4. The jury are instructed that if they believe from the evidence that the money represented in the two drafts paid by Burke & Frazier was first furnished by the defendant bank to Sigman to buy cattle and then drawn for by said bank on Burke & Frazier and paid by them to said bank, and you further believe from the evidence that it was the intention of Sigman that the cattle so purchased should be shipped to the said Burke & Frazier to meet said drafts, and that said bank so understood at the time it drew said drafts, and you further find that said cattle were afterward diverted to Chicago with the knowledge of said bank, and

said bank again received the money so advanced by it out of the proceeds of the sale in Chicago, said bank would be liable for the money so obtained from Burke & Frazier, and your verdict, if you find as above stated, should be for the plaintiffs for the amount of said drafts, with interest at seven per cent per annum from June 7, 1890."

In the first of these instructions the ground of liability of the bank was predicated upon its false representation acted upon, that Mr. Sigman would ship certain cattle to Burke & Frazier as an inducement to said firm to accept the drafts which form the subject-matter of this action. In the second instruction the ground of liability was the receipt and retention of funds furnished by Burke & Frazier to pay for the stock expected to be shipped to that firm in South Omaha as the bank knew, and the acquiescence of the bank in such shipment being afterwards made to Chicago and its receipt and retention of the proceeds of the sale there made. These grounds upon which the defendant bank might be held liable were distinct it is true, but each was consistent with the other and either presented a sufficient reason for holding the bank liable. There existed no reason for mingling these independent grounds of liability in the same instruction. The judgment of the district court is

AFFIRMED.

EDWARD BROWN ET AL. V. ROYAL C. CLEVELAND.

FILED MARCH 5, 1895. No. 6050.

1. **Review:** CONFLICTING EVIDENCE. Where the evidence was conflicting the verdict reached will not be disturbed unless clearly unsustained by the proofs.

2. **Trial:** FAILURE TO EXCEPT TO TESTIMONY: WAIVER. When testimony has been received without objection, the question of

its competency is waived, and such testimony will not afterwards be eliminated from the records merely because upon proper timely objection it would have been excluded. Following *Oberfelder v. Kavanaugh*, 29 Neb., 427.

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

Herdman & Herdman, for plaintiffs in error.

John P. Breen, contra.

RYAN, C.

The defendant in error recovered judgment against Edward Brown, who did not answer, as well as against John J. Gibson, whose answer was a general denial. Error proceedings by both defendants present for review the questions which we shall now consider.

The action was for the value of certain hay and grain averred to have been sold by the defendant in error to the plaintiffs in error, constituting the alleged firm of Brown & Co. The sole question of fact, as to which there was a controversy on the trial, was whether or not Mr. Gibson was associated as a partner with Mr. Brown in the livery business when the latter purchased for use in the stable the various articles of feed for the payment of which Mr. Gibson, as a partner, was by the jury found liable. As there was sufficient proof to justify this verdict it will not be disturbed as being without support of evidence. During the trial a Mr. Mace testified that at various times, and while the several items were being sold by the defendant in error, he, the said witness, likewise sold hay and grain for use in the same stable as was that as to which a recovery was prayed in this case; that these sales were negotiated with Mr. Brown, by whom, as well as by other parties, the witness had been told that Mr. Gibson was associated as a partner with Mr. Brown and that witness had sued both alleged partners for the amount of his bill, whereupon Mr.

Gibson settled. On cross-examination Mr. Mace said that the settlement with Mr. Gibson was at a discount—Mr. Gibson all the time disclaiming the alleged partnership relation—and that both witness and Mr. Gibson agreed to settle solely to avoid the trouble and expense of litigation. It is very clear that this testimony on proper objections should have been excluded. Without conceding to any extent the competency of the residue, that which disclosed the fact of settlement most certainly was not admissible, for the law favors the amicable adjustment of differences. All this testimony was, however, introduced without an objection being interposed by the plaintiffs in error. After it had been fully detailed, and this witness dismissed, plaintiffs in error asked that all his testimony might be stricken out. This was not proper, for having permitted this evidence to go in without objection the plaintiffs in error were not entitled to have it stricken out, and the district court properly so ruled. (*Oberfelder v. Kavanaugh*, 29 Neb., 427; *Palmer v. Witcherly*, 15 Neb., 98.) No other question is presented by the petition in error and the judgment of the district court is

AFFIRMED.

OMAHA FIRE INSURANCE COMPANY V. JOSEPH DUFEK.

FILED MARCH 5, 1895. No. 5913.

Insurance: MISDESCRIPTION OF PROPERTY: REFORMATION OF POLICY. In a policy of insurance, a misdescription of the land whereon was situate certain personal property insured did not release the insurer from liability from loss; and, as a condition precedent to an action on the policy, no reformation thereof was necessary. Following *Phenix Ins. Co. v. Gebhart*, 32 Neb., 144.

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

Hewitt & Olmstead, for plaintiff in error.

Frick & Dolezal, contra.

RYAN, C.

This action was brought in the district court of Saunders county to recover the value of twenty-two tons of broom corn destroyed by fire. There was a verdict and judgment against the defendant in said district court for the sum of $900.

The petition in error in effect presents but two questions: one is the sufficiency of the evidence to support the verdict; the other the admission of evidence to show that when the broom corn was insured and destroyed it was in a building situate on section 30, township 17 north, range 5 east, 6th P. M., instead of section 30, township 14, range aforesaid. There was no such an absence of evidence as would justify interference with the verdict, and no useful purpose could be subserved by reviewing it at length merely to demonstrate the correctness of this conclusion reached upon full consideration of the evidence. In relation to the mistaken description of the township above indicated, the testimony of Mr. Folda, the insurance company's agent who wrote the policy sued on, was as follows: "Some few days previous to the issuing of the insurance policy Mr. Dufek came in and made an application for insurance on his buildings, the house and other buildings situated on the premises. He gave me the application, the description being, I think, section 30, township 17, range 5, in Saunders county. He also stated to me that he was wishing to place some insurance on broom corn. I stated to him that I could not insure his broom corn that same day as it was a prohibited risk by the company, but I would write to the company and find out if they wished to place the risk. They did, and I placed the insurance on it. I wrote to the company stating the facts,

and when it came back I went ahead and issued the policy, and that error being as township 14 is an error on my part for the reason I issued this policy without the presence of Mr. Dufek himself." There was proof unquestioned that Mr. Dufek had no other broom corn than that which was destroyed by fire.

The contentions of plaintiff in error with reference to the necessity of a reformation of the policy precedent to bringing suit and the alleged fatal effect of the misdescription noted are fully met by the following language quoted from *Phenix Ins. Co. v. Gebhart*, 32 Neb., 144: "The precise question here involved was before this court in *State Ins. Co. v. Schreck*, 27 Neb., 527, and it was held that the variance [misdescription as to the *locus* of the insured property] was not material. The agreement in a policy is to insure certain property of a party—such as the house in which he and his family reside, a barn on his farm, or a warehouse for the storage of produce, or, as in this case, certain personal property. A misdescription of the land on which any of these are situated will not defeat a recovery in case of loss by fire, because the court looks at the real contract of the parties, which was to insure certain property of the policy holder. The fact that such property was on a particular section, as section 16 instead of 17, cannot of itself affect the risk and would not render the policy void." The judgment of the district court is

AFFIRMED.

BADGER LUMBER COMPANY ET AL., APPELLEES, V. EMMA H. HOLMES ET AL., APPELLANTS.

FILED MARCH 5, 1895. No. 6266.

1. **Mechanics' Liens:** PROPERTY COVERED. A material-man contracted with the owner of six city lots to furnish him material for the erection of six buildings, one on each of said lots. The material was furnished and so used. In a suit by the material-man to have established and foreclosed a lien against said lots for the balance due for material furnished under said contract, the district court, by its decree, gave the material-man a lien on a portion of said lots for the entire amount remaining due for the material furnished under the contract. The evidence did not show what proportion of the material furnished was used in the construction of the buildings on the lots made liable by the decree for the balance due. *Held*, (1) That the whole debt might be charged to all the real estate; (2) but all the debt could not be charged to a part of the lots; (3) that the decree should be reversed.

2. ———: ———: APPORTIONMENT. Where it is sought to charge a part only of certain real estate for the value of material furnished for the erection of improvements upon all said real estate, then the value of the material furnished must be apportioned so that the parts of the real estate charged shall bear no greater amount of the expense than the value of the material actually used in constructing the improvement made on such part. *Byrd v. Cochran*, 39 Neb., 109, followed and reaffirmed.

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

Harwood, Ames & Pettis, for appellants, cited: *Doolittle v. Plenz*, 16 Neb., 153; 2 Jones, Liens, secs. 1313–1315; *Holmes v. Richet*, 56 Cal., 307; *McCarty v. Van Etten*, 4 Minn., 358; *Knox v. Starks*, 4 Minn., 7; *Roose v. Billingsly*, 74 Ia., 51.

Albert Watkins and *Dawes, Coffroth & Cunningham*, *contra*, cited, contending that the material-man was entitled

to a joint lien: *Wakefield v. Latey*, 39 Neb., 285; Phillips, Mechanics' Liens, secs. 374, 376; *Mandeville v. Reed*, 13 Abb. Pr. [N. Y.], 173; *Bowman Lumber Co. v. Newton*, 72 Ia., 90; *Lewis v. Saylors*, 73 Ia., 504; *Stockwell v. Carpenter*, 27 Ia., 119; *Millsap v. Ball*, 30 Neb., 728; *Bohn Mfg. Co. v. Kountze*, 30 Neb., 719; *Wilcox v. Woodruff*, 61 Conn., 578; *White Lake Lumber Co. v. Russell*, 22 Neb., 126; *Oster v. Rabeneau*, 46 Mo., 595; *Rose v. Perse*, 29 Conn., 256; Phillips, Mechanics' Liens, sec. 387.

RAGAN, C.

On the 25th day of August, 1890, the Badger Lumber Company, a corporation dealing in lumber in the city of Lincoln, filed in the office of the register of deeds, in Lancaster county, a "verified account of items" of certain material which it alleged it had, previous to that time, furnished for the erection of a "dwelling house" upon certain real estate. This "verified account of items" recited that in the month of August, 1889, one Cadwalader entered into a verbal contract with the Badger Lumber Company for lumber and other material for the erection of a dwelling house on lots 1, 2, 3, 10, 11, 12, in block 3, in Avondale Addition to the city of Lincoln; that in pursuance of said verbal contract the Badger Lumber Company, between the 14th day of August, 1889, and the 2d day of May, 1890, furnished the material mentioned in said account on said premises, and that such material was used on said premises in the construction of said "dwelling house," and claimed a lien against said premises for such material for a balance of $492.18 remaining unpaid. The Badger Lumber Company brought this action in the district court of Lancaster county, making the "verified account of items" filed in the office of the register of deeds of said county the basis of its suit, and in its petition set out the making of the verbal contract with Cadwalader to furnish material for the erection of a "dwelling house" on said real estate; that it had

furnished such material; the making, verification, and filing of the "account of items" of material furnished under the contract, and the balance remaining due thereon, and prayed that it might be decreed a lien upon said real estate for the balance due it for the material furnished under the contract with Cadwalader. Numerous parties were made defendants to the action, among them Cadwalader and wife and W. W. Holmes and wife, the latter of whom had become the owners of those portions of said premises mentioned in the court's decree. The district court found and decreed that there was a balance of $580 due from Cadwalader and wife to the Badger Lumber Company for material which it had furnished Cadwalader under his verbal contract with the lumber company, and to secure its payment decreed the lumber company a lien on the south fifty feet of lots 1 and 2, the north fifty feet of lots 11 and 12, the south fifty feet of lots 11 and 12, and the west forty-five feet of lot 10, in block 3, in Avondale Addition to the city of Lincoln; and from this decree the representatives of W. W. Holmes have appealed.

The undisputed evidence is that the verbal contract between the Badger Lumber Company and Cadwalader was that the former would furnish material to the latter for erecting a building on each of the six lots mentioned in the "verified account of items" filed in the office of the register of deeds by the Badger Lumber Company; that the material, in pursuance of said contract, was used indiscriminately by Cadwalader in erecting these buildings, one on each of said six lots. But the evidence does not show, nor was there any attempt to show, what proportion of the material mentioned was used in constructing the buildings on the lots and parts of lots which, by the decree of the district court, was made liable for the balance due the Badger Lumber Company from Cadwalader. In *Byrd v. Cochran*, 39 Neb., 109, HARRISON, J., speaking for this court, said: "When a subcontractor paints two separate

houses and furnishes the paint and other materials necessary for use in the painting, * * * in order to recover upon a mechanic's lien filed against one of the houses and the lot upon which it stands it must be shown that the amount charged against the one house and lot is the value of the labor performed upon, and materials furnished for, such house, or an estimate made by some method or plan which will produce a certain definite result, and mere approximation or guess-work will not suffice to establish the lien." (*Doolittle v. Plenz*, 16 Neb., 153.) This case is decisive of this appeal. Here the contract was to furnish material to erect six buildings upon six lots, the material was so furnished, and it was used indiscriminately in building each of the six buildings. The whole debt then might be charged to all six of the lots. (*Wakefield v. Latey*, 39 Neb., 285.) But all the debt for all the material cannot be charged to a part of the lots. If it is sought to charge a part only of the lots for material furnished under the contract, then the amount of the material furnished must be apportioned so that the parts charged shall bear no greater amount of the expense than the value of the material actually used on said parts in the construction of the improvements made thereon.

The finding and decree of the district court in favor of the Badger Lumber Company only is reversed and the cause remanded to the district court for further proceedings in accordance with this opinion. All the costs of this appeal are to be taxed to the Badger Lumber Company.

JUDGMENT ACCORDINGLY.

MORRIS MORRISON ET AL. V. GEORGE H. BOGGS ET AL.

FILED MARCH 5, 1895. No. 6117.

1. **Bonds:** PENALTIES. The object of a penalty in a bond is to fix the limit of the liability of the signers thereof.
2. ———: FORCIBLE ENTRY AND DETAINER. Section 1030 of the Code of Civil Procedure makes the signers of the bond of a defendant, in a forcible detainer suit against whom a judgment of restitution has been rendered, and who appeals, liable, if such judgment shall be affirmed, for the costs of the suit and for the reasonable rent of the premises during the time the defendant wrongfully withholds possession of the premises.
3. ———: ———: MEASURE OF DAMAGES. Said section fixes the measure of damages of the signers of a bond executed in pursuance of its provisions.
4. ———: ———: PENAL SUM NEED NOT BE SPECIFIED. A writing obligatory, whether it be called a bond or undertaking, executed in accordance with the provisions of said section and for the purposes mentioned therein, is not void because no specific sum of money is specified therein as a penalty.
5. ———: ———: SIGNATURE. Whether it is necessary to the validity of the bond mentioned in said section that it be signed as principal by the defendant in the judgment appealed from not decided.
6. **Evidence:** PROCEEDINGS IN COLLATERAL ACTIONS. Where a case is appealed to the district court and the issue in another action is whether the case appealed was tried in the appellate court, a finding made or verdict returned, and a judgment pronounced thereon, such issue can be proved by a certified copy of the record of proceedings had in the case in the appellate court.
7. **Cases Distinguished.** *Gregory v. Cameron*, 7 Neb., 414, and *State v. Cochran*, 28 Neb., 798, distinguished.

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

Morris & Beekman, for plaintiffs in error, cited in addition to cases discussed in the opinion: *Turner v. Lord*, 4

S. W. Rep. [Mo.], 420; *Austin v. Richardson*, 1 Gratt. [Va.], 310; *Farni v. Tesson*, 1 Black [U. S.], 309; *Bragg v. Murray*, 6 Munf. [Va.], 32; *Garrett v. Shove*, 9 Atl. Rep. [R. I.], 901; *Irwin v. State*, 10 Neb., 325.

J. W. West, contra.

RAGAN, C.

George H. Boggs and Lew W. Hill, copartners under the name of Boggs & Hill, brought this suit in the district court of Douglas county against Henry P. Horen, Morris Morrison, and John O'Keefe. The suit was based on a bond, undertaking, or writing obligatory executed in pursuance of the provisions of section 1030 of the Code of Civil Procedure and which was in words and figures as follows:

"Know all men by these presents, that Henry P. Horen, as principal, and Morris Morrison and John O'Keefe, as sureties, are held and firmly bound unto the firm of Boggs & Hill in the penal sum of ——, for the payment of which, well and truly to be made, we jointly and severally bind ourselves. Dated this 19th day of October, A. D. 1888. Whereas in an action of forcible entry and detainer tried before R. D. A. Wade, a justice of the peace of Douglas county, Nebraska, wherein Boggs and Hill *was* [were] plaintiffs and Henry P. Horen was defendant, judgment was rendered by said justice in favor of said plaintiffs, from which judgment the defendant now appeals to the district court: Now, therefore, the condition of this obligation is such that if judgment is rendered against said defendant on said appeal, that he will satisfy said final judgment and costs; and we will satisfy and pay a reasonable rent for the premises during the time he wrongfully withholds the same, then this obligation to be null and void, otherwise remain in full force and effect. HENRY P. HOREN.
"MORRIS MORRISON.
"JOHN O'KEEFE."

The petition then alleged that the judgment of the justice of the peace was affirmed by the district court on the 9th of August, 1890; that Horen wrongfully withheld the possession of the premises sued for for a period of two years, and that the reasonable rent of said premises for that time was $600, for which sum judgment was prayed. Boggs & Hill had a verdict and judgment, and Morrison and O'Keefe prosecute to this court proceedings in error. Two arguments are relied on here for a reversal of this judgment.

1. The first assignment of error is that the district court erred in admitting in evidence the written obligation made the basis of this suit. The argument is that the obligation sued upon is not a bond within the meaning of section 1030 of the Code of Civil Procedure, the contention being that it is not such bond because no certain sum of money is mentioned in said obligation as a penalty. Section 1030 of the Code provides: "Either party may appeal from the judgment rendered by such justice by giving bond with two responsible sureties to be approved by the justice, conditioned: If the plaintiff appeals to satisfy the final judgment and costs; if the defendant appeals to satisfy the final judgment and costs, and pay a reasonable rent for the premises during the time he wrongfully withholds the same." It will be observed that the obligation sued upon is in exact conformity with this section of the Code. This statute does not require that a bond executed in pursuance of its provisions should have therein any specific sum of money fixed as a penalty for such bond. The object of a penalty in a bond is to fix the limit of the liability of the signers thereof; and the statute, by its provisions, makes the signers of a bond of a defendant in a forcible detainer suit against whom a judgment of restitution has been rendered, and who appeals, liable, if such judgment shall be affirmed, for the costs of the suit and for a reasonable rent of the premises during the time the defendant shall wrong-

fully withhold possession of the premises from the plaintiff. This statute fixes the measure of damages of the signers of a bond executed in pursuance of its provisions. It was never the intention of the legislature to invest a justice of the peace with discretion to make the liability of the signers of such a bond more or less than that provided for by the statute. What guide would a justice of the peace have for fixing the penalty in a bond of this character? How could he determine what length of time the appeal might be pending? How could he determine the reasonable rental value of the premises for an indefinite time?

Counsel for the plaintiffs in error in support of their contention cite us to *Gregory v. Cameron*, 7 Neb., 414. Section 481 of the Code of Civil Procedure, in force when that case was decided, but since repealed, provided that judgments "shall be stayed * * * whenever the defendant * * * shall enter into a bond to the plaintiff with one or more sufficient sureties," etc. A judgment was obtained against Cameron, and McMurtry and Gregory signed a writing obligatory and had it approved by the probate court before whom the judgment against Cameron was rendered in words and figures as follows: "In pursuance of the statute in such case made and provided, J. H. McMurtry and J. S. Gregory, for the purpose of staying the above judgment, do hereby promise and undertake to pay the above judgment, interest, and costs, and the costs that may accrue." Suit having been brought on this written agreement signed by McMurtry and Gregory, the court held that the writing obligatory signed by them did not satisfy said section 481 of the Code; that the issuing of an execution on said judgment against Cameron was not stayed by the execution of said instrument and its approval, and that, therefore, the signers were not liable. The court said: "It was not a bond executed by the defendants to the plaintiff in the judgment, but it was merely an undertaking to pay the

judgment, interest, and costs, executed by sureties alone." In other words, the court held that said section 481 required the writing obligatory to be executed by the judgment debtor as principal and by sureties in order to prevent the issuing of an execution for the satisfaction of a judgment. But in the case at bar the writing obligatory, called a bond, was signed by the defendant, against whom the judgment was rendered, as principal, and by the plaintiffs in error as sureties. *Gregory v. Cameron, supra,* then is not an authority in this case.

Another case relied on by the plaintiffs in error is *State v. Cochran,* 28 Neb., 798. That case involved a construction of section 1049 of the Code, which provides that a defendant against whom a judgment had been rendered may stay an execution "by entering into an undertaking with [to] the adverse party * * * with good and sufficient surety, * * * conditioned for the payment of the amount of said judgment, * * * which undertaking shall be entered on the docket of the justice and be signed by the surety." One Strange recovered a judgment against Bowlby and Knox, and for the purpose of staying an execution to satisfy such judgment they procured one Stevens and one Love to execute an undertaking conditioned as required by said section 1049, that at the expiration of the stay they would satisfy the judgment. The writing obligatory signed by Stevens and Love, however, was not signed by the judgment debtors Bowlby and Knox. It would seem from reading the opinion, although it is not so stated therein, that the justice of the peace refused to issue an execution on this judgment after the execution of the writing obligatory by Stevens and Love, and that Strange applied to this court for a writ of *mandamus* to compel him to do so, claiming that the bond, undertaking, or writing obligatory, executed by Stevens and Love for the purpose of staying the issuing of an execu ion on the judgment, was void because not signed by the defend-

ants to the judgment; and the court held that a bond or undertaking executed in pursuance of said section 1049 of the Code need not be signed by the judgment debtor. This conclusion of the court was based on the language of the section that such "undertaking shall be entered on the docket of the justice and be signed by the surety." It will thus be seen that *State v. Cochran, supra,* is not an authority in point in the case at bar.

In other words, the two cases cited by counsel simply decide this: The case in 7 Neb., that an instrument in writing executed in pursuance of section 481 of the Code, as it once existed, for the purpose of staying the issuing of an execution on a judgment, to have that effect and be valid and bind the signers thereof, must be signed by the judgment debtor. The case in 28 Neb., that an instrument executed in pursuance of section 1049 of the Code of Civil Procedure, for the purpose of staying the issuing of an execution on a judgment, to have that effect and to be valid, need not be signed by the judgment debtor. But neither of these cases go to the length of holding that where the word "bond" is used in our statutes or Code, the term is to be necessarily given the full meaning it had at common law. A bond at common law to be valid had to be in writing and to be under seal, and the legislature, by using the word "bond," in section 1030 of the Code of Civil Procedure, did not mean a writing obligatory such as would come within the meaning of a bond at common law.

The writing obligatory made the basis of this suit, whether it be called a bond or an undertaking, conforms to the statute in every essential particular. The statute does not prescribe any form of such bond, but it does prescribe the conditions of such bond, and fixes the measure of damages of the signers thereof. We do not decide that a bond executed in pursuance of said section 1030, to be valid, must be signed by the defendant against whom the judgment of restitution is rendered, but if such is the correct construc-

tion of the section the instrument in suit complies therewith. But we do decide that a writing obligatory, whether it be called a bond or an undertaking, executed in accordance with the provisions of said section 1030, and for the purposes mentioned in said section, is not void because no specific sum of money is specified in such writing obligatory as a penalty. The assignment of error must be overruled.

2. As already stated, Boggs & Hill alleged in their petition in the district court that the judgment they had obtained against Horen before the justice of the peace had been affirmed on appeal by the district court. The defendants Horen, Morrison, and O'Keefe, in their answer, admitted that Horen had perfected in the district court his appeal from the justice of the peace, but denied that such judgment had ever been affirmed by the district court. Boggs & Hill, to prove their allegation that the district court had by its judgment affirmed the judgment of the justice of the peace, put in evidence a duly certified copy of an order made by the district court in a case entitled "George H. Boggs et al. v. Henry P. Horen et al." The material parts of this order were and are in words and figures as follows:

"This cause coming on to be heard upon the application of Mary Horen, praying that the judgment heretofore rendered herein in favor of plaintiffs and against defendants be set aside and claiming in a petition of intervention filed by the said Mary Horen that she was the owner of a certain building situated upon the real estate described in the complaint herein, and the court being fully advised in the premises, after hearing the testimony of the said Mary Horen and other witnesses on her behalf, and witnesses on behalf of the said plaintiffs, finds for the said plaintiffs.

"The court further finds that the said Mary Horen has wholly failed to prove her case, and that said building situated upon said premises was not and is not owned by her, and that the said plaintiffs have lawful right to remove said

house from said premises under a judgment for restitution obtained by said plaintiffs against said defendants at a former term of said court.

"Wherefore it is adjudged and considered that the said plaintiffs have restitution of the premises described in the judgment of this court, and that said writ of restitution be issued and served on the 20th day of September, 1890, and that plaintiffs have and recover their costs in this proceeding, taxed at $——."

This was the only evidence offered or given to prove the issue made by the pleadings as to the affirmance by the district court of the judgment of the justice of the peace rendered against Horen and from which he appealed. We do not think this evidence sufficient to establish such issue. It does not purport to be a judgment in favor of Boggs & Hill against Henry P. Horen rendered in the forcible detainer suit. It seems to be an order or a judgment rendered by the district court on a petition of intervention filed in the action of Boggs v. Horen by one Mary Horen. The evidence shows that the case appealed from the justice of the peace was docketed in the district court. Was the action tried in the district court? If so, on what pleadings? Was a finding or verdict returned? If so, what were they? Was a judgment rendered on the finding or verdict made? If so, what was that judgment? Was the appeal for any reason dismissed and the judgment thereby affirmed? If so, where is the judgment of dismissal? Where an appeal is taken to the district court and it is claimed that the action was there tried, a finding made or verdict returned, and a judgment pronounced thereon, such facts can be proved by a certified copy of the record of the proceedings in such case. For the reason that the judgment of the district court is not sustained by sufficient competent evidence it is reversed and the cause remanded.

REVERSED AND REMANDED.

NATIONAL MASONIC ACCIDENT ASSOCIATION V. GEORGE F. BURR.

FILED MARCH 5, 1895. NO. 6039.

1. **Mutual Benefit Societies:** ACCIDENT INSURANCE. The charter and by-laws of the National Masonic Accident Association of Des Moines, Iowa, examined, and *held:* (1) That the object of the association is to furnish its members the advantages of accident insurance; (2) that the association has no capital and no capital stock; that the only moneys it ever has are derived from the membership fees and dues and assessments paid by its members; (3) that these moneys are used for the purpose of paying the operating expenses of the association and paying the weekly or other benefits due to its members; (4) that the association is purely a mutual institution, only members of the Masonic fraternity being eligible to membership; (5) that the association does not issue policies, as that term is generally understood, but issues to each of its members a certificate of membership; (6) that its members are divided into classes according to the hazard of the occupation they pursue; (7) that the scheme contemplated by the association is the payment of a certain sum per week for a specified time to such of its members as may be temporarily injured; and if such injury proves to be permanent or results in death, then the payment to such member or his beneficiary of a gross sum of money.

2. ———: DEFAULT IN PAYING ASSESSMENTS: SUSPENSION: WAIVER. The certificate of membership provides: "This association does not agree to pay any certificate holder or beneficiary * * * a greater sum than is realized by said association from one assessment of two dollars made and collected upon all members assessable at the date of the accident." "To keep this certificate in force all assessments and dues must be paid within thirty days of the date of the notice from the secretary calling therefor." The by-laws of the association provide: "Information of the amount of each required payment and of the time when the same is to be paid shall be given by the secretary to each member by mailing a written or printed notice to him, postage prepaid, at his last given post-office address at least thirty days prior to the maturity of such payment. * * * And it shall thereupon be the duty of each member to promptly pay the same to the secretary at his office in Des Moines, Iowa, on or

before such time of maturity. If any member shall fail to pay any required payment on or before the day so fixed, his certificate and membership shall cease to be of any force and validity and can only be revived by payment thereof. No indemnity or benefits of any kind shall be paid for or on account of any injury received between the time when the delinquent payment became due and the time when the same is received by the secretary at his office. No suit shall be brought upon any disputed claim before the same shall have been arbitrated by a committee, and the award of such committee shall be final and conclusive upon the claimant and the association." On the 14th of February, 1891, the board of directors of the association made an assessment of three dollars upon each of its members. This assessment matured on the 1st day of April, and notice thereof was duly given to George F. Burr, who was a member of the association. Burr did not pay his assessment on or prior to April 1st. About noon of April 27th, 1891, Burr was injured and made a claim against the association for the weekly benefits which he alleged he was entitled to be paid as the result of his injury and his membership. The association refused to pay the claim, and Burr brought this suit. The evidence tended to show that on the 25th of April, 1891, Burr mailed a letter at York, Nebraska, directed to the association in Des Moines, Iowa, containing his check for three dollars to pay the assessment due April 1, and that ordinarily such letter would reach the association on the 26th or by the morning of the 27th of April. On the other hand, there was evidence which tended to show that this check was received by the association on the morning of the 29th of April, or not earlier than the afternoon of the 27th of April. On the trial the association requested the district court to instruct the jury that "Plaintiff having not paid such assessment at or before maturity, his certificate ceases to be in force and effect until the payment actually reached the secretary at his office in Des Moines, and plaintiff's certificate of membership only becomes valid from the time said secretary received such payment at his office in Des Moines. If you find from the evidence that the payment was received by the secretary at his office in Des Moines previous to the time that the accident happened to the plaintiff, then the plaintiff is entitled to recover; but if the said payment did not reach the secretary's office in Des Moines until after said accident happened to the plaintiff, then the plaintiff is not entitled to recover in any sum whatever." This instruction the court refused. *Held*, (1) That it was not for the district court to say whether the evidence established the fact that the assessment remitted by Burr to the asso-

ciation was received by it prior to the time he was injured; that was a question which the jury, and the jury alone, had a right to determine; (2) that Burr's failure to pay the assessment due the 1st day of April on or before that date did not oust him from membership in such association, but suspended his right to claim indemnity from the association for an injury received after the assessment became due and before such payment was made; (3) that the nature and objects of the association considered, the retention by the association of the remittance made by Burr was not evidence that the association waived Burr's default; (4) that the court erred in refusing to give the instruction.

3. ——: ARBITRATION CLAUSE VOID. On the trial the association requested the court to instruct the jury that before Burr could maintain an action upon the claim he must have procured it to have been arbitrated by a committee of arbitration as provided by the articles of incorporation of the association; that such arbitration was a condition precedent to the right of Burr to maintain the suit. This instruction the district court refused. *Held*, (1) That the ruling of the district court was correct; (2) that whatever may be the rule elsewhere, it is the firmly established doctrine here that if parties to a contract agree that if a dispute arises between them that such dispute shall be submitted to arbitration, refusal to arbitrate or no arbitration is not a defense to an action brought on such contract by one of the parties thereto, as the effect of such agreement is to oust the courts of their jurisdiction, and is contrary to public policy and therefore void.

4. **Stare Decisis.** *Home Fire Ins. Co. v. Bean*, 42 Neb., 537, and cases there cited, and *Phenix Ins. Co. v. Bachelder*, 32 Neb., 490, 39 Neb., 95, followed and reaffirmed.

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

Merton Meeker and *Clark Varnum*, for plaintiff in error:

The National Masonic Accident Association is a mutual concern, a fact which is determined by the statute under which it is organized. (*State v. Critchett*, 37 Minn., 13; *Block v. Valley Mutual Insurance Association*, 52 Ark., 201; *Masonic Aid Association v. Taylor*, 50 N. W. Rep. [S. Dak.], 93; *State v. Whitmore*, 75 Wis., 332; *Common-*

wealth v. Equitable Benevolent Association, 18 Atl. Rep. [Pa.], 1112.)

Members of mutual insurance companies are conclusively presumed to know what the laws of the organization are, and must act accordingly. (*Pfister v. Gerwig,* 122 Ind., 567; *Coleman v. Knights of Honor,* 18 Mo. App., 189; *Coles v. Iowa State Mutual Ins. Co.,* 18 Ia., 425; *Fugure v. Mutual Society of St. Joseph,* 46 Vt., 368; *People v. St. George Society of Detroit,* 28 Mich., 261; *Sperry's Appeal,* 116 Pa. St., 391; *Osceola Tribe No. 11 Independent Order of Red Men v. Schmidt,* 57 Md., 98; *Belleville Ins. Co. v. Van Winkle,* 12 N. J. Eq., 335; *Hanf v. Northwestern Masonic Aid Association,* 45 N. W. Rep. [Wis.], 315; *Hood v. Hartshorn,* 100 Mass., 117; *Rowe v. Williams,* 97 Mass., 163; *Davenport v. Long Island Ins. Co.,* 10 Daly [N. Y.], 535; *Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.,* 50 N. Y., 250; *Lafond v. Deems,* 81 N. Y., 507; *Hudson v. McCartney,* 33 Wis., 331; *Herrick v. Belknap,* 27 Vt., 673; *United States v. Robeson,* 9 Pet. [U. S.], 319; *Trott v. City Ins. Co.,* 1 Cliff. [U. S.], 439; *Viney v. Bignold,* 20 Q. B. Div. [Eng.], 172; *Holland v. Supreme Council Chosen Friends,* 25 Atl. Rep. [N. J.], 367.)

Even an old line insurer is not liable during default in premiums. (*Phenix Ins. Co. v. Bachelder,* 32 Neb., and citations.)

There was and could have been no waiver of the provisions of the by-laws as to time of payment. (*Hale v. Mutual Fire Ins. Co.,* 6 Gray [Mass.], 169; *Brewer v. Mutual Fire Ins. Co.,* 14 Gray [Mass.], 203; *German Ins. Co. v. Heiduk,* 30 Neb., 288; *Dawes v. North River Ins. Co.,* 7 Cow. [N. Y.], 461.) Arbitration was a condition precedent to suit. (*Canfield v. Maccabees,* 87 Mich., 626; *Van Poucke v. St. Vincent De Paul Society,* 63 Mich., 378; *Anacosta Tribe of Red Men v. Murbach,* 13 Md., 91; *Toran v. Howard Association,* 4 Pa. St., 519; *Woolsey v. Independent Order of Odd Fellows,* 61 Ia., 492; *Rood v.*

Railway Passenger & Freight Conductors Mutual Benefit Association, 31 Fed. Rep., 62; *Bauer v. Samson Lodge, Knights of Pythias*, 102 Ind., 262; *Leech v. Harris*, 2 Brewster [Pa.], 571; *Osceola Tribe No. 11 Independent Order of Red Men v. Schmidt*, 57 Md., 98; *Harrington v. Workingmen's Building Association*, 70 Ga., 340; *Old Saucelito Land & Dry Dock Co. v. Commercial Union Assurance Co.*, 5 Pac. Rep. [Cal.], 232; *Perkins v. United States Electric Light Co.*, 16 Fed. Rep., 513; *Smith v. Boston, C. & M. R. Co.*, 36 N. H., 458; *Holmes v. Richet*, 56 Cal., 307; *Haley v. Bellamy*, 137 Mass., 357; *Palmer v. Clark*, 106 Mass., 373; *Hood v. Hartshorn*, 100 Mass., 117; *Rowe v. Williams*, 97 Mass., 163; *Davenport v. Long Island Ins. Co.*, 10 Daly [N. Y.], 535; *Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y., 250; *Lafond v. Deems*, 81 N. Y., 507; *Hudson v. McCartney*, 33 Wis., 331; *Herrick v. Belknap*, 27 Vt., 673; *United States v. Robeson*, 9 Pet. [U. S.], 319; *Trott v. City Ins. Co.*, 1 Cliff. [U. S.], 439; *Viney v. Bignold*, 20 Q. B. Div. [Eng.], 172.)

Sedgwick & Power, contra, cited, contending that the delay in payment had been waived. (*Schoneman v. Western Ins. Co.*, 16 Neb., 406, and authorities cited; *Phœnix Ins. Co. v. Lansing*, 15 Neb., 494; *Nebraska & Iowa Ins. Co. v. Christiensen*, 29 Neb., 572; *Phenix Ins. Co. v. Bachelder*, 32 Neb., 490; *Grand Lodge v. Brand*, 29 Neb., 644; *Western Horse & Cattle Ins. Co. v. Scheidle*, 18 Neb., 495.

The arbitration clause is invalid. (*German-American Ins. Co. v. Etherton*, 25 Neb., 505; *Western Horse & Cattle Ins. Co. v. Putnam*, 20 Neb., 331; Bacon, Mutual Benevolent Societies, sec. 450.)

RAGAN, C.

The National Masonic Accident Association (hereinafter called the "association,") is a corporation organized under

the laws of the state of Iowa and domiciled in the city of Des Moines, in said state. The object of the association is to furnish its members the advantages of accident insurance. The association has no capital and no capital stock. It is purely a mutual institution. Only members of the Masonic fraternity can become members of the association. The association does not issue policies, as that term is generally understood, but issues to each of its members a certificate of membership. The members are divided into classes according to the hazard of the occupation pursued by them. The scheme contemplated by the association is the payment of a certain sum per week for a specified time to such of its members as may be temporarily injured; and if such injury proves to be permanent or results in death, then the payment to such member or his designated beneficiary of a gross sum of money. The certificate of membership issued by the association provides: "This association does not agree to pay to any certificate holder or beneficiary * * * a greater sum than is realized by said association from one assessment of two dollars made and collected upon all members assessable at the date of the accident." The only money or capital that the association ever has is derived from membership fees and dues paid by and assessments made on its members, and these moneys are used for the purposes of paying the operating expenses of the association and paying the weekly or other benefits due to its members. The certificate of membership also provides: "To keep this certificate in force all assessments and dues must be paid within thirty days of the date of the notice from the secretary calling therefor." The affairs of the association are conducted by a board of directors chosen annually from among its members, each member of the association being entitled to cast one vote for the election of the directory. This vote may be cast either in person by the member or his proxy. A small membership fee is required to be paid by each person on his becoming

a member of the association, and each member is required to pay to the association the further sum of one dollar on the 1st days of January, April, July, and October of each year. These moneys are used in defraying the operating expenses of the association so far as they may be necessary to that purpose, and the surplus is applied to the payment of benefits and death claims. When proof of the death or injury by accident of any member is received by the association, if there are not sufficient funds in the treasury to pay the benefits or death loss, an assessment is levied upon each member of the association for that purpose.

The by-laws of the association provide: "Information of the amount of each required payment—assessment for the payment of benefits or death losses—and of the time when the same is to be paid shall be given by the secretary to each member by mailing a written or printed notice to him, postage prepaid, at his last given post-office address, at least thirty days prior to the maturity of such payment. Notice so given shall be full legal notification of such payment and it shall thereupon be the duty of each member to promptly pay the same to the secretary at his office in Des Moines, Iowa, on or before such time of maturity. If any member shall fail to pay any required payment on or before the day so fixed his certificate and membership shall cease to be of any force or validity, and can only be revived by payment thereof. No indemnity or benefits of any kind shall be paid for or on account of any injury received between the time when the delinquent payment became due and the time when the same is received by the secretary at his office." The articles of incorporation of the association also provide: "Disputed claims shall be adjusted as follows: Should such a claim arise it shall be referred to a committee of three, all of whom shall be master Masons, one to be chosen by the assured or his representative, one by the association, and the two so chosen shall select the third; none of whom shall be relatives of

the assured or have any pecuniary interest in the claim. No suit shall be brought upon any disputed claim before the same shall have been arbitrated by such committee; and the award of such committee shall be final and conclusive upon the claimant and the association."

On the 17th day of April, 1890, George F. Burr was accepted as a member of the association and a certificate of membership of that date duly issued to him. On the 14th of February, 1891, the board of directors of the association made an assessment of three dollars upon each member of the association for the purpose of raising money to pay the expenses of the association and benefits to members who were justly entitled thereto. On or before the 1st of March, 1891, the secretary of the association mailed in the city of Des Moines, postage prepaid, a notice of this assessment addressed to Burr at his post-office in York, Nebraska. The notice stated the amount of such assessment, and that it would be due and payable at the office of the secretary on the 1st day of April, 1891. Burr did not pay this assessment on or prior to April 1st, 1891. About noon of the 27th day of April, 1891, Burr was injured and made claim to the association for the weekly benefit which it pays to its injured members. The association refused to pay the benefits, and Burr brought this action against it in the district court of York county to recover the benefits which he alleged he was entitled to be paid by the association as the result of his injury and his membership in such association. He had a verdict and judgment and the association has prosecuted to this court a petition in error.

1. The evidence is undisputed that Burr was injured about noon on the 27th day of April, 1891; that an assessment of $3 was levied against him and all other members of the association by its board of directors on or about the 14th of February, 1891, for the purpose of raising money to pay the operating expenses of the association and benefits to certain of its members who were entitled thereto; that

the secretary of the association mailed a notice of this assessment to Burr, with the postage prepaid, at Des Moines, Iowa, and addressed to Burr, at York, Nebraska, on or before the 1st day of March, 1891; that this assessment was due and payable at the office of the secretary of the association in Des Moines, Iowa, on the 1st day of April, 1891; that Burr did not pay this assessment on or before that date. There is some evidence in the record, on behalf of Burr, which tends to show that on the 25th of April, 1891, he mailed a letter at York, Nebraska, directed to the association, or its secretary, in Des Moines, Iowa, containing an ordinary check drawn by him on a bank for $3 to pay the assessment which had matured the 1st of April, and that ordinarily such letter and check would reach Des Moines on the evening of the 26th or on the morning of the 27th of April. On the other hand, the evidence tends very strongly to show that the check which Burr sent to the association to pay the assessment due April 1, was received by the association on the morning of the 29th of April, 1891, or at least after noon of the 27th of April, 1891. With this evidence before it the association requested the district court to instruct the jury: "Plaintiff having not paid such assessment at or before maturity his certificate ceases to be in force and effect until the payment actually reached the secretary at his office in Des Moines, and plaintiff's certificate of membership only becomes valid from the time said secretary received such payment at his office in Des Moines. If you find from the evidence that the payment was received by the secretary at his office in Des Moines previous to the time that the accident happened to the plaintiff, then the plaintiff is entitled to recover; but if the said payment did not reach the secretary's office in Des Moines until after said accident happened to the plaintiff, then the plaintiff is not entitled to recover in any sum whatever." The district court refused to give this instruction, but peremptorily instructed the jury to return a ver-

dict for Burr for the amount claimed in his petition. The learned district court was wrong in refusing to give the instruction asked and erred in instructing the jury to return a verdict for Burr. The relations existing between the association and Burr and all its other members is a contractual one, and the contract of the association with Burr and its other members is made up of the articles of incorporation, the by-laws thereof, and the certificate of membership of the members. (*Holland v. Supreme Council of the Order of Chosen Friends*, 25 Atl. Rep. [N. J.], 367.) By the articles and by-laws of the association and the terms of the certificate of Burr's membership therein, Burr contracted and promised to pay the assessment levied against him and which matured on April 1st on or before that date, and if he made that payment the association promised him, in case he should be temporarily injured prior to that time, to pay him an indemnity of $25 per week for a certain length of time for time lost as the result of such injury. The contract between the association and Burr further provided that if Burr should fail to pay this assessment on the day it matured that from that day until he did make such payment his certificate of membership or the force and effect of it should be suspended; and that he should not be entitled to any indemnity or benefits on account of any injury received by him between the time when the assessments became due, April 1, and the date when the assessment levied against him should be received by the association at its office in Des Moines, Iowa. It was not for the district court to say whether the evidence established the fact that the assessment remitted by Burr to the association was received by it prior to the time he was injured. That was a question which the jury, and the jury alone, had the right to determine. Burr's failure to pay the assessment due the 1st day of April on or before that date did not oust him from membership in such association, but suspended his

right to claim indemnity from the association for an injury he received after the assessment became due and before its payment; but Burr's rights as a member of the association and his claims for an injury received were reinstated at the very moment of time that the association received at its office in Des Moines the assessment paid by Burr. The argument of counsel for Burr here is, and this is perhaps the argument which influenced the court below, that as the association received the assessment remitted by Burr and retained it the association thereby waived Burr's default in not paying it on the day it matured, and though Burr's claim to indemnity had been suspended since the 1st of April, the receipt and retention of the assessment by the association annulled the suspension and restored Burr to the same rights he would have occupied had he paid his assessment the day it matured. The answer to this argument is that there is no evidence in the record that would sustain a finding either by a court or a jury that the association waived Burr's default in making the payment of this assessment due April 1. It must be borne in mind that this is not an ordinary insurance company which sells insurance to whoever will buy, but it is a mutual concern, and it is only by the assessments levied upon all its members that the benefits to which a member is entitled if he be injured, or the death benefits to which his beneficiary is entitled if he shall die from an injury, can be paid. Every member of the association knows and must know this, and if all members of the association refuse to pay assessments levied against them when due the association will have no funds with which to make good its promise to its members and its business would be at an end. A member who fails to pay his assessment when due, though he may afterwards pay it and his rights as a member be reinstated from the time of making such payment, has no cause to complain because his rights as a member and his claims against the association are not made to date back so

as to cover any injury he may have received during the time of his default, for this is his express contract, and it is a reasonable and valid one. If a member refuses to pay his assessment when due, then the injured member for whose benefit the assessment was levied receives that much less indemnity than he would have received if the defaulting member had paid his assessment, and if the defaulting member, while in default, shall become injured, to require the other members to indemnify him would be to permit the party to a contract who had violated it to enforce it as against a party thereto who had kept all his promises. Here the contract is that all the members must pay their assessments in order that if one be injured he may be indemnified for loss of time. One member is injured and one or some members refuse to pay their assessments and the injured party's indemnity is diminished by so much. On what principle of law or equity then can the defaulting members who are injured during their default claim that the other members should indemnify them for the injury received while in default? *Phenix Ins. Co. v. Bachelder*, 32 Neb., 490, was a suit on a fire insurance policy issued by an ordinary capitalized corporation. The policy contained a clause to the effect that if the insured should fail to pay his premium note at the time it matured then the policy should cease to be in force and remain null and void during the time the note remained unpaid after maturity, but that the payment of the premium should revive the policy and make it good from the date of the payment of the premium note. This court, speaking through the present chief justice, said: "The clause referred to is not unreasonable. It is but fair and just that while the insured is in default of the payment of his [premium] note the company should not be liable for loss, when the parties have so agreed."

2. The association also requested the court to instruct the jury to the effect that if they found from the evidence

that Burr was a member of the association, that he made the claim in suit against the association, and that such claim was disputed by the association, that then, before Burr could bring an action upon the claim, he must have procured the claim to have been arbitrated by a committee of arbitration raised as provided by the articles of incorporation of the association; and that such arbitration was a condition precedent to the right of Burr to maintain an action in the courts upon the claim. This instruction the district court refused, and correctly so. Whatever may be the rule elsewhere it is now the firmly established doctrine here that though the parties to a contract provide that if a dispute arise between them that such dispute shall be submitted to arbitration, refusal to arbitrate or no arbitration is not a defense to an action brought on such a contract by one of the parties thereto, as the effect of such agreement is to oust the courts of their legitimate jurisdiction and is contrary to public policy and therefore void. This was the rule announced in the *German-American Ins. Co. v. Etherton*, 25 Neb., 505. It was followed in *Union Ins. Co. v. Barwick*, 36 Neb., 223, and again reaffirmed in *Home Fire Ins. Co. v. Bean*, 42 Neb., 537. In the latter case HARRISON, J., speaking for the court, said: "A provision in a policy that no suit or action against the insurer shall be sustained in any court of law or chancery until after an award shall have been obtained by arbitration, fixing the amount due after the loss, is void, the effect of such provision being to oust the courts of their legitimate jurisdiction."

For the error of the district court in refusing to give the instruction first above quoted its judgment must be and is reversed and the cause remanded.

REVERSED AND REMANDED.

ALFRED G. COREY, APPELLEE, ET AL. V. SCHUSTER, HINGSTON & COMPANY ET AL., APPELLANTS.

FILED MARCH 5, 1895. No. 6203.

1. **Homestead**: ACTION TO REMOVE CLOUD FROM TITLE: APPARENT LIEN OF JUDGMENTS: INJUNCTION. The appellee owned a lot and building situate thereon in McCool Junction, York county. The total value of the premises was less than $2,000. Appellee with his family occupied these premises as a homestead. Appellants recovered judgments against appellee, which were of record in the office of the clerk of the district court of said county. The judgments were not based on debts secured by a mortgage, mechanics' or vendors' liens, nor for laborers', clerks', or servants' wages. *Held*, (1) That such judgments were apparent liens upon appellee's homestead and constituted a cloud upon his title thereto, which a court of equity had jurisdiction to remove at the suit of the appellee; (2) that it was not an essential prerequisite to the maintenance of the action that the judgment creditors were threatening to cause executions to be issued and levied upon the homestead; (3) that the judgments might be used injuriously and vexatiously to harass the homestead owner and injure and depreciate his title to the property were sufficient to authorize the interposition of a court of equity.

2. ———: DWELLING HOUSE. Appellee's building on said premises was a two-story frame building. He used the first floor for mercantile purposes and resided with his family on the second floor. *Held*, (1) Such building was a "dwelling house" within the meaning of section 1, chapter 36, Compiled Statutes, 1893, entitled "Homesteads;" (2) this statute by the word "dwelling house" does not contemplate any particular kind of house. This requirement of the law is satisfied if the homestead claimant and his family reside in the habitation, whatever be its character, on the premises claimed as a homestead.

3. ———: ABANDONMENT: EVIDENCE. The rule is that to establish abandonment of a homestead the evidence must show not only that the party removed from the homestead, but that he did so with the intention of not returning, or, after such removal, he formed the intention of remaining away. *Mallard v. First Nat. Bank of North Platte*, 40 Neb., 784, and cases there cited, followed.

4. ———: ———: ———. One of the issues tried in this case was whether appellee had abandoned his homestead. The evidence was that appellee, prior to the bringing of this action, leased the premises at McCool Junction for a year, the rent, by the terms of the lease, being applied to discharge a mortgage on the premises; removed with his family to a town in an adjoining county for the purpose of sending his older children to a college located there; left a part of his household goods in the building on the lot at McCool Junction; rented a house in the town removed to in which he and his family resided; that when he removed from his homestead he intended returning there; that he had not since changed that intention; that while he resided in the adjoining county he voted once therein at a general election. The district court found that appellee had not abandoned his homestead. *Held*, (1) That whether appellee at the time he removed from McCool Junction did so with the intention of returning, and whether appellee after settling in the adjoining county formed the intention of remaining away from his former homestead, were questions of fact for the trial court; (2) that by voting in the adjoining county appellee may have violated the law,—may have committed a crime,—but whether he did so was not the issue tried in this case; (3) appellee's voting in the adjoining county was evidence tending to show that when he removed from McCool Junction he did so with the intention of not returning, or that, after settling in the adjoining county, he had formed the intention of remaining away from his former homestead, but such act of appellee was not conclusive evidence of such intention; (4) that the district court was not bound to disregard all the other facts and circumstances in the case in favor of the contention of appellee and find that because he had exercised the right of suffrage in the adjoining county that such fact was conclusive evidence that he had abandoned his former homestead; (5) that the evidence supported the finding of the district court. (*Dennis v Omaha Nat. Bank*, 19 Neb., 675.)

5. ———: INJUNCTION AGAINST JUDGMENTS: DECREE. That the decree of the district court perpetually enjoining the appellants from attempting to satisfy their judgments by judicial sale of said homestead premises should be so modified as to permit appellants, at any time, to move the court for a vacation of such injunction on showing that the appellee, still owning the legal title to said premises, had permanently abandoned the premises as a homestead, or that said premises had appreciated in value so that the interest of the appellee therein had become of a greater value than $2,000.

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

The facts are stated in the opinion by Commissioner RAGAN.

A. G. Greenlee and *George B. France*, for appellants:

An action *quia timet* to declare a judgment not to be a lien on property claimed as a homestead and to debar the creditor from claiming such lien cannot be maintained by a judgment debtor, nor by any one, while the judgment debtor remains the owner of the property.

The property in controversy does not possess the essential characteristics of a homestead. (*Garrett v. Jones*, 10 So. Rep. [Ala.], 702; *Rhodes v. McCormick*, 4 Ia., 368.)

If the property ever was a homestead it was abandoned as such long prior to the commencement of this action. (*Bowker v. Collins*, 4 Neb., 494; *Jarvais v. Moe*, 38 Wis., 440; *Garibaldi v. Jones*, 48 Ark., 230; *In re Estate of Phelan*, 16 Wis., 79; *Warren v. Peterson*, 32 Neb., 728; *Holmes v. Greene*, 7 Gray [Mass.], 299; *Herrick v. Graves*, 16 Wis., 157; *Atchison Savings Bank v. Wheeler*, 20 Kan., 625; *Kimball v. Wilson*, 59 Ia., 638; *Cabeen v. Mulligan*, 37 Ill., 230.)

Sedgwick & Power, *contra*, contending that the homestead was not abandoned, cited: *Kenley v. Hudleson*, 99 Ill., 493; *Holden v. Pinney*, 6 Cal., 234; *Dunn v. Tozer*, 10 Cal., 171; *Bunker v. Paquette*, 37 Mich., 79; *Euper v. Alkire*, 37 Ark., 283; *Brown v. Watson*, 41 Ark., 309; *Wetz v. Beard*, 12 O. St., 431; *Lamb v. Wogan*, 27 Neb., 238; *Giles v. Miller*, 36 Neb., 346; *Dennis v. Omaha Nat. Bank*, 19 Neb., 675.

RAGAN, C.

On the 25th day of November, 1892, Alfred G. Corey and Mary C. Corey brought this action in the district court

of York county, making Schuster, Hingston & Co. and Plummer, Perry & Co. defendants thereto. The Coreys in their petition alleged that they were husband and wife, residents and citizens of the state of Nebraska, had a family of five children; that they were the owners in fee-simple of lot 23, in block 18, in the town of McCool Junction, in said York county; that said real estate consisted of one lot and a dwelling house and out-buildings thereon, all of the value of not to exceed $800; that they had occupied said premises as their homestead since June, 1885, until within about four months of the time of filing the petition, during which four months they had been living temporarily in Clay county, Nebraska, where they were educating their children, the older children being in attendance upon a college in said Clay county; that neither of them had any other homestead than the above described real estate, and that neither of them had any other real estate whatever; that the parties made defendants to the action, in the year 1891, recovered certain judgments against the said Alfred G. Corey, which judgments are of record in the office of the clerk of the district court of said York county and are wholly unpaid; that said judgments were not based on debts secured by mechanics', laborers', or vendors' liens, nor on debts secured by mortgage on said premises, but that they cast a cloud upon the title of plaintiffs to said premises and caused persons not learned in the law and not fully informed of the facts to question the title of said premises as against said judgments, to the annoyance, injury, and damage of the plaintiffs; that said premises were incumbered by a mortgage of $300; that plaintiffs had but little means and were desirous of selling said premises for the purpose of investing the proceeds in a cheaper homestead and one not incumbered. The prayer was that said judgments and each of them might be decreed to be not liens upon the premises; that the cloud cast thereby upon the title to said premises might be removed, and the parties

made defendants perpetually enjoined from asserting or claiming a lien on said premises by virtue of said judgments. The parties made defendants to the action appeared and answered the petition. The district court found all the issues in favor of Corey and wife and entered a decree as follows: "It is hereby ordered and adjudged by the court that such judgments be, and they hereby are, declared no liens on said real estate, and said defendants are hereby enjoined from setting up any claim to or claiming any lien on said premises by reason of their said judgments." From this decree Schuster, Hingston & Co. and Plummer, Perry & Co. have appealed.

1. The first contention is that the petition does not state facts sufficient to constitute a cause of action. The argument is that these judgments do not constitute clouds upon the title to the homestead. By the provisions of our statute a homestead not exceeding in value $2,000, consisting of a dwelling house in which the claimant resides and the land on which the same is situate, not exceeding two contiguous lots within any incorporated city or village, is exempt from judgment liens and from execution or forced sale, unless the judgment against the owner of the homestead shall be based on certain debts not material here. (Ch. 36, Comp. Stats., 1893, entitled "Homesteads.") By section 477 of the Code of Civil Procedure it is provided: "The lands and tenements of the debtor within the county where the judgment is entered shall be bound for the satisfaction thereof, from the first day of the term at which judgment is rendered," etc. It is clear then that the judgments of the appellants are apparent liens upon the homestead of the Coreys. Do these apparent liens constitute a cloud upon their title to said premises?

In *Lick v. Ray*, 43 Cal., 83, it is said: "If a title against which relief is prayed as a cloud be of such a character that, if asserted by action and put in evidence, it would drive the other party to the production of his own title in order

to establish a defense, it constitutes a cloud which the latter has a right to call upon equity to remove."

In *Sanxay v. Hunger*, 42 Ind., 44, it is said: "When the claim set up by one to an interest in land appears to be valid on the face of the record, and the defect can only be made to appear by extrinsic evidence, particularly if that evidence depends upon oral testimony, it presents a case invoking the aid of a court of equity to remove it as a cloud upon the title." The court cites 1 Story, Equity, sec. 711, and *Crooke v. Andrews*, 40 N. Y., 547.

Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet the possession of real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title. (Mr. Justice Gray, in *Frost v. Spitley*, 121 U. S., 552; *Phelps v. Harris*, 101 U. S., 370; *City of Hartford v. Chipman*, 21 Conn., 488.)

In 3 Pomeroy, Equity Jurisprudence, it is said:

"Sec. 1398. The jurisdiction of courts of equity to remove clouds from title is well settled, the relief being granted on the principle *quia timet*; that is, that the deed or other instrument or proceeding constituting the cloud may be used to injuriously or vexatiously embarrass or affect a plaintiff's title.

"Sec. 1399. Whether or not the jurisdiction will be exercised depends upon the fact that the estate or interest to be protected is equitable in its nature, or that the remedies at law are inadequate where the estate or interest is legal. * * * While a court of equity will set aside a deed, agreement or proceeding affecting real estate, where extrinsic evidence is necessary to show its invalidity, because such instrument or proceeding may be used for annoying and injurious purposes at a time when the evidence to contest or resist it may not be as effectual as if used at once, still, if the defect appears upon its face and a resort

to extrinsic evidence is unnecessary, the reason for equitable interference does not exist for it cannot be said that any cloud whatever is cast upon the title."

Applying the doctrine of these authorities to the facts of the case at bar we reach the conclusion that the judgments of the appellants are apparent liens upon the homestead of the Coreys, and as such constitute a cloud upon the title to the homestead, which a court of equity has jurisdiction to remove at the suit of the homestead owner. If the appellants should cause executions to be issued and levied upon this real estate it would require the production of extrinsic evidence on the part of the Coreys to show that such real estate was not in fact subject to the liens of such judgments. It is not an essential prerequisite to the maintenance of such an action as this that the judgment creditors should be threatening or about to cause executions to be issued and levied upon the exempt homestead. It is sufficient, to authorize the interposition of a court of equity, that the existence of the apparent liens of the judgments upon the premises may be used injuriously or vexatiously to harass the owner of the homestead and injure and depreciate his title to the property.

2. The evidence in the record shows that the building on the homestead premises of Corey was a one and one-half story frame building. The first floor of this building was used by Corey for the purpose of conducting therein a mercantile business, while he and his family resided on the second floor, which was divided into several rooms or apartments suitable for dwelling purposes. The second argument is that the building on the homestead premises was and is not a "dwelling house" within the meaning of the statute. We think this argument wholly without merit. The law does not contemplate by the word "dwelling house" any particular kind of house. It may be a "brown-stone front," all of which is occupied for residence purposes, or it may be a building part of which is used for

banking or business purposes, or it may be a tent of cloth. All that the law requires on the subject is that the homestead claimant and his family should reside in this habitation or dwelling house, whatever be its character, on the premises claimed as a homestead.

3. The third argument is that the evidence shows that Corey and his wife abandoned the premises claimed as a homestead prior to the bringing of this suit. The evidence is that Corey and his wife resided in the upper story of the building on this lot from 1885 until within a few months before the bringing of this suit; that while they were so residing on the premises Corey conducted a mercantile business on the first floor of the building; that he failed in business and made an assignment for the benefit of his creditors; that for some time after that event he sold machinery on commission, using the building formerly used by him as a store-room for that purpose, himself and family continuing to reside in the upper story of the building; that about four months before this action was brought he leased the homestead premises for a year or a year and one-half, the provisions of the lease being such that the rents were applied to the discharge of the mortgage incumbrance upon the homestead premises; that he then removed with his family to Fairfield, in Clay county, in this state; that he went there intending to return to McCool Junction; that at the time of the removal of himself and family to Fairfield he left part of his household goods in the building on the premises claimed as a homestead in McCool Junction; that he bought no property in Fairfield; that he moved his family to that place for the purpose of sending his oldest children to a college situate there. All this evidence is practically undisputed. "The rule is, that to establish abandonment of a homestead the evidence must show, not only that the party removed from the homestead, but that he did so with the intention of not returning, or, after such removal, he formed the intention of remaining

away." (*Edwards v. Reid*, 39 Neb., 645; *Mallard v. First Nat. Bank of North Platte*, 40 Neb., 784, and cases there cited.) But Corey while living in Fairfield voted at the general election held preceding the bringing of this action; and this act of Corey in voting, it is argued by counsel for appellants, conclusively establishes either that Corey at the time he left McCool Junction left without the intention of ever returning to his homestead, or that after he settled in Fairfield he formed the intention of remaining away from his former homestead. Whether the Coreys at the time they removed from McCool Junction to Fairfield did so with the intention of returning to McCool Junction, and whether after they settled in Fairfield formed the intention of remaining there or at least of not returning to their former homestead, were questions of fact for the trial court, which it found in their favor. The fact that Corey voted while residing in Fairfield was and is a strong circumstance tending to show that he either left McCool Junction with the intention of not returning there to live, or that after he settled in Fairfield he formed the intention of remaining away from or not returning to his former homestead. But this act of Corey, though evidence of abandonment of his homestead, was not conclusive evidence of such abandonment. Corey in voting in Fairfield may have violated the law, may have committed a crime, but that was not the issue tried in this case. If Corey removed with his family from McCool Junction to Fairfield temporarily and with the intention of returning to his homestead at McCool Junction, and if after settling in Fairfield he did not abandon the intention of returning, then the mere fact that he unlawfully, illegally, or criminally exercised the right of suffrage while in Fairfield is not conclusive evidence that he had abandoned his homestead. What Corey and his wife, or either of them, said, if anything, at the time they removed from McCool Junction as to whether they were

going away permanently or with the intention of returning the fact that they left part of their household goods at McCool Junction, the fact that they applied the rents from the McCool Junction homestead to the discharge of the mortgage upon the premises, were all facts and circumstances in evidence which tended to support the contention of the Coreys that they had not abandoned their homestead; and the fact that Corey exercised the right of suffrage while residing in Fairfield was evidence, and, as already said, very strong evidence, which tended to support the contention of the appellants that Corey had abandoned his homestead at McCool Junction when he removed therefrom; but what Corey and his wife said as to their intentions, their leaving part of their household goods at McCool Junction, and the application they made of the rent derived from the homestead, nor either of these facts, were conclusive evidence in favor of their theory, nor was the district court bound to disregard all the facts and circumstances in evidence in the case in favor of the contention of Corey and wife and say that because Corey exercised the right of suffrage while in Fairfield that all his other conduct and all the other circumstances in evidence in the case should count for nothing. Corey's voting in Fairfield should have been and was by the district court weighed and considered in connection with all the other conduct of Corey and his wife in the premises and the other facts and circumstances in evidence. (*Dennis v. Omaha Nat. Bank*, 19 Neb., 675.) The evidence sustains the finding of the district court that the Coreys did not remove from McCool Junction with the intention of not returning. The decree of the district court, however, is too broad. It perpetually enjoins the appellants from attempting to satisfy their judgments by a judicial sale of the real estate in controversy in this action. If this real estate by reason of the growth and development of the town of McCool Junction or the surrounding country, or other cause should appreciate in value until it was worth more than $2,000, then

the appellants would be entitled to have applied towards the satisfaction of their judgments whatever interests the Coreys had in said real estate in excess of $2,000; and if they in the future—still owning the title to these premises—should permanently abandon such premises as a homestead, then it is clear that the appellants would be entitled to have their judgments satisfied by a judicial sale of said real estate. (*Hoy v. Anderson*, 39 Neb., 390.) The decree of the district court will therefore be so modified as to permit the appellants to at any time move the court for a vacation of the injunction granted in this case on showing that the Coreys, still owning the legal title to said premises, have permanently abandoned the premises as a homestead, or that said premises have appreciated in value so that the interest of the Coreys therein is of a greater value than $2,000; and as thus modified the decree of the district court is affirmed.

JUDGMENT ACCORDINGLY.

LINCOLN SHOE MANUFACTURING COMPANY V. FRANK L. SHELDON.

FILED MARCH 5, 1895. No. 6217.

1. **Corporations: SUBSCRIPTION CONTRACTS: CONSTRUCTION.** A manufacturing corporation sued Sheldon on an instrument in writing, signed by himself and others, as follows: "For value received we, the undersigned subscribers, hereby bind ourselves to purchase the number of shares of stock set opposite our respective names in the Lincoln Shoe Manufacturing Company at fifty dollars per share; one-fourth of the amount so subscribed * * * to be paid when the foundation of the building is laid; one-fourth when the building is under roof, and the balance on call of the directors." Sheldon demurred to the petition on the ground that it did not state a cause of action. *Held*, (1) That by the contract in suit Sheldon became a subscriber to the cap-

ital stock of the manufacturing company; (2) that Sheldon's contract was not a contract to purchase stock of the corporation; (3) and if it had been, the manufacturing company's measure of damages would be the contract price of the stock, it having tendered the stock to Sheldon before suit was brought.

2. **Sales:** BREACH OF CONTRACT: DAMAGES. Where a vendee refuses to perform the vendor has either of two remedies. He may keep the property made the subject of the contract and sue the vendee for damages for a breach of his contract, and in such case his measure of damages will be the difference between the contract price of the property and its actual value at the date of the vendee's breach of the contract; or the vendor may tender the property made the subject of the contract to the vendee, and then in a suit upon the contract the vendor's measure of damages will be the contract price of the property.

3. **Corporations:** CHARTERS. In this state the legislature does not by a special act charter a corporation, but all corporations are formed under general laws, and these laws and the articles of incorporation adopted in pursuance of and in conformity with such laws constitute the charter of a corporation in this state.

4. ———: SUBSCRIPTION. The fact that all the stock authorized by the articles of incorporation of a manufacturing company formed under sections 37, 38, and 39, chapter 16, Compiled Statutes, 1893, entitled "Corporations," has not been subscribed, is not a defense to a subscriber for part of such stock when sued on his contract of subscription, if ten per cent of the stock of such manufacturing corporation has been subscribed.

5. ———: ———. *Livesey v. Omaha Hotel Co.*, 5 Neb., 50, *Hale v. Sanborn*, 16 Neb., 1, and *Hards v. Platte Valley Improvement Co.*, 35 Neb., 263, distinguished.

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

See opinion for statement of the case.

Thomas C. Munger, for plaintiff in error:

It was unnecessary to allege that all the stock had been subscribed. It was sufficient to allege that more than ten per cent of the stock had been subscribed. (Compiled Statutes, ch. 16, sec. 39; Cook, Stock & Stockholders, secs. 177,

178; *Abbott v. Omaha Smelting Co.*, 4 Neb., 416; *Hunt v. Kansas & Missouri Bridge Co.*, 11 Kan., 412; *Port Edward, C. & N. R. Co. v. Arpin*, 80 Wis., 214; *Hoagland v. Cincinnati & F. W. R. Co.*, 18 Ind., 452; *Schenectady & S. P. R. Co. v. Thatcher*, 11 N. Y., 102; *Hamilton & D. P. R. Co. v. Rice*, 7 Barb. [N. Y.], 166; *Boston, B. & G. R. Co. v. Wellington*, 113 Mass., 79; *Hanover, J. & S. R. Co. v. Haldeman*, 82 Pa. St., 36; *Penobscot & K. R. Co. v. Bartlett*, 12 Gray [Mass.], 244; *New Haven & D. R. Co. v. Chapman*, 38 Conn., 65; *Illinois River R. Co. v. Zimmer*, 20 Ill., 564; Beach, Corporations, p. 866, sec. 535; *Hale v. Sanborn*, 16 Neb., 1.)

There was a sufficient averment to show that plaintiff was organized under the manufacturing company statute. (*Port Edward, C. & N. R. Co. v. Arpin*, 80 Wis., 217; Morawetz, Corporations, sec. 38; *Dorsey v. Hall*, 7 Neb., 460; Maxwell, Code Pleading, pp. 379, 393; Bliss, Code Pleading, pp. 208–213.)

The contract was a subscription. Plaintiff would be entitled to recover if it were a contract of purchase. (3 Parsons, Contracts, 208*; Newark, Sales, sec. 391; *Wasson v. Palmer*, 17 Neb., 330; Thompson, Stockholders, sec. 105; Cook, Stock & Stockholders, sec. 52; *Vanderheyden v. Mallory*, 1 N. Y., 459; *Buffalo & J. R. Co. v. Gifford*, 87 N. Y., 294; *Peninsular R. Co. v. Duncan*, 28 Mich., 130; *Oler v. Baltimore & R. R. Co.* 41 Md., 591; *Beene v. Cahawba & M. R. Co.*, 3 Ala., 660; *Penobscot R. Co., v. Dummer*, 40 Me., 172; *Haskell v. Sells*, 14 Mo. App., 91; *Cross v. Pinckneyville Mill Co.*, 17 Ill., 54; *Athol Music Hall Co. v. Carey*, 116 Mass., 471; *Hartford & N. H. R. Co. v. Kennedy*, 12 Conn., 499; *Stuart v. Valley R. Co.*, 32 Gratt. [Va.], 154; *Busey v. Hooper*, 35 Md., 28; *McClure v. People's F. R. Co.*, 90 Pa. St., 269; *Cass v. Pittsburg, V. & C. R. Co.*, 80 Pa. St., 31; *Robinson v. Jennings*, 7 Bush [Ky.], 630; *Skowhegan & A. R. Co. v. Kinsman*, 77 Me., 370; *Connecticut & P. R. R. Co. v. Bailey*, 24 Vt., 465;

Sagory v. Dubois, 3 Sandf. Ch. [N. Y.], 466; *Minneapolis Threshing Machine Co. v. Davis*, 40 Minn., 110.)

A proposition to subscribe, even to a company to be formed in the future, is valid. (*Starrett v. Rockland Fire & Marine Ins. Co.*, 65 Me., 374; *Buffalo & J. R. Co. v. Gifford*, 87 N. Y., 294; *Minneapolis Threshing Machine Co. v. Davis*, 40 Minn., 110; *Penobscot R. Co. v. Dummer*, 40 Me., 172; *Athol Music Hall Co. v. Carey*, 116 Mass., 471; *Ashuelot Boot & Shoe Co. v. Hoit*, 56 N. H., 548; *Cross v. Pinckneyville Mill Co.*, 17 Ill., 54; *Haskell v. Sells*, 14 Mo. App., 91; *Kirksey v. Florida & G. P. R. Co.*, 7 Fla., 23.)

The subscription in this case was not to a corporation to be formed but to one then existing. The defendant is liable. (Beach, Corporations, sec. 64; Cook, Stock & Stockholders, secs. 69, 70.)

The contract should be construed a subscription. (*Spear v. Crawford*, 14 Wend. [N. Y.], 20; *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y., 451; *Robinson v. Jennings*, 7 Bush [Ky.], 630; *Waukon & M. R. Co. v. Dwier*, 49 Ia., 121; *Skowhegan & A. R. Co. v. Kinsman*, 77 Me., 370; *Nulton v. Clayton*, 54 Ia., 425; *Connecticut & P. R. R. Co. v. Bailey*, 24 Vt., 465; *Sagory v. Dubois*, 3 Sandf. Ch. [N. Y.] 466; *Fry's Executor v. Lexington & B. S. R. Co.*, 2 Met. [Ky.], 314; *Starrett v. Rockland Fire & Marine Ins. Co.*, 65 Me., 374; *Kirksey v. Florida & G. P. R. Co.*, 7 Fla., 23, 68 Am. Dec., 426; *Ashuelot Boot & Shoe Co. v. Hoit*, 56 N. H., 548; *Stuart v. Valley R. Co.*, 32 Gratt. [Va.], 154; *Busey v. Hooper*, 35 Md., 28.)

Pound & Burr, contra:

The fact that the agreement was entered into after incorporation shows it to be an agreement to purchase, as it purports to be. (*Thrasher v. Pike County R. Co.*, 25 Ill., 393; *St. Paul S. & T. F. R. Co. v. Robbins*, 23 Minn., 440; *People's Ferry Co. v. Balch*, 8 Gray [Mass.], 303.)

The measure of damages is the same as in any other

contract for the sale of personal property. In failing to state what the value of the stock was, or is, the petition fails to state a cause of action. (*Thrasher v. Pike County R. Co.*, 25 Ill., 393; *Quick v. Lemon*, 105 Ill., 578; *Rhey v. Ebensburg & S. P. R. Co.*, 27 Pa. St., 261; *Mt. Sterling Coalroad Co. v. Little*, 14 Bush [Ky.], 429; *St. Paul S. & T. F. R. Co. v. Robbins*, 23 Minn., 440.)

The whole amount fixed by the articles must be subscribed, and without an allegation to that effect no cause of action is stated. (*Hale v. Sanborn*, 16 Neb., 1; *Hards v. Platte Valley Improvement Co.*, 35 Neb., 263.)

RAGAN, C.

The Lincoln Shoe Manufacturing Company brought this suit in the district court of Lancaster county against Frank L. Sheldon. The petition, so far as material here, was in words and figures as follows:

"The plaintiff complains of the defendant and alleges that the plaintiff is a corporation duly organized and incorporated under the laws of the state of Nebraska for the purpose of manufacturing, selling, and dealing in boots and shoes of every description and kind and character and to deal in all branches common to that line of trade, and to that end to own all necessary real estate, buildings, machinery, and appliances necessary for said business, and having a capital stock of $100,000, divided into 2,000 shares of $50 each, of which more than ten per cent has been subscribed.

"2 That the said plaintiff corporation was organized under the general laws of the state of Nebraska relating to manufacturing corporations as well as that relating to corporations in general, as found in sections 37, 38, 39, and 123–144 of the laws of Nebraska (Compiled Statutes, 1891), and became organized and incorporated on the 10th day of February, 1890, and ever since has been, and is and was at the time hereafter mentioned, a corporation

in fact and conducted and carried on business as such corporation.

"3. On the 22d day of March, 1890, and for the purposes of manufacturing and dealing and buying boots and shoes and for the purposes named in the first paragraph of this petition and in consideration of the advantages thereof and of each other's subscriptions the defendant, with other persons, became a subscriber to the capital stock of the plaintiff by severally executing and delivering to the duly authorized representatives and agents and officers of the plaintiff company the following agreement in writing: 'For value received we, the undersigned subscribers, hereby bind ourselves to purchase the number of shares of stock set opposite our names in the Lincoln Shoe Manufacturing Company at fifty ($50) dollars per share; one fourth of the amount so by us subscribed respectively to be paid when the foundation of the building is laid; one fourth when the building is under roof; the balance on call of the directors. In consideration of the building being erected on the west half of the northeast quarter of section twenty-eight (28), town ten (10), range six (6), along the line of the Lincoln & Northwestern railroad. Witness our hands on this 22d day of March, 1890.'

"4. That the defendant signed and delivered the said above agreement and placed the number of shares opposite his name for which he subscribed, to-wit, the number of fifty shares for which he subscribed, and thereby agreed to take the number of fifty shares, each share being of the par value of $50, and agreed to pay the plaintiff thereof the sum of $2,500, as required by law and the terms of said agreement.

"5. That there was subscribed with the defendant greatly in excess of ten per cent of the said amount of capital stock as specified by the charter, and after the amount of ten per cent of the capital stock had been subscribed the plaintiff company commenced operations and adopted rules

and began the erection and equipment of a building for the purposes of the company and made preparations for the business of manufacturing and dealing in boots and shoes and bought material and acted under their charter and as an incorporation, and after as before the subscription of the defendant.

"6. The plaintiff company was formed on the 10th day of February, 1890, and the articles of incorporation were duly filed the same day, a true copy of which are hereto attached and marked 'Exhibit A' and made a part of this petition. The plaintiff accepted the subscription of the defendant and proceeded with the work and business of its charter and organization. A board of directors was chosen and the other officers necessary to the corporation and provided by its charter were elected and qualified. By and on the 10th day of June, 1890, the foundation of the building in which the operations of the company were to be carried on was laid, and on the 1st day of September, 1890, the said building was erected and under roof. This building was the same building referred to and set forth in the agreement as set forth in paragraph 3 of this petition, and was so founded and erected and roofed on the land described and along the railway named in the agreement as above set forth. And the sum of one-fourth of the said amount so agreed by the defendant to be paid became due on the 10th day of June, 1890, and the one-fourth part also became due on the 1st day of September, 1890, and the plaintiff company requested and duly demanded the payment of the said sums and offered to deliver and tendered the certificates of stock to defendant before the beginning of this action, and now offers to deliver them to defendant, amounting in all to the sum of $1250 (twelve hundred and fifty dollars.)

"7. The plaintiff has performed all the conditions precedent in said agreement on its part. The defendant has not paid the said sum or any part thereof, and the plaintiff

therefore prays judgment against the defendant for the sum of $1250, as aforesaid, with interest thereon at the rate of seven per cent from the 1st day of June, 1890, on half the amount due, and from the 1st day of September on the other half due, and costs of suit."

To this petition Sheldon interposed a demurrer, the grounds of which were that the petition did not state facts sufficient to constitute a cause of action. This demurrer the court sustained, and rendered a judgment dismissing the manufacturing company's petition, to reverse which it has prosecuted to this court a petition in error.

Two arguments are relied upon here to sustain the judgment of the district court.

1. The first contention is that the contract of Sheldon made the basis of this suit is an agreement to purchase certain shares of stock of the manufacturing company, and not a subscription to the stock of such company; and that the measure of the manufacturing company's damages is the difference in the actual value of the stock and the price which Sheldon agreed to pay for it at the date of the breach of his contract; and since the petition does not allege what the value of the stock was at the date Sheldon refused to take it, that it does not state a cause of action. Is the contract of Sheldon a contract to purchase stock in the manufacturing company, or is it a contract of subscription to the capital stock of such corporation? Whether one or the other is a matter of construction for the court, and to be determined from the intention of Sheldon, gleaned from the contract itself and the law in force applicable to the subject-matter of the contract. The manufacturing company is a corporation organized under chapter 16, Compiled Statutes, 1893, entitled "Manufacturing Companies." Section 37 of that chapter provides that whenever any number of persons associate themselves together for the purpose of engaging in the business of manufacturing they shall make a certificate specifying the amount of capital stock necessary,

the amount of each share, the name of the place where the corporation shall be located, and the name by which it shall be known; that such certificate shall be certified and forwarded to the secretary of state and by him recorded; and when these things are done that the persons so associating themselves together are authorized to carry on manufacturing operations by the name they have adopted; and section 39 of the chapter provides: "The persons named in the certificate of incorporation, or a majority of them, shall be commissioners to open books for the subscription to the capital stock of said company, at such times and places as they shall deem proper, and the said company are [is] authorized to commence operations upon the subscription of ten per cent of said stock." It appears from the petition that on the 10th of February, 1890, certain gentlemen associated themselves together for the purpose of organizing the manufacturing company; that they made the certificate contemplated by said section 37 on that date and filed it with the secretary of state; and on the 22d of March afterwards Sheldon signed the contract sued upon in this case. The presumption then is that the gentlemen, or a majority of them, who executed the certificate of incorporation provided for by said section 37, after it was executed and filed with the secretary of state, opened books to enable persons, who might desire to do so, to subscribe for the capital stock of the corporation, and that the contract sued upon was made by Sheldon at such time. The law does not require that the capital stock of a corporation like this shall be subscribed before its certificate of incorporation is executed and filed with the secretary of state; indeed the statute contemplates that the certificate of incorporation shall be first made and filed and afterwards the stock books opened.

In *Haskell v. Sells*, 14 Mo. App. 91, Sells signed a paper in the following language: "'We, the undersigned, hereby severally subscribe for the number of shares set opposite our respective names to the capital stock of the Mis-

souri Cotton Seed Oil Company, a company to be organized under the laws of the state of Missouri, and we severally agree to pay the said company the sum of one hundred dollars on each share. Twenty-five per cent to be paid on organization of the company. Twenty-five per cent to be paid on first day of September. Fifty per cent to be paid on the first day of October, or as soon thereafter as the board of directors shall call for it to be paid in.'" The court said: "The subscription paper signed by Sells was an unconditional agreement to take a certain number of shares. This, *prima facie*, constituted the subscriber a stockholder. (Thompson, Stockholders, sec. 105.)"

In *Waukon & M. R. Co. v. Dwyer*, 49 Ia., 121, the contract sued on was in the following language: "'We, the undersigned, do hereby agree to take stock in the Waukon & Mississippi Railroad to the amount of the number of shares set opposite to our names, respectively, subject always to the by-laws, rules, and articles of incorporation of the Waukon & Mississippi Railroad.'" The court held that the contract contained a promise to pay the amount of the subscription, and that the subscriber became a shareholder of the company by virtue of the subscription. (*Hartford & N. H. R. Co. v. Kennedy*, 12 Conn., 499; *Peninsular R. Co. v. Duncan*, 28 Mich., 130.)

The language of the contract in suit is: "We, the undersigned subscribers, hereby bind ourselves to purchase the number of shares of stock set opposite our names in the Lincoln Shoe Manufacturing Company at fifty dollars per share; one-fourth of the amount so by us subscribed, respectively, to be paid when the foundation of the building is laid; one-fourth when the building is under roof; the balance on call of the directors." While it is true that the word "purchase" is in the contract, yet we are unable to construe this contract as a contract of sale of stock. The corporation did not own any stock. The averments of the petition exclude the presumption that this

manufacturing company on the 20th of March, 1890, was the owner of any of its stock and that it agreed on that day to sell its stock or any of it to Sheldon. When we take into consideration the law under which this incorporation was organized; that it was authorized to commence business when ten per cent of its capital stock had been subscribed; that after its articles or certificate of incorporation had been filed with the secretary of state, that the persons executing such certificate had the right to open books for subscriptions to the capital stock of the corporation; that the contract bound the signer of it to pay one-fourth of the value of fifty shares of stock at fifty dollars a share when the foundation of the building to be used by the manufacturing company should be laid, and a like one-fourth when such building should be under roof, and the remainder of the value of said fifty shares at fifty dollars per share on call of the directors, we are forced to the conclusion that by the contract in suit Sheldon subscribed and agreed to pay for, in the manner stated in the contract, fifty shares of the capital stock of the manufacturing company. For the purposes of this case, however, we think it entirely immaterial whether the contract of Sheldon is one to purchase fifty shares of stock of this manufacturing company, or whether by the contract he subscribed for fifty shares of this stock. The petition alleges that before the bringing of this suit the foundation of the building to be used by the manufacturing company had been laid and such building was under roof, and that the manufacturing company demanded of Sheldon that he pay it $1,250, the agreed value of twenty-five shares of said stock, and at the same time tendered him certificates of the stock of said corporation for the amount of money claimed. So that if we should adopt the construction of this contract claimed by Sheldon he would still be liable to the manufacturing company for the agreed price of the shares of stock. As Sheldon's having agreed to purchase fifty shares of this

stock at fifty dollars per share, and the manufacturing company having tendered him the stock, it would be entitled to recover the contract price of the stock. (3 Parsons, Contracts [5th ed.], 209.)

Wasson v. Palmer, 17 Neb., 330, was an action brought by a vendor of real estate against the vendee for the latter's breach of a contract to purchase the real estate, and this court held: "Where the vendee of real estate refuses to perform the contract on his part and an action is brought to recover damages for the breach, no tender of a deed for the property is necessary before bringing the action. The rule is different, however, where the action is to recover the contract price."

Thrasher v. Pike County R. Co., 25 Ill., 393, was an action by the railroad company against Thrasher to recover the contract price of certain shares of stock which he had subscribed for of the stock of said company. Speaking of the measure of damages the court said that an agreement to subscribe for a certain amount of stock is like an agreement to purchase any specific article of property, and if there has not been a delivery or an offer to deliver the stock, the measure of damages is not the value of the stock, but only such as would result from the loss of the sale.

In *Thompson v. Alger*, 53 Mass., 428, A. made a contract with T. for the purchase of railroad shares, and afterwards paid T. a part of the price; T. subsequently caused the shares to be transferred to A., but he refused to take them, and T. brought an action against him, and the court held that the measure of damages was the contract price.

These decisions are but applications of the well known rule that where a vendee refuses to perform his contract the vendor has either one of two remedies: he may keep the property made the subject of the contract and sue the vendee for his failure to perform, and in such case his measure of damages will be the difference between the contract price of the property and its actual value at the

date of the breach of the contract; or the vendor may tender the property made the subject of the contract to the vendee, and then in a suit upon the contract the vendor's measure of damages will be the contract price of the property.

2. The second contention is that the petition fails to state a cause of action for the reason that it shows that the whole amount of capital stock provided by the articles of incorporation of the manufacturing company has not been subscribed. To sustain this contention we are cited to *Livesey v. Omaha Hotel Co.*, 5 Neb., 50, in which it was held: "When the subscription contract or charter of a corporation specifically fixes the capital stock at a certain amount, divided into shares of a certain amount each, the capital so fixed must be fully subscribed before an action will lie against a subscriber to recover assessments levied on the shares of stock, unless there is a clear provision in the contract to proceed with the accomplishment of the main design with a less subscription than the whole amount of capital specified, or there is a waiver of the condition precedent," and *Hale v. Sanborn*, 16 Neb., 1, and *Hards v. Platte Valley Improvement Co.*, 35 Neb., 263. The general rule announced in the case in 5 Neb. was followed and adhered to in the cases in the 16th and 35th; but these cases are not in point here. In the case in 5 Neb. the corporation was a hotel company, in 16 Neb. the corporation was a flouring mill, and in 35 Neb. the corporation was organized for the erection and operation of a hall for the use of societies, organized meetings, and for such other purposes as the trustees of the corporation might deem for the benefit of the stockholders. In other words, none of the corporations were manufacturing corporations. The corporations mentioned in those cases were organized under the general incorporation laws of the state, and there is no provision in this general law by which a corporation is authorized to commence the transaction of business until all

its capital stock is subscribed. In the case at bar the corporation is a manufacturing corporation and expressly authorized by the statute under which it was incorporated to commence business when ten per cent of its capital stock should be subscribed. Cook, in his work on Stock and Stockholders, after stating the general rule that it is an implied part of a contract of subscription to the capital stock of a corporation that the contract is to be binding and enforceable against the subscriber only after the full capital stock of the corporation has been subscribed, says: "The act of incorporation may of course vary this rule. Thus, it is well established that where the charter authorizes the organization of the company, and the commencement of corporate work after a certain amount of the capital stock has been subscribed, such a charter provision is equivalent to an express authority to the corporation to call in the subscriptions as soon as this organization is effected. Subscriptions to the full amount of the capital stock are held not to be necessary. The defense is not good." (1 Cook, Stock & Stockholders, sec. 177.) In this state the legislature does not by a special act charter a corporation, but all corporations are formed under general laws, and these laws and the articles of incorporation adopted in pursuance of and in conformity with such laws constitute the charter of a corporation of this state.

In *Jewett v. Valley R. Co.*, 34 O. St., 601, the contract sued upon was in the following language: "'We, the undersigned, hereby respectively subscribe to and agree to take of the capital stock of the Valley Railway Company the number of shares, of fifty dollars each, set opposite our respective signatures,'" etc. The capital stock of the railway company was fixed by its certificate of incorporation at three millions of dollars. Jewett subscribed for one hundred shares of its stock amounting to $5,000. A law in force in Ohio at the time provided that railroad corporations, so soon as ten per cent of their capital stock should be sub-

scribed, might give notice to the stockholders to meet for the purpose of choosing directors and construct and maintain a railroad. The railroad company sued Jewett on his subscription, and he defended on the ground that, as the entire amount of the capital stock authorized by the certificate of incorporation had not been subscribed, he was not liable. The court said. "Can assessments be made and enforced on subscriptions for shares of the capital stock of a railroad corporation before the whole amount of stock, mentioned in the certificate of incorporation, has been subscribed? In the absence of both legislation and express agreement on the subject, they cannot." The court then cites *Salem Mill-Dam Corporation v. Ropes*, 6 Pick. [Mass.], 23, and other cases supporting the general doctrine, and continues: "In most states, however, provision has been made by statute; and it is well settled that 'contracts must be expounded according to the laws in force at the time they are made, and the parties are as much bound by a provision contained in a law as if that provision had been inserted in and formed part of the contract.' * * * A careful consideration of the enactments set forth in the statement of this case, and other cognate statutory provisions, leaves with us no doubt that when ten per cent of the capital stock had been subscribed the company may organize by the election of directors, who may 'transact all business of the corporation,' and, looking to the duties imposed on the directors, it is clear that the residue of the stock, beyond the ten per cent, * * * must 'be paid in such installments and at such times and places, and to such persons as may be required by the directors of such company,' though the whole amount of the capital stock may not have been subscribed. * * * The terms of the subscription on which this suit was brought are in harmony with the statutory provisions as we have construed them; and hence the fact that the whole of the capital stock had not been taken afforded no defense to this action." (See, also, *Hunt v. Kansas & Missouri Bridge Co.*, 11 Kan., 412)

We conclude, therefore, that the fact that all the stock authorized by the articles of incorporation of a manufacturing company has not been subscribed is not a defense to a subscriber for such stock when sued on his contract of subscription, if ten per cent of the stock of such manufacturing corporation has been subscribed. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

GERTRUDE T. EDNEY ET AL. V. JAMES E. BAUM ET AL.

FILED MARCH 5, 1895. No. 5205.

1. **Assignments of Error.** Errors in the admission or rejection of testimony cannot be considered unless by assignments of error the particular rulings complained of are specified.
2. **Review:** AMOUNT OF VERDICT. A verdict will not be set aside because of the inadequacy of the damages awarded, when on one issue, if found for the plaintiff, they would be inadequate, but when the verdict may have been based on other issues calling for a smaller recovery.
3. **Trial:** MISCONDUCT OF JURY. A verdict should be set aside when it is made to appear that jurors discussed among themselves the merits of the case, expressing opinions thereon, before final submission, and where an unauthorized communication took place between a juror and one of the attorneys while the jury was deliberating. Especially should such a verdict be set aside where the evidence establishes a high probability that there was misconduct in other particulars.
4. ———: ———. In this case it was not shown that anything prejudicial occurred in the communication between counsel and juror. But prejudice will in such cases usually be presumed. The fact that there existed the opportunity and inclination among jurors to communicate with those outside the jury-room may be sufficient to vitiate a verdict.

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

W J. Lamb and *R. Cunningham*, for plaintiffs in error, cited, contending that there was such misconduct both on the part of defendants below and of the jury as warranted a reversal: *Ensign v. Harney*, 15 Neb., 330; *Knight v. Freeport*, 13 Mass., 218; Thompson, Trials, sec. 2605; *Stampofski v. Steffens*, 79 Ill., 303; *Ortman v. Union P. R. Co.*, 32 Kan., 419; *Winslow v. Morrill*, 68 Me., 362; *Bradbury v. Cony*, 62 Me., 223; *Sanderson v. Nashua*, 44 N. H., 492; *People v. Bonney*, 19 Cal., 426.

The verdict was too small, forced, and without support in the evidence. (Thompson, Trials, sec. 2606; *St. Louis Brewery Co. v. Bodeman*, 12 Mo. App., 573; *Ellsworth v. Central R. Co.*, 34 N. J. Law, 93.)

Pound & Burr, contra, cited, contending that the facts alleged did not constitute misconduct on the part of the jury, counsel, or parties: *Clarke v. Town Council of South Kingston*, 27 Atl. Rep. [R. I.], 336, and cases there cited; *Walker v. Dailey*, 54 N. W. Rep. [Ia.], 344; *Paramore v. Lindsey*, 63 Mo., 63; *State v. Duestoe*, 1 Bay [S. Car.], 380; *State v. Cucuel*, 31 N. J. Law, 249; *Borland v. Barrett*, 76 Va., 128; *Wise v. Bosley*, 32 Ia., 34; *Gale v. New York C. & H. R. R. Co.*, 53 How. Pr. [N. Y.], 385, 393.

In such cases the presumption is that the juror acted properly, and there must be clear and convincing proof to the contrary. (*People v. Williams*, 24 Cal., 31; *Goodright v. McCausland*, 1 Yeates [Pa.], 372, 378.)

Nor is the testimony of third persons as to declarations made by jurors admissible. (*Commonwealth v. Meserve*, 156 Mass., 61; *Allison v. People*, 45 Ill., 37; *Gale v. New York C. & H. R. R. Co.*, 53 How. Pr. [N. Y.], 385; *Smith v. Smith*, 50 N. H., 212.)

The finding of the trial court upon such questions will not be disturbed. (*Ererton v. Esgate*, 24 Neb., 235; *Campbell v. Holland*, 22 Neb., 615; *Dill v. Lawrence*, 109 Ind., 564; *Borland v. Barrett*, 76 Va., 129; *Stevens v. Stevens*, 127 Ind., 560.)

As to the amount of the verdict: *St. Louis & S. E. R. Co. v. Myrtle*, 51 Ind., 566.

IRVINE, C.

This was an action brought by the plaintiffs in error against the defendants in error to recover damages because of certain alleged false representations made by the defendants to the plaintiffs, inducing the purchase by the plaintiffs of a number of lots in the city of Lincoln. There was a verdict for the plaintiffs for $500 after a protracted trial of the case. The plaintiffs prosecute error, arguing in their briefs only two points affecting the merits of the case.

The lots referred to formed a portion of the consideration for the conveyance by the plaintiffs to the defendants of a stock of hardware in Omaha. On the trial the defendants were permitted to offer testimony to the effect that the condition of the hardware was not as good as it had been represented by plaintiffs to be, and that it was of less value than it would have been if such representations had been true. The jury was expressly instructed that this evidence could not be considered as affecting the measure of damages, and could only be considered in determining the good faith of the parties to the transaction. Whether it was admissible for this purpose we cannot now determine, because the only assignment of error covering the subject is as follows: "That the court erred in allowing evidence to be introduced in the trial as to the condition and value of the stock of hardware. The admission of all the evidence as to its condition and value being in error, viz., the evidence introduced by defendants on said trial, and to which plaintiffs' counsel duly objected to and excepted at the time, as to the condition and value of said hardware stock, to-wit, the testimony of the witnesses David Baum, Daniel Baum, J. E. Baum, John Dennis, A. S. Carter, and H. J. McCarty as to the inventory and the condition and value of said stock." This assignment does not challenge attention to any par-

ticular ruling of the court and is too general for consideration.

The second assignment argued in the briefs is that there was error in the assessment of the amount of recovery, the same being too small. There were 130 lots conveyed. One of the representations charged was that these lots were of the value of $200 each. This was coupled with averments of facts which plaintiffs claimed justified them in relying on this representation. If the jury had found that this representation as to value was in fact made, and that a state of affairs existed which took the case out of the general rule in regard to representations of value and justified plaintiffs in relying thereon, then it is more than doubtful whether under the evidence a verdict for so small an amount as $500 could be sustained. But the petition charged twenty distinct false representations. Some of these were not submitted to the jury, the court deeming them evidently not actionable. Of those submitted to the consideration of the jury there were some whose truth or falsity might only slightly affect the value of the land. Because the jury found for the plaintiffs, it does not follow that it found that they were entitled to recover because of the specific representation as to value; and if the verdict was based on other representations, the evidence was not such as to demand necessarily a higher verdict than the one rendered. After the verdict was rendered the parties, except upon the two matters already discussed, seem to have abandoned the prosecution of the case upon its merits, and instead thereof there began a most unseemly trial by affidavit of the defendants, their counsel, the jury, and even the trial court. Some of the matters charged in the motion for a new trial are in implied contradiction of the record. Many of them relate to matters occurring in the presence of the trial judge, whose determination of which would not, therefore, be ordinarily interfered with. Almost every affidavit as to misconduct is met by flat contradiction. As

to these matters, therefore, we would not disturb the finding of the district court in overruling the motion for a new trial. The perusal of the proof filed on most of the questions raised has not aided us in ascertaining the truth of the matter. The only conviction reached after reading it is that of the total unreliability of human testimony when adduced in the form of voluntary affidavits. A few facts are, however, established by uncontradicted evidence, and we think require that the judgment be reversed. They were probably lost sight of by the trial judge in the throng of repulsive and ill-founded charges which were crowded upon his attention.

The arguments to the jury were concluded on the evening of April 21st. The jury was allowed to separate and the case was committed to it on the morning of the 23d, the 22d being a holiday, Arbor day.

Peter Luther, one of the jurors, swears that William Dalstrom, another juror, during the first part of the trial frequently stated in Luther's presence that the lots in controversy were swampy and of no value, and that Mrs. Edney had been cheated, but changed his mind before the case was determined. Two other jurors, A. C. Sharrick and S. D. Eastman, testify to the same effect. J. W. Estabrook testifies that after the trial was over he met Dalstrom, who declared to him that on Arbor day Dalstrom, with several men, went to see the property in question and inquired about the lots. This affidavit as to declarations by a juror after the verdict would of itself be of no importance, but it is entitled to some little weight in connection with the rest of the testimony. B. F. McCall, one of the jurors, testifies that he met Dalstrom on Arbor day, that Dalstrom was then intoxicated and told McCall that he was going to see the lots. George S. Overton testifies that on Arbor day he saw two men looking at the lots and they inquired of him in regard to the names of the streets and numbers of lots, and as to the value of lots in the

neighborhood; that he had since seen Dalstrom and recognized him as one of the men he saw and talked to that day. By another affidavit Overton says that it may have been several days after Arbor day when this occurred, and that he swore to his former affidavit without accurately knowing its contents. George Scherer corroborates Estabrook as to Dalstrom's declarations. Dalstrom himself denies that he went to see the lots on Arbor day, and denies talking with Overton and Estabrook, but admits that he talked to Juror Gable on Arbor day about going to see the lots. He says he drank a few glasses of beer that day and may have indulged in idle talk with Gable and others. As to his condition on that day his own rather peculiar statement is that he "was not intoxicated and was only slightly under the influence of the beer he had drank." He practically admits having told McCall he was going to see the lots. H. W. Gable, another juror, says that during the trial Dalstrom stated that the lots were low and of no value, and that Mrs. Edney had been cheated badly; that on Arbor day Dalstrom was intoxicated and offered to hire a team at his own expense and show Gable that the lots were high and dry. He also testifies that Juror William Barr, during the early part of the trial, spoke frequently in favor of the defendant, and at one time said, "What is the use trying this case and fighting it so, a trade is a trade and ought to be, and let go at that." Barr testifies that he did not make any such statement, but that "sometimes the jurors in arguing with one another would become a little earnest, and perhaps unguarded, and say things which neither juror really meant, which is usual among jurors." If the only feature of this evidence was the alleged visit of Dalstrom to the lots we would hardly feel justified in setting aside the finding of the district court on that point, although we think from the affirmative evidence, from the proof as to Dalstrom's condition, and from his own admissions, that the weight of the evidence is that he took this

private view of the property. But aside from this the affidavits clearly show that before the case was submitted to the jury, jurors discussed its merits among themselves and expressed opinions in regard to the rights of the parties. It is made the duty of the court to admonish the jurors, when permitted to separate during the trial, against such conduct, and it is presumed that the court did its duty in this respect.

The proof on another point is worthy of comment. E. M. Wolfe states that during the deliberations of the jury he was in company with one of the attorneys for the defendants and while beneath the window of the room within which the jury was deliberating the window was opened. Two of the jurors stood in the window when affiant's companion raised his hands and said, "Throw it down to me and I will catch it—the verdict, I mean." A juror said, "We will have the verdict in a few minutes." The attorney referred to testifies that Juror Sharrick addressed, from the window, Wolfe and the affiant, saying, "We will be down in a few minutes." Wolfe and affiant stopped and in imitation of a ball player affiant said, "I can catch it." This occurrence is suspicious, not because of the language used on this occasion, because the conduct of the attorney referred to seems at most to have been indiscreet, but because it evinces both a disposition and an opportunity on the part of the jurors to discourse with outsiders. Prejudice will usually be presumed from such communications. (*Veneman v. McCurtain*, 33 Neb., 643.)

We think that the proof discloses such irregularities in the way of communications among the jurors and with others as to demand that the verdict be set aside, and while we are loath to encourage the practice of assailing the adverse party and jurors after an unfavorable verdict, we are the less reluctant in setting this verdict aside because of the fact that some five or six of the jurors have filed affidavits stating that their minds never assented to the verdict, but

that they were induced to acquiesce therein to avoid further confinement. The portions of the affidavits relating to this were struck out by the district court, and properly so, as being incompetent for the purpose of impeaching the verdict. But the fact that the affidavits were filed moves us to say that these jurors were evidently utterly regardless of their oaths. Each one violated his oath, either as a juryman or else in making the affidavit. While the verdict could not be set aside on this ground the fact that the case was tried by a jury embracing so many men of this character renders us, we repeat, the less reluctant in setting aside the verdict on other grounds. To those interested in the case it may be proper to suggest that in further proceedings it will be well to avoid all conduct calculated to arouse even a suspicion of evil.

REVERSED AND REMANDED.

C. S. WEBSTER v. JOHN D. DAVIES.

FILED MARCH 5, 1895. No. 6022.

Limitation of Actions: RESIDENCE IN ANOTHER STATE. Under section 21 of the Code of Civil Procedure, providing that "when a cause of action has been fully barred by the laws of any state or country where the defendant has previously resided, such bar shall be the same defense in this state as though it had arisen under the provisions of this title," an action is barred in this state when the defendant has resided in another state for the full period of limitations under the laws of that state, even though the cause of action arose here and the defendant resided here when it arose.

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

McAllister & Cornelius, for plaintiff in error.

Albert & Reeder, contra.

IRVINE, C.

The question presented in this case is the construction of sections 18, 20, and 21 of the Code of Civil Procedure in relation to limitations of actions. Webster sued Davies on several promissory notes made by Davies and maturing in 1884, 1885, and 1887. The action was brought in the district court of Platte county on June 21, 1890. Davies answered that on June 21, 1890, and for more than three years prior thereto, he had been a resident of Wyoming; that each of the notes was executed and delivered in the state of Nebraska while Davies was a resident of this state. He then pleaded a statute of Wyoming to the effect that such actions on contracts expressed or implied, contracted or incurred before the debtor became a resident of Wyoming, shall be commenced within two years after the debtor shall have established his residence in Wyoming. The reply was a general denial. The only evidence was the statute pleaded by the defendant and the testimony of the defendant himself, which shows that in 1887 he went to Wyoming in the employ of a railroad company, going first to Wiser, then moving to Laramie, where he bought a home, then to Green River, where he bought another home, thence to Rock Springs, thence to Millis, remaining altogether at these different points in Wyoming about three years; that he went to Wyoming because he was employed by the railroad company and went from place to place in Wyoming as directed by that company, but he left with the intention of making his home in Wyoming and without any intention of returning to Nebraska. Shortly before this action was brought his father died and he thereby inherited property in Nebraska, and for that reason returned. The court found generally for the defendant and entered judgment accordingly.

The evidence referred to was ample to sustain a finding that the defendant had resided in Wyoming for more than two years, and the statute of Wyoming introduced in evidence provided that where an indebtedness of this character arose before the defendant went to Wyoming action must be brought thereon within two years. The question is, therefore, presented whether, when a contract is made and is performable in Nebraska, the defendant being a resident of Nebraska at the time, and he afterwards removes to another state, remaining there until an action on the contract would be barred by the laws of that state, and then returns to Nebraska, the action is also barred here. Sections 18, 20, and 21 of the Code of Civil Procedure are as follows:

"Sec. 18. All actions, or causes of action, which are or have been barred by the laws of this state, or any state or territory of the United States, shall be deemed barred under the laws of this state."

"Sec. 20. If, when a cause of action accrues against a person, he be out of the state, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he come into the state, or while he is absconded or concealed; and if after the cause of the action accrues he depart from the state, or abscond, or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought.

"Sec. 21. When a cause of action has been fully barred by the laws of any state or country where the defendant has previously resided, such bar shall be the same defense in this state as though it had arisen under the provisions of this title."

Where similar statutes are in force there was formerly much doubt because of the apparent conflict between section 20 and the other sections quoted; but it has been quite generally decided that the provision of section 20 which tolls the statute during the absence of a defendant from the

state does not apply where his absence has been of such a character as to entitle him to the benefit of the statute of limitations of another state to which he has removed. This court has so construed the law. (*Hower v. Aultman*, 27 Neb., 251; *Minneapolis Harvester Works v. Smith*, 36 Neb., 616; *Harrison v. Union Nat. Bank*, 12 Neb., 499.) None of these cases, however, presented the question which we now have before us. Plaintiff in error argues that sections 18 and 21 apply only where the cause of action arose in another state and became there barred, and that they do not apply to a case which arose in this state while the defendant was here a resident and where the bar of the foreign statute was created by his removal from this state after the cause of action arose. This view has the apparent support of the supreme courts of Tennessee and Montana. (*Bagwell v. McTighe*, 85 Tenn., 616; *Kempe v. Bader*, 86 Tenn., 189; *Chevrier v. Robert*, 6 Mont., 319.) But the statute of Tennessee is: "Where the statute of limitations of another state or government has created a bar to an action upon a cause accruing therein, whilst the party to be charged was a resident in such state or under such government, the bar is equally effective in this state." In order, then, that the statute of another state might be effectual this statute required both that the cause of action should have accrued therein and that the defendant should have been a resident thereof. In Montana the statute is: "When the cause of action shall have arisen in any other state or territory of the United States, or in any foreign country, and by the laws thereof an action cannot be maintained against a person by reason of the lapse of time, no action thereon shall be commenced against him in this territory." In the case cited the debt was contracted in Canada and the defendant removed thence to Nevada, remaining there long enough for the Nevada statute to bar an action, and then came to Montana. The court thought that the cause of action did not, in the language of the statute,

"arise" in Nevada and considered that to so construe the statute would be unjust and unreasonable. But on the other hand the appellate court of the first district of Illinois, construing a similar statute, held directly to the contrary. (*Humphrey v. Cole*, 14 Ill. App., 56.) In that case the instrument sued on was made by the defendant in Illinois while he resided there. He then came to Nebraska, where he remained more than twenty years, returning to Illinois, where action was brought. The court, citing an unreported decision of the supreme court, said that the words in the Illinois statute, "when a cause of action has arisen," should be construed as meaning when jurisdiction exists in courts of a state to adjudicate between the parties upon a particular cause of action if properly invoked, without regard to the place where the cause of action had its origin. Judge Blodgett, following the same authority and using the same language, construed the statute in the same manner. (*Osgood v. Artt*, 10 Fed. Rep., 365.) Our statute does not, in either section 18 or section 21, require that the cause of action should have arisen in the state the benefit of whose statute is claimed, and this case might be resolved for the defendant for this reason on the authority of either the Montana, the Illinois, or the federal case. The statute of Iowa was formerly in the same language as our own. We cannot find that while the statute so remained it received any construction upon this point, but in 1870 there was added to the section corresponding to our section 21 the following words: "This section shall not apply to causes of action arising within this state." The supreme court then intimated in several cases that under states of facts like those of the case now before us the statute did not operate, but it was held inapplicable solely because of the amendment of 1870. (*Lloyd v. Perry*, 32 Ia., 144; *Davis v. Harper*, 48 Ia., 513.) The same court held more definitely that the amendment was not retroactive, and that where a cause of action arose in Iowa and the defendant afterwards became

entitled to the benefit of the statute of another state by residing there for the full period of limitations, he could plead that statute in bar of the action in Iowa, notwithstanding the amendment of 1870, the bar having arisen before that amendment. (*Thompson v. Read*, 41 Ia., 48; *Goodnow v. Stryker*, 62 Ia., 221.) These decisions show that the Iowa court deemed an express exception necessary in order to justify the construction for which the plaintiff in error contends. Indiana formerly had the same statute, and it was there held that the fact that a note was payable in Indiana and that the defendant resided there when the cause of action arose was not a good replication to an answer pleading the bar of the statute of another state. (*Wright v. Johnson*, 42 Ind., 29; *Van Dorn v. Bodley*, 38 Ind., 402.) After these decisions the legislature adopted an amendment similar to the Iowa amendment, and the court held that because of this amendment the rule was changed. (*Mechanics' Building Association v. Whitacre*, 92 Ind., 547.) We think it is immaterial under our statute, as it was in Iowa and Indiana before the amendments referred to, where the cause of action arose or where the defendant resided when it arose. If he has resided in another state so long as to be protected by the statute of that state, such fact is a good defense to an action here.

JUDGMENT AFFIRMED.

POST, J., not sitting.

FIRST NATIONAL BANK OF WYMORE, APPELLANT, V. JAMES D. MYERS ET AL., APPELLEES.

FILED MARCH 5, 1895. NO. 5250.

1. **Fraudulent Conveyances: EVIDENCE.** In an action by an attaching creditor of a mortgagor to vacate the mortgage for fraud plaintiff pleaded that "on the 17th day of April, 1890, and

before the levy of the attachment * * A and B conveyed" the land to the mortgagee. This the answer admitted. *Held*, That evidence that the mortgage was not delivered until after the levy of the attachment was irrelevant and foreign to the issues.

2. ——: PLEADING. In such case a general averment in the answer denied in the reply that the mortgage was prior to all other liens, does not prevail against the specific pleading of fact, and does not put the date of delivery of the mortgage in issue.

3. **Amendments** will not be allowed after judgment where their effect would be to substantially change the cause of action or defense.

4. **Amendments** will not be allowed where to do so would prejudice the rights of the adverse party.

5. **Stare Decisis.** *First Nat. Bank of Wymore v. Myers*, 38 Neb., 152, reaffirmed.

REHEARING of case reported in 38 Neb., 152.

A. D. McCandless and *S. J. Tuttle*, for appellant, cited, on the question of amendment: *Humphrey v. Spafford*, 14 Neb., 488; *Homan v. Steele*, 18 Neb., 652; *Pomeroy v. White Lake Lumber Co.*, 33 Neb., 240; *Anglo-American Land, Mortgage & Agency Co. v. Brohman*, 33 Neb., 409.

Griggs, Rinaker & Bibb and *R. W. Sabin, contra.*

IRVINE, C.

An opinion was written in this case affirming the judgment of the district court and filed November 8, 1893. (*First Nat. Bank v. Myers*, 38 Neb., 152.) The nature of the case is there briefly stated. The inquiry was then directed solely to whether a sufficient consideration had been shown for the conveyances to Holt. On a motion for a rehearing it was urged that the proof disclosed that while the conveyances to Holt were dated and filed for record before the levy of plaintiff's attachment, still the conveyances had been made without the knowledge of the grantee, had been

filed for record by the grantor, and were not delivered to the grantee until after the levy of the attachment, the grantee not till then knowing of their existence or their delivery. It was argued that under this state of the evidence the lien of the attachment was superior to that of the mortgages. It seeming that this phase of the case had probably not received proper attention, a rehearing was allowed. The case has been reargued, and having considered all the questions presented, we see no reason for reaching a conclusion different from that reached on the former hearing. It is true that there is in the record evidence tending to show a state of facts in regard to the delivery of the mortgages in accordance with the argument of the appellant. All material portions of this evidence were admitted over the objections of the appellees on the ground that the testimony was irrelevant under the pleadings. The petition, after alleging the levy of the plaintiff's attachment on May 10, 1890, and the subsequent entry of judgment in the attachment case, avers "that on the 17th day of April, A. D. 1890, and before the levy of the attachment and the rendition of a judgment in this case, the said James D. Myers and —— Myers, his wife, defendants, conveyed the following of the said above described property to one Charles B. Holt," etc. Similar allegations are then made in regard to the other conveyances. The gist of the action lay in the subsequent averment that these conveyances were made without consideration and for the purpose of hindering and defrauding the plaintiff and other creditors of James D. Myers.

The answer of Myers admitted the making of the conveyance in the words of the petition as above quoted, and the answer of Holt contained a similar admission. Both answers joined issue in regard to the consideration and purpose of the conveyance. So far as we have quoted the pleadings, then, it stood admitted of record that the land had been conveyed prior to the levy of the attachment.

The date of the delivery of the conveyance was, therefore, not put in issue and the testimony on that point was for that purpose irrelevant. Counsel now contend that certain averments in the answer and reply formed an issue on this subject. The answer of Holt, after admitting the conveyance on the 17th of April and denying that it was made without consideration or for the purpose of defrauding creditors, avers affirmatively the nature of the consideration and the purpose of the conveyance, and then proceeds, "this defendant has a first and valid lien upon said premises so conveyed to him as aforesaid by the defendants James D. Myers and Elizabeth A. Myers, his wife, which said lien is prior and superior to any lien or interest which the plaintiff or any of this defendant's co-defendants have in, to, or upon said premises or any part thereof." The substantive part of the reply is that the plaintiff "denies each and every allegation of new matter" in the answer contained. The contention is that the allegation in the answer that Holt's mortgage was superior to any lien of the plaintiff, together with the denial of that allegation in the reply, made an issue to which all facts affecting the priority of the mortgage became relevant; but we cannot attach to this general allegation any such force. It pleads merely a conclusion of law, and the pleading of a conclusion of law in such a general form cannot be allowed to prevail as against the distinct pleading of specific facts.

The appellant asks that in case the court should reach the conclusion above stated it be permitted to now amend its petition in such manner as to present an issue upon the date of the delivery of the conveyance in question. It has been quite recently held (*Scott v. Spencer*, 44 Neb., 93) that an amendment after judgment will not be permitted where its effect is to make a substantial change in the cause of action or defense presented by the pleadings upon the trial. The plaintiff's petition was in the nature of a creditor's bill attacking the validity of the

Holt mortgage on the ground that it was without consideration and made to defraud creditors. If we should permit it now to amend as desired it would state a cause of action not only to vacate the mortgage on the ground of fraud, but also to marshal liens upon averments to the effect that the real priorities were other than would appear from an inspection of the public records. This would be to permit a substantially different cause of action to be stated by amendment after judgment. The Code permits amendments in furtherance of justice. In construing this provision the rights of the party seeking to amend are not alone to be considered. The court in permitting amendments must be careful not to sacrifice the rights of the other party. To do so would not be in furtherance of justice. Mr. Holt resided, at the time of the trial, in Tioga county, New York. He was seventy-five years of age. His testimony was taken by deposition. The defendants examined him solely in regard to the issues made by the pleadings. It is true he was briefly cross-examined in regard to the delivery of the mortgage, but the defendants did not reexamine on this point, nor were they called upon to do so in view of the issues as then framed. To permit the amendment now sought might deprive the defendants of the opportunity of presenting evidence upon the issue so interpolated.

One more point, perhaps, ought to be mentioned. The former opinion was addressed solely to the existence of a consideration. It was also claimed that the evidence showed that an actual intent to defraud existed in making the conveyances. We have examined the evidence on this point and think it amply sustains the finding of the trial court that the mortgage was made in good faith.

JUDGMENT AFFIRMED.

LUCIEN WOODWORTH v. F. L. THOMPSON.

FILED MARCH 5, 1895. No. 5207.

1. **Evidence** examined, and *held* sufficient to sustain the verdict.
2. **Landlord and Tenant**: PAROL AGREEMENT FOR REPAIRS. Where a tenant is not obligated by his lease to make any particular repairs a subsequent parol agreement, whereby certain extensive repairs are agreed upon, the landlord promising to pay the cost thereof above a certain sum, is valid and will be enforced.
3. ———: ———: CONSIDERATION. In such case the making of the repairs by the tenant and his promise to pay a portion of the cost constitute a sufficient consideration for the landlord's promise.
4. **Depositions**: OBJECTIONS FIRST RAISED AT TRIAL. It is not reversible error for the trial court to refuse to strike out a portion of the answer of a witness in a deposition because the answer stated the witness' conclusion as to the effect of the language used by one whose conversation is related, instead of repeating the language itself, the answer being probative in its character and material to the issues, and no objection having been made until the deposition was read at the trial.
5. **Pleadings**: AMENDMENTS: USE OF ORIGINAL IN ARGUMENT. Where an amended pleading has been filed the original loses its force as a pleading, and the adverse party may not read it to the jury or comment upon it in argument without first offering it in evidence.

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

Brown & Talbott, for plaintiff in error.

Brome, Andrews & Sheean, contra.

IRVINE, C.

The plaintiff in error brought suit against the defendant in error, charging in the first count of his petition that

Woodworth had rented to Thompson a hotel building in Omaha at a rental of $300 per month, and that upon the rent so reserved there was $1,100 due and unpaid. In the second count it was charged that Woodworth had leased to Thompson a piano at a rental of $5 per month, and that $50 was due on this account. Judgment was prayed for these two amounts.

The second amended answer, on which the case was finally tried, was to the effect that after Thompson entered into possession Woodworth, desiring to have certain repairs made, employed Thompson to procure the same to be made and agreed to pay the reasonable price therefor beyond the sum of $500; that Thompson caused such repairs to be made to the reasonable value of $1,750, whereby there became due him from the plaintiff $1,250. Answering the second count of the petition, Thompson averred that the rental price of the piano was $4 per month, and that prior to the expiration of the first month the lease therefor was terminated, but the piano was allowed to remain at the hotel at the request of Woodworth. Thompson admitted that there was due to Woodworth $1,104, and asked judgment for the difference between that sum and $1,250. There was a verdict for the defendant for $172.70. From this the defendant remitted $27.80, and on overruling the motion for a new trial judgment was entered for $144.90, from which judgment the plaintiff prosecutes error.

The plaintiff in error argues that the verdict is not sustained by the evidence. The original lease was in writing and contained a provision as follows: "All improvements on the second story to be made by the party of the second part," Thompson. But the testimony of Thompson was to the effect that the so-called improvements then contemplated, were of a minor character, and after they had been begun it was found necessary or advisable to make very extended repairs. In particular that it was found necessary to renew the plumbing throughout the whole build-

ing. Thompson did not feel like undertaking such extensive repairs and thereupon he proposed to Woodworth that the repairs should be made; that he, Thompson, would bear the expense up to $500, and Woodworth the remainder. Woodworth agreed to this. This testimony is flatly contradicted by Woodworth, and, perhaps, if the case were presented to us to decide in the first instance we would consider the weight of the evidence in favor of Woodworth, but there was sufficient evidence to sustain Thompson's theory. In this connection the plaintiff in error argues that if such a contract were established it would be void for want of consideration. In support of this proposition several cases are cited to the effect that for one to agree to do what he is already bound to do, or for one to waive a legal obligation on the part of the other, is *nudum pactum;* but that is not this case. The lease did not require any particular repairs or improvements to be made. Thompson was not obliged to make any improvements, and the agreement to make and in part pay for the particular improvements which were made was a sufficient consideration for Woodworth's promise to pay for the remainder. The deposition of Thompson was read in evidence. This question was asked, "You may now state what conversation or conversations you had with the plaintiff concerning the improvements to be made on the hotel property, and when and where the conversations were had." The witness then proceeded at great length, and without objection, to answer this question. Near the close of his answer he states the proposition which he made to Woodworth in regard to repairs, and proceeds as follows: "This he agreed to do, and he was knowing to all the work that was done. All of it was necessary to the good of the house, and he got the benefit of it all." When the deposition was offered in evidence on the trial, and not before then, objection was made to so much of the answer as we have quoted. This was overruled, and complaint is made of the ruling of the court in that regard.

It is objected that the statement, "This he agreed to do," was the statement of a conclusion merely and incompetent. The witness was not stating the effect of any agreement, but the language used was equivalent merely to a statement that Woodworth assented to Thompson's proposition. Probably the witness should have been required, if possible, to state the language; but while our Code allows exceptions to depositions for incompetency to be made at the trial (Code, sec. 390), still, where the objection is of this character, going merely to the form of a question or answer and is directed against only a portion of an answer to a question calling for a narrative statement, and no objection has been made to that question, the court is justified in overruling the objection when made for the first time on the trial of the case, even though the portion of the answer objected to is not strictly competent. This objection being directed against a portion of an answer to a question not calling for such an answer in such form is similar to a motion to strike out incompetent testimony after it has been admitted. The answer being material and of a probative character it should not be struck out where no opportunity was given, by objection to the form when the deposition was taken, to establish the same fact in a more regular manner.

Objection is made to two or three rulings whereby the court admitted testimony to the effect that Woodworth had knowledge of the repairs throughout their progress. It is claimed this testimony was immaterial. We do not think so. It would probably be entitled to very little weight, but such testimony, accompanied as it was by some proof to the effect that Woodworth exercised supervision over some of the work, tends to throw light upon the transaction and afford some corroboration for the defendant.

Finally, the plaintiff in error complains because the trial court refused to permit his counsel to read to the jury in argument and comment upon certain allegations in the first

amended answer. The record shows that the defendant offered testimony to explain the differences between the first amended answer and the second amended answer on which the case was tried. This evidence the court excluded unless the first amended answer was offered in evidence. It was not offered in evidence, but the defendant undertook to read it to the jury and comment upon it. The court forbade this procedure, and without doubt correctly. Counsel cite us to *Colter v. Calloway*, 68 Ind., 219, and *Holmes v. Jones*, 121 N. Y., 461. These cases hold that the pleadings are a part of the record and open to the comments of counsel and consideration of the jury, although not offered in evidence; but both cases, as well as those of *White v. Smith*, 46 N. Y., 418, and *New Albany & Vincennes Plank Road Co. v. Stallcup*, 62 Ind., 345, were cases where the question arose as to pleadings upon which the case was tried and not pleadings which had been superseded by amendment. Where a pleading has been so superseded and an amended pleading has been filed the original ceases to perform any office as a pleading, and the party is no longer estopped by its allegations. It is not such a part of the record as to be open to the inspection and criticism of the jury, but it may be offered in evidence by the adverse party merely as an admission, not conclusive, but open to explanation and rebuttal. (*Johnson v. Powers*, 65 Cal., 179; *Boots v. Canine*, 94 Ind., 408; *Strong v. Dwight*, 11 Abb. Pr., n. s., [N. Y.], 319.) "It has been over and over again decided that when pleadings are superseded by amendment they must be brought again before the court by some appropriate method; in such a case as this that method is by offering them in evidence." (*Boots v. Canine, supra.*) This court has tacitly recognized this rule. (*Bunz v. Cornelius*, 19 Neb., 107; *McGavock v. City of Omaha*, 40 Neb., 64.) If counsel had desired to avail themselves of any admission in the first amended answer, they should therefore, have offered it in evidence and so afforded the defense an opportunity

of meeting it. Not having done so, they had no right to read it to the jury or comment upon it.

JUDGMENT AFFIRMED.

HENRY LINGONNER V. GLAUCUS S. AMBLER.

FILED MARCH 5, 1895. No. 6346.

1. **Statutes:** CONSTRUCTION. When two independent statutes are not necessarily in conflict, the later will not be construed as creating an exception to the operation of the earlier.
2. **Animals:** HERD LAW: METROPOLITAN CITIES. The herd law (Comp. Stats., ch. 2, art. 3) is applicable to cultivated lands within the limits of cities of the metropolitan class, notwithstanding the charter of such cities granting power to the mayor and council by ordinance to provide for impounding animals running at large.
3. **Estoppel.** To create an estoppel *in pais* the party in whose favor the estoppel operates must have altered his position in reliance upon the words or conduct of the party estopped.
4. **Animals:** EVIDENCE OF TRESPASS. Evidence *held* sufficient to sustain the verdict.

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

David Van Etten, for plaintiff in error.

George O. Calder, contra.

IRVINE, C.

This case originated before a justice of the peace and grew out of the failure of the parties to reconcile between themselves a difference of $2.50. It is true that the constitution guaranties the right to be heard in the court of

last resort in any civil action, but litigants should be in some manner discouraged from taking advantage of this provision in cases where the amount involved is trivial and no question of law of importance to the parties is presented. It should be remembered that the cost bill which the defeated party ultimately has to pay forms but a small portion of the real expense of litigation. The state and the counties, in the way of fees to jurors and salaries of judges and other court officers, bear the great burden of litigation. The crowded condition of the dockets, causing a delay amounting in some cases to a practical denial of justice, is largely due to the persistent prosecution of such cases as this. Ambler was the owner and resided upon a tract of land within the limits of the city of Omaha, but near the western border thereof. On a certain Sunday afternoon his rest and meditations were disturbed by observing five black hogs rooting up the blue grass on his lawn. He called assistance and took up the hogs *damage feasant*. It turned out that they were the property of Lingonner, who came upon the scene shortly after and inquired the amount of damages which Ambler claimed. Ambler asked $5. Lingonner thought this too high and offered $2.50. The next day Lingonner replevied the hogs. Ambler served a notice upon him as provided by the herd law, Compiled Statutes, chapter 2, article 3, section 3. Whether this notice was served before or after the hogs were replevied is doubtful, but we do not think important. Ambler had judgment before the justice, and again on appeal in the district court, the value of his interest being found in the latter court at $5. From this judgment Lingonner prosecutes error.

The principal question presented is that of the applicability of the herd law to cities of the metropolitan class. The plaintiff in error contends that the law is not applicable to such cities and that as to them it has been superseded by the city charter, Compiled Statutes, chapter 12*a*, section 34. The section referred to gives the mayor and council power

to prohibit or regulate the running at large, or the herding or driving of domestic animals within the corporate limits, and to provide for the impounding of all animals running at large, herded, or driven contrary to said prohibition; and also for the forfeiture and sale of animals impounded to pay the expenses of taking up, caring for, and selling the same. We think this statute in nowise limits the operation of the herd law. In the first place, our present herd law was intended to provide a general law for the state, and to supersede a number of special and local acts theretofore existing on the subject. Its title is "An act for a general herd law to protect cultivated lands from trespass by stock." (Laws, 1871, 120.) The law was certainly intended to apply generally throughout the state, except in certain counties then unsettled and especially exempted from its operation. It is, therefore, applicable to lands within cities unless the section of the charter of metropolitan cities already referred to operated as an implied amendment. Leaving out of consideration the question as to whether the legislature, in an act for the incorporation of cities, could, under our constitutional provision, by implication amend another general law such as the herd law, we do not think that the charter should be construed as such an amendment. Repeals by implication are not favored, and a later act will not be construed as repealing, by implication, a former act where it is possible that they may stand together. The same rule obtains in regard to implied amendments which would have the effect of carving out exceptions to the former law. There is no necessary conflict between the herd law and the charter provision. The former was designed to protect owners of cultivated lands from the depredations of domestic animals and to afford an adequate and speedy civil remedy therefor by way of creating a lien on the stock doing the damage, and providing an easy method of its enforcement. Section 34 of the charter is plainly a police regulation giving to the mayor and council power to pro-

tect the public against the excursions of domestic animals and authorizing the sale of animals impounded, not for the payment of any damage to individuals, but solely to defray the expense of enforcing the ordinance adopted under the grant of power conferred by the act.

It is next urged that the defendant was estopped from claiming the statutory lien because of a statement made by him to the plaintiff in the conversation during which the disagreement arose as to the amount of damages. The story is thus told by the plaintiff as to what occurred: "I say, 'How you do, Mr. Ambler? You sent your man over;' and I said, 'I heard you sent your man over, and that you had some of my hogs taken up.' No, I say this way: 'You send your man. I heard you got some of my hogs taken up;' and Mr. Ambler say, 'Yes, they yours;' and I say, 'How did you get them?' He say, 'I got them right out of your pasture, and drive them into my yard, and pen them up.' I say, 'Did they done any damage at the time you drive them over and pen them up?' He say, 'No, they didn't do a great deal of damage.' I say, 'What you want from your trouble?' He say, 'I want five dollars to-day and ten dollars to-morrow.' I say, 'No, that too much; not $2.50 enough?' He say, 'No, I got edge of you now. Last summer your cow was in my granary, and I got the edge of you now.' I say, 'If you won't take $2.50, that is all right.'" Ambler admits that he told Lingonner that he had driven the hogs out of the hog pasture into his own yard, but says he considered Lingonner's question so ridiculous that he made this answer by way of a joke. We presume that even Mr. Ambler will not now insist that this was a very brilliant piece of humor, but we cannot agree with the plaintiff that the punishment for it should be by holding him estopped from now claiming the fact to be otherwise. To constitute an estoppel *in pais* the party in whose favor the estoppel operates must have altered his position in reliance upon the conduct of the

other party. It is very evident that Lingonner did not rely upon Ambler's statement, for according to his own testimony he immediately inquired about the damage and offered to pay $2.50 in satisfaction.

It is urged that the judgment must fail for want of proof of the value of the hogs. The point made is that while Ambler's interest must be limited to the damage sustained by him, still, if the hogs themselves had a value less than that damage, his interest would also be limited by the value of the hogs. The point is not important, because the plaintiff alleged in his petition that the hogs were of the value of $25, and he is estopped by that averment.

It is argued also that the evidence is insufficient to show that the hogs were trespassing, and that it is insufficient to establish the damages allowed. These points involve no question of law and we shall not discuss the evidence on the subject. We think it is sufficient on both points.

JUDGMENT AFFIRMED.

PACIFIC MUTUAL LIFE INSURANCE COMPANY V. MARTIN C. FRANK.

FILED MARCH 5, 1895. No. 5841.

Accident Insurance: ACTION TO REFORM POLICY: EVIDENCE: AUTHORITY OF AGENT: CIRCULARS: ESTOPPEL. Suit was brought to reform a policy of accident insurance by inserting a provision in accordance with the verbal contract between the insurer's agent and the insured. The provision which it was sought to insert was to the effect that in case of the loss of one foot the insurer would pay one-third of the principal sum. The insurer defended on the ground that its agents were forbidden to write policies of that character in favor of persons already crippled when the policy was written. *Held*, (1) That the evidence sustained a finding for plaintiff; (2) that circulars issued

by authority of the insurer and brought to the notice of the insured before the policy was written were admissible in evidence where they advertised that the insurer wrote policies paying one-third for the loss of one foot, and stated no restrictions as to persons in whose favor such policies should be written; (3) that such circulars were admissible to show that the insurer had held its agent out as authorized to write such policies to all persons; (4) that the insurer having so held out its agent as authorized to write the policy, it is estopped from now denying his authority.

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

Charles O. Whedon and *Charles E. Magoon* for plaintiff in error:

A policy which does not conform to the agreement of the parties, whether by fraud or mistake, may be reformed in equity, and damages for a loss decreed in the same case; but such non-conformance must be conclusively proved. (*Milligan v. Pleasants*, 21 Atl. Rep. [Md.], 695; *Cooper v. Farmers' Mutual Fire Ins. Co.*, 50 Pa. St., 299; *Patterson v. Benjamin Franklin Ins. Co.*, 81 Pa. St., 454; *Mead v. Westchester Fire Ins. Co.*, 64 N. Y., 453 *Bryce v. Lorillard Fire Ins. Co.*, 55 N. Y., 240: *Van Tuyl v. Westchester Fire Ins. Co.*, 55 N. Y., 657; *National Fire Ins. Co. v. Crane*, 16 Md., 260; *Tesson v. Atlantic Mutual Ins. Co.*, 40 Mo., 33; *Hearne v. Marine Ins. Co.*, 20 Wall. [U. S.], 490; *Snell v. Atlantic Fire & Marine Ins. Co.*, 98 U. S., 85.)

Statements in a pamphlet issued by an insurance company cannot affect or modify the strict terms of a policy thereafter issued. (*Fowler v. Metropolitan Life Ins. Co.*, 116 N. Y., 389; *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y., 516; *Mutual Benefit Life Ins. Co. v. Ruse*, 8 Ga., 534; *Smith v. National Life Ins. Co.*, 103 Pa. St., 184; *Knickerbocker Life Ins. Co. v. Heidel*, 8 Lea [Tenn.], 488; *Clark v. Allen*, 132 Pa. St., 40; *Connaway v. Wright*, 5 Del. Ch.,

472; *James v. Clough*, 25 Mo. App., 147, *Dodge v. Kiene*, 28 Neb., 216.)

Sedgwick & Power, contra.

IRVINE, C.

The plaintiff in error opens its brief by stating that this cause comes into this court both on appeal and by petition in error. This is impossible. It has been several times held that in cases which are in their nature appealable a party must elect which remedy to pursue, and will not be permitted to bring up for review the same judgment by both methods. A petition in error having been filed in this case, and there having been an appearance by the defendant in error, the case will be treated as before us on error and not on appeal. The assignments of error, however, cover all the questions argued, so that the difference in procedure does not affect the result.

Frank sued the insurance company, alleging that on January 8, 1891, he had paid the company $4.50 as the premium for a policy of accident insurance, in consideration whereof the defendant executed and delivered to him a ticket of accident insurance in the sum of $3,000. The policy, or so-called ticket, is then set out at large in the petition. The terms of this policy are for the most part immaterial to a consideration of the case. It purported to insure the person to whom issued for a period of thirty days against death or disability caused by external, violent, and accidental means, providing for the payment of $3,000 in case of death and a certain sum per week during disability caused by accident. The plaintiff then alleged that it was agreed between the parties at the time the contract was made that in case of loss of one foot by such accident he should be paid one-third of the amount of the insurance named in the policy, to-wit, the sum of $1,000, but by mistake the provision for such payment was omitted

from the ticket; that by agreement the ticket had been left with the agent of the company after its issuance, and plaintiff did not see or read it and supposed it contained this provision in accordance with the terms of the actual contract; that while the policy was in force plaintiff received an injury by being accidentally shot, necessitating the amputation of one foot. He then pleaded compliance with all the terms of the policy and prayed that the policy be reformed by inserting a clause in accordance with the oral agreement providing that in case of the loss of one foot he should be paid one-third of the amount of the policy, and then prayed judgment for $1,000. The insurance company admitted issuing the policy, and admitted the injury sustained by plaintiff, and denied all other allegations in the petition. For a second defense defendant pleaded a failure to give proper proofs of loss. The company is not now claiming anything by reason of this defense. For a third defense the company alleged that before the issuing of this policy the plaintiff had lost his right hand and a portion of his right arm; that the company did not insure any persons who were crippled or maimed so as to provide for the payment to them in case of loss of a foot of one-third of the amount of the policy; and that no agent of the defendant had any authority to issue a policy so providing to any one so crippled or maimed, or to make any contract so insuring any one. The plaintiff in reply admitted that he had, prior to the issuing of the policy, lost his right hand and a portion of his right arm, and averred that at the time the policy was issued the defendant furnished its agents with circulars and advertising matter representing that the defendant wrote policies of insurance as stated in the petition, without mentioning any such restrictions as pleaded in the third defense of the answer, and that such circulars and advertising matter had been furnished to plaintiff as a basis of, and inducement to enter into, the contract of insurance, and that defendant

thereby led the plaintiff to believe that its agents were authorized to make such contracts. There was a finding and judgment for the plaintiff for $1,000.

The argument by the insurance company is not directed to any special assignments of error, but is based on the ground that the evidence did not warrant the court in reforming the policy as prayed. We agree with counsel that in order to authorize a court of equity to reform an instrument purporting to constitute a contract it must be shown by satisfactory evidence that because of mutual mistake the instrument fails to express the contract which was in fact made, but we think the evidence was of such a character as to bring this case within the rule stated, and justified the finding and judgment of the trial court. The evidence shows that the plaintiff was the editor of a newspaper; that he habitually carried a large amount of accident insurance; that the defendant company inserted its advertisements in his paper, and the cost of this advertising was applied to the payment of premiums for insurance issued to him. Some months before this policy was issued he had applied for a policy of accident insurance in the defendant company, and his application was referred to the principal office for action on account of his having lost a hand and a portion of an arm. The policy was finally issued him, and provided among other things that if injuries of the character insured against should, within ninety days, result in the loss of one entire foot, one-third of the principal sum should be paid. This policy was canceled, the agent stating as the reason therefor that for the premium paid on such a policy the company was not willing to carry it when the insured already had so much other insurance. The agent then stated that while this was true the plaintiff could buy accident tickets which would insure him in the same manner as the policy, the agent giving the plaintiff at the same time a circular to the same effect. The premium on a ticket was $4.50 for thirty days, while on the regular

policy it was $25 per year. A ticket was therefore issued to plaintiff but left in the possession of the agent. When this ticket expired another was issued and left in the same manner. These tickets seem to have been left with the agent because of the manner in which accounts were carried between the agent and the plaintiff, the agent retaining the tickets in his possession and charging the premiums against the plaintiff's bills for advertising whenever settlements were had. This procedure went on for some months until plaintiff met with the accident described in the petition, during the currency of one of the tickets. In endeavoring to collect upon this ticket he learned for the first time that it contained no provision for the payment of one-third of the principal sum in case of the loss of a foot. The agent testifies that he supposed throughout the whole proceeding that the tickets did contain such a provision. The evidence shows that both the agent and the plaintiff had a distinct understanding to the effect that the contract was of this character, and if the agent was authorized to make such contract then the case was clearly one of a mutual misunderstanding calling for a reformation by a court of equity. The company proved quite conclusively that agents had no actual authority to issue policies having the provision contended for (which seems to be termed an "eye and limb clause") to persons already crippled or maimed. It was also shown that the company customarily did not issue policies under such conditions. But the question here is not what was the company's custom, or even what was the agent's actual authority, but what did the company do in this case, and what did it hold its agent out as authorized to do? It appears that when the plaintiff's regular policy was canceled, the agent informed plaintiff that he could obtain a ticket of insurance containing the same terms as the circular, which it is proved was issued for distribution by authority of the company, advertising these tickets, and calling special attention to this "eye and limb clause," without

stating that there were any restrictions upon the issuing of such tickets. The defendant contends that this circular was not admissible in evidence, being in the nature of preliminary negotiations not embodied in the final contract. But the effect of the circular in this case is not to engraft foreign provisions upon the policy. It was admissible in evidence, accompanied as it was by proof that it was issued by authority of the company, for the purpose of showing that the company held out its agents as authorized to write policies such as both the agent and the insured thought had been written in this case. Having held out its agent as authorized to write such a policy, the company is now estopped from denying his authority. The judgment of the district court is right and is

AFFIRMED.

WESTERN UNION TELEGRAPH COMPANY V. CALL PUBLISHING COMPANY.

FILED MARCH 8, 1895. NO. 5603.

1. **A telegraph company is a public carrier** of intelligence, with rights and duties analogous to those of a public carrier of goods or passengers.

2. **Telegraph Companies:** REGULATION. Section 7, article 11, of our constitution limits the legislature in the regulation of telegraph companies to the correction of abuses and prevention of unjust discrimination.

3. ———: RATES: DISCRIMINATION. Not all discrimination in rates is unjust. In order to constitute an unjust discrimination there must be a difference in rates under substantially similar conditions as to service.

4. ———: ———: ———: WHEN PROHIBITED. Chapter 89*a*, Compiled Statutes, regulating telegraph companies, prohibits, first, all partiality or discrimination between patrons in the handling of business; second, all partiality or discrimination in rates for

similar services; third, partiality or discrimination as to terms of payment or delivery; and fourth, all discrimination in favor of persons transmitting dispatches to the greater distance.

5. ———: ———: ———. In so far as the act referred to forbids unjust discrimination, and disregarding the penalties imposed by the act, it merely declares principles recognized by the common law.

6. ———: ———: ———: WHAT CONSTITUTES. Either under the common law or the statute a telegraph company must charge for its services no more than a reasonable rate; under like conditions it must render its services to all patrons on equal terms; and it must not so discriminate in its rates to different patrons as to give one an undue preference over another.

7. ———: ———: ———: ———. It is not an undue preference to make to one patron a less rate than to another, where there exist differences in conditions affecting the expense or difficulty of performing the service, which fairly justify a difference in rates.

8. ———: ———: ———: ———: VERDICT AGAINST EVIDENCE. Where it is shown that a difference in rates exists, but that there is also a substantial difference in conditions affecting the difficulty or expense of performing the service, no cause of action arises without evidence to show that the difference in rates is disproportionate to the difference in conditions. A jury cannot be permitted to find such disproportion without evidence.

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

H. D. Estabrook and *Harwood, Ames & Pettis*, for plaintiff in error, cited: *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 43 Fed. Rep., 37; *Bayles v. Kansas P. R. Co.*, 40 Am. & Eng. R. Cases [Col.], 42; *McNees v. Missouri P. R. Co.*, 22 Mo. App., 224; *Hays v. Pennsylvania R. Co.*, 12 Fed. Rep., 309; *Schofield v. Lake Shore & M. S. R. Co.*, 43 O. St., 571; *Lotspeich v. Central R. & B. Co.*, 73 Ala., 306; *Cleveland, C., C. & I. R. Co. v. Closser*, 45 Am. & Eng. R. Cases [Ind.], 275; *Johnson v. Pensacola & P. R. Co.*, 16 Fla., 623; *Leloup v. Port of Mobile*, 127 U. S., 640; *Wabash, St. L. & P. R. Co. v. Illinois*, 118

U. S., 557; *Western Union Telegraph Co. v. Pendleton*, 122 U. S., 349.

William Leese and *John M. Stewart, contra*, cited, contending the service performed for the two papers was similar: (*Manufacturers' & Jobbers' Union of Mankato v. Minneapolis & St. L. R. Co.*, 4 Int. Com. Rep., 79; *Boards of Trade v. Chicago, M. & St. P. R. Co.*, 1 Int. Com. Rep., 215; *Louisville & E. St. L. C. R. Co. v. Wilson*, 32 N. E. Rep. [Ind.], 311. As to the measure of damages: *In re Excessive Freight Rates on Food Products*, 4 Int. Com. Rep., 74; note to *Long Island R. Co. v. Root*, 11 Am. St. Rep., 647–655; *Chicago & A. R. Co. v. People*, 67 Ill., 11; *Indianapolis, P. & C. R. Co. v. Rinard*, 46 Ind., 293; *McDuffee v. Portland & R. R. Co.*, 52 N. H., 430; *Cook v. Chicago, R. I. & P. R. Co.*, 81 Ia., 551; *Hdys v. Pennsylvania R. Co.*, 12 Fed. Rep., 309; *Louisville & E. St. L. C. R. Co. v. Wilson*, 32 N. E. Rep. [Ind.], 311; *Burlington, C. R. & N. R. Co. v. Northwestern Fuel Co.*, 31 Fed. Rep., 652; *Samuels v. Louisville & N. R. Co.*, 31 Fed. Rep., 57; *Scofield v. Lake Shore & M. S. R. Co.*, 43 O. St., 571; *State v. Cincinnati, N. O. & T. P. R. Co.*, 47 O. St., 130; *Connell v. Western Union Telegraph Co.*, 18 S. W. Rep. [Mo.], 883.

IRVINE, C.

The Call Publishing Company is a corporation publishing a daily newspaper in the city of Lincoln. It brought this suit against the Western Union Telegraph Company, alleging that since July 1, 1888, it had been receiving from the telegraph company the dispatches of the Associated Press collected by that organization at Chicago and transmitted daily from Chicago to Lincoln as well as to other cities; that there existed between the Associated Press and the telegraph company a contract which prevented the Call Company from procuring its news otherwise than over the

lines of the telegraph company; that during said period the telegraph company had charged and collected from the Call Company $75 per month for transmitting such dispatches, not exceeding 1,500 words each day; that the State Journal Company published in the city of Lincoln a daily newspaper which had been during the whole of such period and prior thereto receiving the same dispatches; that during the whole of said period the telegraph company unjustly discriminated in favor of the State Journal Company and against the Call Company, and gave to the State Journal Company an undue advantage, in that it charged the State Journal Company for the same, like, and contemporaneous services as were rendered to the Call Company only the sum of $1.50 per hundred words daily per month; that the amount charged and collected by the telegraph company from the Call Company was excessive and unjust to the amount of the excess of the charge to it over that to the State Journal Company; that immediately upon discovering such discrimination, the Call Company demanded repayment of such excess, which was refused. Damages were alleged on this account in the sum of $1,962, for which judgment was prayed. The telegraph company admitted the charges made to the Call Company and admitted that it charged the State Journal Company for its dispatches $125 per month, but denied that it had given the State Journal Company any undue advantage or that it had unjustly discriminated in favor of the State Journal Company. It further alleged that the Call Company published an evening paper, and received over the telegraph company's lines dispatches not exceeding 1,500 words per day, all transmitted and delivered in the day-time, and that this charge was fair and reasonable and was no greater than was charged other persons for similar services. It further alleged that it had accepted the provisions of the act of congress of 1866, in regard to telegraph companies, and pleaded that the subject-matter of the

action was within the exclusive jurisdiction of the federal courts; and it further pleaded that it at all times had been ready to transmit all dispatches with impartiality in the order in which they were received, and had ever been willing to offer the same and equal facilities to the plaintiff and all publishers of newspapers, and to furnish dispatches for publication to all newspapers on the same conditions as to payment and delivery. The reply was a general denial. There was a verdict for the plaintiff for $975, upon which judgment was rendered, and the telegraph company prosecutes error.

The errors assigned relate to the instructions given and refused, and to the sufficiency of the evidence. The assignments of error in regard to the instructions group themselves in the same manner as in the case of *Hiatt v. Kinkaid*, 40 Neb., 178. One assignment is directed against the instructions given by the court *en masse*. Another is directed against those asked by the telegraph company and refused. Some of those given by the court were manifestly correct, and at least one asked by the telegraph company was substantially covered by the court's charge. These assignments must, therefore, be overruled, and we are remitted in an examination of the case to a consideration of the sufficiency of the evidence.

The evidence shows, without substantial conflict, that prior to July, 1888, a newspaper had been published in the city of Lincoln known as the *State Democrat*. This paper had acquired what is styled a "franchise" in the Northwestern Associated Press, and had been receiving the dispatches of that organization, paying to the Associated Press $20 per month therefor, and paying to the telegraph company for transmitting and delivering the dispatches $75 per month for a maximum of 1,400 words per day. The manner in which this contract was brought about was that Mr. Calhoun, the proprietor of the *State Democrat*, negotiated with the manager of the press association for procuring its

news, and was by that manager informed that he should first make terms with the telegraph company for transmitting the messages. Negotiations were entered into between Mr. Calhoun and the telegraph company, resulting in an offer by the telegraph company to transmit 1,400 words per day for $75 per month, and this offer was accepted by Mr. Calhoun. About July 1, 1888, Mr. Calhoun sold his paper to the Call Company and assigned to that company the franchise which he had acquired in the Northwestern Associated Press. No new contract is disclosed between the Call Company and telegraph company, but the telegraph company continued to deliver and the *Call* to receive the dispatches in the same manner as they had been transmitted and received to and by the *Democrat* before the sale, and the Call Company paid the rate of $75 per month. The paper published by the Call Company was an evening paper published between 3 and 4 o'clock in the afternoon.

The State Journal Company published a morning paper. It was also a member of the Associated Press and received over the wires of the telegraph company dispatches not to exceed 5,600 words a day, for which it paid, during this period, the sum of $125 per month. It also was a member of the United Press, another association for the collection of news, and received through that association over the wires of the Postal Telegraph Company from 7,500 to 8,000 words per day, for which it paid to the Postal Company $200.

The Associated Press transmits its news in two groups, called "reports." The day report is transmitted between 11 A. M. and about 2:30 P. M., and is for the especial benefit of evening papers. It is this report which the Call Company received. The night report is usually transmitted at night and generally between 7 P. M. and 3 A. M., and is for the especial benefit of morning papers. The Journal Company's contract strictly included only the night report, but for many years it has in fact received

both day and night reports. Prior to the acquisition by the *Democrat* of its franchise in the Associated Press the day report to the *Journal* was relayed at Omaha, whence it was usually transmitted to Lincoln by wire, but sometimes by mail. The Journal Company sent to the office of the telegraph company for this report, and usually obtained it about 4 P. M. After the *Democrat's* acquisition of the franchise the day report was transmitted from Chicago directly, except when the weather or other influences required a relay at Omaha. It was sent in time for use by the afternoon paper, was committed to writing on manifold paper, one copy delivered to the *Democrat*, and after its sale, to the *Call*, and the other to the *Journal*. The *Journal* was not permitted to use this report until after it had been published in the *Call*. It was also shown that in order to be of any service to the *Call* the day report must be delivered to it not later than 3 o'clock in the afternoon, while the night report to the *Journal* might be transmitted at any time prior to about 3 o'clock in the morning. Prior to the contract between the *Democrat* and the telegraph company for the day report, the telegraph company used but one wire between Omaha and Lincoln. In order to promptly transmit the day report to the *Democrat* the telegraph company was required to erect another wire and to employ an additional operator at Lincoln. Neither this wire nor this operator was employed exclusively for transmitting the report. Other business between the two cities demanded additional facilities, and this wire and this operator, when not engaged in transmitting the press report, were used for commercial business. But the necessity of transmitting this report was one of the elements, and evidently a large one, in requiring the telegraph company to so increase its facilities. During the hours within which the day report must be transmitted the facilities of the telegraph company are taxed with a great burden of commercial business, and during those hours certain wires are leased to individuals

to accommodate their business. After 4 o'clock in the afternoon these leased wires are free and can be used by the telegraph company for other purposes. During the night when the night report is transmitted not only are these leased wires free for use by the telegraph company, but there is not the same pressure of commercial business generally, and it is the established usage of telegraph companies, on account of these circumstances, to transmit messages during the night at less rates than in the day-time. There is also evidence tending to show that there were more morning papers to divide the aggregate cost of transmitting the night report than there were evening papers to divide the aggregate cost of transmitting the day report.

There was some question made as to whether or not the *Call* and the *Journal* were in any sense competitors in such a way that either could be affected by the relative rates charged. On this point we have no doubt that a state of competition was shown. One was a morning paper, the other an evening paper, and the same persons frequently buy or subscribe to both; but it was shown that the advertising rates of a newspaper depend chiefly upon its circulation, and that its circulation depends largely upon its ability to supply the news to its patrons. That a paper with good facilities for obtaining and publishing the news will, other things being equal, exceed in circulation a paper with poorer facilities; and that these influences operate upon newspapers having the same field of circulation, although one be published in the morning and the other in the evening Indeed it would hardly require evidence to establish such patent facts.

From the foregoing statement of the evidence it will be seen that the following propositions were established: First—That the actual rate charged to the *Call* was much greater than the actual rate charged to the *Journal*. Second—That the two papers were in such sense competitors, that if one, for a given sum, could not obtain the same news

facilities as the other for the same sum, the difference would operate to the disadvantage of the former. Third—That from the requirements of the two papers, based upon their respective hours of publication, there was a marked and substantial difference in conditions affecting the convenience and expense to the telegraph company in transmitting to each its dispatches. Fourth—That there was no evidence of any character showing to what extent this difference in conditions affected the telegraph company. There was no evidence tending to show that the charge to the Call Company was in itself unreasonably high, that the charge to the Journal Company was unreasonably low, or that the charge to either was greater or less than the ordinary or reasonable charge to others for similar services. It follows, therefore, that the verdict was sustained by the evidence if, as a matter of law, it was sufficient to show either that another person was obtaining dispatches for a less sum than the plaintiff without regard to differences in conditions, or if it was sufficient to show a difference in rate accompanied by a difference in conditions, leaving to the jury, without other evidence, the duty of comparing the difference in rates with the difference in conditions and determining without other aid whether or not the difference in rates was disproportionate to the difference in conditions. But the verdict was not sustained by the evidence if a mere difference in rates without regard to conditions was insufficient to ground a right of action, or, a difference both in rates and conditions being shown, it was also necessary to establish by evidence that these differences were disproportionate.

The action was evidently begun under section 8 of chapter 89*a*, Compiled Statutes, providing that "it shall be unlawful for any telegraph company, association, or organization engaged in the business of forwarding dispatches by telegraph to demand, collect, or receive from any publisher or proprietor of a newspaper any greater sum for a given service than it demands, charges, or collects from the publisher or

proprietor of any other newspaper for a like service, * * and * * * such telegraph company or association shall be liable for all damages sustained by the person or parties in consequence of such discrimination." Our constitution contains an express grant of authority to legislate upon this subject. Article 11, section 7, of the constitution is as follows: "The legislature shall pass laws to correct abuses and prevent unjust discrimination and extortion in all charges of express, telegraph, and railroad companies in this state, and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of their property and franchises." In the absence of such a provision in a state constitution there could be little doubt of the power of the legislature in the premises. But *expressio unius est exclusio alterius*, and the constitution containing this express grant of power the provision quoted must be taken as establishing the limits of legislative authority upon this subject. We refer to the constitutional provision because it simply grants the right to prevent by legislation "unjust discrimination." This phrase has been frequently used by the courts and legislatures and has obtained a well settled construction. It is not every discrimination which is unjust. So many cases illustrate this principle that it would be difficult to collate them. But the general nature of the decisions may be readily seen from an examination of the note to *Root v. Long Island R. Co.*, 11 Am. St. Rep. [N.Y.], 643. In construing our statute it is necessary to bear in mind the constitutional limitation quoted, and the statute bears a just and reasonable construction within that limitation. It provides in its fifth section that all telegraph companies shall transmit all dispatches with impartiality in the order in which they are received, and use due diligence in their delivery without discrimination as to any person or party to whom they may be directed. This section evidently refers to the duty of the telegraph company as to the mode of conducting its business and not to the charges

therefor, and forbids partiality or discrimination in the transmission of messages. Section 7 is very similar in its terms to what is known "as the long and short haul clause" of the interstate commerce act, and forbids the charging of a greater sum for the transmission of a message over a given distance than it charges for a similar message over a greater distance, but adds this significant proviso: "That dispatches transmitted during the night and dispatches for publication in newspapers may be forwarded and delivered at reduced rates; such rates must, however, be uniform to all patrons for the same service." Section 8 we have already quoted so far as it is material. Section 9 provides: "Every telegraph company and every press association engaged in the transmission, collection, distribution, or publication of dispatches shall afford the same and equal facilities to all publishers of newspapers, and furnish the dispatches, collected by them for publication in any given locality, to all newspapers there published, on the same conditions as to payment and delivery."

An analysis of these provisions discloses that the legislature sought, by the act referred to, to prohibit, first, all partiality or discrimination between patrons in the handling of business; second, all partiality or discrimination in regard to rates for similar services; third, all such partiality or discrimination as to terms of payment or delivery; and fourth, all discrimination in favor of persons transmitting dispatches to the greater distance. Without violence to the language of the act, and without giving it an interpretation beyond the constitutional grant of power, it cannot be construed so as to require a telegraph company to transmit messages to two patrons under different conditions at the same rate. So interpreted we do not think that the act, in so far as it affects civil actions, and disregarding the penalties it imposes, is anything more than declaratory of the common law. In the present state of civilization it would be idle to assert that a telegraph company is not charged

with a public function. The telegraph company in this case does not so assert. It is now the established law that a telegraph company is a public carrier of intelligence, with rights and duties analogous to those of a public carrier of goods or passengers. The law regulating the duties of railroads and other carriers is, therefore, largely applicable to telegraph companies. The act of congress known as the "Interstate Commerce Act" contains few new features and was chiefly designed to carry into the statutes of the United States (the United States as such not having any common law) the principles of the common law already enforced by the states in their domestic affairs. England and many of the states have adopted similar statutes, not so much to engraft new principles upon the law as to make certain and more readily enforce principles already established.

It is argued by the telegraph company that no cause of action can be predicated upon the mere fact that another patron obtained services for a lesser rate, unless it be shown that the rate charged the complainant is in itself unreasonable and excessive. There are cases to this effect, but we cannot lend our assent either to their reasoning or to their conclusion. On the contrary, we believe the true rule to be that rates must not only be reasonable in themselves, but must be relatively reasonable; that is, that a person or corporation engaged in public business, and obligated to render its services to all persons having occasion to avail themselves thereof, is bound, in fixing its rates, to observe two rules: First, its rates must be reasonable, and second, it must not, without a just and reasonable ground for discrimination, render to one patron services at a less rate than it renders to another, where such discrimination operates to the disadvantage of that other. (*Board of Trade v. Chicago, M. & St. P. R. Co.*, 1 Int. Com. Rep., 215; *Hays v. Pennsylvania R. Co.*, 12 Fed. Rep., 309; *Scofield v. Lake Shore & M. S. R. Co.*, 43 O. St., 571; *Chicago & A. R.*

Co. v. People, 67 Ill., 11; *Indianapolis, D. & S. R. Co. v. Ervin*, 118 Ill., 250; *Messenger v. Pennsylvania R. Co.*, 36 N. J. Law, 407; *Atwater v. Delaware, L. & W. R. Co.*, 48 N. J. Law, 55; *McDuffee v. Portland & R. R. Co.*, 52 N. H., 430; *Houston & T. C. R. Co. v. Rust*, 58 Tex., 98; *Ragan v. Aiken*, 9 Lea [Tenn.], 609.) But it is not unjust discrimination, it is not contrary to the common law, and it is not contrary to our statutes to make a difference in rates where the expense or difficulty of performing the services renders such discrimination fair and reasonable. Many of the cases already cited illustrate this principle. In addition thereto there may be cited *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 43 Fed. Rep., 37; *Bayles v. Kansas P. R. Co.*, 13 Col., 181; *Root v. Long Island R. Co.*, *supra*; *Savitz v. Ohio & M. R. Co.*, 49 Ill. App., 315, 37 N. E. Rep., 235. With the general rule announced in the latter cases we concur, but we do not wish to commit ourselves to its application in all of them. Some cases justify a discrimination merely on account of the quantity of business transacted. In the language of *Hays v. Pennsylvania R. Co.* and *Scofield v. Lake Shore & M. S. R. Co.*, *supra*, such discrimination in favor of the patron having the larger business tends to create monopoly, destroy competition, and is contrary to public policy. The same objection can be urged to the giving of privileged rates for the purpose of obtaining the business of a particular patron, and a discrimination on this ground is, we think, very justly condemned by the house of lords in the case of *London & N. W. R. Co. v. Evershed*, L. R., 3 App. Cases [Eng.], 1029. Many of the cases cited construe statutes, but they were statutes declaring what we think to be common law rules, so that whether this case be viewed as one under our statutes relating to telegraph companies, or one based upon the common law, we think the principles governing it are the same. These are that the telegraph company was bound, first, to charge for services no

more than what was reasonable; second, that under like conditions it must render services to all patrons on equal terms; third, that it must not so discriminate in its rates to different patrons as to give one an undue preference over another; but fourth, it is not an undue preference to make to one patron a less rate than to another when there exist differences in conditions as to the expense or difficulty of the services rendered which fairly justify such a difference in rates.

As we have already stated, a considerable difference in the absolute rate charged the Call Company and the Journal Company was shown, but there were also shown a difference in conditions affecting the expense and difficulty of rendering the services which at common law would justify some difference in rates, and this difference was one which the proviso quoted from the seventh section of our statute expressly recognizes as justifying a discrimination in this state. There was no evidence to show that the rate charged the Call Company was unreasonably high. There was no evidence to show that the rate charged the Journal Company was unreasonably low. There was no evidence to show what difference in rates was demanded or justified by the exigencies of the differences in conditions of service. We do not think that the enforcement of contracts deliberately entered into should be put to the hazard of a mere conjecture by a jury without evidence upon which to base its verdict. How can it be said that a jury acts upon the evidence and reaches a verdict solely upon consideration thereof when, having established a difference in rates and a difference in conditions, without anything to show how one difference affects the other, or to what extent, it is permitted to measure one against the other, and to say that to the extent of one dollar or to the extent of one thousand dollars the difference in rates was disproportionate to the difference in conditions? It may be said that it would be difficult to produce evidence to show to what extent such

differences in conditions reasonably affect rates. This may be true, but the answer is that whatever may be the difficulties of the proof a verdict must be based upon the proof and a verdict must be founded upon evidence and not upon the conjecture of the jury, or its general judgment as to what is fair without evidence whereon to found such judgment.

The chief justice takes a different view, and thinks there is found in the evidence a basis for the verdict. This conclusion is arrived at by considering the service performed for the *Journal* so far as the day report is concerned as similar in its conditions to that performed for the *Call*. We agree with him that it is the fair inference from the evidence of the witness Hathaway that the sum of $125 per month paid by the *Journal* is intended to include compensation for both day and night reports, but we do not think that any basis of comparison is thus afforded. The chief justice argues that because the day report is now taken from the wires on manifold paper and one copy given to the *Call* and the other to the *Journal*, the conditions of service as to this report are the same. In this we think there is overlooked the fact that it is only on account of the *Call's* contract that the telegraph company is required to deliver the report to either paper at the time or in the manner in which it is now delivered. At the risk of some repetition we shall point out what are conceived to be the differences in the conditions affecting the two papers. Before the *Call*, or rather its predecessor, the *Democrat*, began to take the report, the day report was delivered to the *Journal* at the convenience of the telegraph company. The *Journal* had no contract requiring the delivery of this report at any particular time. This is shown by the testimony both of Mr. Calhoun and Mr. Horton. The *Journal* makes use of this day report only to assist it in editing the night report, and did not then have, nor has it now, any use for the day report until evening. Indeed, now that

there is an evening paper in Lincoln, for the purposes of the *Journal* it might wait until the *Call* appeared and use the dispatches published in that paper, without depending upon the telegraph company at all. Under the former conditions, therefore, commercial business was given the right of way on the wires and the day report was transmitted during lulls in the commercial business, without any requirement that it should go to Lincoln before evening. In taking advantage of this right to give commercial business the preference there was then a delay of several hours at Omaha. According to the testimony on behalf of both parties the day report is of no use to the *Call* unless it is all received by 3 o'clock, or within a few minutes thereafter, and this report now has the right of way during the hours of its transmission as against commercial business. In order to accommodate this business the telegraph company was compelled to increase its facilities between Omaha and Lincoln. The evidence is undisputed upon this. Mr. Horton says in answer to a question as to what the telegraph company did to enable it to transmit the day report:

I put up an additional wire between Omaha and Lincoln over the Missouri Pacific railway. We had to employ an additional operator at Lincoln to take the afternoon report. A portion of his time, of course, was utilized in other business.

Q. What portion of the time was devoted to this exclusively?

A. From 11 o'clock to 3:30.

Q. How much was his salary per month?

A. Sixty dollars.

On cross-examination the same witness was asked whether it was not the growth of commercial business that made it necessary to put in a new wire for this report. His answer was, "That was partly it, certainly. We would not have built a wire on purpose to accommodate one newspaper at $75 a month." From this we think it ap-

pears not that the wire was erected chiefly on account of the commercial business, but that it was the necessity of supplying the day report to the *Call* which was the immediate cause of erecting the wire. Under the old conditions the *Journal* paid the same rate which it does now for its report. Those conditions were then, and are now, sufficient for the purposes of the *Journal*. The fact that it now gets the day report on manifold paper as early as the *Call* is a matter of no consequence to the *Journal*, as it is not allowed to use the report until after the *Call* is published. Both Mr. Cox and Mr. Calhoun testify to this. To hold that the conditions are now similar and that the *Journal* and *Call* must have the same rate would require either that the telegraph company make its rate for the increased service as low as it was for the former service, or else that it increase the rate charged the *Journal*, although the *Journal* is in nowise interested in the increase of service. We think, therefore, that the conditions of service which the *Call* requires and which the *Journal* requires are so different as to leave no basis for comparison.

REVERSED AND REMANDED.

NORVAL, C. J., dissenting.

I do not concur in the conclusion reached by Commissioner IRVINE, that there is no evidence in the bill of exceptions to sustain the verdict and judgment. The record shows without controversy that for nearly three years prior to the bringing of this action the Call Company paid the telegraph company the sum of $75 per month for transmitting in the day-time the dispatches or reports of the Associated Press containing not exceeding 1,500 words each day, and during this period manifold copies of the dispatches were likewise delivered by the telegraph company to the State Journal Company, and the last named company also, in addition to said day reports, received each

night from the Associated Press over the wires of the telegraph company dispatches not exceeding 6,500 words; that the State Journal Company paid for transmitting the dispatches received by it during said time the sum of $125 per month, and no more. Whether the last named sum was paid for both the day and night reports or messages, or for night reports alone, the evidence is conflicting.

Mr. C. B. Horton, the assistant superintendent of the telegraph company, in his testimony says no compensation was received for transmitting the day messages, but the sum of $125 was paid for the night dispatches alone; that no charge was made for the day reports, but the same were furnished the State Journal Company without compensation, as a mere gratuity.

Mr. J. D. Calhoun testified that the State Journal Company paid $125 for the transmission of both the day and night reports received by it.

Mr. H. D. Hathaway, the manager of the State Journal Company, being interrogated while upon the witness stand whether anything was paid for the day reports, answered: "No, sir; except as we paid—it might be included in the whole arrangement."

The fair inference to be drawn from the testimony of the last named witness is that no specified amount was collected for the day reports alone, but that the sum collected —$125 per month—was for both reports. The record discloses that the usual rate charged for night reports or messages is four times less than that paid for sending the day reports of the same number of words. This being true, it is not reasonable to suppose that the State Journal Company would pay $125 per month for the night dispatches merely, when the Call Company was paying $75 per month for the day reports received by it. According to the customary difference between the day and night rates, the State Journal Company, if we adopt as a basis the sum the Call Company was charged for its dispatches, should

have paid but $75 per month, had the night reports contained 6,000 words each, instead of paying $125 per month for the transmission of dispatches of 5,600 words each, as is claimed by the telegraph company. In my view the plaintiff was entitled to a verdict for some amount whether the State Journal Company paid $125 for both the day and night dispatches or for the night reports alone. If, as contended by the telegraph company, nothing was charged the State Journal Company for the day reports, and the evidence before the jury was sufficient to authorize them in so finding, then it is patent that the plaintiff in error did not render the services to the Call Company on the same terms it did to another patron, but unjustly and unlawfully discriminated in its rates against the defendant in error. The evidence shows that the State Journal Company had been receiving the day reports of the Associated Press for a long time prior to the date the Call Company commenced taking them, and no additional trouble, costs, and expense were incurred by the telegraph company in furnishing the reports to the defendant in error, inasmuch as the day reports were taken off the wires on manifold paper and one copy thereof was delivered to the State Journal Company and the other copy to the defendant in error. It is true that after the Call Company began taking the dispatches the plaintiff in error put up another wire between Lincoln and Omaha, but the evidence shows that this was done chiefly to provide additional facilities for taking care of the rapid increase of its commercial business. Prior to the time the *Democrat*, the predecessor of the *Call*, commenced taking the dispatches the day reports were usually delivered to the Journal Company about 4 o'clock in the afternoon, which was no later than they are now received. These reports were sometimes forwarded to the Journal Company by mail, but the common practice, as well as the most convenient mode for the telegraph company, was to send them over the wire. Now there is no relay at

Omaha, but the day reports are received at Lincoln at the same time as in Omaha, but, so far as the proofs show, the trouble and expense to the telegraph company was not increased by the change but lessened. That formerly it was under no contract to deliver the day reports at a particular hour is unimportant, inasmuch as the fact remains that there has been no substantial change in the time of delivery since the contract with the publishers of the *Democrat* was made. Nor is it material that the *Call* is an evening paper and the *Journal* is published in the morning, and that the latter has no use for the day report until late in the afternoon or night. There is a total lack of evidence to show that these facts, or any of them, in the least affected the expense or difficulty of performing the service.

It also appears by the testimony of Mr. Cox, one of the proprietors of the *Call*, and Mr. Calhoun, formerly managing editor of the *Journal*, that the day dispatches appear regularly and in full in the last named paper. It is said, however, that the Journal Company, without any extra cost to it, might have taken the dispatches from the *Call* instead of depending upon the telegraph company. This could have been done only to the extent the *Call* uses them. Mr. Cox testifies, and it is undisputed, that the *Call* did not always contain the full report, or even half of it. Sometimes it is received too late for use in the evening paper. We have not overlooked the fact that the *Call* contract contains a clause to the effect that the telegraph company should not deliver the day report to any other paper in Lincoln until after the *Call* goes to press. This provision is of no validity. A telegraph company is a common carrier and must treat all persons alike. It cannot discriminate against its patrons, or give one paper a monopoly of the Associated Press dispatches. It could no more do that than a railroad company could contract with A to carry his stock from Lincoln to South Omaha and

provide therein that the stock of B, consigned to the same place and carried on the same train, shall not be delivered until A's stock has been delivered and sold. Again, the stipulation in the *Call* contract did not affect the Journal Company, for the reason that the latter had no use for the day report until in the evening. We are convinced that the services rendered the defendant in error and the State Journal Company, as to the day dispatches, were under like conditions as to costs and expense; therefore, upon the testimony of Mr. Horton alone, the plaintiff was entitled to recover. The rule is where a telegraph company charges one person a higher rate than it exacts from another for the transmission of dispatches under like conditions, the difference between the charges is the measure of damages the one who has been discriminated against is entitled to recover. (*Cook v. Chicago, R. I. & P. R. Co.*, 81 Ia., 551; *Scofield v. Lake Shore & M. S. R. Co.*, 43 O. St., 571; *Louisville & E. St. L. C. R. Co. v. Wilson*, 32 N. E. Rep. [Ind.], 311; *Hays v. Pennsylvania R. Co.*, 12 Fed. Rep., 309; *Samuels v. Louisville & N. R. Co.*, 31 Fed. Rep., 57.) The plaintiff below was entitled to a verdict, even though the State Journal Company paid $125 per month for both the day and night reports.

It will be observed that the Call Company was required to pay for the transmission of its dispatches at the rate of $5 per month for each one hundred words, while the State Journal was charged for the messages received by it a little over $1.76 per month per hundred words. There is no room for doubt that this difference in rates would constitute unjust discrimination against the Call Company, for which it would be entitled to recover the difference between the amount paid by it and the more favorable rates granted the State Journal Company were it not for the fact that all the messages to the two companies were not transmitted by the plaintiff in error under like conditions as to service. What were the differences in conditions which affected the

cost or expense of the transmission of the messages? The day reports, as we have already seen, were sent to each of the two patrons under practically similar conditions and at the same time. As to the day reports, as we have seen, there could be no difference in the costs or expense of the service. The night and day messages or reports were transmitted under conditions materially different. It was shown that such differences in conditions necessarily made the tolls charged for the night reports less than the rates received for the service rendered in transmitting the day messages of the same number of words. I do not agree with my associates that there was no evidence of any character showing to what extent the difference in conditions affected the telegraph company. On the contrary, I am fully persuaded that there is such evidence in the record and that it shows the difference in the rates charged was not proportionate to the difference in the conditions which affected the expense of performing the service.

Mr. C. B. Horton, the witness already mentioned, testified upon this branch of the case as follows:

Q. What, if any, difference is there in the case of operating or handling news at night and during the day—what difference in cost and in the convenience? State wherein it is.

A. In the day-time, as everybody knows, our wires are loaded with important business, board of trade grain messages, and we have wires leased during those hours and they are filled and occupied. At night we have idle wires and we utilize them. A lower rate has always been made in the night service. On press reports it is about one to four, one of day to four at night.

Q. One word at day to four at night?

A. Yes, sir; I believe that is the rule in all of our contracts.

Q. Whether it is by the word or by the job?

A. Yes, sir.

The foregoing evidence was sufficient to authorize the jury in finding the difference in rates between the day and night reports. The Call Company should not have been charged more than four times the rates charged for the night messages. The difference between the rates paid and the tolls which should have been charged for service rendered the defendant in error was fully established by the evidence. It paid $5 for each one hundred words daily per month, when the rate should have been not exceeding $4. There was, therefore, an unjust discrimination of $1 per hundred words per month, which amounted to $15 per month. This sum was overpaid each month for thirty-four months, making an aggregate of $510, to which should be added interest at seven per cent on each payment from the date thereof until the rendition of the judgment in the court below, amounting to $83.30. So under this view of the case the Call Company was entitled to a verdict for at least the sum of $593.30, while if as the telegraph company contends, and there is some evidence in the record tending to show that the Journal Company paid nothing for the day reports, the verdict is none too large. The judgment should be affirmed, or at least it should be allowed to stand upon the defendant in error entering a remittitur for the amount the verdict is in excess of $593.30.

JAMES S. PALMER V. ROBERT VANCE ET AL., COUNTY COMMISSIONERS OF SALINE COUNTY.

FILED APRIL 3, 1895. NO. 6272.

Highways: LOCATION: DAMAGES: ROAD FUNDS. The damages sustained by the land-owner by reason of the location of a public highway cannot be paid out of the county road fund, but must be paid out of moneys in the road fund of the road district in which the land taken for the highway is situated. *Ackerman v. Thummel*, 40 Neb., 95, followed.

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

Palmer & Hendee, for plaintiff in error.

NORVAL, C. J.

A public road was located over lands belonging to the relator and his damages were allowed at $50. An appeal was taken to the district court, where he recovered the sum of $65 and costs taxed at $100.75. This action was brought against the respondents, as the county commissioners of Saline county, to compel them to draw a warrant in favor of the relator on the county road fund for the amount of said judgment and costs. A writ of *mandamus* was denied and the action dismissed.

A single question is presented for determination and that is whether the respondents should have paid the judgment in controversy out of moneys in the county road fund. In *Ackerman v. Thummel*, 40 Neb., 95, this court had under consideration the several statutory provisions relating to the location of highways and the payment of damages sustained by the land-owner by reason of the establishment of a public road, and it was there held that all such damages must be paid out of moneys in the road fund of the road district in which the land taken for highway purposes is situated, and that the county is not liable for the payment of such damages. The rule there announced is decisive of the case at bar, and that too against the contention of relator. The respondents having no authority to draw a warrant on the county treasury in payment of the judgment, the district court did not err in refusing the writ of *mandamus*. The judgment is

AFFIRMED.

RALPH R. OSGOOD, APPELLEE V. PATRICK J. GRANT ET AL., APPELLANTS.

FILED APRIL 3, 1895. No. 5848.

1. **Trial.** Under section 281*a* of the Code of Civil Procedure, an action in which the issues have been joined during term time may be placed upon the trial docket and tried at such term of court.
2. ———. Causes are to be tried in the district court in the order in which they are entered upon the trial docket, unless the court, in the exercise of a sound discretion, shall direct otherwise.
3. **Interest on Taxes:** RATE. On the foreclosure of a valid tax sale certificate the holder is entitled to recover interest on the amount bid at the sale and on the several sums paid for subsequent taxes on the property, at the rate of twenty per cent per annum, from the date of the sale and said payments respectively until the expiration of two years from the date of the purchase, and ten per cent interest thereon after that period.
4. **Attorney's Fees:** COSTS: TAX SALES. The holder of a tax lien, based upon a valid tax sale, on obtaining a decree foreclosing the same, is entitled to an attorney fee of ten per cent of the amount of the decree.

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

Richard Cunningham, for appellants.

W. Q. Bell and *E. C. Rewick, contra.*

NORVAL, C. J.

This was an action brought by Ralph R. Osgood against Patrick J. Grant, Mary A. Grant, and others to foreclose certificates of tax sales upon lots 14 and 15, in block 69, in the city of Lincoln. Answers and cross-petitions were filed by several of the defendants, setting up liens against the premises by virtue of certain judgments and decrees of foreclosure entered in the district court of Lancaster county.

At the close of the trial a decree of foreclosure and sale of the premises was rendered and the amount and priority of the several liens were established. The Grants have prosecuted an appeal to this court.

The first complaint made in the brief relates to the placing of the cause on the trial docket for the February, 1892, term of the district court and the trying of the same at said term. The action was commenced on January 23, 1892, and on February 25, 1892, the appellants, by leave of court, were permitted to file their answer out of time. The answers and cross-petitions of the other defendants were filed at various dates between February 23 and May 16, 1892. The February term of Lancaster county district court commenced on February 1 and continued until the following July. At the time the decree in question was entered, namely, June 16, and for at least thirty days prior thereto, the issues in the case had been made up. Section 281*a* of the Code of Civil Procedure provides: "Actions shall be triable at the first term of the court, after the issues therein, by the times fixed for pleading, are, or should have been, made up; and when, by the times fixed for pleading, the issues are, or should have been, made up during a term, such action shall be triable at that term. When the issues are, or should have been, made up, either before or during a term of court, but after the period for preparing the trial docket of such term, the clerk shall place such actions on the trial docket of that term." It requires no argument to show that authority is conferred upon the clerk of the district court, by the provisions of the foregoing section, to enter upon the trial calendar for the term causes in which the issues are, or should have been, joined during such term. Such is the plain language of the statute.

What is the meaning of the language "during a term," as used in the section under consideration? That it does not refer alone to the first day of the term is quite evident, but it applies as well to every succeeding day of the term.

Therefore, all cases, when the rule day for pleading expires on or after the convening of a term of court, and prior to the final adjournment thereof, in which the issues are, or should have been, made up during term time, may be placed upon the docket and disposed of at that term of court. In other words, it is not essential that the rule day should fall on the first day of a term of court in order that the cause may be docketed and tried at that term. Nor is it indispensable that the action should have been instituted during a term of court, but the section applies in all cases whenever brought when the term continues until after the expiration of the period for making up the issues. There was, therefore, no error in placing this action upon the trial docket of the term at which it was entered, and trying the cause at that term. By the section quoted where the issues in a cause have been made up during term time, the action is triable at such term. Under section 324 of the Code, causes in the district court are to be tried in the order in which they are entered upon the trial docket, unless the court in the exercise of a sound discretion shall otherwise direct, or the parties consent to a postponement of the trial. There is nothing in the record to show that the cause at bar was heard out of its regular order, nor does it appear that the appellants were prejudiced by the trial of the action at the February term. True, an application was made for a continuance of the cause over the term, but upon what ground the record fails to advise us. Appellants had ample time after the issues were formed to procure their witnesses, if any they had, and prepare for trial. If postponement of the hearing was desired on the account of the absence of witnesses, a proper showing to the court should have been made. The objection urged to the trial of the cause at the term during which the issues were joined is without merit and is overruled.

The trial court found that there was due the plaintiff upon first cause of action set forth in the petition, for

moneys paid by him for taxes levied against said lot 14 for the year 1883 and years subsequent thereto, with interest thereon, the sum of $434.03; also an attorney's fee of $43.03, and said sums were made liens upon said lot. The court further found that there was due the plaintiff upon his second cause of action for taxes paid by him upon lot 15 for the year 1883 and subsequent years, with interest and costs, the sum of $654.57, and decreed the same to be a lien upon said lot, and also an attorney's fee of $65.45, which was allowed the plaintiff by the court. The appellants insist that the several amounts found due the plaintiff are too large, and are contrary to the evidence. The contention is well taken. The record discloses that the district court, in making its findings, computed interest at the rate of twenty per cent on the several sums paid by the plaintiff for the purchase of each lot, at the sale thereof for delinquent taxes, and subsequent taxes paid thereon for the period of two years from and after each payment, and at the rate of ten per cent thereafter. The tax sales in question were not invalid; therefore, plaintiff was entitled to interest on the amount bid at the sale, and the several sums paid for subsequent taxes, at the rate of twenty per cent per annum from the date of the tax certificate and said several payments respectively until the expiration of two years from the date of said sale, and ten per cent interest after that time. (See *Merriam v. Ranen*, 23 Neb., 217; *Alexander v. Thacker*, 43 Neb., 494.) The district court erred in allowing interest at the rate of twenty per cent per annum on each payment for two years from the date of such payment, instead of until the expiration of two years from the date of the tax certificates. We have computed the amount due plaintiff at the date of the rendition of the decree in the court below, according to the rule established by the foregoing decisions, which computation shows that the sum due the plaintiff on his first cause of action to be $373.74, and on his second cause of action to be $641.73. The decree of

the district court is accordingly modified, and plaintiff is given a lien on lot 14 for said first mentioned sum and a lien on lot 15 for the last named amount, with ten per cent interest on each sum from the date of the entry of the decree in the district court until the day of payment.

Complaint is made of the allowing of the plaintiff an attorney's fee in the action. The holder of a tax lien, on the foreclosure thereof, if the sale on which the lien is based is valid, is, under the statute, entitled to an attorney's fee of ten per cent of the amount of the decree. (Sec. 181, ch. 77, Comp. Stats.; *Toule v. Shelly*, 19 Neb., 632; *Adams v. Osgood*, 42 Neb., 450; *Alexander v. Thacker*, *supra*.) The awarding of an attorney's fee in this case was proper; but as the amount allowed as such fee exceeds ten per cent of the sum found due the plaintiff by the court, the decree in that respect is modified by reducing the attorney's fee to $37.37 for the first cause of action, and for the second cause of action to the sum of $64.17.

The county of Lancaster sets up in its cross-petition a lien on the lots arising by virtue of decree of foreclosure rendered in the district court of the county. In the case at bar the county was given a lien for the amount of the decree, with ten per cent interest thereon. The only complaint made relates to the rate of interest allowed. Appellants insist that the county was only entitled to seven per cent interest. The evidence, without conflict, shows that interest was computed at the proper rate, on the decree in favor of the county, as well as on the decree in favor of Mr. Burr. The findings and decree in the case under review are modified as indicated above, and, as thus modified, are

AFFIRMED.

F. W. BARNES v. D. A. HALE.

FILED APRIL 3, 1895. No. 5167.

Judgments: MODIFICATION AFTER TERM. The power of a district court to vacate or modify its own judgments after the term at which they were rendered is limited to the grounds for granting such relief enumerated in section 602 of the Code of Civil Procedure.

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

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

Allen, Robinson & Reed, contra.

HARRISON, J.

D. A. Hale commenced an action in the district court of Madison county, the object being to obtain the relief stated in the prayer of the petition, which was as follows: "Wherefore your petitioner prays that this court enter a judgment and decree in this case reforming the deed of conveyance of said real estate from the defendant to the plaintiff, by making it embrace said entire block of land, or so much thereof as the defendant is in a situation to convey in accordance with the contract of the parties, the plaintiff hereby expressing a willingness to accept whatever title defendant had in the said land at the commencement of this suit. That if the defendant fails to comply with the decree within thirty days from its date, the clerk of this court be appointed a commissioner, with full power to make, execute and record said conveyance in the name and on behalf of the defendant, and he be directed to so convey said block to the plaintiff; that if the court shall find on the trial of

this case that for any reason a conveyance should not be desired as herein prayed, that then a decree and judgment be entered in the case setting aside said contract entirely and awarding a judgment against the defendant and in favor of the plaintiff for the sum of $250, with interest thereon from July 31, 1886, and that the plaintiff have such other and further relief in this cause as may be just and equitable, together with costs of suit." The cause was tried and submitted to the court and a decree rendered in words and figures as follows:

"On November 23, 1888, it being the adjourned term of the regular October, 1888, term of this court, this cause came on to be heard upon the petition, answer, and evidence in the case and was submitted to the court, who took the case under advisement, on consideration whereof the court did, on the 17th day of May, 1889, it being the adjourned regular April, 1889, term of the district court in Madison county, Nebraska, find for the defendant, denying the plaintiff's claim for reformation of the deed, and denying the plaintiff's claim for specific performance of the contract set forth in plaintiff's petition.

"The court further finds that the plaintiff is entitled to a rescission of the said contract, upon his conveying to the defendant within thirty days from May 17, 1889, the south half of said block 59, in the Railroad Addition to the town of Madison, in Madison county, Nebraska, by deed of general warranty, a good and sufficient title free from any incumbrance; and if the plaintiff shall convey said premises, he shall have judgment against the defendant for the sum of $250, and that the plaintiff pay all the costs of this action to the time of trial, and the defendant the balance.

"It is therefore considered, adjudged, and decreed by the court that the plaintiff is not entitled to a specific performance of the contract set out in the petition, but that if the plaintiff convey to the defendant within thirty days from this date the south half of block 59, in Railroad Addition

to the town of Madison, in Madison county, Nebraska, by good and sufficient deed with covenants of general warranty and free from all incumbrances, he may have judgment against the defendant for the purchase price thereof, $250. Plaintiff to pay all costs made up to the time of going to trial, and defendant to pay the remaining costs."

On April 14, 1890, there was filed for D. A. Hale the following motion:

"The plaintiff herein moves the court to correct the judgment in this case as follows:

"1. By permitting the deeds filed in this court, respectively, June 7, 1889, and August 21, 1889, to stand as a compliance with the decree of this court.

"2. By entering an absolute money judgment against the defendant, and directing the clerk of this court to issue an execution against the defendant thereon.

"3. By retaxing and readjusting the costs of the case in compliance with the judgment of the court."

This was accompanied by some affidavits in relation to matters of fact pertaining to the grounds of the motion. F. W. Barnes, defendant in that court and plaintiff in error in this, appeared by counsel and resisted the motion, interposing objections to its allowance as follows:

"Now comes the defendant and objects to the court making the order, judgment, and decree asked for by plaintiff in his motion filed in this case, April 14, 1890.

"1. Because the deeds made and delivered by the plaintiff and his wife to the clerk June 7, 1889, and August 21, 1889, and which the clerk filed with the papers in this case, is not a compliance with the order and decree of this court.

"2. Because this being an action in equity, this court cannot enter an absolute money judgment.

"3. Because the plaintiff has failed, neglected, and refused to comply with the order and decree of the court in this action in many particulars; that the plaintiff failed, re-

fused, and neglected to deed the premises in controversy to the defendant within the time required by the order of the court, and he failed to deed it to the defendant with as good and sufficient title as he received from the defendant; that at the time the plaintiff and his wife made the deed aforesaid there were several unsatisfied judgments against the plaintiff on record, and the same are still unsatisfied; that the taxes for the years 1888 and 1889 on said premises were unpaid and a lien on said premises; that there were no judgments, liens, or tax liens against said premises when they were deeded to the plaintiff by the defendant.

"3. Because this court has no authority to change or modify its decree, as requested by the plaintiff, upon motion.

"4. Because the costs have been taxed in this case in accordance with the decree of the court.

"5. Because it would work a great hardship to the defendant to now have to take said premises, as he has changed his residence and now resides in the state of California, and had the plaintiff desired the defendant to have had the property, and had complied with the terms and conditions of the decree of the court in this case, this defendant could have disposed of said premises while residing in Madison, Nebraska.

"And in support of this objection the defendant offers the affidavit and abstract hereto attached and made a part hereof, also the papers and judgment entries made in the case."

The paper upon which was set forth the above list of objections was, it appears, filed February 18, 1891, and the court, after hearing on the motion, made an entry as follows:

"And now on this 25th day of February, 1891, it still being a day of the regular February, 1891, term of this court, this cause came on for hearing upon the motion of plaintiff for an order requiring the clerk of this court to issue an execution against the defendant to recover the sum

of $250, with interest thereon at seven per cent from August 20, 1889, and was submitted to the court, on consideration whereof said motion is sustained.

"It is therefore considered by the court that the plaintiff recover from the defendant the sum of two hundred and fifty dollars ($250), with interest at seven per cent thereon from August 20, 1889, to this date (February 25, 1891), amounting to the further sum of twenty-six and $\frac{49}{100}$ dollars ($26.49), amounting in the aggregate to two hundred and seventy six and $\frac{49}{100}$ ($276.49); and that the clerk of this court is hereby commanded to issue an execution carrying into effect this judgment, a sufficient amount of the proceeds thereof to be retained by the clerk and applied in satisfaction of the tax liens upon the property in controversy in Madison county, Nebraska, accruing while title thereto was in the plaintiff; to which judgment and ruling of the court the defendant excepted, and forty days allowed in which to prepare and present to the adverse party or his attorneys his bill of exceptions. Supersedeas bond fixed at $525."

An examination of the record and affidavits filed in support of and against the granting of the motion discloses that after the original decree rendered by the court May 17, 1889, there was filed on June 7, 1889, by D. A. Hale with the clerk of the district court a deed which was intended to convey to plaintiff in error "the south half of lot numbered fifty-nine (59) of Railroad Addition to the town of Madison," and that on August 21, 1889, there was filed with the clerk another deed which was intended to convey to him, as it states, "the south half of block number fifty-nine (59) of Railroad Addition to the town of Madison," and which also contained this further statement: "This deed is given as a deed of correction of a deed made by D. A. Hale and Amelia Hale, his wife, to F. W. Barnes, dated on the 4th day of June, 1889, which last named deed was filed with the clerk of district court

of Madison county, Nebraska, on the 7th day of June, 1889." It further appears that there were unpaid taxes and some judgments of record against defendant in error unsatisfied.

It is quite clear that the court in its original decree in this case did not render a personal judgment against the plaintiff in error and that the motion filed by defendant in error and acted upon by the court was an attempt in the nature of a supplemental proceeding to obtain such a judgment and not by reason of compliance by defendant in error with the decree of the court, for he had not delivered to plaintiff in error a warranty deed within thirty days of the entry of the decree, of the property described in the petition, the subject of litigation, and free from all incumbrances, but by virtue of occurrences stated in the motion which had wholly arisen subsequent to the rendition of the judgment and some of which had their origin in the failure or neglect of the defendant in error to perform the acts required of him by the judgment in the manner therein prescribed. The issues in the case had been tried and determined by the court and its judgment thereon pronounced, and the decree rendered must be viewed as an adjudication upon the matters in litigation and, as such, not be set aside by this motion and questions which originated since the decree was rendered, made the subject of litigation and adjudication in the action. It was not proper to do this upon motion. (*Kenyon v. Baker*, 47 N. W. Rep., [Ia.], 977; *Woffenden v. Woffenden*, 25 Pac. Rep. [Ariz.], 666; Freeman, Judgments, sec. 100.) The motion of defendant in error was filed after the close of the term, during which the case was tried and judgment rendered, and there was no allegation in the motion of either of the grounds mentioned in section 602 of the Code of Civil Procedure. It is well settled that a district court has no power to vacate or modify its own judgments after the term at which they were rendered, except for at least one of the grounds enumerated in

such section of the Code. (*Carlow v. Aultman*, 28 Neb., 672; *McBrien v. Riley*, 38 Neb., 561.) The portion of the motion which referred to the costs and asked for retaxation of them does not seem to have been considered by the district court, or if it was, no disposition of it was made, or at least none is shown in the record; hence there is nothing in this point of the motion presented for examination at this time. The action of the court and entry made on the hearing of the motion of defendant in error is reversed and the cause remanded.

REVERSED AND REMANDED.

JOHN F. BROWNE ET AL. V. EDWARDS & MCCULLOUGH LUMBER COMPANY ET AL.

FILED APRIL 3, 1895. No. 6390.

1. **District Courts:** JUDGES: AUTHORITY AT CHAMBERS. "The judges of the several district courts, as such, have no inherent authority at chambers whatever, but only such as the statutes give them." *Ellis v. Karl*, 7 Neb., 381, followed.
2. ———: ———: ———: INJUNCTION. The authority of district judges at chambers in injunction cases is limited by law to the power "to grant, dissolve or modify temporary injunctions" and does not include a final disposition of the cause, either by dismissal or otherwise.
3. **Injunction Bonds:** ACTION BEFORE TERMINATION OF SUIT. No right of action accrues upon an injunction bond given on the granting and issuance of a temporary injunction in an action commenced to obtain a perpetual injunction until the final determination of the suit in which the temporary order was granted, and an action at law instituted on the undertaking prior to the final disposition of the cause is prematurely brought and cannot be maintained.
4. ———: ———: EVIDENCE. *Held*, that the evidence in this case does not show a final determination of the suit in which the injunction bond upon which it is based was given.

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

A. M. Gooding and *Benjamin M. Weed*, for plaintiffs in error.

Wilbur F. Bryant and *J. C. Robinson*, *contra*.

HARRISON, J.

It appears from the pleadings in this case that on the 11th day of September, 1891, John F. Browne, of plaintiffs in error (hereinafter referred to as "plaintiffs"), commenced an action in the district court of Cedar county against defendant in error (hereinafter called the "Lumber Company") and obtained a temporary order of injunction by which the Lumber Company was restrained from selling or causing to be sold, or in any manner interfering with, Browne's right of possession of certain personal property of which he then held possession, as sheriff of Cedar county, by virtue of an execution issued by the county court of said county in an action wherein the Lumber Company was plaintiff and Browne defendant; that upon the granting of the temporary injunction an undertaking was executed by John F. Browne as principal and Peter Garney, Joseph Morton, Theodore Beste and T. H. Cole as sureties; that a motion was filed by the Lumber Company to vacate the temporary injunction, and upon the hearing of the motion by the judge of the district court at chambers, during vacation, the order of injunction was dissolved, and it is claimed the judge then further ordered or attempted a dismissal, or to make a full disposition of the cause. The Lumber Company then instituted this action upon the injunction undertaking to recover its damages alleged to have been suffered by reason of the operation of the order of injunction while in force, and in a trial of the issues to the court, a jury having been waived, was successful and obtained a judgment

for such damages, and from which disposition of the issues these proceedings in error have been prosecuted to this court.

Subsequent to the filing of the papers here a motion was interposed on behalf of the Lumber Company, asking the court to strike the bill of exceptions from the files, assigning as a reason therefor that it was not prepared and served within the time prescribed by law, or that fixed by the trial court, also to dismiss the case for want of prosecution, and the questions raised by this motion are argued in connection with the merits of the case in the brief presented for the Lumber Company; but it appears from the record that on October 24, 1893, the motion was denied, hence we will not give it further consideration at this time.

It is contended by plaintiffs that the judge had no jurisdiction at chambers to consider the merits of the cause, or to finally dispose of it by dismissal or otherwise. Section 23 of article 6 of the constitution provides: "The several judges of the courts of record shall have such jurisdiction at chambers as may be provided by law." And it has been provided by the legislature (see secs. 39 and 57, ch. 19, Comp. Stats., 1893): "That any judge of the district court may sit at chambers at any time and place within his judicial district, and while so sitting shall have the power, 1. To grant, dissolve or modify temporary injunctions. * * 4. To discharge such other duties or to exercise such other powers as may be conferred upon a judge in contradistinction to a court;" and in section 252 of our Code of Civil Procedure, under the heading "Injunction," the allowance of an injunction is provided for as follows: "The injunction may be granted at the time of commencing the action, or at any time afterward, before judgment, by the supreme court or any judge thereof, the district court or any judge thereof, or in the absence from the county of said judges, by the probate judge thereof, upon it appearing satisfactorily to the court or judge by the affidavit of the plaintiff

or his agent that the plaintiff is entitled thereto;" and in section 263 the right to move to vacate the order of injunction is given, and it is therein stated that such application may be made "to the court in which the action is brought or any judge thereof," etc. In the case of *Ellis v. Karl*, 7 Neb., 381, this court said that under the constitution "the judges of the several district courts, as such, have no inherent authority at chambers whatever, but only such as the statutes give to them." We have quoted, or given, the substance of the statutes in which authority is conferred upon a judge at chambers in regard to injunctions, and it is clearly limited in respect to a motion to vacate, such as was the one in this case, to its dissolution or modification; and if the judge disposed of the main case on the hearing at chambers of the motion to vacate the temporary order, such action was without authority on his part and unwarranted and of no effect.

On the hearing of the motion to vacate the temporary injunction the district judge, as appears from a copy of the journal entry of the proceedings, made and caused to be entered of record in the clerk's office the following order: "Now on this 24th day of September, 1891, this cause came on to be heard upon the motion of the defendants to vacate the temporary injunction, heretofore granted in this case, and was submitted to the court upon affidavits and arguments of counsel, and the court being fully advised in the premises, does sustain said motion, and said injunction is hereby vacated and dismissed, to which plaintiff excepts." From a perusal of this order it seems very evident that there was no attempt on the part of the judge to go beyond his jurisdiction or to do anything more than set aside the temporary order of injunction. It is headed, "Order Dissolving Injunction," which makes apparent the intention of the judge with reference to what was to be included in it, and it states in the body that "the court being fully advised in the premises,

does sustain said motion, and said injunction is hereby vacated and dismissed." There is nothing contained in the entry which can in the least be construed as alluding to the main case, or as an attempt to dispose of it in any manner or to any degree. That the word "dismissed" is used in connection with the disposition of the temporary injunction affords no ground for the statement that the cause itself was dismissed or attempted to be, as it plainly refers and applies to the injunction, and though the word "dissolved" is almost universally used in this entry, "dismissed," when given the meaning "discharged," while probably not a strictly proper use of it, alluding to the termination of a temporary order of injunction, we think it an allowable one, and we conclude, so far as the record discloses, there was and has been no final disposition of the case in which the temporary injunction was granted. If this be true, then this action was prematurely brought, as no action at law can be maintained upon the injunction bond until the final determination of the cause in which the injunction issued. (High, Injunctions, sec. 1649; *Bemis v. Gannett*, 8 Neb., 236.) "This right of action on the bond cannot accrue until there has been a final decree in the cause in which the bond is given. The order dissolving an injunction before final hearing is interlocutory merely from which no appeal would lie (*Thomas v. Wooldridge*, 23 Wall. [U. S.], 283; *Young v. Grundy*, 6 Cranch [U. S.], 51; *Moses v. Mayor*, 15 Wall. [U. S.], 387); and we have not been been cited, nor have we found, a well considered case in which it has been held that an action on an injunction bond could be maintained before final decree in the cause in which such bond was given. The authorities are all the other way (2 High, Injunctions, sec. 1649; *Gray v. Veirs*, 33 Md., 159; *Penny v. Holberg*, 53 Miss., 567; Murfree, Official Bonds, p. 393, secs. 391, 392; *Bemis v. Gannett*, 8 Neb., 236; *Bentley v. Joslin*, Hemp. [U. S.], 218; *Clark v. Clayton*, 61 Cal., 634; *Weeks v. Southwick*,

12 How. Pr. [N. Y.], 170; *Brown v. Galena Mining & Smelting Co.*, 32 Kan., 528, 4 Pac. Rep., 1013.) It follows in this case, then, that although the injunction was dissolved in the district court before final hearing, yet no right of action accrued on the bonds, or could accrue, until a final decree had been rendered in the cause in which such bond was given." (*Cohn v. Lehman*, 6 S. W. Rep. [Mo.], 267; *Jones v. Ross*, 29 Pac. Rep. [Kan.], 680.) The judgment of the district court must be reversed and the cause remanded.

REVERSED AND REMANDED.

WILLIAM THOMPSON V. STATE OF NEBRASKA.

FILED APRIL 3, 1895. No. 7331.

1. **Rape:** EVIDENCE OF INABILITY OF PROSECUTRIX TO RESIST. In a prosecution for the crime of rape, where it appears from the record that the person upon whom the crime was alleged to have been committed was but sixteen years of age, had suffered a physical injury which still affected her and partially deprived her of physical strength, and was "simple minded" and acted upon by fear, *held*, that these facts must be considered by the jury in connection with all the attendant facts and circumstances of the alleged crime to determine whether the resistance to the act was such as to show non-consent of the prosecutrix and to constitute the act rape.

2. ———: SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION. The evidence examined, and *held* sufficient to sustain the verdict.

3. ———: ADMISSION OF TESTIMONY. The action of the court in admitting testimony examined, and *held* not erroneous.

4. **Criminal Law:** REVIEW: EXCEPTIONS TO ADMISSION OF TESTIMONY. Where no objections are made nor exceptions taken to the admission of testimony in the trial court, such action cannot be reviewed in this court.

5. **Assignments of Error:** INSTRUCTIONS: EVIDENCE. It was

assigned for error that the court erred in giving paragraphs 2, 3, 4, 5, 7, 8, and 10 of the instructions given by the court on its own motion, for the reason that under the evidence the court should have instructed the jury to acquit the defendant and not have submitted the question of his guilt to the jury. *Held*, That the determination that there was sufficient evidence to sustain a verdict against defendant meets this objection to the instructions.

6. **Criminal Law**: ASSIGNMENTS OF ERROR: REVIEW. Where in an assignment of error in a motion for new trial it is stated that the court erred in refusing to give a group of instructions, it will be examined or considered no further when it is ascertained that the refusal to give any one of the instructions was proper. (*Jenkins v. Mitchell*, 40 Neb., 664.)

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

Gaslin & Leek, for plaintiff in error.

A. S. Churchill, Attorney General, for the state.

HARRISON, J.

During the month of September, 1894, at a term of the district court then being held in the county of Dawson, the plaintiff in error, William Thompson, was convicted of the crime of rape upon one Carrie Brockett, committed May 18, A. D. 1894. After motion for new trial filed in his behalf the same was overruled and he was sentenced to confinement in the penitentiary for the period of three years, and he has removed the case to this court to obtain a review of the proceedings during the trial in the district court.

The assignment of error which seems to be mainly relied upon by plaintiff in error is that the verdict was not sustained by sufficient evidence. In the district court the accused produced evidence of an *alibi*, but the testimony relating to this branch of the case was conflicting, and it is conceded by counsel in the brief filed that the finding of the

jury on this subject cannot be disturbed. The testimony discloses that the prosecutrix, Carrie Brockett, was but sixteen years of age at the time the crime was committed; that during the month of August, 1893, "she fell off a horse" and broke her collar bone, and that on May 18, 1894, the date of the alleged crime, her right arm and shoulder felt very sore and she could not and had not used it to do much heavy work since the time it was injured. She was at the time living with her grandmother, who was very deaf, almost bedridden, and partially demented, and nursing and attending her. They lived in a house in the town of Lexington, and were the only occupants of the house. A physician, who made regular professional calls at the house to render such medical assistance or relief as was needed by the grandmother, testified that the prosecutrix was a simple-minded girl, or was mentally weak and not possessed of the average intellect of girls of her age, and there was testimony of one other witness which was slightly corroborative of the physician's evidence on the subject of the Brockett girl's deficiency in mental development or capacity.

The house in which the girl and her grandmother resided was, as she testifies, located about four blocks from the court house in the city of Lexington, fronted on the street to the south of it, and there was what they called an east room, a west room, and a summer kitchen. The east room was used as a bedroom by the prosecutrix and her grandmother. There was an outer door to what was called the west room, and she states that about 9 o'clock of the evening or night of the 18th of May, 1894, some one knocked at this door, and when she opened it she saw the accused standing there, and he stated to her he had been informed the house was for rent, and requested to be allowed to see the rooms; that she took the lamp which was then in the west room and conducted him through the house, into the east, or bedroom, into the summer kitchen,

and back into the west room. She placed the lamp upon a table and stood behind a rocking chair near the table; that the accused talked about the house, and coming toward her, put his hand upon hers and then threw his arms about her waist; that she tried to get away from him and he stumbled over a box; that just then the grandmother called her, and after asking him to go home she went into the east room to see what was wanted. He followed, and she then went again into the west room after the light, and he immediately followed, closed the door between the two rooms, put his arm or arms around her and held her hands in his, pulled or led her from the door to the table on which the lamp stood, and with one hand turned the light down, and then put his right hand under her knees and carried her over next to one side of the room and threw her down. She states that during the whole time she was trying to release herself, but was unable to do so; that she did not kick or bite him or make any outcry, but struggled to get her hand loose and keep her dress down with her right hand, of which he did not have hold or control; that when he threw her down she said to him, "For God's sake let me up." She further stated that when they were on the floor he was by her side; that he obtained control of both her hands and pulled up her clothes; that she had her feet crossed and was fighting to keep him off; that he then got on top of her and put his foot between her legs and pulled them apart and accomplished his purpose, got up and sat in a chair, and, when she was getting up, caught her and pulled her down on his lap and held her there and talked to her for possibly a few moments, when she asked him to take his cap and go home and he went away. When asked if she made any outcry, and why she did not strike him, she answered that she did not because she was afraid of the accused, and she feared him because he had been drinking whiskey, and that she knew this to be so from smelling his breath. She did not tell any person of

what had occurred until the following day. The prosecutrix also testified that while at the house the accused told her his name was William Thompson. It further appears from her testimony that there was a house right across the street and west from this one in which it was alleged the rape was committed, and one just across the road northwest, and another, the doctor's house, in the adjoining block.

It seems very clear from an examination of all the testimony that the finding of the jury to the extent that the party who did the deed fully intended to employ all the force which might become necessary to enforce his will and pleasure, and did use all that became needful to overcome the resistance made by the girl, was sufficiently shown by the evidence; but it is strenuously argued that the prosecutrix did not resist the attacks upon her as energetically as she should, by the use of all the natural agencies and powers which she possessed and which might have been employed for such purpose; that she made no outcry and did not kick, bite, or strike the party who made the assault, and that it must be concluded that she consented to the act of sexual intercourse, and the finding of the jury, embracing, as it must have done, as one of its constituents, non-consent on her part, was wrong and not supported by the evidence. In support of this assignment the case of *Oleson v. State*, 11 Neb., 276, is cited, in which the general doctrine on the subject of resistance in cases of rape was announced in the following language: "To constitute the crime of rape, where it appears that at the time of the alleged offense the prosecutrix was conscious and had possession of her natural, mental, and physical powers, and was not terrified by threats or in such position that resistance would be useless, it must appear that she resisted to the extent of her ability;" and in the body of the opinion there appears a quotation from the case of *People v. Morrison*, 1 Parker Crim. Rep. [N. Y.], 625, as follows: "To constitute the crime there must

be unlawful and carnal knowledge of a woman by force, and against her will. * * * The prosecutrix, if she was the weaker party, was bound to resist to the utmost. Nature had given her hands and feet with which she could kick and strike, teeth to bite, and a voice to cry out; all these should have been put in requisition in defense of her chastity." We understand that where it is apparent from the testimony that these things were or were not done by the party upon whom it is alleged the rape was committed, it is matter of evidence to be considered by the jury in connection with all the other facts and circumstances surrounding and elements of the crime charged and from which, combined, the jurors must determine their verdict. The rule stated in *Oleson v. State, supra,* as a general rule, is a correct one and has, since the decision, been adhered to by this court, but the application of this rule must and will be governed and modified by the circumstances and facts surrounding each particular case.

In the case of *People v. Connor*, 27 N. E. Rep. [N. Y.], 252, it was decided: "The evidence showed that the defendant was a strong man of mature years, engaged in conducting an intelligence office; that the prosecutrix was a girl, only a little over sixteen, who went to his office to obtain employment; that defendant suddenly assaulted her while they were alone together in his office; that she struggled to get away from the defendant, and continually requested him to release her, and that she did not cry out because she was too frightened to do so. Held that the jury were justified in finding that she resisted to the extent of her existing ability;" and the court states in its opinion: "It is quite impossible to lay down any general rule which shall define the exact line of conduct which shall be pursued by an assaulted female under all circumstances, as the power and strength of the aggressor, and the physical and mental ability of the female to interpose resistance to the unlawful asssult, and the situation of the par-

ties, must vary in each case. What would be the proper measure of resistance in one case would be totally inapplicable to another situation accompanied by differing circumstances. One person would be paralyzed by fear and rendered voiceless and helpless by circumstances which would only inspire another with higher courage and greater strength of will to resist an assault. A young and timid child might, we think, be easily overpowered and deprived of her virtue before she had an opportunity to recover her self-possession and realize her situation, and the necessity of the exercise of the utmost physical resistance in order to preserve her virtue. It would be unreasonable to require the same measure of resistance from such a person that would be expected from an older and more experienced woman who was familiar with the springs and motives of human action and acquainted with the means necessary to be used to protect her person from violence. * * * When an assault is committed by the sudden and unexpected exercise of overpowering force upon a timid and inexperienced girl, under circumstances indicating the power and will of the aggressor to effect his object, and an intention to use any means necessary to accomplish it, it would seem to present a case for a jury to say whether the fear naturally inspired by such circumstances had not taken away or impaired the ability of the assaulted party to make effectual resistance to the assault." See, also, *People v. Dohring*, 59 N. Y., 383, where it is said: "Of course the phrase, 'the utmost resistance,' is a relative one, and the resistance may be more violent and prolonged by one woman than another, or in one set of attending physical circumstances than another. In one case, a woman may be surprised at the onset and her mouth stopped so that she cannot cry out, or her arms pinioned so that she cannot use them, or her body so pressed about and upon that she cannot struggle." The nature and the extent of the resistance which ought reasonably to be expected in each particular case must necessarily

depend very much upon the peculiar circumstances attending it; and hence it is quite impracticable to lay down any rule upon that subject as applicable to all cases involving the necessity of showing a reasonable resistance. (*Felton v. State*, 39 N. E. Rep. [Ind.], 228; *Anderson v. State*, 104 Ind., 467, 474, 4 N. E. Rep., 63, and 5 N. E. Rep., 711; *Ledley v. State*, 4 Ind., 580; *Pomeroy v. State*, 94 Ind., 96; *Commonwealth v. McDonald*, 110 Mass., 405; 2 Bishop, Criminal Law, sec. 1122.)

In the opinion in the case of *Hammond v. State*, 39 Neb., 252, POST, J., says with reference to an instruction in which it was stated: "'In order to convict, they must find that the prosecutrix resisted to the extent of her ability in view of the circumstances surrounding her at the time.' Such, undoubtedly, is the general rule, but to that rule there are some recognized exceptions, among which is that where the female assaulted is very young and of a mind not enlightened on the subject, the law exacts a less determined resistance than in the case of an older and more enlightened person. (2 Bishop, Criminal Law, 1124; Wharton, Criminal Law, 1143.) * * * There exists a wide difference between consent and submission, particularly in the case of a female of tender years when in the power of a strong man. Mere submission in that case is essentially different from such a consent as the law declares to be a justification of the act. (3 Russell, Crimes, 934.) Coleridge, J., in *Reg. v. Day*, 9 C. & P. [Eng.], 722, thus distinguishes: 'Every consent involves a submission; but it by no means follows that a mere submission involves consent. It would be too much to say that an adult submitting quietly to an outrage of this description was not consenting. On the other hand, the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken as such consent.'"

In the case at bar the testimony disclosed that the party

alleged to have been assaulted was but sixteen years of age, and although of sufficient mental capacity to be placed and left in charge of the house and her invalid, almost helpless, and partially demented grandmother, and to do the necessary housework, that she was "simple minded," not of average mentality, and, moreover, that she was partially disabled physically, her collar bone having been broken a few months prior to the time of the assault, and that the injured portion of her body was still causing her pain and she was unable to employ the right arm in doing any heavy work; that the accused, when they were in the room alone and no one in the house who could be of any assistance to her (for the grandmother, according to her testimony, would have been powerless to aid her), pinioned her, or caught her around the body, held her hands and disabled her from offering resistance. Combining these facts with her testimony that she did struggle all she could and was afraid to offer further resistance to his efforts because he had been drinking whiskey, and other facts and circumstances connected with the alleged crime, as detailed in the evidence, we are satisfied that there were sufficient evidential facts apparent in the testimony to sustain a finding by the jury that there was no consent to the sexual intercourse by the prosecutrix during any portion of the act, and that she made such resistance as it was reasonable to expect her to do to manifest her opposition, when we consider her age, her strength physically, and the light or understanding which she possessed mentally, and all the other attendant facts and circumstances. If so, this was sufficient. (Wharton, Criminal Law, sec. 557; *Commonwealth v. McDonald*, *supra*.)

One assignment of the petition is that the court erred in giving paragraphs 2, 3, 4, 5, 7, 8, and 10 of the instructions given on its own motion, for the reason that under the evidence the court should have instructed the jury to acquit the defendant, and not have submitted the question of his

guilt to the jury. Having concluded that there was sufficient evidence to sustain a verdict of guilty, we have, in effect, determined the question raised by this allegation of the petition and need not further examine it. There being no fault found with any particular one of the instructions, but a general complaint directed against all of them that they should not have been given, but in their stead there should have been a direction to the jury to acquit the defendant, based upon the insufficiency of the evidence, a determination that there was evidence sufficient to submit to the jury completely answers this objection to the instructions. It is claimed in the petition that the trial court erred in admitting a portion of the evidence of one of the witnesses for the state, Philip Yocum, found on page 35 of the bill of exceptions. We have examined all of the evidence on the page indicated to the admission of which any objection was interposed, and in our opinion there is none which could in any degree prejudice the accused in his rights or mislead the jury. Hence, if there was any error it was not prejudicial.

It is further alleged that the court erred in admitting the evidence of John A. Funke, one of the witnesses for the state, and for such testimony we are directed by the petition to pages 37, 38, and 39 of the transcript of the evidence. The only interrogatory on either of the pages to which any objection was made is the following: "Q. State if on the 19th day of May, 1894, you saw the defendant Thompson. Defendant objects as immaterial and irrelevant. Overruled. Exception. A. Yes, sir." There was nothing in this question nor its answer which was harmful to the accused or his interests. All the testimony on the pages designated, except this just quoted, was received without objection, and at the close of the evidence given by this witness the attorneys for the accused asked that it all be stricken out, and it was so ordered by the court, except a small portion of it, and to the ruling of the

court allowing this small portion to remain in the record there was no objection or exception; hence there is nothing in this assignment of the petition in which we can discover any available error.

It is argued that the court erred in refusing to give certain of the instructions offered and requested by the defendant. In the motion for a new trial appears the following statement in regard to these instructions: "The court erred in refusing to give the first, second, third, fourth, and fifth paragraphs of instructions asked for by the defendant and duly excepted to at time of said refusal." It is conceded by counsel for the accused that at least one, if not two, of the instructions referred to in the foregoing quotation from the motion for a new trial were properly refused. This being conceded or determined, the action of the court in this particular will not be further examined, as where, in a motion for a new trial, it is alleged that the court erred in refusing to give a group of instructions, it will be examined or considered no further when it is ascertained that the refusal to give any one of the group of instructions was proper. (*Jenkins v. Mitchell*, 40 Neb., 664; *Hedrick v. Strauss*, 42 Neb., 485.) The judgment of the district court must be

AFFIRMED.

THOMAS C. SCOTT ET AL., APPELLEES, V. JOSEPH F. CORNISH ET AL., APPELLANTS.

FILED APRIL 3, 1895. No. 6242.

Review: DISMISSAL OF APPEAL: COSTS: JUDGMENT WITHOUT FINDING. The appeal of a party against whom alone the district court had found having been dismissed, the right of the remaining appellant to be relieved of costs is recognized in view of the fact that appellees have waived the want of a motion for such relief.

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

Jacob Fawcett, for appellants.

J. W. Roudebush, contra.

RYAN, C.

In this action the appeal of Joseph F. Cornish was dismissed for want of prosecution October 2, 1894. The rights of the other appellant, C. C. Stanley, are now presented for determination. The record discloses no finding whatever against the appellant last named, and the judgment against him was merely for costs. The appellees do not insist, as technically they might, that an alleged error in the taxation of costs, when that is the sole question made, should be presented in the district court by an appropriate motion. It is argued that since there were allegations in the petition that the contract assailed thereby was obtained by fraud through a conspiracy between the appellants, the finding that Joseph F. Cornish was guilty of fraud, as charged in the petition, was, by direct implication, a finding that C. C. Stanley was likewise guilty. It seems to us that this is too far fetched, for the finding of fraud does not necessarily involve the existence of a conspiracy, especially as this affirmative finding was alone in respect to one individual, who by no possibility could be guilty of conspiracy with himself. The judgment of the district court against C. C. Stanley is therefore

REVERSED.

CHARLES S. ELGUTTER, ADMINISTRATOR V. HERMAN DRISHAUS.

FILED APRIL 3, 1895. No. 6357.

Landlord and Tenant: NOTICE OF INTENTION TO QUIT: WAIVER. A landlord, by accepting without objection the possession of leased premises, may be deemed to have waived such right as otherwise he might have had to insist upon notice of his tenant's intention to quit, even though before such acceptance of possession the landlord had notified the tenant that he would insist upon such notice.

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

Charles S. Elgutter, pro se.

McCabe, Wood, Newman & Elmer, contra.

RYAN, C.

By the terms of a written contract between the parties to this action the plaintiff in error leased to the defendant in error certain described real property in Omaha, at a monthly rental of $35. The term of the lease was one year, beginning August 15, 1890. After the expiration of this particular year the defendant in error continued to occupy the premises, paying in advance monthly rent at the rate above stipulated. The last of these payments was made about February 1, 1892. On the 3d day of the month last named defendant in error sent to plaintiff in error a communication in the following language:

"OMAHA, February 3d, 1892.

"*Charles Elgutter, Esq., Omaha, Neb.*—DEAR SIR: I beg to inform you that I have rented a new house and intend to move by February 15th. I regret that I have no time to give you longer notice, and you are at liberty to

put a sign up now, and shall be pleased to show anybody the house while we occupy it. Should the weather be very severe by that date, and I be compelled to remain in the house a few days longer, I trust it will be satisfactory if I pay you rent up to the date I move, unless of course you should have rented it by the 15th. Please state if this is satisfactory, and oblige,

"Yours truly, H. DRISHAUS."

On the day following the last above date plaintiff in error sent the following reply to the defendant in error:

"FEBRUARY 4, 1892.

"*Mr. H. Drishaus, City*—DEAR SIR: In reply to yours of the 3d, relative to vacating the house, it will be necessary for me to require of you the usual statutory notice of one month. Trusting this is satisfactory, I am,

"Yours truly, CHARLES S. ELGUTTER."

Before February 15, 1892, defendant in error removed from the aforesaid premises and sent to plaintiff in error the keys of the house situated thereon. Plaintiff in error accepted said keys without further protest or communication to defendant in error and entered upon said premises and began making repairs for his own interest without notice to defendant in error. This action was brought to recover $35 as rent for the month which followed February 15, 1892, on the theory that the defendant in error was bound in advance to give thirty days' notice to terminate his liability for rent. There was a judgment in the district court of Douglas county in favor of the defendant. There is in the above facts sufficient evidence of a waiver of the technical right to insist upon thirty days' notice of an intention to quit to justify a finding in the district court in favor of the defendant in error, even if that right existed, a point which we do not feel called upon to determine. The judgment of the district court is

AFFIRMED.

EAGLE FIRE COMPANY OF NEW YORK V. GLOBE LOAN & TRUST COMPANY.

FILED APRIL 3, 1895. No. 5973.

1. **Insurance**: ADDITIONAL INSURANCE: WAIVER OF TERMS OF POLICY. An insurance contract provided: "This policy, unless otherwise provided by agreement indorsed hereon, shall be void if the insured shall hereafter procure any other insurance on the property covered by this policy." The insured procured additional insurance on the insured property. In a suit upon the first policy the first insurer interposed the defense that the policy was not in force at the date of the loss because the insured had procured additional insurance contrary to the above provision of the policy. The insured admitted the procuring of the additional insurance, but pleaded in avoidance of the defense that the insurance company had waived its right to forfeit the policy by reason thereof in this: (1) That the insurance company knew of the additional insurance prior to the loss, and by neglecting to cancel the policy in suit, by reason thereof it thereby waived its right to forfeit the policy and elected to carry the risk notwithstanding the additional insurance; (2) that after the loss occurred the insurer, with full knowledge of the additional insurance, submitted the amount of the loss sustained by the insured to arbitration, the insured and insurer paying the expenses thereof; (3) that after the arbitration the insurer canceled the policy, the cancellation taking effect from and after the day of the date of the loss, and repaid to the insured the unearned premium for carrying the risk from the day after the date of the loss until the expiration of the policy by its terms. *Held*, (1) That the provision in the insurance policy prohibiting additional insurance on the insured property was inserted therein for the benefit of, and might be waived by, the insurer; (2) that the violation of the policy by the insured in procuring additional insurance on the insured property without the knowledge or consent of the first insurer did not render the policy issued by it void, but voidable only at the election of such first insurer (*Hughes v. Ins. Co. of North America*, 40 Neb., 626, followed); (3) that the evidence set out in the opinion does not establish that the insurance company knew of the additional insurance prior to the date of the loss sued for; (4) that the conduct of the insurance company after the loss, and with actual knowledge of the additional insurance, in submitting the amount of the

loss to arbitration and in canceling the policy and repaying the unearned premium, sustains the finding of the jury that the insurance company by such conduct elected to and did waive its right to cancel the policy by reason of such additional insurance.

2. ———: KNOWLEDGE OF AGENT. Knowledge on the part of the agent of an insurance company authorized to issue its policies, of facts which render the contract voidable at the insurer's option, is knowledge of the company. *Gans v. St. Paul & Marine Ins. Co.*, 43 Wis., 108, followed. *German Ins. Co. v. Heiduk*, 30 Neb., 288, distinguished.

3. ———: NOTICE OF ADDITIONAL INSURANCE. The statement of an insured to the agent of the insurance company carrying the risk that the former intends to take out additional insurance on the insured property is not notice to such agent or his principal of the existence of such additional insurance when taken out by the insured.

4. Review: ASSIGNMENT OF ERROR. An assignment of error in this court that the district court erred in admitting the evidence of a certain witness will be overruled if any of the evidence given by the witness was competent.

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

The opinion contains a statement of the case.

Jacob Fawcett, for plaintiff in error:

Where a policy of insurance contains a stipulation that if the assured shall have or shall subsequently obtain additional insurance upon property insured, without the consent of the company indorsed in writing on the policy, the same shall be void, said stipulation is material, and lawful, and will be upheld. (*Herman Ins. Co. v. Heiduk*, 30 Neb., 288; *Zinck v. Phœnix Ins. Co.*, 60 Ia., 266; *Sugg v. Hartford Fire Ins. Co.*, 98 N. Car., 143; *Phenix Ins. Co. v. Lamar*, 106 Ind., 513; *Continental Ins. Co. v. Hulman*, 92 Ill., 145; *Phœnix Ins. Co. v. Michigan S. & N. I. R. Co.*, 28 O. St., 69.)

Where the policy provides that its conditions shall only

be waived by the written or printed consent of the Company indorsed upon the policy, the local agent cannot bind the company by an oral waiver of such conditions. (*German Ins. Co. v. Heiduk*, 30 Neb., 288; *Kroeger v. Birmingham Fire Ins. Co.*, 83 Pa. St., 264; *Beebe v. Equitable Mutual Life & Endowment Association*, 40 N. W. Rep. [Ia.], 122; *Walsh v. Hartford Fire Ins. Co.*, 7 Ins. L. J. [N. Y.], 423; *Smith v. Niagara Fire Ins. Co.*, 15 Atl. Rep. [Vt.], 353; *Enos v. Sun Ins. Co.*, 8 Pac. Rep. [Cal.], 379; *Catoir v. American Life Ins. & Trust Co.*, 33 N. J. Law, 492; *Weidert v. State Ins. Co.*, 19 Ore., 261; *Messelback v. Sun Fire Ins. Co.*, 26 N. E. Rep. [N. Y.], 34; *Gould v. Dwelling House Ins. Co.*, 51 N. W. Rep. [Mich.], 455; *Dircks v. German Ins. Co.*, 34 Mo. App., 44.)

An insurance company, as well as an individual, may limit and restrict the powers of its agent. When such restriction is known to the person dealing with the agent, the company is only bound by the acts of the agent performed within the scope of the authority conferred. (*German Ins. Co. v. Heiduk*, 30 Neb., 288.)

And the holder of the policy is estopped, by accepting the policy, from setting up or relying upon powers of the agent in opposition to the limitations and restrictions in the policy. (*Weidert v. State Ins. Co.*, 19 Ore., 261; *Smith v. Niagara Fire Ins. Co.*, 15 Atl. Rep. [Vt.], 353; *Catoir v. American Life Ins. & Trust Co.*, 33 N. J. Law, 492.)

Where the contract between the parties is that an appraisal for the sole purpose of determining the amount of loss may be had upon request of either party, and that the expenses thereof shall be borne equally, and the agreement to appraise expressly stipulates that such submission shall not be taken as a waiver on the part of the company as to the conditions of the policy, there is no room for claiming a waiver on the part of the company. (*Hill v. London Assurance Corporation*, 9 N. Y. Sup., 502; *Whipple v. North British & Mercantile Fire Ins. Co.*, 11 R. I., 139; *Jewett*

v. Home Ins. Co., 29 Ia., 562; *Johnson v. American Fire Ins. Co.*, 43 N. W. Rep. [Minn.], 59; *Boyd v. Vanderbilt Ins. Co.*, 16 S. W. Rep. [Tenn.], 471; *Englehardt v. Young*, 86 Ala., 535; *Briggs v. Fireman's Ins. Co.*, 65 Mich., 58.)

Where the mortgagee, to secure his interest in the mortgaged premises, takes out a policy of insurance thereon, running to the mortgagor, containing a stipulation against other insurance, the policy is defeated by unauthorized insurance obtained on the property by the mortgagor. (*Hale v. Mechanics Mutual Fire Ins. Co.*, 6 Gray [Mass.], 169; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y., 391; *State Mutual Fire Ins. Co. v. Roberts*, 31 Pa. Sta., 438; *Pupke v. Resolute Fire Ins. Co.*, 17 Wis. 389; *Lawrence v. Holyoke Ins. Co.*, 11 Allen [Mass.], 387; *Fix v. Illinois Mutual Fire Ins. Co.*, 53 Ill., 151; *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. [U. S.], 495.)

A statement of the insured to the agent of the company that the former intended to obtain additional insurance cannot be made the basis of a waiver of the condition of the policy which requires consent for other insurance to be indorsed on the policy. (*Kroeger v. Birmingham Fire Ins. Co.*, 83 Pa. St., 264; *Beebe v. Equitable Mutual Life & Endowment Association*, 40 N. W. Rep. [Ia.], 122; *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y, 5; *Gladding v. Insurance Associations*, 13 Ins. L. J. [Cal.], 893; *Kyte v. Commercial Assurance Co.*, 10 N. E. Rep. [Mass], 518; *Lohnes v. Ins. Co. of North America*, 6 Ins. L. J. [Mass.], 472; *Bush v. Westchester Fire Ins. Co.*, 5 Ins. L. J. [N. Y.], 207; *Bowlin v. Hekla Fire Ins. Co.*, 16 Ins. L. J. [Minn.], 305; *Enos v. Sun Ins. Co.*, 8 Pac. Rep. [Cal.], 379; *Catoir v. American Life Ins. Co.*, 33 N. J. Law, 492; *Crane v. City Ins. Co. of Pittsburg*, 2 Flip. [U. S.], 576; *Barnes v. Continental Ins. Co.*, 30 Mo. App., 539; *Dircks v. German Ins. Co.*, 34 Mo. App., 44; *Weidert v. State Ins. Co.*, 19 Ore., 261; *Messelbach v. Sun Fire Ins. Co.*, 26 N. E. Rep.

[N. Y.], 34; *Gould v. Dwelling House Ins. Co.*, 51 N. W. Rep. [Mich.], 455; *Cleaver v. Traders Ins. Co.*, 65 Mich., 527; *Marvin v. Universal Life Ins. Co.*, 85 N. Y., 278; *Forbes v. Agawam Mutual Fire Ins. Co.*, 9 Cush. [Mass.], 470; *Worcester Bank v. Hartford Fire Ins. Co.*, 11 Cush. [Mass.], 265; *Hale v. Mechanics Mutual Fire Ins. Co.*, 6 Gray [Mass.], 169; *Smith v. Niagara Fire Ins. Co.*, 15 Atl. Rep. [Vt.], 353; *Loring v. Manufacturers Ins. Co.*, 8 Gray [Mass.], 28; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y., 391; *State Mutual Fire Ins. Co. v. Roberts*, 31 Pa. St., 438; *Pupke v. Resolute Fire Ins. Co.*, 17 Wis., 389; *Lawrence v. Holyoke Ins. Co.*, 11 Allen [Mass.], 387; *Chishom v. Provincial Ins. Co.*, 20 U. C. C. P., 11; *Fix v. Illinois Mutual Fire Ins. Co.*, 53 Ill., 151; *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. [U. S.], 495; *Buffalo Steam Engine Works v. Sun Mutual Ins. Co.*, 17 N. Y., 401; *Gillett v. Liverpool, L. & G. Ins. Co.*, 41 N. W. Rep. [Wis.], 78.)

Frank T. Ransom and *Howard B. Smith, contra:*

The insurance company waived the forfeiture after it learned of the loss, and after it had full knowledge of all the facts as to the loss and additional insurance. (1 Wood, Fire Insurance, p. 286, sec. 109; *Ins. Co. of North America v. McLimans*, 28 Neb., 659; *Dwelling House Ins. Co. v. Weikel*, 33 Neb., 668.)

RAGAN, C.

This is a suit brought in the district court of Douglas county against the Eagle Fire Company (hereinafter called the "Insurance Company") upon an ordinary policy of fire insurance issued by the Insurance Company to one Ida W. Brown, insuring certain property of hers against loss or damage by fire from noon of the 13th day of March, 1890, to noon of the 13th day of March 1895. The suit is brought by Henry G. Hubbard, Mrs. Brown's assignee.

Pending the action Hubbard died, and the suit was revived in the name of his executors. The connection of the Globe Loan & Trust Company with the case need not be stated. Hubbard's executors had a verdict and judgment and the Insurance Company has prosecuted to this court a petition in error. In our examination of the case we shall not confine ourselves to a consideration of the errors assigned in the order of their assignment but consider them under the following heads:

1. That the verdict is not sustained by sufficient evidence. The policy sued upon contains this provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." As a defense to the action the Insurance Company pleaded that after the issuance of the policy in suit, and without its consent indorsed in writing on the policy, Mrs. Brown procured additional insurance on the insured property. Hubbard's executors by their reply to this defense admitted that Mrs. Brown procured additional insurance on the insured property without the consent of the Insurance Company having been first indorsed in writing on the policy in suit, but pleaded in avoidance of the defense that the company had waived Mrs. Brown's violation of the policy in that respect in this: That prior to the loss the company had notice of the procuring of such additional insurance and failed to exercise its right to cancel the policy by reason of such additional insurance and thereby elected to carry the risk notwithstanding such additional insurance; that after the loss occurred the Insurance Company, with full knowledge of the existence of the additional insurance in pursuance of an agreement with Mrs. Brown, submitted the amount of the loss or damage sustained by Mrs. Brown by reason of the destruction of the insured

property by fire to arbitration, the insured and the insurer paying the expenses of such arbitration; that the loss occurred on the 9th day of November, 1890, and on the 24th of November, 1890, after arbitration of the amount of the loss, the company elected to and did cancel its policy, such cancellation taking effect only from and after the day of the date of the loss, and repaid to the insured the unearned premium for carrying the risk from the day after the date of the loss until the expiration of the policy by its terms.

The evidence is undisputed that the company canceled the policy on the 24th of November, 1890, and repaid to Mrs. Brown the unearned premium and took from her a receipt of that date in words and figures as follows: "Received of the Eagle Fire Company twenty-nine dollars, return premium on policy number 474, in consideration of which said policy is canceled. Said cancellation dates from November 9th, 1890, subject however to claim for loss up to and including November 9th, 1890." The evidence is also undisputed that after the loss had occurred that the Insurance Company, with knowledge of the fact that Mrs. Brown had procured additional insurance upon the property subsequent to the date of the policy in suit, submitted the amount of the loss or damage to the insured property to arbitration. The evidence as to the knowledge or notice which the Insurance Company had of the additional insurance prior to the loss is contained in the following testimony given by Brown, the husband of the insured:

Q. After * * * this insurance had been taken out that is being sued on here did you visit Ringwalt Bros., agents for the Eagle Company, for the purpose of taking out further insurance?

A. I did; yes, sir.

Q. Who did you find in the office?

A. Mr. Ringwalt, the same that is sitting right near the desk in the court room.

Q. At the present time?

A. Yes, sir.

Q. What transpired between you and Mr. Ringwalt?

A. I told Mr. Ringwalt that I was going to take out some more insurance. I asked him to give me a list of the insurance, as Mr. Devries had changed the amount of the policies. I was not sure about the amount. He said all right, and he went and got some large book from a book-case and he put it down with a lead pencil.

Q. Who put it down?

A. Mr. Ringwalt put down the amount of the insurance and the name of the company and handed that to me.

Q. Look at the paper I hand you now and state whether that is the memorandum Mr. Ringwalt made and handed you at the time you are speaking of?

A. That is the memorandum.

Q. When did you first speak to Mr. Ringwalt after that about additional insurance and when did he first learn about it to your knowledge, about the additional insurance?

A. After the time I got this paper from him?

Q. Yes.

A. Why, on the morning of the 10th, I think it was, of November. That was the day after the fire on Monday morning.

Q. Where did you see him?

A. Out there at the house.

Q. What was said there about additional insurance?

A. He wanted to know if I had that insurance written I was speaking about, and I told him "Yes." He said, have I notified those companies. He wanted to know if they had been out there, and I said, "No, not so far."

Q. Was anything said about the amount of additional insurance?

A. Yes, I told him the amount.

Q. Was anything further said about it?

A. No, sir; Mr. Ringwalt seemed to be in a hurry. He didn't stop there more than ten minutes probably all together.

What is the effect of this evidence? We think that the evidence of Brown amounts to this: (1.) That about the 5th of November, prior to the destruction of the property by fire, Mr. Brown, husband and agent of the insured, went to the agents of the Insurance Company, asked them for certain information, and told them that he intended to place additional insurance upon the insured property; but we do not think that this evidence shows, nor that the jury would have been justified in inferring from it, that the Insurance Company, or its agents, knew at any time before the loss made the subject of this suit that Mrs. Brown had procured additional insurance upon the insured property. (2.) That the conduct of the Insurance Company after the loss, in submitting the amount of the loss or damage sustained by Mrs. Brown by reason of the destruction of the insured property by fire to arbitration, was evidence which tended to show that the Insurance Company at that time, having knowledge of the existence of the additional insurance, had elected to waive a cancellation of the policy on account of such additional insurance. It is true that the contract between the insured and the insurer under which this arbitration took place provided that the arbitration should not be construed as a waiver of any of the rights or defenses of either party, nor as either an admission or denial of liability on the part of the Insurance Company; but this only meant that the arbitration should not be conclusive evidence of a waiver on the part of the Insurance Company of any legal defense it might have to a suit upon the policy. The arbitration, then, while not conclusive evidence, was we think competent evidence for the jury to consider in determining whether or not the Insurance Company waived the violation of the policy by Mrs. Brown in taking out additional insurance. (3.) That the act of the

Insurance Company in canceling the policy on the 24th of November, 1890, and repaying to Mrs. Brown the unearned premium to which the Insurance Company would have been entitled for carrying the risk from the 10th of November, 1890, until noon of the 13th of March, 1895, both dates inclusive, was evidence which tended very strongly to show that the Insurance Company at that time recognized the policy as being in force up to and including the day that the loss sued for occurred. Whether the Insurance Company waived the provision in the policy which made it voidable at the election of the Insurance Company in case the insured should procure additional insurance without the consent of the company thereto having been first indorsed on the policy was a question of fact for the jury, and this question of fact was to be found one way or the other by the jury from the facts and circumstances in evidence in the case which went to show the intention of the Insurance Company in the premises. If the Insurance Company did not intend to and had not waived its right to cancel the policy by reason of Mrs. Brown's procuring additional insurance, it is very difficult to understand its conduct in going to the expense of having the amount of the loss or damage sustained by Mrs. Brown determined by arbitration; and it is still more difficult to understand why the Insurance Company paid her the unearned premium from the 10th day of November, 1890, to the expiration of the policy by its terms. Mrs. Brown having violated the policy by procuring additional insurance thereon without the knowledge or consent of the insurer, it was entitled on discovering such violation to cancel the policy by reason thereof, such cancellation to take effect from and after the date of its violation. But the Insurance Company did not do this. By its own act it canceled the policy on the 24th of November, the cancellation to take effect on and after the 10th day of November, the day after the date of the loss. The evidence then on which this verdict rests is not very satis-

factory. It is slight; but we are constrained to say we think it is sufficient.

2. That the judgment is contrary to the law of the case. The argument under this contention is that the notice given by the insured to the insurance company's agents of his intention to procure additional insurance on the insured property was not notice to the company. In other words, that notice to an agent is not notice to his principal. In view of what we have already said as to the effect of the evidence of Brown, we might dispense with any further consideration of this evidence, and would do so but for the fact that counsel seems to misapprehend the decision of this court in *German Ins. Co. v. Heiduk*, 30 Neb., 288. In that case the defense was the same as it is here—additional insurance without the knowledge or consent of the insurer, and the reply that the insurance company had waived the violation of the policy in that respect, in this, that the local agent of the insurance company orally consented to such additional insurance. The policy provided: "No consent or agreement by any local agent should affect any condition of the policy until such consent or agreement is indorsed thereon," and the court held, the present chief justice, NORVAL, writing the opinion, that the oral consent of the local agent to taking out the additional insurance was not binding on the company. But that case does not hold, nor does any other case in this court hold, that a notice given to a duly authorized and acting agent of a principal about a matter within the scope of such agent's authority is not notice to the principal. In the case at bar it is not claimed that the agent of the insurance company consented that the insured might procure additional insurance upon the property. The claim made is—though, as we have seen, the evidence does not sustain it—that the insured notified the agent that he had taken out additional insurance upon the insured property, and that such notice to the agent was notice to the principal. Without a doubt the conclusion

contended for would be correct if the evidence established the fact that the insured did give the insurance company's agent notice that additional insurance had been procured upon the property. It would seem unnecessary to cite an authority in support of this rule. Insurance companies for the most part are corporations. They act and can only act through agents. Some of the insurance companies doing business in this state hold charters from the parliament of Great Britain; their domicile is in England. It will not do to say that a notice, to be effective and binding upon such a company, must be served by the insured on the company at its home office in London or Liverpool. Again, it is to be remembered that the violation of this provision by the assured in procuring additional insurance on the property without the knowledge or consent of the first insurer did not render the policy issued by it void, but voidable at the election of such first insurer; that this provision was inserted in the insurance contract for the benefit of, and might be waived by, the insurer. (*Hughes v. Ins. Co. of North America*, 40 Neb., 626.) The evidence in this record shows that Ringwalt Bros. were the agents of this insurance company at the time the policy in suit was issued, and that they continued to be the agents of this company, so far as this record shows, until the present time; and that they had authority not only to issue but to cancel policies when in their judgment it was for the interest of their principals to do so.

In *Phenix Ins. Co. v. Covey*, 41 Neb., 724, this court said: "Where an insurance agent, with authority to receive premiums and issue policies, exercises such authority with knowledge of the existence of concurrent insurance on the premises, the company is estopped, after a loss, to insist that the policy is void because consent to such concurrent insurance was not given in writing." In other words, the case last cited holds that the knowledge of the insurance company's agent of the existence of insurance on the property

on which he issued the policy was the knowledge of the insurance company. This rule is supported by the overwhelming weight of authority.

In *Gans v. St. Paul Fire & Marine Ins. Co.*, 43 Wis., 108, it was held: "Knowledge on the part of the agent of an insurance company, authorized to issue its policies, of facts which render the contract voidable at the insurer's option is knowledge of the company."

In *Bennett v. Council Bluffs Ins. Co.*, 31 N. W. Rep., 948, the supreme court of Iowa said: "Where the clerk of a duly appointed agent of a fire insurance company solicits insurance on property which he knows to be insured already in another company, and his employer, the agent, issues the policy upon the application so obtained, the insurance company is bound by the knowledge of the clerk."

In *McEwen v. Montgomery County Mutual Ins. Co.*, 5 Hill [N. Y.], 101, it is said: "Notice given to an agent relating to business which he is authorized to transact, and while actually engaged in transacting it, will in general enure as notice to the principal." (See, also, *American Ins. Co. v. Gallatin*, 3 N. W. Rep. [Wis.], 772; *Mattocks v. Des Moines Ins. Co.*, 37 N. W. Rep. [Ia.], 174.)

3. Another assignment of error here is that the court erred in admitting the evidence of the witness Brown, the husband and agent of the insured. We cannot review this assignment of error. Brown's testimony covers several pages of the bill of exceptions, and the petition in error does not specifically point out any particular part of his evidence which it is alleged the court erred in permitting to go to the jury; nor does it appear from the bill of exceptions that any exception was taken to the rulings of the court in permitting Brown to give the testimony which we have quoted above. An assignment of error in this court that the district court erred in admitting the evidence of a certain witness will be overruled if any of the evidence given by the witness was competent.

4. Another error assigned is "That the court erred in giving instructions numbered 1, 2, 3, and 4, given by the court upon its own motion." The first of these instructions is in the following language: "That the terms contained in the policy of insurance which has been introduced in evidence, providing for a forfeiture of the policy under certain conditions, were inserted therein for the benefit of the defendant company, and such forfeiture may be waived by the company if it chooses so to do." Certainly the court did not err in giving this instruction; and as the assignment is that the court erred in giving all of the instructions named, it must be overruled.

5. Another assignment of error is that the court erred in modifying instructions numbered one and three asked by the Insurance Company. The third of these instructions was in the following language: "You are further instructed that it appears from the evidence that one Mr. Butler, whom the evidence shows to have been an independent adjuster, residing in St. Louis, Missouri, came here and represented the defendant in the adjustment and appraisal, but there is no evidence as to what authority, if any he possessed, and the law will presume that his power extended co-extensive with the business entrusted to him, namely, the ascertaining the amount of the loss; but it will not be presumed that he had power to alter the contract between the parties, or to waive any of its conditions, these not being within the apparent scope of his authority." And the modification complained of was the addition by the court at the end of the instruction of the following words: "But such want of authority in the adjuster, if there was such want of authority, would in no way affect the authority of other officers and agents of the company to waive the conditions ofthe policy." The court did not err in modifying this instruction.

6. The final assignment of error is that the court erred in refusing to give instructions 2, 4, and 5, asked by the

Insurance Company. The fourth of these instructions is in the following language: "You are instructed that so far as the evidence discloses in this case the Ringwalt Bros. were the agents of the defendant company who issued the policy and collected the premium, but when that was done, so far as the evidence shows in this case, their authority ceased and determined, and the defendant is not bound by any knowledge which came to them affecting the validity of the policy subsequent thereto, unless it be shown that the same was communicated to the company; and as to such knowledge or information as may have come to their knowledge, or to the knowledge of either of them, and as to which there is no evidence to show the same was communicated to the company, the company is not bound, the burden being upon the plaintiff to show that such information or communication was delivered to the company." The court did not err in refusing to give this instruction; and since the assignment is that it erred in refusing to give all the instructions named, the assignment must be overruled. By this instruction the Insurance Company requested the court to tell the jury that after Ringwalt Bros., the Insurance Company's agents, had issued the policy in suit that their authority as agents of the Insurance Company ceased. This would have been wrong. The evidence in the record shows that they were not only agents of the company at the time they issued the policy in suit, but that they were agents of the company at the time the loss occurred, at the time the arbitration of the loss took place, at the time the policy in suit was canceled, and at the time of the trial of this action; and that they had authority not only to issue policies, but to cancel them. The agent of the Insurance Company said on the witness stand in this case that had he known of the existence of the additional insurance prior to the occurrence of the loss that he would have canceled the policy of Mrs. Brown. But this instruction was bad for another reason. By it the Insurance Company requested

the court to charge the jury as a matter of law that the Insurance Company was not bound by any knowledge affecting the validity of the policy which came to the Insurance Company's agents unless such knowledge was communicated to the Insurance Company. We have already seen this is not the law.

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

AFFIRMED.

GERMAN INSURANCE & SAVINGS INSTITUTION v. JACOB KLINE.

FILED APRIL 3, 1895. No. 6063.

1. **Insurance:** NOTICE AND PROOF OF LOSS: WAIVER. Notice and proofs of loss are waived when an insurance company denies liability on the ground that its policy was not in force when the loss occurred.
2. ———: VALIDITY OF POLICY: APPLICATION: WAIVER. When an insurance company issues its policy and accepts and retains the premium without requiring an application by the insured and without making inquiry as to the condition of the property or the state of its title, and the insured has in fact an insurable interest, the company will be conclusively presumed to have insured such interest and to have waived all provisions in the policy providing for its forfeiture by reason of any facts or circumstances affecting the condition or title of the property in regard to which no such statement was required or inquiry made.

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

The facts are stated by the commissioner.

Bartlett, Crane & Baldrige, for plaintiff in error:

Denial of liability after expiration of time for furnish-

ing proofs of loss is not a waiver of the proofs. (Wood, Fire Insurance, p. 725; *Metropolitan Safety Fund Accident Association v. Windover*, 27 N. E. Rep. [Ill.], 538; *Van Kirk v. Citizens Ins. Co.*, 48 N. W. Rep. [Wis.], 798.)

The provision of the policy to furnish proofs of loss as soon as possible was not complied with. The right to furnish and keep alive a claim of recovery required this to be done in a few days. (*Trask v. State Fire & Marine Ins. Co.*, 29 Pa. St., 198; *Roper v. Lender*, 1 El. & El. [Eng.], 825; *McEvers v. Lawrence*, 1 Hoff. Ch. [N. Y.], 172; *Inman v. Western Fire Ins. Co.*, 12 Wend. [N. Y.], 452; *Cornell v. Milwaukee Mutual Fire Ins. Co.*, 18 Wis., 407; *Whitehurst v. North Carolina Mutual Ins. Co.*, 7 Jones Law [N. Car.], 433; *Quinlan v. Providence Washington Ins. Co.*, 31 N. E. Rep. [N. Y.], 32.)

The company is not liable. It had no notice that the insured building was situated on leased ground. Knowledge of the agent was not notice to the company. (*East Texas Fire Ins. Co. v. Brown*, 18 S. W. Rep. [Tex.], 713; Ostrander, Fire Insurance, p. 108, and citations; *Pottsville Mutual Ins. Co. v. Minnequa Springs Improvement Co.*, 100 Pa. St., 137; *Liverpool, London & Globe Ins. Co. v. Sorsby*, 60 Miss., 302; *Forest City Ins. Co. v. School Directors*, 4 Ill. App., 145; *Queen Ins. Co. of Liverpool v. Young*, 5 So. Rep. [Ala.], 116; *American Ins. Co. v. Luttrell*, 89 Ill., 314; *Jordan v. State Ins. Co.*, 64 Ia., 216; *Donnelly v. Cedar Rapids Ins. Co.*, 70 Ia., 693; *Mullin v. Vermont Mutual Fire Ins. Co.*, 58 Vt., 113; *Mers v. Franklin Ins. Co.*, 68 Mo., 127.)

Charles Offutt, contra:

The company's denial of all liability was a waiver of proofs of loss. (*Brink v. Hanover Ins. Co.*, 80 N. Y., 112; *Goodwin v. Massachusetts Mutual Life Ins. Co.*, 73 N. Y., 480; *Grattan v. Metropolitan Life Ins. Co.* 80 N. Y., 289;

Mosely v. Vermont Mutual Fire Ins. Co., 55 Vt., 146; *Marston v. Massachusetts Life Ins. Co.*, 59 N. H., 94; *Kansas Protective Union v. Whitt*, 36 Kan., 760; *State Ins. Co. v. Maackens*, 38 N. J. Law, 569; *Lebanon Mutual Ins. Co. v. Erb*, 4 Atl. Rep. [Pa.], 8.)

Where there is no exact limit for furnishing proofs of loss, the policy should be construed as requiring their production within a reasonable time. (*Brink v. Hanover Ins. Co.*, 80 N. Y., 112; *Hoose v. Prescott Ins. Co.*, 23 Ins. L. J. [Pa.], 475; *Continental Ins. Co. v. Lippold*, 3 Neb., 391; *Killips v. Putnam Fire Ins. Co.*, 28 Wis., 472; *Columbia Ins. Co. v. Lawrence*, 10 Pet. [U. S.], 507.)

The company cannot claim a forfeiture on the ground that the building stood on leased land. There was no written application and no concealment by the insured of the true state of the title. The company was bound by the knowledge of its agent. (*Bardwell v. Conway Mutual Fire Ins. Co.*, 122 Mass., 90; *Armenia Ins. Co. v. Paul*, 91 Pa. St., 520; *O'Neill v. Ottawa Agricultural Ins. Co.*, 30 U. C. C. P., 151; *Dodge County Mutual Ins. Co. v. Rogers*, 12 Wis., 374; *Tiefenthal v. Citizens Mutual Fire Ins. Co.*, 53 Mich., 306; *Carson v. Jersey City Fire Ins. Co.*, 43 N. J. Law, 300; *Jersey City Fire Ins. Co. v. Carson*, 44 N. J. Law, 210; *John Hancock Mutual Life Ins. Co. v. Daly*, 65 Ind., 6; *Cross v. National Fire Ins. Co.*, 132 N. Y., 133; *Wood v. American Fire Ins. Co.*, 29 N. Y. Sup., 252; *Phœnix Life Ins. Co. v. Raddin*, 120 U. S., 183; *Dunbar v. Phenix Ins. Co.*, 72 Wis., 492; *Lorillard Fire Ins. Co. v. McCulloch*, 21 O. St., 179; *Dayton Ins. Co. v. Kelly*, 24 O. St., 345; *Philadelphia Tool Co. v. British-American Assurance Co.*, 20 Ins. L. J. [Pa.], 566; *O'Brien v. Ohio Ins. Co.*, 13 Ins. L. J. [Mich.], 825; *Van Kirk v. Citizens Ins. Co. of Pittsburg*, 48 N. W. Rep. [Wis.], 798; *Peet v. Dakota Fire & Marine Ins. Co.*, 47 N. W. Rep. [So. Dak.], 532; *Wytheville Ins. & Banking Co. v. Stultz*, 20 Ins. L. J. [Va.], 481; *Castner v. Farmers Mutual Fire*

Ins. Co., 46 Mich., 15; *Alkan v. New Hampshire Ins. Co.*, 53 Wis., 137; *Dwelling House Ins. Co. v. Hoffman*, 18 Atl. Rep. [Pa.], 397; *Gristock v. Royal Ins. Co.*, 49 N. W. Rep. [Mich.], 634; *Morrison v. Tennessee Mutual & Fire Ins. Co.*, 18 Mo., 262; *Hall v. Niagara Fire Ins. Co.*, 53 N. W. Rep. [Mich.], 727; *Hoose v. Prescott Ins. Co. of Boston*, 84 Mich., 309; *German Ins. Co. v. Rounds*, 35 Neb., 752; *Bennett v. Council Bluffs Ins. Co.*, 70 Ia., 600; *State Ins. Co. v. Jordan*, 29 Neb., 514; *Boetcher v. Hawkeye Ins. Co.*, 47 Ia., 253; *McArthur v. Home Life Association*, 73 Ia., 336; *Indiana Ins. Co. v. Hartwell*, 19 Ins. L. J. [Ind.], 824.)

IRVINE, C.

This was an action by Kline against the insurance company to recover upon a policy of insurance written on a frame building in the city of Omaha, the building having been destroyed by fire. The insurance company answered, admitting the payment of the premium and the issuance of the policy, but denying that plaintiff was the owner of the building. Further answering, the defendant alleged that the policy provided that "if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company and so expressed in the written part of this policy, otherwise this policy shall be void;" that the building did stand upon leased ground, and that this fact was not communicated to the defendant. Two other defenses were pleaded of an affirmative character, in support of which it was not sought to introduce any evidence. They will not, therefore, be noticed. The defense was actually made on two grounds: First, that notice and proofs of loss were not furnished; and second, that the building stood on leased ground, contrary to the terms of the policy. At the close of the

evidence the court instructed the jury that the only question for their consideration was the amount of damage, and that they should return a verdict for the plaintiff for such amount.

After the loss the company wrote to plaintiff's attorney a letter stating that the company denied all liability because the policy was void according to its conditions at the time of the fire. In its answer it pleaded that for three different reasons the policy was so void. Notice and proofs of loss are waived when an insurance company denies liability on the ground that the policy was not in force when the loss occurred. (*Phenix Ins. Co. v. Bachelder*, 32 Neb., 490; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 475; *Dwelling House Ins. Co. v. Brewster*, 43 Neb., 528.)

As to the defense based upon the title to the land, the evidence showed that the policy contained the provision set out in the answer; that the building belonged to the plaintiff, and that it stood on leased land. It appears that the Omaha agents of the company were Kneutsen, Smith & Co., and that they had in their employ one Miller, who solicited insurance for them and received a commission on policies written. Miller approached the plaintiff, requesting insurance, and was told to return some days later and it would be given him. Plaintiff told Miller that the building stood on leased ground. Miller filled out a printed blank stating certain facts in connection with the risk, but containing no reference to title. This he delivered to Kneutsen, Smith & Co., who issued the policy. The insurance company claims that Miller was not the agent of the company and that plaintiff's statement to him in regard to the title did not charge the company with notice, and that therefore the provision of the policy avoiding it because of the building's being on leased ground was enforceable. It is not necessary to decide what the nature of Miller's agency was. If of such a character as to charge the company with notice,

then the facts in regard to the title were truly disclosed and the company issued the policy and received and retained the premium with such notice. This fact would estop the company from now insisting that the policy was void because of the lease-hold clause. (*Phenix Ins. Co. v. Covey*, 41 Neb., 724; *German-American Ins. Co. v. Hart*, 43 Neb., 441.) On the other hand, if Miller was not the agent of the company, then the policy was issued without any inquiry in regard to title. In any event it was issued without requiring any formal application, and there was certainly no concealment or misrepresentation by plaintiff. When an insurance company issues its policy and accepts and retains the premium without requiring an application by the insured, and without making any inquiry as to the condition of the property or the state of the title, and the insured has in fact an insurable interest, the company will be conclusively presumed to have insured such interest and to have waived all provisions in the policy providing for its forfeiture by reason of any facts or circumstances affecting the condition or title of the property in regard to which no such statement was required or inquiry made. The real contract of insurance is made before the policy is written, and the insured, by accepting the policy with such a condition as the one relied upon, cannot be deemed to have represented his title to be in fee-simple, or not by lease-hold. How can it be said that under such circumstances there has been either fraud, misrepresentation, or concealment on the part of the insured? He has represented nothing. He has not been asked to represent anything. To give such a condition the force contended for would, instead of protecting the insurance company from fraud, be to permit it to work a fraud upon a policy holder, and permit insurance companies to avoid their policies all the more readily because of neglecting inquiry and investigation before writing them. On this point, as on most points of insurance law, the authorities are not alto-

gether harmonious, but we think their great weight is in accordance with the views we have expressed. (*Philadelphia Tool Co. v. British-American Assurance Co.*, 132 Pa. St., 236; *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass., 136; *Castner v. Farmers Mutual Fire Ins. Co.*, 46 Mich., 15; *O'Brien v. Ohio Ins. Co.*, 52 Mich., 131; *Western Assurance Co. v. Mason*, 5 Brad. [Ill.], 141; *Dunbar v. Phenix Ins. Co.*, 72 Wis., 492; *Cross v. National Fire Ins. Co.*, 132 N. Y., 133.) It is in accordance with the same principle that the courts have held with practical uniformity that where a formal application is required and some questions are left unanswered or not fully answered, and the company accepts the application in that form and issues its policy, the company thereby waives the information required by such questions. (*Phœnix Life Ins. Co. v. Raddin*, 120 U. S., 183; *Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300; *Lorillard Fire Ins. Co. v. McCulloch*, 21 O. St., 176.) There was no contradiction and no conflict in the evidence on any of these points, and it follows that in any view of the case the plaintiff was entitled to judgment. Therefore, the instruction given by the court was correct.

Error is assigned on the refusal of certain instructions asked by the company. None of these related to the measure of damages, and as the peremptory instruction to find for the plaintiff was correct, it was not error to refuse any instruction asked by the defendant in regard to the right to recover.

Numerous assignments of error relate to the rulings upon the evidence. But one of these is referred to in the briefs and the others are deemed waived. The plaintiff, on direct examination, was asked, "Who was the agent with whom you made the transaction when you got this policy?" This was objected to as calling for a conclusion. The objection was overruled and the witness answered, "Mr. Miller." It is claimed that this ruling was particularly prejudicial because a similar question was excluded when asked a wit-

ness for the defendant. The latter witness was asked whether he knew Miller and then this question was put, "Was he an agent of the German Insurance & Savings Institution at that time?" An objection to this question was sustained. Both rulings were free from error. In the question first quoted, put to the plaintiff, he was not asked for whom Miller was agent. There was no dispute as to Miller's agency either for the company or for the plaintiff in procuring the policy, and the question put to the plaintiff merely asked as to the identity of the person. It involved no question as to his authority or the identity of the principal. The second question put to defendant's witness called for a legal conclusion as to what constituted agency.

The record discloses no error and the judgment is

AFFIRMED.

M. YENNEY ET AL. V. CENTRAL CITY BANK.

FILED APRIL 3, 1895. No. 5939.

1. **Negotiable Instruments:** PAYMENT: NOTICE TO TRANSFEREE. Where a negotiable promissory note has been before maturity indorsed to a third person, the maker of the note must, in order to avail himself of the defense of payment before the indorsement, plead and prove that the plaintiff had notice of such payment before the indorsement.

2. **Bill of Exceptions:** DOCUMENTS: AUTHENTICATION. In order to authenticate a document attached to a record as the bill of exceptions settled in the district court, there must be a certificate of the clerk of the court to that effect.

3. ———: ALLOWANCE BY CLERK. The mere stipulation of counsel that the clerk of the court may sign and allow a bill of exceptions is not sufficient to confer authority upon him to do so. In order to confer such authority it must appear that the judge is dead; that he is prevented by sickness or absence from signing and allowing the bill, or the parties or their counsel must agree

upon the bill of exceptions and attach thereto their written stipulation to that effect. *Scott v. Spencer*, 42 Neb., 632, followed.

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

J. W. Sparks, for plaintiffs in error.

W. T. Thompson, contra.

IRVINE, C.

The defendant in error sued the plaintiffs in error on a promissory note made by the plaintiffs in error to the order of the Central City Bank, a partnership formerly existing, and which, before the maturity of the note, indorsed it to the defendant in error, a corporation which purchased the assets of the partnership of the same name. The Yenneys answered the petition, pleading that the partnership had held as collateral security to the note three notes of other persons which, prior to the transfer to the corporation, had been paid and their proceeds applied to the satisfaction of the note sued on, and that the corporation had notice of these facts at the time of its purchase. There was a verdict and judgment for the bank and the Yenneys prosecute error.

The first point made on behalf of plaintiffs in error is that under the pleadings they were entitled to judgment. This argument is based upon the proposition that either by the petition or the reply it must be alleged that the bank was an innocent holder before maturity and had actually paid the consideration before notice of the defense. We have before had occasion to advert to the unfortunate distinctions which have been drawn as to the burden of proof of *bona fides* when defenses are pleaded which would be sufficient against the original parties to a negotiable instrument. (*Violet v. Rose*, 39 Neb., 660.) The legislature has, however, freed the present case from difficulty on that

ground. Chapter 41, section 5, Compiled Statutes, is as follows: "If any such bond, note, or bill of exchange shall be indorsed on or before the day on which the same is made payable, and the indorsee shall institute an action thereon, the defendant may give in evidence at the trial any money actually paid on said bond, note, or bill of exchange before the same was indorsed or assigned to the plaintiff, on proving that the plaintiff had notice of such payment before such indorsement was made and accepted." The statute, therefore, requires as a part of the defense that the defendants establish notice on the part of the plaintiff. The petition alleged an indorsement to the plaintiff for value before maturity. The answer, after pleading the payment, proceeded as follows: "And these defendants allege that the plaintiff had knowledge before the assignment of said note set forth in said petition to it that said Merriam and Persinger held said three notes as collateral security to said note, and the said plaintiff had sufficient knowledge of the above set forth facts to have put it on its guard that these defendants had a full defense to said note; and that the same had been paid. And these defendants deny that said plaintiff is an innocent purchaser of said note before due and for a valuable consideration." The reply was a general denial. The allegation of notice was a material and necessary averment of the answer and the denial in the reply properly joined issue thereon.

Complaint is made of the sixteenth paragraph of the instructions. The only assignment of error in relation thereto is as follows: "The court erred in refusing to give instruction No. 1 asked for on behalf of plaintiffs in error and in giving on his own motion instructions Nos. 10, 11, 14, 15, 16, 20, 21, and 22 of instructions given." No complaint is made in the briefs of any instruction except the sixteenth, and some of those given by the court are too manifestly correct to admit of discussion. This assignment of error must, therefore, fail. (*Hiatt v. Kinkaid*, 40 Neb., 178.)

Complaint is also made of the admission in evidence of certain books of the banking partnership. What purports to be the bill of exceptions was allowed by the clerk of the court apparently under a stipulation of the same character as in *Scott v. Spencer*, 42 Neb., 632. Even this stipulation is not attached to the bill, but appears without any authentication whatever after the transcript of the record. The authority of the clerk to settle the bill does not therefore appear. Furthermore, there is no certificate of the clerk as required by section 587*b* of the Code of Civil Procedure authenticating the document filed as a bill of exceptions.

In order to leave no misapprehension as to the effect of this opinion, we think it proper to say that we have treated the case on the theory on which it was presented to the district court, and we are not deciding that payments made on collateral notes before the maturity of the note to secure which they are pledged are to be treated as payments upon the principal note before its maturity.

JUDGMENT AFFIRMED.

FRANK E. MOORES ET AL. V. PEYCKE BROTHERS ET AL.

FILED APRIL 4, 1895. NO. 5937.

1. **Executions:** DISTRIBUTION OF PROCEEDS OF SALE. Where two or more judgments in favor of different plaintiffs and against the same defendant are entered at the same term of the district court, and executions are issued thereon during the term, or within ten days thereafter, and delivered to the sheriff, although on different days, which are levied upon the debtor's goods and chattels, the money arising from the sale under any or all of such writs, if insufficient to satisfy all the executions, must be apportioned *pro rata* among the several execution creditors.

2. ———: ———. Where two or more writs of execution against the same debtor are delivered to the officer on the same day, in distributing the fund raised thereon, or upon any one of such writs, each creditor is entitled to a *pro rata* application of the money.

3. ———: ———. In every case not enumerated above the execution first placed in the hands of the officer for service has preference and must be first satisfied.

4. **Judgments:** TRANSCRIPTS FROM INFERIOR COURTS. The filing of the transcript of a judgment of a justice of the peace or county court with, and the docketing of it by, the clerk of the district court do not make it a judgment of the district court.

5. **Executions:** DISTRIBUTION OF PROCEEDS OF SALE. Two executions were issued against H. upon judgments of the district court during the term at which they were entered and placed in the hands of the sheriff, who levied the writs upon the personal property of the debtor, and subsequently, at the same term of said court, several transcripts of judgments recovered against H. before a justice of the peace were filed in the district court, and executions were immediately issued thereon by the clerk and delivered to the officer, which were levied upon the same property subject to the other levies. *Held*, That the money raised on the sale of the property must be first applied *pro rata* to the satisfaction of the writs first delivered to the officer, and next to the payment of the other executions in the order of their priority.

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

Chas. B. Keller, for plaintiff in error, cited: *Hibbard v. Weil*, 5 Neb., 44; *State v. Hunger*, 17 Neb., 217; *Johnson v. Walker*, 23 Neb., 742; *Lambert v. Paulding*, 18 Johns. [N. Y.], 312; *Marsh v. Lawrence*, 4 Cow. [N. Y.], 461; *Davis v. Scott*, 22 Neb., 154; *Longenocker v. Zeigler*, 1 Watts [Pa.], 252; *Auerbach v. Behnke*, 41 N. W. Rep. [Minn.], 946.

McCabe, Wood & Elmer, contra, cited: *Wilcox v. May*, 19 O., 408; *Clevenger v. Hansen*, 24 Pac. Rep. [Kan.], 61; *Atkins' Appeal*, 58 Pa. St., 86; *Brock v. Hopkins*, 5 Neb.,

231; 2 Herman, Executions, sec. 446; *State v. Hamilton*, 29 Neb., 198; *Craig v. Governor*, 3 Cold. [Tenn.], 244; *Blohme v. Lynch*, 2 S. E. Rep. [S. Car.], 136; *Whitman v. Haines*, 4 N. Y. Sup., 48.

NORVAL, C. J.

This is a proceeding in error to review the order of the district court of Douglas county distributing the moneys arising from the sale of certain personal property upon executions. The facts upon which the order in question was based are as follows: On the 1st day of June, 1892, the Farmers & Merchants Bank of Fremont recovered a judgment by confession in the district court of Douglas county against one O. S. Higgins for the sum of $500, and on the same day Higgins confessed judgment in the same court in favor of D. M. Steele & Co. for $360. An execution was issued upon each of these judgments on the date they were rendered and delivered to the sheriff, who levied the writs on that day upon a stock of merchandise belonging to the execution debtor. Two days later Allen Bros. recovered a judgment for the sum of $137 against Higgins before a justice of the peace of Douglas county, and the justice immediately issued an execution thereon and placed it in the hands of the sheriff, who levied upon the same stock of goods theretofore taken under the writs in favor of the Farmers & Merchants Bank and D. M. Steele & Co., said levy being made subject to said prior executions. No transcript of the judgment in favor of Allen Bros. was ever filed in the district court. On June 3, 1892, judgments were recovered against said Higgins in the justice court of Seymour G. Wilcox, in and for Douglas county, in favor of the following named parties, and for the amounts stated: Peycke Bros., for $47.70 debt and $7.70 costs; R. Douglas & Co., in the sum of $101.30 and $7.70 costs; and Sahmer-Richardson Manufacturing Company, for $20.88 debt and $7.70 costs. On the same

day transcripts of the three last described judgments were duly filed in the district court and executions issued thereon by the clerk and delivered to the sheriff, and by him on the same day levied upon the stock of merchandise already mentioned, but in terms subject to the levies made under the three prior executions aforesaid. On June 6, 1892, the following judgments were recovered before the said Justice Wilcox against said Higgins: Pitkin Bros., $90.84; Farwell & Co., $23.38; Peycke Candy Company, $17.25, and Pitkin & Brooks, $159.11. The costs are not included in the above sums, the costs in each case being $7.70. Transcripts of last named judgments were filed in the district court on June 11, 1892, and on the same day executions were issued thereon and delivered to the sheriff, who forthwith levied the writs upon the stock of goods above named, subject to the executions issued on June 1 and June 3 respectively. The property levied upon was advertised and sold by the sheriff on June 17, 1892, under the executions in favor of the Farmers & Merchants Bank and D. M. Steele & Co., for $1,105. The next day the sheriff, after deducting the costs of sale, $142.40, returned the residue of the proceeds into the district court, paying to Frank E. Moores, the clerk of said court, the sum of $962.60. On the same day said clerk paid to the Farmers & Merchants Bank $502.36, being the amount of their judgment and interest, and to D. M. Steele & Co., $361.99, said sum being the principal of their judgment and interest, and after the payment of the costs in these two cases, amounting to $16.76, there remained in the hands of the clerk of the district court the sum of $71.49. The May, 1892, term of the district court in and for Douglas county convened May 9, 1892, and adjourned *sine die* July 30th of the same year. On June 20, 1892, two days after the money had been paid out by the clerk as aforesaid, a motion was filed in the district court in the case of Peycke Bros. v. Higgins, praying a *pro rata* distribution of the moneys

realized from the sale of the property among all the judgment creditors above referred to, excepting Allen Bros. This motion was sustained by the court, and the clerk was ordered to distribute the funds *pro rata* between all of the execution creditors except Allen Bros. To reverse this decision Frank E. Moores, the clerk of the court, and the Farmers & Merchants Bank and D. M. Steele & Co. have prosecuted a petition in error to this court.

Under the foregoing facts the defendants in error contend that no priority or preference between the eight executions issued out of the district court exists, but that the entire fund was properly ordered by the court applied *pro rata* in payment of the eight execution creditors, according to the amount of their respective claims.

On behalf of plaintiffs in error it is urged that, as the money arising from the sale of the property is insufficient to satisfy the several executions, the judgments in favor of D. M. Steele & Co. and the Farmers & Merchants Bank, having been rendered at the same term of court and the executions thereon having been first levied, should be first satisfied in full before any portion of the proceeds of the property should be distributed or appropriated to the judgments subsequently rendered.

The determination of the question depends upon the construction of section 484 of the Code of Civil Procedure, which provides as follows:

"Sec. 484. When two or more writs of execution against the same debtor shall be sued out during the term in which judgment was rendered, or within ten days thereafter, and when two or more writs of execution against the same debtor shall be delivered to the officer on the same day, no preference shall be given to either of such writs; but if a sufficient sum of money be not made to satisfy all executions, the amount made shall be distributed to the several creditors in proportion to the amount of their respective demands. In all other cases the writ of execution first delivered to the

officer shall be first satisfied. And it shall be the duty of the officer to indorse on every writ of execution the time when he received the same, but nothing herein contained shall be so construed as to affect any preferable lien which one or more of the judgments on which execution issued may have on the lands of the judgment debtor."

By the foregoing section, where two or more judgments are recovered at the same term of court against the same debtor, and where there is no priority of lien, and executions are issued thereon during such term, or within ten days thereafter, and placed in the hands of the sheriff, whether on the same or different days, no preference shall be given either of said writs, but if the property levied upon is insufficient to satisfy all the executions, the money realized from the sale must be distributed or appropriated to the several execution creditors in proportion to the amounts of their respective judgments. The legislature, by the section quoted, has further provided that "in all other cases the writ of execution first delivered to the officer shall be first satisfied." In other words, in all cases where executions are not issued during the term at which the judgments are entered, or within ten days after the term, as well as where the writs are received by the officer on different days, the proceeds of the sale of the preperty must be first applied in satisfaction of the execution first delivered to the officer, and so in the order of their priority. By the last clause of the section provision is made saving the rights of preferable lien-holders, but this limitation, or proviso, applies alone to lands within the county upon which the judgment is a lien, and not to lands out of the county where the judgments were rendered, nor to goods and chattels, for upon neither of which does a judgment operate as a lien.

Section 484 was under consideration in *Hibbard v. Weil*, 5 Neb., 41, and Mr. Justice GANTT, in delivering the opinion of the court, after quoting the section mentioned,

uses this language: "The above seems to be the only cases in which the statute authorizes the apportionment of money arising from the sale of a debtor's land on execution *pro rata* to judgment creditors. The one is where two or more excutions against the same debtor shall be issued during the term at which the judgments were rendered, or within ten days thereafter; the other when two or more executions against the same debtor are issued and placed in the hands of the officer on the same day."

State v. Hunger, 17 Neb., 216, was where several executions issued by a justice of the peace were delivered to the officer on the same day, and it was held that the provisions of section 484 were applicable to executions issued by justice courts, and that the money realized from the sale of the property levied upon must be distributed *pro rata* among the several judgment creditors.

In the case under consideration, the judgments of D. M. Steele & Co. and the Farmers & Merchants Bank were entered at the same term of court and on the same day, and executions were issued thereon during the term and placed in the hands of the sheriff at the same time. All the other judgments were subsequently rendered in the justice court and, with the exception of the one in favor of Allen Bros., were transcripted to the district court and executions issued thereon by the clerk thereof at the same term of court the judgments in favor of the Farmers & Merchants Bank and D. M. Steele & Co. were obtained. Does the fact that transcripts of the judgments were filed in the district court and executions were issued therefrom and delivered to the sheriff at the same term the two judgments were procured authorize the applying of the proceeds of the sale in question *pro rata* upon all the executions issued out of the district court? It is obvious that the question must be answered in the negative, unless the judgments, of which transcripts were filed and entered upon the execution docket, stand upon the same footing with the judgments rendered

in the district court. We do not think such is the case. The purpose of the legislature in enacting the section of the statute we have been considering was to provide that there should be no preference in cases where two or more executions are sued out of the same court in term time or within a specified number of days thereafter on judgments rendered at the same term against the same defendant, and when there is no priority of lien. Section 561 of the Code provides for the filing of transcripts of judgments rendered by justices of the peace in the district court of the county in which the judgments were recovered. The next section makes such judgment so transcripted and filed in term time a lien upon the lands of the defendant from the date of the filing, but when filed in vacation it is a lien as against the judgment debtor from the day of filing, "and against subsequent judgment creditors from the first day of the next succeeding term, in the same manner, and to the same extent as if the judgment had been rendered in the district court." Section 563 declares that "execution may be issued thereon to the sheriff by the clerk of the court in the same manner as if the judgment had been taken in court, and the sheriff shall execute and return the same as other executions." It is plain from these provisions that the filing and docketing of such transcript does not transform the original judgment into a judgment of the district court. The statute authorizes such filing simply for the purpose of making the judgment a lien upon the real estate of the debtor and for being enforced by the issuing of execution out of the district court. (*People v. Doe*, 31 Cal., 220; *Martin v. Mayor*, 11 Abb. Pr. [N. Y.], 295.)

The transcriptive judgments of the several defendants in error not being judgments of the district court, the conclusion is irresistible that they are not proratable in the distribution of the fund in question. The clause in section 484, which provides that "in all other cases the writ of execution first delivered to the officer shall be first satisfied,"

governs and controls in making distribution of the proceeds of the sale in the case at bar. The executions in favor of the defendants in error were not upon judgments obtained in the district court, nor were such executions placed in the sheriff's hands on the same day those in favor of the bank and D. M. Steele & Co. were delivered, but subsequently thereto; hence the writs first delivered to the officer must be first satisfied.

We have examined the three cases cited by counsel for the defendants and find them not in point. In *Wilcox v. May*, 19 O., 408, three judgments were entered at the suit of different creditors against the same defendant in the same court, at the same term, and executions were issued during the term, but on different days, directed to the sheriff of another county, which were levied upon lands of the debtor. The money arising from the sale being insufficient to satisfy all the writs, it was decided that it must be distributed *pro rata* among the three execution creditors. To the same effect is *Clevenger v. Hansen*, 24 Pac. Rep. [Kan.], 61. In *State v. Hunger*, 17 Neb., 216, twenty-four executions were issued upon separate judgments obtained in different justices' courts and placed in the officer's hands on the same day. It was held that the proceeds of the sale should be applied *pro rata* upon the several executions. The question we have been considering was not involved in any of the cases above referred to. The order of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JOHN R. PERRY V. STATE OF NEBRASKA.

FILED APRIL 4, 1895. NO. 7447.

1. **Criminal Law:** NAMES OF STATE'S WITNESSES. When the surname and the initials of the Christian name of a witness appear upon an information in a criminal prosecution, it is a sufficient compliance with the statute requiring the names of the state's witnesses to be indorsed upon the information before trial.
2. **Larceny:** EVIDENCE. In a prosecution for larceny, if the owner of the property alleged to have been stolen is examined as a witness upon the trial, his testimony that he did not consent to the taking of the property is indispensable to a conviction.

ERROR to the district court for Fillmore county. Tried below before HASTINGS, J.

Farrington Power and *John C. Martin*, for plaintiff in error.

A. S. Churchill, Attorney General, for the state.

NORVAL, C. J.

An information was filed by the county attorney in the district court of Fillmore county, charging John R. Perry, the plaintiff in error, with the larceny of a buggy of the value of $50, the property of one John W. Frantz. Upon the trial of the prisoner a verdict of guilty was returned, and he was sentenced to the penitentiary for the period of one year and to pay the costs of the prosecution, taxed at $228.68.

It is contended that the court erred in permitting Albert F. Herriot to testify as a witness on behalf of the state, for the reason that his full Christian name was not indorsed upon the information, his initials and surname alone being thereon indorsed. The statute, section 579 of the Criminal Code, requires that the names of the state's witnesses in a criminal prosecution must be indorsed upon the information

before the trial. Strictly speaking, the name of a person consists of his given and surname, yet we are unwilling to hold that the full Christian name of the witness must be indorsed on an information, although the better practice is for the county attorney to do so. Where the witness' surname and the initials of his Christian name appear upon the information it is a sufficient compliance with the law. Initials only for the given name are frequently used both in official and business transactions, and to declare that when such initials are employed it is no name would be a harsh rule. Such a construction would invalidate an information signed by the county attorney by the initials of his Christian name. It has been held that where an officer in signing the jurat to the verification of an information in a criminal case gave the initials only of his Christian name, it is a sufficient signing. (*Rice v. People*, 15 Mich., 9. See *Fewlass v. Abbott*, 28 Mich., 270.) The objection to the examination of the witness Herriot is not well taken, and is overruled.

The next assignment of error is that the verdict of guilty is not supported by sufficient evidence. The only testimony in the case was that given on the part of the prosecution, and it is urged that it does not show that the buggy in question was stolen, or taken without the consent of the owner. It is an elementary rule in criminal law that it is indispensable to the commission of larceny that the property alleged to have been stolen should have been taken against the will of the owner, and it is incumbent upon the state in such a prosecution to establish that fact before a conviction can be had. Does the proof show that the buggy was taken against the consent of the owner? The question must be answered in the negative. From the evidence returned in the bill of exceptions it appears that the prosecuting witness, John W. Frantz, at the time of the alleged theft resided in Fillmore county; that on July 29, 1894, he went to Geneva, the county seat, in his buggy,

arriving about 6 o'clock in the evening; that he tied his horse to the hitch rack in one of the principal streets of the city, the horse being attached to the vehicle; that about 10 o'clock of the same evening he returned to the place where he had left his rig and discovered that his horse was unhitched from the buggy and the latter was gone; that some five weeks thereafter the vehicle was found in the possession of the plaintiff in error; that the buggy was worth from $40 to $50. There is an entire lack of competent evidence in the case before us proving, or tending to establish, a want of consent to the taking of the buggy in dispute, on the part of Mr. Frantz, the owner. Although Mr. Frantz was called and examined as a witness by the state he was not interrogated, nor did he testify upon the point, whether or not he gave his consent or permission to the taking of the property. So far as the testimony in the record discloses, the buggy may have been taken by the permission of the owner, or under a claim of title, or under circumstances which repel all presumptions of felonious intent. Mr. Frantz being in attendance upon the trial as a witness, his testimony that he did not consent to the taking of the buggy was necessary to a conviction. The reason for the rule is that his testimony is the best evidence of the fact, and secondary evidence is allowable only when the primary or best evidence is not attainable.

In 1 Phillipps, Evidence [5th Am. ed.], note 183, section 635, it is said: "In all cases, but especially in this, the larceny itself must be proved by the best evidence the nature of the case admits. * * * This should be by the testimony of the owner himself, if the property was taken from his immediate possession, or if from the actual possession of another, though a mere servant or child of the owner, that other must be sworn, so that it may appear that the immediate possession was violated, and this, too, without the consent of the person holding it. Where nonconsent is an essential ingredient in the offense, as it is

here, direct proof alone, from the person whose non-consent is necessary, can satisfy the rule. You are to prove a negative, and the very person who can swear directly to the necessary negative must, if possible, always be produced. (*Rex v. Rogers*, 2 Campb. [Eng.], 654; *Williams v. East India Co.*, 3 East [Eng.], 192, 201.) Other and inferior proof cannot be resorted to till it be impossible to procure this best evidence. If one person be dead who can swear directly to the negative, and another be living who can yet swear to the same thing, he must be produced. In such cases, mere presumptive *prima facie* or circumstantial evidence is secondary in degree, and cannot be used till all the sources of direct evidence are exhausted."

This court in *Bubster v. State*, 33 Neb., 663, decided that in a prosecution for larceny the owner of the property ordinarily must be called as a witness to prove the taking of the property was without his consent. This doctrine is supported by the following authorities: Rapalje, Larceny & Kindred Offenses, sec. 135; *State v. Morey*, 2 Wis., 362; *State v. Moon*, 41 Wis., 684; *Erskine v. State*, 1 Tex. Ct. App., 405; *Jackson v. State*, 7 Tex. Ct. App., 363; *Wilson v. State*, 12 Tex. Ct. App., 481; *Bowling v. State*, 13 Tex. Ct. App., 338.

Because of the insufficiency of the evidence, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

W. C. COFFIELD V. STATE OF NEBRASKA.

FILED APRIL 4, 1895. NO. 6853.

1. **Criminal Law: PRELIMINARY EXAMINATION: WAIVER.** A defendant, unless a fugitive from justice, is entitled to a preliminary examination before he can be placed upon trial in a

prosecution by information, unless he waives such examination, which he may do either when brought before the examining magistrate, or when called upon to plead to the information in the district court.

2. ———: ———: OBJECTION AFTER VERDICT. It is too late after verdict to raise the objection that a preliminary examination has not been had for the crime charged in the information.

3. ———: ———: OBJECTION TO TRIAL. Such objection must be raised before going to trial by motion to quash the information or by plea in abatement.

4. **Adoption of Foreign Statute and Construction.** Where the legislature adopts the statute of another state, the judicial construction which it has already received in such state is also adopted.

5. **Information Without Preliminary Examination:** JURISDICTION. Fourth point of the syllabus of *White v. State*, 28 Neb., 341, overruled.

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

Estelle & Hoeppner, for plaintiff in error:

Plaintiff in error having had a preliminary examination on a complaint charging the forgery of one instrument, the filing of an information by the county attorney charging the forgery of another instrument was without jurisdiction and void. (*White v. State*, 28 Neb., 341.)

A. S. Churchill, Attorney General, for the state:

An immaterial variance should be disregarded. (*Moore v. State*, 20 Tex. App., 233; *Johnston Harvester Co. v. Clark*, 30 Minn., 308; *Kopplekom v. Huffman*, 12 Neb., 99; *Began v. O'Reilly*, 32 Cal., 11; *Plate v. Vega*, 31 Cal., 383; *Hedrick v. Osborne*, 99 Ind., 143.)

NORVAL, C. J.

An information was filed in the court below containing two counts, one charging the plaintiff in error with the

forgery of a draft and the other with the uttering and publishing of the same instrument. To the information a plea of not guilty was entered by the accused, whereupon he was tried and convicted under both counts.

But one ground is urged in this court for a reversal of the judgment, and that is the prisoner has not had a preliminary examination for the offenses charged in the information. The record shows, and it is conceded by counsel for the plaintiff in error, that a complaint under oath was made before a magistrate charging the accused with having forged and uttered a certain bank draft, and that a preliminary examination was duly had before such magistrate prior to the filing of the information in the district court. It is insisted, however, that the draft set out in the complaint and the one set forth in the information are different instruments. The following is a copy of the draft contained in the complaint:

"No. 34872. FT. SCOTT, KANSAS, Nov. 13, '93.

"Chase National Bank of New York, pay to the order of W. C. Coffield (1800.00) eighteen hundred dollars.

"STATE BANK OF FT. SCOTT,

"JAS. R. COLEAN, *Cashier.*"

The instrument set forth in the information under which the conviction was had is in the words and figures following:

"FORT SCOTT, KANSAS, Nov. 13, 1893. No. 34872.

"The State Bank of Fort Scott, pay to the order of W. C. Coffield ($1800.00) eighteen hundred dollars.

"To Chase National Bank, New York.

"JAMES R. COLEAN, *Cashier.*"

A comparison will disclose that the complaint and information described and set forth substantially the same offense. In the complaint the "No. 34872" appears upon the upper left-hand corner of the draft, while the same number is on the right-hand corner of the instrument

copied into the information. The words "State Bank of Ft. Scott" are immediately above the signature of the cashier on the draft as copied into the complaint, while they appear on the second line from the top of the instrument set out in the information. Again, the words "Chase National Bank of New York" are on the second line of the draft alleged in the complaint to be forged, and the words "To Chase National Bank New York" appear in the copy of the instrument in the information just above the name of the cashier. The variances above indicated are insufficient to show that a different crime is alleged in the information from that for which the preliminary examination was had. Both before the magistrate and in the district court the plaintiff in error was charged with the forging and uttering of the same obligation. The instrument set out in the information bears the same date, is for a like amount, purporting to have been drawn by the same individual as cashier and upon the same bank as the one copied into the complaint. The purport and effect of each is identically the same, notwithstanding the slight and immaterial variance alluded to. In no proper sense is a preliminary examination before a magistrate a trial, and the rules which govern in respect to the fraud and construction of criminal pleadings are not applicable to such proceedings. The objection that plaintiff in error has not had a preliminary examination for the matters averred in the information is not well taken.

For another reason a reversal cannot be had upon the ground urged. No complaint was made in the trial court that a preliminary examination was not had, until after verdict, the objection being first presented in the motion for a new trial and then by a motion in arrest of judgment. This was too late. It should have been raised before he pleaded not guilty, either by a motion to quash the information or by plea in abatement on the ground that there had been no preliminary examination as required by stat-

ute, and no waiver of the same. (*Cowan v. State*, 22 Neb., 519; *Davis v. State*, 31 Neb., 252.)

Section 585 of the Criminal Code in express terms provides that a preliminary examination may be waived. It is obvious that this may be done either when the defendant is called upon to plead to the information, or when brought before the examining magistrate. The failure to give a prisoner a preliminary examination does not oust the district court of jurisdiction. It is a mere defect in the proceedings which the accused may waive, and he will be deemed to have done so if the objection is not timely made. If there could be any doubt upon the proposition, it is set at rest by section 444 of the Criminal Code, which declares that "the accused shall be taken to have waived all defects which may be excepted to by motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar, or the general issue." We are aware that in *White v. State*, 28 Neb., 341, this court has held that an information filed by the county attorney in the district court without a previous examination for the offense before a magistrate, except the accused is a fugitive from justice, confers no jurisdiction upon the district court, but the doctrine therein laid down is unsound and the case has been practically overruled by later decisions of this court. In *White v. State, supra*, too narrow a construction was placed upon the statute; besides, the provisions of section 444, already quoted, were entirely overlooked. Again, *People v. Chapman*, 62 Mich., 280, was relied upon as a precedent, yet this court overlooked the fact that the objection in the Michigan case, that there had been no preliminary examination and no waiver thereof, was raised by a motion to quash, while in *White v. State* the objection was not taken until after the verdict.

It has been held that defects in the verification of an information are waived unless made before trial. (*Davis v. State*, 31 Neb., 247; *Hodgkins v. State*, 36 Neb., 160; *Bailey v. State*, 36 Neb., 808.) And in the language em-

ployed by Judge POST in his opinion in *Hodgkins v. State*, "The provision for the verification of an information before a magistrate is surely not more imperative than the provision found in section 585 of the Criminal Code, that no information shall be filed against any person, except fugitives from justice, until such person shall have had a preliminary examination as provided by law. Yet it has been repeatedly held that by pleading not guilty, and going to trial on the issue thus formed, the accused waives his right to object on the ground that he has not had a preliminary examination."

The statute of Michigan relating to prosecutions of offenses by information contains this provision: "No information shall be filed against any person, for any offense, until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace, or other examining magistrate or officer, unless such person shall waive his right to such examination; *Provided however*, That informations may be filed without such examination against fugitives from justice." (Michigan Laws of 1859, p. 393, sec. 8.) Section 585 of our Criminal Code was copied literally from the statute of the state of Michigan, and that too after it had been construed by the highest tribunal of that state. The precise question first came before the supreme court of Michigan in 1862, in *Washburn v. People*, 10 Mich., 383, in which Christiancy, J., after quoting the statute says: "It is not doubted that a defendant, unless a fugitive from justice (which is not pretended here), has a right to insist upon such examination before he can be put upon his trial, or called upon to answer the information. But the statute is express that he may waive his right; and we think he may waive it when called upon to plead to the information, as well as when brought before the magistrate for examination. It is not a matter which goes to the merits of the trial, but to the regularity of the previous proceedings. If he make no

objection on the ground that such examination has not been had or waived, he must be understood to admit that it has been had, or that he has waived or now intends to waive it. If he intends to insist upon the want of the examination, we think he should, by plea in abatement, set up the fact that it has not been had, upon which the prosecuting attorney might take issue, or reply a waiver; or he must upon a proper showing by affidavit, move to quash the information. The latter is the simpler course." The same doctrine has been adhered to in *Hicks v. People*, 10 Mich., 395; *People v. Jones*, 24 Mich., 214; *Hamilton v. People*, 29 Mich., 177; *People v. Williams*, 53 N. W. Rep. [Mich.], 779.

It is a familiar rule that the legislature by adopting the statute of another state thereby adopts the construction it has already received by the courts of that state. It follows that where a defendant pleads not guilty to an information and goes to trial without any objection that a preliminary examination has not been had or waived, he will be considered to have waived such examination. The judgment is

AFFIRMED.

NELSON MORRIS, APPELLANT, V. MARION G. MERRELL ET AL., APPELLEES.

FILED APRIL 4, 1895. No. 6745.

1. **Counties:** COUNTY BOARD: PROCEEDINGS. County commissioners cannot legally transact county business except at a regular session of the county board, or one specially called by the county clerk of which notice is given in the mode provided by law.

2. ———: LOCATION OF DRAINAGE DITCHES: VALIDITY OF PROCEEDING. On July 9, 1892, a petition for the location ond construction of a ditch was filed with the county clerk of B. county, and on the same day the county commissioners adjourned to meet

on August 2, following. On July 16, without any special session of the county board being called, two members of the board of county commissioners, together with the county surveyor, met at the office of the county clerk, and upon consideration of said petition located the proposed ditch and ordered the construction thereof. *Held*, That the proceedings were a nullity, and the special assessments levied for the purpose of paying for such improvement were absolutely void.

3. Injunction: RESTRAINING COLLECTION OF VOID TAXES: PARTIES. A party who is not guilty of laches may invoke the aid of a court of equity to restrain the collection of a void tax or assessment.

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

Wharton & Baird and *H. Wade Gillis*, for appellant, cited: *Commissioners of Merrick County v. Baty*, 10 Neb., 176; *Morrill v. Taylor*, 6 Neb., 246; *Lyman v. Anderson*, 9 Neb., 367.

W. G. Sears, Lake, Hamilton & Maxwell, and *Jesse T. Davis, contra*, cited: *Touzalin v. City of Omaha*, 25 Neb., 817.

Ira Thomas, also for appellees.

NORVAL, C. J.

This action was brought by Nelson Morris in the district court of Burt county to enjoin the location and construction of a ditch over his lands, and to restrain the collection of the special assessments made against said lands for the purpose of paying the costs of constructing said ditch. A general demurrer to the petition was sustained by the court and the action dismissed. Plaintiff appeals.

It appears from the petition that on the 9th day of July, 1892, there was filed in the office of the county clerk of Burt county a petition signed by J. H. Stork and others, praying the board of county commissioners to locate and

construct a ditch upon a certain described route, the same being over and across lands owned by the plaintiff; that on the 16th day of the same month two of the county commissioners, W. T. Berry and F. E. Higley, with the county surveyor, W. E. Pratt, met in the county clerk's office and, upon consideration of the petition, entered an order upon the journal of the commissioners to the effect that the improvement is necessary and will be conducive to the public health, convenience, and welfare, and that the proposed location is the best and the most practicable route. W. E. Pratt was appointed engineer on said ditch, and ordered at once to make the necessary survey, levels, and estimates, also the assessments against the lands benefited by said improvement. Subsequently, the county commissioners adopted the report and assessment made by the engineer. Claims for damages by reason of the location of the ditch were allowed C. M. Woodworth, A. J. McClannahan, and May Burch, all other claims being rejected. Advertisement for bids for the construction of the proposed ditch was made, bids were received, and the contract for said construction was awarded to the defendant George Southerland. It is also alleged that on December 2, 1892, the county clerk, without any order or entry of an order from the board of county commissioners, made and delivered to the county treasurer a special duplicate containing said assessment; that the county treasurer, unless restrained, will advertise and sell plaintiff's land to pay said assessments; that the county commissioners will allow claims for work upon said ditch, for damages occasioned thereby and for payment for other costs and expenses, including services of the engineer; that George Sutherland threatens, and is about, to construct said ditch across the lands belonging to plaintiff. The sixth paragraph of the petition is in the following language:

"6. Plaintiff alleges that the whole of the proceedings of the board of county commissioners of said Burt

county, and of said county clerk, are utterly void and without authority or warrant of law, because the said county clerk did not at the next meeting, after the filing of the petition for the construction of said ditch herein referred to, deliver a copy of said petition to the board of county commissioners at their next meeting after the filing of said petition on the 9th day of July, 1892. Plaintiff alleges that on the 16th day of July, 1892, that the pretended meeting of W. T. Berry and the hereinbefore mentioned F. E. Higley was utterly and absolutely void, without authority or warrant at law, because the same was not upon a day fixed by statute for holding meetings of boards of county commissioners; that it was not a meeting which had been called or pretended to be called, or was special, of said board of county commissioners; nor was the same upon a day to which said board of county commissioners had adjourned, but plaintiff alleges the fact to be that on the 9th day of July, 1892, said board of county commissioners adjourned until the 2d day of August, 1892."

The first point made by the appellant, and upon which he relies for a reversal of the judgment, is that the proceedings had on July 16, 1892, ordering and locating the ditch in question, are without jurisdiction and void, for the reason that the board of county commissioners were neither in regular nor special session on that date, and therefore could not legally transact any official business at that time. In our view the objection is well taken. Sections 56 and 57, chapter 18, Compiled Statutes, are as follows:

"Sec. 56. The county commissioners shall meet and hold sessions for the transaction of county business at the court house in their respective counties, or at the usual place of holding sessions of the district court, on the second Tuesday in January, third Monday in June, and first Tuesday in October of each year, and may adjourn from time to time.

"Sec. 57. The county clerk shall have power to call

special sessions when the interests of the county demand it, upon giving five days' notice of the time and object of calling the commissioners together, by posting up notices in three public places of the county, or by publication in a newspaper published therein."

The first section quoted above fixes the time for holding the regular meetings of the county board, and authorizes the board to prolong a session by regular adjournments. By said section 57 provision is made for the calling of special sessions of the county board, and it specifies by whom and in what manner the same shall be called, and prescribes the manner in which notice of such called session shall be given. The county commissioners of a county can only transact county business at the time specified in said section 56 or at some regular adjourned session of the board, or a special session called in the manner pointed out in section 57. Such is evidently the legislative will. The statute is imperative, and must be followed. A special session of the board can only be called in the mode provided by law and notice thereof must be published or posted as the statute directs. Such notice is essential to the validity of the proceedings at the special session. It is jurisdictional. The failure to give the required notice is not a mere irregularity. From an examination of the averments of the petition in this case it fully appears that the petition for the location of the ditch was filed on July 9, 1892, the same day on which the county board adjourned to meet on the 2d day of August, 1892. Without a called session of the county board, the commissioners, or any two of them, could not lawfully meet and transact county business prior to the last named date. The petition for the ditch was acted upon at an alleged session held on July 16th, at which but two of the commissioners were present. There was no call issued by the county clerk for the convening of the county board at that time, nor was any notice of such pretended meeting given. The proceedings locating the ditch were without

jurisdiction, and are void. They are of no greater validity than had the same been made by any other two citizens of the county. Suppose after this court has adjourned to a day certain two members thereof should meet at the capitol before the date fixed for the convening of the court and render a judgment in a pending cause. Would such judgment have any validity? Clearly not. (*In re Terrill*, 52 Kan., 29; *In re McClusky*, 52 Kan., 34.) In principle there is no distinction between the case supposed and the one before us. In *Morrill v. Taylor*, 6 Neb., 246, it is said: "The jurisdictional fact must exist before an irregularity can occur, for without the existence of such fact there is in law no assessment, and all subsequent acts of the officers are mere nullities."

It is argued by counsel for appellees that plaintiff cannot maintain this action for the reason he has not paid to the county treasurer the amount of the alleged special assessment made against his lands. This contention is founded upon section 28 of "An act to provide for draining marsh and swamp lands in the state of Nebraska," the same being chapter 89 of the Compiled Statutes. The section declares: "The collection of assessments to be levied to pay for the location or construction of any ditch shall not be enjoined nor declared void; nor shall said assessment be set aside in consequence of any error or irregularity committed or appearing in any of the proceedings provided by this act, and no injunction shall be allowed restraining the collection of any assessment until the party complaining shall first pay to the county treasurer the amount of his assessment, which amount so paid may be recovered from the county in an action brought for that purpose in case such injunction is made perpetual." It must be conceded that the foregoing provision applies to all cases where a mere error or irregularity has been committed in the proceedings leading up to, and including, the assessment. Where the assessment is not void, but is simply irregular or erro-

neous, a court of equity will not interfere by injunction to prevent the collecting of such assessment. (*South Platte Land Co v. City of Crete*, 11 Neb., 344; *Spargur v. Romine*, 38 Neb., 736.) But the rule is otherwise where the assessments are absolutely void for want of jurisdiction or power to impose the same. In such case, a party may invoke the aid of a court of equity, notwithstanding the provisions of said section 28. (*Touzalin v. City of Omaha*, 25 Neb., 817; *Bellevue Improvement Co. v. Village of Bellevue*, 39 Neb., 876; *Thatcher v. Adams County*, 19 Neb., 485.)

This court, in construing a provision similar to said section 28, in the opinion in *Touzalin v. City of Omaha, supra*, uses this language: "It will be observed that the above statute relates to a special tax or assessment which is apparently legal, but by reason of irregularities or error in the proceedings may be open to attack. It does not apply to a tax or assessment which is absolutely void. Where a tax is just in itself, but there are irregularities or errors in the proceedings, or where a party has permitted a municipality to improve his property and add to its value by grading or othewise improving the streets of the city, the legislature no doubt by general statute may require him to pay the taxes assessed against his property for such improvements, and provide the procedure by which the same or some portion thereof claimed to be illegal may be recovered back. Injunctions to prevent the collection of taxes are not favored, and should only be granted where the relief at law is wholly inadequate. If, however, the tax is void, in other words, is levied without authority of law, the forms of law nevertheless being used to cast a cloud upon the title of the party's real estate and thereby diminish its value, the power of the legislature to close the doors of the courts to aid the taxpayer is very doubtful. A void tax is no tax. How then can the statute debar the taxpayer from enjoining the unlawful sale of his property to pay such al-

leged taxes? The law might as well authorize the seizure of the property of A by force and violence, and without authority, to pay the debts of a municipality as to seize and sell such property under a void assessment. In either case the taxpayer may invoke the aid of the courts to protect him from wrong and oppression. The rule is, that where public officers are proceeding illegally under claim of right they may be enjoined. (*Johnson v. Hahn*, 4 Neb., 139; *Mohawk & H. R. R. Co. v. Artcher*, 6 Paige Ch. [N. Y.], 88; *Belknap v. Belknap*, 2 Johns. Ch. [N. Y.], 472; *Livingston v. Livingston*, 6 Johns. Ch. [N. Y.], 497; *Hamilton v. Cummings*, 1 Johns. Ch. [N. Y.], 516; *Hughes v. Trustees*, 1 Ves. Sr. [Eng.], 188.)"

Having reached the conclusion that the proceedings by which the ditch was located and the alleged assessments made, were not irregular or erroneous merely, but entirely void, it follows that plaintiff was not required to pay such assessment and then bring an action at law to recover the money back, but is entitled to invoke the aid of a court of equity to restrain the collection of the assessment. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JERRY D. WOODS V. STATE OF NEBRASKA, EX REL. JAMES C. MCNERNEY.

FILED APRIL 4, 1895. No. 7320.

1. **Elections: ARRANGEMENT OF PARTY NAMES.** Some discretion is conferred upon the officer charged with the preparation of the official ballot, such as the arrangement thereon of party names and in other respects not inconsistent with the spirit and purpose of the law, and the exercise of such discretion will not be controlled by the court.

2. **Mandamus:** AUSTRALIAN BALLOTS: PARTY NAMES: COUNTY CLERKS. Certain candidates for state offices were, according to the certificate of the secretary of state, nominated by the people's independent party and also by the democratic party. The respondent, as clerk of L. county, in preparing the ballot allotted to each candidate, together with the above party names, one line, thus:

"For Lieutenant Governor.

"James N. Gaffin, of Colon. Democrat—People's Independent."

Subsequently, the district court allowed a peremptory writ of *mandamus* commanding the respondent to so prepare the ballot that the names of all candidates who had received more than one nomination would be followed by the names of the parties or principles represented by them on parallel lines preceded by a brace, thus:

"For Lieutenant Governor,

"James N. Gaffin, of Colon, { People's Independent. Democrat."

Held, Error, since discretion in the arrangement of the ballot is conferred upon the county clerk, and in the absence of abuse thereof the courts are not authorized to interfere.

ERROR from the district court of Lancaster county. Tried below before HALL and TIBBETS, JJ.

A. J. Sawyer and *A. W. Field*, for plaintiff in error.

William Leese, contra.

POST, J.

This cause was submitted by agreement at the last term and a judgment reversing the order of the district court then announced. The facts established by the evidence are all shown by the written stipulation of the parties, and are, so far as essential to an understanding of the question presented, as follows: The plaintiff in error, as clerk of Lancaster county, had prepared and caused to be printed the sample and official ballots for use by the electors of said county at the general election for the year 1894. Said ballots contained the names of all candidates for the several state offices certified to the plaintiff in error as county

clerk by the secretary of state, and were, it is conceded, in all respects conformable to law except as hereafter mentioned. Certain candidates for state offices, including the offices of governor, lieutenant governor, attorney general, and superintendent of public instruction, were, according to the certificate of the secretary of state, the nominees of two parties, to-wit, the people's independent party and the democratic party. In the preparation of the said ballots, the plaintiff in error allotted one line thereon to the name of each candidate, together with the party designations to which he was entitled, thus:

FOR LIEUTENANT GOVERNOR.	VOTE FOR ONE.
Belle G. Bigelow, of Lincoln.	Prohibition.
Rodney D. Dunphy, of Seward.	Straight Democrat.
James N. Gaffin, of Colon.	Democrat and People's Independent.
Robert E. Moore, of Lincoln.	Republican.

The defendant in error, who is the chairman of the people's independent party for Lancaster county, being dissatisfied with the form of the ballot, applied to the district court of said county for a writ of *mandamus* requiring the plaintiff in error, who was made the respondent therein, to cause the names of all candidates who had received more than one nomination to be followed by a brace with the names of the parties or principles represented by them on parallel lines to the right thereof. On a final hearing the district court made the following among other findings:

"We find and hold that the only legal way to prepare and print the ballots in such a case is to place a brace after the name of the candidate, and to place the names of the parties or principles represented by such candidate to the right of the brace, one above another, within the space allowed the name of the candidate on the ballot, thus:

FOR LIEUTENANT GOVERNOR. VOTE FOR ONE.

James N. Gaffin, of Colon. { People's Independent. / Democrat.

And we find and hold the method adopted by respondent to be an error in the printing of the sample and official ballots."

Judgment having been entered in accordance with the views expressed in the finding above set out, the cause was removed into this court for review upon the petition in error of the respondent.

It is not claimed that the ballot act contains any provision pertaining to the printing of the ballots aside from that found in section 14, which is, so far as material in this connection, as follows: "Every ballot shall contain the name of every candidate whose nomination for any office specified in the ballot has been certified or filed according to the provisions of this act, and no other names. The names of candidates for each office shall be arranged under the designation of the office in alphabetical order according to surnames, except that the names of electors of president and vice president of the United States presented in one certificate shall be arranged in a separate group. Every ballot shall also contain the name of the party or principle which the condidates represent as contained in the certificates of nomination," etc. (Compiled Statutes, ch. 26, sec. 139.) It would seem that some discretion is of necessity conferred upon the several officers charged with the duty of printing and distributing the ballots, such as the arrangement thereon of party names and in other respects not inconsistent with the spirit and purpose of the act. We recently held in *State v. Allen*, 43 Neb., 651, that the act under consideration contemplated that the name of each candidate should appear once only on the official and sample ballots, accompanied by such political or other designations as correspond to his nomination papers on file with the proper officer. The reason upon which that conclusion rests is that the tendency of repeating the names of candidates on the ballot, accompanied by different political designations, without disclosing their identity or indicating that they represent two or more parties, is to deceive the ignorant and uninformed,—a result so radically at variance with the expressed purpose of the act as to

leave no doubt of the intention of the legislature. But the arrangement of party names is manifestly non-essential and within the discretion of the officer charged with the duty of preparing the ballot, provided each candidate be given the political or other designations to which he is entitled; and the discretion thus conferred cannot be regulated or controlled by the judicial power of the state. It follows, therefore, that in awarding the writ of *mandamus* the district court erred, for which the judgment is reversed.

We must not from what has been said be understood as intimating that the form of ballot prescribed by the district court is in any way objectionable to the statute. On the contrary, had the respondent decided to print the party names on parallel lines preceded by a brace in accordance with the request of the relator, his action would have been a substantial compliance with the provisions of the statute. What we decide is that the discretion in this instance has been conferred upon the county clerk and not upon the district court.

REVERSED.

STATE OF NEBRASKA, EX REL. ELMER B. STEPHENSON, v. M. M. COBB.

FILED APRIL 4, 1895. NO. 7226.

1. **Municipal Corporations:** ROAD TAXES: STATUTES. The provision of section 49 of the act of March 29, 1889, for the incorporation of cities of the first class, that "the road taxes collected from property in the city shall be paid to the city treasurer and expended as the council may direct," has reference merely to such taxes as are by general law collected for the use of the city as a road district, and was not intended as a repeal of the provision of section 76 of the general road law for the distribution of the county road fund.

2. **Statutes:** CONSTITUTIONAL LAW. But assuming the legislature

by the act first above mentioned to have intended a repeal of the provision of the general road law for the distribution of the county road fund so far as it affects cities of the first class, it is within the restriction contained in section 11, article 3, of the constitution and, therefore, void.

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

N. C. Abbott and *Abbott, Selleck, & Lane*, for plaintiff in error, cited: *State v. Howe*, 28 Neb., 618.

W. H. Woodward, contra, cited: *City of Tecumseh v. Phillips*, 5 Neb., 505; *White v. City of Lincoln*, 5 Neb., 505; *State v. Lancaster County*, 6 Neb., 474; *Burlington & M. R. R. Co. v. Saunders County*, 9 Neb., 507.

POST, J.

This was a proceeding by *mandamus* in the district court for Lancaster county on the relation of Elmer B. Stephenson, as treasurer of the city of Lincoln, against M. M. Cobb, the respondent, as county treasurer, to require the payment by the latter of certain moneys claimed by the city and belonging to the road fund of said county.

In order to reach an understanding of the question presented by the record it is necessary to examine certain provisions of the statutes which appear to bear directly upon the subject. It is provided by section 76 of the general road law that "In counties not under township organization, one-half of all the moneys paid into the county treasury in discharge of road tax shall constitute a county road fund, which shall be at the disposal of the county commissioners for the general benefit of the county for road purposes. The other half of all moneys paid into the county treasury in discharge of road tax and all money paid in discharge of labor tax shall constitute a district road fund, which shall be paid by the county treasurer to the overseer of the road district from which it was collected," etc. On April

7, 1891, an act was approved with an emergency clause, entitled "An act to amend section 76 of chapter 78, Compiled Statutes, [the general road law,] and to repeal said original section." (Laws, 1891, p. 314, ch. 43.) The only material amendment of the section mentioned is the addition thereto of the following: "*Provided*, That the commissioners of counties not under township organization may levy the same rate of tax upon the property within any incorporated city of the metropolitan class and cities of the first class as is levied upon property situated within the several road districts, and all moneys paid into the county treasury in discharge of road tax levied upon property within the corporate limits of any such city shall constitute a part of the general road fund of the county and be subject to the disposal of the county commissioners for the general benefit of the county and city, one-half of which shall go to the county for road purposes and one-half to the council of said cities to be used for road purposes." On the 29th day of March, 1889, there was approved "An act to incorporate cities of the first class, and regulating their duties, powers, government, and remedies," and which will, for convenience, be referred to as the charter of the city of Lincoln, which is, as alleged, a city of the first class within Lancaster county,—a county not under township organization. We find therein no authority for a road tax, but in section 49, after a provision for the levy of taxes for various purposes incident to municipal government, is used the following language, evidently referring to the tax contemplated by the general road law, viz.: "The road taxes collected from property in the city shall be paid to the city treasurer and expended as the council may direct." On the 9th day of April, 1891, an act was approved entitled "An act to amend sections 1, 10, 12, 13, 14, 17, 25, 26, 27, 42, 46, 49, 52, subdivisions 3, 6, and 31 of section 67 and sections 69, 81, 84, 87, and 91 of an act entitled 'An act to incorporate cities of the first class,'" etc., and to repeal said original

sections and subdivisions. The amendments therein of section 49 are few and unimportant and in no way relate to the provision under consideration.

Counsel for the relator appear to regard the provisions above quoted as irreconcilable, from which they argue that the re-enactment of section 49 of the city's charter on April 9, 1891, two days later than the re-enactment of section 76 of the road law, being the latest expression of the legislative will, worked a repeal of the previous act in so far as they are inconsistent with each other. But we believe the alleged inconsistency to be imaginary rather than real, and that when we take into consideration the history and evident purpose of the respective provisions there will be found no difficulty in giving effect to both. In the first place, the general law merely provided for payment of one-half the county road fund to the overseer of the road district from which it was collected; second, the only provision of the act, as it then existed, defining road districts was that contained in section 53, as follows: "The county board shall divide the county, except that portion occupied by cities and incorporated villages, into as many road districts as may be necessary, and may alter the boundaries thereof as may seem proper," etc. And although it was probably intended that each city and village should constitute a single road district and be in that regard independent of the county board, it was not in express terms so provided. Nor did the law designate the officer or board authorized to receive or disburse the moneys apportioned to such city or village out of the county road fund. Again, it will be observed that the charter of the city does not provide that all road taxes collected from property within the city shall be paid into the city treasury, and does not on its face purport to repeal existing provisions on the subject. Viewed in the light of the foregoing facts the provision under consideration would seem to contemplate such funds only as are by general law collected for the use

of the city as a road district; that its purpose was merely to provide an agency for the receipt and disbursement of such funds, and not the repeal of any part of the road law of the state. But assuming, for the purpose of this investigation, that there exists a radical conflict between the city's charter and the general road law, and that the intention of the legislature was by enacting the former to repeal the latter, it is within the prohibition of section 11, article 3, of the constitution and, therefore, void.

It is not our purpose at this time to review the cases in which construction has been given to that section of the fundamental law. We do not doubt that a provision for the receipt and disbursement of the road fund within cities of the first class is germane to the title of the act to which reference is here made as the charter of the city of Lincoln. But an attempt to thus amend an existing general law by a provision which is in effect a repeal thereof, without any reference to the prior act, presents an entirely different question, and is, without doubt, within the restriction above cited. (*Vide City of South Omaha v. Taxpayers' League*, 42 Neb., 671, and cases cited.) It follows that the order of the district court sustaining the demurrer to the petition and dismissing the proceedings is right and must accordingly be

AFFIRMED.

S. W. BURNHAM V. STATE OF NEBRASKA, EX REL. FARMERS LOAN & TRUST COMPANY.

FILED APRIL 4, 1895. No. 6584.

1. **Registration of Tax Deeds.** The provision of the revenue law for the recording of treasurer's tax deeds is mandatory in the sense only that it is made the duty of the register of deeds to record such conveyances when presented for that purpose, accompanied by the fee prescribed by law.

2. **County Treasurers: TAX DEEDS: COLLECTION OF REGISTRATION FEES.** A county treasurer is not entitled as a condition to the execution and delivery of a tax deed to demand and collect the fee allowed the register of deeds for recording the evidence upon which such conveyances are issued.

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

W. H. Woodward, for plaintiff in error.

M. J. Sweeley and *John L. Doty, contra.*

POST, J.

This is a petition in error from the district court for Lancaster county and presents for review the judgment of that court awarding a peremptory *mandamus*, commanding the plaintiff in error, as county treasurer, to execute and deliver to the relator, defendant in error, a treasurer's tax deed for certain property in said county. The only defense interposed by the respondent below is indicated by the following quotation from his answer: "For a further answer to the petition defendant says that he refused to make, execute, and deliver to the plaintiff a tax deed to the land in question for the reason that the plaintiff failed and refused to comply with the statutes in such cases made, in that it failed and refused to tender to defendant the necessary money and funds to pay the register of deeds of said county for recording the evidence upon which said tax deed would be issued, to-wit, the notice, affidavit, and certificate; that by the statutes of this state it is made the duty of the register of deeds to record such evidence as above specified, and allow the said register to charge the regular fees for placing the same on record, and makes it the duty of this defendant, as county treasurer, to deliver to the register of deeds the evidence upon which said tax deed should be issued for the purpose of having the same recorded," etc.. It will be observed that there is here presented no question

involving fees payable to the treasurer himself as a condition to the execution of the tax deed. The single point of the controversy is the duty of the respondent to protect the register of deeds by collecting in advance fees which the latter is by law authorized to charge for recording the evidence upon which such deeds are issued.

The provisions of statute to which we have been referred as bearing upon the subject are section 123 of the revenue law, requiring notice of the expiration of the time of redemption, and which is made a condition precedent to the right of the purchaser to demand a deed; section 124, requiring proof of service of notice by affidavit and prescribing a penalty for false swearing; section 126, authorizing the execution of deeds on request within the prescribed period after the expiration of the time within which to redeem, upon the production of the certificate of purchase, and upon compliance with the preceding sections; section 127, prescribing the form of tax deeds and providing that they shall be recorded in the same manner as other conveyances of real estate; and section 128, which is here set out: "County clerks shall record the evidence upon which the deeds are issued, and be entitled to the same fee therefor that may be allowed by law for recording deeds, and the county treasurer shall deliver the same to the county clerk for that purpose, and in case of the loss of any certificate, on being fully satisfied thereof by due proof, and bond given to the state of Nebraska in a sum equal to the value of the property conveyed, as in cases of lost notes or other commercial paper, the county treasurer may execute and deliver the proper conveyance, and file such proof and bond with the clerk to be recorded as aforesaid."

We are unable to perceive any substantial grounds for the claim of the plaintiff in error. The foregoing provisions, so far as they relate to the record of the evidence of title, are, like all kindred provisions, for the benefit of the

purchaser, and may, therefore, be waived by him. They are mandatory in the sense that it is the duty of the treasurer to execute the deed on the production of the evidence prescribed by statute, and also the duty of the register to record such deed and evidence on request and tender of the requisite fee, but in no other sense can they be said to be mandatory. The recording of his tax deed is a subject within the discretion of the defendant in error, and the inference is a reasonable one in view of recent constructions of the revenue law that it does not attach sufficient importance to a treasurer's deed as evidence of title to justify the expense of procuring it to be recorded; but however that may be, it will be time for the plaintiff in error to deliver to the register of deeds the statutory evidence whenever the defendant in error shall present his deed for record and tender the proper fee therefor, including charges for the recording of the evidence here mentioned. The judgment is right and is accordingly

AFFIRMED.

TONY CORNELIUS ET AL. V. CAROLINE HULTMAN ET AL.

FILED APRIL 4, 1895. No. 6055.

1. **Intoxicating Liquors:** DEATH FROM DRUNKENNESS: ACTION AGAINST SALOON-KEEPER: DAMAGES: QUESTION FOR JURY. H., a section foreman, left his home in company with a friend on a hand-car to transact business in the city of K., four miles distant, where they arrived about 5:45 P. M., and went direct to the saloon of C., and each drank whiskey. They returned to the saloon twenty or thirty minutes later and again drank whiskey, and where H. remained, except at short intervals, until nearly 11 P. M., in the meantime drinking three or four glasses of beer in said saloon. About the hour last named they started to return home on the hand-car, but were run down by a fast passenger train and H. instantly killed. One of the station men

observing that the deceased was drunk and staggering, cautioned him against starting ahead of the passenger train, which was due to arrive in ten minutes. The evidence of C. tended to prove that they did not observe the train until about the instant of the collision, although both were aware that it was then due. *Held*, The question whether the liquor furnished by C. contributed to the fatal result so as to render him liable in an action under the statute by the widow of the deceased was properly submitted to the jury.

2. ———: ———: ———: EVIDENCE. It is immaterial whether the deceased was on account of drunkenness physically incapable of jumping from the hand-car, or whether he was thereby rendered insensible to the peril of his position until too late to escape. The foregoing evidence accordingly *held* admissible under an allegation that "Said H., on account of his drunken condition, was unable to alight from said hand-car and was struck," etc.

3. ———: ———: ———: ———. *Held*, On the evidence adduced, that the drunkenness of the deceased was the primary cause of the fatal accident, and that the court did not err in refusing to submit to the jury the question of the negligence of the railroad company.

4. **Damages**: EVIDENCE. Evidence examined, and *held* sufficient to sustain the verdict in favor of the plaintiff below.

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

H. M. Sinclair, for plaintiffs in error.

Dryden & Main and *Greene & Hostetler*, *contra*.

POST, J.

This was an action in the district court for Buffalo county by Caroline Hultman, widow of Gust Hultman, deceased, in her own behalf and in behalf of her minor children, against the plaintiffs in error on the bond of Tony Cornelius, a licensed saloon-keeper, for damages on account of the death of said Hultman, while under the influence of intoxicating liquors sold and furnished him by said Cornelius. A trial before the district court resulted in a verdict

and judgment for the plaintiffs therein, which it is sought to reverse by means of a petition in error addressed to this court.

The first proposition asserted in the brief of plaintiffs in error is that the verdict is not sustained by the evidence and should have been arrested on that ground. That contention necessitates a brief recital of the facts so far as disclosed by the record. On the night in question the deceased, who had for six years last preceding been in the employ of the Union Pacific Railroad Company as section foreman at Buda, a station on its main line, left home in company with one Carlson, going to Kearney, about four miles distant, on a hand-car for the purpose of procuring provisions for his family. About 11 o'clock of the same night he started for his home on the hand-car but was run down and killed by a passenger train before reaching his destination. Carlson, who accompanied the deceased, testified that they visited the saloon mentioned in the pleadings about fifteen minutes before 6 o'clock, where each took a drink of whiskey. They then left the saloon for the purpose of making their purchases, in which they were engaged from twenty to thirty minutes, when they returned to the saloon and took a second drink of whiskey. They remained there, in the language of the witness, "talking and fooling around" until a few minutes before 9 o'clock, when, being admonished by the clerk in the grocery store that he was about to close for the night and to go and get the goods purchased by them, the deceased requested the witness to get the groceries and take them to the hand-car, which the latter did, remaining at or near the car until the arrival of the deceased, nearly two hours later. After their return to the saloon from the grocery store the deceased, in addition to the two drinks of whiskey, drank three or four glasses of beer. Mr. Birch, an employe in the freight office at Kearney, testified that he met the deceased about 11 o'clock, at which time the latter was drunk and staggered constantly

while assisting Carlson to put the hand-car on the track, and that he, witness, warned him not to start ahead of the passenger train which was due in about ten minutes. An inquest was held under the direction of the coroner the following day, at which Cornelius, the proprietor, testified that the deceased drank beer in his saloon the night of his death, and purchased a bottle of liquor which he carried away. Dr. Humphreys, the coroner who examined the person of the deceased, found thereon a broken bottle which had recently contained whiskey. John Campbell, proprietor of a saloon on the same street and directly opposite that of the plaintiff in error Cornelius, testified that deceased visited his saloon the night of his death and appeared to the witness to be then intoxicated. On the other hand, Mr. Downing, the barkeeper, testified that the deceased drank nothing in the saloon of plaintiff in error Cornelius that night and was apparently sober when he left. Messrs. Walker, Toole, and Barnes, who saw him in the saloon about the time he left, testified that he appeared to be sober, while Mr. Hawkins testified that he drank two or three and maybe four glasses of beer with the deceased in the saloon of plaintiff in error Cornelius that night, and assisted him to put the hand-car on the track, but that he, deceased, "wasn't excited by drink or anything of that kind."

The question at issue was whether Cornelius in person or by his servants furnished to the deceased intoxicating liquor on the night in question which caused or contributed to the result stated. (*McClay v. Worrall*, 18 Neb., 44; *Jones v. Bates*, 26 Neb., 693; *Elshire v. Schuyler*, 15 Neb., 561.) That the evidence adduced by the plaintiffs below tends to establish the affirmative of that issue cannot be doubted. It is not the province of this court to critically weigh the evidence. That is a function of the jury under the instruction and guidance of the trial judge; and a verdict or finding will not be disturbed on account of a mere difference of opinion between this court and the jurors who

personally saw and heard the witnesses, and are therefore better qualified to judge of their credibility. Such is the rule universally recognized in appellate proceedings, and is without doubt applicable to the facts of this case.

Another objection argued under this assignment is that the evidence is not responsive to the allegations of the petition, which, after charging the sale of liquor to Hultman, in consequence of which the latter became intoxicated, concludes as follows: "The said Gust Hultman * * * while on his way home was overtaken by one of the trains of the Union Pacific Railroad Company, and because of his drunken and intoxicated condition he was unable to alight from said hand-car and was struck by said railroad train," etc. In addition to the evidence above summarized, Carlson, who was with the deceased on the hand-car, testified that he jumped the instant he saw the head-light of the engine, and had barely touched the ground when the collision occurred. There is no evidence that the deceased saw the approaching train or was aware of its presence until Carlson cried, "Jump, the train is on us!" The witness was further interrogated as follows:

Q. Did he jump?

A. No.

Q. What happened?

A. I do not know, because as I touched the ground the engine struck the hand-car."

The point made on this record is that the fatal injury was occasioned, not by the inability of the deceased to alight from the hand-car, but on account of his failure to observe the train; or, to state the proposition in the language of counsel for plaintiffs in error, "The real question is, was Hultman incapacitated by liquor to such an extent that by reason thereof he was unable to escape the danger that was upon him, or is it a fact that he was not apprised of the danger until too late to escape?" We are unable to perceive the force of this reasoning. That the deceased was

unable to safely alight from the hand-car after he observed the passenger train is conceded by the plaintiffs in error, and satisfactorily established by the evidence of Carlson; and whether his incapacity was a physical one, or was due to mental obtuseness which rendered him insensible to the peril confronting him until too late to make his escape, cannot be regarded as material, provided the primary or responsible cause thereof was the intoxication alleged.

The next assignment is the giving of instruction No. 8 by the court on its own motion as follows:

"If you find from the evidence that the deceased was under the influence of intoxicating liquors, furnished in whole or in part by the defendant Cornelius, at the time of his death, and that because of such intoxication he was unable to exercise the care and precaution he otherwise would have done, and that because of such intoxication he was unable or did not get off of the hand-car and out of the way of the approaching train, then the defendants would be liable, notwithstanding the railroad may also have been guilty of negligence.

"It is not material in this action whether the employes of the railroad were negligent or not, or whether or not the railroad company is liable for damage, if any, sustained by the plaintiffs; the question for you to determine is, whether the deceased was intoxicated at the time of his death, and whether the defendant Cornelius furnished the intoxicating liquors, or some part thereof, and whether in consequence of such intoxication he lost his life."

The objection to the first paragraph of this instruction is that it is unwarranted by the pleadings or proofs, there being no allegation that the deceased was intoxicated to such a degree that he was unable to exercise the care essential to insure his safety. Substantially the same objection was noticed under the preceding assignment. It is only necessary to add that on the record presented the trial court was fully warranted in submitting to the jury the question

stated, and that the finding is not so decidedly against the weight of the evidence as to call for interference in this proceeding.

The objection to the second paragraph should be considered in connection with instruction No. 4 requested by defendants below, viz.:

"If the negligence of the railroad company contributed to the death of the deceased, so that you cannot say that the deceased would have been killed but for such negligence, you will find for the defendant, although you may further find that the defendant Cornelius sold liquor to the deceased, which the deceased drank, and that the deceased was drunk at the time of his death."

The contention with respect to this branch of the case is that the negligence of the railroad company contributed to the death of the deceased and for which it might be answerable in a proper proceeding, is a sufficient defense to the cause of action here alleged. A sufficient answer to that claim is that it is entirely unsupported by the answer which is in the form of a general denial. But the fallacy of that argument is apparent also when viewed in the light of common law principles without any reference to the liability of a saloon-keeper under our statute. In *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb., 448, decided at the present term, it was said that when subsequent to the alleged wrongful act a new and independent cause has intervened sufficient of itself to stand as the cause of the injury, the original cause will be deemed too remote to be made the basis of a recovery. But where the evidence discloses a succession of events so linked together as to make a natural whole, and all so connected with the first event as to be in legal contemplation the natural result thereof, the latter will be deemed the primary cause. The most that can be claimed for the evidence bearing upon the subject is that while the trainmen may have been negligent in not discovering the hand-car on the track, the primary

cause of the collision was the reckless conduct of the deceased in starting on the hand-car ten minutes before the fast train was due to leave Kearney. The instruction of the court was on the facts of the case proper, and that asked by the plaintiffs in error was rightly refused. But the ruling assigned must be sustained for another reason. Under the provision of our statute it is not necessary in an action of this character to prove that the liquor furnished by the defendant was the sole or even the principle cause of the injury alleged. (See cases above cited.)

Evidence was offered and rejected tending to prove that the defendant in error, Mrs. Hultman, had settled with the railroad company and received thereby satisfaction for the death of her husband. That ruling was certainly right for the reason, as we have seen, that the evidence offered was not responsive to any issue of the pleadings.

It is also alleged that the court erred in denying the plaintiffs in error leave to amend their answer so as to charge settlement with the railroad company. But that assignment is unsupported by any evidence of such a request or refusal.

There are other assignments in the petition in error, but they are not mentioned in the brief of counsel, and, following the settled practice of this court, will not be noticed in this opinion. We find no error in the record and the judgment must be

AFFIRMED.

ST. JOSEPH & GRAND ISLAND RAILROAD COMPANY V. EVA HEDGE.

FILED APRIL 4, 1895. No. 6310.

1. **Torts: SUBSEQUENT ACT.** Where in an action sounding in tort it is shown that subsequent to the alleged wrongful or negligent act a new and independent cause has intervened sufficient of it-

self to stand for the cause of the injury, the former will be held too remote to be made the basis of a recovery.

2. ———: ———: To have such an effect, however, the intervening cause must be one not procured by the original wrongful act or omission. Where the evidence discloses a succession of intermediate events, each dependent upon the one immediately preceding it, and all depending upon such original act, the latter is, in legal contemplation, the primary cause of the resultant injury.

3. ———: ———: QUESTION FOR JURY. Whether the natural connection of events is maintained or interrupted by the introduction of a new and independent cause is usually a question of fact and not of law.

4. **Railroad Companies:** INJURY TO PASSENGER: BURDEN OF PROOF. It is sufficient under the provisions of section 3, article 1, chapter 72, Compiled Statutes, in an action to recover for injuries received by the plaintiff while a passenger on a railroad train in this state, to prove that such injuries resulted from the operation and management of the road. The law infers negligence from the fact of the injury and imposes upon the railroad company the burden of proving that the case is within one of the exceptions mentioned in the statute.

5. **Carriers:** NEGLIGENCE: PERSONAL INJURIES. A common carrier of passengers is liable for personal injuries to passengers produced by the concurrent negligence of its servants and third persons.

6. ———: ———: ———. Independent of the statutory rule, a passenger who is placed in a position of apparent imminent peril through the negligence of a carrier may recover for injuries received while endeavoring to escape in obedience to the natural instinct of self-preservation, provided he exercise ordinary prudence in view of the circumstances, as they appear to him at the time.

7. ———: ———: ———. And such is the rule, although it subsequently appear that the danger was apparent only, and not real, since the carrier, whose negligence is the proximate cause of the injury, cannot complain on the ground that passengers err in their estimate of the danger confronting them or the choice of means to insure their safety.

8. ———: ———: EVIDENCE. Under an allegation that "the braking apparatus of said car * * * was in bad repair, the brake chain broken, and said brake useless for the purpose of stopping

said car or controlling its movements," *held* not to disclose such a relation of the chain mentioned to the braking apparatus as to warrant the inference that the escape of the car resulted from that cause alone, and that it was not error to receive evidence tending to prove that the brake rod was broken and useless.

9. **Witnesses:** LEADING QUESTIONS: REVIEW. While a party will not ordinarily be permitted to lead his own witness, that rule has especial application to the trial court, which may for sufficient cause permit leading questions, and its action in that regard presents no ground for reversal in the absence of a clear abuse of discretion.

10. **Damages:** MENTAL SUFFERING. Mental and bodily suffering is incapable of measurement by any fixed and arbitrary rule, but must from its nature depend largely upon the judgment of the jury, governed by the circumstances of each particular case.

11. **Carriers:** NEGLIGENCE: PERSONAL INJURIES: DAMAGES. The plaintiff below jumped from a moving train in order to escape a threatened collision with a runaway freight car due to the negligence of the defendant. In jumping she severely injured her left ankle and was unable to sleep on account of pain for seventy hours, was confined to her bed three weeks, and unable to walk without the assistance of crutches for five months. A surgeon who examined the injured limb the following day testified that from the crepitus or grating sound observable on moving and pressing upon the ankle there was an evident fracture of the astragalus or ankle bone. At the time of the trial three years later her ankle was still enlarged and extremely sensitive, with partial anchylosis or permanent stiffness of the joint, and evidence tending to prove that such condition, including present lameness, would be of long duration and probably permanent. *Held*, That a verdict of $3,000 is not excessive.

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

The facts are stated in the opinion.

M. A. Reed, *W. S. Prickett*, and *L. P. Crouch*, for plaintiff in error:

When the injury happened the persons through whose instrumentality it was inflicted must have been engaged

in doing an act for the person sought to be charged with liability. (Wood, Law of Master & Servant, sec. 281; *Roddy v. Missouri P. R. Co.*, 104 Mo., 246; *Hitte v. Republican V. R. Co.*, 19 Neb., 620; *Meyer v. Midland P. R. Co.*, 2 Neb., 319; *Stevenson v. Chicago & A. R. Co.*, 18 Fed. Rep., 493.)

If subsequent to the original wrongful or negligent act a new cause has intervened of itself sufficient to stand as the cause of the misfortune, the former act or cause must be considered too remote. (*Mire v. East Louisiana R. Co.*, 7 So. Rep. [La.], 473; *Stanton v. Louisville & N. R. Co.*, 8 So. Rep. [Ala.], 798; *Pease v. Chicago & N. W. R. Co.*, 20 N. W. Rep. [Wis.], 908; *McClary v. Sioux City & P. R. Co.*, 3 Neb., 44; Wharton, Law of Negligence, secs. 134, 438; *Schmidt v. Mitchell*, 84 Ill., 195; *Tweed v. Mutual Ins. Co.*, 7 Wall. [U. S.], 44; *Chicago, B. & N. R. Co.*, 46 N. W. Rep. [Minn.], 76.)

The defendant in error was without legal justification in exposing herself to the hazard of jumping from the moving train. (*Coulter v. American M. U. Express Co.*, 56 N. Y., 585; *Gulf, C. & S. F. R. Co. v. Wallen*, 65 Tex., 568; *Chicago, R. I. & P. R. Co. v. Felton*, 33 Am. & Eng. R. Cas. [Ill.], 533; *Kleiber v. People's R. Co.*, 107 Mo., 240; *Gumz v. Chicago, M. & St. P. R. Co.*, 10 N. W. Rep. [Wis.], 13.

It is error to introduce evidence of carelessness and negligence not pleaded, as it introduces an issue not raised by the pleadings. Having specifically alleged certain acts of negligence, proof of others was error. (*Ravenscraft v. Missouri P. R. Co.*, 27 Mo. App., 617; *Waldhier v. Hannibal & St. J. R. Co.*, 71 Mo., 514; *Schneider v. Missouri P. R. Co.*, 75 Mo., 296; *Alabama G. S. R. Co. v. Richie*, 12 So. Rep. [Ala.], 612.)

The damages assessed by the jury are excessive. (*Klein v. Jewett*, 26 N. J. Eq., 474; *Tuttle v. Chicago, R. I. & P. C. Co.*, 42 Ia., 518; *Northern C. R. Co. v. Mills*, 16 Md., 355;

Wyandotte v. Agan, 37 Albany L. J., 38; *Fuller v. Naugatuck R. Co.*, 21 Conn., 557; *Baltimore C. P. R. Co. v. Kemp*, 61 Md., 74; *City of Atlanta v. Martin*, 13 S. E. Rep. [Ga.], 805; *Smith v. City of Des Moines*, 51 N. W. Rep. [Ia.], 77; *Girard v. St. Louis Car Wheel Co.*, 46 Mo. App., 79; *Wesley v. Chicago, St. P. & K. C. R. Co.*, 51 N. W. Rep. [Ia.], 163; *City of La Salle v. Porterfield*, 38 Ill. App., 553; *Buck v. People's S. R. & E. L. & P. R. Co.*, 18 S. W. Rep. [Mo.], 1090.)

Thomas Ryan and *Epperson & Sons, contra:*

A railroad company is liable for an injury sustained by a passenger in leaping from a train, although if he had remained in the cars he would have been uninjured, if the leaping was rendered an act of reasonable precaution on such passenger's part on account of his perilous position through the fault of the company or its servants. (*Lincoln Rapid Transit Co. v. Nichols*, 37 Neb., 332; *Southwestern R. Co. v. Paulk*, 24 Ga., 356; *Buel v. New York C. R. Co.*, 31 N. Y., 314; *Caswell v. Boston & W. R. Corp.*, 98 Mass., 194; *Twomley v. Central Park, N. & E. R. R. Co.*, 69 N. Y., 158; *Galena & C. U. R. Co. v. Yarwood*, 17 Ill., 509; *Schultz v. Chicago & N. W. R. Co.*, 44 Wis., 638; *Missouri P. R. Co. v. Baier*, 37 Neb., 235; *Galena & C. U. R. Co. v. Fay*, 16 Ill., 558.)

The verdict is not excessive. (*Illinois C. R. Co. v. Barron*, 5 Wall. [U. S.], 90; *Heucke v. Milwaukee City R. Co.*, 34 N. W. Rep. [Wis.], 243; *Atchison, T. & S. F. R. Co. v. Moore*, 31 Kan., 197; *Quinn v. Long Island R. Co.* 34 Hun [N. Y.], 331; *Rockwell v. Third Avenue R. Co.*, 64 Barb. [N. Y.], 439; *Funston v. Chicago, R. I. & P. R. Co.*, 61 Ia., 452; *Hinton v. Cream City R. Co.*, 65 Wis., 323; 3 Sutherland, Damages, p. 730; *Gale v. New York C. & H. R. R. Co.*, 76 N. Y., 595.)

POST, J.

On the 2d day of January, 1890, the defendant in error Mrs. Hedge, at the city of Fairfield, purchased of the plaintiff in error, the St. Joseph & Grand Island Railroad Company (hereafter called the "railroad company") a ticket good from the station above named to the city of Hastings and took passage on a west-bound freight train which was also accustomed to carry passengers between said stations. When the train in question had reached a point about one mile east from Hastings a stop was made for the purpose of taking on a car loaded with brick then standing on a side track constructed for the accommodation of the proprietor of the brick yards there located. In order to take on the car mentioned, the train was cut so as to leave the caboose and one or two freight cars east of the switch connecting the side track with the main line. The side track is constructed on a grade which inclines toward the main line, so that cars left thereon unsecured will by force of gravity alone run down to and upon the main track. To prevent this a safety switch had been constructed in connection with the side track so arranged that when left open it served to disconnect the siding from the main track, and cars coming down the grade from the brick yards would accordingly be run onto what is known as a spur instead of the main track. But when closed, said switch served to connect the rails of the siding, thus making a continuous track from the brick yard to the main line. In order to take on the car of brick it was necessary for the men in charge of the train to move a partially loaded car standing in front thereof. This was accomplished by pulling the two cars mentioned onto the main track and, after coupling the loaded car into the train, pushing the other back onto the siding and blocking the wheels thereof with billets of wood in order to keep it in position. It seems that the point where the last named car was left was too far

above the brick-kiln to enable the yardmen to complete their task of filling it. The latter thereupon undertook to move it down the track to its proper place, when it was discovered that the brake rod thereof was broken and dragging so that it was impossible to hold the car in position by that means, and the billets of wood referred to, one four by four and the other two by four inches, proved insufficient for that purpose. In consequence thereof the car escaped from the men in charge, and the safety switch above mentioned, being still closed, it followed the siding onto the main track with the result hereafter stated. While the conductor and brakeman were engaged in an attempt to lock the switch connecting the main track with the siding, the former discovered that the brick yard men were unable to control the car, and that a collision was imminent on account of their inability to close the switch (the lock being out of order), gave the signal to pull up. His signal seems to have been recognized and obeyed by the engineer, since the train was started and so nearly cleared the switch that the wild brick car merely struck the iron bar or hand rail at the end of the caboose. There were at that instant three men in the overhead lookout of the caboose, and who were evidently watching the brick car approaching the switch, as indicated by the following quotation from the testimony of Mrs. Hedge, who is strongly corroborated by other witnesses:

Q. What first attracted your attention to this car of brick?

A. The first was from hearing remarks made in the caboose by different parties relative to this car.

Q. What was said?

Objection. Overruled. Exception.

A. The first is "That is a dangerous switch."

Q. What else, if you remember?

A. That the car was going to get away from the old man; that he could not handle it. * * *

Q. What else do you remember being said there about this matter?

A. That there was danger, and we had better be getting out of there. * * * I heard that first from the lookout.

Q. Did they [the men in the lookout] get down when they made the remark about getting out?

A. Yes, sir.

Q. Where did they go, if any place?

A. They went out.

Q. In what manner?

A. Hurriedly.

Q. What remarks did you hear from others as they went out?

Objected to, as incompetent, irrelevant, and immaterial. Overruled. Exception.

A. I heard the remark outside, "Jump for your lives." * * *

Q. Whom was that remark addressed to, if you, as you understood it?

A. To ourselves.

Q. What were the parties in the lookout doing when that remark was made?

A. They were getting out through the narrow passageway. * * *

Q. What did they do when they reached the platform?

A. I suppose they jumped, but did not see them.

Q. Was the car in motion at that time?

A. Yes, sir.

Q. Where did you find those parties when you reached the platform?

A. On the ground.

Q. In what positions?

A. They were lying down. I cannot say just what position.

Q. They were not upright?

A. No, sir; they were not standing up.

Q. Who was with you at the time?

A. Mrs. Dinsmore.

Q. What did she do?

A. She jumped out from the train just ahead of me. * * *

Q. What happened to you when you jumped?

A. I do not know.

Q. What is the first thing you can recollect?

A. The first thing I can remember is they were gathering around me and I was trying to get up.

The following is a quotation from the testimony of Mrs. Dinsmore:

Q. What was the condition of the caboose in that respect at the time of the speaking of the remark? [Referring to the character of the switch.]

A. It was standing still.

Q. What occurred afterward?

A. The engine started up so quickly that I nearly fell on the stove. I took my seat, and just as I took my seat some one in the look-out said (Objection. Overruled. Exception.): "That car will get away from that old man. We had better be getting out of here. Every one run and jump quick." * * * There were some in the lookout, I know, that ran and jumped.

Q. Were they men or women?

A. They were men. * * *

Q. What occurred when you reached the platform on the end of the car?

A. I turned before I got out on the platform to see if Mrs. Hedge was coming, and when I got to the platform I jumped. I did not see Mrs. Hedge again until I found her on the ground.

Q. What, if anything, did you hear in the way of directions as to what to do?

A. I was told to hurry up quick.

Q. At the time this was said what were the other passengers doing?

A. They were getting out as fast as they could.

And Mr. Morris, who was at the time employed at the brick yards, testified that the direction "jump for your lives" was given by a brakeman at the rear end of the caboose.

The injury, which is the foundation of this action, was, as will be perceived from the evidence above quoted, received by Mrs. Hedge in jumping from the caboose, and the questions presented all relate to the liability of the railroad company therefor.

We will first notice the assignment relating to the agreement between the railroad company and Hurley, the proprietor of the brick yards, under which the side track and switches were constructed. The offer was to prove that said tracks were graded by Mr. Hurley, the company merely furnishing the rails and ties; that they were constructed for the exclusive use and accommodation of the former, that cars were delivered to him on said track whenever demanded and were, while they remained thereon, under his exclusive control. The evidence so offered was excluded on the objection of the plaintiff below, and the ruling thereon is one of the grounds assigned in the motion for a new trial as well as in the petition in error. The contention of the railroad company with respect to that question is best illustrated by a quotation from its brief, viz.: "If Hurley's men had not meddled with the car at the inopportune time, the accident would not have happened. * * * The car would have stood there securely blocked with wood under its wheels till doomsday and injured no one. * * * The defective brake cannot in law be considered the proximate cause of the accident. The rule is that if subsequent to the original wrongful or negligent act a new cause 'has intervened sufficient of itself to stand as the cause of the misfortune the former act or cause must be considered too remote.'"

The rule thus invoked is an ancient and salutary one, but cannot be said to be applicable to the admitted facts of the case before us. The question in all such cases is whether the facts shown constitute a continuous succession of events so linked together as to make a natural whole, or was there a new and independent cause intervening between the wrong and the injury. The intervening cause must be one not produced by the alleged wrongful act or omission, but independent of it, and adequate to produce the result in question. There may be, it is evident, a succession of intermediate causes, each dependent upon the one preceding it and all so connected with the primary cause as to be in legal contemplation the proximate result thereof. The foregoing proposition is exemplified by the following authorities: Ray, Negligence of Imposed Duties, 699; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S., 469; *Purcell v. St. Paul City R. Co.*, 48 Minn., 134; *Mahogany v. Ward*, 16 R. I., 479. Whether the natural connection of events is maintained or broken by the intervention of a new and independent cause is, according to the authorities cited, a question of fact. Therefore, assuming the act of the yard men to have been the immediate cause of the injury, the question whether such act naturally resulted from the negligent leaving of the car at a point above the brick-kiln and the neglect of the trainmen to open the safety switch was properly submitted to the jury. The suggestion that cars, while on the side track, are under the exclusive control of Hurley, the proprietor of the brick yard, and that the railroad company is accordingly not liable for the alleged negligent acts, is not entitled to serious consideration. The relation of carrier and passenger existed at the time of the injury, and the duty imposed upon the former was to safely carry the latter, subject to the conditions named in the statute. (Sec. 3, art. 1, ch. 72, Comp. Stats.) In *Missouri P. R. Co. v. Baier*, 37 Neb., 235, and in *Union P. R. Co. v. Porter*, 38 Neb.,

226, it was held sufficient for one who has received personal injuries while a passenger on any line of railroad in this state to prove that such injury resulted from the operation or management of the said road, and that the law will presume negligence from that fact alone. The direct and immediate cause of the injury charged was the exposing of the passengers on the caboose to the peril of collision with the wild freight car by means of the open switch. If the railroad company negligently exposed the plaintiff below to danger in the manner indicated, and which resulted in the injury alleged, the fact that the escape of the freight car was in nowise attributable to its negligence must, in view of the statute above cited, be regarded as immaterial. The same result is reached also by another and more direct course of reasoning, viz., the offer was in effect to prove that the injury complained of resulted from the concurrent negligence of the defendant railroad company and Hurley, a stranger, and is therefore directly within the principle recognized in *Pray v. Omaha Street R. Co.*, 44 Neb., 167.

We will next examine the assignment relating to the sufficiency of the evidence. The only additional testimony which calls for notice in this connection is that of Mr. Swearingen, the conductor, who was at the time of the injury evidently near the rear end of the caboose, and substantially corroborates the other witnesses respecting the hurried exit of the passengers. He also heard one of them, Mr. Furrer, addressing the others, say to get off the car. Said witness testified, however, that the caboose had cleared the switch at the time Mrs. Hedge jumped therefrom, and that there then existed no danger of a collision with the freight car. From the facts thus stated it is argued that in jumping from the moving train the plaintiff below was guilty of contributory negligence within contemplation of the statute, and which amounts to a defense in this action. But to that proposition we cannot give our

assent. In *Omaha & R. V. R. Co. v. Chollette*, 33 Neb., 143, and *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 642, it was held not such negligence to jump from a moving train as will in every instance defeat a recovery under our statute. But independent of the statutory rule, a passenger placed in a position of apparent imminent peril through the negligence of the carrier may recover for injuries received while endeavoring to escape in obedience to the natural instinct of self-preservation, provided he exercises ordinary prudence in view of all of the circumstances of the case; and such is the rule, although it subsequently appears that no actual danger existed. (*Lincoln Rapid Transit Co. v. Nichols*, 37 Neb., 332, and cases cited.) The scene at and immediately preceding the injury was apparently one of confusion and terror. The hurried exit of the men who were watching the runaway car from the lookout, and the cry "Jump for your lives!" accompanied by the sudden starting of the train, when regarded from the standpoint of the plaintiff below, certainly tend to establish reasonable ground for the apprehension of imminent peril; and the railroad company is in no position to complain on the ground that she erred in her estimate of the danger confronting her, or the choice of means to insure her safety.

Exception was taken to the admission of evidence by the plaintiff below as to the condition of the broken rod of the runaway freight car and which tends strongly to prove that said rod was broken and useless for the purpose of controlling the car. The ground of the objection is that said evidence is immaterial under the issues. The allegation of the petition is: "The braking apparatus of said car at the time and before it was placed on said side track was in bad repair, the brake chain thereon broken, and said brake was useless for the purpose of stopping said car or controlling its movements." True, the broken rod is not specifically mentioned in the pleadings, but the allegation that the braking apparatus was in bad repair and useless for

the purpose of controlling the car is a sufficient foundation for the proof. Had the petition disclosed such a relation of the chain mentioned to the braking apparatus as to warrant the inference that the escape of the car resulted from that cause alone, a different question might have been presented; but the allegation quoted is not such as, by any natural construction, to exclude defects other than that above named.

Exception is also taken to the admission of testimony tending to prove that it was the duty of the trainmen to open the safety switch after pushing the freight car onto the side track, but a reference to the record shows that the only objection urged to the questions mentioned is that they are leading and suggestive. A party will not, as a general thing, be permitted to lead his own witnesses, but the rule in that regard is especially applicable to the trial court, and the subject is so far a matter within the discretion of the court as to present no ground for reversal in the absence of a clear abuse of discretion. (*St. Paul Fire & Marine Ins. Co. v. Gotthelf*, 35 Neb., 351.)

Lastly, it is argued that the damage, $3,000, is excessive, and that the verdict should have been set aside on that ground. Mrs. Hedge, according to the undisputed evidence, was, as the result of the injury, confined to her bed for three weeks, and was unable to walk without the assistance of crutches for nearly, if not quite, five months. For seventy hours after the injury she was unable to sleep on account of pain, and was, at the time of the trial, in March, 1893, unable to use or bend her left ankle without considerable pain. Dr. Prentiss, an experienced surgeon, who made a careful examination of her limb on the day of the accident or the day following, testifies to a severe sprain of the ligaments, and that from the crepitus or grating sound observed when moving and pressing upon the ankle there was an evident fracture of the astragalus or ankle bone, and that in his opinion her present lameness will be

of long duration, if not permanent. Dr. Steel, who examined the limb in September, 1892, found the ankle swollen and enlarged, with partial anchylosis or permanent stiffness of the joint. It was also extremely painful and sensitive to the touch. On the second examination a few days before the trial the witness observed the same condition of the ankle, except that the swelling and tenderness were less pronounced. He states as his conclusion that the limb, in all probability, will never be restored to its normal condition. On the other hand, Dr. Neville and Dr. Gilbraith, who examined the injured limb in January or February, 1891, about twelve months after the accident, testify to a severe sprain, but discovered no evidence of a fracture of the astragalus. It has been frequently said by this court that mental or bodily anguish is incapable of measurement by any fixed and arbitrary rule, but from its nature must depend largely upon the judgment of the jury, based upon the circumstances of the particular case. Judged by that rule the verdict cannot be said to be so decidedly against the weight of the evidence as to call for interference in this proceeding. The judgment must accordingly be

AFFIRMED.

RYAN and RAGAN, CC., not sitting.